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# The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights in Cases Concerning Workplace Monitoring

Michał Barański
PhD, Assistant Professor, Faculty of Law and Administration, University of Silesia in Katowice, correspondence address: ul. Bankowa 11b, 40–007 Katowice, Poland; e-mail: michal.baranski@us.edu.pl
https://orcid.org/0000-0001-6797-8124

Tomasz Mirosławski
MA, Deák Ferenc Doctoral School of the Faculty of Law of the University of Miskolc, Junior Researcher at the Central European Academy, correspondence address: st. Városmajor 12–14, "Major Udvar" building, HU-1122 Budapest, Hungary; e-mail: tomasz.miroslawski@centraleuropeanacademy.hu, miroslawskitomasz@gmail.com
https://orcid.org/0000-0002-7758-7415

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**Abstract:** This article examines the principle of proportionality in the jurisprudence of the European Court of Human Rights concerning workplace monitoring under Article 8 ECHR. It contrasts two models of proportionality, interest balancing and balancing as reasoning, and shows how the Court has increasingly adopted the latter in landmark judgments such as *Bărbulescu v. Romania* and *López Ribalda and Others v. Spain*. Particular emphasis is placed on the structural inequality inherent in the employment relationship, which undermines the notion of that relationship as a contract between equal parties and makes contextual, reasoning-based balancing especially relevant in cases concerning labor relations. The analysis highlights how proportionality, to a certain extent, constrains the margin of appreciation and provides normative guidance in adapting national legal frameworks to the challenges of digital surveillance. At the same time, the article cautions against an uncritical drive towards harmonization and eventual unification through instruments such as the GDPR or the AI Act, as excessive standardization may overlook the diversity of national labor markets. It also highlights the risks associated with


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the expanding role of the ECtHR beyond judicial review. Proportionality, understood as balancing as reasoning, therefore emerges as the suitable model for safeguarding employee privacy and dignity while preserving respect for legal and social pluralism in Europe.

## 1. Initial Remarks

The principle of proportionality is a widely recognized approach to balancing individual rights with the public interest. It is applied both in the national judiciaries of democratic states and within pan-European normative orders.[1]

There is no synthetic or comprehensive definition of proportionality in the European Convention on Human Rights[2] or in any of its additional protocols.[3] According to Wiśniewski, the jurisprudence of the European Court of Human Rights[4] is "relatively casuistic and does not easily provide a basis for the conceptualization of this principle."[5] The longstanding ambiguity surrounding the relationship between the principle of proportionality and the principle of fair balance further deepens this uncertainty. While the two are sometimes treated as synonymous,[6] an increasingly prevalent view suggests that

> the principle of fair balance should be regarded as a more fundamental norm, addressing the underlying tensions inherent in the application of the provisions of the ECHR. In contrast, the principle of proportionality ought to be

1 Magdalena Michalska, "Zasada proporcjonalności w orzecznictwie TK i ETPC – analiza prawno-porównawcza," *Krytyka Prawa. Niezależne Studia nad Prawem* 14, no. 2 (2022): 82, https://doi.org/10.7206/kp.2080-1084.524.

2 Also referred to as the ECHR or the Convention.

3 Aleksander Stępkowski, *Zasada proporcjonalności w europejskiej kulturze prawnej: sądowa kontrola władzy dyskrecjonalnej w nowoczesnej Europie* (Warszawa: Liber, 2010), 216–17; Adam Wiśniewski, "Proporcjonalność i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," *Gdańskie Studia Prawnicze* 42, no. 2 (2019): 57, https://gsp.ug.edu.pl/index.php/gdanskie_studia_prawnicze/article/view/5262.

4 Also referred to as the ECtHR or the Court.

5 Wiśniewski, "Proporcjonalność i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," 57.

6 Bartłomiej Latos, *Klauzula derogacyjna i imitacyjna w Europejskiej Konwencji o Ochronie Praw Człowieka i Podstawowych Wolności* (Warszawa: Wydawnictwo Sejmowe, 2008), 45–46.

understood *sensu stricto* as referring specifically to the relationship between the objective pursued and the means used to achieve that objective.[7]

Despite the doubts indicated and the issues unresolved at a high level of generality, the principle of proportionality is one of the key interpretative tools used in the case law of the ECtHR.[8] As Michalska points out, despite the lack of a synthetic definition of proportionality, the ECtHR's jurisprudential practice shows structural repetition in the application of the three basic elements of the proportionality test: utility, necessity, and proportionality *sensu stricto*. This approach constitutes a *de facto* standard for assessing the legality of interference in the sphere of protected individual rights.[9]

Undoubtedly, the principle of proportionality serves as a tool for assessing the admissibility of state interference with individual rights, particularly in cases where the tension between private and public interests is especially pronounced, as is the case in the context of employee monitoring. Modern workplaces, shaped by extensive digitalization and the automation of processes, are increasingly becoming spaces where the boundaries of privacy are being redefined. Workplace surveillance (especially electronic monitoring, such as the inspection of email correspondence, the processing of geolocation data, or video surveillance) raises questions regarding its compatibility with Article 8 of the ECHR, which guarantees the right to

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7 Ibid., 69. See also: Alastair Mowbray, "A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights," *Human Rights Law Review* 10, no. 2 (2010): 289–317, https://doi.org/10.1093/hrlr/ngq006; Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden: Brill, 2009), 27.

8 Ibid., 1; Kai Möller, "Proportionality: Challenging the Critics," *International Journal of Constitutional Law* 10, no. 3 (2012): 709, https://doi.org/10.1093/icon/mos024.

9 Michalska, "Zasada proporcjonalności w orzecznictwie TK i ETPC – analiza prawnoporównawcza," 89–93. According to K. Möller the principle of proportionality, widely used in human rights and constitutional law doctrine, has in its practical dimension taken the form of the proportionality test, commonly applied both by the ECtHR and by national courts and constitutional tribunals. In this author's view this test consists of four stages: (1) legitimate goal stage, (2) rational connection or suitability stage, (3) necessity stage, and (4) balancing stage, better known as proportionality in the strict sense. See: Möller, "Proportionality: Challenging the Critics," 711. The literature also emphasizes that "in order to strike a fair balance, the ECtHR applies strict (in respect of absolute rights) and persuasive (convincing) democratic necessity tests." See: Kristina Trykhlib, "The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights," *EU and Comparative Law Issues and Challenges Series (ECLIC)* 4 (2020): 151, https://doi.org/10.25234/eclic/11899.

respect for private life. In such cases, the ECtHR has repeatedly emphasized the need to strike a balance between the legitimate interests of employers (e.g., property protection, operational efficiency, data security) and employees' rights to autonomy and privacy. The mechanism for achieving this balance is precisely the proportionality test.

