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ARTICLE

Fundamental Rights and Limited Possibilities: The Proviso of the Possible in European Fundamental Rights Doctrine

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Abstract

Fundamental rights to positive state action are costly. An allocation in favor of one individual rightsholder always results in lower allocations in favor of others. The dominant approach in fundamental rights doctrine assumes these conflicts can be resolved judicially by balancing competing rights and other public needs. In practice, carrying out an in-depth balancing in resource allocation cases proves challenging but constitutional courts developed different strategies and concepts to deal with costly rights. The European Court of Human Rights applies a "wide" margin of appreciation and requires that positive state obligations do "not impose an impossible or disproportionate burden on the authorities." Following the German Federal Constitutional Court, several constitutional courts have applied a concept known as the "proviso of the possible." The proviso of the possible constrains positive rights and results in a wide margin of discretion granted to political authorities. This article attempts to investigate the specific meaning of the "proviso of the possible" in the context of European fundamental rights law by comparing it against alternative doctrinal concepts. The investigation aims to identify common legal principles and methods to deal with fundamental rights conflicts over scarce public resources.

Keywords: Fundamental rights; positive state obligations; margin of appreciation; proportionality; minimum core rights

A. Introduction

In 2014, the European Court of Human Rights (ECtHR) had to decide on Portuguese austerity measures. The applicant, Mrs Da Silva Carvalho Rico, was a pensioner whose pension was cut due to cost-cutting constraints. The ECtHR ruled that the pension cut did not violate the applicant's rights, namely the right to property laid down in Article 1 of Protocol No. 1 to the European Convention on Human Rights (ECHR). Within its judgment, the ECtHR accepted a legal concept that had previously been applied by the Portuguese Constitutional Court when dismissing the applicant's claim in the same case. The concept of the "proviso of the possible" was used as a limitation of her right.[1] However, since then, the *Da Silva Carvalho Rico* judgment and its implicit recognition of the proviso of the possible have not received much attention.[2] By accepting the

[1] *Da Silva Carvalho Rico v. Portugal*, App. No. 13341/14 (September 24, 2015), para. 44.

[2] See only Beatrice Delzangles, *The negotiating function of the European Court of Human Rights: Reconciling diverging interests born from new European challenges*, *in* New Challenges to Constitutional Adjudication in Europe 259, 266–70 (Zoltán Szente & Fruzsina Gárdos-Orosz eds., 2018); Dimitrios Kagiaros, *Austerity Measures at the European Court of Human Rights: Can the Court Establish a Minimum of Welfare Provisions?*, 25 European Public Law 535, 541, 553 (2019).

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application of the proviso of the possible, the ECtHR implies that the concept is compatible with its positive obligations doctrine.[3] Nevertheless, it needs to be clarified whether the proviso of the possible and the ECtHR's doctrine express the same meaning in different terms or whether the proviso of the possible offers an alternative approach to a judicial review of rights in conflicts over limited public resources. These issues will become relevant once more. A German case involving applicants who complained about the lockdown of schools during the pandemic is pending before the ECtHR.[4] In the challenged ruling, the German Federal Constitutional Court (FCC) recognized a positive right to educational services in the German Constitution but subjected it to the proviso of the possible.[5] In the 1970s, the FCC became the first court to use the proviso of the possible ("Vorbehalt des Möglichen").[6] Since then, constitutional courts and legal scholars worldwide have taken up the concept.

As allocative conflicts and the necessity to fulfill positive rights obligations concern all European states, a broader consensus about how to deal with these conflicts is desirable. At first sight, the existing doctrinal formulas and concepts appear to have more in common than has been noticed so far. This article attempts to investigate the hitherto vague formula of the proviso of the possible by comparing it against similar doctrines of resource constraints and feasibility conditions. In particular, the proviso of the possible shall be contrasted against doctrinal concepts used by the ECtHR, such as the "Osman test" and the margin of appreciation doctrine. The thesis to be tested is that the proviso of the possible partially overlaps with these concepts. Granting a particularly wide margin of discretion to political authorities in distributive conflicts is a *result of* applying the proviso of the possible. Both the proviso of the possible and the ECtHR's margin of appreciation doctrine widely subject positive rights claims to political decision-making. The courts do not carry out an in-depth balancing of costly rights; they only exclude minimum rights from the application of resource constraints.

The investigation starts with a comparison of constitutional jurisprudence dealing with fundamental rights conflicts over public resources (B). The comparative study will cover German and Italian constitutional law as well as the case law of the ECtHR. Based on the findings, the investigation aims to develop common principles for a European fundamental rights doctrine and their integration into a theoretically grounded "model of the proviso of the possible" (C).[7] This inquiry will consider why the established standards of judicial review, such as the proportionality test and the balancing formula, fail to resolve complex distributive conflicts judicially. The phenomenon of constitutional courts applying the proviso of the possible could be a result of this failure and indicate the limits of adjudication and positive rights constitutionalism.[8] The proviso of the possible also implies a certain understanding of the separation of powers and the legitimation of distributive decisions.

B. A Comparative Study: From Karlsruhe to Strasbourg

The proviso of the possible originates in German fundamental rights doctrine. It did not take long before the German "Vorbehalt des Möglichen" found its way into other jurisdictions. In particular, South American scholars developed a keen interest in the concept of the proviso of the

[3]Cf. for an overview: MALU BEIJER, THE LIMITS OF FUNDAMENTAL RIGHTS PROTECTION BY THE EU: THE SCOPE FOR THE DEVELOPMENT OF POSITIVE OBLIGATIONS 19–106 (2017).

[4]*M.C.K. and M.H.K.-B. v Germany*, App. No. 26657/22.

[5]159 BVerfGE 355 – *Bundesnotbremse II*.

[6]See 33 BVerfGE 303 (333) – *Numerus Clausus I*.

[7]This model is presented in more detail in LINO MUNARETTO, DER VORBEHALT DES MÖGLICHEN: ÖFFENTLICHES RECHT IN BEGRENZTEN MÖGLICHKEITSRÄUMEN (2022).

[8]Cf. GUNNAR FOLKE SCHUPPERT & CHRISTIAN BUMKE, DIE KONSTITUTIONALISIERUNG DER RECHTSORDNUNG: ÜBERLEGUNGEN ZUM VERHÄLTNIS VON VERFASSUNGSRECHTLICHER AUSSTRAHLUNGSWIRKUNG UND EIGENSTÄNDIGKEIT DES EINFACHEN RECHTS 67 (2000).

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possible, which nowadays is an integral part of their fundamental rights doctrine.[9] In European jurisdictions, the proviso of the possible has been adopted by courts and scholars as the "réserve du possible" (France),[10] the "riserva del possibile" (Italy),[11] the "reserva de lo posible" (Spain),[12] the "επιφύλαξη του εφικτού" (Greece),[13] and – as already mentioned – as the Portuguese "reserva do possível."[14] German and Italian constitutional jurisprudence as well as the case law of the ECtHR were selected for the following comparative study.

I. The "Vorbehalt des Möglichen" in German Constitutional Law

In the 1970s, the German Federal Constitutional Court (FCC) had to rule on constitutional complaints from applicants who had been rejected by universities. The judges stated that a right to access public higher education and be admitted to university could be part of the fundamental right to choose one's occupation pursuant to Article 12 of the German Basic Law (*Grundgesetz*). This was remarkable in that the Basic Law does not contain any explicit rights to state benefits but merely establishes the welfare state (*Sozialstaat*) as a goal of state policy. However, after having considered the recognition of a positive right to higher education, the judges noted that this right was subject to the "proviso of the possible" (*Vorbehalt des Möglichen*), "meaning that which the individual may reasonably claim from society." As a result of the proviso of the possible, the students could only effectively claim a fair and equal chance to participate in the capacities that already existed, but a substantive claim for greater capacity was rejected. The FCC further explained that it was the "primary responsibility" of the legislator to decide what one "may reasonably claim," taking into consideration "other welfare concerns as well as the demands of overall economic balance."[15] The Court later applied the proviso of the possible to other areas of state benefits, such as financial support for private schools[16] and families.[17] In these cases, applying the proviso resulted in a limitation of positive rights (*Leistungsrechte*) and the dismissal of the claims. Instead, the court only enforced procedural guarantees to equal participation in existing capacities (*Teilhaberecht*), which must be efficiently exhausted (*Kapazitätserschöpfungsgebot*).[18]

[9]Brazil: Supremo Tribunal Federal, Decisions ADPF 45 MC/DF (29 April 2004) and RE 956475/RJ (May 12, 2016); Ingo Wolfgang Sarlet, A Eficácia dos Direitos Fundamentais: Uma Teoria Geral dos Direitos Fundamentais na Perspectiva Constitucional 293–97 (13 ed. 2018); Ricardo Perlingeiro, *Does the Precondition of the Possible (Vorbehalt Des Möglichen) Limit Judicial Intervention in Social Public Policies?*, 2 NLUO Law Journal 20 (2015); Leonardo Romero Marino, *Time Shaping the Proviso of the Possible: Fiscal Sustainability as a Fundamental Group Right*, 5 Braz. J. Pub. Pol'y 171 (2015). Columbia: Corte Constitucional, Decision C-073/18 (July 12, 2018); see also: Horacio Guillermo Corti, *Ley de presupuesto y derechos fundamentales: Los fundamentos de un nuevo paradigma jurídico-financiero*, *in* El derecho constitucional presupuestario en el derecho comparado, Tomo I 637, 668–81 (2010).

[10]Didier Ribes, *L'incidence financière des décisions du juge constitutionnel*, Cahier du Conseil Constitutionnel 104 (2008); Laurence Gay, *Des droits à part (entière)? La justiciabilité inaboutie des droits sociaux en droit constitutionnel français*, 61 Les Cahiers de Droit 397 (2020). The French Constitutional Council recognizes the orderly usage of public resources ("*bon usage des deniers public*") as a legitimate aim of constitutional value ("*objectif de valeur constitutionnelle*"): Conseil Constitutionnel, Décision n° 2019-796 DC (December 27, 2019), para. 126.

[11]Antonio Baldassarre, *Diritti sociali*, Enciclopedia giuridica, Vol. XI 30 (Istituto dell'Enciclopedia Italiana ed., 1989).

[12]Álvaro Rodríguez Bereijo, *Gasto Público, Estado social y Estabilidad Presupuestaria*, *in* XVIII Jornadas de Presupuestación, Contabilidad y Control Público: IGAE 140 Años 121, 125 (Ministerio de Hacienda y Administraciones Públicas ed., 2014).

[13]Constantin Yannakopoulos, Το ελληνικό Σύνταγμα και η επιφύλαξη του εφικτού της προστασίας των κοινωνικών δικαιωμάτων: 'να είστε ρεαλιστές, να ζητάτε το αδύνατο', Εφημερίδα Διοικητικού Δικαίου 417 (2015).

[14]Tribunal Constitucional (Portugal) [T.C.], Decision No. 731/95 (13 December 13, 1995); J. J. Gomes Canotilho, Direito Constitucional e Teoria da Constituição 481 (7th ed. 2003); Jorge Reis Novais, As Restrições aos Direitos Fundamentais não Expressamente Autorizadas pela Constituição 170 (2nd ed. 2010).

