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### Public Protection, Proportionality, and the Search for Balance

Benjamin J. Goold

*Allard School of Law at the University of British Columbia, goold@allard.ubc.ca*

Liora Lazarus

*Allard School of Law at the University of British Columbia, lazarus@allard.ubc.ca*

Gabriel Swiney

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# Public Protection, Proportionality, and the Search for Balance

by Benjamin Goold, Liora Lazarus and Gabriel Swiney  
University of Oxford

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# **Public Protection, Proportionality, and the Search for Balance**

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## The authors

**Benjamin Goold**, BEc, LLB (Tasmania), BCL, DPhil (Oxon) is a University Lecturer in Law and a Fellow and Tutor at Somerville College, University of Oxford. His major research interests are in the use of surveillance technology by the police, and the relationship between individual privacy rights and the criminal law. He also writes on aspects of the Japanese criminal justice system, and is a member of the Faculty of Oriental Studies and an Associate Member of the Nissan Institute of Japanese Studies. He is the co-editor, along with Liora Lazarus, of the book *Security and Human Rights* (Hart 2007), and co-authored the recent book *Crime and Security* (Ashgate 2006) with Lucia Zedner. He is currently working on the book *Surveillance*, part of the Key Issues in Criminology Series (Routledge 2007).

For further details, see <http://users.ox.ac.uk/~corp0538/>

**Liora Lazarus**, BA (UCT), LLB (LSE), DPhil (Oxon) is a University Lecturer in Law, Member of the Centre for Criminological Research and a Fellow of St. Anne's College at the University of Oxford. She is also an associate of the Centre for Cultural Inquiry, Berlin and was a Fellow of the Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany from 1994-95. Her research interests are in comparative human rights and criminal justice. She is the author of the book *Contrasting Prisoners' Rights* (OUP 2004) and co-editor of the book *Security and Human Rights* (Hart 2007). Other recent publications include her article entitled 'Conceptions of Liberty Deprivation' (*Modern Law Review* 2006). She is currently working on a book which explores the relationship between constitutional rights and civic identity in emerging democracies with a particular focus on South Africa.

For further details, see [http://denning.law.ox.ac.uk/members/profile.phtml?lecturer\\_code=lazarusl](http://denning.law.ox.ac.uk/members/profile.phtml?lecturer_code=lazarusl)

**Gabriel Swiney**, BA, JD (Harv), BCL is a researcher at the Oxford University Faculty of Law. His research interests are in comparative and public international law. Gabriel has conducted fieldwork in Jordan and has published on the topics of humanitarian law and international economic development. Beginning in fall of 2007, he will be a Legal Advisor to the United States Department of State.

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## Disclaimer

The views expressed are those of the authors and are not necessarily shared by the Ministry of Justice.

# Contents

	Page
<b>Executive Summary</b> .....	<b>i</b>
<b>Part 1 Introduction</b> .....	<b>1</b>
1.1 Aim of the report.....	1
1.2 Balancing, proportionality, and margins of appreciation.....	1
1.3 Methodology.....	3
1.4 Structure of the report.....	4
<b>Part 2 Setting the Scene</b> .....	<b>5</b>
2.1 The European Court of Human Rights.....	5
2.2 The United Kingdom.....	7
2.3 Germany.....	10
2.4 France.....	13
2.5 Spain.....	16
2.6 Summary of the jurisdictions.....	18
<b>Part 3 Case Discussion</b> .....	<b>19</b>
3.1 Overview of the data.....	<b>19</b>
3.2 Torture and inhuman or degrading treatment.....	21
3.3 Liberty and security.....	25
3.4 Fair trial rights.....	29
3.5 Privacy.....	34
3.6 Family life.....	38
3.7 Freedom of expression.....	40
3.8 Freedom of association.....	45
<b>Part 4 Conclusions</b> .....	<b>48</b>
<b>Bibliography</b> .....	<b>53</b>
<b>Annex 1: Methodology</b> .....	<b>57</b>

## Tables

1. Frequency of rights and security claims.....	19
2. Outcome of rights and security cases from 2000 to the Present .....	20

## Executive Summary

This report examines how courts in the UK and Europe respond when human rights and security appear to conflict. It compares cases from the United Kingdom, France, Germany, Spain, and the European Court of Human Rights (ECtHR). It examines how rights are applied and how courts use the concept of proportionality to mediate conflicts between rights and security. The report concludes that British courts are less consistent in their application of proportionality than countries with constitutional rights protections which tend to be more rigorous in their protections of rights than are countries, like the UK, that rely instead on the European Convention on Human Rights (ECHR).

### Proportionality and balancing

At its most rigorously applied, proportionality requires a multi- stage analysis. First, the court must ask whether the purpose of any rights restriction is legitimate. Second, the court must then ask whether the measure in question is suitable to attaining the identified purpose. Third, the court must ask whether the measure is necessary for the attainment of the purpose. Finally, the court must establish whether the measure is proportionate in the strict sense, namely whether it strikes a proper balance between the purpose and the individuals' rights in question.

Proportionality as a legal concept must be distinguished from the concept of balancing. Balancing, as identified in this report, involves a broad brush, and sometimes opaque, analysis aimed at a resolution of the interests and rights involved. When balancing, courts are effectively applying a utilitarian analysis of the rights and public interest goals in question, giving no significantly greater weight to rights than to security measures.

### Setting the scene

In order to understand differences in how jurisdictions mediate between rights and security, it is necessary to understand structural differences between these five legal systems. Most important is the fact that some jurisdictions, such as Germany and Spain, have domestic constitutions that protect human rights in addition to applying the ECHR. Others, such as France and the UK, rely instead on the ECHR itself as their primary rights instruments.

## Overall conclusions

First, British courts are not being overwhelmed with rights versus security cases. Since the Human Rights Act came into force in 2000, only twenty-one cases involving a conflict between rights and security have been decided by the House of Lords. With the exception of France, the other jurisdictions included in this study had a similar number of cases. The British Government's success in these rights versus security cases does not vary substantially from other European jurisdictions. Since 2000, the British Government won domestic cases at about the same rate as the German Government, and lower only than France in proportional terms.<sup>1</sup> On this basis, it can be argued that the perception that the British government's security policies are more restricted by human rights considerations than in other comparable European jurisdictions is open to question.

Second, proportionality plays a crucial role in deciding rights versus security cases. Proportionality criteria were applied by courts in 70 percent of the cases in our selection. In the remaining cases proportionality was typically not applied either because the right in question is seen as absolute, such as with torture, or because the court chooses to simply balance interests rather than use, or mention, proportionality. However, there is significant variation between jurisdictions as to the consistency with which proportionality is applied.

Third, there is no single formulation of the proportionality principle. Courts across jurisdictions vary considerably in the level of scrutiny they apply to government assertions through the proportionality lens. In Germany and Spain, proportionality almost always involves a rigorous four-stage enquiry. However, the picture is less consistent in the ECtHR, France and the British House of Lords. In the UK in particular the House of Lords is more prone to adopt a broad brush balancing approach. Moreover, even where proportionality is applied British courts appear to be more forgiving of government assertions than in other countries except France. Hence, the importance of proportionality and the impact it has on case outcomes varies depending the jurisdiction.

Fourth, while all jurisdictions have some concept of deference, margin of appreciation or evaluative leeway, there are significant differences between these jurisdictions as to how these ideas are applied, articulated and understood. As a supra-national court the ECtHR has developed the margin of appreciation doctrine in order to afford greater respect to the

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<sup>1</sup> The French case example is complex however. Although in proportional terms the French government wins at the highest rate, in absolute terms the French government has lost more security versus rights cases than the UK government since 2000: 13 versus 12, respectively.

democratic decisions of the signatory states to the Convention. The British House of Lords has developed a strong and autonomous concept of “judicial deference,” and references to deference have been frequent in human rights decisions since the HRA entered into force in 2000. The Spanish constitutional court splits its jurisprudence between greater deference to legislative decisions and close scrutiny of administrative decisions. The German FCC does not use the term deference, but applies a very narrow concept of evaluative leeway which is interpreted in light of the right to “effective legal protection.” The term *déference* does not appear in French law, however the *Conseil d’Etat* affords the administration some evaluative leeway in its decision-making. The *Conseil constitutionnel* is also conscious of the respective competences of the branches of government and will sometimes refrain from substituting its own judgment for that of the legislature.

Fifth, the decisive factor in determining the importance of proportionality and the approach of courts in human rights versus security cases across jurisdictions is the existence of a domestic charter of rights. Courts with constitutional systems that include their own charter of rights – such as in Germany and Spain – are more consistent and rigorous in their application of proportionality to rights versus security cases than other jurisdictions which rely solely on the ECHR. This is almost certainly linked to the fact that courts under these domestic constitutions are vested with significant constitutional authority to scrutinize their respective governments and parliaments in the light of constitutional rights. As a consequence, a “British Bill of Rights” would most likely result in stricter rights protections in British courts.

Sixth, proportionality analysis varies depending on the right in question as well as the relevant jurisdiction.

- **Torture:** Courts across all jurisdictions are consistent in their view that questions of security cannot be a basis for limiting the rights provided under Article 3 ECHR or other prohibitions on torture, and that the right to be free from torture is not subject to balancing exercises. Nevertheless, in both the German and the ECHR jurisprudence, proportionality of the penalty to the crime does enter into the equation when interpreting whether treatment constitutes torture.
- **Liberty:** All jurisdictions apply the doctrine of proportionality to the question of whether states fall within the exceptions to the right to liberty, however the intensity of proportionality review varies considerably across jurisdictions. At the one end of the

spectrum the ECtHR and the UK courts are inclined to balance rights and interests against each other, while at the other end of the spectrum the German court applies a strict necessity test for any deprivation of liberty.

- **Fair trial rights:** Fair trial rights are frequently subjected to a proportionality analysis. However, in the ECtHR, the UK and Spain there is a considerable blurring of balancing and proportionality. The German FCC on the other hand applies a strict proportionality test and frequently returns to the important idea of the 'core of the right' when determining restrictions on fair trial rights.
- **Privacy:** A rigorous proportionality test has played a decisive role in protecting the privacy related rights of applicants in Germany, Spain and, to a lesser extent, France. In the UK the doctrine has not been as consistently or strictly applied. While the *Daly* case has shown a stringent application of proportionality review, other cases tend towards a balancing of privacy rights against security measures. In *Klass*, the ECtHR refers not to proportionality, but to strict necessity – yet in *Segerstedt-Wiberg*, proportionality and strict necessity are both required.
- **Family life:** The French and ECtHR cases demonstrate that family life cases, perhaps more than any other human right, are determined predominantly by the application of proportionality *strictu sensu*, rather than by questions of the legitimacy and necessity of the rights limiting measures cited by states.
- **Expression:** Courts in all selected jurisdictions apply the proportionality analysis most rigorously and consistently with respect to freedom of speech. They are also less inclined to develop a strong doctrine of deference or evaluative leeway in this context. Despite this, courts in all jurisdictions are also broadly sympathetic to the state's need to restrict freedom of expression where potential or actual terrorist activity is involved.
- **Association:** The ECtHR has the most stringent proportionality requirements with respect to freedom of association relative to the other jurisdictions in this selection. However, it is difficult on the sample available to draw very clear comparative conclusions. In all cases where the restriction on the right to association was upheld, the organisations in question were characterised by the courts as posing a threat to the basic democratic values of the State.

## **Part 1      Introduction**

### **1.1      Aim of the report**

Perhaps one of the most difficult issues facing the United Kingdom today is how best to reconcile a commitment to fundamental human rights with the need to provide the public with security and protection. Under the Human Rights Act 1998, courts in the United Kingdom are responsible for ensuring that any rights restrictions are consistent with the European Convention on Human Rights (ECHR). The results are often controversial, and in recent years the debate surrounding the relationship between rights and security in Britain has only intensified. Calls for a ‘rebalancing’ are common, with three recent government reports addressing the issue (HM Inspectorate of Probation 2006; The Home Office 2006; Department of Constitutional Affairs 2006).

This report compares recent human rights cases in several jurisdictions – the European Court of Human Rights (ECtHR), the United Kingdom, Germany, France, and Spain – with a view to putting the current debate over rights and security in its broader European context. In particular, it considers whether courts in the United Kingdom are more rights regarding than their European counterparts, and as such less willing to allow government to place restrictions on those rights in the name of security and public safety. Finally, it examines how different European courts have attempted to resolve conflicts between rights and security using concepts such as proportionality and the margin of appreciation, and considers whether less formal exercises in balancing – as sometimes employed by Court of Appeal and the House of Lords – are consistent with a commitment to these more established human rights principles.

### **1.2      Balancing, proportionality, and margins of appreciation**

The report has identified three concepts which the courts apply in our selected jurisdictions in order to resolve the conflict between security measures and human rights: proportionality, balancing and the margin of appreciation.

At its most rigorously applied, proportionality requires a four stage analysis. First the court must ask whether the purpose of any rights restriction is legitimate, namely that it is foreseen by the rights instrument in question or is determined by the court to be a legitimate democratic purpose. Second, the court must then ask whether the measure in question is suitable to attaining the identified purpose. Third, the court must ask whether the measure is

necessary for the attainment of the purpose, namely whether it is the least restrictive measure available for achieving the purpose in question. Finally, the court must establish whether the measure is proportionate in the strict sense, namely whether it strikes a proper balance between the purpose and the individuals' rights in question. Applied in this way, the proportionality matrix serves legal transparency in demonstrating clearly how rights arguments are resolved. This report reveals significant variations in the rigor with which courts apply the proportionality test across jurisdictions and shows that courts sometimes only focus on one or two stages of the proportionality analysis.

Proportionality as a legal concept must be distinguished from the concept of balancing which courts, particularly in the UK, sometimes adopt in order to resolve the conflict between security and rights. Balancing, as identified in this report, involves a broad brush, and sometimes opaque, analysis aimed at a resolution of the interests at stake and the rights involved. Unlike proportionality, it does not operate from a presumption that public interest goals must be restricted by rights, or that rights take precedence over public interest goals which are not suitable and necessary to their purpose. Rather, when balancing, courts are effectively applying a utilitarian analysis of the rights and public interest goals in question, giving no significantly greater weight to rights than to security measures. The balancing which takes place at the fourth stage of the proportionality test - proportionality strictu sensu – must also be distinguished here. It is one thing to ask at the outset whether the rights and measures are 'balanced' in a broad utilitarian sense, it is another to ask this question after the first three stages of the proportionality test have been fully satisfied.

Alongside proportionality, as well as balancing, courts apply the margin of appreciation doctrine in order to afford some leeway to the democratic or specialist decision maker in their appreciation and weighting of the relevant factors involved in the case. The margin of appreciation doctrine is however variously applied and manifests in different ways in different jurisdictions. While the ECtHR applies the doctrine as a supra-national court to afford leeway to the jurisdictions over which it presides, UK courts have developed the doctrine in a number of ways. Sometimes UK courts refer to a 'margin of appreciation' or 'discretionary area of judgment', while other times they refer to notions of 'deference' to the decision maker. In other jurisdictions, such as Germany, the courts refer to an 'evaluative leeway' on the part of the decision maker. This variation in terminology reflects also a difference in the weight given to the doctrine and the extent to which the courts in different jurisdictions defer to governments in the application of security measures.