It is impossible to omit at this point the significance of the doctrine of the "margin of appreciation," which shapes the manner in which the ECtHR assesses the actions of member states. The scope of this margin, as demonstrated by case law, varies depending on the nature of the right being protected, the existence of European consensus, and the social context.[10] In cases related to workplace monitoring, this margin is often relatively broad, due in part to differences in labor law models and privacy-protection cultures among individual states. However, this does not exempt states from the obligation to demonstrate that the interference was proportionate to the legitimate aim pursued and that its impact on the rights of the individual was not excessive.

The article introduced by the foregoing remarks aims to reconstruct and critically analyze the manner in which the ECtHR applies the principle of proportionality in cases concerning workplace monitoring. By examining specific rulings of the Court, an attempt will be made to identify jurisprudential patterns, the scope of the margin of appreciation granted, and the consequences arising from a potential failure to uphold proportionality. Simultaneously, the analysis will address the axiological tensions underpinning such cases: between the need to ensure security, efficiency, and oversight in the workplace, and the protection of employee privacy and dignity. This approach is intended not only to deepen the understanding of the principle of proportionality but also to foster reflection on its practical significance in light of evolving surveillance technologies and socio-legal relations in the workplace.

[10] Wiśniewski, "Proporcjonalność i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," 64–67; Michalska, "Zasada proporcjonalności w orzecznictwie TK i ETPC – analiza prawno-porównawcza," 93.

## 2. Character of Article 8 of the ECHR in the Context of Interference with Employees' Right to Respect Their Private Life by Monitoring Measures

The traditional interpretation of the right to privacy under Article 8 of the ECHR significantly differs from the modern understanding of this right. Initially, Article 8 of the ECHR was interpreted narrowly, with the aim of protecting the private and family life of citizens from arbitrary interference by public authorities. At that time, the provision had the characteristics of a negative right, serving primarily to restrain public authorities from acting.[11]

It was only later, alongside social changes, that the ECtHR began to indicate that, in addition to its defensive character, Article 8 of the ECHR also entails a positive dimension. This stems primarily from the Convention's formulation that everyone has the right to "respect" for their private and family life.[12] The positive dimension of Article 8 has a dual nature. On the one hand, it involves the use of the power and capacity of the state in such a way as to secure the rights of individuals under the Convention and to ensure that they are practically accessible, as exemplified in *Marckx v. Belgium*. On the other hand, it entails a duty on public authorities to adopt legal regulations that provide protection of Convention rights against interference by other private actors.[13] The latter concept is primarily related

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11 Ursula Kilkelly, "The Right to Respect for Private and Family Life, Home and Correspondence," in *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, eds. David J. Harris, Michael O'Boyle, and Colin Warbrick (Oxford: Oxford University Press, 2009), 362.

12 In the case of *Marckx v. Belgium*, regarding the "respect for family life" the Court stated that "it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life." See: ECtHR Judgment of 13 June 1979, Case *Marckx v. Belgium*, application no. 6833/74, para. 31.

13 In the case *X and Y v. the Netherlands*, the Court indicated that "although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves." ECtHR Judgment of 26 March 1985, Case *X and Y v. the Netherlands*, application no. 8978/80, para. 23. David J. Harris et al.,

to the development of a horizontal interpretation of the Convention[14] and becomes especially visible in cases concerning employees' right to respect for their private and family life. Although the interference is most often carried out by a private entity – the employer – in accordance with the present conception, it is the state and its national judiciary that bear the burden of fulfilling positive obligations to protect individuals against unjustified violations of their Convention rights. As the Court itself has held:

> in certain circumstances, the state's positive obligations under Article 8 of the Convention are not adequately fulfilled unless it secures respect for private life in the relations between individuals by setting up a legislative framework taking into consideration the various interests to be protected in a particular context.[15]

The rapid technological progress, the development of new forms of workplace surveillance, and changes in the work environment that blur the boundaries between the public and private spheres,[16] have all contributed to an increasing number of cases before the Strasbourg Court concerning employees' privacy being infringed by employers. Accordingly, in line with the living-instrument doctrine, the ECtHR has begun reinterpreting

"The European Convention on Human Rights in Context," in *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights*, eds. David J. Harris, Michael O'Boyle, and Colin Warbrick (Oxford: Oxford University Press, 2009), 19–20.

14 Judge Pinto De Albuquerque in his partly dissenting opinion to the judgment of the fourth section of the ECtHR in case of *Bărbulescu v. Romania* stated that "[c]onvention rights and freedoms have a horizontal effect, insofar as they are not only directly binding on public entities in the Contracting Parties to the Convention, but also indirectly binding on private persons or entities, the Contracting State being responsible for preventing and remedying Convention violations by private persons or entities. This is an obligation of result, not merely an obligation of means." See: ECtHR Judgment of 12 January 2016, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 23. The opinion is of great significance in the context of the subsequent judgment of the Grand Chamber in *Bărbulescu v. Romania*, as the court confirmed it when ruling on the violation of Article 8.

15 ECtHR Judgment of 5 September 2017, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 115.

16 See: Kalina Arabadjieva and Paula Franklin, "Home-Based Telework, Gender and the Public-Private Divide," in *The Future of Remote Work*, eds. Nicola Countouris et al. (Brussels: ETUI, 2023), 61–81.

Article 8 of the Convention "in the light of present-day conditions,"[17] which has significantly influenced the principle of proportionality, one of the most important doctrinal tools used by the Court to resolve conflicts between fundamental rights or between a right and a competing interest.[18]

The principle of proportionality has a uniquely multi-dimensional character. Its interpretation and application may vary depending on the factual context, and especially on the nature of the Convention right in question and the interest or right that opposes it.[19] The rights stated in the Convention are divided into absolute rights, which cannot be restricted under any circumstances, and non-absolute (qualified) rights, which may be limited, but only within the boundaries defined by each state's (signatories to the Convention) margin of appreciation.[20] The scope of the margin of appreciation, i.e., the extent to which individual states are free to interpret the rights set out in the Convention,[21] depends on the existence of so-called "European consensus."[22] Where such consensus exists, the margin is narrower; in its absence, states enjoy broader discretion.[23] In cases involving alleged violations of employees' right to privacy through monitoring

17 ECtHR Judgment of 25 April 1978, Case of *Tyrer v. the United Kingdom*, application no. 5856/72, para. 31. The role of national courts in the doctrine of positive obligations has been clearly defined, *inter alia*, in the ECtHR Judgment of 17 October 2019, Case *López Ribalda and Others v. Spain*, applications nos. 1874/13 and 8567/13, para. 15. The Court stated that "[i]n sum, we find that both the national courts and this Court failed to strike a fair balance between the rights of the employer and the rights of the employees."