[15]See 33 BVerfGE 303 (333) – *Numerus Clausus I*, for a translation, see: Donald P. Kommers & Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany 679–85 (3rd ed. 2012).

[16]75 BVerfGE 40 (68) – *Privatschulfinanzierung I.*

[17]87 BVerfGE 1 (34–35) – *Trümmerfrauen.*

[18]39 BVerfGE 258 (271–74); 54 BVerfGE 173 (192-201); 85 BVerfGE 36 (56–68).

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The court also recognized certain non-derogable minimum rights that are costly but not subjected to the proviso of the possible; for example, the *Hartz IV* ruling recognized the right to the guarantee of a subsistence minimum[19] and a series of decisions granting civil servants the right to an appropriate remuneration (*amtsangemessene Besoldung*).[20] Regarding both rights, the FCC applied a procedural approach requiring the legislator to set up a consistent calculation mechanism for the respective benefits. However, recognition of these non-derogable minimum rights has always been of an exceptional nature. The Court has not given up its restrained position regarding the recognition of positive rights and their limitation by the proviso of the possible. The FCC recently decided on the constitutionality of the federal government's nationwide lockdown measures during the pandemic. The federal law, named "Bundesnotbremse," provided for the closure of schools.[21] In its *Bundesnotbremse II* ruling, the Court recognized a "right to school education" under Articles 2 and 7 of the Basic Law. The Court stated that this right has both a negative and a positive dimension.[22] As regards the positive dimension, the right entails an entitlement to educational services that enable the students to develop a self-determined personality.[23] The Court subjected this entitlement to the proviso of the possible. The German judges stressed that this reservation does not exclusively apply if the provisioning of the desired educational benefits was factually impossible due to insurmountable resource constraints. The proviso of the possible also grants discretion to the legislator to decide "to what extent the available resources are to be used for the purposes of school education, taking into account other equally important state obligations."[24] The Court, however, stressed that the proviso of the possible does not apply to the "minimum standard" of the right.[25]

From the case law outlined above, we can derive the following conclusions. Apart from the right to equal participation, the requirement to effectively exhaust existing capacities and the recognition of minimum standards, the FCC subjects fundamental rights to state benefits to the proviso of the possible. This does not merely apply in cases of factual impossibility when the fulfillment of a right is completely unfeasible (*proviso of the factually feasible*). The FCC applies the proviso of the possible if the fulfillment of the claim of a fundamental right might be feasible but only at the expense of other fundamental rights and public interests. The FCC clearly assigns these distributive decisions to the democratic legislator who determines, *politically,* what the state should make possible (*proviso of the politically possible*). This is what interpreters have described as a "double function" of the proviso of the possible.[26]

Upon a closer look, the FCC's case law lacks information on the scope of the proviso of the possible and its implications for fundamental rights review. If the proviso of the possible demands "judicial self-restraint" from a constitutional court,[27] it needs clarification of to what extent the

[19]125 BVerfGE 175 – *Hartz IV*; cf. Stefanie Egidy, *Case note – The Fundamental Right to the Guarantee of a Subsistence Minimum in the Hartz IV Decision of the German Federal Constitutional Court*, 12 GERMAN LAW JOURNAL 1961 (2011); Ingrid Leijten, *The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection*, 16 GERMAN LAW JOURNAL 23 (2015).

[20]130 BVerfGE 263; 140 BVerfGE 240; 139 BVerfGE 64.

[21]96 BVerfGE 288 (305–06) – *Integrative Beschulung.*

[22]159 BVerfGE 355 (380–81) – *Bundesnotbremse II.* Another ruling concerning the general lockdown measures was 159 BVerfGE 233 – *Bundesnotbremse I.*

[23]159 BVerfGE 355 (382–84).

[24]*Id.* at 384–86, trans. by the author.

[25]*Id.* at 390, 428–30. For an analysis of the judgment with respect to the proviso of the possible and the minimum standard, see Lino Munaretto, *Das Mögliche und das Mindeste: Zur Grundrechtsdogmatik der Leistungsrechte am Beispiel des Grundrechts auf schulische Bildung*, 62 DER STAAT 419 (2023).

[26]Volker Neumann, *Der Grundrechtsschutz von Sozialleistungen in Zeiten der Finanznot*, NZS 401 (1998); HANS MICHAEL HEINIG, DER SOZIALSTAAT IM DIENST DER FREIHEIT. ZUR FORMEL VOM SOZIALEN STAAT IN ART. 20 ABS. 1 GG 383 (2008).

[27]For this opinion of a former FCC judge cf. Reinhard Gaier, *Der Vorbehalt des Möglichen als Gebot richterlicher Selbstbeschränkung*, *in* DEMOKRATIE-PERSPEKTIVEN: FESTSCHRIFT FÜR BRUN-OTTO BRYDE ZUM 70. GEBURTSTAG 367 (Michael Bäuerle, Philipp Dann, & Astrid Wallrabenstein eds., 2013).

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court is supposed to restrain itself – and to what extent it might review costly rights. Former FCC judge Dieter Grimm once suggested that the proviso of the possible results in an "inverse proportionality test," raising the question of "whether the state can reasonably be expected to fulfill its protective duty taking into account other basic rights."[28] However, an analysis of the jurisprudence reveals that the court avoids carrying out a comprehensive proportionality test in positive rights cases. In *Bundesnotbremse II*, the court expressly stated that the application of the proportionality test was to be reserved for negative rights.[29]

Since the FCC introduced the proviso of the possible into its case law, the term became subject to different interpretations by German constitutional scholars. Even though it is an often-used argument, substantial contributions to its implications remain rare.[30] The few examples of deeper engagement conceive the term as a meta principle rather than as concrete guidance on legal decision-making. Erhard Denninger, for instance, characterized the proviso of the possible as a "key term of constitutional law," marking an "economic-political limitation" to state obligations, thereby regulating the tension between individual and collective needs.[31] Jürgen Habermas regarded the proviso of the possible from a critical perspective as a "functional imperative" that would only support the conservation of the existing order.[32] This critique opposes a conservative reading of the proviso of the possible represented by German legal scholars such as Josef Isensee and former FCC judge Paul Kirchhof. From their perspective, which appears to have been inspired by Carl Schmitt's legal theory of Concrete-Order Thinking (*Konkretes Ordnungsdenken*)[33], the proviso of the possible is a warning against extensive demands on the state and the loss of the state's proper functioning. These scholars used the proviso of the possible as a major argument against an increase in state debt and migration, which could impose impossible burdens on public authorities.[34] Following Schmitt's remark that "the state can only distribute what it has taken from others,"[35] German constitutional scholars frequently pointed out that fulfilling positive rights always presupposes an encroachment on taxpayers' rights, which requires justification.[36]

II. The Proviso of the Possible under European Constitutions with Social Rights

In contrast to the German Basic Law, other European constitutions contain explicit social rights to certain state benefits.[37] Since the provision of constitutionally guaranteed goods such as health care, education, and housing is costly, constitutional courts in their respective countries have often been confronted with distributive conflicts, and some adopted the proviso of the possible to

[28]Dieter Grimm, Constitutionalism: Past, Present, and Future 196 (2016).

[29]159 BVerfGE 355 (381).

[30]See Otto Depenheuer, *§ 269 Vorbehalt des Möglichen*, XII Handbuch des Staatsrechts 557 (Josef Isensee & Paul Kirchhof eds., 3rd ed. 2014); Veith Mehde, Grundrechte unter dem Vorbehalt des Möglichen (2000).

[31]Erhard Denninger, *Verfassungsrechtliche Schlüsselbegriffe*, *in* Festschrift für Rudolf Wassermann zum sechzigsten Geburtstag 279, 292 (Christian Broda et al. eds., 1985).

[32]Jürgen Habermas, *Law and Morality*, VIII The Tanner Lectures on Human Values 217, 240 (1988).

[33]Carl Schmitt, Über die drei Arten des rechtswissenschaftlichen Denkens (3rd ed. 2006).

[34]Josef Isensee, *On the Validity of Law with Respect to the Exceptional Case*, *in* Emergency Powers: Rule of Law and the State of Exception 11, 16–18 (Jakub Jinek & Lukáš Kollert eds., 2020); Paul Kirchhof, *Grenzen der Staatsverschuldung in einem demokratischen Rechtsstaat*, *in* Finanzpolitik im Umbruch: zur Konsolidierung öffentlicher Haushalte 271 (1984).

[35]Carl Schmitt, *Nehmen/Teilen/Weiden*, *in* Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954 489, 503 (4 ed. 2003).

[36]Robert Alexy, A Theory of Constitutional Rights 342 (Julian Rivers tran., 2010); Paul Kirchhof, *Steuergerechtigkeit und sozialstaatliche Geldleistungen*, 37 JuristenZeitung 305 (1982).

[37]This model goes back to the Weimar Constitution (*Weimarer Reichsverfassung*), the Constitution of the German Reich of 1919; cf. Colm O'Cinneide, *The Present Limits and Future Potential of European Social Constitutionalism*, *in* The Future of Economic and Social Rights 324, 327 (Katharine G. Young ed., 2019).

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react to them. The Portuguese *Tribunal Constitucional* interprets the social rights of the Constitution of 1976 primarily as legislative goals subject to the "reserva do possível" in terms of political, economic, and social possibilities.[38] Regarding the realization and concretization of the rights, the legislator generally enjoys a broad margin of discretion (*larga margem na realização ou conformação*). Only an "essential core" (*núcleo essencial*) is precluded from the application of the proviso of the possible.[39]

A closer look at Italy reveals that Italian constitutional jurisprudence discovered the German proviso of the possible in the 1980s. Antonio Baldassarre introduced the concept to Italian constitutional law doctrine as the "riserva del possibile e del ragionevole" (proviso of the possible *and reasonable*),[40] thereby pointing out that positive rights are not only conditioned by the factual possibilities of a community but also by its political decisions on the "reasonableness" of individual claims to state benefits. Since then, the "riserva del possibile e del ragionevole" has been recognized as a general principle of Italian fundamental rights doctrine.[41] The Corte Costituzionale, even though it never explicitly used the term, applies principles similar to those extracted from the case law of the FCC. Commentators on Italian jurisprudence interpreted these principles as recognizing the "riserva del possibile e del ragionevole."[42] In a key ruling concerning the right to health laid down in Article 32 of the Italian Constitution, the Corte Costituzionale stated:

> This right is conditioned by the way the legislature chooses to implement it, balancing the interest it protects against other constitutionally protected interests and also considering the objective limits it encounters in doing so (e.g., the organizational and financial resources available at the time).

The Court further held that *this* "principle" was "common to every other constitutional right imposing a positive obligation on the State."[43] Therefore, the state authorities are only required to fulfill the positive rights "gradually" (principle of *gradualità*) depending on the availability of resources.[44] The social rights of the Italian constitution only provide *whether* and *that* (*an e quid*) the state is obliged to act, not *how* and *when* (*quomodo e quando*).[45] Like the German FCC, the

[38]T.C., Decision No. 131/1992 (1 April 1992). In the early decisions, the court expressively quoted the German "Vorbehalt des Möglichen", thereby disclosing its origin.

