

[4.2.4] Conflicting rights and the principle of 'practical concordance'

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Pinned

[MatthiasMS](#) about a month ago

Having read the cases of *E and Others* and *Odièvre*, and having considered the strategies deployed by the Court for handling conflicts between rights, what is your opinion about Hesse's proposed 'practical concordance' strategy? Are you convinced that it is preferable to a methodology of 'balancing'? Would you consider a different approach preferable and if so, why? In your own country, how do courts handle this kind of conflict?

Please respond to this post, rather than starting new posts. As usual, don't forget to 'upvote' the opinions and thoughts of your colleagues that you find most interesting, innovative or well-argued!

1. [44 votes \(click to vote\)](#) [SakineYilmaz](#)

25 days ago

Practical concordance has the advantage to promote the effectiveness of different fundamental rights at stake. Moreover this method complies with the theoretical characteristics of fundamental rights such as incommensurability. Balancing implies some idea of hierarchy between the human rights that cannot be agreed with.

However this method is not operable in all cases of conflicts and it implies the "balancing method" cannot be definitively set aside. Moreover it shares with the balance the same downside: the heterogeneity of situations doesn't allow for generalizations and it entails that legal security is difficult to achieve in area of conflict of fundamental freedoms. According to me the method of practical concordance is also more prejudicial to the separation of powers since the judicial decisions in relation to these situations could reduce the margin of appreciation of the legislative and executive powers. Indeed the judge will impose its own view of the "concordance" although different tenable equilibria can be found as the dissenting opinion of the judges in the *Odièvre* case has shown.

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- I fully agree with Sakine's response.

Besides and in my opinion, the *practical concordance* method is of little use for international courts since they usually have a single alternative: to quash or not to quash the national decision or statute. If the ECtHR's 'optimal outcome' based on this method does not coincide with the national decision, is there a sufficient ground to quash the latter ?

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-posted 21 days ago by [AmauryV](#)

- I completely agree with Sakine's view.

No one can deny that the "practical concordance" is a far better method than the balancing one. At least, the idea is better because no right has to be sacrificed or set aside. It's of course more profitable and more equitable for the parties. And, like Sakine said, it complies with the idea of incommensurability of human rights.

But I'm quite skeptical about the concrete application of the "practical concordance". To

me, in such delicate questions as the questions seen in this section, like the Odièvre case, it is sometimes very difficult to satisfy both human rights without putting one of them a little bit higher than the other one. I think that this method is maybe a revolution on paper, but still difficult to put into practice.

And then, just like Amaury said, it is indeed of little use for international courts.

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-posted 20 days ago by [MarieTancré](#)

- According to me, the practical concordance appears to present many more advantages than the balancing method, because it doesn't make a right "win a battle" against another, but it tries to conciliate both rights.

Although, like the others said, I can't picture the concrete application of this technique. If we take the example, given earlier in the section, of the conflicting rights that are the freedom of expression of paparazzi and the respect of privacy of a celebrity: what would do the practical concordance in the example? In my opinion, unfortunately, I think one right always seems to be put a bit higher than the other, and so the balancing method seems to be the only one really applicable...

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-posted 19 days ago by [VioletteMouvet](#)

- Hesse's practical concordance principle relies on the fact that it tries to avoid sacrificing one right against the other. Which means that it tries to find a compromise between the 2 rights by optimizing each of the rights against each other. I think that the use of this principle would be different from case to case. Sometimes it would be a good thing to find a compromise but I think that sometimes one right is so essential that it in no way can be limited. Even though there are 2 rights at stake here.

As I said, I think that this needs to be evaluated case by case. In Belgium they look at what is the best solution for each case concerning the different rights. Sometimes one rights needs to be limited to allow the most essential right to be followed. To find a balance between 2 rights and to prefer the right with the highest value, can sometimes be a better solution than finding a compromise between 2 rights. But as mentioned above, sometimes this is a difficult matter to decide upon.

