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How to Resolve Conflicts Between
Fundamental Constitutional Rights



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Preface

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TABLE OF CONTENTS

A. Introduction	4
B. What is a Conflict of Fundamental Rights?	5
I. Definition	5
II. Relativity of the Definition	5
C. Methodology to Resolve a Conflict	7
I. Ranking Fundamental Rights.....	7
II. Sacrificing Equally	9
III. Calculating the Weight of the Fundamental Rights	11
IV. Human Dignity.....	12
V. State Liability.....	13
VI. Balancing the Interests.....	15
D. How Does the ECtHR Deal with Conflicting Convention Rights?.....	18
E. Conclusion	20

A. Introduction

Overtime, especially after the Second World War, fundamental rights have gained more importance than ever. The legislatures have broadened the list, by adopting and legally protecting a wider range of fundamental rights. But more importantly, the ample interpretation of the legislation by the Courts made a much more *generous* contribution in establishing an immense catalogue.¹

For example the United States Supreme Court has added rights through its interpretation, which were not explicitly enlisted in the Bill of Rights, such as the right to vote,² the right to privacy³ and the right to an abortion.⁴

Fundamental rights were initially adopted into the legislation to protect the individuals from the state and its powers.⁵ “They are designed to protect the individual from unwarranted interference in crucial aspects of her life.”⁶ But in time the aspect of fundamental rights have changed. Apart from the duty to respect fundamental rights of individuals, the State also carries the obligation, namely the *positive obligation*, to protect them from each other. “This positive obligation to provide protection presupposes the adoption of legislative, administrative, judicial and substantive measures to protect individuals against violation of their fundamental rights by other individuals. It leads necessarily to an increase in the number of actions founded on the violation of individual freedoms and as a result, to an escalation in the number of conflicts between fundamental rights.”⁷ The State is not only obliged to respect the fundamental rights of the individuals, but also has to protect their rights from being violated by other individuals as well.

With the increase in the number of fundamental rights protected, it is inevitable to come across clashes in between such a long list. “Occasions for conflict among rights multiply as

¹ For example Article 8 of the ECHR, Right to Respect Private Life; another important example would be how the ECJ, with its case-law, incorporated fundamental rights into Union Law, before the Charter existed. See ECJ, case C-29/69 *Stauder v City of Ulm – Sozialamt*, ECR 1969, I-00419; ECJ, case C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECR 1970, I-01125; ECJ, case C-4/73, *J. Nold Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, ECR 1977, I-00001 and ECJ, case C-5/88, *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, ECR 1989, I-02609.

² *Briffault*, Review: The Contested Right to Vote, Michigan Law Review 2002, pp. 1521–1522.

³ *Griswold v Connecticut* 381 U.S. 479, 85 S Ct 1678 (1965).

⁴ *Roe v Wade* 410 U.S. 113, 93 S. Ct. 705, (1973).

⁵ *Cherednychenko*, Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions, 2007, p. 241.

⁶ *Smet*, Freedom of Expression and the Right to Reputation: Human Rights in Conflict, in: American University International Law Review 2010, p. 184.

⁷ *Bribosia and Rorive*, In the Search of a Balance Between the Right to Equality and other Fundamental Rights, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G.2, 2010, p. 14.

catalogs of rights grow longer.”⁸ It is somehow an intriguing situation to see, how the possibility of a conflict to occur increases, when the level and scope of the protection of fundamental rights become stronger. It is more common than ever, to come across situations where two fundamental rights, or maybe sometimes even more than two, go head to head. The essential question here is, how does one solve a conflict between fundamental rights?

B. What is a Conflict of Fundamental Rights?

I. Definition

Before moving on to the question of how to resolve these conflicts, the first step is to understand what they are. Without defining the nature of the conflict, it will not be possible to find a clear path on how to solve it.

Conflict of fundamental rights means the existence of one right is pushing the other one out of the picture. As Zucca writes; “Whichever way you look at it, you are going to lose something fundamental. A constitutional dilemma typically involves two elements: a choice between two separate goods (or evils) protected by fundamental rights; a fundamental loss of a good protected by a fundamental right no matter what the decision involves.”⁹

Keeping both fundamental rights intact is simply impossible. The presence of one right is causing the other right to partially or completely *fade away*.

After the definition, Zucca also points out that there is a distinction of “spurious or genuine” conflicts.¹⁰ Spurious conflicts are not actually conflicts of fundamental rights. They either appear to be a conflict on the first sight and after close examination it can be seen that the issue is actually not about fundamental rights, or a different angle to the problem will solve the conflict without disturbing any one of them.

When there is no possibility of solving the conflict without limiting the benefits given to an individual by a fundamental right, there is a conflict, or as Zucca summarizes: *Constitutional Dilemmas*.

II. Relativity of the Definition

Another question which is crucial in the definition of a conflict is what is a fundamental right? Without going into much detail, it needs to be pointed out that this concept has a feature that

⁸ Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 1991, p. 16.