18 Möller, "Proportionality: Challenging the Critics," 710.

19 Trykhlib, "The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights," 130.

20 Ibid., 130–31.

21 The Court clearly emphasizes the subsidiarity of the protection mechanism established by the convention in relation to national systems protecting human rights. Moreover, it also states that it is the responsibility of the national authorities to make the initial assessment whether specific provisions or actions comply with the ECHR. See: ECtHR Judgment of 7 December 1976, Case *Handyside v. the United Kingdom*, application no. 5493/72, para. 48. See also: Thomas A. O'Donnell, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights," *Human Rights Quarterly* 4, no. 4 (1982): 478, https://doi.org/10.2307/762206.

22 Consensus among member states of the Council of Europe on a specific issue connected to the rights indicated in the ECHR.

23 Trykhlib, "The Principle of Proportionality in the Jurisprudence of the European Court of Human Rights," 145–46.

measures used by employers, the Court has explicitly stated that no European consensus currently exists,[24] which in turn grants states a wider margin of appreciation. This has a direct impact on how the principle of proportionality is applied. However, it must be remembered that the final assessment of whether the balancing of competing rights and interests, the use of specific measures, and the degree of interference with an employee's private life was proportionate ultimately rests with the Strasbourg Court, due to its supervisory role.[25]

## 3. Balancing Competing Rights and Interests – Conceptual Approaches in the ECtHR Case Law

The ECtHR, in its scrutiny, most often focuses on proportionality *sensu stricto*.[26] Moreover, the balancing stage is especially significant in cases concerning employers' interference with the privacy of employees, particularly through surveillance measures. This is mainly because the relationship between employer and employee is inherently unequal,[27] due to the structural subordination of the employee to the employer's authority.[28]

The essence of balancing can be summarized as the process of determining which of the competing rights, values, or interests, should be given priority in a particular case.[29] Therefore, it is a matter of weighing certain

[24] "It also appears from the comparative-law material at the Court's disposal that there is no European consensus on this issue. Few member states have explicitly regulated the question of the exercise by employees of their right to respect for their private life and correspondence in the workplace." See: ECtHR Judgment of 5 September 2017, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 118.

[25] Wiśniewski, "Proporcjonalność i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," 66. ECtHR Judgment of 22 October 1981, Case *Dudgeon v. the United Kingdom*, application no. 7525/76, para. 59.

[26] Michalska, "Zasada proporcjonalności w orzecznictwie TK i ETPC – analiza prawnoporównawcza," 90.

[27] See: Aditi Bagchi, "The Myth of Equality in the Employment Relation," *Michigan State Law Review* (2009): 579–628, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1255&context=faculty_scholarship.

[28] Nóra Jakab, "Theoretical Issues of Employment Contracts and Collective Agreements on Current Regulatory Issues," in *Fundamentals of Labour Law in Central Europe*, ed. Nóra Jakab (Miskolc: Central European Academic Publishing, 2022), 17.

[29] Möller, "Proportionality: Challenging the Critics," 715.

values against one another. This naturally gives rise to the question: how should such balancing be conducted?

The answer lies in two distinct conceptual models of balancing. The first is the so-called "interest balancing," closely associated with cost-benefit analysis, which constitutes one of the general standards applied by the ECtHR when assessing interferences with Convention rights.[30] Interest balancing involves weighing conflicting rights *sensu stricto* – comparing their relative weight and granting primacy to the one that carries greater importance.[31] However, this raises a further question: how is the weight of a particular right to be determined, and do the rights enumerated in the Convention possess an autonomous value regardless of the specific context, especially when it comes to non-absolute rights?

To address these questions, a second concept emerges: "balancing as reasoning." This model calls for a contextual and comprehensive weighing of all relevant factors present in a given case. It is best described as the construction of a moral argument to determine which right or interest, under the particular circumstances, ought to prevail.[32] This model of balancing, which may be referred to as balancing *sensu largo* or contextual balancing, takes into account both the direct and indirect elements of the situation, including the broader context in which the alleged violations have occurred. As such, it may lead to different outcomes from a purely interest-based approach.

A useful example to illustrate how these two approaches function in practice is the case of *Hatton v. United Kingdom*.[33] Due to the nature of competing rights and interests, this case provides a good starting point for analyzing cases concerning interference with the right to respect for private life of employees as a result of monitoring measures taken by employers and for determining which concept is more appropriate in such cases. In *Hatton*, the core conflict lay between the right to respect for private and family life under Article 8 ECHR, which had allegedly been violated by night-time

30 Michalska "Zasada proporcjonalności w orzecznictwie TK i ETPC – analiza prawno-porównawcza," 90; Stępkowski, *Zasada proporcjonalności w europejskiej kulturze prawnej*, 221.

31 Möller, "Proportionality: Challenging the Critics," 715.

32 Ibid.

33 ECtHR Judgment of 8 July 2003, Case *Hatton and Others v. the United Kingdom*, application no. 36022/97.

aircraft noise, and the public interest in ensuring economic development through the efficient operation of air transport. The case resulted in two diverging judgments. In the first, the Third Section of the ECtHR ruled in favor of the applicants, holding that a failure to maintain a fair balance between the public interest and the individuals' rights to respect for their private, home, and family life constituted a violation of Article 8 of the ECHR.[34] However, in the subsequent judgment, the Grand Chamber reached the opposite conclusion, assigning greater weight to the public interest.[35]

A comparative analysis of these two judgments reveals that the Court, in fact, applied a broad model of balancing. Had the Court relied solely on the interest balancing the outcome might have favored the public interest from the outset, given that economic benefits outweighed the relatively lower degree of harm caused by the night flights – an outcome that would likely have been reflected in the Section judgment. However, this was not the case. The primacy of the public interest was only confirmed by the Grand Chamber, suggesting that the reasoning process involved a contextual assessment of all relevant factors, rather than a mechanical application of cost-benefit logic.