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-posted 18 days ago by [CarolienVdB](#)

- I agree with the other students. In my opinion however, practical concordance is more a GOAL which has to be achieved, an IDEAL, which expresses that we cannot establish a hierarchy and sacrifice one right for another. It's a goal, but the appropriate methodology in order to put into practice this "practical concordance" still has to be found according to me...

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-posted 18 days ago by [Sophiecartondetournai](#)

- I agree too. It reminds me of a method that is used in Belgium in order to find a solution that both parties can be "happy" about (and not, as in court, saying "one is right, the other is not"): the arbitration. Of course, this method cannot be used for every conflict

between parties. As for the 'practical concordance', I think, as some other students, that this is a good way of seeking for a compromise between two rights but this practice should not be generalized to every case.

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-posted 18 days ago by [DorotheeUytterhaegen](#)

- I also agree with the view that practical concordance is, in some cases, a better method than the balancing method because one right doesn't override another and it permits to take advantages and protection from both. But I think in some situations, the two rights concerned aren't of the same importance and one deserves a larger protection than the other. So I'm not against a certain hierarchy between human rights, for instance when it concerns the right of life or the protection against torture and ill-treatment. I think that with this kind of rights, the balance of interest is more appropriate.

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-posted 16 days ago by [Paulinecastiaux](#)

- I agree with Sophiecartondetournai in the sense that I think that the method of practical concordance should be the preferred solution, since it does not subordinate one right to another. I do think though, that in many cases it will not be possible to find equilibrium, and a choice will still have to be made between conflicting rights. Nevertheless, if practical concordance is kept in mind as a goal to pursue, I think it can in some cases offer a compromise solution.

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-posted 15 days ago by [Charlotte VR](#)

- Like most of you said, I also agree that 'practical concordance' is a good way of seeking for a compromise between 2 rights, even if it might not work in every case. We just need to keep in mind that human rights will always create "conflicts" between two or more parties because, even if they are FUNDAMENTAL rights, they never mean the same for everyone. I mean here that depending of where you come from, what is your religion, culture, etc. one right can seem much more important than another one, while someone else could think exactly the opposite. That's why the 'practical concordance' seems to be a good methodology to me because it seeks a COMPROMISE, which is essential and will always be when dealing with human rights.

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-posted 14 days ago by [Marie-Odile2](#)

- Like all of you, I think that the principle of "practical concordance" is a great idea. However, I think this idea of the lawyer Konrad Hesse is difficult to achieve in practice. For example, in the case of Odièvre v. France, how can we make a compromise between the right of the child to know who is his biological mother and the right of the mother to remain anonymous? I think it's not possible to make a compromise.

I believe, that since there is no hierarchy between fundamental rights, there is no other solution than privileging a right to the detriment of another.

The only solution I am considering is to introduce a hierarchy between fundamental rights, which I believe will greatly facilitate the work of judges, but I am aware that this

is impossible.

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-posted 14 days ago by [LMarkarian](#)

- I also agree with the prior posts. As sophiecarton said the principle of practical concordance is to view like a goal. It is the best way to solve a conflict of rights. But as it explained above it is the solution that *should* be found, the solution that achieves the best 'fit' but it is not always possible to find a compromise in the enjoyment of equivalent rights.

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-posted 14 days ago by [ameliethibaut](#)

- I also believe that practical concordance is a good doctrine on paper. I agree with most of the comments set above as I am not sure that practical concordance could be apply to every situation. If I am not sure that a hierarchy of fundamental rights is the solution, in practice it is most certainly applied by default as Court find themselves with the only solution being to "weight" the rights, to balance the interest.

I would also like to add that if practical concordance is actually applied it might lead to a system of the lowest common denominator of rights to actually find them fully compatible to one another. Taking that into consideration I don't know what doctrine could be applied at the least expense to the rights themselves.

