A Critical Analysis of the Proportionality Test

in Human Rights Adjudication

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Abstract

In this thesis I argue against the proportionality test in human rights adjudication, and provide a framework for understanding the proportionality debate. I identify two accounts of proportionality. One sees proportionality as a doctrinal tool aimed at maximising rights and public interests. The other sees proportionality as allowing for open-ended moral reasoning. I analyse the two accounts and identify their main deficiencies. I argue against both conceptions, and conclude that defenders of proportionality are in the following dilemma: either proportionality is insensitive to important moral considerations related to human rights and their limitations, and thus it is an unsuitable tool for human rights adjudication; or proportionality can accommodate the relevant moral considerations, but at the price of leaving the judge undirected, unaided by the law. I will further argue that lack of guidance is a deficiency in legal adjudication, which has important negative effects.

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Table of Abbreviations

Balancing and Subsumption	Alexy R, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 4 Ratio Juris 433
CEJF I	Finnis J, *Reason in Action, Collected Essays: Volume I* (OUP 2011)
CEJF II	Finnis J, *Intention and Identity, Collected Essays: Volume II* (OUP 2011)
CEJF III	Finnis J, *Human Rights and Common Good, Collected Essays: Volume III* (OUP 2011)
CEJF IV	Finnis J, *Philosophy of Law, Collected Essays: Volume IV* (OUP 2011)
Challenging Critics	Möller K, 'Proportionality: Challenging the Critics' (2012) 10 3 Int'l J Const L 709
CR	Kumm M, 'Constitutional Rights As Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 Int'l J. Const. L. 574
Global Model	Möller, K, *The Global Model of Constitutional Rights* (OUP 2012)
LE	Dworkin R, *Law's Empire* (Harvard University Press 1986)
NLNR	Finnis J, *Natural Law and Natural Rights* (2nd edn, OUP 2011)
Negotiable Constitution	Webber G, *The Negotiable Constitution: On the Limitation of Rights* (CUP 2009)
PCJ	Cohen-Eliya M, Porat I, 'Proportionality and the Culture of Justification' (2011) 59 2 American Journal of Comparative Law 463
Proportionality	Barak A, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012)

PL	Kumm, M 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in Pavlakos G (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart 2007)
Socratic	Kumm M, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 2 Law & Ethics of Human Rights 142
Theory	Alexy R, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002)

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Canada

R v Oakes [1986] 1 SCR 103: 11, 196

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Handyside v United Kingdom (1979-80) 1 EHRR 737: 159, 210

Hirst v United Kingdom (No 2) [2005] ECHR 681: 289

IA v Turkey (App 42571/98) (2007) 45 EHRR 30: 156, 160

Müller and Others v Switzerland (App no 10737/84) (1991) 13 EHRR 212: 157

Murphy v Ireland (App no 44179/98) (2004) 38 EHRR 13: 157

Otto-Preminger Institute v Austria (App no 13470/87) (1995) 19 EHRR: 156-9, 162.

W*ingrove v United Kingdom* (App no 17419/90) (1997) 24 EHRR 1: 157

Israel

The Public Committee Against Torture v Israel HCJ 5100/94: 177-8

Lior Horev v Minister of Communication/Transportation HCJ 5016/96: 31-2

United Kingdom

Mitchell and Anor v Buckingham International plc (1998) BCC 943 Ch.: 248-9

Re G (Children) (2012) EWCA Civ 1233: 300

R (Begum) v Governors of Denbigh High School [2006] UKHL 15: 289

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Brown v Board of Education, 347 U.S. 483, 495 (1954): 177-8.

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Insolvency Act 1986: 248

I. Introduction

This thesis provides a critical analysis of proportionality, as a judicial test for establishing whether a measure that affects a human right is justified or not. I shall defend the following claim: the proportionality test—as understood by the main accounts of the test—is either insensitive to important moral considerations related to human rights and their limitations, and thus an unsuitable tool for human rights adjudication; *or* it can accommodate the relevant moral considerations, but at the price of leaving the judge undirected, unaided by the law. I will further argue that lack of legal direction is a deficiency in legal adjudication, which has important negative effects.

A first difficulty in analysing the proportionality test is to establish its content. Much discussion about proportionality depends on the language of 'balancing' and 'weighing,'[1] but what do these metaphors convey? What makes a measure 'disproportionate'? These questions are not answered explicitly by doctrinal analysis of the proportionality test, nor by the case law that applies the test. The task of articulating the methodology implied by the proportionality test, its essential characteristics, its justification, and its relation to other legal ideas, has been undertaken by theoretical accounts of proportionality. There is a lively debate, and no shortage of accounts. Robert Alexy, David Beatty, Aharon Barak, Mattias Kumm, Moshe Cohen-Eliya, Iddo Porat, Kai

[1] See Matthias Jestaedt, 'The Doctrine of Balancing—its Strengths and Weaknesses' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 165.

Möller, and others, have proposed different accounts of what proportionality ultimately consists in and of its justification. Since this thesis is not concerned with the specific application of the proportionality test in a particular set of cases or in a particular jurisdiction, but with the concept of the proportionality test and its normative justification, it engages primarily with theories that provide a general explanation and defence of the proportionality test, and with the debate surrounding these theories.

In engaging with these theories, a second difficulty arises. '[A]ny number of different "theories" about how to resolve any existing normative conflict can be operating under the rubric of a proportionality-based test of justified rights limitation.'[2] The doctrinal formulation of the proportionality test (the traditional four-pronged test[3]) is vague enough to allow for different accounts of proportionality—different proposals as to what

[2] Denise Réaume, 'Limitations on Constitutional Rights: The Logic of Proportionality' (2009) 2009 Oxford Legal Research Paper Series 1, 3.

[3] The test is formulated as a set of standards that a measure must pass so as to be considered 'proportionate'. The standards are:

a) Legitimate aim: the measure interfering with the right has to have a legitimate aim.

b) Suitability: the measure interfering with the right has to be apt to attain the legitimate aim.

c) Necessity: no equally effective but less intrusive means must be available.

d) Proportionality stricto sensu: the benefits of infringing the protected interest must be greater than the loss incurred with regard of the protected interest.

For this particular formulation of the four prongs see Mattias Kumm, 'Who Is Afraid of the Total Constitution?: Constitutional Rights As Principles and the Constitutionalization of Private Law' (2006) 7 4 German LJ 341, 348. The formulation is slightly different from the other much quoted one from the Canadian *Oakes* test, which sets a higher bar for the first standard, requiring 'an objective of sufficient importance'. It also formulates the fourth standard less precisely: 'there must be a proportionality between the *effects* of the measures which are responsible for limiting the right or freedom, and the objective which has been identified as of "sufficient importance"'. See *R v Oakes* [1986] 1 SCR 103 [69]-[70], and Webber, *Negotiable Constitution* 71-72.

proportionality is. I identify two main accounts of proportionality.[4] One sees proportionality as a doctrinal tool aimed at maximising the interests, values, or principles at stake in the case. For this account some of the characteristic advantages of proportionality relate to it being largely a technical, structured, and manageable test, and, on some versions, also neutral and fact-dependent. This is the 'maximisation account of proportionality'. The other account sees proportionality as a doctrinal tool that allows for judges to perform unconstrained moral reasoning in their search for a solution to the case. For this account, proportionality has the advantage of allowing for appropriate deliberation on justice and rights. I call this account: 'proportionality as unconstrained moral reasoning.' Each account has its own characteristic understanding of the balancing test—the final and most important stage of the proportionality test—, one conceiving balancing as consisting in a commensuration of rights, interest, values or principles, and the other conceiving balancing simply as assessing the reasons in favour and against a particular measure.[5] I explain these two accounts of proportionality in chapters II and VI.

These two accounts of proportionality are very different, though they are sometimes confused and treated under the same label. Thus, proportionality can seem at times to be a moving target. But when both accounts are clearly defined, it becomes obvious that they are incompatible. Proportionality cannot be narrow and technical, and at

[4] The distinction between these two accounts is hinted at, though not explicitly articulated, in Charles-Maxime Panaccio, 'In Defence of Two-Step Balancing and Proportionality in Rights Adjudication' (2011) 24 Can JL & Jur 109, 119, 128 fn 62.

