Rethinking the Proper Role of Proportionality in the Limitation of Fundamental Rights

Francesco Viganò

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1. INTRODUCTION

In an often-quoted judgment delivered in 2013, the Italian Constitutional Court, speaking of the fundamental right to health based on Article 32 of the Constitution, stated in general terms that no constitutional right enjoys absolute prevalence over the others. No right – not even the right to life, one might infer – can become a 'tyrant' in respect of the others, the Court goes on; there is no hierarchy among fundamental rights, since all rights are expressions of human dignity. The Italian Constitution, like other contemporary charters of rights, requires a permanent balancing exercise among fundamental rights under proportionality criteria, without sacrificing the very essence of any of them.[1]

At EU law level, Article 52(1) CFREU makes the very same point, stating that '[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'. The provision is worded as well in general terms, and apparently applies to *all* rights and freedoms recognised by the Charter.

Yet the ECtHR jurisprudence – which sets minimum standards of protection not only for the rights recognised by the European Convention, but also for the corresponding rights enshrined in the Charter, thanks to the equivalence clause contained in Article 52 (3) of the latter – has long recognised the existence of some 'absolute rights', for which *no limitation* is possible. Their emblematic example is the right not to be subjected to torture and inhuman or degrading treatment or punishment enshrined in Article 3 ECHR, whose protection, according to the

[1] Judgment No 85/2013, 9 April 2013 at 9.

consistent case law of the Strasbourg Court, may never be balanced against any other competing interest or right.

For its part, the EU Court of Justice recognised, as early as 2003, the existence of some rights enshrined in the ECHR 'which admit of no restriction', mentioning in particular 'the right to life or the prohibition of torture and inhuman or degrading treatment or punishment'[2]. More recently, the same Court reaffirmed the absolute nature of the protection afforded by Article 4 of the Charter in crucial cases on the European Arrest Warrant[3] and on the Dublin asylum system.[4] Such recognition means, as the current President of the Court has pointed out, that 'since no limitation may be imposed upon those rights, their content and their essence are, in effect, coterminous'[5]: any restriction of these rights would result in an impingement on their very 'essence' and would, as such, be impermissible. Which means that, in practice, Article 52 (1) CFREU should not apply to those 'absolute rights', which apparently do not lend themselves to limitations under the general umbrella of proportionality.

So, was the Italian Court wrong? Are there really – according to the common constitutional tradition of EU member States, on which the Charter is built – fundamental rights that are, so to speak, *more fundamental* than the others, and cannot be limited under any circumstances? More precisely: are there rights which cannot be limited according to general proportionality criteria, such as those set out in Article 52(1) of the Charter?

2. THE CASE AGAINST 'ABSOLUTE' RIGHTS

As is well-known, the very existence of 'absolute rights' has been long discussed in legal philosophy, and continues to be the subject of a lively debate among human rights law scholars, some of whom strongly deny the very theoretical plausibility of such concept.

(a) To start with, the precise *identification* of absolute rights is still a matter of debate. Beyond the rights enshrined in Article 3 ECHR, to which – incidentally – the whole bulk of Strasburg case law on the point refers, which other rights should be considered 'absolute' remains unclear.

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[2] *Schmidberger v Austria* Case No C-112/00, 12 June 2003 at para. 80.

[3] *Aranyosi and Căldăraru v. Generalstaatsanwaltschaft Bremen*, joined cases C-404/15 and C-659/15 PPU, 5 April 2016 at 85-87.

[4] *C. K. and Others v Republika Slovenija*, C-578/16PPU, 16 February 2017 at 69.

[5] Laenarts, 'Limits on Limitations: The Essence of Fundamental Rights in the EU' (2019) 20 *German Law Journal* 779 at 783.

The standard assumption identifies absolute rights with those in respect of which no derogation is permitted under Article 15 ECHR, even in times of war and other public emergency threatening not less that 'the life of the nation'.

However, this simple equivalence is hardly convincing.

Article 15 ECHR encompasses rights that can of course be limited, such as the right to life, which is subject to the exceptions set out in Article 2(2) ECHR as well as to those resulting from the *ius in bello*, as the same Article 15 ECHR makes clear.