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-posted 13 days ago by [pmohimont](#)

- I also agree with what it has been said. I believe like Sakine implied that the principle of practical concordance has to be applied on a casuistic basis and that I do not see how it could be generalized. This is definitely one of its major downsides, it all depends on the facts of the case. I think the example of the case Ollinger v. Austria provided in the casebook proves this point : the facts of this case are really specific and they allow for the principle of practical concordance to be applied by the court.

If this principle could be applied to all kinds of conflicts or rights, then why would the idea of balancing even exist since I think that finding a compromise between two conflicting rights is always better (since everyone's rights would be satisfied to a certain extent) than making one right prevail over the other (which implies some sacrifice).

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-posted 13 days ago by [MariaMorariu](#)

- I believe, tat 'practical concordance' is a practical approach for finding a compromise between two rights. However, there are cases in which it isn't applicable. So the best way is to use different approaches in different cases.

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-posted 6 days ago by [PollyTolstaya](#)

- nice

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-posted 6 days ago by [Julia1990](#)

- I agree , but I think it is a case specific to each country.For the case of adoption in our country the child has the right to look for his real parents .But he should preserve respect to the parents who adopted him or her.In some cases I know the adopted child is in touch with his two parents .He does not forget their favour .perhaps the real mother or father are blamed more than the adopting ones.

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-posted 6 days ago by [RemHab](#)

- My different approach would be to make it a law that all children should know who their parents are. Shift the balance to the applicant who is seeking the information.

However if that cannot be the case I favor the argument of the minority dissent where a balancing test would give some hope to the child seeking knowledge of their parent.

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-posted 6 days ago by [dearaunt](#)

- i agreed too.

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-posted 6 days ago by [AHMEDIE](#)

- Based on my understanding and believes practical concordance is a great strategy to keep the balance.

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-posted 6 days ago by [workeye](#)

- I agree that the principle of practical concordance is a great idea, on a theoretical perspective. It permits not to prefer one right over another, but to give weight to all rights in question. It gives a certain utility to the protection of the conflicting rights. But the difficulty resides in the fact that it is very hard not to favor one right over another in practice because, like in a compromise in which both parties have to give up a part of their opinion, all rights in presence have to be waved a bit in order to come to a "practical concordance".

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-posted 5 days ago by [Virginiecerexhe](#)

- As every situation seems to be different, then finding a solution that does not infringe on one parties rights is like walking into a mine field with a plastic spoon as your only tool to dig up the mines..

No wonder lawyers are wealthy as trying to decide who has right in one way or another, is so difficult.

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-posted 5 days ago by [TonyBerr](#)

- Sono pienamente d'accordo

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-posted 5 days ago by [Rossella87](#)

- I think practical concordance brings the utmost peace between the parties. It is not to win a battle, but to have a position for the future.

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-posted 5 days ago by [Walter Knorz](#)

- Right. Practical concordance does seem to be a better strategy than the aforementioned plans. However, it assumes the best of every individual in interpreting the circumstances and assumes that no bias is made. However, rights do have to be waived to certain degrees here and there. So the concern isn't in preventing bias but in allocating bias..

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-posted 5 days ago by [Eungyu](#)

- I also agree with the opinions expressed above. Practical concordance is a great method but sometimes it can be difficult to apply. So, the balancing method cannot be abandoned.

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-posted 4 days ago by [JulieThonus](#)

- To put it differently a win-win situation is to be preferred over a win-lose situation.

I would prefer that the system devise simple systems that attempt the win-win, and that if either party opposes and insists on a win-lose, then one must fall back on the "balancing" matter...

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-posted 4 days ago by [sunilguptasg](#)

- It seems to me that the practical concordance is a variant of the balancing of rights approach, except that it seems to say each claim should be given more or less equal weight in coming to a decision. Perhaps I need to learn a bit more about these issues but as others have said in the discussion, it seems to present much the same difficulties in practice as the balancing approach.

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-posted 4 days ago by [NatWellington](#)

- Practical concordance makes sense.