[5] See *Negotiable Constitution* 97-8; and Möller, *Challenging Critics* 709, 715.

the same time allow for every possible consideration to be assessed through unconstrained moral reasoning.[6]

There is a need for a general framework for understanding the proportionality debate, and assessing the arguments and counterarguments made against and in favour of proportionality. This general framework has been lacking, and as a consequence, it is not always clear whether defenders and critics of proportionality are discussing the same thing, and properly engaging each other arguments. This thesis provides such a framework, and this framework is put to use at the service of my general critique of proportionality. The framework is based on two basic distinctions. The first is the distinction between the two main accounts of proportionality outlined above, which allows us to understand which account of proportionality is at stake when a particular objection to proportionality is discussed.

The second basic distinction is between two different kinds of flaws that can be imputed to proportionality. This is relevant because the two different accounts of proportionality have flaws of different kinds. Generally speaking, legal categories can be

[6] Because I engage with proportionality as stated by the theories that defend it, I engage with the two accounts of proportionality addressed in this thesis (the maximisation account of proportionality and proportionality as unconstrained moral reasoning), and not other potential accounts that might be offered. For example, there is what Julian Rivers calls the 'state-limiting' account of proportionality. See 'Proportionality and Variable Intensity of Review' (2006) 65 1 Cambridge LJ 174, 176-80. But defenders of proportionality do not promote this account nor elaborate on it. Rivers himself favours a different account: the 'optimising' conception of proportionality, which broadly corresponds to what I call here the 'maximisation account of proportionality' (though it is unclear to me to what extent Rivers distinguishes this account from 'proportionality as unconstrained moral reasoning', as I do here). I believe that engaging with the two main accounts of proportionality will provide us with the resources for evaluating other potential accounts of the test—but I cannot assess all potential interpretations of the test here.

analysed from two perspectives. One I call 'moral', and the other 'technical'. The moral perspective is aimed at discovering the relevant practical considerations that should bear on a particular question. When considering adjudication, this perspective tries to establish what would be a correct or reasonable solution to a case and the right reasons for justifying such a conclusion. It focuses on what kinds of considerations should bear upon and determine the different types of cases.

The technical perspective is aimed at analysing the enterprise, familiar to lawyers, of designing technical legal categories that would be successful at expressing and enforcing the demands of practical reason in different types of cases, considering the circumstances in which cases will take place in the real world, so that the application of those technical categories increases as much as possible the likelihood of a reasonable solution (I explain this further in ch VII). The technical perspective also evaluates existing legal categories from the perspective of how successful they are in achieving its aim of expressing and enforcing the relevant demands of practical reason that bear on the case. In this sense, the technical perspective is always subordinated to the moral, as a tool for the fulfilment of its demands.[7]

A legal category can be morally defective, or technically defective, or both. In designing a legal category, sometimes the moral issue is the harder one to settle. For

[7] The distinction between the moral and the technical perspective is different from Dworkin's famous distinction between the dimensions of fit and justification in interpretation. See Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) ch. 7, especially 255 ff. The distinction between moral and technical perspective offers two distinct criteria for evaluating institutions and technical doctrinal categories. It is aimed at improving our understanding and evaluation of the legal materials that Dworkinian interpretation must 'fit'.

example, we can argue about whether it is right for the state to impose a duty to vote in general elections. There can be a vexed moral debate on this question. But once that debate is settled, it may be relatively simple to design legal institutions that can enforce and express that moral requirement (for example, by establishing the duty to vote in the electoral law and a punishment for breach of that duty).

Sometimes the technical issue can be the more complex one. For example, morality can tell us that the rich should pay tax at a higher rate than the poor, and that there is some need for arbitrary lines in any tax system between the different categories of salaries that one is going to tax progressively—a need for positive law to specify certain requirements that reason leaves underdetermined[8]—as well as other considerations that are relevant for designing a tax system. But when crafting the legislation, we need to be aware that many lawyers and accountants may seek loopholes so that their customers pay as little as possible. Even if one had all the relevant moral information, crafting the legal categories necessary to express and enforce these demands of morality can be extremely challenging.

It is important to distinguish these two perspectives, because they point to different ways in which the law can succeed or fail in achieving its tasks. Here, I will argue that the most important defects of the maximisation account of proportionality relate to the moral perspective, and that the idea of proportionality as allowing for unconstrained moral reasoning, on the other hand, has flaws that relate to the technical perspective: it fails to

[8] See the concept of determinatio, in Finnis, *NLNR* 284-290.

provide the necessary legal categories that are able to express the moral requirements that bear on the issues to which proportionality is applied.

This thesis is divided in two parts. In the first part I engage with the maximisation account of proportionality. I first explain this account and the different theories of proportionality that fall under it (ch II). In the subsequent chapters (III-V), I offer a critique of this account. In chapter III, I present a general account of incommensurability and explain why and to what extent incommensurability is a problem for the maximisation account of proportionality. I also engage with recent arguments aimed at establishing that proportionality is not affected by the incommensurability objection. Chapter IV builds up from the previous chapter and poses the question at the heart of the moral perspective: why apply proportionality? It argues that there is no reason for applying the proportionality test in human rights cases, because there is no reason to think that the test is able to capture what is morally relevant in human rights cases. Furthermore, there are reasons to think that the test does not capture some relevant moral considerations of particular importance in human rights cases. In this light, chapter V argues for the objection that proportionality does not reflect the special force rights are taken to have, and may (at least of some versions of the test) conflate illegitimate interests with legitimate ones. It also argues against recent defences of proportionality that address this objection.

Part I concludes that the maximisation account of proportionality does not provide an adequate method for deciding cases regarding human rights infringements. Part II criticises the idea of proportionality as unconstrained moral reasoning. Its first chapter (ch VI) explains this account of proportionality and the theories that fall under it, and how it

avoids the objections made against the maximisation account of proportionality. It also introduces the objections to this account. The following chapter on the need for legal direction in adjudication provides a general explanation of why legal adjudication should not allow generally for decisions to be made through open-ended moral reasoning unconstrained by the law. This chapter explains the importance of having relatively precise legal categories able to express the relevant moral considerations that bear on the different issues to which the legal categories are applied. Thus, it sets a standard for doctrinal tools to meet. Chapter VIII shows how proportionality as unconstrained moral reasoning fails to meet this standard, and how as a consequence, proportionality adjudication is likely to have all the deficiencies that legally unaided adjudication is likely to have. This shows how some deficiencies that in principle might seem as peculiar to a court or judicial decision, can be seen as the likely manifestations of some underlying defect with the legal categories that are being applied, not because those legal categories could not be applied better, but because they are not providing the legal guidance that they should provide.

The thesis concludes with a general summary of the argument and its results. It claims that none of the main accounts of proportionality represents an adequate test for deciding human rights cases. It also claims that, if the argument presented here is correct, we should not attempt to replace these accounts of proportionality for a somehow 'better' or 'correct' account of proportionality. There are reasons why attempts to provide such an account have failed so far. Also, we should not try to replace proportionality with some other test. I conclude by making some suggestions on how to think about an alternative to proportionality.

PART I

II. The Maximisation Account of Proportionality

In this chapter I analyse one of the most prominent and widespread theoretical accounts of the proportionality test: what I call 'the maximisation account of proportionality'. The analysis here is mostly descriptive, leaving the criticism of this account for the next chapters. In what follows, I explain the main theories of proportionality that propose a maximisation account of proportionality, that is, an account of proportionality that conceives the test as evaluating whether a particular property has been realised to the greatest extent possible. I analyse them from the two perspectives explained in the introduction: the moral perspective and the technical perspective. The moral perspective is the most interesting one for analysing this account of proportionality. It attempts to establish what view of what is of moral relevance in a certain situation is presupposed by a legal category (a legal test, for example) that applies to that situation. As applied to proportionality, the question is: What view of what morally matters in the human rights cases to which proportionality is applied is presupposed by the maximisation account of proportionality? The second perspective is the technical perspective. It analyses how successful legal categories are in expressing what is morally relevant in the cases to which they are applied. With respect to proportionality, the question is whether the doctrinal articulation of the proportionality test is apt to express what is morally relevant in the cases to which it is applied.