This section now turns to the analysis of cases involving a conflict between employees' right to privacy and the monitoring measures implemented by employers for supervisory purposes. Two cases decided in recent years by the ECtHR play a key role in the analysis, offering valuable insights into how the principle of proportionality operates in this context. These cases are *Bărbulescu v. Romania* and *López Ribalda and Others v. Spain*. In general, it can be pointed out that the essence of each of the above-mentioned cases is the need to achieve a fair balance between the interests of the employee, i.e., his or her right to privacy, and the interests of the employer, which can be defined as the employer's right to monitor the employee deriving from the organizational function of labor law and the employer's obligation to properly organize the work process.[36] If this bal-

[34] ECtHR Judgment of 2 October 2001, Case *Hatton and Others v. the United Kingdom*, application no. 36022/97.

[35] ECtHR Judgment of 8 July 2003, Case *Hatton and Others v. the United Kingdom*, application no. 36022/97, paras. 129–130.

[36] Dominika Dörre-Kolasa, "Rights and Obligations of the Parties to an Employment Relationship," in *Outline of Polish Labour Law System*, ed. Krzysztof W. Baran (Warszawa: Wolters

ance were to be established using a strict interest balancing logic, we would most likely experience a dichotomy of decision: either each case would be decided in favor of the employer – on the basis that the employer's interest should be identified with the public interest in economic development through the efficient functioning of the business,[37] indicating that it outweighs the interests of individual employees – or, conversely, the public interest would be equated with the protection of employee privacy, leading to findings of violations of Article 8 ECHR in each case.

However, the reality is far more complex. The public interest can rarely be reduced to the interest of a single social group, as it is typically shaped by a variety of factors and composed of overlapping interests of different groups, which will be weighed differently depending on the circumstances. Furthermore, in cases concerning alleged violations of Article 8 ECHR through employee monitoring, a number of elements must be taken into account when assessing the rights and interests at stake: for example, how the right to privacy was exercised by the employee, the extent to which it was interfered with, and the purpose and nature of the monitoring measures used.

It appears that this conclusion was shared by the ECtHR, which, in the mentioned cases, departed from a simple cost-benefit analysis and refrained from assigning abstract or autonomous weight to competing rights and interests. Instead, the Court adopted a more context-sensitive approach, i.e., balancing *sensu largo*, focusing on the specific facts of each case.

The role of "balancing as reasoning" in cases concerning employee privacy is well illustrated by the judgments in *Bărbulescu v. Romania* and *López Ribalda and Others v. Spain*. In *Bărbulescu v Romania,* two separate judgments were delivered, each based on a different assessment. In the first judgment, issued by the Fourth Section, the Court found no violation of Article 8 of the Convention in relation to the monitoring by the employer of the employee's activity on a Yahoo Messenger account created for work purposes, which revealed that the employee had used the account

Kluwer, 2016), 259–60; Krzysztof W. Baran, "Functions of Labour Law," in *Outline of Polish Labour Law System*, ed. Krzysztof W. Baran (Warszawa: Wolters Kluwer, 2016), 35–36.

37 The basis for this statement is reasoning *per analogiam* in relation to *Hatton v. United Kingdom* case.

for personal communication.[38] The Court justified its decision by noting that the employer had acted within the scope of its disciplinary powers[39] and that its intention to verify whether employees were carrying out their duties during working hours was reasonable.[40] Moreover, the Court found that the monitoring measures used by the employer were limited in scope and showed features of proportionality.[41]

Therefore, it can be seen that, in balancing the competing rights and interests, the Court applied a narrow set of criteria and did not address the issue of whether the employee had been informed about the monitoring, which, in turn, became a key issue in the Grand Chamber's judgment. The limited scope of the Court's search for a fair balance leads to the conclusion that this judgment was more heavily influenced by the concept of "interest balancing" than by "balancing as reasoning."

The above-mentioned judgment, and specifically the brevity of the analysis concerning the alleged violation of Article 8 ECHR, was widely criticized by Judge Pinto de Albuquerque, who, in his partly dissenting opinion, drew attention to several important elements that had been overlooked by both the domestic courts and the ECtHR majority. These included: the absence of a policy on monitoring internet activity, which should have been properly implemented and enforced by the employer; the sensitive and personal nature of the employee's messages accessed by the employer; and the broad scope of the disclosure of the employee's private communications during the disciplinary proceedings.[42] Judge Pinto de Albuquerque placed particular emphasis on the employer's obligation to establish an appropriate internal policy on the use of the Internet and online communication tools in the workplace. While such policies may vary

38 ECtHR Judgment of 12 January 2016, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 63.

39 Ibid., para. 56.

40 Ibid., para. 59.

41 The characteristics of the monitoring, such as its limited scope and proportionality, the Court derived from the fact that only the employee's communications on Yahoo Messenger were examined, excluding other data and documents stored on his computer. See: ECtHR Judgment of 12 January 2016, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 60.

42 Partly Dissenting Opinion of Judge Pinto de Albuquerque, ECtHR Judgment of 12 January 2016, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 2.

across companies depending on operational needs, they must in all cases clearly define the employee's rights and obligations, including the permissible scope of internet use, methods of monitoring, mechanisms for securing, using, and destroying data, and the individuals authorized to access it.[43] The implementation of such a policy should be consistent with the principles of necessity and proportionality, and Judge Pinto de Albuquerque elaborated in detail on what this should look like in practice.[44] Additionally, he drew attention to another important issue, indirectly referring to the unequal power dynamic between employer and employee. Namely, he warned that the absence of a clear internet-use policy in the workplace may lead to employer behavior resembling that of "Big Brother," wherein employee activity is excessively monitored. Such behavior reflects a commodification of the employee, as if both his or her labor and private life were subject to negotiations between two parties of equal standing.[45]

When analyzing the position of Judge Pinto de Albuquerque, it becomes clear that his reasoning goes far beyond a cost-benefit assessment. In weighing the employee's right to privacy against the employer's right to surveillance, he applies a contextual approach, placing the issue within a human-rights-centerd approach to internet usage in the workplace. He also draws attention to the unequal relationship between the parties to the employment contract, as well as to the personal and sensitive nature of the messages sent by the employee that were subject to monitoring. Applying a more extensive proportionality analysis, the judge reached a conclusion that diverged from that of the majority, holding that Article 8 ECHR had been violated in this case.