⁹ Zucca, *Conflicts of Fundamental Rights as Constitutional Dilemmas*, in *Brems* (Ed.), *Conflicts Between Fundamental Rights*, 2008, p. 20.

¹⁰ *Ibid.* pp. 23-26.

is influenced by several elements. Depending on traditions, culture, politics, religion, historical background and many other factors, the concept of fundamental rights will be open to some amount of divergence in each society.

“As different legal orders grant *different* rights, have *divergent understandings* of what these rights are supposed to protect, adopt *different substantive standards* for the protection of these rights or use *alternative conceptualizations* to frame similar conflicts of interests and values, the proportion of conflicts between interests and/or values expressed in terms of ‘conflict of fundamental rights’ will vary as between them.”¹¹

Based on the perception of ‘fundamental rights’ there will be differences as to what is defined as a conflict and what is not. Although there is a common group of fundamental rights that most legal orders accept and protect, the scope of the same fundamental right might, nevertheless, alter. And even the slightest alteration in the understanding of one fundamental right could lead to a totally different answer when resolving the same conflict in different legal orders.

In Europe, through the case law of the European Court of Human Rights (ECtHR), *environmental protection* has gained some level of fundamental rights protection.¹² On the contrary, in the United States, environmental interests of an individual would not be expressed as a conflicting fundamental right.¹³

The Supreme Court of the United States found that the inflammatory racist speech of the Ku Klux Klan members was protected by the First Amendment’s freedom of speech and did not conflict with any fundamental right of Holocaust survivors and African-Americans not to encounter expressions which at the very least cause emotional suffering.¹⁴ Meanwhile in Germany, the game of Laser-Tag was found to violate human dignity, since it was *promoting the playful killing of human beings*.¹⁵ On the one hand a mere game is found to violate a fundamental right of willing adults who voluntarily participate in the game, on the other hand the public discriminatory and offensive statements of a racist group are found not to violate any fundamental rights at all.

¹¹ *Bomhoff*, ‘The Rights and Freedom of Others’: The ECHR and Its Peculiar Category of Conflicts Between Individual Fundamental Rights, in *Brems* (ed.), *Conflicts Between Fundamental Rights*, 2008, p. 628.

¹² ECtHR, application no. 16798/90, *Lopez Ostra v. Spain*, judgment of 9 December 1994

¹³ *Bomhoff*, (fn. 11), p. 629.

¹⁴ *Brandenburg v Ohio* 395 U.S. 444 (1969).

¹⁵ ECJ, Case C-36/02, *Omega Spielhallen-und Automatenaustellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, ECR 2004, I-09609. Although this case is about a conflict between a fundamental right and a fundamental freedom provided by the EU Law, and not a conflict between two constitutional fundamental rights, it is nevertheless given as an example here, since it illustrates and gives a clue about the difference in the interpretation and the scope of fundamental rights.

The approach towards the headscarf mostly used by Muslim women shows how the same situation can be resolved differently in different legal systems. In the United States, the headscarf has never been a public problem or subject to banishment. Despite the difficulties the American Muslims went through after 9/11, it did not take the society long time to restore their *unity in diversity* again. Meanwhile in Europe, the view is quite different. The ban on headscarves in schools was not seen to be in violation of the freedom of religion or expression by the ECtHR in the cases of *Dogru v. France*¹⁶ and *Leyla Sahin v. Turkey*.¹⁷

The distinction of the concept lies within the nature and backgrounds of the legal orders.¹⁸ On the one hand, there is a nation which has the motto of “In God we trust” and is known for its “religiosity”.¹⁹ On the other hand there are two states which established their secularism either after the disempowerment of the Catholic Church or the abolition of the Caliphate. Obviously the history of a state also has an effect on the interpretation of fundamental rights and their limitations.

Thus the importance of the scope of each fundamental right is crucial when searching for a solution to the conflict. The nature of the legal order where the conflict has occurred, as seen in the examples, will highly affect the outcome. One should keep in mind and consider such influences when dealing with a conflict, knowing that not always a common answer for the problem will be available.

C. Methodology to Resolve a Conflict

I. Ranking Fundamental Rights

As a solution to conflicts of fundamental rights, there have been attempts in the literature to find a hierarchy. If ranking the fundamental rights in an order of precedence could be achieved, then resolving a conflict between them would not be problematic, since the higher ranking right would override the other. For example a common view in the past was that, civil and political rights would come before economic and social rights.²⁰

But the problem is that, human rights instruments do not provide a hierarchy between fundamental rights. Other than the division of “absolute rights” and “relative rights”, there is no indication of a ranking among fundamental rights. Absolute rights are “rights or principles which are in no circumstances subject to any limitation by the state and reconciliation with

¹⁶ ECtHR, application no. 27058/05, *Dogru v. France*, judgment of 4 December 2008.

¹⁷ ECtHR, application no. 44774/98, *Leyla Sahin v. Turkey*, judgment of 10 November 2005.