Another possible criterion to identify absolute rights could be, then, that of inferring this nature from the simple fact that the relevant provision sets forth no explicit limitation to it. But fresh difficulties would arise on this path: other fundamental rights, such as the fair trials rights enshrined in Article 6 ECHR, are subject to no explicit limitation; yet, the resulting standards of protection for fair trial rights are the result of complex balancing exercises with the competing interests of all the parties involved in a trial, so that it would be odd indeed to speak of an 'absolute' right in this context – in fact, Article 6 ECHR is usually not labelled as such, either in academic discourse or in case law.

Things are somewhat muddled even in respect of the rights on whose 'absolute' nature (almost) everyone seems to agree, namely Article 3 ECHR rights. As is well known, the question whether it should be permissible for State actors to torture someone – or at least to submit her to some kinds of ill-treatments proscribed by Article 3 ECHR – under exceptional circumstances, such as in the ticking-bomb scenarios, has been intensively discussed in international legal literature in recent times, especially in the wake of the tragic 9/11 attacks. A majority of legal scholars around the world have reaffirmed the absolute nature of the international commitment against any act of torture enshrined in Article 2 (2) UNCAT. However, the number of voices in favour of a relativisation of the ban on torture in exceptional cases have been remarkable, even among well-respected legal scholars, to the surprise and disappointment of many human rights lawyers.

(b) But even if we take for granted the absolute nature of at least Article 3 ECHR rights, the theoretical and practical implications of such an assumption remain, to some extent, unclear.

The ECtHR case law has consistently held, in principle, that as regards Article 3 rights – including the prohibition of ill-treatments other than torture – there is no room for balancing them against any competing interest. The point has been made, for example, in the line of cases concerning the removal (by way of deportation, extradition or European arrest warrant) of an individual towards a State where he or she faces the risk of being subjected to torture or other ill-treatments proscribed by Article 3 ECHR.

Yet it has long been claimed by prominent legal scholars that a certain degree of 'relativism' cannot be excluded in the application of an 'absolute' guarantee such as that afforded by Article 3 ECHR.[6] The determination of the thresholds of 'torture' as well as 'inhuman and degrading treatments' is notoriously context-sensitive, and takes into account all the circumstances that confer the special significance of an attack on human dignity to an act that, in a different context, would not qualify as such. Indeed, slapping a person in the face could be considered as a minor act of violence, surely falling below Article 3 ECHR threshold, unless such an act is performed by a policeman in a cell on a person under arrest. In such an instance, the ECtHR would surely hold that Article 3 ECHR applies.

On the other hand, the *positive* obligations stemming from Article 3 ECHR – for example, the obligation to protect a person from possible ill-treatments carried out by third parties – are surely not 'absolute': as we shall see in greater detail later, the State is under an obligation to take all *reasonable* steps according to the circumstances and the available resources, but not to avoid *any* possible ill-treatment.

(c) Finally, one of the strongest arguments against 'absolute' rights is that of a possible *clash of absolutes*. Absolute rights can reciprocally conflict, in situations where the fulfilment of both is impossible. The law – so runs the argument – must solve such dilemmas, and determine which of the competing rights must prevail in the given circumstances. But if one of the 'absolute' rights must yield to the other, this means precisely that it cannot be considered 'absolute'.

Think of the *Gäfgen* case, decided by the Grand Chamber of the ECtHR in 2010. A police officer was held to have violated Article 3 rights because he had threatened a suspected kidnapper with torture, with a view to forcing him to reveal the whereabouts of his young hostage. The claim made by distinguished scholars is that the prohibition of torture and inhuman/degrading treatments enshrined in Article 3 ECHR were clashing, here, with the duty imposed upon the State by Article 2 to save the hostage's life (and with the duty, arising from the very same Article 3, to free him from the anguish and distress caused by his unlawful detention, amounting as such to torture).[7] If the right not to be subjected to torture is an absolute right, *whose* right must prevail here?

[6] See e.g. Feldman, *Civil Liberties and Human Rights in England and Wales* (2002) at 242.
[7] See, among others, Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading treatments Really "Absolute" in International Human Rights Law?' (2015) *Human Rights Law Review* 101 at 106.