The approach to balancing expressed in the partly dissenting opinion found direct reflection in the Grand Chamber judgment, which held that there had indeed been a violation of Article 8 ECHR. Firstly, the Grand Chamber more precisely defined the employer's interest competing with the employee's right to privacy than had the previous judgment. Echoing the national courts, the ECtHR acknowledged that the employer has a legitimate interest in ensuring the smooth functioning of the company, which may be pursued through the implementation of monitoring mechanisms to

43 Ibid., para. 10.
44 See: ibid., para. 13.
45 See: ibid., para. 15.

check whether employees perform their duties diligently.[46] Secondly, the Court developed a list of six criteria intended to guarantee the proportionality of surveillance and guard against its arbitrary application. These factors should be taken into consideration by national authorities when assessing a situation involving employee monitoring, and they are as follows:

(1) whether the employee had been informed about the possibility of monitoring their communications and about the implementation of monitoring measures;
(2) the extent of the monitoring and the degree of intrusion into the employee's privacy;
(3) whether the employer provided legitimate reasons to justify the monitoring and access to the actual content of communications;
(4) whether less intrusive methods of monitoring could have been used instead of accessing the content of the employee's communications directly;
(5) the consequences of the monitoring for the employee, particularly whether the monitoring results contributed to achieving its stated objectives;
(6) whether appropriate safeguards were in place for the employee, especially where the surveillance was of an intrusive nature.[47]

The ECtHR found that none of the above factors had been adequately assessed by the domestic authorities. Therefore, the Romanian appellate court's conclusion that a fair balance had been struck between the competing rights and interests was called into question.[48]

The trajectory of the *López Ribalda and Others v. Spain* case closely resembles that of *Bărbulescu v. Romania.* This case also resulted in two contrasting judgments. In the first judgment, the Third Section of the ECtHR found that the domestic courts had failed to strike a fair balance between the employee's right to privacy and the employer's interest in protecting property. The Court supported its position with an in-depth

46 ECtHR Judgment of 5 September 2017, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 127.
47 Ibid., para. 121.
48 Ibid., paras. 133–139.

proportionality analysis, concluding that the covert video monitoring had not been prompted by a specific suspicion of theft against particular employees but was directed at the entire group of checkout staff. Moreover, the Court observed that the hidden monitoring was not compliant with applicable domestic law, as it breached the obligation to provide prior and explicit notice to employees about the existence and characteristics of a system collecting personal data. It also deemed the period of surveillance as disproportionate and indicated that the employer's interest could have been protected by less intrusive means.[49]

The Third Section's judgment was accompanied by a dissenting opinion of Judge Dedov, who argued that illegal or abusive behavior is not protected by the right to private life under the ECHR. He stressed that in such circumstances, the public interest should prevail and that safeguards against illegality and arbitrariness should be limited to protection from abuse.[50] The judge's reasoning added an important dimension to the balancing process by introducing a public interest perspective – namely, the interest in preventing unlawful behavior, such as employee theft. This argument played a significant role in the subsequent judgment of the Grand Chamber, which overturned the judgment of the Third Section.

In its judgment, the Grand Chamber relied on the six criteria for assessing the proportionality of monitoring established in the *Bărbulescu* case. However, it emphasized that these criteria must be applied with regard to the specific context – the nature of the employment relationship and the increasing technological capacity to interfere with employees' private lives.[51] When analyzing the case, the Grand Chamber found that the Spanish labor courts had undertaken a thorough balancing exercise between the competing rights and interests. These domestic courts relied on criteria developed by the Spanish Constitutional Court, which largely mirrored the standards elaborated by the ECtHR.[52]

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49 ECtHR Judgment of Case of 9 January 2018, Case *López Ribalda and Others v. Spain*, applications nos. 1874/13 and 8567/13, paras. 68–69.

50 Dissenting Opinion of Judge Dedov, ECtHR Judgment of 9 January 2018, Case *López Ribalda and Others v. Spain*, applications nos. 1874/13 and 8567/13.

51 ECtHR Judgment of 17 October 2019, Case *López Ribalda and Others v. Spain*, applications nos. 1874/13 and 8567/13, para. 116.

52 Ibid., para. 132.

Nevertheless, the Court noted a departure from the indicated rules, which was the failure to inform employees about the monitoring measures. In addressing this issue, the ECtHR indirectly engaged with Judge Dedov's argument regarding the need to protect public interest against problematic behavior of certain groups. The Court held that only an overriding need to protect significant public or private interests can justify the lack of prior notification of the employee.[53] The argument was further developed by the Court, which stated that not every suspicion of employee misconduct justifies covert surveillance. Only suspicion of serious wrongdoing may warrant such measures, and in assessing the seriousness, one must consider the scale of losses suffered by the employer. Furthermore, misconduct that poses a risk to the employer's smooth functioning should not result from the actions of a single employee but rather from a group, as this creates an atmosphere of distrust in the workplace.[54] Ultimately, the Court found that the circumstances of the case, specifically the conduct of the employees in question, provided sufficient justification for omitting the information obligation and for the installation of covert monitoring.

A comparison between *Bărbulescu* and *López Ribalda and Others* cases leads to the conclusion that although the Court in its initial judgments adopted a rather narrower approach to balancing rights and interests at stake, focusing mainly on their core content or omitting certain contexts, later Grand Chamber judgments expanded the balancing process to include a broader context. This involved considering additional factors that significantly affected the ability to maintain a fair balance between competing rights and interests. The Court gave explicit expression to this approach in the *Bărbulescu* case, where it set out six comprehensively defined principles for employee monitoring, allowing an assessment of whether a fair balance had been struck. While such a broad approach to balancing in connection with Article 8 ECHR had already been established in the Strasbourg Court's case law,[55] in the specific context of employee monitoring and

53 Ibid., para. 133.

54 Ibid., para. 134.

55 ECtHR Judgment of 12 November 2002, Case *Płoński v. Poland*, application no. 26761/95, para. 35; ECtHR Judgment of 7 August 1996, Case *Johansen v. Norway*, application no. 17383/90, para. 73; ECtHR Judgment of 25 February 1997, Case *Z v. Finland*, application no. 22009/93, para. 113.

privacy, there is one further argument in favor of applying the "balancing as reasoning" model. This argument had already been briefly raised by the Court and deserves closer attention – it concerns the unique character of the employment relationship and, more precisely, the relative position of its parties.