¹⁸ For further analysis on this matter see, *Gordon, Why Is There No Headscarf Affair in the United States?*, *Historical Reflections*, 2008, pp. 37-60.

¹⁹ *Elver, The Headscarf Controversy: Secularism and Freedom of Religion*, 2012, p. 161.

²⁰ *Xu and Wilson, On Conflict of Human Rights*, *Pierce Law Review* 2006 (Vol. 5), p. 42.

other rights”,²¹ such as human dignity. Relative rights on the other hand, are “rights which can be limited by law in the interest of others or public order”,²² such as freedom of expression.

Absolute rights under the European Convention of Human Rights (ECHR) are, for example, the freedom from torture, slavery and forced labor and the right not to be subject to punishment without law. These rights cannot be derogated from in a state of emergency (Article 15 ECHR). It can be said that the absolute rights have more weight than relative rights in case of a conflict.

Some scholars argue that rights which have a closer tie with “generally recognized human values”,²³ such as the right to privacy, override other fundamental rights, such as the right to property. Despite the fact that some of the fundamental rights are within the core of an individual’s identity, which at the first sight would give them a higher ranking, does not mean that other rights are less important to the interests of that individual.

In a follow-up to the division of absolute-relative rights, a group of scholars²⁴ have searched for an implied hierarchy established by the framers of the respective fundamental rights catalogue within the limitation clauses for the purpose of ranking the relative rights. After prioritizing the absolute rights on the top, they try to maintain a ranking between relative rights based on the differences in the wording of their limitation clauses. Nevertheless, the helpfulness of such a differentiation is questionable.

Despite all the attempts made, no common understanding of a hierarchy has been established. There simply is no commonly agreed system which can be used to rank the rights.²⁵

The former United Nations High Commissioner for Human Rights, Mary Robinson, thus stated:

“Divisions and ranking of rights is artificial. When President Roosevelt spoke of the famous “four freedoms,” freedom from want stood equally alongside freedom from fear. Human rights will not be truly achieved until all accept economic, social and cultural rights as rights that deserve and require equal attention to civil and political rights and freedoms. This imperative was endorsed by over 170 states at the Vienna World Conference on Human Rights, 1993: All human rights are universal, indivisible and interdependent and inter-related. The

²¹ *Cherednychenko*, (fn. 5) p. 241.

²² *Ibid.*

²³ *Cherednychenko*, (fn. 5) p. 242 - (see footnote 132).

²⁴ For an example in German literature see, *Blaesing*, *Grundrechtskollisionen*, 1974, p. 143 ff.

²⁵ *Meron*, *On a Hierarchy of International Human Rights*, *American Journal of International Law*, 1986, pp. 21-22.

international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”²⁶

It is true that all human rights should be upheld with equal determination, since “all rights are inter-related, indivisible and have equal status. One group of rights is not more important than another and all rights – whether civil, political, economic, social or cultural – must be equally respected.”²⁷

But when looking at the essence of the rights, some of them are bound to show a higher level of importance, but only *in the context* of a conflict.

It is also questionable how useful a theoretical ranking of fundamental constitutional rights would be. Would it really solve the problem? Would ranking fundamental rights give a single solid solution for all conflicts? What if a severe infringement of a lower ranking right was necessary in order to avoid a slight infringement of a higher ranking fundamental right? Is an absolute sacrifice of a right justified in such a case?

The answer to this question could hardly be affirmative. Although a theoretical hierarchy among fundamental rights might be helpful when resolving the conflict, their importance in the context and facts of the conflict is much more relevant than their theoretical classification.

II. Sacrificing Equally

Based on the view that all rights are equal and must be given the same level of value, some scholars suggested making equal sacrifice from all of the conflicting fundamental rights, so that an equal treatment could be established. This *utilitarian view* is explained as follows;

“Conflicts between these prima facie rights might be handled by a utilitarianism of rights, so that what would count as the ideally just arrangement would be that in which total right-fulfillment was maximized, or total right-infringement minimized. Alternatively, they might be handled by assuming that ideally, one person’s rights should not be infringed more than another’s. Again the two methods are not even extensionally equivalent, and again I suggest that the second is the more attractive. Such equality of sacrifice in compromises between our Lockean rights is, of course, not equivalent to the equal need-satisfaction in our second reading of the Marxist slogan, precisely because our rights include each individual’s private property in his own body, energy, talents, and labor, and because each has a prima facie

²⁶ *Robinson*, United Nations High Commissioner for Human Rights, Second Annual BP Lecture on Human Rights and Global Civilisation <http://www.unhchr.ch/hurricane/hurricane.nsf/0/AFD931913249074EC1256B17002C27BF?opendocument>, 29.11.2001.