3. SHIFTING THE FOCUS FROM 'RIGHTS' TO 'OBLIGATIONS'

In the light of these objections, one might wonder whether the concept of 'absolute rights' is really helpful, or rather gives rise to unnecessary misunderstandings, which could perhaps be avoided by shifting the focus from the rights to the *obligations* flowing from them.

Indeed, obligations of diverse nature and scope can lie behind a single right.

If I say that A has a right to life, privacy, or a particular payment, the information I am giving by such a statement is incomplete. At least two basic clarifications are required: *towards whom* A has a right, and what is the *content* of his right – i.e., what is the *obligation* that the duty-bearer is supposed to fulfil.

If we are speaking of A's right to life recognised by both *constitutional* and *human rights law*, we mean that *States*, and in general *public powers*, have a number of *different* duties: the basic *negative* prohibition – spelled out in Article 2 (1) ECHR – to intentionally kill A; but also, *inter alia*, the duties not to deport or extradite him to a State where he faces a serious prospect to be sentenced to the capital penalty, as well as the various *positive* obligations developed by constitutional and human rights law aimed at ensuring a practical and effective protection of A's life (from the obligation, primarily incumbent on police forces, to prevent aggressions by other individuals to that, incumbent rather on the criminal justice system, of investigating suspicious deaths, and later prosecuting and punishing those found responsible for unlawful killings).

Now, the claim implied in the assertion that a particular *human right* is 'absolute' is that the State, as a bearer of the duty, is under an obligation to protect it whatever the circumstances. But since many heterogeneous *obligations*, of either negative or positive content, can correspond to the same *right*, we should rather discuss whether each one of these obligations – which are directed, by the way, to different public actors – really needs to be discharged *under any circumstance*, or does admit some *exceptions*.

Focusing firstly on the ECHR, a closer analysis is warranted on the precise *content* of the single obligations set forth, explicitly or implicitly, in its single provisions, and consequently on their possible *limitations* as resulting from the very text of the Convention.

(a) Now, several ECHR provisions spell out sharp-edged *prohibitions* directed at State agents. Think, firstly, of Article 3: "No one shall be subjected to torture….". But consider also Articles 2 (1) ("No one shall be deprived of his life intentionally…"), 4 ("No one shall be held in slavery or servitude"; "No one shall be required to perform forced or compulsory labour"), Article 5 (1) ("No one shall be deprived of his liberty…"), 1 (1) Prot. 1 ("No one shall be deprived of his possessions…"), 1 Prot. 13 ("No one shall be condemned to [the death

penalty]"). Even Article 7, enshrining the principle of legality in criminal matters, is framed in fact as a prohibition ("No one shall be held guilty of any criminal offence…"), preventing criminal courts from convicting someone of an offence that was not established by law at the time of its commission.

The prohibitions set out by these provisions are sometimes worded in an *unconditional* way, more often as subject to possible *exceptions*.

The negative obligation spelled out in Article 3 ECHR is a paradigm of the first category. The prohibition ("No one shall be subjected…") is expressed here in *unconditional* terms, no possible exception to it being mentioned. By contrast, the prohibition to intentionally deprive anyone of his life enshrined in Article 2 (1) ECHR is subject to the *exceptions* enumerated in para. 2 of the same provision.

It is important to take note, for our purposes, that the exceptions that are explicitly recognised to obligations clearly set forth by a Convention provision are themselves generally worded in a (relatively) precise fashion. Apart from Article 2 (2) ECHR, a remarkable example is represented by Article 5 (1) ECHR, which on the one hand sets out a general prohibition of depriving someone of his liberty ('no one shall be deprived…'), and on the other hand sets out in detail *six possible conditions* under which such a deprivation is lawful under the Convention.

Crucially, there seems to be no room, in these cases, for a recourse to the general criterion of proportionality of the interference in the assessment whether or not the interference is lawful: either the court will find that one of the exceptions allowed by the norm applies to the case at issue (and then, a violation of the Convention right at issue should be ruled out); or it will find that none of these exceptions is applicable (and then, it will be bound to conclude that a violation has actually occurred).

(b) Things work differently for those Convention provisions that simply recognise a 'right' or a 'freedom', without specifying what obligations should flow upon the State from this recognition.