Here I will not describe some of the complex details of the different theories, but their essential traits. In the following chapters I will criticise these general features of the theories of the maximisation account of proportionality.

II.1. Theories that provide a maximisation account proportionality

II.1.1. Robert Alexy's theory of constitutional rights and proportionality

The German theorist Robert Alexy has provided the most influential and sophisticated account of proportionality, and of the conception of rights implied by it. I will therefore explain Alexy's theory at greater length than the other theories I explain in this chapter.

II.1.1.1. The theory described

In *A Theory of Constitutional Rights*, Alexy's 'central thesis' is that 'constitutional rights are principles and that principles are optimisation requirements'.[1] The underlying crucial distinction is between rules and principles. Rules are *definitive requirements*, while principles are *prima facie requirements.* This means that rules 'are norms which are either fulfilled or not. If a rule validly applies, then the requirement is to do exactly what it says'.

[1] Alexy, *Theory* 388. Note the shift from a rule-principle structure in the original book, to a purely principle structure in the later postscript (though in the previous account the principle character was in the end the predominant feature and the one that was at work in his account of the justification of potential limitations of rights through proportionality tests). See ibid 80-110.

Principles, by contrast, are *optimisation requirements*. They are 'norms which require that something be realised to the greatest extent possible given the legal and factual possibilities', and thus, they 'can be satisfied to varying degrees'.[2] On this account, 'the nature of principles implies the principle of proportionality'[3]. The different stages of the proportionality test follow from the requirement to optimise relative to what is legally and factually possible. The necessity and suitability prongs of the proportionality test concern what is factually possible. The balancing stage concerns optimising within what is legally possible, by weighing the particular principle with other legally recognised principles that bear on the case.[4]

This weighing is done according to a rule that 'expresses a law for balancing all types of principles', which Alexy calls the *Law of Balancing* (later 'the first Law of Balancing' or the 'substantive Law of Balancing'[5]), according to which 'the permissible level of non-satisfaction of, or detriment to, one principle *depends* on the importance of satisfying the other.' The law is formulated thus: 'The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.' [6] Alexy claimed that the idea behind his Law of Balancing could be 'illustrated by the use of indifference curves' which he defines as 'a means of representing a relation of

[2] Ibid 47-8, and 57.

[3] Ibid 66.

[4] Ibid 67-8.

[5] Ibid 418.

[6] Ibid 102 (emphasis added).

substitution between interests'. The curves would illustrate that the law of marginal utilities applies to principles, as is expressed by the Law of Balancing requiring increasing importance of satisfying one principle for justifying greater interferences with the other.[7]

Later on Alexy further developed his theory of principles and its application to balancing. The substantive Law of Balancing remains the same. We must not be distracted by Alexy presenting the balancing exercise as assessing the weight of, on the one hand, the 'intensity of interference' that the measure produces to one principle, and the 'degree of importance' of satisfying the principle that the measure promotes. Alexy uses different terms to refer to the same thing, since he equates 'degree of importance' with 'degree of interference'. Thus, Alexy says that 'the concrete importance of P_j is the same as the intensity with which the non-interference with P_i interferes with P_j.'[8] By interference Alexy means 'the degree of non-satisfaction, or detriment to one principle'.[9] Hence, the comparison that the Law of Balancing commands is between degrees of satisfaction and non-satisfaction of the two principles at stake.[10] Alexy acknowledges this, but believes that his terminology (using different terms in relation to the satisfaction and non-satisfaction of the different principles at stake, talking in relation to one about 'interference' and in relation to the other about 'importance') is clearer for the non-specialist.[11] I think it is

[7] Ibid 103.

[8] Ibid 407.

[9] Ibid 405. See also Robert Alexy, 'The Weight Formula' in Jerzy Stelmach and Wojciech Załuski, *Game Theory and the Law* (Copernicus Center Press 2011) 15-7.

[10] This point is important for Virgilio Alfonso Da Silva's defence of Alexy's theory. See III.5.

[11] See *Theory* 406-7.

misleading, since it suggests that what is compared are different considerations in relation to the conflicting principles. I will follow Da Silva in talking about 'degrees of satisfaction and non-satisfaction' in relation to the considerations that are assessed by the Law of Balancing.[12]

Alexy proposes that the relevant aspects that the Law of Balancing captures—degree of satisfaction of the principle promoted by the measure under review, and the degree of non-satisfaction with the principle interfered by the measure[13]—can be rationally assessed. To do so, the Law of Balancing 'breaks the balancing process down into three steps', the first two consisting in establishing the intensity of interference with each principle at stake.[14] To undertake these two initial steps, he proposes a scale of light, moderate, and serious, in relation to which to assess the degree of non-satisfaction or satisfaction with each opposing principle, 'which are identified with the letters *l, m,* and *s,* respectively.'[15] For Alexy, 'the letter *l* stands not only for the common term "light", but also for other expressions such as "minor" or "weak", and *s* includes "high" and "strong" as well as "serious".'[16] Thus, according to the balancing formula the first step is to categorise

[12] See Virgilio Alfonso Da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision' (2011) 31 OJLS 273. Similarly, Klatt and Meister refer to 'intensities of interference' for both principles. See Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012) 11.

[13] For ease of exposition I assume that only two principles are at stake. More principles could be promoted or infringed by the measure.

[14] *Theory* 407.

[15] Ibid 405.

[16] Ibid.

the level of non-satisfaction with the principle interfered with by the measure as *l, m*, or *s*. Then the second step is to categorise the level of satisfaction with the principle promoted by the measure as *l*, *m,* or *s* (the level of non-satisfaction of that principle if it were not promoted by the measure).

After performing these two steps, Alexy says, 'the question is now how the third step can be carried out, in which the evaluations are to be set in relationship with each other.'[17] Alexy does not give an argument as to how this relationship is established, but rather asserts, in his characteristically technical nomenclature, right after posing the question on 'how the third step can be carried out', that:

> There are three circumstances in which P_i takes precedence [over P_j]:
> $IP_iC : s / SP_jC : l$
> $IP_iC : s / SP_jC : m$
> $IP_iC : m / SP_jC : l$[18]

Where IP_iC means 'intensity of interference with principle i (P_i) under circumstances C', and SP_jC means 'degree of importance of satisfying [which is the same as "degree of satisfaction" of] principle j (P_j) under circumstances C'.[19] This solution implies, in non-technical parlance, that a principle takes precedence over another when that principle would be satisfied to a greater degree by a favourable decision (or non-satisfied to a greater degree by an unfavourable one) than the other.

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[17] Ibid 407.

[18] Ibid.

[19] Ibid 405-7.

There are two further considerations that Alexy mentions as bearing on the comparison between the different principles at stake. The first is the 'abstract weight of a principle'. For Alexy, 'abstract weights only have an influence on the outcome of balancing if they are different. If they are equal, which in the case of competing constitutional rights is often the case, the only relevant factor is their concrete importance.'[20]

The second consideration is what Alexy calls the 'second Law of Balancing' or the 'epistemic Law of Balancing', which states: 'The more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premises.'[21]

These considerations can also be assessed by reference to a triadic scale. A principle's abstract weight or importance can be categorised as *l*, *m*, or *s* in the same way that the degrees of satisfaction or non-satisfaction. And the reliability of the empirical premises as to the satisfaction or non-satisfaction of a principle can be categorised as 'reliable', 'plausible', and 'not evidently false', which are expressed with the letters *r*, *p*, and *e*, respectively. [22]

Alexy does not provide an argument as to how these different considerations should be related to each other to establish which principle has greater concrete weight in a

[20] Ibid 406.

[21] Ibid 418.