### 1.3 Methodology

This report is based on a comparison of key human rights cases involving questions of security and public protection decided primarily since January 2000. In total, some 192 cases were considered, making this report the most comprehensive study of its kind to date. Broadly speaking, this report engages in two types of analysis: first, quantitative comparisons between jurisdictions, such as how many cases were decided, how often proportionality was applied, and at what rate governments win rights versus security cases. For these quantitative comparisons, we looked solely at cases decided since 2000, in order to obtain comparable samples between jurisdictions. This does not apply to table 1, below, which identifies trends in the relationship between rights claims and security claims, rather than comparing trends between jurisdictions, and includes pre-2000 cases. The second type of analysis in this report is qualitative, comprising an in-depth examination of the case law and jurisprudence in the rights versus security context for each jurisdiction. In this qualitative analysis, we have chosen to include some cases decided before 2000. This inclusion was necessary because for many jurisdictions – in particular Germany – human rights jurisprudence has a long history. Key principles were developed prior to 2000; excluding such cases would thus give an incomplete view of the law.<sup>2</sup> For that reason, some pre-2000 cases have been included in our qualitative examination of the case law.

A full description of the methodology adopted can be found in Annex One, but for the purposes of this introduction it is important to note that each of the jurisdictions chosen has both an established human rights jurisprudence and extensive experience of dealing with serious threats to public order and national security. As a consequence, although there may be many differences between the legal systems considered in this report, they have all grappled with similar rights and security issues in recent years. Furthermore, regardless of their domestic human rights frameworks, all of the countries included for comparison are signatories to the ECHR and recognise the rights and principles set out in the Convention.

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<sup>2</sup> Selecting these older cases required attention to several factors: in many jurisdictions, the most significant factor was citation in later decisions. If a pre-2000 case was cited as determining a principle of law that bears on the rights versus security conflict, we included that older case in our data. Another factor in our search for older cases was academic literature. Cases described as important by this academic literature were also included, even if they were decided before 2000.

## **1.4 Structure of the report**

Following this introduction, which comprises Chapter 1 of the report, the report is divided into two additional parts. Chapter 2 provides a brief overview of the system of constitutional and human rights protection in each of the jurisdictions included in the report. It also alludes to the security threats within each jurisdiction. In Chapter 3, decisions of the ECtHR and various national courts are compared, with discussion organised around those rights most frequently raised in cases involving issues of security and public protection, with particular attention being paid to questions of proportionality and balance. Finally, Chapter 4 provides a general overview of the key issues identified in the report, and a discussion of the relationship between rights and proportionality in the context of security and the ECHR.

## Part 2      **Setting the scene**

This section provides a brief introduction to the history, legal culture and system of rights protection in each of the jurisdictions examined in this report. Although it is not possible to provide a comprehensive account of all the relevant distinctions between the jurisdictions, it is nevertheless important to draw attention to a number of key differences, most notably as regards the role of the ECHR in domestic human rights law and its relationship to existing constitutional rights frameworks.

### **2.1      The European Court of Human Rights (ECtHR)**

#### *Historical background and legal framework*

The European Court of Human Rights (ECtHR) was created in 1998, and immediately replaced the older system that relied on both the European Commission of Human Rights and the European Court of Human Rights. The ECtHR is now the primary body responsible for interpreting and enforcing the European Convention on Human Rights (ECHR). A Council of Europe project, the Convention came into force in 1953 and was designed to implement and protect some of the rights enshrined in the 1948 Universal Declaration of Human Rights. The ECHR describes a set of rights and provides, in some cases, for restrictions or limitations to be placed on those rights, with Article 1 of the Convention obliging parties to ‘secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’ Under the original scheme of the Convention, individuals who believed that their Convention rights had been violated by a state party could apply for relief to the European Commission on Human Rights, which then had the power to bring cases before the ECtHR. In 1998, however, Protocol 11 to the Convention came into force, which provided individual claimants with direct access to the new ECtHR. The Convention is made up of absolute rights, such as the right against torture, rights which are subject to exceptions, such as the rights to life and liberty, and rights which are subject to express limitations, such as the right to freedom of expression. For some of these rights, derogation – the possibility for States to opt-out of certain Convention obligations under narrow and specified conditions- is also possible under Article 15 ECHR.<sup>3</sup>

The ECtHR exists by virtue of international law and is not itself part of any domestic system. The Court is not sovereign – that is, it has no direct means to enforce its judgments – nor does it have any special relationship with individual member states. The ECtHR therefore

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<sup>3</sup> No derogations are allowed for Articles 2, 3, 4(1) and 7.

plays a very different role compared to that of national courts, which may have the power to overturn decisions of the state or declare particular state practices and policies unlawful. In practice, this means that the ECtHR is on the one hand more independent than certain domestic courts, but on the other often more hesitant to use its power than those same courts. The Court has consistently to face the tension between upholding individual rights and the political reality of rendering judgments against the same sovereign countries that created the Court in the first place.

### ***Constitutional culture and the development of principles***

Multiple concerns guide the Court's thinking on human rights cases. The court occupies a unique position, standing in some ways above national systems but also as a bridge between countries with distinct legal systems. The Court draws from common and civil law traditions, but has ultimately developed its own constitutional culture. One aspect of this culture is of particular importance: respect for national decisions, or as the court refers to it the margin of appreciation doctrine.<sup>4</sup> The Court's respect for state-level decisions stems from its status as a supranational institution: 'the supranational character of the European Commission and Court of Human Rights may induce deference and self-restraint in respect of conclusions reached at the national level as to the appropriateness of restrictions on rights and freedoms' (McBride 1999, p.25).

Although it has come to be recognized as one of the central principles governing the application of the rights and freedoms contained within the Convention, the concept of proportionality is not specifically mentioned in its text or in any of its additional Protocols (McBride 1999, p.23). Proportionality entered Convention jurisprudence by way of the limitations clauses, clauses that require restrictions on rights – such as Article 8, the right to private and family life – to be 'necessary in a democratic society.'<sup>5</sup> In order to judge whether specific restrictions placed upon these rights are justifiable, the Strasbourg court has turned to proportionality, a concept originally developed in German administrative and constitutional law.

Significantly, the proportionality of a state measure may also be relevant in considerations of whether absolute rights have been violated. Articles 3 (the prohibition on torture) and 6

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<sup>4</sup> For a detailed examination of the origins of the margin of appreciation, see Yourow, Howard Charles, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence, Kluwer Law International: London (1996).

<sup>5</sup> ECHR, Articles 8 (family life and privacy), 10 (expression), 11 (association).

(the right to a fair trial) fall in this category. Finally, proportionality is also used to judge whether state measures fall within exceptions to the right to liberty provided under Article 5.

### **Recent issues in rights and security**

Limitations to Convention rights must be justified; if they are not, they violate the Convention. Often, state parties appearing before the ECtHR argue that it is necessary to limit rights in order to protect security. Because limitations on rights are often justified by reference to security concerns, the jurisprudence of the ECtHR reflects the changing and diverse threats faced across Europe. Instead of describing a set of inflexible rules, the Convention has created a dialogue between states, individuals, and courts that moulds and shapes rights over time. For that reason, it is impossible to understand the jurisprudence of the ECtHR without understanding the security threats faced by parties to the Convention.

Perhaps the most significant – and certainly the most conspicuous – type of threat that has been considered by the Court in recent years is terrorism. However, it is actually rare for member states to cite concerns about terrorism or the need to combat terrorist activities as a reason for limiting Convention rights when defending cases before the ECtHR.<sup>6</sup> Instead, a more prosaic threat occupies the greatest bulk of cases, namely the fear of crime. The most common type of case to appear before the Court involves the deportation of convicted criminals, in which the need to prevent future crime is used to justify limitations on Convention rights.<sup>7</sup>

## **2.2 The United Kingdom**

### **Historical background and legal framework**

In the absence of a written constitution, individual rights in the United Kingdom have traditionally been protected by a combination of parliamentary legislation and the common law. This historical position was fundamentally altered in 1966 when individual petitions to the European Commission on Human Rights were allowed. Yet despite this reform – and the effect of latter amendments to the convention via Protocol 11 – until 1998 the enforcement of many basic human rights remained essentially a matter of international, not domestic, law in the United Kingdom (Feldman 1999, p.165-66). Under the new regime created by the Human Rights Act 1998, however, UK courts are now obliged to interpret domestic legislation so that it is compatible with the ECHR and, where this is not possible, are empowered to issue a

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<sup>6</sup> Three such cases were identified that met the criteria for inclusion in this report: *Chahal v United Kingdom*, *Dogan v Turkey*, and *Heaney and McGuinness v Ireland*.

<sup>7</sup> Typically article 8 rights to family life. Five such cases met the criteria for this report: *Uner v the Netherlands*, *Yildiz v Austria*, *Radavanovic v Austria*, *Jakupovic v Austria* and *Boultif v Switzerland*.

declaration of incompatibility. Although such declarations do not affect the status of the given legislation and are not binding on Parliament, they nevertheless represent an important mechanism for the protection of rights in the UK, while also preserving the doctrine of parliamentary sovereignty.

Before the Human Rights Act, the British constitutional system lacked a set of clearly stated, enumerated human rights. Due to the relative continuity of local democratic traditions, constitutional conventions, and state institutions, successive governments have not felt the need to formalise such rights. The changes brought about by the Human Rights Act clearly represent a break with traditional thinking about rights in the United Kingdom, establishing for the first time a set of defined rights that can be readily identified and which are enforced by courts endowed with substantial powers of review (Lazarus 2004, ch. 6).

### ***Constitutional culture and the development of principles***

Although the constitutional structure of the United Kingdom does not emphasize the formal separation of powers, a strong tradition of judicial independence has emerged as a result of informal but effective constitutional conventions. According to these conventions, courts and the judiciary are apolitical and should be wholly free from political influence. This traditional vision of the judiciary has had important implications for the development and exercise of judicial review and the protection of individual rights in the UK. Given that the courts have had no legitimate role to play in the formulation of policy-making, their role has been confined to checking the legality, as opposed to the merits, of executive actions (Lazarus 2004, ch. 6). As for acts of Parliament, strict adherence to the doctrine of parliamentary sovereignty historically constrained the ability of the courts to perform meaningful legislative review.

The Human Rights Act 1998 demands a different role for courts. By requiring courts to decide whether the limitations placed on rights are justified, it obliges judges to investigate the merits of state and executive actions. Furthermore, by providing courts with the power to issue declarations of incompatibility, the Act also requires some level of judicial oversight over Parliament. As a consequence of these changes, the Act has led to a significant shift in the constitutional culture of the United Kingdom, placing the doctrine of separation of powers under increasing strain, and requiring the judiciary to take a more active role in the protection of rights and the review of state action.

Evolving standards of judicial review have also led courts to question the level of deference they must give to the legislative and executive branches of government. Before the Human

Rights Act, deference in the human rights context was intertwined with the Wednesbury standard of review.<sup>8</sup> Wednesbury review, even where reformulated as ‘anxious scrutiny’ in the human rights context,<sup>9</sup> implies, if not requires, a high level of deference to the political branches of government. However, with the introduction of proportionality review in 1998, the question of how much and in what instances the courts should defer to the will of parliament and the government was reopened.

Interestingly, since the Human Rights Act entered into force recourse to the language of deference has been ubiquitous in judicial analysis of Convention rights in the United Kingdom. Faced with a conflict between the generous (to the government) Wednesbury standard and more restrictive visions of deference applied in Strasbourg in the wake of the Human Rights Act, British courts have charted their own path and developed what has been referred to as an ‘autonomous concept of deference’. This notion of deference is distinguished by the fact that it is not static – that is, it changes with context – and explicitly leaves open the possibility of judicial scrutiny.<sup>10</sup> In particular, it outlines those areas in which the government and Parliament have greater – but not absolute – discretion as regards the exercise of legislative authority and the limitation of rights (*R v A (No2)* 2001, para. 58).<sup>11</sup> This newly evolved concept of deference now influences, informs, and sometimes determines the work of judges as they review limitations on human rights in the United Kingdom.<sup>12</sup>

### **Recent issues in rights and security**

The most obvious security threat faced by the United Kingdom is terrorism. The tension between the need to respond to threats of terrorism and the commitment to protecting individual rights has been a constant theme in British human rights law, and has informed political and legal debates over how best to deal with the challenges posed by the IRA in the 1970s and Al-Qaida today. Recent attacks in the United States, Spain, and Britain have served to underscore this danger, and have ensured that terrorism will continue to be regarded as the one of the most serious threats facing Britain in the twenty-first century.

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<sup>8</sup> *Wednesbury* review requires courts to ask the question: could a reasonable decision-maker have made this decision? If the answer is yes, the decision stands. It is one of the weakest forms of judicial review known to the common law.

<sup>9</sup> *Ex p. Smith* [1996] QB 517, 554.

<sup>10</sup> See *R (Kebeline) v DPP* [1998] 4 All ER 801, 844; *R v Lambert* [2001] HRLR 4, para 16; *Brown v Stott* [2001] HRLR 9, para 58.

<sup>11</sup> For the ongoing argument about levels of deference, see *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153.

<sup>12</sup> A number of different types of deference have been formulated by British courts. Due deference, discretionary area of judgment, degrees of deference, weight given to the legislature are all terms used by the courts. See Lazarus 2004, 6.1.3.1.

This said, other threats and state responses to them have also had a significant effect on the development of human rights law in the UK. In particular, the need to combat illegal immigration and organized crime has been cited by the government as a reason to limit certain rights, and to enact legislation that expands the power of criminal justice agents. Terrorism is cited less often by the British government in human rights cases than are these more everyday threats.

## 2.3 Germany

### *Historical background and legal framework*

The German constitution, called the 'Basic Law' for historical reasons,<sup>13</sup> is in most important respects a reaction to, and rejection of, the horrors of the Third Reich, which many constitutional historians link to the breakdown of the Weimar Republic. In aiming to avoid the mistakes of the Weimar Constitution – in which all rights were subject to parliamentary amendment – the Basic Law places basic rights at the head of the text of the Constitution,<sup>14</sup> declaring as unamendable the right to human dignity and the Democratic, Social, Federal and Rechtsstaat principles.<sup>15</sup> It also ensures that all State institutions are obliged to 'respect and protect' basic rights.<sup>16</sup> The Federal Constitutional Court (FCC) is afforded extensive powers of legislative review and citizens have direct access to this Court.<sup>17</sup>

As regards the ECHR, the German FCC takes the view that the Convention is simple federal law as opposed to 'Basic Law'. Hence under domestic law, the German Basic Law supersedes the Convention. However, the Courts will recognize the Convention alongside the Basic Law where the protective potential of the rights contained therein go further than those contained under the Convention.

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<sup>13</sup> The Basic Law was originally created with the intent of forming an interim constitution for what was then West Germany. Because of this temporary nature, the term 'constitution' was avoided. Yet the document proved so successful that the Basic Law was retained even after reunification.

<sup>14</sup> Basic Law, arts 1-19. For further basic rights, see Basic Law, arts 20(4), 33, 38, 101, 103, 104. Despite the exclusion of these rights from the first chapter of the Constitution, they are still considered to be fundamental.

<sup>15</sup> Basic Law, art 79(3): 'Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in the legislative process, or the principles laid down in arts 1 and 20 shall be prohibited'.