Article 8 ECHR, for example, proclaims the right to respect for private and family life, but does not directly set out which specific obligations to abstain or to act derive from this right. Here, the definition of the State obligations flowing from the provision is entirely entrusted to the interpretation; and the Strasbourg case law has, indeed, fulfilled this task, through a gradual clarification of the scope of the right and, consequently, of the *obligations* binding on public actors.

At the same time, a parallel process of judicial definition of the possible *exceptions* to the obligations flowing from the right or freedom has taken place within the Strasbourg case law. The relevant ECHR norm recognising a right or a freedom usually contains a *general clause*

authorising limitations to the right or freedom at issue, subject to a set of standard basic conditions: in particular, a legal basis of the limitation, and its being 'necessary in a democratic society' to protect at least one of the competing interests or rights enumerated in the provision itself. Based on this kind of limitation clause, the Strasbourg case law has notoriously borrowed the general criterion of proportionality from German constitutional law and jurisprudence, using it as a tool to assess, in each concrete case at issue, whether or not the interference with the right is justified under the Convention perspective.

Both the definition of the (negative) obligations arising from the Convention provisions enshrining a right or a freedom and the possible exceptions to this prohibition are, here, *an open field for the interpretation*, under the general umbrella of the proportionality principle.

(c) A similar process of judicial development has notoriously led the ECtHR to derive from most Convention provisions *positive* obligations, beyond those, of purely negative content, which the framers of the Convention had in mind. The Strasbourg case law has long recognised, beyond the traditional *Abwehrrechte*, duties to act upon State actors, with the aim of ensuring a practical and effective protection of the rights enshrined in the Convention.

One might wonder, at this point, whether these obligations are unconditional, or subjected to possible exceptions; and a possible answer could be that those obligations flowing from 'absolute rights', such as that enshrined in Article 3 ECHR, should as well be considered unconditional, whereas those derived from 'relative rights' should follow the logic of those rights and remain, therefore, subject to possible exceptions. This answer actually corresponds to the standard opinion in the current debate on 'absolute rights'; yet it is hardly convincing in the end.

The positive obligations derived by the case law from Article 3 ECHR, for example, have indeed very little in common with the basic negative obligations (i.e., prohibitions) explicitly stated, in unconditional terms, in that provision. The former obligations require State officials to take action, rather than refrain from doing something. And whereas inaction is never impossible, the possibility of taking action, and even more the possibility of taking a *successful* action (in terms of effective protection of the right), are necessarily *conditioned* by all sort of circumstances.

The State's duty to protect X from ill-treatment by Y, for example, can be effectively fulfilled only if the police knew, or at least ought to have known, given the circumstances, that X was at risk of being assaulted by Y. Moreover, in the definition of the boundaries of these obligations, the ECtHR takes into due account a wide set of factors, among which the multiplicity of the tasks incumbent on the State and the scarcity of the overall resources, so as not to impose excessive burdens on the State, especially when the fulfilment of the positive obligation would have a significant financial impact.

But there is more. When it comes to determining the scope of positive obligations, the explicit provisions on the exceptions to (or on the possible limitations of) a particular right or freedom do not seem to play any role. Take Article 2 (2) ECHR: the three exceptions envisaged here are tailored on the completely different instance of a public agent intentionally killing people, and are immaterial as to definition of the scope of the positive obligations to protect people's lives.

If all this is true, it would be arduous indeed to draw a sensible distinction between the positive obligations derived from Article 2 ECHR, on the one hand, and those derived from Article 3 ECHR, on the other, based on an alleged 'absolute' character of the latter. As a matter of fact, neither set of obligations can sensibly be held 'absolute': there is simply no unconditional obligation upon the State to *prevent* (or to *punish*) either *any* unlawful killing, or *any* ill-treatment. There is, instead, an obligation to take *reasonable*, *adequate* steps to prevent and punish both categories of acts. The language of 'absoluteness' seems out of place here.

4. NON-WRITTEN LIMITATIONS TO THE ECHR OBLIGATIONS?

Having said that, a new question arises: are those prohibitions that are actually framed in *unconditional* terms, or are subject to a list of explicit *exceptions*, open to (further) *non-written exceptions* in particular situations?