If reality matched the neoliberal theory of employment, where labor is treated as a market commodity exchanged between workers and employers who are equal in economic power and freely enter employment for mutual benefit,[56] then "interest balancing" grounded in cost-benefit analysis might appear to be the more appropriate approach to balancing the rights and interests at stake. In such a scenario, there would be no need to account for additional factors derived from the specific nature of the employment relationship, and the analysis would be stripped of the broader legal and social context defined by modern labor-law standards.

However, in the real-world employment relationship departs from the neoliberal ideals.[57] As the ECtHR itself has recognized, employment is characterized by the legal subordination of the employee,[58] which results in an unequal relationship between the parties. This inequality also arises from the employee's weaker bargaining position in relation to the employer.[59]

The unequal position of employees and the resulting need to protect them have become, in a sense, formative factors in the emergence of labor law as a distinct legal field.[60] As Kahn-Freund famously stated:

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56 John W. Budd and Devasheesh P. Bhave, "The Employment Relationship: Key Elements, Alternative Frames of Reference, and Implications for HRM," in *Sage Handbook of Human Resource Management*, eds. Adrian Wilkinson et al., 2nd ed. (London: SAGE Publications Ltd, 2019), 46–47.

57 Already the Treaty of Versailles, which established ILO, stated in Article 427 that labor should not be regarded merely as a commodity or article of commerce. See: Part XIII (Labour) of the Treaty of Versailles of 28 June 1919, Article 427.

58 ECtHR Judgment of 5 September 2017, Case *Bărbulescu v. Romania*, application no. 61496/08, para. 117.

59 Frank Hendrickx, "Foundations and Functions of Contemporary Labour Law," *European Labour Law Journal* 3, no. 2 (2012): 120, https://doi.org/10.1177/201395251200300202.

60 A similar view was expressed by Pope Pius XI, who wrote in his encyclical *Quadragesimo Anno* that "[a] new branch of law, wholly unknown to the earlier time, has arisen from this continuous and unwearied labor to protect vigorously the sacred rights of the workers that flow from their dignity as men and as Christians. These laws undertake the protection of life, health, strength, family, homes, workshops, wages and labor hazards, in fine, everything

> The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.[61]

This idea has found reflection in national labor-law systems, taking the form of a doctrinal function of labor law or, in some cases, a legal principle enshrined in legislation. For example, the Polish labor law doctrine explicitly recognizes the protective function of labor law and links it with the principle of favoring the employee, as the economically and socially weaker party, expressed, *inter alia*, in Article 18 of the Polish Labour Code.[62]

The significance of the contextual inequality between the parties to the employment relationship has been recognized, among others, by such scholars as Barański and Piszczek. Pointing out the risks to which employees are exposed at work and their less privileged position in relations with their employers, they conclude that the information obligation under Article 8 of the Convention concerning the degree of environmental pollution in the workplace should, in principle, be considered absolute.[63] Admittedly, these authors address Article 8 ECHR in the context of the employee's rights

which pertains to the condition of wage workers, with special concern for women and children (…)." See: Pope Pius XI, *Quadragesimo Anno*, 1931, para. 28. See also: Łukasz Pisarczyk, "Przeobrażenia prawa pracy a jego funkcja ochronna," in *Studia Prawnicze: Rozprawy i Materiały – Prokatywna funkcja prawa pracy?*, eds. Barbara Wagner and Ewa Hoffmańska (Kraków: Oficyna Wydawnicza AFM, 2010), 19.

61 Otto Kahn-Freund, *Labour and the Law*, eds. Paul Davies and Mark Freedland, 3rd ed. (London: Stevens & Sons, 1983), 18.

62 Article 18 of the Polish Labour Code defines the specific nature of labor law provisions. These provisions are referred to as "unilaterally binding" (*jednostronnie bezwzględnie obowiązujące)* or "semi-imperative" provisions, as they allow for deviations only in favor of the employee. See: Teresa Liszcz, *Prawo Pracy* (Warszawa: LexisNexis, 2009), Chapter I, § 4. Funkcje prawa pracy. Moreover, see: Łucja Kobroń-Gąsiorowska, "Interes publiczny jako element podstawowy funkcji ochronnej prawa pracy – w kontekście ochrony sygnalistów," *Rocznik Administracji i Prawa* 1, no. 19 (2019): 340, https://doi.org/10.5604/01.3001.0013.3605; Mariusz Wieczorek, "Some Aspects of Labour Law's Protective Function at the Time of COVID-19," *Studia Iuridica Lublinensia* 30, no. 1 (2021): 340, http://dx.doi.org/10.17951/sil.2021.30.1.339-355; Krzysztof W. Baran, "Functions of Labour Law," in *Outline of Polish Labour Law System*, ed. Krzysztof W. Baran (Warszawa: Wolters Kluwer, 2016), 34–35; Zbigniew Góral, "Principles of Labour Law," in *Outline of Polish Labour Law System*, ed. Krzysztof W. Baran (Warszawa: Wolters Kluwer, 2016), 69–72.

63 Michał Barański and Anna Piszczek, "Employees' Right to a Pollution-Free Working Environment in the Context of Articles 2 and 8 of the ECHR," *Praca i Zabezpieczenie Społeczne* 65, no. 6 (2024): 7, https://doi.org/10.33226/0032-6186.2024.6.2.

to a safe and clean working environment, rather than from the perspective of workplace monitoring, where the obligation to provide information is only one of the criteria that must be taken into account when assessing the proportionality of the measures used. Nevertheless, the presented approach clearly illustrates how the context determined by the distinct nature of the employment relationship can influence the interpretation of Article 8 of the Convention and, in particular, an assessment of the proportionality of interference with the right to privacy.[64]

## 4. The Role of the Principle of Proportionality in Restricting the Margin of Appreciation Under the Necessity Test

The relationship between the principle of proportionality and the margin of appreciation has long been a subject of scholarly and judicial debate.[65] Although both concepts function as interpretive mechanisms within the ECtHR's jurisprudence, legal scholars frequently emphasize the normative tension between them – one granting discretion, the other imposing constraints.