[39]T.C., Decision No. 400/2011 (22 September 2011). The court imposed limits on the cutting of pensions, ruling that the pension must still ensure a "social minimum" (*mínimo social*) with respect to the principle of human dignity: T.C., Decision No. 575/2014 (August 14, 2014).

[40]Baldassarre, *supra* note 11 at 30; for a later reception cf. Andrea Sandri, *Il Vorbehalt des Möglichen nella Giurisprudenza della Corti Tedesche*, *in* I diritti sociali dal riconoscimento alla garanzia: il ruolo della giurisprudenza 483 (Elisa Cavasino, Giovanni Scala, & Giuseppe Verde eds., 2013).

[41]Massimo Luciani, *Costituzione, bilancio, diritti e doveri dei cittadini*, 7 (Varenna, Villa Monastero, September, 20–22, 2012), www.camera.it/temiap/allegati/2015/03/19/OCD177-1158.pdf; Aldo Carosi, *Prestazioni sociali e vincoli di bilancio*, 33 (October 7, 2016), www.cortecostituzionale.it/documenti/convegni_seminari/Aldo_Carosi_Trilaterale_ 2016.doc.

[42]Alessandro Pace, *Libertà e diritti di libertà*, 17 Giornale di Storia costituzionale 11, 20 (2009); Giovanna Razzano, *Lo "Statuto" costituzionale dei diritti sociali*, *in* I diritti sociali dal riconoscimento alla garanzia: il ruolo della giurisprudenza 25, 29 (Elisa Cavasino, Giovanni Scala, & Giuseppe Verde eds., 2013). For references to the "riserva del ragionevole e del possible" in the case law of the Consiglio di Stato cf. Decision No. 4347/2017 (September 14, 2017) and No. 5251/2017 (November 14, 2017).

[43]See: Corte Costituzionale [Corte Cost.], Decision No. 445/1990 (26 September 26, 1990), translation by Vittoria Barsotti, Paolo G. Carozza & et al., Italian Constitutional Justice in Global Context 148 (2016). See also: Decisions No. 94/2009 (1 April 1, 2009) and 248/2011 (20 July 20, 2011).

[44]For the criteria of "gradualità" cf. Corte Cost., Decision No. 12/1986 (January 22, 1986) and No. 374/1988 (March 23, 1988).

[45]Baldassarre, *supra* note 11 at 31; Franco Modugno, I "nuovi diritti" nella giurisprudenza costituzionale 71 (1995). Cf. for similar statements on duties to protect (*Schutzpflichten*): Matthias Jestaedt, Grundrechtsentfaltung im Gesetz: Studien zur Interdependenz von Grundrechtsdogmatik und Rechtsgewinnungstheorie 198 (1999).

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Italian court exempts a minimum core (*nucleo irreducibile*) from being subjected to the proviso of the possible:

> [. . .] the protection of the right to health is subject to the limitations and constraints arising from limited financial resources; [. . .] however, [. . .] the balancing discretion granted to the legislature may not assume 'such a weight preponderant as to violate the irreducible core of that right, protected by the Constitution as an inviolable sphere of the human personality.'[46]

Although the Corte Costituzionale mentions the necessary balancing of the public interest and social rights as part of the budgetary decision-making process, it never carried out a strict proportionality test on the social rights of the Constitution. Instead, the Court focused on enforcing minimum rights, as did the German FCC. The court ruled that basic levels of social assistance (*livelli essenziali di assistenza*), if specified by the legislator, must be fulfilled and cannot be refused due to broad reductions in public spending.[47] A definite state obligation in secondary legislation is no longer subject to budgetary discretion. In these cases, the proviso of the possible does not apply.[48] The regional authorities responsible for providing the benefits must be sufficiently funded to carry out their legal obligations.[49] In recent years, the Corte Costituzionale has specified several core rights, including the right to access educational services for people with disabilities. Pursuant to the Court's rulings, the state must provide these students with the necessary teaching, transport, and assistance.[50] This minimum standard must be provided and "financed in any case and cannot depend on financial choices."[51] Critical commentators have observed that the court's definitions of minimum rights often remained vague and inconsistent.[52] Others have pointed to the idiosyncrasies of different rights and state sectors that require each minimal core to be determined individually.[53]

The Corte Costituzionale also established procedural hurdles to austerity measures. Due to the state debt crisis, the legislature suspended an automatic increase mechanism for certain pensions. In 2015, the Court ruled that the law interfered with the right to adequate social security rooted in Articles 36 and 38 of the Constitution and could not solely be grounded on the "contingent financial situation" but had to be justified in detail.[54] The principle of a balanced budget, laid down in Article 81 of the Italian Constitution, while being recognized as a legitimate public interest and a limitation to constitutional rights, is not a "winner-take-all principle."[55] Even though critics have pointed to the potential cost burden of the ruling,[56] the decision does not deviate fundamentally from the settled case law and its implicit recognition of the proviso of the possible. The Court established a mere procedural *duty to give reasons* when deviating from an objective and

[46]Corte Cost., Decision No. 354/2008 (October 22, 2008), trans. by the author; see also: Decision No. 309/1999 (July 7, 1999).

[47]Corte Cost., Decision No. 169/2017 (March 21, 2017).

[48]Renato Balduzzi, *Livelli essenziali e risorse disponibili: la sanità come paradigma*, *in* La tutela della salute tra garanzie degli utenti ed esigenze di bilancio 79, 88–89 (Fabio Roversi Monaco & Carlo Bottari eds., 2012).

[49]Similarly, in Germany the FCC has ruled that the right to a place in a childcare center is not subject to the proviso of the possible since the legislator has granted an unconditioned claim to it: 140 BVerfGE 65 (84).

[50]Corte Cost., Decision No. 80/2010 (February 22, 2010).

[51]Corte Cost., Decision No. 83/2019 (February 20, 2019), trans. by the author.

[52]Matteo De Nes & Andrea Pin, *The Outcome of the Financial Crisis in Italy*, *in* European Welfare State Constitutions after the Financial Crisis 276, 305 (Ulrich Becker & Anastasia Poulou eds., 2020).

[53]Balduzzi, *supra* note 48 at 83.

[54]Corte Cost., Decision No. 70/2015 (March 10, 2015), English trans. www.cortecostituzionale.it/documenti/ download/doc/recent_judgments/S70_2015_en.pdf.

[55]De Nes & Pin, *supra* note 52 at 304; see also: Marta Picchi, *Tutela dei diritti sociali e rispetto del principio dell'eliquibrio di bilancio: La corte costituzionale chiede al legislatore di motivare*, Osservatorio sulle fonti 1 (2017).

[56]Cf. Chiara Bergonzini, *The Italian Constitutional Court and Balancing the Budget*, 12 European Constitutional Law Review 177, 185–86 (2016) (estimating the additional costs at €20 billion).

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consistent mechanism that is supposed to ensure that pensions are aligned with increases in the cost of living. This approach resembles the procedural review applied by the FCC to certain positive rights. The Corte Costituzionale later confirmed the constitutionality of the adapted law, also considering the "wide margin of appreciation" recognized by the ECtHR.[57]

The Italian "riserva del possibile" broadly overlaps with the German "Vorbehalt des Möglichen." In both jurisdictions, the proviso of the possible becomes relevant if a constitutional right is costly and its fulfillment depends on factual possibilities. Its application results in a limitation of the right relative to the factual feasibility as well as to political preferences. Both constitutional courts grant the legislator wide discretion when scarce public resources are at stake, and multiple demands are in conflict. The legislator's assessment is not subject to a structured proportionality review and strict judicial balancing. Instead, the constitutional courts enforce equality rights to prevent discrimination with respect to the distribution of scarce goods. The courts apply a narrower margin of discretion and stricter scrutiny if the legislator violates legitimate trust in the continuity and consistency of existing benefit schemes. In exceptional cases, the courts adjudicate minimum rights against which the proviso of the possible cannot be invoked. These common principles are now contrasted against the positive obligations doctrine applied by the ECtHR in similar cases.

III. The ECtHR's Positive Obligations Doctrine and Resource Constraints

The ECtHR recognizes that the rights of the ECHR correspond with positive state obligations, distinguishing between procedural and substantive obligations.[58] In particular, substantive obligations can significantly impact state budgets and require public resources. In the *Belgium Linguistic Case*, the Court, for the first time, acknowledged this positive dimension of the Convention rights. The applicants were French-speaking parents demanding that their children be taught in their mother tongue. The Court stated:

> The right to education [. . .] calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals. [. . .] such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention. [. . .] The Convention therefore implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter.[59]

This passage contains statements reminiscent of those above with the proviso of the possible. The Court addressed the distributive conflict over scarce resources and the tension between the individual and the public interest. It also mentioned the necessity of striking a fair balance and the inviolability of a "substance of the right." Since then, the court has developed different formulas and approaches to assess positive state obligations. In some cases, the court applies an "even wider" margin of appreciation due to the scarcity of resources (1). In other cases, the court interpreted the right "in a way which does not impose an impossible or disproportionate burden on the authorities" (2). However, the Court does not restrain from reviewing distributive decisions. For example, the court reviews benefits schemes with regard to discrimination in violation of Article 14 ECHR (3).

[57]Corte Cost., Decision No. 250/2017 (25 October 2017); cf. Donato Greco, *The Compliance of Retrospective Pension Legislation with the ECHR before the Constitutional Court*, XXVIII Italian Yearbook of International Law 471 (2018).

[58]The court differs between a "substantive aspect" and a "procedural aspect": *Öneryildiz v. Turkey*, App. No. 48939/99 (November 30, 2004), paras 97–118; cf. Jean-François Akandji-Kombe, Positive obligations under the European Convention on Human Rights 16 (2007).

[59]*Belgian Linguistic case*, App. Nos. 1474/62 et al. (July 23, 1968), para. 5.

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1. The "Even Wider" Margin of Appreciation

With respect to the fulfillment of the rights of the Convention, through its margin of appreciation doctrine, the ECtHR grants discretion to legislators and other public authorities. Given the pluralism of values among the Contracting States, reaching a consensus is an ambitious task. The ECtHR can only strive for an effective protection of certain minimum standards. By granting a margin of appreciation, the Court respects the plurality of values and refrains from taking the final decision.[60] Due to their "direct democratic legitimation," the Court sees the national authorities as "better placed" to "assess priorities, use of resources and social needs."[61] Beyond these considerations of legitimacy, the margin of appreciation doctrine reflects the Convention's indeterminacy and textual openness, which requires interpretation and specification like most constitutional legal texts.[62] Depending on the individual case, the ECtHR adjusts the width of the margin of appreciation. A narrow margin of appreciation results in strict scrutiny, often carried out through a proportionality review, while a wider margin of appreciation usually means that the court refrains from an in-depth assessment.[63] This flexible use of the margin of appreciation also affects the court's assessment of positive state obligations.