(a) One might be tempted to answer in the affirmative at least in the situation, mentioned above, of a clash between *negative* obligations (prohibitions) and the competing *positive* obligations to protect the Convention rights.

Such a conflict could theoretically arise in respect of both the unconditional obligations, such as those enshrined in Article 3 ECHR, and the obligations subject to a list of possible exceptions. The *Gäfgen* case is an example for the first category, while the case of German Avian Security Law (*Lufssicherheitsgesetz*), declared unconstitutional by the German Federal Constitutional Court in 2006, is an excellent example of the second. While the FCC has addressed the question mainly under the perspective of the principle of the inviolability of human dignity as enshrined in Article 1 of the Basic Law, a case could have easily been made that the order to strike down a plane hijacked by terrorists – which would inevitably cause the deaths of many innocent passengers and crew members alongside the hijackers – should be considered justified by the need to fulfil the competing (positive) obligation to *save the lives* of an even greater number of

potential victims, who would be bound to die if the plane were directed into a crowded tower in a 9/11-like fashion.

The argument, though, would not be persuasive in the end.

As I have already mentioned, the positive obligations, having no specific textual basis in the Convention, have been construed by the Strasbourg Court as *intrinsically* 'conditional': they do not, and cannot, impose *unlimited* duties. Crucially, the ECtHR requires that the action which might be necessary to afford protection to the individual interest at stake be itself *lawful*: and one of the essential conditions for the lawfulness of the action is its compliance not only with the national legal system, but *also with the Convention standards themselves*, which impose constraints to any State action – including the fulfilment of the positive obligations arising from the very same Convention.

In other words, positive obligations are *a priori* limited by the need to respect the negative obligations based on human rights law, and indeed by the principle of the rule of law: the State has the duty to take all reasonable steps *within the limits permitted by the law*, and in particular by the negative obligations set forth by the Convention. The obligation to save the lives of potential terrorist victims yields to the prohibition to intentionally kill someone, outside the (exhaustive) exceptions listed in Article 2 (2) ECHR.

The same is true for the right to personal liberty enshrined in Article 5 ECHR. This provision allows for several exceptions to the general ban on depriving someone of his freedom of movement; but beyond those exceptions, no further limitation of the liberty at issue is allowed, not even for the sake of other Convention rights, as the Grand Chamber of the Court has recently clarified in *Kurt v Austria*, a case concerning the positive obligations to prevent domestic violence. No State could claim, for example, the legitimacy of a measure implying the preventive indeterminate detention of suspected terrorists, alleging that such a measure is imposed by the need to fulfil the positive obligations, arising from Article 2 ECHR, to protect lives and limbs of the potential victims of those suspects. Such an argument would ignore that the latter obligations must only be fulfilled within the boundaries drawn by the rule of law, which include the respect for the obligations set forth, in unequivocal terms, by the Convention, among which the prohibition to deprive someone of his or her personal liberty except in the cases (exhaustively) listed in Article 5 (1), letters (a) to (f), ECHR.

(b) One might wonder, though, whether both kinds of prohibitions are subject to possible *non-written* limitations warranted not by the logic of a conflict with competing positive obligations, but instead by the general criterion of *proportionality*, under the same logic expressed by the Italian Constitutional Court's judgment quoted at the outset of this paper.

But since the relevant provisions do not mention such a limitation, on which legal basis could this conclusion be grounded?

An obvious reference could be the idea of *necessity*, which is indeed firmly established in several branches of the law, including international law as well the national criminal and tort laws, and which typically works as a defence against the allegation of a breach of the law. Such a defence is often considered based on the idea – equally widely recognised in legal as well as in moral discourse – of the *lesser evil*: when the causation of a harm is necessary to avert a greater harm, the decision to act could not amount, from a moral as well as a legal perspective, to a proscribed wrong. The same logic, in the end, which underlies the general criterion of proportionality.

The defence of necessity has received so far, at least to my knowledge, little attention within the specific context of international human rights law, and surely has not been addressed as such either by the ECtHR nor by the respondent States or intervening third parties as to allegations of breaches of 'absolute' rights. In fact, this silence is striking, since necessity is the obvious defence raised in national criminal proceeding concerning cases like that examined by the ECtHR in *Gäfgen*.