<sup>16</sup> Basic Law, art 1(3): 'The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law'.

<sup>17</sup> Basic Law, art 19(4), art 93(1)(4a).

### *Constitutional culture and the development of principles*

As a consequence of the constitutional powers of the FCC and the political and legal culture in which it operates, the FCC has developed a broad and extensive conception of human rights. Since its earliest jurisprudence, it has viewed basic rights both as subjectively held and also as a 'system of values' or 'objective norms' which radiate through the whole legal system (Alexy 1990; Böckenförde 1990; Jarass 1985). Alongside the notion of constitutional rights as 'objective norms and values' is the view of basic rights as not only negative limits to State intervention, but also as positive justifications for State action. In short, basic rights, and the FCC as the court set up ultimately to protect them, constitute the cornerstone of modern German democracy and a defining feature of its political, legal and constitutional culture.

Basic rights may be limited where the Basic Law provides for legal reservations (Gesetzesvorbehalte). Moreover, the FCC has developed a doctrine of 'constitutional limitations' (verfassungsimmanente Schranken) whereby basic rights may be limited by other basic rights or further constitutional norms. Though some basic rights are not subject to any limitation, such as the right to human dignity (Basic Law, Article 1(1)) and the right to equality (Basic Law, Article 3), most basic rights are subject to some kind of legal or constitutionally immanent limitation.

The FCC is clear that the onus rests on the State to justify any rights limitations. Without legal authority to encroach upon individual rights State encroachments would be struck down. Rights limitations cannot simply be justified through the legislative process, as these infringements must accord with the fundamental principles of the Basic Law.<sup>18</sup> Where the constitution foresees the limitation of a basic right, a number of principles must be followed. Many of these principles stem from the Rechtsstaatsprinzip (rule of law), but are also referred to independently under the umbrella term of 'limits of limits' (Schranken-Schranken) (Pieroth and Schlink 1997, p. 6473). Included in the notion of Schranken-Schranken is the "essence guarantee," set out in Article 19(2) Basic Law, which sets an absolute limit beyond which no basic right can be restricted by asserting that each right has an inviolable essence or core (Pieroth and Schlink 1997, p.70; Jarass and Pieroth 2002, p.471).

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<sup>18</sup> Under Basic Law, art. 20(3) the legislature is bound by the constitutional order and is therefore duty bound to respect basic rights in the content and shape of legislation.

Rights restrictions short of those which infringed upon the 'essence' of a right are also subject to limitation. These limitations must be proportionate. The doctrine of proportionality, developed in Germany in the nineteenth century, stipulates that State measures be 'suitable' and 'necessary' for attaining a legitimate (i.e. constitutional or legal) purpose, and 'proportionate' in the narrow sense (Degenhart 1997, p.128-33). Such is the centrality of proportionality in German constitutional and legal reasoning that Schlink, a leading constitutional scholar in Germany, has argued for a separate constitutional principle called 'the proportionate law proviso' (Pieroth and Schlink, p.63).<sup>19</sup> Another way in which proportionality is described in Germany is as the 'prohibition of excess' principle (Übermaßverbot).

Article 19(4) of the Basic Law stipulates that 'where rights are violated by public authority the person affected shall have recourse to law'. Sentence 2 of Article 19(4) stipulates that this will normally result, unless otherwise specified, in recourse to the ordinary courts. This article has come to be known as establishing the principle of 'effective legal protection' which the FCC has taken to mean that a citizen has a right to a thorough judicial assessment of the challenged measure in legal and factual terms. It is therefore clear that the constitution normally requires a dense judicial assessment, through the proportionality matrix, of any legislative or administrative act which infringes upon the basic rights of the individual. Nevertheless, judicial oversight of human rights does not preclude the possibility of the courts allowing for leeway in the determination of details, in the exercise of discretion and in the exercise of evaluation of facts. The test is whether the leeway allowed is consistent with the level of judicial scrutiny required by the right to effective legal protection. Hence, as a consequence of Article 19(4) Basic Law, the circumstances in which such leeway or 'margin of appreciation' is acknowledged are limited.

### *Recent issues in rights and security*

Germany has considerable experience of terrorist activity, from the activities of the Red Army Faction (RAF/Baader-Meinhof Gang) in the 1970s to the threats from Al-Qaida today. The FCC has taken a pro-active role in determining the political response to terrorism. Its approach to anti-terrorist measures has matured over time with the Court showing less inclination to accept overly oppressive measures today than it did in the 1970s. Most recently the FCC struck down provisions of the Aviation Security Act, a law passed in response to terrorist activities of 9/11 that gave powers to shoot down aircraft which had

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<sup>19</sup> See below.

been hijacked with the intention of using them 'as weapons in crimes against human lives'. The court argued that these measures violated the essence of the right to life and the right to human dignity of the innocent passengers on the plane, who had been made into the mere objects of State action directed at the security of others.

German human rights jurisprudence responds to other threats as well: border security and the prevention of crime also play a role in the cases studied. As later sections in the report will show, the FCC has played a vigilant role in limiting state measures that violate its conception of the proportionality principle.

## 2.4 France

### *Historical background and legal framework*

The idea of human rights first came to prominence in France during the 1789 Revolution. The 1789 Declaration of Human Rights stood as the cornerstone of public liberties in French law for decades, casting the legislature as the primary guardian of fundamental rights and freedoms. That role was not, however, always fulfilled, and it was only after the enactment of the 1958 Constitution that the freedoms contained in the 1789 Declaration, the Preamble to the 1946 Constitution and the fundamental principles recognised by the laws of the Republic acquired a higher place in the hierarchy of legal norms. Following a 1971 judgment in which the Conseil Constitutionnel accepted that it could hold acts of parliament to be unconstitutional where they violated fundamental human rights, France then ratified the ECHR in 1974, bringing the rights contained within it into domestic law (16 July, 1971). As a consequence, although the French Constitution does not contain a charter of rights, French courts may look to the rights and freedoms contained in the 1789 Déclaration des Droits de l'Homme et du Citoyen, the Preamble to the 1946 Constitution, the ECHR, and legislation enacted by Parliament in order to regulate the exercise of certain rights (Bell, 1992:138).

In addition, according to Article 55 of the 1946 Constitution, the provisions of international treaties ratified by France are superior to domestic law. The administration is therefore obliged to conform with *normes internationales*, and individuals may invoke such *normes* before French courts (CE Ass 30-05-1952 Dame Kirkwood). If a *norme internationale* conflicts with a French statute, the Cour de cassation resolves the conflict in favour of the international norm (Directeur general des douanes c Société des Cafés Jacques Vabre, 1975:336), whereas the Conseil d'Etat would hold that the Conseil constitutionnel was the only proper forum to review the constitutionality of a statute and thus apply the French statute (Brown and Bell, 1998:284).

### *Constitutional culture and the development of principles*

Separation of powers is one of the founding principles of the 5<sup>th</sup> Republic (Vincent, 2002:1139). It appears in Article 16 of the 1789 Déclaration des Droits de l'Homme et du Citoyen and in the loi constitutionnelle of 3<sup>rd</sup> June 1958, according to which 'the executive power and the legislative power should be separated in a way that the Government and the Parliament assume all of their competences each for its own part and under its own responsibility'. The Conseil d'Etat sits on top of the administrative courts and retains for historical reasons its position as the supreme administrative organ of the State and official advisor of the Government, whose President is the President of the Republic. This does not affect the Conseil d'Etat's impartiality as a court since the President's role is purely ceremonial (Brown and Bell:64).

Constitutional review was formally launched by the Conseil constitutionnel in 1971 (CC 1971 Liberté d'association). However, constitutional principles were present in the field of judicial review before 1971. The Conseil d'Etat guaranteed the freedoms and liberties of the French recognised by the 1789 Déclaration effectively long before the Conseil Constitutionnel was established. The existence of human rights in public law can be traced as far back as the ruling of the Tribunal des conflits in Dugrave in 1873, where a right in private life and property was acknowledged.

Although the Conseil d'Etat has itself never used the phrase 'principle of proportionality', various academic authors and judges have claimed that this principle is part of French law. Proportionality was introduced by Commissaire G. Braibant, commissaire du gouvernement, in CE 1971 Ville Nouvelle-Est., and the Conseil d'Etat accepted his submissions. Both Commissaire Braibant and Conseiller d'Etat Costa argue that proportionality has been implicitly applied by French judges (1988, p. 434). They agree that proportionality is applied in three fields: (i) limitations to civil liberties; (ii) manifest error of appreciation; and (iii) the 'bilan coût-avantages' or balancing of cost and benefits theory.

There is no concept of deference in French administrative law, primarily for historical reasons. The Conseil d'Etat was established in the 19<sup>th</sup> century as a public body that would sit above all other administrative authorities and would directly oversee and control their activities. It was thus inconceivable that it would defer to public bodies that were inferior to it. This assumption survives today even though the Conseil d'Etat is considered to be a court. Nonetheless, the Conseil d'Etat does give some leeway to the administration in certain situations. One of these

occasions is covered by the 'actes de gouvernement' doctrine, according to which the courts will not review acts concerning the relations between the Government and Parliament as well as the relations between the Government and foreign States or international organisations (Brown and Bell 1998, p. 162). The courts will also provide leeway to the administration when the legislature has granted discretion to the latter, especially with regard to highly technical matters. In such occasions, the courts will review the administrative act for an "erreur manifeste d'appréciation" or a manifest error of appreciation.

The idea of manifest error of appreciation constitutes an implicit application of the principle of proportionality, as it requires a judge to inquire whether there is a manifest disproportion between the motives of the act and its content (Costa 1988, p. 435). This enquiry requires the judge to substitute his judgment for that of the administration and thus the margin of discretion accorded to the public body vanishes. This is even more evident in the human rights context where the court substitutes its own judgment for that of the administration to ascertain for itself whether a human rights violation has been committed.

Although the term *déférence* is not used by French courts, analogous concepts do exist in the jurisprudence of the Conseil constitutionnel. The first and most frequent analogue is when the Conseil constitutionnel states that it is the task of the legislature to take measures to safeguard the public interest and to ensure conciliation between the latter and the exercise of civil liberties.<sup>20</sup> The second and considerably rarer analogue takes the form of true deference where the Conseil constitutionnel enunciates that it cannot 'substitute its own judgment to that of the legislature' (CC 13.03.2003 Loi pour la sécurité intérieure).

### ***Recent issues in rights and security***

Security arguments made by French authorities are typically linked with the prevention or suppression of ordinary crime (such as murder and other bodily harm, robbery, rape, drug traffic, possession and use of weapons etc). In the vast majority of other security-related cases, the primary focus has been on issues of deportation, particularly of Algerian nationals originating from the Maghreb. In the few cases where specific questions of terrorism have arisen, most have concerned threats from Spanish and Algerian terrorists, although similar security issues were also raised in cases involving French national defence policy with regard to the French nuclear tests in French Polynesia and the civil unrest in urban areas of France during 2005.

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<sup>20</sup> CC 13.03.2003 Loi pour la sécurité intérieure, CC 20.11.2003 Loi relative à la maîtrise de l'immigration, au séjour des étrangers en France et à la nationalité.

## 2.5 Spain

### *Historical background and legal framework*

The history of Spain during the 20th century is unlike that of most of the other countries in Europe. After a bloody civil war between 1936 and 1939, General Franco seized power and served as the head of an authoritarian regime until his death in 1975. This period was characterized by an absence of civil liberties, minimal democratic participation, and the political persecution of adversaries. In 1978 Spain adopted a new Constitution which – to a certain extent – married the conservative concerns of Franco's heirs with the democratic aspirations of his enemies, among them the moderate Spanish Communist Party (Woodworth 2001, p. 4). Spain then took the form of a parliamentary monarchy with a clear commitment to popular sovereignty, democracy and the rule of law. Spain entered the Council of Europe in 1977 and the European Community in January 1986.

The Spanish Constitution provides a substantive list of fundamental rights and freedoms, which according to Section 53 of the Constitution are binding on all public authorities. In addition, Section 10 states that provisions relating to the fundamental rights and liberties recognized by the Constitution are to be construed in conformity with the Universal Declaration of Human Rights and other international treaties ratified by Spain, such as the ECHR. The ECHR was signed in November 1977 and ratified by Spain in October 1979, and is frequently used by the Constitutional Court to aid in the interpretation of domestic rights and freedoms (de Casadevante 1988, p. 27-44). The ECHR can be directly invoked before the Spanish Courts and is binding upon them.

### *Constitutional culture and the development of principles*

Spain is a constitutional monarchy with the Constitution providing for the separation of powers between the executive, legislature and judiciary. Several commentators have argued that, regardless of its Constitutional design, the Spanish legislature is weak vis-à-vis the control of executive power. This imbalance has led to the judiciary acquiring an unusually high profile in Spanish public life (Woodworth, p. 442). The prominence of the judiciary is ensured by the fact that the Spanish Constitution provides for the concept of administrative legality, a legal requirement enforced through judicial control of the constitutionality of all governmental and parliamentary decisions (Heywood 1995, p. 103-20).

The Constitutional Court is the highest authority on the interpretation of the Constitution and the constitutionality of laws in Spain. In particular, the Court has competence to decide two types of fundamental constitutional questions. On the one hand, the Court examines appeals (amparos) in cases in which a constitutional right may be affected by a particular decision of an administrative or judicial body. On the other hand, it decides actions of unconstitutionality (recurso de inconstitucionalidad and cuestión de inconstitucionalidad), which examine whether a particular act, or a specific provision of that act, is compatible with the Spanish Constitution.<sup>21</sup> The Constitutional Court is concerned with violations to the bill of rights in the Spanish Constitution. It has explicitly stated that it cannot make findings concerning whether any of the provisions in the ECHR has been violated (such as STC 7/2004). Finally, unlike most decisions of 'ordinary' courts in a civil law country, the decisions of the Constitutional Court are binding for the lower Courts (STC 184/2003 and art. 5.1 of the Judicial Organization Act).

Generally speaking, the Constitutional Court follows a four-stage proportionality analysis – similar to that developed in German jurisprudence and the ECtHR – to determine whether the restriction of a fundamental constitutional right is consistent with the Spanish Constitution. In some instances, the Court explicitly refers to the German doctrine of the “core of a right” (STC 7/2004). It is worth noting that the motivation or express justification of a particular judicial decision restricting a fundamental right and the control of the way in which these decisions are carried out are also considered part of this proportionality analysis (STC 261/2005).

In the context of constitutional challenges, the Court has provided a significant degree of leeway to the legislature and has established an extremely high threshold that must be met before holding a specific legal provision inconsistent with the Constitution on grounds of being disproportionate.<sup>22</sup> For a legal provision to be disproportionate, the Court has reasoned that a “patent and unreasonable or excessive imbalance must exist.” (STC 16/1997). In contrast, the Court rarely defers in cases involving the decisions of administrative authorities (STC 11/2006).

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<sup>21</sup> The Court is competent in other issues that are not relevant for our project, such as conflicts with the autonomy of the local communities or the control of constitutionality of international treaties to which Spain may be a party (see <http://www.tribunalconstitucional.es/tribunal/competencias.html>).

<sup>22</sup> *Stricto sensu* refers to the last stage of the proportionality analysis.