[22] Ibid.

particular conflict. Bellow (III.2 and IV) I show some of the difficulties that his theory faces in this respect. What Alexy proposes is a 'Weight Formula', 'which expresses the weight of a principle under the circumstances of the case to be decided'[23]. That is, it expresses whether a principle is 'weightier' than (ie, should prevail over) the rival principle at stake in that concrete case. This formula attempts to give numerical expression to the different considerations and principles that are balanced, thus expressing the concrete weight of a principle as a quotient of the considerations (abstract weight, degree of satisfaction or non satisfaction, and reliability of premises) that apply to each principle at stake. For Alexy this formula 'illustrates the structure of balancing. In legal argumentation, it is only analogous to a quotient. But the analogy is an instructive one.'[24]

When one wants to express all the considerations that affect the weight of a principle, the Weight Formula would look like this:

$$W_{i,j} = \frac{I_i \bullet W_i \bullet R_i}{I_j \bullet W_j \bullet R_j}$$

Where '$W_{i,j}$' means 'concrete weight of principle of principle 'i' in relation to principle 'j'; 'I' stands for 'interference', or satisfaction or non-satisfaction of a principle, 'W' for abstract weight, and 'R' for reliability of empirical premises as to the satisfaction or

[23] Alexy, *Balancing and Subsumption* 444.

[24] *Theory* 409.

non-satisfaction with the principles. Letters 'i' or 'j' as subscript indicate the principle to which the variables *I, W,* and *R* apply to.

For the first consideration (degrees of satisfaction or non-satisfaction), Alexy proposes to ascribe numbers to the different points in the scale following a 'geometric sequence 2^0, 2^1 and 2^2, that is 1, 2, and 4. On this basis *l* has the value 1*, m* has the value 2, and *s* the value 4.'[25] Regarding the second consideration, if the values are of equal abstract weight, then they cancel each other. If they are not, 'one can express the values of W_i and W_j by the same triadic scale as in the case of I_i and I_j.'[26] For the third consideration (reliability of premises) the value of *r* is 2^0, the value of *p* is 2^{-1}, and the value of *e* is 2^{-2}.[27]

For a given case, the different numbers are to be introduced into the formula, which consists in a division. If the quotient of the division is greater than 1, then it means that principle 'i' is of greater weight than principle 'j', and thus should prevail over it in that case. If the quotient is less than one, it means that the latter principle should prevail over the former. If the result is 1, it means that there is a stalemate: both principles are of the same weight and thus the court should be deferent and grant discretion to the primary decision-maker.[28]

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[25] *Balancing and Subsumption* 444.

[26] Ibid 446.

[27] Ibid 447.

[28] Ibid 444-5, *Theory* 401-14. These central features of Alexy's theory have remained largely unchanged during the last decade or so. See Robert Alexy, 'The Construction of Constitutional Rights' (2010) 4 Law & Ethics of Human Rights 1.

II.1.1.2. Analysis from the moral perspective

Alexy does not deal directly with the question of what the relevant moral considerations are that ought to bear on the kinds of cases he is analysing, and which his model for proportionality analysis should therefore capture. But he does say what the considerations that his theory captures are, as when he talks of 'what is significant in balancing exercises, namely the degree of intensity of non-satisfaction of, or detriment to, one principle versus the importance of satisfying the other.'[29] These considerations are about maximisation of particular interests or values that are, on Alexy's account, related to principles.

Alexy talks about 'optimisation requirements' to highlight that, according to his theory, conflicting principles should be realised to the greatest extent possible: one should attempt to optimise realisation of each principle, and therefore, sub-optimal decisions should be avoided. This is the case when a measure fails the necessity or adequacy subtests of the proportionality test. But Alexy also acknowledges that any principle seen in isolation is a 'maximisation requirement', since it requires maximising the realisation of something.[30]

[29] *Theory* 105.

[30] Ibid 51 fn 37.

Furthermore, Alexy's theory of balancing is not simply about achieving Pareto-optimality in the realisation of each principle (ie, achieving a situation where none of the principles could be realised more without negatively affecting the realisation of the other), since this is achieved by the previous adequacy and necessity subtest. In Alexy's model, when applying the balancing test one is to attempt to choose the alternative that realises principles to a greater degree. One does so by choosing to satisfy one principle at the expense of the other if this brings overall greater principle realisation. In the standard case[31], for Alexy, satisfying a principle will bring overall greater principle realisation if this principle has more at stake in the decision. This occurs when the degree to which the principle would be satisfied by a favourable decision is higher than the degree to which the opposing principle would be satisfied by a decision favourable to this opposing principle.

This method for solving conflicts of principles must be premised on the idea that what morally matters in the cases to which it is applied is to maximise principle realisation. This is so because if the criterion proposed for choosing between A and B consists in establishing whether A or B realises more P, then this criterion can only be justified if what is relevant for this choice is to realise P as much as possible, ie, to maximise P. Theories that promote the maximisation account of proportionality all have this structure, and thus all are premised on the idea that what morally matters in the cases to which proportionality

[31] It could be that one principle is more important in the abstract than the other, which would affect the result. Nevertheless, as said in the previous subsection, Alexy believes this is not common with constitutional rights. Also, it could be that the premises put forward for establishing the degree of satisfaction or non-satisfaction with the principles are some more reliable than others, which also affects the result. Nevertheless, this last consideration is at the service of establishing well the degrees of satisfaction or non-satisfaction, so that it can be said that it is the latter what matters intrinsically in conflicts of principles.

is applied is to maximise something specified (perhaps vaguely) by the relevant theory. Alexy's theory is no exception to this.

Alexy does not deal directly with a prior question: what are the kinds of considerations that are of moral importance in the kinds of cases that he is interested in (human or 'constitutional' rights cases) and (perhaps for that reason?) he never explains why the kinds of considerations his theory captures are what morally matters in those cases and accordingly should be the decisive considerations. This will be assessed in the following chapters.

II.1.2. David Beatty's theory of proportionality

In the Anglo-American context, Canadian scholar David Beatty introduced an account of proportionality that is also based on the idea of maximisation. Beatty does not articulate his proposal for proportionality analysis as clearly and explicitly as Alexy. This is partly a consequence of his method, since Beatty proposes to focus 'on how the practice of judicial review actually works', using the methods of the common law. This method is characterised by 'its pursuit of theory and overarching principles from the bottom up. … Instead of starting with a preconceived theory of law and democracy … to which jurisprudence is made to conform, the order is reversed and theory emerges out of the cases.'[32]

[32] David Beatty, *The Ultimate Rule of Law* (OUP, 2004) 34.

In his analysis of different human rights cases, Beatty engages with a number of different considerations that apply to the circumstances of the cases. But there is one major principle on which Beatty insists all along: that the challenged authorities' measure should be assessed 'from the perspective of those who reap its greatest benefits and those who stand to lose the most.'[33] Beatty's method (though he does not articulate it explicitly) consists in asking which party stands to win or lose the most in a human rights case: this party should be the one favoured by a decision. For example, Beatty sees the judgement by Aharon Barak, former judge of the Israeli Supreme Court, in *Lior Horev v Minister of Communication/Transportation* case as

> an especially powerful image of the great jurist … reasoning pragmatically to resolve a highly charged, politically volatile issue of church/state relations in a way that is equally sensitive to both. At issue was a government regulation that would have closed a major artery running through the heart of Jerusalem—Bar Ilan Street—during the hours of prayer on the Jewish sabbath. The street cut across a number of orthodox neighbourhoods and the Government's hope was that a partial closing would be accepted as a compromise between the orthodox community who argued for a complete ban on all traffic for the duration of the sabbath and secular Israelis who insisted their mobility rights guaranteed them unimpeded access to the street seven days a week, twenty-four hours a day.[34]

Beatty approves of Barak's analysis, which Beatty reports as focusing on first establishing the harm that the orthodox community 'would suffer from an unrestricted flow of traffic' during the period of the day when prayers were being said, which Barak considers to be 'harsh and bitter'. This is contrasted with the 'inconvenience most Israelis would suffer from being denied access to the street during such times', which Barak

[33] Ibid 160. See also 47, 53, 59, 60, 74, 93, 94, 98, 114.

[34] Ibid 58.

characterises as 'trivial', since it would consist in no more than in them having to take an alternative route and add two minutes to their trip. According to Beatty's assessment, 'At least during the times when prayers were being said, *the proportionalities—in the significance of the closing for the two communities*—were clear.'[35]

What for Beatty needs to be compared in the proportionality test ('the proportionalities') is the significance of the measure for the parties, which, as in the Bar Ilan case, refers to how it impacts the parties' interests. The party for whom the case is more significant, ie, the one that has the stronger interest in the decision, is the one that should be favoured. A measure would be disproportionate when, in a conflict of interests, it sacrifices those of the party that has a greater interest in the issue, the party for which the issue is of greater significance.