One point, however, should be crystal clear.

Admitting, by way of *interpretation*, a possible role for the defence of necessity in international human rights law would open a dangerous path indeed.

The Convention has already struck the balance between the competing (individual and collective) interests and has already determined, as to the unconditional obligations, that they cannot be overridden under any circumstance; and as to the remaining obligations, that they can be overridden only in the carefully drafted circumstances set out by the Convention itself.

Recognising instead that (unspecified) 'necessity' considerations could limit the reach of the protection afforded by the Convention beyond the recognised exceptions, based on case-by-case balancing exercises among the competing interests at stake, would be tantamount to allowing the States to regularly invoke the logic of lesser evil – if not even the *raison d'Etat* – to exonerate themselves from those obligations. In practice, the reach of obligations as vital for the rule of law as the prohibition to unlawfully kill someone, to subject someone to torture or the other ill-treatments proscribed in Article 3 ECHR, or to deprive someone of her personal liberty save in the exceptional circumstances listed in Article 5 (1) ECHR, would be transformed into an obligation subject to the general, non-written clause 'unless such an act is necessary, under the circumstances, to avoid a greater harm'. Any more precise determination of the scope of this general clause would be left, then, to the interpretation by the courts (and, prior to their

intervention, to the appreciation of State authorities, who would be all too happy to read them extensively).

5. IMPLICATIONS FOR EU LAW

What implications should be derived for EU law from the above conclusions?

As already mentioned, Article 52 (1) CFREU is framed as a general provision, which might be interpreted as applying, in principle, to every one of the rights and freedoms recognised by the Charter.

Such a conclusion, however, would hardly be convincing. Para. 3 of the same provision establishes an equivalence clause, according to which '[i]n so far as [the] Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention', without prejudice – of course – to the possibility for the Charter to grant a higher standard of protection. It seems to me that the general clause on limitations contained in para. 1 ought to be interpreted *in the light of the equivalence clause* itself – which, for its part, is linked to the general obligation upon the EU to respect the European Convention, expressed in Article 6 (3) TEU. Accordingly, in so far as a Charter provision recognises a right that corresponds to a right guaranteed by the ECHR, this right should be granted, *at least*, the same level of protection it enjoys under the Convention and its relevant case law, including – crucially – with respect to possible exceptions and limitations.

(a) This means, firstly, that the Charter provisions recognising a right in respect of which the Convention sets forth obligations framed in *unconditional* terms, the EU law will be called upon to ensure that this obligation is respected in an equally unconditional way, i.e. *without being subject to the general limitation clause* contained in Article 52 (1) CFREU.

The obvious example is, once again, the prohibition of torture and inhuman or degrading treatment or punishment enshrined in Article 4 of the Charter, which corresponds to Article 3 ECHR. But the same should be said, *inter alia*, for the prohibition of retroactive application of new or harsher criminal law provisions, enshrined in Article 49 (1) of the Charter, which corresponds to Article 7 ECHR – which admits, again, no exceptions apart from the international criminal law clause contained in para 2.

(b) Secondly, as regards Charter rights for which the ECHR sets out obligations subject to a list of carefully crafted *exceptions*, EU law will be equally bound to ensure at least the same

level of protection, without any possibility of creating new exceptions through the general limitation clause based on Article 52(1) CFREU.

Therefore, whenever exhaustive exceptions are explicitly provided for in the Convention – as in Articles 2(2) and 5 ECHR – the recourse to Article 52(1) CFREU as a legal basis to craft new possible exceptions to the corresponding Charter rights would be inappropriate, and could potentially lead to conflicts with the ECtHR as to the definition of the standards of protection for the various rights and liberties.

If this is correct, the recent case law on Article 50 CFREU on the right to *ne bis in idem* could possibly be questioned as to its compatibility with the equivalence clause.

Both Article 50 CFREU and the corresponding Convention provision – Article 4 (1) of Protocol 7 – are framed as prohibitions, the second explicitly allowing the 'reopening of the case in two specific cases: emergence of new evidence, or a 'fundamental defect' in the previous proceedings. According to the equivalence clause of Article 52 (3) CFREU, the same minimum standard should apply also to EU law, with the consequence that no further limitation should be possible based on Article 52 (1) CFREU.