In *Abdulaziz,* the Court first held that "as far as those positive obligations are concerned [. . .] the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals."[64] Later, in *O'Reilley*, the Court stated that the margin of appreciation "is even wider when the issues involve an assessment of the priorities as to the allocation of limited State resources."[65] The Court thereby recognized the availability and scarcity of resources as a decisive criterion for adapting its margin of appreciation. Most of the quoted formula's decisions concern "general measures of economic or social policy."[66] In *HUC*, *Pentiacova*, *McDonald,* and *Sentges*, the claimants invoked the right to private life (Article 8 ECHR) with respect to health and demanded funding of costly therapies, treatments, and other benefits. In *O'Reilley*, the applicants complained about the lack of maintenance of the public roads in their county, which impaired their private lives. *Abdulaziz, Cabales, Balkandali, Tanko,* and *Dreshaj* were immigrants invoking their right to respect for family life against refusals of family reunifications and expulsions (Article 8 ECHR). In *Koufaki* and *Da Silva Carvalho Rico*, the claimants contested austerity measures that reduced their salaries and pensions, relying on their right to property under Article 1 of Protocol No. 1 to the Convention. The aforementioned rulings have in common that the legislators made crucial distributive decisions concerning the claimants' rights on a macro level. Although the Court always points to the requirement of a "fair balance that has to be struck between the competing interests of the individual and of the community as a whole,"[67] the Court abstains from carrying out judicial balancing to evaluate whether this criterion

[60]Janneke Gerards, *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, 18 Human Rights Law Review 495 (2018).

[61]*Hatton v. UK*, App. No. 36022/97 (July 8, 2003), para. 97; *Vavřička et al. v. Czech Republic*, Applications nos. 47621/13 et al. (April 8, 2021), paras 273–74; *Draon v. France*, App. No. 1513/03 (October 6, 2005), paras 107–08.

[62]Steven Greer, The margin of appreciation: Interpretation and discretion under the European Convention on Human Rights 14 (2000).

[63]Gerards, *supra* note 60 at 499.

[64]*Abdulaziz, Cabales and Balkandali v. UK*, App. Nos. 9214/80, 9473/81 and 9474/81 (May 28, 1985), para. 67; *Johnston v. Ireland* App. No. 9697/82 (18 December 1986), para. 55; *Ibrahim Tanko v. Finland*, App. No. 23634/94 (May 19, 1994); *Dreshaj v. Finland*, App. No. 23159/94 (19 May 1994). See also: *James et al. v. UK*, App. No. 8793/79 (February 21, 1986), para. 46.

[65]*O'Reilley v. Ireland*, App. No. 54725/00 (February 28, 2002, partial decision); see also: *Sentges v. The Netherlands*, App. No. 27677/02 (8 July 2003); *Pentiacova v. Moldova*, App. No. 14462/03 (January 4, 2005); *McDonald v. UK*, App. No. 4241/12 (May 20, 2014), para. 54; *HUC v. Romania*, App. 7269/05 (December 1, 2009), para. 64; *Koufaki and Adedy v. Greece*, App. Nos. 57665/12 and 57657/12 (May 7, 2013), para. 31.

[66]*Da Silva Carvalho Rico v. Portugal*, App. No. 13341/14 (September 24, 2015), para. 37.

[67]*Powell and Rayner v. UK*, App. No. 9310/81 (February 21, 1990), para. 41.

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has been met. Rather, the ECtHR respects the "State's freedom to decide whether or not to have any form of social-security scheme in place, or to choose the type or amount of benefits to provide under any such scheme."[68] Consequently, the Court does not carry out a fully-fledged proportionality review when it applies the wide margin of appreciation to allocative cases. In some of the cases, the Court did not enter into a proportionality test at all, dismissing the claims beforehand on grounds of inadmissibility.[69] In *Pentiacova*, the Court found the claim manifestly ill-founded, considering "that the applicants' claim amounts to a call on public funds which, in view of the scarce resources, would have to be diverted from other worthy needs funded by the taxpayer." Similarly, in *Sentges*, the Court ruled the application inadmissible since the national authorities would be "in a better position to carry out [. . .] an assessment of the priorities in the context of the allocation of limited State resources". In *McDonald,* the court addressed the proportionality of the non-fulfillment of a positive obligation but expressed, without a further assessment, that it was "satisfied that the national courts adequately balanced the applicant's personal interests against the more general interest." This "satisfaction" was not based on comprehensive judicial balancing. Instead, the court explicitly restrained from substituting "its own assessment" for the political assessment of the authorities, "notably in relation to the allocation of scarce resources."[70] By respecting the legislator's assessment within its margin of appreciation "unless" it "is manifestly without reasonable foundation,"[71] the ECtHR shifts the burden of justification and establishes a general *presumption of reasonableness* that can only be refuted if a distributive decision is evidently imbalanced.

Commentators noted that the concept of the margin of appreciation generally "lacks any normative force" as it does not indicate how to "strike a balance between individual rights and public interest."[72] The Court simply decides "not to intervene."[73] In relation to the cases investigated above, these observations apply. Even though the Court requires that the right is not deprived "of its substance,"[74] it has adjudicated concrete minimum obligations only in exceptional cases, particularly when high-ranking rights were concerned. For instance, the ECtHR defined the minimum living space for a detainee in prison.[75] The Court emphasized that states are obliged to fulfill these requirements "regardless of financial or logistical difficulties."[76] Consequently, the "wide" margin of appreciation ends where the "substance" of rights begins. This complementary relationship coincides with the one between the proviso of the possible and minimum rights under German and Italian constitutional law.

2. The Osman Test

In *Osman,* the ECtHR assumed a positive state obligation to take preventive measures to protect an individual whose life is at risk from the acts of another individual. The complaint was directed at an alleged failure by the police to prevent the murder and injury of two members of the Osman family. Investigating the scope of the state's protective duty under Article 2 ECHR, the Court considered the following:

[68]*Da Silva Carvalho Rico v. Portugal*, App. No. 13341/14 (September 24, 2015), para. 31.

[69]Cf. *Sentges v. The Netherlands*, App. No. 27677/02 (8 July 2003); *Pentiacova v. Moldova*, App. No. 14462/03 (January 4, 2005).

[70]*McDonald v. UK*, App. No. 4241/12 (May 20, 2014), paras 56–58.

[71]*Koufaki and Adedy v. Greece*, App. Nos. 57665/12 and 57657/12 (May 7, 2013), para. 39.

[72]George Letsas, *Two Concepts of the Margin of Appreciation*, 26 Oxf. J. Leg. Stud. 705, 711 (2006).

[73]Ronald MacDonald, *The Margin of Appreciation*, *in* The European System for the Protection of Human Rights 83, 85 (Ronald MacDonald, Franz Matscher & Herbert Petzold eds., 1993).

[74]*Da Silva Carvalho Rico v. Portugal*, App. No. 13341/14 (September 24, 2015), para. 44.

[75]*Muršić v. Croatia*, App. no. 7334/13 (October 20, 2016), paras 107, 136.

[76]*Id.*, para. 100.

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> [B]earing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct, and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.[77]

This formula became part of the settled case law of the Court and is known as the "Osman test." Pursuant to this test, a violation of the right to life guaranteed by Article 2 ECHR is only assumed if the authorities knew of a risk and "failed to take measures within the scope of their powers."[78] The cases in which the court relied on the formula concerned complaints about non-action by state police authorities and other local administrative bodies in situations where they were responsible for protecting the right to life.[79] Similar principles were applied when other convention rights required protective measures. In *Plattform Ärzte für das Leben*, the court held that Article 11 ECHR implies a positive state obligation "to take reasonable and appropriate measures to enable lawful demonstrations." The ECtHR, however, limited the obligation to the extent that the state "cannot guarantee this absolutely" and granted the police forces "a wide discretion in the choice of the means to be used."[80]

There are similarities and linkages between the Osman test and the "even wider" margin of appreciation, as both respect the difficulties public authorities encounter when making use of limited resources. In *Öneryildiz*, the Court, referring to Osman, accepted the "argument that in this respect an impossible or disproportionate burden must not be imposed on the authorities" and explained that "this results from the wide margin of appreciation States enjoy [. . .] in difficult social and technical spheres."[81] However, the Court's scrutiny in *Osman* and the cases named in the preceding paragraph has been stricter. The reason for the different treatment of the cases could be a matter of perspective. In *Osman* and most of the other cases where the "Osman test" reappeared, the ECtHR primarily focused its review at the *micro level* of a certain administrative body and the question of whether it could have acted differently to safeguard a Convention right, taking into consideration the available resources, in particular, the "knowledge" of the relevant authority.[82] Under the Osman test, it is not necessary to question the allocation of resources at the *macro level*. Even if the rulings concluded the authorities could have done more to protect the right, the potential cost of the respective measures was limited to the case.[83] The Court could find that the failure to act was due to organizational failure and the *inefficient* use of the available resources.[84] If the Court held the legislator liable for a failure to protect, it called for regulatory and organizational measures rather than for additional expenses and a reallocation of the overall budget.[85] While the margin of appreciation primarily refers to the political latitude in prioritizing certain needs over others, the Osman Test addresses the factual feasibility of particular protective actions given the available resources in a specific situation. These two doctrinal figures correspond

[77]*Osman v. UK*, App. No. 23452/94 (October 28, 1998), para. 116.

[78]*Id.*

[79]*Giuliani and Gaggio v. Italy*, App. No. 23458/02 (March 24, 2011), para. 245; *Maiorano and Others v. Italy*, no. 28634/06 (December 15, 2009), para. 105; *Rantsev v. Cyprus and Russia*, App. No. 25965/04 (January 7, 2010), para. 219; *Özgut Gündem v. Turkey*, App. No. 23144/93 (March 16, 2000), para. 43; *Edwards v. UK*, App. No. 46477/99 (March 14, 2002), para. 55; *Gongadze v. Ukraine*, App. No. 34056/02 (November 8, 2005), para. 165.

[80]*Plattform "Ärzte für das Leben" v. Austria*, App. No. 10126/82 (June 21, 1988), para. 34.

[81]*Öneryildiz v. Turkey*, App. No. 48939/99 (November 30, 2004), para. 107.

[82]Cf. BEIJER, *supra* note 3 at 53, referring to the Osman decision as a kind of "knowledge test."

[83]For instance, in *Öneryildiz* the Court stated that the local authority should have installed a gas-extraction system timely to prevent the situation of becoming fatal.

[84]The "ineffectiveness" of investigations was assumed in: *Dink v. Turkey*, App. No. 2668/07 (September 14, 2010), para. 91; *Gongadze v. Ukraine*, App. No. 34056/02 (November 8, 2005), paras 175–80; *Rantsev v. Cyprus and Russia*, App. No. 25965/04 (January 7, 2010), paras 232–42.

[85]*Aydoğdu v. Turkey*, App. No. 40448/06 (August 30, 2016), para. 86; *Şentürk v. Turkey*, App. No. 13423/09 (April 9, 2013), paras 80–82.

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largely with the two functions of the proviso of the possible. The Osman test mirrors the proviso of the factually feasible, whereas the wide margin of appreciation mirrors the proviso of the politically possible.