### ***Recent issues in rights and security***

Since the beginning of the transition to democracy, Spain has had to deal mainly with the challenges posed by the Euskadi Ta Askatasuna or ETA (Basque Fatherland and Freedom) group, which adopted a policy of armed struggle in 1968. In 2004, Spain suffered what has been the most terrible terrorist attack in its contemporary history with the bombings in the Atocha railway station in Madrid by Islamic terrorists. Additional threats to security include organized crime and illegal immigration, and as a consequence immigration policy and border control have become highly sensitive political issues (see Ferris 2002, p.28-29).

### **2.6 Summary of the jurisdictions**

Four key points emerge out of this survey of the jurisdictions: first, that every jurisdiction studied deals with conflicts between human rights and security. Second, that all jurisdictions apply some concept of proportionality, even if the concept varies across jurisdictions. Third, all jurisdictions have some concept of deference, margin of appreciation or evaluative leeway, although there are significant differences between these jurisdictions as to how these are applied, articulated and understood. Finally there is the structural difference between jurisdictions in terms of human rights protections. Some jurisdictions, such as Germany and Spain, have domestic charters of rights in addition to applying the ECHR. Others, such as France and the UK, rely instead on the ECHR itself as their primary rights instruments. This difference proves to be the single most important distinction between jurisdictions; it has implications for how cases are decided at not only the domestic level, but also how states fare in cases before the ECtHR itself.

## Part 3 Case discussion

### 3.1 Overview of the data

In total, 192 cases were analysed for this report, 125 of which were decided since the year 2000. Out of all 192 cases, 89 were from France, with the balance distributed evenly among the four remaining jurisdictions. The human rights most frequently claimed in these cases were the right to family life and fair trial rights. By far the most common claim to security was the prevention of crime or disorder, followed by the need to protect against terrorism.

**Table 1: Frequency of Rights and Security Claims**

<b>Rights</b>	<b>Security Arg</b>	<b>Cases</b>
<b>Freedom from torture, inhuman and degrading treatment</b>		<b>22</b>
	Terrorism	3
	Crime	1
	Immigration	1
	None	17
<b>Liberty</b>		<b>20</b>
	Crime	4
	Terrorism	3
	Immigration	1
	Disease	1
	National Security	1
	None	10
<b>Fair trial and associated rights</b>		<b>40</b>
	Prosecution	7
	Crime	5
	Terrorism	5
	Military	2
	Prisons	1
	None	20
<b>Privacy</b>		<b>26</b>
	Prosecution	5
	Terrorism	3
	Prisons	2
	Immigration	2
	National Security	2
	Crime	1
	None	11
<b>Family life</b>		<b>79</b>
	Crime	61
	Terrorism	5
	Immigration	1
	None	12
<b>Expression</b>		<b>19</b>
	National Security	6
	Terrorism	5
	Democracy	1
	Crime	1
	Prosecution	1
	None	5
<b>Association</b>		<b>13</b>
	National Security	6
	Terrorism	3
	Crime	3
	Democracy	1

Table 1 shows the number of cases in which various rights and security arguments were cited. Often, more than one right or security argument was raised in each case.

It demonstrates that rights and security claims are not randomly distributed: certain security arguments tend to be made in the context of certain human rights. Most notably, out of the 79 cases that raised the right to family life, 61 of those cases involved a government argument that a restriction on the right was necessary to prevent crime.

Focusing only on cases decided since the year 2000, proportionality criteria were applied by courts in 70 percent of the cases. Significantly, governments won 46 percent of the cases in which rights and security came into conflict.<sup>23</sup> Table 2 provides an overview of the data. It gives the number of cases for each jurisdiction as well as the percentage of those cases in which the principle of proportionality was applied by the court. It then shows the percentage of cases won by governments, and the percentage of cases in which proportionality was used that were won by governments. Absolute numbers of cases are shown in brackets.

**Table 2: Outcome of Rights and Security Cases from 2000 to the Present**

	Number of Cases	Proportionality Applied	Government Wins	Government Wins when Proportionality Applied
ECtHR	23	61% (14)	22% (5)	29% (4)
United Kingdom	21	57% (12)	43% (9)	50% (6)
Germany	24	67% (16)	42% (10)	38% (6)
France	41	76% (31)	68% (28)	58% (18)
Spain	16	94% (15)	38% (6)	33% (5)
All Jurisdictions	125	70% (88)	46% (58)	44% (39)

There is significant variation between jurisdictions. For example, proportionality is applied 61 percent of the time by the ECtHR, but 94 percent of the time by Spanish courts of final appeal. Governments have only a 22 percent chance of winning their case before the ECtHR, but the French government wins 68 percent of domestic cases. Proportionality is applied less often in the UK than in any other jurisdiction. Significantly, the British Government wins 43 percent of rights versus security cases before the House of Lords – about the same rate as Germany and higher than Spain’s. Only the French government fares better before domestic courts. Finally, proportionality in Britain is more forgiving to the Government than in other countries except France. The Government wins 50 percent of proportionality cases before the House of Lords, compared to a 38 percent rate in Germany.

<sup>23</sup> That is, the court either found no rights violation or, if there was a violation, that violation was justified.

Although these comparisons are instructive, they must be treated with considerable caution. The relatively small sample size means that statistical comparisons are unreliable. In addition, differences in how domestic appellate processes work could account for variation in win/loss records. For example, one might expect that if a court is especially willing to entertain large numbers of challenges to legislation, a high percentage of those claims will fail, thus resulting in a very high win/loss record for the government. If, on the other hand, a court only heard the most difficult cases, a higher percentage – though not necessarily a higher absolute number – of challenges to legislation would succeed. Note that although the French Government wins 68% of post-2000 cases as compared to the German Government's 42%, the French and German governments lost about the same absolute number of cases: 13 and 14 cases, respectively. Percentage comparisons, then, may mislead. That said, absolute comparisons are also fraught with difficulties: it is not useful to know that Spanish courts used proportionality in 15 cases since 2000 (as compared with, for example, 16 cases in Germany) unless one also knows that those 15 Spanish cases amount to 94% of all post-2000 Spanish cases in the study, compared with 67% of German cases. Empirical comparisons in these circumstances are most useful as guides for further enquiry rather than as conclusions. It is to this more detailed examination that we now turn.

### **3.2 The right to be free from torture and inhuman or degrading treatment**

Article 3 of the ECHR states: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Article 3 does not allow for limitations to the right. In the leading case of *Chahal v United Kingdom*, the ECtHR explicitly confirmed that the right to be free from torture is absolute, and that proportionality analysis in cases involving torture is inappropriate because no restriction on the right, regardless of the reason, can ever be legal (1997 23 EHRR 413, para 81). Provisions in national constitutions are similarly absolute: Section 15 of the Spanish Constitution states that 'under no circumstances' may such treatment be inflicted. Although the German Basic Law does not forbid this treatment explicitly, courts have consistently held that the article 1(1) statement 'human dignity shall be inviolable' forbids torture and ill treatment.

Despite the statements contained in *Chahal*, the ECtHR has considered questions of proportionality in the context of Article 3 where it has been necessary to determine whether the treatment in question constitutes cruel, inhuman, or degrading treatment in the first place (*Labita v Italy* 2000; *Soering v UK* 1989). Once that threshold is passed, there is no proportionality enquiry: the right is absolute. For example, in *Soering v United Kingdom* a

challenge was made to the UK government's decision to deport a suspected murderer to Virginia, in the United States, for trial. If convicted, Soering could have faced the death penalty. In determining whether the death penalty in Virginia violated Article 3, the Court mentioned that the disproportionality of the penalty to the crime could constitute a factor. It also examined the details of the death penalty system in the United States, noting that the long period of time between conviction and death could lead to the 'death row phenomenon,' which could constitute cruel treatment even though capital punishment does not itself violate the terms of Article 3 (para. 104-09).

'The manner in which it is imposed or executed, the personal circumstances of the condemned person and a dis-proportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (para. 104)'.

To date, courts in the UK have broadly followed the approach taken by the ECtHR in cases involving torture and the application of Article 3. In the period covered by this report, four cases which raised the right to be free from torture and cruel, inhuman or degrading treatment were considered by the House of Lords (*A (no 2) v Home Secretary* 2005; *N v Home Secretary* 2005; *R (Limbuela) v Home Secretary* 2006; *R v Lichniak* 2002). In each instance the court followed the Strasbourg jurisprudence by deciding Article 3 cases without recourse to either proportionality or balancing.<sup>24</sup> In the cases of *N* and *Limbuela*, for example, the House was faced with the questions whether the Government could (1) deport someone to a country where he would be unlikely to receive lifesaving AIDS treatment and (2) deny support services to asylum seekers who did not claim asylum according to the proper procedures. In both cases the Lords insisted that Article 3 creates an absolute protection entirely bereft of any considerations of proportionality (*N*, 307-08; *Limbuela*, 402-14).

Clearly, strict adherence to Article 3 has the potential to create conflicts between a commitment to rights and the demands of security. In the UK context, such tensions arose in the case of *A (No 2) v Home Secretary*, a case involving the admissibility of evidence obtained by torture abroad. Significantly, in this instance the Lords applied both the common

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<sup>24</sup> The final Article 3 case, *Lichniak*, does not involve a detailed examination of the Article 3 claim. Rather, the Lords consider Articles 3 and 5 together when judging the compatibility of the prison sentences in question. *Lichniak* is essentially an Article 5 case.

law and Article 3 and found the same result would be reached in either case: namely, that evidence obtained through torture is inadmissible regardless of its utility.

While both the ECtHR and the UK courts look to Article 3 of the European Convention in cases relating to torture, in Germany the protections of human dignity under Article 1(1) of the German Basic Law provides the basis for the prohibition on inhuman treatment or torture. Nevertheless, where torture is in question, applicants often use Article 3 of the ECHR alongside Article 1(1) of the Basic Law. The FCC takes the strongest possible position against torture or inhuman and degrading treatment. There is no question of applying the proportionality test in this context, as the right is absolute. In a recent case, the FCC stopped an extradition of a prisoner to a Californian prison where he would have been imprisoned for life without any hope of parole (2 BvR 2259/04). The court took the view that the State could not extradite a person where it was clear that such an extradition violated basic principles of the German Constitution. As a consequence of the right to human dignity and the right to personal development (Article 2(1) Basic Law), the sentence in question was viewed as both grossly disproportionate and 'cruel, inhuman or humiliating', and extradition in this context was said to constitute a violation of the 'indispensable foundations of the German constitutional order' (margin 23).

The court nevertheless must be convinced that there is a real risk of a violation to human dignity where a person is to be deported or extradited. This was not found to be the case in a decision regarding an alleged Spanish terrorist (2 BvR 1521/03), or a Yemenite accused of links with Al Qaida who had been tricked into Germany by the US authorities who then applied for his extradition to the United States (2 BvR 1243/03, 1506/03). Moreover, while the FCC strongly condemns torture, it did not view this as a basis for setting aside unrelated and overwhelming criminal evidence that the applicant had kidnapped and murdered an eleven year old boy. Important in this case was the fact that the lower court had already excluded the evidence obtained under the threat of torture (2 BvR 1249/04).

The Spanish courts take a similarly stringent position on torture and inhuman and degrading treatment. In the period covered by this report the right against torture has arisen in two separate contexts in Spain. In STC 32/2003, the Constitutional Court considered the case of Nejat Das, a Turkish national who claimed that if extradited to Turkey he would be tortured. In its decision in favour of Mr. Das, the Constitutional Court first recalled the duties and responsibilities that Spain had under the ECHR and the Convention against Torture, and made it clear that it was obliged to ensure that an individual who faces extradition to a third

state would not be tortured upon his arrival (para. II.3).<sup>25</sup> In addition, it also recalled that the right to life and to be free from torture and other inhuman and degrading treatment were probably the most fundamental rights of every human being, and that in such contexts proportionality analyses were simply not appropriate. The right against torture was also invoked in a criminal trial against alleged members of ETA in STC 7/2004. Here the appellants alleged that they were tortured while in custody and immediately prior to being questioned by police. Accepting this allegation, the Court subsequently rejected the evidence given in police custody, reasoning that torture rendered it both useless and inadmissible. In any event, the Court concluded, because the conviction can rest on evidence other than their replies, and although their rights had been violated, the sentence was upheld.<sup>26</sup> Again, the proportionality principle was not applied.

Based on our analysis of the above jurisdictions, it is clear that the ECtHR, Spain, and the British and German courts take a similar approach to the treatment of Article 3 (or similar) claims, and are on the whole hostile to exposing such claims to any sort of proportionality analysis. A similar approach has been taken in France, although interestingly claims based on appeals to Article 3 have met with far less sympathy or success in the French courts. Although the reasoning of the French courts in cases concerning Article 3 is perhaps less readily accessible than in the European, British or German contexts – in part due to the fact that published decisions in France are typically very brief – of the eleven cases in France in which issues surrounding torture were raised during the period covered by this report, the courts rejected all claims based on Article 3.<sup>27</sup> Whereas four of the cases in question arose out of litigation concerning the legality of deportation orders, five were concerned with the legality of *reconduites à la frontière*<sup>28</sup> and the final two related to the validity of extradition decrees. Significantly, the government only raised issues of security, namely that the individual had committed crimes in France, in two of these eleven cases, primarily because *reconduite à la frontière* and extradition proceedings do not require the Government to argue security in order to be successful. Feelings of insecurity and oppression in the country of destination, being a member of a ‘victims of terrorism’ organisation in the country of

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<sup>25</sup> The Court made reference to various decisions by the ECtHR and some of its own prior judgements on this matter. Among the most important ones, see *Jabari v Turkey*, *GHH v Turkey*, *Mahmut Kaya v Turkey*, *Soering and Chahal v UK*; also see STC 120/1990, 13/1994, 141/1998, 147/1999 and 91/2000.

<sup>26</sup> The Court made the following clarifying remark: although the appellants invoked on top of the constitutional provisions, some provisions of the ECHR and the ICCPR, it is not for this Court to examine whether any of these international provisions have per se been violated. Rather its only task is to examine whether any Constitutional right has been violated.

<sup>27</sup> 10 from the Conseil d'Etat and 1 from the Cour de cassation.

<sup>28</sup> There are two kinds of deportations: *expulsion* and *reconduite à la frontière*. The former is taken against aliens whose presence in France has become illegal, whereas the latter is taken against aliens who have entered France illegally.

destination, or the fact that other members of the family are at risk in the country of destination were not enough to bring the claim within Article 3. All the cases failed because the individual failed to produce evidence that he or she would run a personal, future and realistic risk in the country of destination. Yet while the outcome in each of these cases could be said to have favoured the government, none involved the courts in any form of proportionality analysis, since the right to be free of torture was regarded by the courts as having been conferred without limitations.

Looking back over the five jurisdictions, it is clear that all of them take an almost identical position in relation to the use of the proportionality principle in cases of torture. Put simply, the courts in each case have been clear that questions of security cannot be a basis for limiting the rights provided under Article 3 or other prohibitions on torture, and that the right to be free from torture is not subject to balancing exercises. Nevertheless, in both the German and the ECHR jurisprudence, proportionality of the penalty to the crime does enter into the equation when interpreting whether treatment constitutes torture. It is interesting to note however that in France, despite the fact that the French courts have not subjected Article 3 to any form of proportionality analysis, claims based on this article are rarely if ever successful. In part, this is a result of the fact that the courts are generally unwilling to question the evidence on which initial administrative decisions to deport or extradite individuals are made, and as such are rarely in a position to seriously evaluate claims that such an action may lead to a violation of Article 3. As the subsequent sections of this report will show, the approach of the French courts in this regard has led them to be less likely to overturn administrative or executive decisions in situations in which considerations of security and human rights are in conflict.