²⁷ *Desai*, A Rights-Based Preventative Approach for Psychosocial Well-being in Childhood, Children’s Well-being: Indicators and Research, 2010, p. 43.

right to be free and to pursue happiness in whatever way he chooses, doubtless with very varying degrees of success.”²⁸

So no matter which two fundamental rights are in question, both parties should forfeit equal amount of their interests to resolve the conflict.

Applying equal treatment to all rights does not in fact mean equality and justice. A strict equality approach does not always bring a reasonable solution. The ECtHR’s opinion on Article 14, the prohibition of discrimination, in *the Thlimmenos v Greece* case gives the idea of what real equality should be like:

“The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”²⁹

Equality cannot mean that all rights have the same weight, no matter under what circumstances. Just the mere fact that some rights can be derogated from or legitimately limited in certain situations necessitates an equality approach in compliance with the *Thlimmenos v Greece* case, which does not amount to equality in the strictly formal sense.

In the *Belgian Linguistics* case, the ECtHR emphasized the importance of special factors in the concept of equality as follows;

“... Article 14 does not forbid every difference in treatment in the exercise of the rights and freedoms recognized. ...The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities.”³⁰

The utilitarian view is a “compromise formula that would, when conflicts among rights arise, infringe all people’s rights equally and therefore dehumanize them all. Not all equal treatment is ipso facto fair treatment: a tyrant may boil all his subjects in oil.”³¹ Although all fundamental rights are equally important, they do not necessarily carry equal weight in every situation. So sacrificing both parties’ interests to an equal amount cannot be the answer on how to resolve conflicts between fundamental rights.

²⁸ Mackie, Rights, Utility and Universalization, in Frey (Ed), Utility and Rights, 1985, pp. 88-89.

²⁹ ECtHR, application no. 34369/97, *Thlimmenos v. Greece*, judgment of 6 April 2000, para. 44.

³⁰ ECtHR, application no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; [2126/64](#), Case “*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*” v. *Belgium (Merits)*, (*Belgian Linguistics*), judgment of 23 July 1968, para. 10.

³¹ *Freedon*, Rights, 1991, p. 99.

III. Calculating the Weight of the Fundamental Rights

The importance of a fundamental right is a relative concept. As explained before, it would depend also on the characteristics of the legal system. So when doing the calculation, one should keep in mind the influential elements of the respective legal order.

“The weight of a right is a determination, sometimes explicit and sometimes not, sometimes quite exact and sometimes rather imprecise, of how it stands with respect to other normative considerations and whether it would give way to them, or they to it, in cases of conflict.”³²

When evaluating the weight, the scope and the strictness of the right should be examined. Here, the separation of absolute rights and relative rights would be relevant. The fundamental rights which, under cannot be limited or derogated from under any circumstances, would weigh heavier in relation to the fundamental rights which can in certain situations, be subject to limitation.

The relationship of a fundamental right with the others is of course a relevant aspect at this point.

But what happens if the conflict is between two individuals' interests that are protected under the same right? An example, given by Zucca³³, would be the case of the conjoined twins, in which the right to of the twins are in conflict, since to save one of them requires a surgery that would kill the other, but the absence of such a surgery would mean the death of both. Since the conflicting rights and their weight are the same, how does one resolve the problem then?

Even if the calculation of weight method is to be applied, this approach alone will not lead to a different conclusion than the attempts to rank the fundamental rights and establish a hierarchy amongst them. Theoretical assumptions as to which right weighs more than the other, practically mean prioritizing them according to their value. And considering the fact that sometime the clash is between interests protected by the same right, weighing the rights falls short of answering the question.

So the helpfulness of this method in resolving conflicts is also questionable. Since the weight of a right cannot be isolated from the circumstances of the incident causing the conflict, the factual background appears as an important element, again.

³² *Martin*, Rawls and Rights, 1985, p. 130.

³³ *Zucca*, (fn. 9), p. 23.

IV. Human Dignity

After the Second World War, human dignity became popular in national and international human rights texts.³⁴ Many of the international conventions pointed to human dignity in their preambles and/or within their articles. It has become the core value of the United Nations' concept of human rights, which was highlighted by the UN General Assembly stating that all new human rights instruments should "derive from the inherent dignity and worth of the human person."³⁵ Some states incorporated the principle into their constitutions, such as Spain,³⁶ Greece³⁷ and Israel,³⁸ but perhaps the one which gives human dignity a level of significance like no other is Germany. The German Constitution³⁹ considers human dignity as "peerless" and as a "supreme value upon which the entire constitutional structure is based."⁴⁰

The most important human rights instrument on the European level, however, does not mention human dignity within its text. Even though the ECHR does not expressly include human dignity, it was mentioned in later instruments of Council of Europe⁴¹ and the Strasbourg Court uses it as a device for the interpretation of the Convention.⁴² It has also been included in Article 1 of the Charter of Fundamental Rights of the EU.

Human dignity is considered to be the core of fundamental rights on which all the constitutional rights are based.⁴³ It would not be wrong to say that human dignity is the *mother* of fundamental rights.