3. Benefit Schemes and the Non-Discrimination Principle

On several occasions, the ECtHR reviewed whether the non-delivery of state benefits and services to certain groups violated Article 14 of the Convention prohibiting discrimination based on the "status" of a person. Since *Stec and Others v UK*, the Court ruled that if a state decides to create a benefits scheme, "it must do so in a manner which is compatible with Article 14."[86] This applies even where the Convention does not include a right to receive certain benefits. The right granted on the grounds of the prohibition of discrimination is, therefore, only of a *participatory* and *derivative* nature. Generally, its recognition depends on the legislator upholding the respective benefits scheme. If the legislator decided to abolish the scheme for everyone, the participatory right would also lose recognition. Consequently, if the ECtHR rules that a benefits scheme is discriminatory and violates Article 14, the Contracting State can rectify the violation either by extending the benefit to the discriminated group ("levelling up") or by abolishing the benefits scheme altogether ("levelling down").[87]

IV. Conclusion of the Comparative Study

The comparison of the proviso of the possible as applied in Germany and Italy and the ECtHR's positive obligations doctrine showed that national constitutional courts and the ECtHR apply similar principles when the rights under review depend on the availability of public resources. The duty to use the available resources efficiently for the fulfillment of rights and the principle of non-discrimination, which results in a derivative right to participate in existing benefit schemes, are recognized in all jurisdictions. To this extent, the scope of the rights cannot be restricted due to resource scarcity. Beyond that, the courts acknowledge minimum rights as non-derogable and preclude them from resource constraints. The concept of a "wide" margin of appreciation and the proviso of the possible address the relationship between individual and collective needs.[88] Courts use these concepts to respect the prerogative role of politics in deciding allocative conflicts. Against the backdrop of this broad doctrinal overlap, it is not surprising that the ECtHR accepted the application of the proviso of the possible by the Portuguese Constitutional Court. Nevertheless, the Court did not consider it necessary to adapt its own doctrine. The proviso of the possible has not occurred in the court's case law ever since. It remains to be seen whether the ECtHR will come back to it again when deciding on the pending application against German school lockdowns. Although the comparison did not reveal significant differences in legal practice, the question arises whether there are common principles underlying the different doctrinal terminology. While the ECtHR maintains diverging terms and formulas to deal with rights conflicts over scarce resources, the proviso of the possible functions as a general and overarching "key term"[89] to moderate such conflicts. For that reason, the proviso of the possible is an appropriate headline for theoretical considerations on the general "idea of resource constraints as

[86]*Stec v. UK*, Apps. No. 65731/01 and 65900/01 (July 6, 2005), para. 55; *Andrle v. Czech Republic*, App. No. 6268/08 (February 17, 2011), para. 30; *Bah v. UK*, App. No. 56328/07 (September 27, 2011), para. 40; *L.F. v. UK*, App. No. 19839/21 (June 16, 2022), para. 42.

[87]*Khamtokhu and Aksenchik v. Russia*, App. no. 60367/08 (January 24, 2017), Concurring Opinion Turković, paras 6–10; Dissenting Opinion Pinto de Albuquerque, paras 23, 46. Cf. also Tilmann Altwicker, *Social justice and the judicial interpretation of international equal protection law*, 35 Leiden Journal of International Law 221, 239 (2022).

[88]Cf. Letsas, *supra* note 72 at 710–15.

[89]Denninger, *supra* note 31.

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limiting rights."[90] The following inquiry intends to integrate the identified common legal concepts of European fundamental rights law into a comprehensive model of the proviso of the possible.

C. A Theoretical Inquiry of the Proviso of the Possible

The findings from the comparison of jurisprudence between European courts raise questions in different fields of legal theory. A theoretical model of the proviso of the possible, which can be expected to work in legal practice, should answer these questions.[91]

The *first* and most general question concerns the *tension between norms and facts*. The proviso of the possible and similar concepts of "feasibility conditions"[92] challenge the legal validity of constitutional norms. Putting the validity of the law into question when legal duties cannot be fulfilled is not a novel phenomenon. It resulted in the formulation of principles like "Ought implies can,"[93] "impossibilium nulla obligatio est,"[94] or "ultra posse nemo obligatur".[95,96] Pursuant to these principles, impossible obligations are invalid. Human rights scholars such as Maurice Cranston argued against positive rights, stating that they can never be rights if they are impossible to fulfill.[97] Of course, if legal norms are completely unattainable, it is "senseless" to uphold their validity.[98] However, it will rarely be proven with absolute certainty that a legal norm is unfeasible for all time. As long as a slight opportunity of feasibility remains, any legal norm transports an "assumption of possibility" and thereby sets a "realization marker."[99] Any norm functions as a goal for approximation, making the addressee "act in such a way that the description of the real approximates the description of the ideal."[100] This understanding of norms as goals for approximation should be reflected in a differentiated theory of the structure of legal norms. Robert Alexy's "rule-principle" model offers an approach for acknowledging the proviso of the possible as a structural concept of law resulting from its textual openness (I).

The *second* question concerns the *methodological limits of adjudication* indicated in the jurisprudence of all courts in the comparative study. The courts investigate costly rights only up to a certain point. They particularly review whether the authorities used their available resources *efficiently* and whether they observed the principle of *non-discrimination* when distributing the resources to individual persons or groups. *Minimum rights* often remain a theoretical concept and have rarely been specified by constitutional courts. Beyond these standards of review, courts refrain from substituting the political evaluation of individual rights and public needs with their own judicial assessment. This is remarkable because, in theory, balancing as part of a structured proportionality test is still considered the key method for resolving all fundamental rights

[90]Vicki C. Jackson, *Positive obligations, positive rights, and constitutional amendment*, *in* Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations 109, 125 (Tsvi Kahana & Anat Scolnicov eds., 2016); cf. also: Walter Kälin & Jörg Künzli, The Law of International Human Rights Protection 88, 105 (2nd ed. 2019); Stephen Holmes & Cass R. Sunstein, The Cost of Rights. Why Liberty Depends on Taxes (1999).

[91]For a detailed investigation of these theoretical questions, cf. Munaretto, *supra* note 7.

[92]James W. Nickel, *How Human Rights Generate Duties to Protect and Provide*, 15 Hum. Rights Q. 77, 80 (1993).

[93]Cécile Fabre, Social Rights Under the Constitution: Government and the Decent Life 31 (2004); Hans Albert, Traktat über kritische Vernunft 91 (5th ed. 1991).

[94]Digesta 50, 17, frag. 185.

[95]Immanuel Kant, *Zum ewigen Frieden, in* Werkausgabe XI 195, 228 (1977).

[96]For a collection of such principles, cf. *Güzelyurtulu et. al. v. Cyprus and Turkey*, App. No. 36925/07 (4 April 2017), Dissenting Opinion Serghides, para. 47 (k).

[97]Maurice Cranston, What are Human Rights? 66 (1973).

[98]Hans Kelsen, Pure Theory of Law 11 (2nd ed. 1967).

[99]Christoph Möllers, The Possibility of Norms: Social Practice Beyond Morals and Causes 84, 91–92 (2020).

[100]Georg Henrik von Wright, *Is and Ought*, *in* Normativity and Norms: Critical Perspectives on Kelsenian Themes 365, 375 (1998).

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conflicts, including those over positive rights.[101] The doctrine of legal balancing assumes that rights can be ranked due to the weight attached to them by the Constitution. However, ranking rights becomes an intricate task when multiple rights and public needs compete over limited resources (II).

The *third* question refers to the *legitimacy* of distributive decisions. Legitimacy is the essential precondition for making collectively binding decisions. Distributive decisions need a high level of legitimacy because they concern the democratic community as a whole. If a right is costly, the expenses must be borne by others who must pay taxes or renounce their individual needs. If fundamental rights norms have an open structure that requires concretization relative to the factual possibilities (I) and legal methods are limited in adjudicating allocative conflicts (II), it remains to be seen who is "better placed" to take the final decision. Decisions become inevitable when scarcity requires the state to choose between competing rights and public needs. From the comparative study, one could learn that courts see the legislator as primarily responsible for making those allocative decisions. Applying the proviso of the possible thus indicates a certain understanding of the separation of powers and democratic legitimacy (III).

I. The Normative Structure of Rights as Principles

Robert Alexy illustrated the normative structure of law in the rule-principle model. Regarding fundamental rights, this model differentiates between rights as principles and rights as rules.[102] While rules provide definite commands, principles are merely general goals. A right can be both a principle and a rule depending on the stage of its normative concretization in different contexts. While the abstract rights laid down in a constitutional text are principles, a court applying a certain right to a single case might derive a rule from it. Due to their textual and normative structure, rules and principles relate differently to the factual and legal possibilities. According to Alexy, "principles are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities." Principles in this way command "optimization."[103] Critics have argued against the understanding of rights as optimization requirements, which would mean recognizing unlimited "prima facie rights to everything."[104] However, optimization requirements are only a starting point for a transparent and comprehensive review of rights. The "ideal ought" does not have to be fulfilled in its entirety, only approximately.[105] As it is impossible to achieve the optimums of competing principles simultaneously under the condition of limited factual possibilities, principles "always have a supervening character." The "concept of supervenience" means that, prima facie, principles may demand the impossible.[106] When applied to a case, the principle's "ideal ought" must be transformed into a rule expressing the "real ought."[107] In this process, principles are subjected to the proviso of the possible inherent in their normative structure.[108] Rights as principles can be

[101]Katharine G. Young, *Proportionality, Reasonableness, and Economic and Social Rights*, *in* PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 248 (Vicki C. Jackson & Mark Tushnet eds., 2017); Matthias Klatt, *Positive rights: Who decides? Judicial review in balance*, 13 ICON 354 (2015); Xenophon Contiades & Alkmene Fotiadou, *Social rights in the age of proportionality: Global economic crisis and constitutional litigation*, 10 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 660 (2012).

[102]Alexy, *supra* note 36 at 44.

[103]*Id.* at 47.

[104]GRÉGOIRE C. N. WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS 213–14 (2009); Stavros Tsakyrakis, *Disproportionate Individualism*, *in* EUROPE'S JUSTICE DEFICIT 235, 237–41 (Dimitry Kochenov, Gráinne de Búrca, & Andrew Williams eds., 2015).

[105]ROBERT ALEXY, LAW'S IDEAL DIMENSION 190–204 (2021).

[106]Alexy, *supra* note 36 at 347.

[107]Robert Alexy, *On the Structure of Legal Principles*, 13 RATIO JURIS 294, 300 (2000); ALEXY, *supra* note 36 at 82.

[108]This has been recognized by: CANOTILHO, *supra* note 14 at 1255; MATTHIAS JESTAEDT, DEMOKRATIEPRINZIP UND KONDOMINIALVERWALTUNG: ENTSCHEIDUNGSTEILHABE PRIVATER AN DER ÖFFENTLICHEN VERWALTUNG AUF DEM PRÜFSTAND DES VERFASSUNGSPRINZIPS DEMOKRATIE 586 (1993).

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limited even if their fulfillment is theoretically possible if the achievement of other individual rights or political aims takes priority and renders the (complete) fulfillment of the respective right relatively impossible. In contrast to principles, rules as definite commands are supposed to lie within the scope of the factually possible:

> [R]*ules* are norms which are always either fulfilled or not. If a rule validly applies, then the requirement is to do exactly what it says, neither more nor less. In this way rules contain fixed points in the field of the factually and legally possible.[109] [. . .] This decision can run up against legal and factual impossibility, which can lead to the rule's invalidity.[110]

The absolute nature of rules precludes the invocation of relative impossibility. Only in rare cases of complete impossibility can they become invalid. If the addressee can act, it must act. However, since rules are derived from principles, applying the proviso of the possible to principles might prevent the establishment of impossible rules. If circumstances change and the factual possibilities diminish, a rule derived from principles might change in a way that makes it feasible again.