### **3.3 The right to liberty and security**

Article 5 of the ECHR protects the right to liberty and security of person. This right forbids governments from depriving an individual of her liberty – typically, by imprisonment – except in specific, listed circumstances such as after conviction of a crime or in order to prevent the spread of disease (Article 5(1)(a,e)).<sup>29</sup> The German Basic Law includes similar rights in articles 2(2) and 104, as does section 17 of the Spanish Constitution.

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<sup>29</sup> As a consequence, if a detention does not fit one of the 5(1) categories, that detention is per se unlawful. See *Labita v Italy* App. No. 26772/95.

According to the jurisprudence developed by the ECtHR, when considering whether a particular detention falls within the ambit of the exceptions created by Article 5(1), it is appropriate for the Court to balance individual and state interests. Although the Court does not make consistent use of the language of proportionality in cases involving Article 5, it is clear from the cases that the balancing tests used in these cases closely resemble those typically associated with the concept of proportionality. In *Enhorn*, for example, the Court tested the detention of an AIDS-sufferer by asking whether the detention was a 'last resort' and struck a 'fair balance' (*Enhorn v Sweden* (2005) 41 E.H.R.R. 30). While the Court makes only passing mention of the need for detention to be proportionate, a close reading of the decision reveals that the 'last resort' and 'fair balance' language used by the Court clearly corresponds to the necessity and balance stages of proportionality review (para. 41).

In contrast to the position taken by the ECtHR, the House of Lords has used balancing, rather than proportionality, to test restrictions on liberty. In *Saadi v UK*, petitioners challenged their detention at an immigration processing facility pending the determination of their asylum claims ([2006] App. no. 13229/03). They argued that detention violated their Article 5 right to liberty because the detention did not fit Article 5(1)(f)'s provision for detention in order to prevent unauthorized entry into the country. The House treated this as a question of proportionality, although in this case the Lords applied a unique form of proportionality review. According to Lord Slynn, proportionality here does not require that the measure in question be necessary. Instead, proportionality requires balance between rights and legitimate governmental aims. This is a marked difference from other formulations of proportionality, and may stem from the fact that Article 5 does not include a limitations clause in its text. Without the need to prove necessity, the Government won the case by arguing that detention for a short time in good conditions was, on balance, an acceptable means of preventing unauthorized entry into the UK.

The British House of Lords has also applied the proportionality test to the question of whether derogations from Article 5 under the Convention are valid. This arose in *A and Others*, which involved a challenge to the detention of foreign nationals under the Anti-Terrorism, Crime and Security Act 2001 ([2005] 2 AC 68). According to the Act, where an individual could not be deported to their home countries because of the possibility of torture, they could instead be detained by the state.<sup>30</sup> Because such detention arguably violated Article 5 of the Convention, the Act authorized derogation from Article 5 under the provisions

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<sup>30</sup> The Act was thus a response to the European Court of Human Rights case *Chahal v the United Kingdom*.

of Article 15, the portion of the Convention that provides for derogations in times of war or other public emergency.<sup>31</sup> The House of Lords imposed a proportionality test on derogations to the Convention, with Lord Bingham arguing that proportionality here involves the traditional test used by the ECtHR.<sup>32</sup> Applying this test the Lords concluded that the detention without trial was not rationally connected to the goal of preventing terrorism, particularly given that British nationals suspected of terrorist connections are not subject to similar restrictions on their rights (para. 34-40). Crucial to this decision were the tests of rationality and arbitrariness: if restrictions on Convention rights are irrational or arbitrary, they are to be regarded as disproportionate per se. Critics have questioned Bingham's application of proportionality to derogations under Article 15 ECHR however (Ashworth in *Goold/Lazarus*: page 215, footnote 51) arguing that the Article 15 requirement that derogations are "strictly required by the exigencies of the situation" is a far higher threshold than simple proportionality.

In Germany the approach taken to the right to liberty has been considerably stricter. Unlike in the United Kingdom, there has been no attempt to derogate from these rights in Germany since the events of 9/11. In a recent case, a man suspected of terrorist activities linked to the events of 9/11 and sentenced to 7 years imprisonment was ordered to be released by the Court (2 BvR 2056/05). In contrast to the balancing approach taken by the House of Lords, on appeal against his detention the FCC found the lower court had violated the proper procedures in question because it had not sufficiently justified its decision to allow further detention in light of the offender's right to personal liberty. Importantly, the court also held the lower court's decision unconstitutional as a milder means of dealing with the offender, in order to satisfy the principle of proportionality, had not been examined (2 BvR 2056/05 margin no. 33 and 48). This can be contrasted with the balancing approach taken in *Saadi* which avoided the 'necessity' part of the test in its reasoning.

Spanish courts consistently apply the proportionality test to cases involving the right to liberty. In the period under review, at least three relevant actions of unconstitutionality were brought before the Spanish Constitutional Court in which the right to liberty was in conflict

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<sup>31</sup> Article 15 states: '(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.'

<sup>32</sup> *A and Others*, Lord Bingham, para 30. Lord Bingham states the test as: 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

with security demands. The first case dealt with the detention of entry applicants at the border, the second with the imprisonment of conscientious objectors who refuse to take on alternatives to military service, the third with the imprisonment of drivers who refuse to take alcohol tests. All cases were rigorously examined under the proportionality doctrine. Nevertheless, the courts are inclined to show more deference to the legislature in such unconstitutionality actions: "...[T]he final relationship between the magnitude of the benefits obtained by the criminal provision and the severity of the penalty is the result of a complex and technical analysis of criminal policy that only the legislature can carry out" (STC 161/1997). Thus, a provision could be considered to be disproportionate only "when a manifest and excessive or unreasonable imbalance obtains between the penalty and the purpose pursued by the law in the light of the most fundamental constitutional principles and the actual text of the rule" (paragraph II.12,) (see also STC 48/2003 and 136/1999 *infra*).

The Spanish courts show less deference however in cases which do not raise questions of the constitutionality of legislation. One of these cases is particularly relevant to this report. In STC 14/2000, Mr. Moreno Quero was in pre-trial detention for drug trafficking and requested parole. This petition was rejected on the grounds of the social alarm created by the offence he allegedly had committed. The Court quashed this decision using the proportionality test. It first argued that the aim explicitly relied upon by the Investigation Justice (pacifying the social alarm created by an offence) was only legitimate as an aim of the actual penalty imposed, and it could not warrant pre-trial detention. In this case the liberty on bail had been decided exclusively on the argument that "because the investigation was in a very advanced stage, the defendant would not be able to endanger it." Now, the Court argued, if the only justification for pre-trial detention is to ensure the normal progress of the investigation, then there is no risk to this aim. In stark contrast to the position that has been taken in a similar case in the UK (*Saadi*), detention was not necessary, therefore it was unjustified. Unlike with the actions of unconstitutionality, in individual appeals the Constitutional Court found in favour of the claimants.

Turning to the situation in France, the picture is considerably less clear than in any of the above jurisdictions. During the period covered by this report, the Cour de cassation considered three cases dealing with Article 5 rights under the European Convention (Cass crim 01-03-2006 Christian X; Cass crim 07-06-2006 Mohamed X; Cass crim 26-02-2003 Thierry X). In all three cases – one of which involved breaches of anti-drug legislation, and the other two charges of murder – proceedings were brought by individuals who had been placed under provisional custody. Significantly, in each instance the state argued that the

restriction on the right to liberty was justified on grounds of security, and in each case the applicant was found to be outside the scope of the right. Although all three judgments are only briefly reported, it is clear that because the court concluded that the right to liberty could not be invoked – and was not inclined to reconsider the facts of the case or the basis of the government’s initial claims – balancing and proportionality were not an issue.

From this review, it is clear that all jurisdictions apply the doctrine of proportionality to the question of whether states fall within the exceptions to the right to liberty. Nevertheless, there is variation across jurisdictions as to the intensity of proportionality review in such circumstances. Whereas the ECtHR and the UK House of Lords have shown a willingness to entertain a broad brush balancing approach to the proportionality of the liberty deprivation in question, the Spanish and German courts are more rigorous in their application of the proportionality doctrine. The German courts have applied a strict standard of necessity – criticizing the lower court where there has been no examination of whether a milder means was available to achieve the end in question. Similarly, although the Spanish courts are inclined to show more deference to the legislature where the constitutionality of penalties or immigration measures is in question, they have shown similar vigilance to the German courts in individual applications regarding restrictions of liberty.

### **3.4 Fair trial rights**

Not all human rights are substantive; procedural rights are also important constraints on government action. Listed most clearly in Article 6 of the ECHR, these rights include: the right to counsel for criminal defendants (6(3)(c)), fair and public hearings (6(1)), and the presumption of innocence (6(2)). Although Article 6 includes a long list of rights, the overarching goal is to secure fair trials. The German Basic Law protects fair trial rights in a number of provisions. For example, Article 103(1) establishes the right to a court hearing in accordance with the law, and Article 19(4) enshrines the principle of “effective legal protection.” In Spain, section 17(3) of the Constitution protects the rights to counsel and silence.

The ECtHR has an extremely complicated jurisprudence regarding Article 6 rights. In part, this reflects the fact that Article 6 protects a wide range of rights, from the broad right to a fair trial to the narrow right to use an interpreter in court (articles 6(1) and 6(3)(e)). Sometimes, the Court does not use proportionality at all. In many instances, the Court has held that the right to a fair trial protected by 6(1) is absolute: if a trial is not fair, there is a violation regardless of the reason for the limitation on the right (*Teixeira de Castro v Portugal*, 28

EHRR 101; *Heaney and McGuinness v Ireland*, (2001) 33 E.H.R.R. 12 para. 58). However, the Court has also just as frequently held that the specific procedural rights listed in Article 6 may be limited so long as the trial itself remains fair overall. In that analysis, proportionality may come into play. In *Devenney v United Kingdom*, for example, the Court considered whether an individual dismissed from his job should have the right of access to a tribunal ((2002) 35 E.H.R.R. 24). That right is normally protected by Article 6(1), but British law precluded access where, as in *Devenney*, the North Ireland Secretary certified that the dismissal was for public safety reasons. Here the ECtHR reasoned that the right of access to a court is not absolute; it could be limited if the limitation were proportionate (para. 23, 26). Citing a lack of oversight of the Secretary's certification, the Court in this case found the system to be disproportionate. In *Devenney*, the Court also explained that the 'very essence of the right' cannot be impaired. This echoes the German concept of the essential core of a right, but the Court did not go further and explore the idea (para. 23).

Finally, sometimes the Court does not talk about proportionality at all in the context of Article 6. Rather, it simply refers to the need to balance competing interests. This is especially common in the context of 6(3) procedural rights and when the rights of criminal defendants might come into conflict with rights of witnesses. For example, in *Van Mechelen and Others* the Dutch government argued that police witnesses in a criminal trial should be allowed to testify anonymously ((1998) 25 E.H.R.R. 647). Considering the case, the Court reasoned that the rights of the defence should be balanced with the interests of the officers in anonymity, and ultimately found anonymous testimony to be unjustified on the facts of that case (para. 56). In *Rowe and Davis v UK*, the ECtHR stated that '[i]n any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused' ((2000) 30 E.H.R.R. 1).

To some extent, the position taken by the ECtHR regarding Article 6 is mirrored in the decisions of the House of Lords, if only insofar as the House has taken a variable approach to the question of proportionality and the appropriateness of balancing. In the case of *Anderson v Home Secretary*, the House of Lords observed that Article 6 does not contain a limitations clause, and as such the right to a fair trial must be regarded as absolute ([2003] 1 AC 837). As a result, the Lords concluded that the Home Secretary's powers to set sentences were inherently incompatible with the right to a fair trial under Article 6, insofar as that right gives rise to a number of procedural protections such as the presumption of innocence and the requirement for tribunals to be impartial. Furthermore, in the subsequent

case of *R v A (no 2)*, the Lords have stated that the 6(1) right to a fair trial is also inviolable ([2002] 1 AC 45, 65).

However, although the right to a fair trial is absolute, proportionality and balancing enquiries may come into play when determining what constitutes a fair trial in the first place (*R v A (no 2)*, Lord Steyn, at 65). Indeed, the courts have suggested that even a right as fundamental as that against self-incrimination can be restricted under some circumstances. In *Brown v Stott*, the Privy Council held that legislation requiring individuals to state who had been driving an automobile that was involved in an accident was compatible with the Convention despite the fact that it was a form of self-incrimination ([2003] 1 AC 681). Although the Convention protects the rights of criminal defendants,

“the [ECHR] has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the Convention” (Lord Bingham at 704).

The most common Government justification for restricting Article 6 rights is that some restrictions are necessary in order to punish certain types of crimes. This argument is sometimes successful, as with self-incrimination in *Brown v Stott* and reverse burdens of proof in *Sheldrake v DPP* [2005] 1 A.C. 264. However, the Lords have typically tested these restrictions using the concepts of proportionality and balance, and have shown themselves willing to reinterpret or declare legislation incompatible if necessary. *Sheldrake* involved two cases in which the relevant legislation imposed a burden of proof on the defendant: the first was drink-driving, the second was the crime of belonging to a terrorist organization. In this instance, the Lords imposed what they called a proportionality test. However, this test was broad and multifactor and lacked the rigorous multi-stage process seen in other Convention jurisprudence. In short, the Lords actually used balancing, not proportionality. In the end, the House “read down” provisions of the anti-terrorism statute in *Sheldrake*. Despite the very real threat of terrorism, they concluded that while “security considerations must always carry weight, they do not absolve member states from their duty to ensure that basic standards of fairness are observed” (Lord Bingham at 313). The Lords reasoned that even the need to prosecute members of terrorist organizations was not sufficient to outweigh the presumption of innocence.<sup>33</sup>

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<sup>33</sup> See also *R v Looseley*, [2001] 1 WLR 2060, holding that entrapment was an unacceptable abuse of process under the common law, not to mention the Convention.

A similar blurring of balancing and proportionality is to be found in Spain. In STC 127/2000, immediately following the arrest of an individual for crimes related to the terrorist group ETA, the investigating judge ordered that he be held incommunicado under the applicable statutes. Two days later the suspect was taken before the judge and interrogated. On hearing the eventual appeal against the detention, the Spanish Constitutional Court acknowledged that being held incommunicado constitutes a limitation to the right to legal counsel provided for in Article 17(3) of the Spanish Constitution, which guarantees the right to designate an attorney one trusts and the right to have a private interview prior to any interrogation. In this case the Court concentrated on the proportionality *stricto sensu* test, and applied what was in essence a balancing test. The Court held that the restriction of individual rights was justified in this case by the protection of social peace and public security.