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-posted 4 days ago by [ismailk](#)

- When the two rights are compete against each other, it would be nice to know both are winners. meet in the middle ground where everyone is winner!

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-posted 4 days ago by [N9A](#)

- Practical Concordance can be accomplished through therapeutic alliance and negotiation. To reach concordance, four essential elements need to be addressed: 1.

partnership 2. communication 3. information giving 4. agreement.

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-posted 3 days ago by [enocothin](#)

- Practical concordance is a good theory and balancing has to be done to some extent. It seems to me that each case has to be considered on its own merits taking these theories into consideration.

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-posted 3 days ago by [GlennaSue](#)

- I think practical concordance can act as a guide, but I am not sure if judges should apply this. Practical concordance does not address the need and doesn't provide solutions to stop the occurrence of similar situations

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-posted 3 days ago by [Piyee](#)

- I agree that it is the preferable approach and the one to strive for, though sometimes balancing might be the only practicable option

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-posted 3 days ago by [EileenKing](#)

- Maybe the "practical concordance" approach would help in resolving some cases, but I don't really understand how this would operate in practice – need to know more. What might it mean in the Odièvre case? (where in my view the majority ruling made sense). I also wonder whether attempts to apply the idea might sometimes lead to an excessive degree of judicial activism, which (in Sakine's words) would be "prejudicial to the separation of powers since the judicial decisions in relation to these situations could reduce the margin of appreciation of the legislative and executive powers."

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-posted 3 days ago by [Mary3](#)

- i think in this situation i will differ with most of you the principle of 'practical concordance is really not on my favor

i prefer the balancing principle because it provides the best results that protects a big percentage of people. let's look at the situation of disclosure like in the Odièvre case, if the daughter would have been given the information related to her mother it means that a lot of women will have no faith with the system as they will think "why not abort the child" because if she gives birth, one day the child will know who she is hence women will prefer abortions and hence there will be failure to protect lives of these unborn children, hence the balancing method is the preferable one so that you can come up with a result for the greater good

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-posted 3 days ago by [dennismsechu](#)

- I agree on the issue of difficulty of establishing any standards or *jus commune* in this regard given the heterogeneity of cases. This leads me to believe that although the

principle of practical concordance might be useful in certain cases, it would still need to be complemented by the other principles.

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-posted 3 days ago by [KarinAndersson](#)

- In my opinion, one way of characterizing "practical concordance" is finding a win-win solution, as opposed to a winner-takes-all solution that is implied with the balancing approach.

In theory, this of course sounds more advantageous. In fact, this appears to be the approach of the majority in *Odievre* - the Applicant got to know at least some non-identifying information, while her mother did not lose the core of her confidentiality, viz her identity.

However, I agree that there may be situations where there is simply no win-win solution. Some rights/interests may be so diametrically opposed that there is no overlap, and hence no common ground to be found. I suppose the ideal approach presently is to use "practical concordance" as the default approach and if no win-win solution can be found, the balancing approach would have to be resorted to.

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-posted 3 days ago by [JamesLow](#)

- Like, MarieTancre, I agree that "practical concordance" is better ideally, but I would like to see how it is applied concretely in several cases. If possible, I believe that it is better to approach a situation with practical concordance (win-win). I'm guessing that in its more practical application, it reflects a certain amount of compromise from each side that will also allow for prioritization of the rights. Of course, sometimes compromise isn't possible.

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-posted 3 days ago by [HollyLocke](#)

- Konrad Hesse principle of "practical concordance" is a workable compromise good for avoiding sacrificing one right for another. The problem is that in trying to optimize each right and compromising between rights in conflict the judicial orders always end up disappointing both parties in discord to a great extent. But this is probably the best possible result that can be attained in every litigation. Not completely right not completely wrong. In Italy the art of compromise goes back to an old tradition and I would say in most cases it is applied widely to a good end.