So even if it is not mentioned explicitly in any legal text, human dignity somehow finds a way to play its role in the legal system. "There is a reasonable consensus that it constitutes a fundamental value that underlines constitutional democracies generally, even when not expressly written in the constitutions."⁴⁴ In legal instruments where there is no mention of human dignity within the catalogue of fundamental constitutional rights, nevertheless there is a notion that human dignity will still be taken into consideration. Most judicial organs use human dignity to interpret the scope and context of rights. On this basis it was suggested that considering the closeness of the relation between a certain right and human dignity should

³⁴ *McCrudden*, Human Dignity and Judicial Interpretation of Human Rights, EJIL 2008, pp. 668-671.

³⁵ GA Resolution 41/120, 4.12.1989

³⁶ Constitution of the Kingdom of Spain, Article 10, 27.12.1978.

³⁷ Constitution of the Hellenic Republic, Article 7, 09.06.1975.

³⁸ Basic Law: Human Dignity and Liberty of the State of Israel, Articles 1 and 2, 09.03.1994.

³⁹ Basic Law of the Federal Republic of Germany, Article 1, 23.05.1949.

⁴⁰ *Barak*, Human Dignity: The Constitutional Value and the Constitutional Right, 2015, p. 231.

⁴¹ The preamble of Protocol No. 13, which abolishes death penalty, refers to human dignity.

⁴² *Barroso*, Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse, Boston College International and Comparative Law Review, 2012, p. 342.

⁴³ *Jakab*, Breaching Constitutional Law on Moral Grounds in the Fight against Terrorism: Implied Presuppositions and Proposed Solutions in the Discourse on 'The Rule of Law vs. Terrorism,' International Journal of Constitutional Law, (Vol. 9), 2011, p. 68.

⁴⁴ *Ibid.* p. 354.

be used as a method of resolving conflicts. Whichever interest is more indispensable in the light of human dignity should be protected.⁴⁵

Despite the higher value given to the human dignity, it cannot be concluded that human dignity will always prevail when it comes into conflict with another constitutional right. When considering that human dignity is the source of all fundamental rights, both conflicting rights will have a human dignity component. If we say that human dignity will always prevail in case of conflict with another fundamental right, what will the solution be in case of conflict between two rights with roots in human dignity?

Rather than saying that human dignity always takes precedence over other fundamental rights, it would be better to consider human dignity as an interpretative tool.⁴⁶ One could suggest looking at both rights and their relation with human dignity and whichever has the closer connection should be kept intact. But the closeness of connection and the importance given to it would depend on the facts.

Since fundamental rights will have different weight depending on the circumstances in which they face each other, it would be wrong to give absolute precedence to human dignity. Fundamental rights should rather be subject to balancing through the proportionality principle,⁴⁷ as will be explained later.

V. State Liability

Another method, which has been suggested by some scholars⁴⁸ as an alternative, is holding the state liable for the failure of protecting constitutional rights. Since it is not possible to keep both conflicting rights intact, the responsibility for this outcome and the duty to pay compensation must be imposed on the State. This method is based on the view that fundamental constitutional rights were developed to protect the individuals from the State. As mentioned before, the state also has the positive obligation to protect them from each other. This positive obligation's consequence is that the individual is entitled to obtain such protection.⁴⁹

Since it is the state's duty to protect fundamental rights, the appearance of a conflict can be seen as the result of the state's failure to fulfill its obligation. For example in a decision by the

⁴⁵ *Lutz-Bachmann and Nascimento*, Human Rights, Human Dignity and Cosmopolitan Ideals: Essays on Critical Theory and Human Rights, 2014, p. 64.

⁴⁶ *Habermas*, The Concept of Human Dignity and the Realistic Utopia of Human Rights, *Metaphilosophy*, 2010, pp. 464-465.

⁴⁷ *Alexy*, A Theory of Constitutional Rights, (translation by Julia Rivers), 2004, pp.47-48.

⁴⁸ *Canaris*, *Grundrechte und Privatrecht*, 1999, p.38.

⁴⁹ *West*, Human Rights, the Rule of Law, and American Constitutionalism, in: *Campbell*, *Protecting Human Rights: Instruments and Institutions*, 2003, p. 99.

African Commission on Human and Peoples' Rights, the state's positive obligation and liability, in case of a failure, was pointed out:

"The Charter specifies in Article 1 that the States Parties shall not only recognize the rights, duties and freedoms adopted by the Charter, but they should also 'undertake... measures to give effect to them'. In other words, if a State neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation."⁵⁰

Within this approach, whether or not the state is in violation will be assessed through the principle of proportionality, but in a special sense. When the minimum protection which is guaranteed by a certain fundamental constitutional right is not respected, the state has failed to fulfill its duty.