This blurring between tests of proportionality and exercises in balancing in the European, Spanish and UK contexts is not, however, to be found in Germany. The German Constitution contains a number of provisions that approximate Article 6 of the Convention. Article 103(1) establishes the right to a court hearing in accordance with the law (*recht auf Rechtliches gehör*). Article 19(4) of the Basic Law enshrines the principle of 'effective legal protection' (*Effektives Rechtsschutz*) where any right (legal or constitutional) has been violated by a public authority. This relates in particular to matters of public law and criminal procedure. Moreover, the Federal Constitutional Court has developed principles approximating the right to a fair trial from Article 20 of the Basic Law which entrenches the *Rechtsstaatsprinzip*. In particular the FCC has argued that the 'presumption of innocence' (*Vermutung der Schuldlosigkeit*) is a fundamental constitutional principle which incorporates a variety of procedural protections (BVerfGE 19 342, 347). The FCC refers also to the European Convention (Article 6 ECHR) as a part of German positive law.

The leading FCC case in relation to fair trial procedures concerns an Imam of Turkish nationality who was threatened with immediate deportation after a translation of a speech was broadcast on television (2 BvR 485/05). The authorities took the speech to be an incitement to terrorism and an insult to Germany. The applicant, who argued that the speech had been misinterpreted in the broadcast, applied for interim legal protection against the deportation order which the Berlin administrative court declined on the grounds that the security of the Federal Republic of Germany was in danger. The applicant claimed *inter alia* a violation of his right to effective legal protection (Article 19(4) Basic Law) and the right to a hearing in court (Article 103(1) Basic Law). The FCC found that the applicant's right to

effective legal protection had been violated by the lower court, because the court did not have sufficient evidence to justify its assertion that the claimant was a threat to security. For a grave measure such as the immediate deportation of the applicant to be allowed, there needed to be more than mere assertion or suspicion (bloße Vermutungen) of a security risk. Concrete factors justifying the danger in question are required.

A second exemplary case involved German legislation implementing the 'European Arrest Warrant' (2 BvR 2236/04). The warrant can be used against German citizens and as a consequence was a direct invasion of Article 16(2) of the Basic Law which stipulates that no German citizen may be extradited to another country. The case struck down the legislation on two grounds. Firstly the legislation governing the 'European arrest warrant' was struck down because it was disproportionate and infringed upon the 'core' of the right against extradition. Secondly, the approval procedure for the warrants involved a discretionary balancing decision which was insufficiently defined in order to allow for proper judicial supervision and therefore constituted a violation of the right to effective legal protection under Article 19(4) of the Basic Law (margin 111-115).

What is clear from these cases is that although the FCC considers the proportionality analysis to be relevant to aspects of the general right to a fair trial, its application of that analysis has been strict. Unlike the ECtHR and the UK courts, the FCC frequently returns to the important idea of the 'core of the right' when determining whether Articles 19, 20, or 103 (1) of the Basic Law have been violated. The FCC is particularly critical where the grounds for the limitation of fair trial rights are based on generalised assertions relating to security threats, or where trial procedures themselves involve an unacceptably broad discretionary balancing exercise.

In stark contrast, and to some extent mirroring their approach taken in relation to Article 5 rights, the French courts almost never consider questions of proportionality in cases in which the right to a fair trial under Article 6 has been invoked. This is not, however, because of some principled hostility to the idea of proportionality, but rather a function of the fact that it is extremely rare for French courts to look behind the reasoning of any state decision which might impinge upon the right. In the period considered by this report, only three French cases referred to Article 6 of the Convention, two from the Cour de cassation and one from the Conseil d'Etat. Only the last of these made any explicit mention of the right to a fair trial, and in this case the Cour de cassation reasoned – somewhat opaquely – that the individual's fair trial rights had prima facie not been restricted. As a consequence, it followed that no

proportionality enquiry was necessary. As with many of the other rights considered in this report, it is clear that the reticence of the higher French courts to look behind the decisions of state officials has the effect of circumventing any potential argument about proportionality, and of leaving many government decisions untouched.

As observed in the case of Article 5, it is clear that Article 6 rights – despite the fact that such rights under the Convention are said to be absolute – are subjected to proportionality review in many jurisdictions. Having said this, based on the cases reviewed for the purposes of this report, there is some evidence to suggest that in the wake of the events of 9/11 the courts – with the exception of the German FCC – are in fact willing to subject such rights to balancing exercises, albeit while retaining the language of proportionality.

### 3.5 Privacy rights

Article 8 of the ECHR protects individuals' right to private life and correspondence. Under the ECHR, this right can be limited, but only in accordance with law and so far as is "necessary in a democratic society" (8(2)). Among other effects, the right to privacy constrains governments' abilities to conduct surveillance and release information about individuals to the public. In Germany, Article 10 of the Basic Law protects the privacy of correspondence, and Article 13 Basic Law protects the privacy of the home. German courts also recognize a right to informational self-determination (Census Case ,BVerfGE 65, 1, 43) under the right to personal development (Article 2 Basic Law). Section 18 of the Spanish Constitution protects rights to honour, personal and family privacy, secrecy of communications, and other privacy-associated rights.

Only two ECtHR cases in this study involved a conflict between the right to privacy and security. In *Klass and Others v Germany* ((1979-80) 2 E.H.R.R. 214)<sup>34</sup> the Court examined German legislation that allowed surveillance without a requirement that the observed individuals ever be informed that their communications had been monitored. In this case, the Court held that although Article 8(1) rights were limited, these limitations were justified under 8(2). The Court applied a "strict necessity" test and sought "balance" but, interestingly, never mentioned the word "proportionality" (para. 42, 59).<sup>35</sup> In *Segerstedt-Wiberg v Sweden*, the ECtHR again faced the question of whether rights to privacy could be limited in order to

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<sup>34</sup> *Labita v Italy* App. No. 26772/95 and *Khan v United Kingdom* (2001) 31 E.H.R.R. 45 also deal with privacy, but in each the Court held that article 8 was violated because the restriction on privacy was not according to law. Proportionality did not enter into the analysis.

<sup>35</sup> Note that this case is much older than most others in this study: decided in 1978, it may precede the language of proportionality in Strasbourg jurisprudence.

protect security. The Court found against Sweden, reasoning that the restrictions were not proportionate. In *Segerstedt-Wiberg*, the Court again applied a “strict necessity test” (para 88), but also required that any restrictions be proportionate.

In the United Kingdom, tests of proportionality have been used by courts considering Article 8 privacy issues but the test is not consistently applied. The highwater mark of proportionality in the UK is the case of *R (Daly) v Home Secretary* ([2001] 2 AC 532). Here, the House of Lords applied a rigorous proportionality test (p. 547). Furthermore, Lord Steyn’s explanation of the difference between proportionality and *Wednesbury* reasonableness in *Daly* has become the touchstone of all future proportionality analysis in British human rights cases.<sup>36</sup> It is perhaps ironic that subsequent privacy cases before the House of Lords have not been dealt with in such a rigorous way. In both *Marper* ([2004] 1 WLR 2196) and *Gillan* ([2006] 2 WLR 537), the Lords judged restrictions on privacy according to a proportionality standard that can best be described as perfunctory. Ignoring the analysis of *Daly*, although the Lords claimed to be analyzing proportionality, they were actually performing a balancing exercise. In both cases, the Lords found the restrictions at issue to be justified with little discussion (*Marper*, p. 2212-13; *Gillan*, p. 344).

In Germany, the FCC uses proportionality stringently to protect privacy rights, in particular the right to informational self-determination. This was evident in the ‘*Rasterfahndung*’ case decided in 2006 which dealt with the police’s search through personal data stored for non-criminal purposes (e.g. University registration details) in order to find potential terrorists after 9/11 (1 BvR 518/02). In their search the police applied the following search criteria: male, age between 18 and 40, students past and present, Islamic religion, country of birth. A Moroccan applicant of Islamic faith challenged the general search on the grounds that it violated his right to informational self-determination. The FCC conducted an extensive proportionality analysis of the policy in question. It concluded that the search policy pursued a legitimate constitutional purpose, that it was suited to that purpose and necessary in the

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<sup>36</sup> Lord Steyn compared human rights proportionality analysis with the older *Wednesbury* standard: ‘there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach... First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* is not necessarily appropriate to the protection of human rights... In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued’ (p. 547-548).

sense that no milder measure could be found to fulfil that purpose. Nevertheless, the FCC found the search for such information in the absence of a 'concrete danger' justified by identifiable indicators/concrete facts (konkrete Tatsachen) to be disproportionate in the narrow sense. The court concluded that the 'general threat which existed after the attacks of 9/11' and the general global threat of terrorism was insufficient to justify such a grave infringement of the right to informational self-determination. The FCC concluded that the policy did not strike the proper balance between the pursuit of security and the protection of the individual's right to informational self-determination.

The FCC also found that the core of privacy was violated by a number of provisions in the Criminal Procedure Code (the so-called Grosse Lauschangriff) which allowed for acoustic surveillance of houses in pursuit of the prevention of crime (1 BvR 2378/98). Here the Court laid much weight on the protection of human dignity as a constraint on the potential limitations under Article 13(3) Basic Law which allows for limitations in pursuit of public safety and order to the right to the privacy of the home. The potential for infringement of human dignity meant that acoustic surveillance had to be limited to conversations about criminal activity, but had to be broken off where the conversations ranged into personal territory. Certainly recordings of any such personal conversations would have to be destroyed. It was not appropriate, according to the FCC, to employ a proportionality analysis where measures touched on "the core of privacy" and thereby the right to human dignity. Where proportionality strictu sensu could apply to surveillance measures, the FCC reiterated the requirement that measures allowing for surveillance on the basis of suspicion of criminal activity had to be justified by reference to concrete facts.

In Spain, the most common use of proportionality principles in relation to privacy-related rights has been in the context of conflicts between the right to privacy and the public interest in combating crime - in particular, organized crime. In such cases, discussion in the Spanish Constitutional Court focuses on the issue of whether there were enough reasons to order the interception and whether the judge, who is the only authority entitled to do so, was properly motivated in her decision. However, convictions are rarely overturned on grounds of violations of the right to privacy. Because the Court reasons that all the evidence that was gathered irrespectively of the interceptions is not affected by the violation of the right to privacy, convictions are often upheld.

The right to privacy does arise however in respect to the right to one's image under Article 18.1 of the Spanish Constitution. In STC 14/2003, the Court held that a murder suspect,

Vergara, whose picture had been taken and broadly distributed to the media had had his right to his personal image violated. This right cannot be said to be unconditioned or absolute, but is limited by other rights and constitutional goods, including the collective interest in security. In order to assess whether this right should be restricted in this case the Court used a three-stage proportionality test. The Court focused its analysis on the necessity of the restriction. The Court reasoned that security and crime control did not require the distribution of Vergara's picture at all. Other means were available for pursuing criminal suspects; for that reason, their privacy rights had been violated (para. II.11).

Privacy rights in Spain have also affected communications by prisoners. In STC 169/2003, the petitioner sent a letter to a fellow prison inmate in which he addressed some of the prison personnel as lazy. This letter was intercepted and he was sanctioned. This interception was carried out in accordance with an internal decision by the Director of that prison which stated that, given that the communication between prisoners in the same premises were not covered by the Penitentiary Regulations, they would all be intercepted. The state lawyer defended the interception and the sanction in this particular case arguing that the security of a prison also covers the respect owed to its guards and other prisoners (para. I.10.a). The Court adopted a different view. First, it claimed that, under Article 53.1 of the Spanish Constitution, a general restriction upon a fundamental right could only be established in a legal provision and not by a decision of an administrative authority such as a prison director (para. II.3). Secondly, it argued that the measure of intercepting all communications between interns was disproportionate for not being explicitly justified under the particular circumstances of a case, for affecting all the interns indiscriminately, and even all future interns (paragraph II.4).

As in Germany and Spain proportionality review has also played a role – albeit a more limited one – in the French courts. During the period under consideration, one case dealing with the right to respect for private life under Article 8 of the Convention was decided by the Cour de cassation, and dealt specifically with the use of telecommunication recordings as evidence used in a prosecution for drug trafficking. Unusually for France, here the Government argued for a restriction on the right on grounds of security, and claimed that the measure was taken in order to verify whether the applicant was involved in international drug traffic and to protect public health (Cass crim 07-12-2005, William X et Autre). In this instance, the court found that the measures were acceptable under the Article 8 scheme, primarily because the surveillance “was placed under the supervision of a judge, it corresponded to a legitimate

end, it was proportionate to the gravity of crimes already committed and being in course of commission... and it was strictly limited to the necessities of verifying the truth.” Given that in the early 1980s the ECtHR had repeatedly found France to be in breach of the right to private life in similar cases, the fact that the surveillance was placed under “effective judicial control” clearly played a major role in finding against the applicants. For the purposes of this report, however, the case is significant because it represents one of the few instances in which a French court has explicitly engaged in a consideration of proportionality principles, and has evaluated the legitimacy of a government decision on that basis.

Overall, it can be said that proportionality has played a decisive role in protecting the privacy related rights of applicants in Germany, Spain and, to a lesser extent, France. The ECtHR also sometimes uses proportionality, coupled with (and, in the case of *Klass*, supplanted by) a strict necessity requirement. The proportionality doctrine has not however been as consistently and rigorously applied in the UK, with the stringency of the *Daly* requirements being watered down in subsequent case law which took a broader balancing approach.

### **3.6 The right to family life**

Article 8 of the Convention also protects the right to family life. Like the right to privacy, the Convention provides that this right can be limited in accordance with law as necessary in a democratic society. The right to family life is most often claimed by individuals facing deportation. These individuals argue that because they have family members in the deporting country, deportation would violate their Article 8 rights. Section 18 of the Spanish Constitution protects the right to family privacy, and Article 6(1) of the German Basic Law states that “marriage and the family shall enjoy special protection by the state.”

Almost one fifth of the cases considered by the ECtHR in this area involved a conflict between the Article 8 right to family life and states’ alleged need to deport individuals deemed a threat to security. This is the most common type of rights versus security case handled by the Court. These cases almost invariably involve a state attempting to deport or refuse residence to an immigrant who has been convicted of crimes. The immigrant typically has family in the country of residence and argues that deportation would limit his Article 8 right to family life. Limitations on 8(1) rights in this context present the most straightforward and consistent application of proportionality used by the ECtHR. Proportionality here is a two-step process: (i) there must be a ‘pressing social need’ and (ii) the limitations on the right must be proportionate to the legitimate aim being pursued (*Uner v the Netherlands* [2005] 3 F.C.R. 111, para. 54-57).

Proportionality in the family life / deportation context is necessarily a multifactor enquiry. The Court examines the applicants' (and their families') connections to their state of residence and the receiving state as well as the severity of the crimes committed. On balance, the ECtHR tends to find for applicants.<sup>37</sup> The following language from *Boultif v Switzerland* is typical ((2001) 33 E.H.R.R. 50):

“[T]he applicant has been subjected to a serious impediment to establishing a family life, since it is practically impossible for him to live his family life outside Switzerland. On the other hand, when the Swiss authorities decided to refuse permission for the applicant to stay in Switzerland, he presented only a comparatively limited danger to public order. The Court is therefore of the opinion that the interference was not proportionate to the aim pursued” (para. 55).