Like Alexy's, this way of understanding human rights cases, is about maximisation—in Beatty's account, maximisation of interest or preference satisfaction of the parties. Recall: If the criterion proposed for choosing between A and B consists in establishing whether A or B realise more P, then this criterion can only be justified if what is relevant for this choice is to realise P as much as possible, ie, to maximise P. If the criterion for deciding a case is whether the interests of A or B would be more heavily impacted by an adverse decision, then the decision is about which course of action would satisfy more or stronger interests or preferences. And if this is so, then this method is about

[35] Ibid 59 (emphasis added).

maximising interests, and can only be justified if what morally matters for the cases to which it is applied is the maximisation of interests.

That what morally matters in proportionality cases is to maximise interest or preference satisfaction, is a necessary premise for Beatty's theory: Beatty's account needs it to have moral appeal. This premise renders the more characteristic and pervasive aspects of Beatty's account intelligible. It explains a) Beatty's insistence on the need for assessing the parties' interests as the parties themselves see them[36] (since what matters is maximising their preferences or interests); b) his intriguing statement that proportionality 'transforms questions that in moral philosophy are questions of value into questions of fact'[37] (since the question the judge is facing is about facts: which outcome would maximise preference satisfaction of the parties, and, if it is impossible to satisfy both, who has a stronger interests in the decision—or in each of the particular choices made in one judicial decision); c) his claim that proportionality 'makes the concept of rights almost irrelevant'[38], and that 'rights lose the special force they are taken to have'[39] (since the method of maximising preference satisfaction filters out considerations of rights); and d) his claim that proportionality is more neutral and objective than alternatives[40] (since it requires comparing

[36] For example, see Beatty (n 32) 47, 53, 70, 72, 74, 93, 116, 160

[37] Ibid 170. See also 171.

[38] Ibid 160.

[39] Ibid 171.

[40] See especially ibid 166-8. See also 64, 73.

preferences and the intensity by which they are desired by the parties, which is in principle a technical undertaking).

II.1.3. Aharon Barak's theory of proportionality

Aharon Barak has also proposed a general account of the proportionality test. The most characteristic aspect of Barak's account is his understanding of the balancing stage of the proportionality test. For Barak, balancing is 'the most important of proportionality's tests.'[41] It demands that

> a proper relation ('proportional' in the narrow sense of the term) should exist between the benefits gained by fulfilling the purpose and the harm caused to the constitutional right from obtaining that purpose.[42]

By 'purpose' here Barak refers to the legitimate aim sought by a government measure that interferes with a right (though Barak does not talk about measure but about 'law', or 'means selected by law', and other such terms). This 'proper relation' that the balancing test achieves to establish, and which serves as a standard for evaluating a measure that engages a right, implies a comparison between 'the positive effect of realising the law's proper purpose' and 'the negative effect it has on the constitutional right.'[43] This comparison is illustrated by the metaphor of the scales which balancing evokes: for Barak

[41] *Proportionality* 340.

[42] Ibid.

[43] Ibid 342.

> 'balancing' is an analytical process that places the proper purpose of the limiting law on one side of the scales and the limited constitutional right on the other, while balancing the benefit gained by the proper purpose with the harm it causes to the right.[44]

Barak, echoing Alexy, seems to see metaphors of 'weight', 'scales' and 'balancing' as expressing a conflict of principles, the question being not which principle is invalid, but 'under which circumstances we may fulfil one principle while limiting another.'[45] The question then is to find in the concrete case a proper relation between the two principles. But what constitutes a 'proper relation'? How is it established? Barak resorts back to metaphors: 'We should establish a normative rule which determines the relative weight of each side of the scale. Based on this weight we could determine which end of the scale is heavier.'[46] The implication here is that a 'proper relation' between the benefits of a measure and its impact on a right is one in which the weight of the benefits are 'weightier' or equally 'weighty' than the harm on the side of the right. When this is not the case and the harm for the right is 'weightier', then the relation between the benefits of the measure and its impact for the right is not 'proper', ie, it is 'disproportionate'.

But what does 'weight' consist of and how is it assigned? For Barak the crucial concept is that of social importance. He says:

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[44] Ibid 343.

[45] Ibid 346.

[46] Ibid (citations omitted).

> The relevant rule according to which the weight of each of the scales should be determined is that of the social importance of the benefit gained by the limiting law and the social importance of preventing harm to the limited constitutional right at the point of conflict.[47]

Social importance generally

> is derived, inter alia, from different political and economic ideologies, from the unique history of each country, from the structure of the political system, and from the different social values. The legal system at issue should be observed as a whole. The assessment of the social importance of each of the conflicting principles should be conducted against the background of the normative structure of each legal system. This kind of balancing should be affected by the entire value structure of the particular legal system. We should consider the constitutional status of the conflicting principles. Principles found in the constitution are *prima facie* of greater social importance than those external to the constitution. That is insufficient. The importance of principles—and the importance of the prevention of their harm—is not determined solely by their normative status. Principles at the same normative level can be considered to be of different social importance. These kinds of values may be influenced by both intrinsic and extrinsic factors. The extrinsic factors are of a social nature. They reflect a society's history and culture. The intrinsic factors are of a normative nature. They reflect the internal relations of the different principles. Thus, for example, a right that constitutes a precondition to another right may be considered more important.[48]

These are extremely vague sources, which furthermore can be contradictory. It is doubtful whether Barak's enumeration of many considerations that affect the social importance of a right or public interest amount to a method at all, let alone a sound one.[49] In specifying what social importance is, Barak does no more than enumerate the sources for the different considerations ('society's fundamental perceptions', 'political and economic

[47] Ibid 349.

[48] Ibid 349 (citations omitted). See also 361.

[49] See Grégoire Webber, 'Proportionality: Constitutional Rights and Their Limitation' (review article) (2013) Public Law 433, 436, where he argues that 'Barak provides too little an account of social importance for it to convince his reader.'

ideologies', 'the legal system as a whole') together with a type of internal consideration ('a right that constitutes a precondition to another right may be considered more important'). He does so without providing a method specifying how these different considerations relate so as to actually establish the social importance of realising a principle for a concrete case.[50] Let us leave this critique aside and continue with the characterisation of Barak's position.

Barak clarifies that what is balanced is not the social importance of the right and the public interest, but 'the marginal effects—on both the benefits and the harms—caused by the law'[51], that is, the 'marginal social importance' of realising one principle or the other in the particular case under review. Also, what needs to be compared is not necessarily 'the state of affairs before the law was enacted' to a state of affairs where the law is enacted and implemented, yielding benefits for one principle and harm for another (a right). When there are alternatives to the government's measure (when these alternatives 'do not fulfil fully the purpose of the limiting law', and thus the measure under review passes the necessity test) the comparison of marginal social importance has to be between the state of affairs that the measure under review would bring about, and that which the viable alternatives would bring about.[52] Therefore, the balance is one 'between the marginal social importance of the benefits gained by one principle (beyond the proportional alternative) and the marginal social importance of preventing the harm to the constitutional right (beyond the

[50] Thus, he concedes briefly that: 'We must assume that, with time, it will be possible to establish more specific criteria on this matter'. *Proportionality* 361.

[51] Ibid 350 ff.

[52] Ibid 353.

proportional alternative).'[53] Also, the probability of the realisation of the benefits for one principle, and the harms for the opposing principle should also be considered in establishing the weight of each scale.[54]

Taking all these elements into consideration, Barak believes it is possible to formulate a 'balancing rule' for establishing whether there is a proper relation between the benefits of a measure and its impact on a right:

> The higher the social importance of preventing the marginal harm to the constitutional right at issue and the higher the probability of such an additional marginal harm occurring, then the marginal benefits created by the limiting law—either to the public interest or to other constitutional rights—should be of a higher social importance and more urgent and the probability of its realisation should be higher. Therefore, we cannot justify a serious and certain limitation of a socially important constitutional right in the fulfilment of a minimal social benefit, to the public interest or to the protection of other less important constitutional rights, whose probability is low.[55]

Barak acknowledges that this formula has many similarities with Alexy's approach to proportionality. The crucial difference for Barak lies in that 'Alexy does not consider the marginal social importance of the limited right, but only the degree of its limitation'; and, I would add, Alexy also considers the abstract weight of the principles involved (in addition to the reliability of premises, also considered by Barak) (II.1.1.1). But Barak is right that Alexy's formula does not consider something like the 'concrete importance' of promoting the conflicting principles in that particular case.