Arai-Takahashi has noted that

> it is possible to consider the application of the proportionality principle as the other side of the margin of appreciation (…) It is proposed that the principle

[64] It appears that when ruling on *Florindo de Almeida Vasconcelos Gramaxo v. Portugal*, which is the latest case concerning the right to privacy and monitoring measures in the workplace, the Court avoided a more detailed analysis of the unequal position of the parties to the employment relationship. The court's position was widely criticized in a dissenting opinion, in which Judges Motoc, Pastor Vilanova, and Guerra Martins stated that the interference with the employee's privacy was very significant and that the balance between competing rights and interests had been incorrectly determined. See: ECtHR Judgment of 3 April 2022, Case *Florindo de Almeida Vasconcelos Gramaxo v. Portugal*, application no. 26968/16, para. 10. Regarding the case *Florindo de Almeida Vasconcelos Gramaxo v. Portugal*, see more: Michał Barański and Tomasz Mirosławski, "Geolocation of an Employee from the Perspective of Article 8 of the ECHR," *Acta Universitatis Sapientiae – Legal Studies* 12, no. 2 (2023): 1–17, https://doi.org/10.47745/AUSLEG.2023.12.2.01.

[65] Jan Kratochvíl, "The Inflation of the Margin of Appreciation by the European Court of Human Rights," *Netherlands Quarterly of Human Rights* 29, no. 3 (2011): 326–28, https://doi.org/10.1177/016934411102900304.

of proportionality should be deployed as a device to ascertain whether national authorities have overstepped their margin of appreciation.[66]

In a similar vein, Möller stresses that proportionality – far from being a mere formalism – is best understood as a normative method of resolving conflicts between competing rights or interests. It provides a rational structure for evaluating whether interferences with rights are justified in the circumstances of a given case.[67] Importantly, Möller argues that the necessity component of proportionality functions as a "conflict filter" – it determines whether a real clash between rights exists, and whether the chosen means are the least intrusive available.[68] This idea is especially pertinent in the context of qualified rights under the ECHR, such as the right to respect for private life under Article 8, where justification for interference requires not only a legitimate aim and suitability, but also clear necessity and proportionality in the strict sense. From the perspective of ECtHR jurisprudence, as analyzed by Wiśniewski, proportionality and the doctrine of fair balance have evolved into interpretive standards that both constrain and shape the application of the margin of appreciation.[69] Fair balance, in particular, serves as the axiological foundation upon which the scope of permissible state discretion is evaluated. It is not merely a rhetorical reference to competing values but a substantive principle that obliges the Court to verify whether the rights of the individual have been sufficiently protected in light of public or third-party interests. Thus, proportionality and fair balance do not merely complement the margin of appreciation – they define its limits.

In the literature, it is frequently noted that the principle of proportionality becomes particularly salient when the margin of appreciation

66 Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp: Intersentia, 2002), 14. See also: Oddný Mjöll Arnardóttir, "*Res Interpretata, Erga Omnes* Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights," *The European Journal of International Law* 28, no. 3 (2017): 819–43, https://doi.org/10.1093/ejil/chx045; Wiśniewski, "Proporcjonalność i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," 64–67.

67 Möller, "Proportionality: Challenging the Critics," 713–15.

68 Ibid.

69 Wiśniewski, "Proporcjonalność i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," 64–67.

is subject to limitation under the necessity test, insofar as this principle constitutes one of its inherent components (Article 8(2) of the ECHR).[70] As Wiśniewski observes,

> the principle of fair balance determines the boundaries of the margin of appreciation in the context of states' positive obligations, as well as in the resolution of conflicts between the interests of the individual and those of society, or between the rights of the individual and third parties.[71]

The original proportionality test adopts an overly simplistic approach by implying that it is sufficient to identify a less restrictive alternative that achieves the legitimate aim equally well.[72] In practice, responses to social issues often vary – some may impose greater restrictions, others may be more effective, and different options may place burdens on different groups.[73] A proper assessment must involve a comparative evaluation of all reasonable policy alternatives in relation to one another.[74]

This dynamic is particularly apparent in cases concerning monitoring in the workplace. As demonstrated in previous sections, the ECtHR interprets Article 8 of the Convention as generating both negative and positive obligations on the state. While public authorities must refrain from arbitrary interferences, they are also required to ensure a normative framework that protects individuals, including employees, from rights violations by private actors, especially employers. The challenge posed by surveillance in the employment relationship lies in the asymmetry of power between employer and employee, which demands additional legal safeguards and elevates the standard for justifying interferences. In this sense, the necessity test becomes a mechanism for ensuring that such asymmetries are not exploited in a manner incompatible with Convention rights.

The jurisprudence of the Court illustrates that although states are formally granted a margin of appreciation, particularly in the absence of a European consensus and in areas closely tied to socio-economic regulation,

70 Wiśniewski, "Proporcjonalnosć i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," 65.

71 Ibid.

72 Möller, "Proportionality: Challenging the Critics," 715.

73 Ibid.

74 Ibid.

this margin is neither unlimited nor exempt from structured review. In *Bărbulescu v. Romania*, the Court held that domestic authorities had failed to verify whether the employee had been sufficiently informed about the scope and nature of the surveillance, or whether less intrusive measures had been considered. Notably, the judgment emphasized that the failure to conduct a proportionality assessment at the national level rendered the interference with Article 8 unjustified.[75]

The necessity of contextualized balancing was also underscored in *López Ribalda and Others v. Spain*, where the Court introduced a structured framework for assessing the legitimacy of covert video surveillance in the workplace. Although the majority accepted the employer's justification due to the specific circumstances of the case, the judgment explicitly warned that such surveillance must remain exceptional and be subjected to close scrutiny. Even where the Court recognizes a wide margin of appreciation, it conditions its application on the quality of the proportionality reasoning conducted domestically.[76]

These cases also illustrate the Court's insistence on pre-emptive legal guarantees. Where procedural safeguards are lacking – such as the absence of notification, oversight, or access to remedies – the legitimacy of state discretion is immediately undermined. In *Antović and Mirković v. Montenegro*, the failure to demonstrate that video surveillance in university lecture halls responded to a "pressing social need" led the Court to find a violation. The Court emphasized that general appeals to institutional efficiency or security are insufficient to justify interferences with Article 8 unless supported by a concrete, evidence-based necessity assessment.[77]

A similar logic underlies the Court's reasoning in *Köpke v. Germany*, where surveillance was upheld but strictly on the basis that it was limited in time and scope, conducted in response to substantiated suspicions, and compliant with national data-protection law.[78] This case illustrates that the

[75] ECtHR Judgment of 5 September 2017, Case *Bărbulescu v. Romania*, application no. 61496/08), paras. 139–141.