Although there have been no comparable Article 8 cases in the UK<sup>38</sup>, Germany, or Spain during the time frame considered by this report, in France some 71 cases referring to the right to family life under the European Convention have come before the Cour de cassation and the Conseil d'Etat. Of the six relevant Cour de cassation cases examined, all concern bans from French territory, which is a penalty that French criminal courts can impose on aliens who have been convicted for crimes of certain gravity. The remaining 65 Conseil d'Etat cases dealt primarily with deportations and reconduites à la frontière, as well as with refusals of residence permits and visas, residence restrictions and electronic collection of data concerning immigrants.

The French Government did not argue security in 10 cases. In those 60 cases where security was raised, the argument was based on the criminal behaviour of the individual, including crimes against life, bodily integrity and property, rape, possession and use of weapons, drug traffic, assault, falsification of documents, support of terrorism, terrorism and exploitation of prostitution. In one case the security argument took the form of a foreign diplomat who was classified as *persona non grata*.

From a consideration of these cases, it is clear that the French courts tend to interpret Article 8 in such a way that the Government will win if it can prove some kind of public interest in removing or excluding the individual from France. That is, Article 8 claims to the right to

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<sup>37</sup> Indeed, it did so in all cases but *Uner*.

<sup>38</sup> None, that is, before the House of Lords. See *R v Carmona* [2006] EWCA Crim 508 for a Court of Appeals case.

family life will fail unless the individual can prove an accumulation of the majority of the following factors: that he or she has lived in France for a long time (usually since his or her adolescence); that his or her family also resides in France; that some members of the family are French nationals; that he or she cannot speak the language of the country of destination and that they have no family ties in their country of origin. Interestingly for France, proportionality appears in the majority of cases. Even in the cases where it does not appear *expressis verbis*, the control for manifest error of appreciation conducted by the court contains proportionality considerations which do not appear on the face of the judgment. In the deportation, visa, residence permit, residence restrictions and ban from French territory contexts, the courts balance all the aforementioned factors that may link the individual with France with the goals of public interest pursued by the measure in question.

To conclude as regards the right to family life, it is difficult to make strong comparative statements without any case examples from the UK, Spain or Germany. Nevertheless, what the French and ECtHR cases demonstrate is that family life cases, perhaps more than any other human right, are determined predominantly by the application of proportionality *strictu sensu*, rather than by questions of the legitimacy and necessity of the rights limiting measures cited by states. In applying the narrow proportionality test both the ECtHR and the French courts adopt a broad multi-factor enquiry into whether the measure in question strikes a proper balance between security on the one hand, and the rights of the individual on the other.

### **3.7 Freedom of expression**

Freedom of expression is protected by Article 10 of the ECHR. This right includes the “freedom to hold opinions and to receive and impart information and ideas without interference by public authority” (10(1)). Under the ECHR, freedom of expression may be limited in accordance with law as necessary in a democratic society (10(2)). According to Article 5 of the German Basic Law, all citizens have “the right freely to express and disseminate their opinions orally, in writing or visually and to obtain information from generally accessible sources without hindrance.” In Spain, section 20 of the Constitution protects a list of rights, including expression, communication, and even academic freedom. Like the ECHR, the Spanish and German provisions on freedom of expression are subject to express limitations.

Including, as it does, the classic limitations clause under Article 10(2), freedom of expression cases under the Convention might be expected to turn on a clear and consistent

proportionality test. This is not always the case. Sometimes, the Court does engage in the proportionality test it uses for other Convention rights (*Incal v Turkey* (2000) 29 E.H.R.R. 449). Other times, the Court appears to follow the proportionality test in form but not in the substance of its reasoning. In *Erdogdu v Turkey*, for example, the Court claimed to be applying the principle of proportionality, but actually decided the case using an American style “bright-line” test: if the speech in question incited violence, it could be restricted; if it did not, no restriction was possible ((2002) 34 E.H.R.R. 50). The ECtHR found that the speech did not incite violence, so Turkey’s restrictions violated the Convention (para. 60). Clearly, this sort of line drawing cannot be meaningfully referred to as a proportionality analysis, and runs counter to the approach adopted by the Court in relation to many of the other Convention rights examined in this report.

In the United Kingdom, freedom of expression has only rarely been the subject of human rights cases before the House of Lords. Two cases included in this study involve Article 10 expression claims: *R (Gillan) v Commissioner of Police* and *R v Shayler*. In *Gillan*, the Lords held that the right to freedom of expression was not triggered because the circumstances of the case did not demonstrate any limitation of that right (p. 345). The Lords’ jurisprudence on Article 10 rights to expression thus depends on their analyses in *Shayler*. *Shayler* involved the question of whether the Official Secrets Act was compatible with the right to freedom of expression if it did not include a public interest defence being available to those prosecuted for releasing classified information in breach of the Act. *Shayler* argued that lack of such a defence violated Article 10; the Government, meanwhile, argued that secrecy was necessary in order to protect national security.

The Lords reasoned that although the Official Secrets Act did limit Article 10 rights, those limitations were justified under the limitations clause contained in 10(2). Following Lord Steyn’s analysis in *Daly*, the House adopted a 3-stage proportionality test for freedom of expression cases. Proportionality requires (1) a sufficiently important objective, (2) a rational connection to that objective, and (3) a no more than necessary limitation on the right (Lords Bingham at 272 (quoting Lord Steyn in *Daly*) and Hope at 281). The Lords reasoned that considering the internal security service procedures available for releasing classified information, the restrictions on expression were proportionate to the goal of protecting national security.

If one focused only on the doctrine of proportionality, *Shayler* would appear to be a relatively simple case. However, Lord Hope’s comment about deference suggests that the Lords

intend, in line with section 12(4) of the Human Rights Act, to afford a higher level of protection to expression than to other Convention rights. Lord Hope “would place the onus firmly on those who seek to rely on Article 10(2) [of the Convention] to show that sections 1(1) and 4(1) [of the Secrets Act] are compatible with the Convention right” (p. 277). Although Lord Hope later acknowledges a “wide margin of discretion” for the Government in matters of national security, it appears that he sees little room for deference in the expression context (p. 287).

The German FCC is broadly sympathetic to security arguments in free speech cases – particularly when terrorism is involved. Based on an analysis of the cases examined for this report, it is clear that the FCC is prepared restrict speech when it threatens state security. For example, the Kurdistan-Komitee case involved an organisation which sympathised with certain terrorist activities/groups. The Komitee was outlawed by the Federal Administrative Court. The organisation appealed to the FCC, which took the view that the Federal Administrative Court was right in judging that the activities and political support of the Kurdistan-Komitee were a threat to national security (margin 41). The determination that the Komitee was a danger to public security was a reasonable use of constitutional law and facts (margin 43). The FCC found that the right to freedom of expression had not been violated as the measure was not disproportionate (margin 18). Uncharacteristically, the FCC did not engage in a detailed analysis of proportionality in this case; it merely stated that the restrictions were proportionate (1 BvR 1539/94). Two other cases in our selection involved similar restrictions on supposedly pro-terrorist speech (1 BvR 289/00 from 15/11/2001 and 1 BvR 77/96 from 22/08/2000). In each, the FCC found that limits on speech were proportionate responses to threats to national security.

However, the government does not win all German speech cases. In 1 BvR 1072/01, the claimant was the editor and producer of a magazine called "Junge Freiheit" which had published a right wing article. The magazine had been listed as being right wing extremist in a report on the protection of the constitution. The editor complained about an infringement of the right to freedom of press. The FCC took the view that the mere criticism of constitutional values is not a danger to the free democratic basic order, but activities going beyond that to dispose of it would be such a threat (margin 70). The FCC argued that, “in order to infringe the right of freedom of press (by tainting a magazine's image by classifying it as extreme right-wing) you need sufficiently concrete points for suspicion” (the intensity must be strong enough to justify infringement) (margin 67-68). Moreover, the Court argued that you need to find expressions which go beyond mere criticism and you need to prove that articles written

by third parties reflect the view of the production team (margin 70, 76). The FCC reasoned that for a magazine to be a “market of opinions” the magazine may reflect a certain portion of the political spectrum but must give freedom within that range of ideas, and need not identify with each individual publication. As a general principle, the FCC reasoned that where there is a weighty measure at stake, the demands of proportionality are in each case influenced by the significance of the legal value that is to be protected and by its level of endangerment, but also by the infringement of the right of freedom of the affected (margin 66).

The picture on freedom of expression is equally mixed in Spain. In STC 11/2006, three issues of a magazine linked to ETA were seized by government authorities and not delivered to an ETA prisoner. He complained on grounds of a violation to his right to freedom of information provided for in the Spanish Constitution (Article 20.1) as well as relevant provisions in Spanish Prison Law. Although the Court applied the proportionality test, it reasoned that the measure was adequate, given that withholding a magazine that could create a security threat within the prison was an adequate means of preventing the threat. Furthermore, it was argued that the measure was necessary, as the only alternatives were either the claimant got the magazine, or he did not. Finally, the court concluded that the measures in question were proportionate *stricto sensu* to the aim of protecting the security and order of the prison and reforming the offender.

This decision can be contrasted, however, with STC 136/1999 – where 22 members of the national direction of Herri Batasuna were sentenced to seven years imprisonment and a fine for collaborating with ETA. The acts of collaboration had been to “recognize” the content of a videotape submitted by ETA during an election campaign and distributing that content in various ways. The Court applied the proportionality test and concluded that the restriction on the rights of freedom of expression and liberty amounted to a constitutionally legitimate aim, and was both adequate and even necessary.<sup>39</sup> However, in this instance it found that the measures were disproportionate *stricto sensu*. Given the severity and effects on the exercise of the rights of freedom of expression and information, this criminal provision was not proportionate to the gravity of the acts that were being punished. The reasons for this were: first, that the acts were not able by themselves to create any risk; second, that the

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<sup>39</sup> The necessity of this provision was defended on the following grounds: a) what was being sanctioned was an illegitimate use of the rights to freedom of expression and information and, therefore, its protection was less strict; b) the acts that were being punished were that of aiding an armed band responsible for terrorist acts. Thus, given the importance of the goods that are being protected, it could not be said that the criminal sanction was unnecessary given that other measures (such as simply prohibiting the broadcasting of these videotapes and tapes) would have had a similar effect (with less costs) (paragraph. II.28).

penalty provided in abstract was too severe<sup>40</sup>; and thirdly, that this criminal rule applied to the expression of ideas and information by members of a legitimate political association in the middle of an electoral period and directed to request votes. With reference to the jurisprudence of the ECtHR, the Court argued that special moderation was required when sanctioning activities related to the rights to freedom of expression and information. Finally, the Court claimed that the deterrent effects of these provisions could have negative consequences over the political process itself (because the prohibition was so vague). While the Court recognized that the legislature has competence to decide what measures will protect the public, it insisted that it had a duty to make sure that the criminal provision under analysis did not imply a pointless use of coercion that would make the rule arbitrary, and that this rule did not undermine basic fundamental rights or the rule of law (para. II.23).

In France, there is only one Cour de cassation case dealing with Article 10 of the ECHR (Cass crim 30-10-2006). This case dealt with a measure taken by the police to obtain a list of telephone calls from some journalists in order to identify a police officer who was leaking information concerning an on-going investigation to the press. In this case, the court took the view that the journalists in question were not obliged to reveal their sources, and that this brought the case within the scope of Article 10. The Government argued security as a limitation to the right, namely that the measure was justified by both public interest imperatives of protecting others, e.g. the presumption of innocence, and the keeping of confidential information as well as by the necessity to guard against behaviours tending to hinder the finding of the truth. In a decision which turned on a proportionality analysis of the government's actions, the court found that the measure was "necessary for the investigation of a crime and proportionate to the aim it pursues."

Overall, these cases suggest that, with the exception of some decisions of the ECtHR, courts in all of the jurisdictions apply the proportionality analysis most rigorously with respect to freedom of speech. Moreover, given the general respect for freedom of expression, courts are less inclined to develop a strong doctrine of deference or evaluative leeway in this context. Notwithstanding, courts in all jurisdictions are also broadly sympathetic to the state's need to restrict Article 10 (or related rights) where potential or actual terrorist activity is involved. As a consequence, the picture on freedom of expression is mixed, with no one jurisdiction standing out in this regard. Nevertheless, of all the cases in our selection, the two most critical of overly oppressive state intervention are Spain and Germany.

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<sup>40</sup> The Court compared it with other relevant provisions in Germany, Austria, the UK and Italy and found that the Spanish sanctions were far more severe.

### 3.8 Freedom of association

Freedoms of association and assembly are protected by Article 11 of the Convention. These freedoms, particularly when taken together with the freedom of expression, protect, among other things, the right of individuals to come together to form political parties (*United Communist Party v Turkey*, 1998). As with expression, these Convention freedoms can be limited in accordance with law as necessary in a democratic society. Articles 8 and 9 of the German Basic Law protect the right to assemble and form peaceful associations; as do sections 21 and 22 of the Spanish Constitution. Both constitutions include express limitations on the right to freedom of assembly and association. In Germany, the right to association includes an express exception under Article 9(2) Basic Law which states: “Associations, the objects or activities of which conflict with the criminal laws or which are directed against the constitutional order or the concept of international understanding, are prohibited.”

The right to freedom of association contained in Article 11 of the European Convention is limited under Article 11(2) which contains the classic Convention limitations clause, once again inviting the Court to use a proportionality test. However, the ECtHR has instead developed a unique version of proportionality in this context. When political association is involved, the Court requires “convincing and compelling reasons” for any limitation on the right, a much stronger standard of review than is typical for proportionality (*Gorzelik and Others v Poland* (2005) 40 E.H.R.R. 4). Furthermore, the 11(2) limitations clause is to be construed strictly. Add in only a “limited” margin of appreciation and the Court leaves little room for states to restrict association.

The ECtHR explored Article 11 most fully in a trio of Turkish cases (*United Communist Party of Turkey v Turkey* (1998), *Socialist Party of Turkey v Turkey* (1999), *Refah Partisi (Welfare Party) v Turkey* (2003)). In the span of a few years, the Turkish Supreme Court dissolved Communist, Socialist, and Islamist parties; each party argued that their dissolution violated Article 11. The ECtHR held that the dissolution of the Communist and Socialist parties violated Article 11. However, *Refah Partisi* – an Islamist party and the most popular party in Turkey – could be dissolved. The key, for the Court, was the Convention language of “necessary in a democratic society.” The Court focused on the concept of democracy and argued that if a party was a threat to democracy, it could be restricted in order to protect the democratic system itself. The Court explained, “the Court points out that it has previously held that some compromise between the requirements of defending democratic society and individual rights is inherent in the Convention system” (*Refah*, para. 94).

Article 11 rights and freedom of association do not play a significant role in the British cases included in this study. Out of the cases identified, only one, *R (Laporte) v Chief Constable*, squarely addresses the issue of freedom of association ([2006] UKHL 55). In *Laporte*, police turned away a bus full of protestors because the police suspected some of the individuals on the bus of intending to cause a breach of the peace. The Lords found the action both unlawful – because no law provided for the indiscriminate police action absent imminent threat – and in violation of the ECHR, because the action was a disproportionate restriction on the Article 11 right to freedom of assembly (para. 56, per Lord Bingham). The Lords focused on the requirement of necessity, and reasoned that the extreme measures taken were unnecessary, and thus disproportionate, to any governmental interest in preventing disorder (para. 85, per Lord Rodger).