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[53] Ibid 357.

[54] Ibid 358 and 362.

[55] Ibid 363. It is unclear to me what the words 'more urgent' add to the formula.

When the weight of the benefits achieved by the measure are greater than the weight of the cost on the right engaged by the measure (as specified by the idea of marginal social importance and the probability of the benefits and harms occurring), the measure is proportional. When the weight of the benefits is less than the weight of the cost of the right, then the measure is disproportionate. What happens when there is a stalemate? Here Barak's solution is slightly different than the one proposed by Alexy, for whom in a case of stalemate the court should be deferent to the decision of the primary decision-maker. We must distinguish between two types of cases. The first are cases were 'both scales carry constitutional human rights'. Here 'there is no reason not to leave the limiting law intact, since its limitation of one constitutional right is equal to its protection of another. … The role of the courts as defenders of human rights is fulfilled.' The second type of cases are those where 'one scale carries the marginal social importance of the benefit gained to the public interest, while the other carries the marginal social importance of preventing harm caused to the constitutional right.' Here 'the issue of the balanced scales should be resolved in favour of the constitutional rights'. [56]

As with Alexy and Beatty's account, one can understand Barak's account as being also premised on the idea that what morally matters in human rights cases is the maximisation of something. In this case, it is of 'social importance'. The assessment required by Barak's method is structurally quantitative and oriented towards establishing which alternative would realise more social importance. This presupposes that what matters

[56] Ibid 367.

morally in the cases to which the method is applied is to realise social importance as much as possible, ie, to maximise social importance.

There is an ambiguity, though, in Barak's statement of his theory of proportionality, and it is worth spelling it out. On the one hand, Barak presents what has the form of a relatively precise method for deciding cases involving limitations of human rights for the sake of the public interest or other rights. Thus, Barak claims that:

> Proportionality is a framework based on a structured method of thought. It determines the information which should be considered, which includes the proper purpose of the limiting law, its rational connection to the mean used by the law, the law's necessity, and the marginal social importance of the purpose of the limiting law as compared to the marginal social importance of preventing the harm to the right.[57]

He therefore attributes to proportionality certain benefits that it could only yield if it were in fact a relatively precise method. Barak says, for example, that proportionality 'establishes a uniform analytical framework for any state action that may affect constitutional rights', and that it 'ensures constitutional uniformity in the search for a justification.'[58] He claims that the 'structured nature of the discretion involved in proportionality has many advantages', particularly, that 'it allows the person conducting proportionality to think analytically, not to skip over things which should be considered, and to consider them in their time and place.'[59] All this would only be possible if

[57] Ibid 457-8.

[58] Ibid 457.

[59] Ibid 461.

proportionality were in fact a relatively precise method, establishing with enough precision which considerations should be taken into account, and how to relate them, and also weeding out considerations that are deemed irrelevant. Only thus could proportionality guide legal adjudication so as to yield the benefits Barak attributes to it (I expand on the idea of legally directed adjudication, and particularly on the epistemic benefit mentioned by Barak, in VII.3.1). The maximisation accounts of proportionality attempt to provide such a method.

Nevertheless, on other occasions Barak seems to suggest a different view of proportionality, one closer to what I have called 'proportionality as unconstrained moral reasoning' (see ch VI). This view conceives of proportionality as a legal doctrinal tool that simply allows judges to demand justification for certain actions, and to assess those actions through open-ended moral reasoning. Thus, Barak also says that proportionality 'is a legal framework that must be filled with content'[60], that it is 'led by extrinsic data' and that one can 'incorporate most current human rights theories into the concept of proportionality.'[61] He claims that 'proportionality *strictu sensu* may well incorporate the notions of "rights as trumps" or "rights as firewalls"' (though he had earlier suggested the contrary[62]).[63] It is particularly noteworthy that in attempting to accommodate within proportionality some

[60] Ibid 489.

[61] Ibid 467.

[62] 'Dworkin's notion of "rights as trumps" is not based on the concept of balancing: in fact, it is meant to prevent it.' Ibid 365. Though Barak thinks that his conception could 'lead to the same results'. Ibid.

[63] Ibid 490.

features that rights are taken to have in the liberal tradition, Barak adopts an argument proposed by Mattias Kumm.[64] I will address Kumm's argument in detail in the second part of this thesis (VI.1-2). For now it is necessary only to say that for Kumm, proportionality can accommodate the priority of rights over collectivists goals, because the balancing stage can be interpreted as requiring 'the decision-maker to engage in theoretically informed practical reasoning'[65]. If the idea of rights having some pre-emptive force is the most reasonable one, then this should inform the balancing stage. But this understanding of proportionality deprives it of any content (VI.2), and thus, if proportionality is to be understood in that way, it cannot be the relatively precise method aimed at maximisation that Barak assumes it is. It is also in tension with the idea that proportionality cannot accommodate absolute requirements because it is committed to a form of reasoning that presupposes the possibility of trade-offs (between the 'benefits gained by fulfilling the purpose and the harm caused to the constitutional right from obtaining that purpose'[66]) and thus assesses a measure by reference to 'the consequences of either advancing or limiting' the relevant values at stake.[67] This idea is defended by Barak, and indeed by Kumm in his paper quoted by Barak. Nevertheless, if the balancing stage requires open-ended moral reasoning, it can accommodate any relevant moral requirement, including absolute ones, as Kumm later came to accept.[68] Furthermore, it cannot be said to yield any of the benefits

[64] Ibid 470.

[65] Kumm, *PL* 148.

[66] *Proportionality* 340.

[67] Ibid 471.

[68] See Mattias Kumm and Alec D Walen, 'Human Dignity and Proportionality: Deontic Pluralism in Balancing' (2013) New York University School of Law Public Law and Legal Theory Research

that a structured and more precise test would yield, since the freedom to engage in open-ended practical reasoning comes at the price of lack of guidance and external structure. I expand on these ideas in chapter VI. For now it is relevant only to notice these tensions in Barak's theory.[69] I will regard it generally as aimed at maximisation, since this seems to be the pretension at the core of his proposal; but I will acknowledge the tension in his work when necessary. The structure of this thesis, which argues against both understandings of proportionality, is well suited to address this type of ambiguity.

II.2. The proportionality test and the maximisation account of proportionality

For the theories explained above, proportionality is oriented towards establishing which alternative (whether to allow the measure that engages a right or not) would realise more of some property, be it interest or preference satisfaction, value or principle realisation, or social importance.

Papers 7-8, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195663&download=yes> accessed June 2013.

[69] Some of these tensions can be seen, in lesser degree in Robert Alexy's remarks on the ability of proportionality to reflect absolute rights. Alexy claims: 'Proportionality analysis is, as the weight formula shows, a formal structure that essentially depends on premises provided from the outside.' Robert Alexy, 'Thirteen Replies' in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart 2007) 344. As I show bellow, this underestimates the level of substantive guidance (and thus constraint) provided by Alexy's model (see V.2.2.). A similar statement can be seen in Klatt and Meister (n 12) 54-5, also quoting from Kumm. Nevertheless, Alexy and Klatt and Meister remain committed to Alexy's method, and these remarks are to be seen as attempts to express that Alexy's method does require some independent moral and prudential reasoning as input, in, for example, establishing whether in infringement with a principle is 'serious' or 'light'.

Maximisation accounts of proportionality are premised on the view that conflicts concerning human rights are conflicts whose solution requires relating the right at stake with the public good or some other competing right, and determining whether loss on the side of the engaged right is somehow compensated by the benefits achieved on the side of the competing right or public good. This is what is distinctive about this account of proportionality, and, because of how prevalent it is, it could be said that it is what is distinctive about proportionality itself: that limitations on human rights must be *justified by reference to* gains on some other interest, principle or value. The question is whether the gains are enough to compensate for the loss on the side of the right engaged by the measure. If they are, then the measure is proportional. If they are not, then it is disproportionate.