II. The Proviso of the Possible and the Limits of Adjudication

Constitutional law scholars have advanced various ideas on how to integrate the proviso of the possible into legal doctrine and its methods of review. Even though the proportionality test is the established method of fundamental rights review, it is contested whether this test is applicable to all types of rights. The case law compared above has shown that the courts, in practice, restrain from carrying out a comprehensive proportionality test. Instead, they primarily test whether the state has taken steps to fulfill the right, used its resources efficiently, and acted in a non-discriminatory manner. These observations make it necessary to examine more closely why principles like "equality" and "efficiency" are more suitable for reviewing positive rights than the principle of "proportionality."

1. A Shortened Proportionality Test: Stranding in "Pareto-land"

Proportionality review is a two-stage test, starting with an analysis of the right's scope and an identification of an *interference* with that right at the first stage, followed by a judicial review of the interference at the second stage, which consists of four sub-stages: (a) *legitimate aim*, (b) *suitability and necessity* and (c) *proportionality stricto sensu*.[111] This last stage is the "heart" of proportionality review. The colliding principles are *weighed* against each other in a dogmatic procedure, better known as *balancing*. According to the understanding of rights as optimization requirements, almost any inaction by the state qualifies as an interference with that right. For example, a right to education might grant a claim to certain educational services, and if the state does not provide the services, the right is not fulfilled. For that reason, most cases will enter the second review stage.

a. The Legitimate Aim of State Inaction

Proportionality demands that the state pursues a legitimate aim when interfering with rights. This condition cannot easily be applied to positive rights as it is doubtful whether the state pursues any aim when doing nothing. Ingrid Leijten correctly emphasized that "when government inaction is concerned, 'not taking a measure' is not really directed at any aim at all."[112] Public authorities, while not weighing every possible option to act, at least consider selected options and prioritize

[109] Alexy, *supra* note 36 at 48.
[110] *Id.* at 57.
[111] Francisco J. Urbina, A Critique of Proportionality and Balancing 5 (2017).
[112] Ingrid Leijten, Core socio-economic rights and the European Court of Human Rights 108 (2018).

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some over others. The prioritized options often form a complex bundle of heterogeneous principles. One specific state inaction is almost never precisely attributable to another specific action that has been performed instead. Statements like "the money spent for the military would have been better spent on schools" ignore the complexity of distributive decisions as there are usually not just two but multiple options as to how public funds can be spent. This makes it hard to identify the legitimate aim of state inaction for the purpose of proportionality review. The mere "lack of resources" alone cannot "justify non-compliance" with fundamental rights.[113] It has been suggested that an unfulfilled positive right could be weighed against a "principle of financial capacity,"[114] a "principle [. . .] of the sparing use of public resources,"[115] the "financial resources available to the state,"[116] simply the "rights of others,"[117] as well as formal principles like the "principles of the separation of powers and democracy."[118] Looking back at the case law examined in Chapter B, one also finds broad, abstract catch-all aims that are supposed to be balanced by the legislator. The ECtHR calls for striking a "fair balance" between the positive obligations and the "demands of the general interest of the community."[119] The constitutional courts expect the legislator to balance the fundamental rights to state benefits against "other welfare concerns as well as the demands of overall economic balance" (Germany) and "other constitutionally protected interests" (Italy).[120] These principles provide only abstract reasons that might justify the limitation of state benefits in general. They share the common *public interest to save resources and spend them on purposes other than the claimant's right*.[121]

b. Suitability and Necessity – The Pareto Test

The intermediary stages of suitability and necessity tend to be underestimated, though they could play a significant role in the judicial review of positive rights. Reviewing these principles is less challenging than the final balancing (c) since it does not require carrying out an interpersonal utility comparison.[122] *Suitability* presupposes that the action or inaction interfering with the right identified at the first stage of the proportionality test promotes the achievement of the legitimate aim. The *necessity* test then checks whether alternative options for achieving the aim are equally suitable but *less restrictive*. However, the state is not obliged to choose a *less effective* means. Both principles are expressions of the general principle of Pareto efficiency.[123] In accordance with this principle, it is objectively unjust (*Pareto inferior*) to deny a distribution of goods to one person that could be made without anyone else being worse off.[124] In the allocation cases investigated here, the state cannot refuse to fulfill a fundamental right if the omission results in even higher costs or if money has already been spent and using the available resources is not causing additional costs.

First, state inaction is not *suitable* for saving resources if, in a particular situation, investing public funds would save even more resources. In some evident cases, courts ruled that inaction was not suitable to save money because the funds saved by doing nothing were lower than the costs due to the omission. In *Plyler v. Doe,* the U.S. Supreme Court recognized the "significant

[113]Julia Laffranque, *Opening Speech*, *to* DIALOGUE BETWEEN JUDGES 2013: IMPLEMENTING THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN TIMES OF ECONOMIC CRISIS, 6, 9 (EGMR ed., 2013).

[114]Robert Alexy, *On Constitutional Rights to Protection*, 3 LEGISPRUDENCE 1, 12 (2009).

[115]Alexy, *supra* note 36 at 400.

[116]Klatt, *supra* note 101 at 356.

[117]AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 431 (2012).

[118]Alexy, *supra* note 36 at 341.

[119]*Da Silva Carvalho Rico v. Portugal*, App. No. 13341/14 (September 24, 2015), para. 41.

[120]*Supra* notes 15 and 43.

[121]Munaretto, *supra* note 7 at 189–91.

[122]BERNHARD SCHLINK, ABWÄGUNG IM VERFASSUNGSRECHT 177 (1976).

[123]BARAK, *supra* note 117 at 320–21; Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMB. LAW J. 174, 198 (2006); Robert Alexy, *Proportionality and Rationality*, *in* PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 13, 15–16 (Vicki C. Jackson & Mark Tushnet eds., 2017).

[124]See: VILFREDO PARETO, MANUEL D'ÉCONOMIE POLITIQUE 354 (1909).

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social costs" caused by the denial of public education to children of illegal migrants and concluded "that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation."[125]

Second, state inaction is not *necessary* to save costs if the resources already invested are inefficiently distributed. For example, if a state bought a certain amount of vaccine doses but failed to distribute these doses in a timely manner, with the result that fewer people get vaccinated than would have been possible, the right to health is infringed. However, no court will adjudicate a substantive claim to a vaccine dose under these circumstances, but it may enforce a claim to an efficient procedure that might increase the chance to participate earlier in the existing capacities.

The case law presented in Chapter B has demonstrated how courts can review positive rights under the Pareto efficiency criterion. The German FCC checked whether the capacities of higher education at universities were efficiently calculated and exhausted, while the ECtHR assumed a violation of the right to the protection of life, either because police authorities had carried out investigations inefficiently or because public health care systems were badly organized. The proviso of the possible is inadmissible in these types of cases as non-performance of the right is not due to resource constraints but due to the inefficiency of public authorities. To achieve Pareto-optimality, the authorities must distribute the already allocated resources more efficiently. The reallocation of the overall budget is not necessary. For that reason, a judgment obliging a state to achieve a Pareto-efficient distribution of benefits will not incur opportunity costs. Consequently, the Pareto efficiency test will never result in a substantive state obligation to spend more resources to promote a fundamental right. In this way, the right to a Pareto-efficient distribution is only of a procedural nature, like the participatory right to state benefits grounded in the principle of equality.

c. Balancing on a Spider Web

When leaving "Pareto-land,"[126] an interpersonal utility comparison becomes inevitable. At this review point, "a fair balance between the competing interests of the applicants and the community as a whole" must be struck.[127] This is the starting point for the final part of proportionality review, the test of *proportionality stricto sensu*. Proportionality is supposed to be examined through the *balancing* of the right under review with competing principles. Balancing is the established standard method of legal reasoning in fundamental rights law because its application ensures that the stakes of all concerned stakeholders are properly disclosed and compared.[128] Its transparent structure makes this method unsuitable to "hide judicial activism" and "political intentions."[129] The translation of the legal operation of balancing into an arithmetic formula ("Weight formula"[130]) is supposed to be proof of its comprehensive rationality. In this way, the rules of an open legal discourse are combined with the economic theory of rational choice. The result of balancing is the establishment of a "conditional" preference relation between the competing principles.[131] This preference relation expresses which right must be prioritized in a certain situation. At first glance, this methodological approach appears to be suitable for the review of

[125]U.S. Supreme Court, *Plyler v. Doe*, 457 U.S. 202 (1982) 230.

[126]For this 'picture,' see Mark Tushnet, *Making Easy Cases Harder*, *in* PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 303, 313 (Vicki C. Jackson & Mark Tushnet eds., 2017).

[127]*Pentiacova v. Moldova*, App. No. 14462/03 (January 4, 2005); *Da Silva Carvalho Rico v. Portugal*, App. No. 13341/14 (September 24, 2015), para. 41.

[128]Cf. MATTHIAS KLATT & MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY 45–73 (2012); Alexy, *supra* note 123.

[129]This remarkable observation stems from NIELS PETERSEN, PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATION IN CANADA, GERMANY AND SOUTH AFRICA 9, 156, 189 (2017).

[130]For the application to positive right cases, see Alexy, *supra* note 114 at 7–9; Matthias Klatt, *Positive Obligations under the European Convention on Human Rights*, 71 ZAÖRV 691, 698–700 (2011).

[131]Alexy, *supra* note 36 at 52.

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distributive conflicts. If this were the case, the proviso of the possible would "simply express the need for the right to be balanced."[132] Why have courts not assessed with strict scrutiny whether the "fair balance" between the competing needs of the rightsholder and the community has been struck? From the comparative study in Chapter B, it appears that the proviso of the possible expresses the failure of balancing and, thereby, the limits of adjudicating distributive conflicts through balancing. The reason for that could lie in the "polycentric" structure of such conflicts and the lack of a "common metric"[133] as a prerequisite for rational balancing.

Allocative conflicts differ decisively from *classical* fundamental rights conflicts, such as the conflict between the mother's right to abortion and the life of the unborn child or the smoker's right to smoke and the right to health of people exposed to the smoke. In the latter cases, the conflict arises from the natural incompatibility of the rights. The proviso of the possible applies in allocative conflicts when rights must be limited only due to their costs and the necessary prioritization of needs. Fundamental rights to certain benefits and the public interest in using the resources for other purposes would not compete if the community's resources covered the costs of all individual and collective needs.[134] Conflictual relations between those *positive* needs only occur when and in so far as it is not possible to fulfill them altogether due to a limitation of the factual possibilities. When allocative conflicts occur, they are not restricted to a limited number of rights and policies as in the classical binary conflict situation. Instead, all legitimate needs, which could be satisfied by accessing the relevant funds, get involved. At this point, transparent balancing requires that all individual and collective needs hidden behind catch-all-aims, such as the "rights of others" and the "competing substantive principles," be revealed.[135] Introducing all these principles and the corresponding needs into the balance means introducing virtually everyone's interest.[136] While someone would like to pay less tax, someone else might want to be prioritized in the allocation over the claimant, and a third party could want the state to invest more in a space program or in public theatres.