As regards Germany, the most important association case involves the *Kurdistan-Komitee*, discussed in the expression section above. As was the case in relation to freedom of expression, the FCC found that there was no violation of the freedom of association (1 BvR 1539/94). The Court's examination of proportionality here was cursory.

None of the French cases in this study raised the right to association.

Finally, there is only one relevant Spanish case on freedom of association that falls within the ambit of this report. In *STC 48/2003*, the Basque Government argued that laws regulating the legality of political parties were incompatible with the rights of freedom of association, ideological freedom, and freedom of expression provided in the Spanish Constitution. The Constitutional Court dismissed this claim reasoning that the restriction on rights satisfied the proportionality test. The Court reasoned, first, that the law did not in itself entail the dissolution of a party. Rather, for dissolution to occur, proscribed acts had to be carried out repeatedly and be of considerable gravity. Secondly, the existence of a political party that contributed or supported terrorism endangered the subsistence of the plural order provided for in the Spanish Constitution. Thus, the Court affirmed that in such cases there seemed to be no other option than dissolution. Finally, the Court stated that for a political party to deserve being recognized as such under the Constitution, the party had to itself recognize the doctrine of political pluralism.

From our analysis of the cases, it appears that the ECtHR has the most stringent proportionality requirements with respect to freedom of association relative to the other

jurisdictions in this selection. However, it is difficult on the sample available to draw very clear comparative conclusions. In Britain, the Laporte case demonstrates relatively high regard for the right to freedom of association. However, while proportionality as necessity was applied in Laporte, this analysis was secondary to the question of legality in this case. Until the House of Lords decides further cases on the issue it remains to be seen just what sort of security justification it will take to limit the right to association in the UK. The one German case example appears uncharacteristic for its absence of detailed reasoning regarding proportionality, although this may be linked to the strong exception clause contained in Article 9(2) Basic Law which expressly prohibits groups which threaten the criminal law or the constitutional order. There is no French case example. While the Spanish case example shows a rigorous application of the proportionality doctrine, it also demonstrates that some security threats are considered significant enough to allow restrictions on even political association. In all cases where the restriction on the right to association was upheld, the organisations in question were characterised by the courts as posing a threat to the basic democratic values of the State.

## Part 4      Conclusions

This report is only a first step: the conflict between rights and security is inherently fraught and complex, shaped by multiple and frequently conflicting legal principles, constitutional concerns, and competing goals. Comparisons between jurisdictions increase the complexity and should prove a ripe subject for further scholarship. For these reasons, our conclusions are necessarily preliminary.

Yet some things are clear. First, British courts are not being overwhelmed with rights versus security cases. Since the Human Rights Act came into force in 2000, only twenty-one cases involving a conflict between rights and security have been decided by the House of Lords. With the exception of France, the other jurisdictions included in this study had a similar number of cases. The British Government's success in these rights versus security cases does not vary substantially from other European jurisdictions. Since 2000, the British Government won domestic cases at about the same rate as the German Government, and lower only than France in proportional terms.<sup>41</sup> On this basis, it can be argued that the perception that the British government's security policies are more restricted by human rights considerations than in other comparable European jurisdictions is open to question.

Second, proportionality plays a crucial role in deciding rights versus security cases. Proportionality criteria were applied by courts in 70 percent of the cases in our selection. In the remaining cases proportionality was typically not applied either because the right in question is seen as absolute, such as with torture, or because the court chooses to simply balance interests rather than use, or mention, proportionality. However, there is significant variation between jurisdictions as to the consistency with which proportionality is applied.

Third, there is no single formulation of the proportionality principle. Courts across jurisdictions vary considerably in the level of scrutiny they apply to government assertions through the proportionality lens. In Germany and Spain, proportionality almost always involves a rigorous four-stage enquiry. However, the picture is less consistent in the ECtHR, France and the British House of Lords. In the UK in particular the House of Lords is more prone to adopt a broad brush balancing approach. Moreover, even where proportionality is applied British courts appear to be more forgiving of government assertions than in other

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<sup>41</sup> The French case example is complex however. Although in proportional terms the French government wins at the highest rate, in absolute terms the French government has lost more security versus rights cases than the UK government since 2000: 13 versus 12, respectively.

countries except France. Hence, the importance of proportionality and the impact it has on case outcomes varies depending the jurisdiction.

Fourth, while all jurisdictions have some concept of deference, margin of appreciation or evaluative leeway, there are significant differences between these jurisdictions as to how these ideas are applied, articulated and understood. As a supra-national court the ECtHR has developed the margin of appreciation doctrine in order to afford greater respect to the democratic decisions of the signatory states to the Convention. The British House of Lords has developed a strong and autonomous concept of “judicial deference,” and references to deference have been frequent in human rights decisions since the HRA entered into force in 2000. The Spanish constitutional court splits its jurisprudence between greater deference to legislative decisions and close scrutiny of administrative decisions. The German FCC does not use the term deference, but applies a very narrow concept of evaluative leeway which is interpreted in light of the right to “effective legal protection.” The term *déference* does not appear in French law, however the *Conseil d’Etat* affords the administration some evaluative leeway in its decision-making. The *Conseil constitutionnel* is also conscious of the respective competences of the branches of government and will sometimes refrain from substituting its own judgment for that of the legislature.

Fifth, the decisive factor in determining the importance of proportionality and the approach of courts in human rights versus security cases across jurisdictions is the existence of a domestic charter of rights. Courts with constitutional systems that include their own charter of rights – such as in Germany and Spain – are more consistent and rigorous in their application of proportionality to rights versus security cases than other jurisdictions which rely solely on the ECHR. This is almost certainly linked to the fact that courts under these domestic constitutions are vested with significant constitutional authority to scrutinize their respective governments and parliaments in the light of constitutional rights. As a consequence, a “British Bill of Rights” would most likely result in stricter rights protections in British courts.

Sixth, proportionality analysis varies depending on the right in question as well as the relevant jurisdiction.

- **Torture:** courts across all jurisdictions are consistent in their view that questions of security cannot be a basis for limiting the rights provided under Article 3 ECHR or other prohibitions on torture, and that the right to be free from torture is not subject to balancing exercises. Nevertheless, in both the German and the ECHR jurisprudence, proportionality of the penalty to the crime does enter into the equation when interpreting whether treatment constitutes torture.
- **Liberty:** all jurisdictions apply the doctrine of proportionality to the question of whether states fall within the exceptions to the right to liberty, however the intensity of proportionality review varies considerably across jurisdictions. At one end of the spectrum the ECtHR and the UK courts are inclined to balance rights and interests against each other, while at the other end of the spectrum the German court applies a strict necessity test for any deprivation of liberty
- **Fair trial rights:** fair trial rights are frequently subjected to a proportionality analysis. However, in the ECtHR, the UK and Spain there is a considerable blurring of balancing and proportionality. The German FCC on the other hand applies a strict proportionality test and frequently returns to the important idea of the “core of the right” when determining restrictions on fair trial rights. France has not applied proportionality to fair trial rights although this is more indicative of the hesitancy of the French courts to look behind the reasoning of governmental decisions, than of any hostility to proportionality per se.
- **Privacy:** A rigorous proportionality test has played a decisive role in protecting the privacy related rights of applicants in Germany, Spain and, to a lesser extent, France. In the UK the doctrine has not been as consistently or strictly applied. While the Daly case has shown a stringent application of proportionality review, other cases tend towards a balancing of privacy rights against security measures. The ECtHR's position is also unclear. In Klass, the ECtHR refers not to proportionality, but to strict necessity – yet in Segerstedt-Wiberg, proportionality and strict necessity are both required.
- **Family life:** The French and ECtHR cases demonstrate that family life cases, perhaps more than any other human right, are determined predominantly by the application of proportionality strictu sensu, rather than by questions of the legitimacy

and necessity of the rights limiting measures cited by states. In applying the narrow proportionality test both the ECtHR and the French courts adopt a broad multi-factor balancing enquiry.

- **Expression:** Courts in all selected jurisdictions apply the proportionality analysis most rigorously and consistently with respect to freedom of speech. They are also less inclined to develop a strong doctrine of deference or evaluative leeway in this context. Despite this, courts in all jurisdictions are also broadly sympathetic to the states' need to restrict freedom of expression where potential or actual terrorist activity is involved.
- **Association:** The ECtHR has the most stringent proportionality requirements with respect to freedom of association relative to the other jurisdictions in this selection. However, it is difficult on the sample available to draw very clear comparative conclusions. In all cases where the restriction on the right to association was upheld, the organisations in question were characterised by the courts as posing a threat to the basic democratic values of the State.



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## Annex 1: Methodology

For each jurisdiction in this study, the first goal of our research was to identify cases in which human rights were in conflict – at least potentially – with security. Although the project is specifically focused on how the legal concept of proportionality mediates this conflict, not all rights-versus-security cases are dealt with by courts using proportionality. All cases in which rights and security were in conflict, not merely those involving proportionality, have been included in our study. After all, it is impossible to understand how proportionality is used by courts without noting which cases do *not* involve proportionality, as well as those that do.

Before we could create a list of cases involving a conflict between human rights and security, we had to be able to answer the questions: What are human rights? and What is security? We have taken a broad view of both. In essence, we have allowed the courts themselves to answer these questions. If a court claims that a case involves rights or security, we do not question that position. As a doctrinal matter, human rights in the jurisdictions studied are protected either by the ECHR, domestic legislation, a domestic constitution, or some combination of the three. These legal instruments define what is and is not a human right.

As for security, we have once again followed the lead of courts: if they say that security is a concern, we assume that to be true. Building also on previous work done by some of our team [Lazarus and Goold], we have arrived at a conception of security that includes such diverse concerns as prevention of crime, border security, prison discipline, and responses to terrorism.

Our definitions of human rights and security are necessarily broad. In practice, however, the cases we have identified across jurisdictions tend to converge on certain rights and certain security concerns. As shown in the report, some rights conflict with security more often than others.

Our research into case law from the jurisdictions studied was restricted to two categories of cases: first, all human rights versus security cases from 2000 to the present; second, important cases in the area of human rights and security that were decided before 2000. These restrictions were driven by two competing desires. The first is our desire to provide a useful comparison between jurisdictions. Since our study is designed to provide guidance to British policy-makers, UK jurisprudence is the touchstone of our work. We therefore chose the year 2000 as the start date for our research because that is when the Human Rights Act

came into effect in this country. In order to make a meaningful comparison between jurisdictions, we felt it necessary to use the same starting date across the board.

However, we are also aware that courts in every jurisdiction have been dealing with human rights and security since well before 2000. Often, key principles and concepts were developed many years ago. Given that fact, limiting our analysis to only cases decided since the year 2000 would provide an incomplete view of the jurisprudence. For that reason, we decided to include a selection of key cases from before 2000. Selecting these cases required attention to several factors: in many jurisdictions, the most significant factor was citation in later decisions. If a pre-2000 case was cited as determining a principle of law that bears on the rights versus security conflict, we included that older case in our data. Another factor in our search for older cases was academic literature. We have consulted secondary sources in each jurisdiction, both in English and in the relevant local languages. Cases described as important by this academic literature were also included, even if they were decided before 2000. Regardless, for the sake of consistency, our empirical analysis of the case law focuses on only cases decided since the year 2000.

We also decided to focus only on decisions by courts of final appeal in each jurisdiction. Doing so allowed us to see what the law is in each jurisdiction without becoming mired in intermediate appellate decisions. This limitation also has the advantage of reducing the impact of differences in judicial systems. Countries might have various levels of appeals and a variety of ways of conceiving the appellate process: by focusing only on courts of final appeal, we were able to minimize the impact of these differences.

Keeping all of these considerations in mind, our first task was to create a list of cases in each jurisdiction that involved a potential conflict between rights and security. We assigned a researcher to each of our five jurisdictions: the UK, the ECtHR, Spain, France, and Germany. Each researcher is fluent in the language of his or her jurisdiction. We began our research by reviewing academic literature on the various jurisdictions. In addition to scholarly articles, we also reviewed reports by government agencies concerning human rights and security. For example, we began our research on UK cases by reading the DCA's *Review of the Implementation of the Human Rights Act*, the *Anthony Rice Report*, and the Home Office's *Rebalancing the Criminal Justice System*. These secondary sources provided not only background to our study, but also pointed us to a number of cases to include in our lists.

We then turned to legal databases to flesh out our lists. Different databases exist in each jurisdiction, so the details of how we used these sources necessarily vary. However, the

general method was consistent and can be illustrated by our research of cases from both the House of Lords and from the ECtHR. For our research of British cases, we used two commercial databases: Westlaw and Casetrack. For our research regarding the European Court, we used the Court's own publicly available database, HUDOC.<sup>42</sup>

Our research using the databases began by listing cases that were classified under the keyword *human rights*. We then narrowed that case list to those that included the terms *security, proportionality, or balancing*. This narrowing nonetheless left a large number of cases to be considered, sometimes well into the hundreds. The next step, then, was to read the fact sections and initial arguments of each case to determine whether it presented a conflict between rights and security. If it did, it was included in our list of cases for that jurisdiction. This manual analysis of the case law was time-consuming but resulted in a much more accurate sample than would have been possible had we relied entirely on computerized keyword and text searches.

The final stage of our list-making occurred as we read the cases already identified. These cases often cited previous cases involving conflicts between rights and security; so long as the cited cases met our criteria for date or importance, we added them to the list as well. This recursive process provided a check on our prior list-making; it ensured that we included all cases that the courts themselves considered important.

Having made lists of relevant cases for each jurisdiction, the next task was to transform them into data that could be used for analysis and comparison. We constructed a data matrix – essentially a database – for each jurisdiction. Our researchers read the cases and input data into the matrices as they did so. They answered the following questions for each case:

- (a) What jurisdiction?
- (b) What is the case name?
- (c) What court?
- (d) What is the citation?
- (e) What are the facts?
- (f) What human rights issues are in question?
- (g) Does the government argue that security is at stake?

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<sup>42</sup> German databases included Beck Online and the website of the Bundesverfassungsgericht ([www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de)). French materials were accessed through Legifrance ([www.legifrance.gouv.fr](http://www.legifrance.gouv.fr)). Spanish databases included that of the Spanish Constitutional Court ([www.boe.es/g/es/bases\\_datos/tc.php](http://www.boe.es/g/es/bases_datos/tc.php)) and the Spanish Supreme Court ([www.poderjudicial.es/jurisprudencia/](http://www.poderjudicial.es/jurisprudencia/)).

- (h) What legal system is applied by the court?
- (i) Does the court use proportionality?
- (j) Does the court use balancing?
- (k) Does the court apply deference or a margin of appreciation?
- (l) What is the holding or result?
- (m) If there is a mixed result, what is it?
- (n) What is the court's reasoning?
- (o) Are there any key quotes? If so, they are translated into English if necessary.
- (p) Does anything else need to be noted about this case?

In total, our team collected, read, analyzed, and input data on 192 cases, 125 of which were decided since the year 2000. This data alone marks an important contribution to scholarship. Never before has such comprehensive and comparative data been collected either on human rights cases or on proportionality.

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Ministry of Justice  
Research Unit  
Selborne House  
54 Victoria Street  
London SW1E 6QW

Tel: 020 7210 8520

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