[76] ECtHR Judgment of 17 October 2019, Case of *López Ribalda and Others v. Spain*, applications nos. 1874/13 and 8567/13, paras. 124–137.

[77] ECtHR Judgment of 28 November 2017, Case *Antović and Mirković v. Montenegro*, application no. 70838/13, paras. 57–60.

[78] ECtHR Decision of 5 October 2010, Case *Köpke v. Germany*, application no. 420/07.

Court's acceptance of the margin of appreciation is not an act of deference but of calibrated judicial restraint, conditioned on the existence of substantive and procedural proportionality safeguards. The Court does not consider the margin of appreciation to be immunity from assessment of proportionality, and its acceptance is conditional, depending on the existence of procedural and substantive guarantees (e.g., transparency, legal remedies, prior analysis of alternatives).

Thus, the margin of appreciation functions not as a zone of unreviewable discretion but as a bounded space, the width of which is shaped by factors such as the presence of European consensus, the nature of the right at issue, and the quality of the state's justification. In cases concerning workplace monitoring, the absence of consensus on privacy standards may widen the formal margin, but the ECtHR uses the necessity test to narrow this space in practice, particularly when the interference is intrusive and affects core aspects of personal autonomy.

Although Wiśniewski does not directly refer to the risk of disproportionate employer interference with workers' privacy rights in the context of workplace surveillance, his analysis makes clear that the function of the fair balance principle, in tandem with the necessity requirement of proportionality, is to constrain discretion and to ensure that individual rights are not disproportionately subordinated to abstract or systemic interests.[79] This interpretive framework affirms that the Convention does not confer blanket authorization for unrestricted employer control over workers' private lives – especially in the digitalized and data-driven workplace environments of the twenty-first century. In this light, the ECtHR's approach reveals a deeper normative logic: the necessity test is not simply a formal step in proportionality analysis, but a substantive filter designed to protect vulnerable parties in asymmetrical legal relationships. The legitimacy of the margin of appreciation hinges on the meaningful application of that filter – a test that requires evidence, transparency, and deliberative justification, not mere invocation of authority or economic interest.

[79] Wiśniewski, "Proporcjonalnosć i fair balance w orzecznictwie Europejskiego Trybunału Praw Człowieka," 62–67.

## 5. Conclusion

The article has demonstrated that the principle of proportionality, particularly when understood through the lens of balancing as reasoning, serves as a crucial interpretive and normative framework in the jurisprudence of the ECtHR, especially in the cases concerning employees' privacy and its alleged violation by means of monitoring introduced by employers. In such cases, the Court has increasingly attempted to implement a contextualized balancing model that considers not only the nature of the interference and the autonomous meaning of the rights and interests at stake, but also the broader socio-legal dynamics inherent in the employment relationship. This is clearly reflected in the Grand Chamber judgments in *Bărbulescu v. Romania* and *López Ribalda and Others v. Spain*, in which the Strasbourg Court overcame the formalistic cost-benefit analysis and engaged in reasoning sensitive to multiple factors, power asymmetries and institutional safeguards.

As indicated in the paper, the lack of a European consensus regarding workplace surveillance affords states a relatively broad margin of appreciation. Yet the discretion caused by the margin is not unbounded. The principle of proportionality, along with its utility[80] and necessity components, serves as a substantive check against excessive employer monitoring and ineffective national safeguards. In this regard, proportionality is not only an adjudicative tool but a standard-setting mechanism that can guide both the shape of the legislation and judicial review.

Despite the state's wide margin of appreciation and discretion in regulating workplace privacy, there are symptoms of a gradual shift towards harmonization of that issue. This can be evidenced by EU legislative efforts such as the AI Act (Regulation (EU) 2024/1689) and the General Data Protection Regulation (Regulation (EU) 2016/679), whose scope also extends to the realm of employment relations. These legal initiatives depict an emerging normative trajectory that seeks to balance technological development with rights-based accountability. This may, in the future, move

[80] Utility, also known as suitability, is part of the principle of proportionality, which means that a given regulation enables the intended objective to be reached. This objective should be achievable, at least to a small extent, because otherwise there would be no conflict. See: Möller, "Proportionality: Challenging the Critics," 713.

the EU closer to a shared regulatory framework, narrow the current margin of appreciation and contribute to the emergence of a European consensus among the signatories of the ECHR.

Nevertheless, approaching this issue from the critical standpoint, harmonization or even unification, including the creation of a European consensus, raises important concerns, especially considering the current state of the dispute on the competitiveness of European industry. A rigid, one-size-fits-all regulatory model may overlook the distinct needs of different national labor markets and the industrial strategies of individual Member States. Another problem, which is beyond the scope of this article but should be mentioned, is the ECtHR's gradual departure from its role as the final guardian of human rights in favor of a quasi-legislative body that sets legislative standards and influences the legal systems of individual states.

On the other hand, we cannot overlook the growing threats to privacy and, above all, to the dignity of employees, resulting from the accelerating use of advanced technologies, such as AI-driven algorithms and the monitoring of employees' social media activity. These developments not only interfere with the employees' right to privacy but also increasingly threaten other Convention rights, notably the freedom of expression. In such cases, the Court should approach the proportionality assessment with enhanced attention.

In the presented context, "balancing as reasoning" emerges as the most suitable model for adjudication. In contrast to the abstract "interest balancing," it follows an in-depth analysis of the specific circumstances of each case, including the nature of the employment relationship, the scope and purpose of the monitoring, the availability of alternative measures, and the procedural safeguards. This model acknowledges that employment is not a purely contractual exchange between equal parties but a legal relationship marked by subordination and structural hierarchy, which justifies heightened protective standards.

Regardless of the case law of the ECtHR, which in its proportionality-based reasoning leans towards contextual balancing,[81] this model of balanc-

[81] However, there are exceptions from this tendency. See: ECtHR Judgment of 3 April 2022, Case *Florindo de Almeida Vasconcelos Gramaxo v. Portugal*, application no. 26968/16.

ing may also set the path for national legislators, who, wishing to protect the privacy of employees, should conduct an in-depth analysis, that takes into account the reality of modern employment, normative clarity, and the need to ensure a fair balance between the interests and rights of both sides of the employment relationship.

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