"Je höher der Rang des betroffenen Grundrechts, je schwerer der drohende Eingriff, je intensiver die Gefahr, je geringer die Möglichkeit seines Trägers zu effizientem Selbstschutz und je schwächer das Gewicht gegenläufiger Grundrechte und Interessen ist, desto eher ist eine verfassungsrechtliche Schutzpflicht zu bejahen."⁵¹

So the state's duty will depend on the weight of the fundamental right and on the circumstances of the conflict. However, the state liability method is not as practical as it seems. As a matter of fact, it is not a method to resolve conflicts, but a way of compensating the violation, rather than facing the actual problem. Another issue with this *method* is that no matter how fully the state fulfills its obligations, conflicts between fundamental rights will continue to exist. This does not necessarily mean that the state has failed to protect them. Even after sufficient protective measures are taken, there will always be situations where rights clash and there is no way to avoid it.

"The obligation to protect is defined as an obligation to take all reasonable measures that might have prevented the event from occurring: it is thus an obligation of means, rather than an obligation of result. In order to engage the responsibility of the State, it is therefore not enough that the event which should have been prevented did occur: it must be shown, *in addition*, that the State could have taken certain measures which might have succeeded to prevent the event, and yet failed to take such measures."⁵²

⁵⁰ African Commission on Human and Peoples' Rights, Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, 1995, para. 20.

⁵¹ *Canaris*, (fn. 47), p. 80.

⁵² *De Schutter*, *International Human Rights Law: Cases, Materials, Commentary*, 2014, p. 428.

A conflict which has occurred because of the lack of sufficient measures taken by the state is not a genuine conflict of fundamental rights, but rather a spurious one, since it could be avoided after all.

VI. Balancing the Interests

Since ranking fundamental rights is almost impossible and no common order of hierarchy can be achieved, prioritizing one over the other can only be possible in the framework of the concrete case. When resolving a conflict between two rights, which are equally protected by the relevant text, balancing is the wiser path to take, in order to maintain the sense of justice.

Balancing is possible through weighing the interests that are to be protected by those fundamental rights in conflict with each other, rather than trying to calculate which right itself weighs heavier in theory.

It is obvious that in order to establish a balance, the facts are crucial. Not giving the facts the necessary consideration would most likely result in an unjust decision, which would also undermine the value of fundamental rights.

Attaching so much importance to the circumstances of the case does not mean that the theoretical considerations are totally irrelevant. The level and nature of the right is also to be taken into account, but jointly with the facts.

“The factors which are considered to be of major importance here are the status of the constitutional rights involved, which is primarily determined by whether those rights are subject to limitation or not, and the intensity of their infringement.”⁵³

Whether or not a fundamental right can be subject to limitations is a question that should be answered before balancing. There may be cases where one of the fundamental rights is subject to limitation and the circumstances legitimate such limitation. In these cases there would not be much of a problem, since the solution is already available within the legal text. For example a group of people want to demonstrate against the changes the government did on its policy towards minorities, however the state received information that this demonstration could lead to a terrorist attack. In this case the state would be entitled to forbid the demonstration, which is protected under freedom of assembly, in order to protect the right to life of several. Since Article 11 of the ECHR provides a limitation clause, there is no actual conflict. These kinds of conflicts can be classified as spurious conflicts as in the distinction made by Zucca.

⁵³ *Cherednychenko*, (fn. 5), p. 250.

But when either right cannot be subject to limitation or the situation in which they can be limited has not arisen, the conflict should be evaluated through balancing.

The seriousness or the level of the violation to each fundamental right in question should be graded also in order to reach a justifiable and reasonable solution. This is what the theoretical ranking method fails to consider. When a higher ranking fundamental right conflicts with a lower ranking fundamental right, the answer of this method would be to protect the higher right and sacrifice the lower one. But what about the cases where the violation of the higher ranking fundamental right is at a minimum level and the lower ranking fundamental right has to be subject to total sacrifice in order to save the higher-ranking right? Can this approach be considered as *reasonable*?

The examination of the level of infringement to each fundamental right would ensure a proper balance and a higher potential of satisfaction on both sides. This can be managed through the application of the proportionality principle. As one judge has said;

“Application of the principle of proportionality is in my view a means of examining whether the decision meets the test of reasonableness.”⁵⁴

The principle of proportionality is addressed in the EU Charter of Fundamental Rights in Article 52§1:

Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

Although Article 52§1 regulates the limitations made by the legislator and is not directly about the conflicts of fundamental rights, it nevertheless shows a certain guideline when limitation of a fundamental right is the issue.

The ECtHR’s case law on limitation of the Convention rights points to a similar method which emphasizes the proportionality. “The Strasbourg organs have consistently held that the principle of proportionality is inherent in evaluating the right of an individual person and the general public interests of society. This means that a fair or reasonable balance must be attained between those two countervailing interests.”⁵⁵

⁵⁴ *Meadow v. Minister for Justice Equality and Law Reform* IESC 3, (2010) Murray CJ.

⁵⁵ *Arai*, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, 2002, p. 14.