Yet, as is well known, the CJEU has recently applied this latter clause in three 'Italian' cases (*Menci*, *Garlsson* and *Di Puma*), in which it held: (i) that the duplication of proceedings that are criminal in nature for the same offence constitutes a *limitation* of the right enshrined in Article 50 ; and (ii) that such a limitation may be nevertheless *justified* on the basis of Article 52 (1) of the Charter. By so doing, the CJEU ends up by recognising the possibility of limiting the right at issue *beyond* the sole exception provided in Article 4 of Protocol 7 ECHR, through a direct application of Article 52 (1) CFREU: a result that the ECtHR had in fact avoided in its Grand Chamber judgment *A and B v Norway*, by ruling out any duplication of proceedings (and the consequent necessity to justify such a duplication) when the authorities involved act within the framework of integrated system of response to the same wrongdoing.

(c) Thirdly, and finally, the 'natural' room for the proportionality assessments envisaged in Article 52 (1) CFREU – and for the judicial determination of the 'essential content' of the right according to that provision – seems confined to those rights, freedoms, principles which either do not correspond to Convention rights, or correspond to those that are themselves subject, in the ECHR legal space, to possible limitations whose determination was left open to judicial interpretation by the framers of the Convention, through 'necessity in a democratic society'-clauses or the like. The wording of Article 52 (1) CFREU marks, indeed, a significant progress, within international human rights law, towards the generalisation of an approach to limitations to fundamental rights born in the different context of German constitutional law, and then gradually adopted by many constitutional and human rights law jurisprudences throughout the world. But the field of application of this 'open' limitation clause should be carefully marked, so as to avoid a dilution of some basic guarantees afforded by the ECHR, whose limitations have been sharply determined by the framers of the Convention.

8. CONCLUSIONS

Proportionality is not, and should not become, a *passe-partout* to weaken human rights guarantees, within the ECHR system of protection as well as in the framework of EU law.

Whilst its role remains crucial as a general criterion for the assessment of the legitimacy of limitations in respect of a large number of fundamental rights and liberties, proportionality should not be used as a tool to narrow the scope of, or carve non-written exceptions to, precise prohibitions spelled out by the charters.

My impression is that the alleged 'absolute' nature of a particular *right* does not play any significant role in determining the nature of the obligations imposed upon States by the ECHR. The relevant limits should be drawn, instead, from the nature of the *obligations* themselves, as set forth by the single Convention provisions. In Ronald Dworkin's terms: whenever a provision of a charter spells out a 'rule', and not simply a 'principle', the rule must be applied in its exact terms. And if the rule contains a *prohibition*, the prohibition must strictly be observed, save in the specific cases for which the provision itself provides for an exception to the prohibition.

The logic behind this assumption is very clear, by the way. Behind these prohibitions lies a comparative assessment between competing interests, which has already been undertaken by the framers of those charters, and is accordingly foreclosed to State actors and courts.

This already corresponds to the established case law of the ECtHR, and should also apply – as I have tried to demonstrate – within the framework of EU law, where Article 52 (1) CFREU should be restrictively interpreted, in the light of the equivalence clause contained in paragraph 3 of the same provision.

But this is also true, I think, from a national perspective, looking at the interpretation of the *constitutional* provisions.

The passage from judgment No. 85/2013 by the Italian Constitutional Court, which I quoted at the outset of this paper, spells out the general principle that no 'right' should be considered absolute. However, this passage should not be overinterpreted as if it allowed non-written limitations to clear *rules* established by the Constitution, beyond the exceptions explicitly provided for in those very rules. When, for example, the Italian Constitution states in Article 13 that no one can be detained for longer than 96 hours unless upon authorisation by a judge, no proportionality assessment and no exceptional circumstances could ever be invoked to elude the stringency of this rule.

The unconditional prohibitions set forth by the Italian Constitution, as well as those subject to a *numerus clausus* of possible exceptions, must be taken seriously by its interpreters, who shall not use proportionality as a tool to unduly narrow the scope of these obligations.