Whether the gains are enough is established through a quantitative comparison of the losses for the engaged right and the gains for the public interest or some other right; ie, a comparison made in terms of more, less, or equal. If the gains are more (and on some accounts, equal) than the losses, the measure is proportionate. If the gains are less (or equal, on Barak's account, when the measure does not promote a right but only a public good), then the measure is disproportionate. This type of quantitative comparison presupposes that there is a common property that captures what is relevant in the elements compared, according to which the elements can be compared in terms of realising more, or less, or equally the said property. I will say more about this in the next chapter.

As said above, this method for deciding cases involving human rights is premised on the idea that what morally matters in those cases is to maximise something. If the criterion proposed for choosing between A and B consists in establishing whether A or B realise more P, then this criterion can only be justified if what is relevant for this choice is to realise P as much as possible, ie, to maximise P. The different theories of proportionality analysed in this chapter specify differently what it is that should be maximised. But they all follow the maximisation logic, and thus, when analysed from the moral perspective, we concluded that they are premised on the idea that what morally matters in the cases for which proportionality is applied is to maximise the relevant property.

From the technical perspective we ask what technical legal categories can express the considerations that are morally relevant in the kinds of cases to which proportionality is applied. If one considers that what is morally relevant in those cases is to maximise something, then the technical doctrinal formulations of the different prongs of the proportionality test make much sense. The proportionality test can be seen as a doctrinal tool aimed precisely at establishing whether the engagement with a human right is justified by reference to the gain in the fulfilment of some other interest, principle or value, thus maximising interest satisfaction or principle or value realisation. The different prongs of the test can be understood as a structured way of analysing this, first asking whether there is a relevant interest, value or principle that is fulfilled by the measure that engages the human right at stake; second, whether the measure is apt to realise that interest, value or principle; third, whether there are other less restrictive means for realising the interest, value or principle (and thus, whether there is a way of realising all the interests, values or principles at stake, including the engaged human right, to a greater degree than under the proposed

measure); and fourth, whether the measure in question produces more or the same interest satisfaction or value or principle realisation than what would be lost by limiting the right (or, on Barak's account, whether the marginal social importance of realising the principle promoted by the measure is greater than the marginal social importance of realising the principle infringed by the measure).

On this understanding of proportionality, the whole test is aimed at maximising some property, and it is aptly structured through technical legal categories designed to shape the reasoning of the judge in doing so.

The idea of maximisation can explain not only the general doctrinal structure of the proportionality test, it can also explain two peculiar features of the test.

First, it can explain the pre-eminence of the final prong of the proportionality test, the 'balancing test'. The balancing prong is the most characteristic part of the proportionality test, which is suggested by the fact that it is referred to as 'proportionality *stricto sensu*'. Barak considers it to be 'the most important of proportionality's tests'[70], and Klatt and Meister, who have proposed a recent defence of Alexy's version of the proportionality test and added further refinements to it, have said that 'balancing [is] the most important prong of the proportionality test, both in practical and theoretical terms.'[71] Once proportionality is seen as a test oriented towards maximisation, it is easy to see why

[70] Ibid 340.

[71] Klatt and Meister (n 12) 6.

the final balancing prong of the test is preeminent. It is the one where the maximisation logic is expressed most directly. The other three stages could be seen simply as an assessment of the rationality of a measure (that it is not irrational in pursuing unworthy or unjust goals, or in deploying means not rationally connected with those goals, or sub-optimal). This assessment, in turn, could be relevant as a way of controlling the inorganic growth of the state or to assure that state action is oriented towards the common good and not to the satisfaction of some private interest, or motivated by prejudices or other sub-rational motives. It is the balancing stage where the maximisation logic becomes explicit, by ending the enquiry with a quantitative comparison of gains and losses, to which all the previous stages are ordered.

Second, it can explain what the test *does not* direct judges to analyse. It is telling that though the test explicitly addresses the question of whether the measure that affects a right pursues a legitimate *aim*, it does not ask whether the measure is a legitimate *means* for furthering that aim. The questions concerned with the means are only whether the means are adequate and sufficiently efficient (in comparison to other alternatives). Then, the question is whether the realisation of the aim is enough to compensate for the cost that the measure causes in a right. The legitimacy or moral soundness of the means as such (ie, not by reference to the aims—whether they are apt for achieving the aim, whether the aim is worthwhile, etc) is not directly assessed. This is remarkable, because the law is generally concerned with the evaluation of means, this is, of actions and choices generally: with whether they are, for example, unjust. The law reacts to unjust actions as such, regardless of whether they are pursued for a legitimate aim (the prohibition of certain forms of interrogation and law enforcement, of which the prohibition of torture is paradigmatic, are

examples of this). But from the maximisation perspective it is perfectly reasonable to disregard the question of the legitimacy of means. If what is morally relevant in cases regarding human rights limitations is to maximise some property, then what matters is the probable consequences of the measure under review and its impact on rights and the public interest.

But this is a big 'if'. In the following chapters I will offer mainly two critiques against the maximisation account of proportionality. In chapters IV and V, I will argue that it cannot be assumed that what morally matters in human rights cases is the maximisation of a single property, nor maximisation generally. But first, in the next chapter I will argue that the kind of comparison that is crucial for the maximisation account cannot be undertaken, because it requires commensuration of incommensurables.

III. The Incommensurability Objection

A common objection to theories such as Alexy's, Beatty's or Barak's is that in attempting to evaluate a particular government measure by reference to some quantitative (though not necessarily purely technical) comparison between gains and losses for principles, rights or the public good, they are attempting a comparison that is not rationally determinable. It is not possible to perform that kind of comparison by means only of rational criteria (as distinct from feelings, commitments, conventions or other per se sub-rational criteria). This is the incommensurability objection, put forward by authors such as John Finnis, Grégoire Webber, Stavros Tsakyrakis, and John Alder.[1] It claims that for rights to be put in the kind of relation suggested by the theories of the maximization account of proportionality, one would need a common property between the two terms in relation to which one could compare them, a property which ought to capture what is relevant for the purposes of the comparison. This is what is necessary to compare or commensurate according to reason (and not merely by reference to a commitment, or feelings, etc.). But no such property exists for comparing human rights and public interests;

[1] See Finnis, *CEJF* III 1 32-4; *Negotiable Constitution* 89 - 100; J Alder, 'Incommensurable Values and Judicial Review: The Case of Local Government' (2001) Public Law 717; J Alder, 'The Sublime and the Beautiful: Incommensurability and Human Rights' (2006) Public law 697; and Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 Int'l J Const L 468, 471-4.

to the contrary, 'the moral and political choices that must be made in determining the limitation of rights reveal a surplus of valuations, not a single metric.'[2]

In this chapter I will provide an explanation and defence of the incommensurability objection, and will attempt to provide an account of it that makes more explicit its scope and limitations. This will be useful for engaging with recent defences of proportionality against the incommensurability objection.

III.1. Incommensurability in general

III.1.1. Incommensurability and incommensurability in choice

Before addressing how incommensurability bears on the proportionality test, it is useful to clarify some general issues about incommensurability, and its relevance for debates on proportionality and human rights adjudication.

There is no shortage of accounts of incommensurability and of related concepts such as incomparability.[3] It is not necessary for our purposes to provide here an extensive account of the different understandings of incommensurability. Here incommensurability

[2] *Negotiable Constitution* 97.

[3] For the different accounts of incommensurability, see Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press 1997). The distinction between incommensurability and incomparability is explained in Ruth Chang 'Introduction', ibid 1-2.

will mean the following: There is incommensurability with respect to X when two things cannot be commensurated along X, that is, when X is not a property by which it can be judged that one of the things is (overall, net) more or less X than, or just as X as, the other. Things that cannot be commensurated in this way are thus *incommensurable.* To describe the same type of situations we could use the term incomparability. There is incomparability with respect to X when two things cannot be compared by reference to X so that it can be judged that one realises (overall, net) more X than, less X than, or the same degree or amount of X as the other—even if there is no unit of measurement that can express X. In this sense, one could say that they cannot be compared. In another sense, one could say they can: they can be compared in the sense that they can be put side by side, so to say, and evaluated in relation to the other. In what follows I will generally use the term 'incommensurability' instead of 'incomparability', using the latter only when there is risk for confusion; and will generally use the word 'compare' in the second, less committed sense. What grounds incommensurability is different in the different kinds of circumstances in which incommensurability arises.