The Supreme Court of Canada, as well, shares the same opinion that conflicts between fundamental rights should be dealt with through balancing, so that a harmonization amongst them could be established.⁵⁶

In general, both national and international human rights systems deal with the conflict of fundamental rights and public interests in the same manner. It can be said that balancing is a commonly accepted approach, as a “near-universal feature of the structure of constitutional rights throughout the contemporary world.”⁵⁷ Since the public interest in essence means, so to say, the fundamental rights of the society, it would be reasonable to expect the courts to apply the same method when resolving a conflict between two individuals’ fundamental rights, which they have done very often.

Balancing has “a key function in the jurisprudence of constitutional courts and is often unavoidable in solving conflicts between fundamental rights. As conflicting rights cannot always be fully reconciled, the courts are forced to conduct a balancing exercise. And, fundamental rights hardly ever have an absolute character; they are generally a codification of general principles of law, an application which can be limited. The courts, before which fundamental rights have been invoked, are therefore forced to adjudicate on these conflicting rights and to make a decision.”⁵⁸

Considering the fundamental rights in a flexible relationship with each other, rather than strictly prioritizing, would be a more constructive approach to establish a balance, since the dependency of the solution to the facts indicates that “sometimes one and sometimes another constitutional right will weigh heavier.”⁵⁹

The flexibility of the relationship between fundamental rights has been pointed out by the German Federal Constitutional Court as follows:

“Da beide Interessen durch Grundrechte geschützt sind, von denen keines den anderen generell vorgeht, hängt die Entscheidung davon ab, welche Beeinträchtigung im Rahmen des vom Gesetzgeber abstrakt vorgenommen Interessenausgleich im konkreten Fall schwerer wiegt.”⁶⁰

⁵⁶ *Amien*, Muslim Personal Law (MPL) in Canada: A Case Study Considering the Conflict Between Freedom of Religion and Muslim Women’s Right to Equality, in: *Brems* (Ed.), *Conflicts Between Fundamental Rights*, 2008, p. 414.

⁵⁷ *Gardbaum*, Limiting Constitutional Rights, *UCLA Law Review*, 2007, available at SSRN: <http://ssrn.com/abstract=971024>, 01.09.2015, pp.3-4.

⁵⁸ *Vries*, Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice, *Utrecht Law Review*, 2013, p. 170.

⁵⁹ *Cherednychenko*, (fn. 5), p. 246.

⁶⁰ BVerfG (German Federal Constitutional Court), *Beschl. v. 09.02.1994, 1 BvR 1687/92, BVerfGE 90, 27 para. 19.*

The German Federal Constitutional Court uses a theory developed by Professor Konrad Hesse named *praktische Konkordanz* (practical concordance) when facing conflicts. Practical Concordance is a “canon that holds that protected constitutional values must be harmonized with one another when they conflict,, it requires the optimization of competing rights. In short, one constitutional value may not be realized at the expense of a competing constitutional value. In the German view, constitutional interpretation is not a zero-sum game’... Professor Hesse wrote, ‘The principle of the Constitution’s unity requires the optimization of [values in conflict]: Both legal values need to be limited so that each can attain its optimal effect. In each concrete case, therefore, the limitations must satisfy the principle of proportionality; that is, they may not go any further than necessary to produce a concordance of both legal values.’”⁶¹

To reach a harmony among the rights and to optimize their values is only possible through the assessment of each individual case, which shows that the German Federal Constitutional Court also uses the balancing method.

Resolving the conflict by balancing the interests in each individual case has been called by one author “ad hoc balancing”⁶², which has two aspects: firstly the consideration of the very essence/core of the fundamental right, secondly the consideration of the circumstances of the case⁶³, which summarizes this method shortly.

The court, here, will have to examine both conflicting fundamental rights, how severe the interests have been damaged and the circumstances under which the situation occurred, and then establish a balance in between the interests that would serve the purposes of justice, uphold the value of fundamental rights and is based on reason.

D. How Does the ECtHR Deal with Conflicting Convention Rights?

First of all it has to be made clear that the Strasbourg Court deals with the conflicts between the individuals and the State. Since the restriction of fundamental rights based on governmental power are not within the scope of this paper, the reference is aimed only to give a general picture of the approach of the ECtHR, since it is the most important international authority on human rights in Europe.

⁶¹ *Kommers & Miller*, The Constitutional Jurisprudence of the Federal Republic of Germany, 3rd ed., 2012, p. 67-68.

⁶² *Quint*, Free Speech and Private Law in German Constitutional Theory, Maryland Law Review, 1989, p. 288, available at: <http://digitalcommons.law.umaryland.edu/mlr/vol48/iss2/3>, 15.10.2012.

⁶³ *Amien*, (fn. 47), p. 416, which is in accordance with Cherednychenko’s view as well. See fn. 44.