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-posted 2 days ago by [Alepalms](#)

- I agree that there is not much in the way of examples of how practical concordance would play out. I am concerned that the discussion seems to treat the positions of the two individuals as equal. The natural mother has already invested time, money and very likely emotional pain into the decision to adopt her child out. If she requires anonymity in return I don't think that is an unreasonable request. All the talk of the child's right to knowledge about their early childhood seems irrelevant. The child arguably has a right to relevant family medical history but I don't think the right to private life encompasses a

right to know information about other people regardless of their relationship. I personally don't feel I have the right to full knowledge of my parents' lives. My relationship with them doesn't negate their right to privacy. People arrive on the planet and should be grateful to those who made their safe arrival possible, not start posing additional demands regarding the personal information of people already here.

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-posted 2 days ago by [LindsayW](#)

- Rather than look for a winner and loser, the state should embark on negotiations and help all parties find an optimal solution rather than a loser and winner. Do all decisions have to be a zero sum value?

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-posted 2 days ago by [carrphilippe](#)

- Practical concordance is a good idea in theory but there are bound to be many cases where it will be difficult to carry through in practice. Surely before this doctrine is applied the relevant parties should also consider whether the rights are more or less equally important or whether one right is a lot more vital in which case practical concordance might not be justifiable.

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-posted 2 days ago by [Lyck](#)

- Most of the time this will not work out. Also, I can imagine cases in which one does not want to balance and the need exist to put one's right above the others right.

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-posted 2 days ago by [sarah1988nijh](#)

- Something to strive for.

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-posted 2 days ago by [paulomac](#)

- I agree with this opinion about the judges must establish their consistency but covered how interpretative laws.

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-posted 2 days ago by [ipevega](#)

- I agree that practical concordance is a great idea in theory. However, there are bound to be situations where it does not apply or where letting one person exercise a right could interfere with someone else's right to life or other similarly important right. Thus, I think it is something that should be tried where applicable, but it will need to be combined with an approach to balance rights from time to time.

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-posted 2 days ago by [Kasiayar](#)

- I agree with Sakine and the comments forthcoming from that. Practical concordance seems like a great idea in principle, and appears workable in a situation where the

competing individuals are available to provide the specific information to allow a determination as to the decreasing levels of utility for each litigant. It does seem that the dissenters in the Odievre case preferred a legislative methodology that would have resulted in a less hierarchical treatment of rights, which shows how practical concordance might be able to work in the courts of human rights.

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-posted a day ago by [DeborahAnne](#)

- I agree. However, like everything about law, It is necessary to consider the context, the actors and the situation to analyzed. Also, the practice has been distanced from what was established in the letters and books, so how to execute the law should be more carefully and adapted to the stage. The only way where human rights could be the biggest winners.

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-posted a day ago by [francela aguirre](#)

- I agree with everything said.

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-posted a day ago by [ZaraJovan](#)

- Practical concordance seems like an alternative dispute resolution technique. Rather than one side winning absolutely and the other side losing completely, it strives to find a way that both sides could win. In other words, the rights of both parties can be respected and protected. As many above has stated, this involves some practical difficulties and the challenge lies in how to optimize both or all conflicting rights. The more parties with conflicting rights are involved, the harder it is to apply practical concordance. I think in most situations, an adaption of practical concordance methodology will end up with no party being satisfied. All parties would feel that their rights have been violated to some extent as each party will have to compromise somewhat and I do not see how it could be possible to enlarge the sum of all rights so that each party may have a larger share (optimization) of his or her rights.

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-posted a day ago by [DominicK65](#)

- Theoretically, I agree with those who have said that often the result of practical concordance results in (minor) infringements upon the rights of both parties. However, we must always remember that these situations we are reading about are not just theoretical thought experiments, but the lives of actual people. In that, well, *practical* sphere, practical concordance is the best solution.

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-posted a day ago by [EmmaCP](#)

- It seems like everyone agrees on this one: a great principle in theory, and certainly better than the balancing of interests idea, but I can't really see how it could be effectively and impartially implemented in practice.