A simple example can demonstrate the structure of such allocative conflicts. For that purpose, we assume that there are ten legitimate needs. The needs are based on different fundamental rights and legitimate public policies. The fulfillment of each of the needs would cost €1. At that specific point in time, the responsible state disposes of a budget of €10 covering all needs. In this situation, there is no conflict between rights and policies. All rights and policies can be (optimally) fulfilled. Later, the budget decreases to €9. Now, the state has to prioritize among the needs and refuse the fulfillment of one of the needs. Balancing would require comparing and weighing all of the needs against each other, resulting in a number of preference relations of 45(!). Considering that the number of needs can be much higher, this example only gives an impression of the complexity of distributive conflicts. If one tries to visualize the conflictual structure by linking the needs as dots on a map, the result will resemble the structure of a polycentric "spider web." Lon Fuller described the complications that occur in any attempt to solve polycentric conflicts: "A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole."[137] Polycentric conflicts may not be "unsuitable for adjudication."[138] Nevertheless, it is challenging to consider all the "interests of non-represented persons" when adjudicating such conflicts.[139]

[132] *Id.* at 346 (in this translation by Julian Rivers: "reservation of the realizable").

[133] Cécile Fabre, Constitutionalising Social Rights, 6 The Journal of Political Philosophy 263, 278 (1998).

[134] One could also differentiate between the "conflict" and the "competition" of obligations. Cf. Vladislava Stoyanova, Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries 95 (2023).

[135] Alexy, *supra* note 36 at 344.

[136] Jeff A. King, Judging Social Rights 5 (2012).

[137] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 395 (1978).

[138] Cf. Jeff A. King, *The Pervasiveness of Polycentricity*, P.L. 101 (2008).

[139] King, *supra* note 136 at 195–96.

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The establishment of preference relations in this conflictual setting would require a constitutional ranking of all competing principles.[140] This ranking could only be established if the values of the principles could be measured on a ratio scale.[141] However, no "common metric" exists for fundamental rights and other constitutional principles. In contrast to the economic theory of rational choice, constitutional theory cannot resort to a neutral currency, such as the market price of goods, to assess the rationality of a distributive decision.[142] No constitution or charter of rights provides guidance for allocating the "marginal dollar" or euro that "may be more wisely spent on reducing pollution or strengthening the military or improving the quality of the roads."[143]

The conflict in question should not reach a level of complexity that exceeds the "connective capacity" of the legal system so that it "is no longer possible to relate every element to every other one."[144] If multiple rights and other legitimate needs compete for the state's limited resources, the connective capacity of the balancing method as a means for legal decision-making gets exhausted.[145]

2. Do Equality Rights have Costs, too?

While the proportionality test and balancing fail to establish a value-based ranking of multiple competing needs, equality rights might at least guarantee everyone non-discriminatory participation in state benefits. Equality rights demand that public resources allocated by the budgetary legislator at the macro level be distributed to individual beneficiaries at the micro level free from discrimination. The principles of equality and non-discrimination result in a derivative right to participate in existing capacities. This right also protects receivers of state benefits from being unequally treated through reductions of their benefits. The burdens of retrogressive measures must be shared equally. Deviations from the principle of equality require justification. The recognition and enforcement of the principle of equality and non-discrimination in allocative conflicts has been observed in all the jurisdictions, compared in Chapter B. The German FCC has subjected a right to educational services to the proviso of the possible but enforces a right to equal participation in the existing capacities of educational facilities, while the ECtHR, on several occasions, reviewed whether the access to existing state benefits schemes was discriminatory. In Italy, the Corte Costituzionale reviewed austerity measures against the principle of equality, checking whether different groups were treated unequally by the retrogressive legislation without reasonable cause.

Why is the principle of equality more suitable to review allocative conflicts from a fundamental rights perspective? The reason is the scope of non-discrimination review remains focused on an appropriate comparator group, meaning that a court will only test whether, for instance, students applying for the same study programme or patients suffering from a similar illness and in need of a similar treatment get an equal share of the state benefits allocated for their specific needs. Therefore, a student applying for university can claim to be treated equally with other applicants. However, if his application has been rejected in a non-discriminating procedure, he may not claim that the state creates additional capacities at the expense of other legitimate needs.[146]

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[140]See Ernst-Wolfgang Böckenförde, *Fundamental Rights: Theory and Interpretation [1974]*, *in* CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS 235, 284 (Miriam Künkler & Tine Stein eds., 2017).

[141]Petersen, *supra* note 129 at 42.

[142]On the non-existence of a "common denominator" for the public realm cf. HANNAH ARENDT, THE HUMAN CONDITION 57 (2nd ed. 1998).

[143]ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW 92–93 (2014).

[144]See, for this definition of complexity from a sociological perspective: NIKLAS LUHMANN, SOCIAL SYSTEMS 24 (John Bednarz trans., 1995).

[145]Cf. for a comprehensive critique of balancing with regard to allocative conflicts: see Munaretto, *supra* note 7 at 182–229.

[146]33 BVerfGE 303 – *Numerus Clausus I*.

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Due to resource constraints, there is no reason to restrict this right to participate in existing capacities in a non-discriminating procedure because the legislator is not obliged to reallocate the budget. In many cases, the discrimination can even be remedied in a cost-neutral way: in order to treat everyone equally without causing higher costs, the legislator may either lower the quality of the services or discontinue the services altogether.[147] Some authors have criticized this option of "levelling down," arguing that equality understood in this way would leave everyone worse off.[148] This perspective ignores the inevitable incurrence of the opportunity costs of "levelling up." If the legislator were sanctioned to "level up" the capacities at stake to achieve the desired equality, the additional costs would make the reduction or omission of other state services necessary. "Levelling up" a state benefit in favor of one applicant always requires "levelling down" other benefits. Evaluating such trade-offs would require the court to carry out its own balancing and substitute its own assessment for the legislator's. However, for the reasons outlined above, judicial balancing fails in allocative conflicts. For that reason, "levelling down" is acknowledged by the judiciary as a legitimate option to comply with the principle of equality.[149] Otherwise, the enforcement of equality rights would not be cost-neutral. Even though the principle of non-retrogression has often been propagated, it has never been recognized by constitutional courts as a legal principle.[150]

The right to equal participation in state benefits is a mere procedural and derivative right that exists only as long as the state voluntarily provides a benefit. However, it cannot be assumed that such rights can always be fulfilled free of charge. Procedural rights incur procedural costs because administrating the distribution of goods occupies technical resources and administrative staff.[151]

III. The Quest for Legitimacy: Who decides about the Possible?

If legal balancing does not reveal whether a positive right is preferred over other competing needs, a court has options: it can prioritize the right regardless of the outcome of balancing and place a duty on the state to give its reasons. It would then be up to the authorities to justify the non-fulfillment of the right. If their reasoning is not persuasive, the right will still trump the will of the majority. This is what legal theorists call the "priority-to-rights-principle."[152] While this approach must be applied when the state actively interferes with personal freedoms, it is unsuited for resolving allocative conflicts.[153] Another option would be to shift the burden of justification by granting a wide margin of discretion to the public authorities while not placing a high burden of justification on them.[154] As demonstrated above, constitutional courts usually do this in conflicts over scarce resources. Courts acknowledge both the "epistemic discretion" in assessing the factual possibilities as well as the "structural discretion" in prioritizing politically preferred options over others.[155] Discretion results both from the textual openness of fundamental rights norms and the

[147] 22 BVerfGE 349 (360–63) – *Waisenrente*; cf. also: Wiltraut Rupp-von Brünneck, *Verfassungsgerichtsbarkeit und gesetzgebende Gewalt: Wechselseitiges Verhältnis zwischen Verfassungsgericht und Parlament*, 102 AöR 1, 19 (1977).

[148] Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Levelling Down in Equality Law*, 46 Wm. & Mary L. Rev. 513 (2004).

[149] See also for "levelling down" as a legitimate option to comply with equality rights and the principle of non-discrimination in EU law: Opinion AG Bobek, Case C-193/17, para. 148, 154–71 (with further references to the CJEU's case law); Germany: 60 BVerfGE 16 (43).

[150] The Portuguese Tribunal Constitutional has expressly refused the recognition of such a principle considering the cost of state benefits and the changing scope of possibilities: T.C., Decision No. 862/2013 (December 19, 2013).

[151] Cf. Tushnet, *supra* note 126 at 313.

[152] Steven Greer, *Constitutionalizing Adjudication under the European Convention on Human Rights*, 23 Oxf. J. Leg. Stud. 405, 413–14 (2003); Eva Brems & Laurens Lavrysen, *'Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights*, 15 Hum. Rights Law Rev. 139, 144 (2015).

[153] Cf. Davor Šušnjar, Proportionality, Fundamental Rights, and Balance of Powers 110 (2010).

[154] For the interdependence of 'margins of appreciation' and the burden of justification, see Gerards, *supra* note 60 at 500.

[155] Cf. for this differentiation: Alexy, *supra* note 36 at 392–97; Matthias Klatt & Johannes Schmidt, *Epistemic discretion in constitutional law*, 10 International Journal of Constitutional Law 69 (2012).

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limits of adjudication in complex polycentric conflicts. Beyond this, granting discretion means assigning decision-making powers and prerogatives to other branches. By refraining from taking the final decision constitutional courts define their role and function within a particular institutional framework, and draw a line between law and politics. The compared case law has shown that all courts share the general assumption that "it is first of all up to the legislatures to decide how to allocate the financial resources of a state, thereby considering all the needs of society, and deciding upon priorities."[156] The courts only intervene in exceptional cases if the distribution of scarce goods is evidently imbalanced. In this respect, the application of the proviso of the possible and the margin of discretion linked to it amounts to an "inversal" of the principle of proportionality.[157] Consequently, the burden of justification shifts. Accordingly, the state does not carry the primary burden to prove the reasonableness of its inaction. Instead, it is up to the applicant to justify why the alleged entitlement to state benefits should be "so important from the perspective of constitutional law that decisions about them cannot be left to a parliamentary majority."[158] Applying the proviso of the possible thus means acknowledging the principle *that distributive decisions can and should be left to a parliamentary majority*. This principle prioritizes political autonomy over the autonomy of individual rightsholders in allocative conflicts, thereby presupposing a certain model of the separation of powers (1). As a principle, it is not absolute, meaning that it does not preclude the judiciary from reviewing minimum rights to safeguard individual autonomy in exceptional cases (2).