When it is faced with a conflict, the ECtHR uses the limitation clauses enshrined in the second paragraphs of Articles 8 to 11 ECHR, particularly the phrase “the rights and freedoms of others” as a key instrument.⁶⁴ The cases which involve the limitation clauses are not always between two rights protected under the Convention,⁶⁵ which are nevertheless, through the interpretation of the ECtHR, included under the term of “rights and freedoms of others.” Most of the time, however, the subject of the limitation clauses is actually a right protected by the Convention. So the ECtHR is indirectly able to rule on conflicts between fundamental rights concerning two individuals. For example in the case *Otto-Preminger-Institut v. Austria*, the Strasbourg Court accepted the prohibition of a film to protect “the rights of citizens not to be insulted in their religious feelings by the public expression of views of other persons”,⁶⁶ which was conflicting with the freedom of expression. In another case, where the right to privacy and freedom of expression was in conflict, the Court accepted the ban on a book, which was giving intimate details of an individual’s private life.⁶⁷

The Court’s approach on conflicting fundamental rights is supportive of the balancing method, which can be seen in the following statement:

“In the present case the only aim invoked by the Government to justify the interference complained of was “protection of the rights and freedoms of others”. Where these “rights and freedoms” are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a “democratic society”. The balancing of individual interests that may well be contradictory is a difficult matter, and Contracting States must have a broad margin of appreciation in this respect, since the national authorities are in principle better placed than the European Court to assess whether or not there is a “pressing social need” capable of justifying interference with one of the rights guaranteed by the Convention.

It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect “rights and freedoms” not, as such, enunciated therein. In such a case only indisputable imperatives can justify interference with enjoyment of a Convention right.”⁶⁸

⁶⁴ *Bomhoff*, (fn. 11), p. 619.

⁶⁵ See, e.g., ECtHR, application no. 8734/79, *Barthold v. Germany*, judgment of 25 March 1985.

⁶⁶ ECtHR, application no. 13470/87, *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, para. 48.

⁶⁷ ECtHR, application no. 58148/00, *Editions Plon v. France*, judgment of 18 May 2004.

⁶⁸ ECtHR, application no. 25088/94, 28331/95 and 28443/95, *Chassagnou and Others v. France*, judgment of 29 April 1999, para. 113.

The margin of appreciation was gradually developed in the Court's jurisprudence and has for a long time not actually had a place in the text of the Convention. Only the Protocol No. 15 amending the Convention of 24 June 2013, which is not yet in force, will introduce the "margin of appreciation" concept into the preamble of the Convention. The margin of appreciation is the "measure of discretion allowed the Member States in the manner in which they implement the Convention's standards, taking into account their own particular national circumstances and conditions."⁶⁹

The emphasis on the margin of appreciation is due to the fact that the national courts will be able to establish a more reasonable and justified balance, since they are more familiar with the factual background of the case and the concrete conditions in the particular Convention State than the Strasbourg Court. "The underlying principle is that state authorities are in a better position than an international judge to decide the proper application of the Convention to specific contexts..."⁷⁰ The *necessity*⁷¹ of a certain restriction on a right can be better assessed on the national level.

The balancing method depends on the evaluation of the facts and what meaning or weight is given to the conflicting rights within a specific jurisdiction, which depends on culture, economy, history, politics and so on. This is why the Court, with the margin of appreciation doctrine, by giving some general guidelines as to the rules that should be followed,⁷² leaves it to the discretion of national courts to make the final decision on the proper balance. However, the Court has also always emphasized that the Convention States' use of their margin of appreciation remains subject to its supervision.

E. Conclusion

After examining the methods listed above, one can say that the only logical method that will help us reach a reasonable solution for the conflict of fundamental rights is balancing. It is the most common method used across the world in different legal orders and the one receiving the most support in the legal literature.

The criticism that the balancing method had received was that it leaves the judges a broad discretion and there is no way of foreseeing the judgment that would be given.⁷³

⁶⁹ *Arai*, (fn. 54), p. 2.

⁷⁰ *Tümay*, The "Margin of Appreciation Doctrine" Developed by the Case-Law of the European Court of Human Rights, *Ankara Law Review* 2008, p. 202.

⁷¹ ECtHR, application no. 5493/72, *Handyside v. United Kingdom*, judgement of 7 December 1976, para.48.

⁷² Such as Principle of Proportionality, see *McBride*, Proportionality and the European Convention on Human Rights, in: *Ellis*, The Principle of Proportionality in the Laws of Europe, 1999, pp. 23-36.

⁷³ *Cherednychenko*, (fn. 5), p. 246.

The discretion that the judges enjoy when applying the balancing method is a part of their duty as the guardians of law. One general rule which embraces all of the situations in which a conflict occurs and gives a common technique to resolve them all cannot possibly be formulated. Even if a single solution was to be formulated. It would not serve justice in each situation, since every case has its own specific circumstances. Also the discretion of the judges is not without any limits; they have to follow the principle of proportionality.

The answer to the question, how to resolve conflicts between fundamental constitutional rights, is, at the end quite simple. Balancing ...

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