

INSTITUT FOR  
MENNESKE  
RETTIGHEDER

14. EIPIN CONGRESS

5. APRIL 2013

# Human Rights as Balancing Tools – The Principle of Proportionality

THEORY

Right affected in legal and non-discriminatory manner:

- Suitability: Useful to purpose
- Necessity: Least intrusive
- Fair balance: Weigh interests
- Essence: Not destroy

## TEST OF NECESSITY

JAMES & OTHERS  
(1986)

- A test of strict necessity is not warranted.
- Alternative solutions does not render measures unjustified
- Constitutes one factor in reasonable and suited to achieving the legitimate aim
- Not for the Court to say whether legislative discretion should have been exercised in another way
- Minimum and maximum protection

INSTITUT FOR  
MENNESKE  
RETTIGHEDER

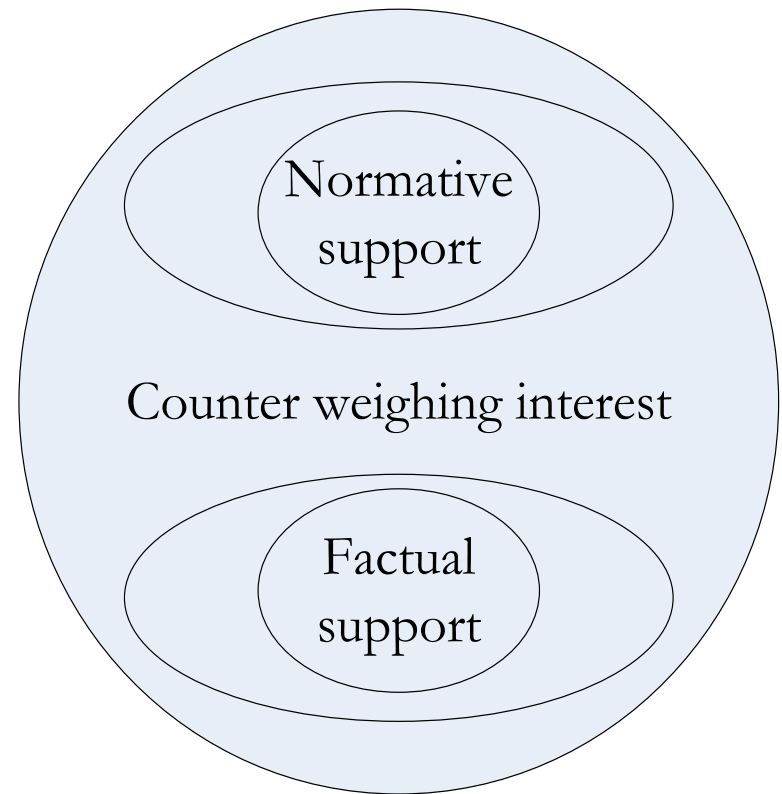
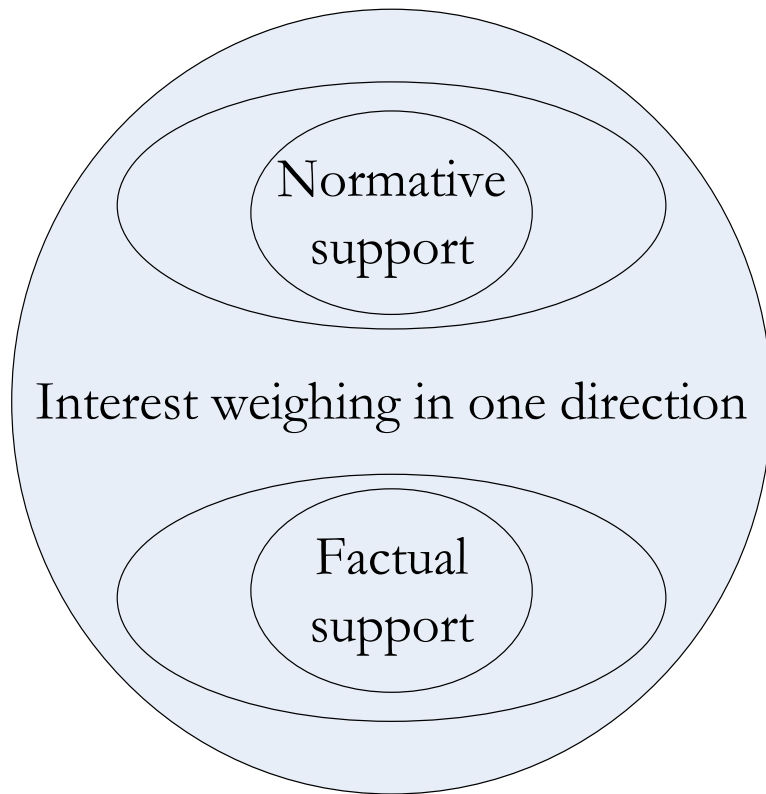
THE ESSENCE OF  
RIGHTS

BELGIAN LINGUISTIC  
CASE (1968)

- Never injure the substance of the right
- Nor conflict with other rights
- Relative and absolute core

SUITABILITY OF  
MEASURES

- No benefit to the aim: no good is done by action
- No danger to the aim: no harm is done by omission
- Dualistic suitability:
  - Perspective of protected right
  - Perspective of pursued aim



FAIR BALANCE

- Openness and criticism of human rights.
  - States too much leeway to undermine human rights
  - Judges too much leeway in promoting human rights
- Law and politics
- Justification and legitimacy