1. The Proviso of Also Being Possible Otherwise

The constitutional concept of the separation of powers is grounded in the tension between individual and collective self-determination.[159] It has been demonstrated through this investigation that individual and collective needs compete when scarce resources are at stake. The separation of powers is supposed to guarantee that both the individual and public interests are sufficiently represented in public decisions. A simple but instructive model of the separation of powers assigns decisions to the state powers depending on the mode of self-determination they represent.[160] The political branches, comprising parliament as a legislator and the government as head of the executive branch, are elected by a democratic majority. These branches primarily represent the collective self-determination of society, and their decisions are acknowledged as binding due to their *democratic legitimacy*. Constitutional courts, on the other hand, have a "counter-majoritarian" function when adjudicating rights. Court rulings on constitutional rights complaints represent individual self-determination. Based on *individual legitimacy*, a constitutional court can enforce rights and overrule democratically legitimated majority decisions that have unduly marginalized individual autonomy. This model is abstract enough to apply to both the national constellation and international regimes, such as the ECHR and the institutional relationship between the ECtHR and national authorities.

Which branch should decide about the allocation of public resources in accordance with this model of the separation of powers? Answering this question requires reconsidering the particularities of allocative conflicts. Distributive decisions concern multiple stakeholders because

[156]E. W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 9 Netherlands Yearbook of International Law 69, 91 (1978); similar: Aryeh Neier, *Social and Economic Rights: A Critique*, 13 Human Rights Brief 1, 2 (2006); Beijer, *supra* note 3 at 81.

[157]Cf. Grimm, *supra* note 28 at 196.

[158]Alexy, *supra* note 36 at 298.

[159]Christoph Möllers, The Three Branches: A Comparative Model of Separation of Powers 4 (2013); see also: Bruce Ackerman, *The New Separation of Powers*, 113 Harvard Law Review 633 (2000); Eoin Carolan, The New Separation of Powers: A Theory for the Modern State 263 (2009).

[160]This model is based on Möllers, *supra* note 159 at 51–109.

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costly rights can only be fulfilled at the expense of other rights and public needs. Cost-effective rights always incur opportunity costs. These opportunity costs need to be borne by the community. To fulfill a positive right, taxpayers must raise the necessary funds, other citizens who desire state benefits must renounce their needs, and the democratic majority must adjust its distributive policy accordingly. Due to the inherent tension between individual and collective needs, the decision-making procedure must enable the participation of all stakeholders.[161] Political elections and parliamentary debates, in contrast to court procedures, guarantee that multiple interests can be considered and integrated into the decision-making process. Everyone who desires additional state action can make use of their political rights. The budgetary debate offers members of parliament, as representatives of the entire electorate, the opportunity to deliberate over plural views and interests. In this way, every individual citizen is simultaneously the co-author and addressee of the budgetary laws governing the spending of public resources.[162] However, this integrative capacity of political procedures is only one reason for primarily assigning allocative decisions to the political branches and not the constitutional courts.

Another reason lies in the higher *flexibility* and *revisability* of democratic decisions. The different sources of legitimacy correspond with different modes of decision-making and justification. In contrast to the legislator and the government, constitutional courts are supposed to remain independent and isolated from politics to safeguard individual self-determination effectively. For that reason, a constitutional court cannot ground its decisions on the outcome of majority voting alone. Instead, a court "labors under an obligation to persuade,"[163] meaning it must provide comprehensive reasoning with its "claim to correctness."[164] By contrast, lawmakers are more flexible. As democratic majorities are subject to change, political decisions are contingent and revisable after later elections. Contingency means that things "could always be otherwise."[165] Contingent decisions made by political bodies are not necessarily a matter of right or wrong; they only express the preferences of a democratic majority at a certain point in time. At a later point in time, these preferences or their underlying circumstances might change. This is important in the context of distributive decisions. The relevant allocative decisions are revisable if the legislator or the government misjudged the factual possibilities or the majority changed its preferences. In such a situation, the proviso of the possible takes on the meaning of a "proviso of being possible otherwise."[166] From the perspective of the democratic legislator, the polycentricity of allocative conflicts is challenging but does not hinder the decision-making process. Due to the contingency of budgetary decisions, preferences can be adapted to shifting democratic majorities without necessarily striking a *constitutionally correct* balance between all needs.

2. A Limit to the Limitation: The Proviso of the Possible and Minimum Rights

All courts that have been subject to comparison in Chapter B recognize that a right must not be deprived "of its substance"[167] even if it incurs costs and resources are limited. This coincides with the understanding of core obligations pursuant to the International Covenant on Economic, Social and Cultural Rights (CESCR). According to the General Comments and the Maastricht

[161]See Stoyanova, *supra* note 134 at 224–25.

[162]For this principle of democratic *self-legislation* in modern legal philosophy, cf.: JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 104 (William Rehg tran., 1996); SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS 19–20 (2004).

[163]PAUL W. KAHN, MAKING THE CASE: THE ART OF JUDICIAL OPINION 1 (2016).

[164]Robert Alexy, *Legal Certainty and Correctness*, 28 RATIO JURIS 441 (2015).

[165]CHANTAL MOUFFE, ON THE POLITICAL 18 (2011); for a general definition of contingency, cf. LUHMANN, *supra* note 144 at 25.

[166]Munaretto, *supra* note 7 at 480–85.

[167]See: *Da Silva Carvalho Rico v. Portugal*, App. No. 13341/14 (September 24, 2015), para. 44. For further references, cf. *supra* notes 19, 20, 39.

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Guidelines, the core obligations are "non-derogable" and must be fulfilled "irrespective of the availability of resources."[168] Consequently, the proviso of the possible does not apply where the "minimum core" of a fundamental right is concerned. The limitation set by the proviso of the possible cannot be limitless. The model of legitimacy explained above shows that the tension between individual and collective needs cannot be unilaterally dissolved in favor of the majority and its collective will. In some situations, the individual would lack essential preconditions of an autonomous life if the state did not provide basic core services and benefits. Courts might not be capable of legitimately striking the judicially correct balance between individual and collective needs; however, they are responsible for the prevention of evidently imbalanced allocative decisions by enforcing minimum rights in favor of individual self-determination. Accordingly, the proviso of the possible as a limitation to rights *and* minimum rights as limits to this limitation are complementary counterparts. The realm of the proviso of the possible ends where the minimum core of a right begins.[169] Nevertheless, before considering a violation of the minimum core of a right, courts should test whether the state has complied with equality rights and the criteria of Pareto efficiency to avoid costs. Only if these tests do not provide effective legal protection is the enforcement of a minimum right considered. The definition of a minimum right remains challenging; it exceeds the scope of this inquiry into the proviso of the possible to develop a comprehensive doctrine of minimum rights.[170] The approaches to minimum rights outlined below intend to demonstrate the complementary relationship between the proviso of the possible and minimum rights.

Minimum rights should not be understood as clearly defined entitlements. Since the availability of resources and social circumstances change over time, a static model of minimum rights would not provide effective safeguards against actual threats to autonomy. Minimum core doctrines may also vary between jurisdictions and depend on the primary decisions of a particular constitution. A universal formula for the definition of minimum rights does not exist. Corresponding to the flexible "width" of the margin of discretion, minimum rights differ in their "hardness." Courts apply stricter scrutiny to the minimum core if the state has monopolized the means of protection (for example, the police or the judiciary), if an individual is already subject to active state interference with his fundamental rights (for example, a prisoner demanding medical care or legal advice), and if high-ranking legal values such as human dignity are concerned. Under these specific circumstances, the individual is particularly dependent on state aid and cannot be expected to help himself. Courts can also approach the minimum core by adjusting the margin of discretion. There is a "flexible scale and correspondingly many ways in which the burden of proof can shift" either to the state or the individual claimant.[171] As explained above, the margin of discretion that courts apply when fundamental rights incur costs is wide from the outset. By narrowing the margin of discretion again, courts incrementally narrow down the core content of a right. To calibrate the burden of justification, courts can, as a first step, examine whether the state remains completely inactive or provides at least some basic benefits. The calibration process can result in a shift in the burden of justification. The German FCC applies such a procedural approach to selected fundamental rights. In its judgments on the right to a dignified subsistence level, the FCC does not define the exact amount of social assistance the state is obliged to provide. Instead, the court reviews whether the amount set by the legislator is based on a consistent

[168]General Comment No. 14, U.N. Doc. E/C.12/2000/4, para. 47; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 9.

[169]Munaretto, *supra* note 7 at 327–29.

[170]See further on this: Leijten, *supra* note 112; John Tasioulas, Minimum Core Obligations: Human Rights in the Here and Now (2017); Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 Yale J. Int. Law 113 (2008).

[171]Bernhard Schlink, *Proportionality (1) in* The Oxford Handbook of Comparative Constitutional Law 718, 734 (Michel Rosenfeld & András Sajo eds., 2012).

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calculation considering all relevant needs and socioeconomic metrics. The approach cannot be generalized and transferred to all fundamental rights. It appears to be particularly suitable for reviewing fundamental rights to certain cash benefits linked to clearly defined purposes or needs.

Although the minimum right is not subject to the proviso of the possible, the cost impact of each minimum right should not be disregarded. In particular, courts should consider whether the adjudication of a minimum right constitutes a precedence that can be generalized and applied to other cases, resulting in additional costs. They should, therefore, stay focused on the case and define only narrow minimum standards with respect to the individual needs of the applicant. For instance, the FCC stated in *Bundesnotbremse II* that the state was obliged to compensate for the school lockdowns by providing remote teaching online during the pandemic.[172] The court avoided making further statements on the minimum core of the right to education because they were not relevant to the ruling. By only adjudicating minimum core rights in exceptional cases and under certain conditions and circumstances, courts can minimize the cost impact of their rulings.

D. Conclusion

Considering the findings of the comparative study (B) and the theoretical investigation of the proviso of the possible (C), the following conclusions can be drawn. All courts need to recognize resource constraints as limitations to costly rights. Several constitutional courts in Europe apply the proviso of the possible as part of their settled case law. The proviso of the possible is a concept of fundamental rights doctrine to deal with conflicts over scarce resources. It addresses the methodical as well as the legitimation challenges posed by these conflicts. The ECtHR has not yet taken up the concept itself but accepted its application while using its established doctrinal concepts, such as the Osman test or the "even wider" margin of appreciation. It is common to the jurisprudence of all courts compared herein that they restrain from substituting the legislator's assessment of budgetary choices. The courts do not carry out a comprehensive proportionality test. Instead, they primarily review whether the state has complied with the principle of Pareto efficiency and the principle of equality. The enforcement of both principles does not fundamentally interfere with the budgetary discretion of the legislator. In specific cases, courts have defined minimum rights that are not subject to the proviso of the possible. Thus, the investigation has revealed the limits of adjudication in allocative conflicts and demonstrated the extent to which courts can review cost-effective rights. The proviso of the possible not only results in a limitation of fundamental rights to what is factually feasible, but its application also means granting a wide margin of discretion to political branches. Due to the proviso of the possible, it is up to them to make contingent decisions on how to allocate public resources. Consequently, allocations subject to the proviso of the possible are "also possible otherwise." Only minimum rights are not subject to the proviso of the possible. While minimum rights guarantee the effective judicial protection of individual self-determination, the proviso of the possible marks the wide realm of democratic self-determination over the allocation of public resources. European societies facing a horizon of limited possibilities must establish political majorities that make the necessary distributive decisions, which, by their very nature, will always result in wins and losses. Democratic legitimacy is essential to generate acceptance for these decisions. Fundamental rights can only be a "fallback" position, not a starting point for solving distributive conflicts in a constitutional democracy.

[172] 159 BVerfGE 355 (428).

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