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-posted a day ago by [ChrisAlford33](#)

- I agree with Sakine view, even though Hesse's ideas sounds interesting, as it would avoid the problem of weighting each right vs. the other, in practice is hard to think how it can work in practice: for example, in the case of Odievre, what would be the situation that would allow both (the daughter that ones to know who her biological mother is, and the biological mother right to be anonymous, assuming she still wants to keep her anonymity)? I don't see an intermediate point where both rights can be fully respected...

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-posted about 24 hours ago by [veheca](#)

- The "practical concordance" stands as the most appropriate method in the sphere of the juridical system, however, it should not entail that the Legislative as well as the Executive branches be set aside from the prerogative of prosecuting.

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-posted about 22 hours ago by [rodolfomaiche](#)

- Another though-provoking post! Thank you Sakine! I have my own concerns about "practical concordance" (as stated in a separated post below), but I had not also considered the issue of separation of powers.

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-posted about 19 hours ago by [LeeRyan](#)

- I agree with the concept of practical concordance but its not always the case. Each country has its own rules and regulations, even the addressed country could not be a part of UNCHR.

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-posted about 19 hours ago by [Ryousif](#)

- agreed

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-posted about 18 hours ago by [Perez545](#)

- I am agrre with these opinions

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-posted about 17 hours ago by [aposligua](#)

- I'm not sure I agree with LindsayW's comments above regarding the Odievre case, 'I am concerned that the discussion seems to treat the positions of the two individuals as equal'.

How else should courts approach such a case? If we do not begin with the belief that each person is 'equal', there is in my view, the potential for subjectivity and discrimination. The same can be said for rights and hence the development of the principle of practical concordance.

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-posted about 13 hours ago by [sfoxton](#)

- I agree with Sakine here

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-posted about 9 hours ago by [fredrikheldal](#)

- I find Sakine's view very thorough and well-reasoned and I totally agree.

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-posted about 7 hours ago by [DimitraTsouka](#)

- I find the notion of 'practical concordance' amusing and interesting and I am also tempted to say that to some extent it is more wishful thinking than a practical solution. However, I cannot take away from the fact that 'practical concordance' is indeed a very respectable solution as it carries with it a logical view. The balancing of rights based on circumstances seems to me to be built more on the foundation of a subjective notion. By finding a compromise between rights regardless of the circumstances is more of an objective notion.

But sadly, 'practical concordance' won't always be the right solution. Sometimes it is necessary for some rights to be restricted to save others if it stands the test of proportionality, legitimacy and legality.

In my opinion, 'practical concordance' should be an option that can be taken where the balancing of rights proves to be ineffective. Whether we like it or not, certain rights are more important than others and at the rate we are going, if everything comes with a right that demands respect, the world will self-destruct on itself.

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-posted about 7 hours ago by [Alufa](#)

- I totally agree with the points exposed by Sakine!

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-posted about 5 hours ago by [LopezGabarron](#)

- I agree with the sentiments made by this post. it would appear Hesse is proposing a win win situation such that no right cancels any other.

the practicality of it all is another matter altogether; it is highly unlikely that judicial forums have the ingenuity to use this method because its application will lead to a case by case approach on competing rights and try to reach a new level... however is it even acceptable to the litigants in the end if they believe that they have an overriding right which needs to be protected.

I found the dissenting opinion in the Odièvre case convincing and also the curious conclusion that an adversarial argument may be one of the things necessary to conclude a matter.

overall a forum will find that there is no hard and fast rule on cases of competing rights. depending on the facts and circumstances of each case it may be found that a hands off approach is more pragmatic for the court to adopt as the executive may be the best placed to deal with that situation.

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-posted about 5 hours ago by [Bernym](#)

- I'm in agreement with the ideas presented above where multiple people said: It seems to me that the practical concordance is a variant of the balancing of rights approach, except that it seems to say each claim should be given more or less equal weight in coming to a decision.

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-posted less than a minute ago by [KarenWest](#)

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