It should be noted right away that whether two things can be commensurated or not depends on the criteria by which one compares them. It is not a feature of things as such. There is always some property with respect to which it is possible to compare two things. I can compare my laptop and a friend by reference to which one is greyer, which makes those two objects of comparison commensurable with respect to greyness. This is of course no more than a mental experiment. We are never confronted with such exotic choices. Incommensurability, in the context of human action, appears in choices, that is, as between options available for morally significant choice.

Incommensurability in choice exists and is relevant because human action is ruled by reasons. When we are confronted with a choice, there are reasons that bear on the choice. These reasons are reasons for choosing in a certain way. It could be the case that different reasons that bear on the issue require that different properties be realised, which properties might not be reducible to each other. When this happens, there will be incommensurability. Imagine I want to buy a house. I am looking for a house that is pretty, located in a good neighbourhood, and that is as big. Imagine that there are only three houses in the market, and that money is not an issue—I can have any of the houses I choose, but have to choose only one (imagine, for example, that my college will provide me a house to live while I work for the college, but only one). House A is pretty and in a good neighbourhood but is small; house B is in a good neighbourhood and is bigger than house A, but is ugly; and house C is pretty and even bigger than house B, but is in a bad neighbourhood. The three criteria that bear on this decision (that I should try to choose a house that is pretty; a house that is big; and a house that is in a good neighbourhood; obviously more criteria could be added) provide content to the idea of the kind of house I would like, of what would be the best or ideal house for me. The criteria are irreducible to each other, because the properties that they prescribe that should be realised in my choosing a house are irreducible to each other: a house does not become prettier by it being very big, nor it becomes better located by being pretty.

The decision is clear if I find a house that ranks higher than the rest in all the criteria: the prettiest, biggest, best-located house available. If I do not, how can I choose between different houses that realise more than others different criteria?

The first thing to note is that I can rank ordinally different houses by reference to each of the different criteria, and even compare cardinally by reference to how big they are (since the criterion 'big' depends on the size of the house, which can be expressed in a measuring unit, like square meters). I can say that house A realises more the criterion of prettiness than house B. But there is no unifying criterion that captures all that is relevant about my three criteria for choosing houses, according to which I could rank my alternatives A, B, and C. I cannot say that C realises overall criteria more than A, or that it is simply 'better' or 'preferable'. The choice between the three houses is an incommensurable one.

III.1.2. Incommensurability and rational underdeterminacy

In the example above, the fact that there is no single property along which I could rank the different houses as 'better' or 'preferable' than the others could mean that my decision between the houses is *rationally underdetermined*. A decision is rationally underdetermined when there is not just one alternative that would be reasonable to choose. Continuing with my example, if my only criteria for choosing houses were the three aforementioned, then my decision would be rationally underdetermined, and this would be the case because the three properties the realisation of which is prescribed by the three criteria (beauty, being in a good neighbourhood, and size) are irreducible to each other or to some other property, and thus the relevant attributes of the houses which are relevant for satisfying the three criteria are incommensurable, and therefore, if the houses rank

differently according to the different rankings (as they do in my example), the alternatives are incommensurable as well.[4]

The temptation is to think that when a choice is incommensurable, it will have to be rationally underdetermined precisely for that reason. But this is not so. Incommensurability only means that the two alternatives cannot be put into one kind of relation: one based on a quantitative assessment on which alternative realises to a greater degree a relevant property. But there are other ways, which are not quantitative, of justifying a relation between

[4] Here it may be useful to clarify my terminology. I speak of criteria, properties, attributes, and alternatives. *Criteria* are the principles according to which we evaluate the alternatives; criteria are prescriptive (eg: choose a pretty house). *Properties* are that which criteria require to realise or not realise in choosing an alternative (eg: beauty). *Attributes* are these properties as they are instantiated in the different alternatives (eg: the beauty of house B). And *alternatives* are the concrete objects of choice (eg: house B). Two criteria can be different, and when this difference cannot be overcome by translating one of the criteria in terms of the other, or both to a third, we say that they are *irreducible* to each other. The same we say of properties. We can also say of properties that they are incommensurable, in that, for example, the beauty of houses, in the abstract, is not more nor less nor equal than the size of houses, in the abstract, for the purposes of defining what is an ideal or the best house. But generally for the purposes of choice one does not compare properties in the abstract. So, most of the time what one wants to say about properties is that they are not reducible to each other, and so it is more pertinent to talk about irreducibility (though on other occasions the aspect one wants to talk about may be their incommensurability, and so it is sometimes proper to say that properties are incommensurable). Attributes we say are incommensurable. Thus, beauty is different than size, and they are irreducible to each other; and the beauty of house A is not more, or less, or the same than its size—it is incommensurable with its size. Alternatives are incommensurable if they (according to their attributes) are ordered differently—rank higher and lower than others—in relation to the different criteria, so that, for example, if two alternatives are assessed in relation to two criteria, and one alternative ranks higher in relation to one criterion and another ranks higher in relation to the other criterion, they are incommensurable. They would not be if they ranked in exactly the same order according to the different criteria. Then they would be commensurable, since one alternative would be better (at everything) than the other. The attributes of each alternative, as specified by each of the relevant properties (eg: the beauty, location and size of house B), would still be incommensurable among themselves in any case. The beauty of house B is not more, or less, or equal than its size. Therefore, I think it is more proper to use the words 'incommensurable' in relation to attributes and alternatives, and 'different' and 'irreducible', in relation to criteria and properties, as I do in this chapter. But for the purposes of this thesis not much depends on the use of this terminology, since it is also possible to say that criteria or properties are incommensurable, in the loose sense that they are different and irreducible, and give raise to incommensurability. I make it explicit only to clarify the sense in which these words can be used and avoid potential misunderstandings.

different alternatives. If the alternatives are incommensurable, as in our example of the three houses, then one cannot reasonably decide between them through commensuration. But the incommensurable attributes of the alternatives at stake might not be the only element relevant for choosing. In the example of the houses, how pretty and big the house is, and how good is the neighbourhood where it is, might not be the only reasons that bear on my choice. Other criteria may apply, in the form of duties, responsibilities, rights, and generally, deontological constraints. I might have to buy house C because it is our old family house and I promised it to my mother in her deathbed. This provides a reason that is conclusive: a reason for choosing house B over the other alternatives.

Note that the decision is still one regarding incommensurable alternatives. There is incommensurability between the competing advantages of the other houses (their realising more than house C the property of being in a good neighbour) and whatever is good in fulfilling my promise to my mother. The reason that requires that I fulfil the promise I made to my mother does not make the alternative prescribed by it yield the advantages of the other alternatives. Choosing house C for the sake of fulfilling my promise does not yield the benefits of living in a good neighbourhood. Something is lost in the decision. A further example can clarify this point. I have an absolute duty not to perform deadly experiments on my neighbour without his consent, even if I could thereby attain knowledge. Let us bracket the potential explanations on the grounds of that particular duty. Whatever the moral good that is brought about by complying with that requirement, it is a different one from the knowledge I would attain by experimenting on my neighbour. It is not the case that respecting my duty not to conduct such experiments on him would realise the value of knowledge to a greater or to the same degree than would be realised by

conducting the experiments, so that we could say that both alternatives realise the same value to different or the same degrees, and so that the decision not to perform the experiment is the only rational one, since it yields more knowledge, or equal knowledge plus something else valuable (respect for my neighbours integrity, for example). If this were the case, one of the decisions would be sub-optimal. But it is not the case. Whatever is of moral relevance in both options is different, and cannot be reduced to what is of moral relevance in the other option. None of the alternatives yields 'more' of a relevant property. Note that this does not contradict, nor is it in tension with, the idea that there is an absolute requirement on me, so that I ought to comply with a certain moral requirement (in this case, not to perform the deadly experiments on my neighbour). Whatever moral good is derived from complying with that requirement is incommensurable in relation to the value of knowledge, but it is still the case that that requirement makes an absolute claim on me—and that the value of knowledge in this case does not, it simply gives me a reason to act in a certain way.

Of course, it could also be said that choices of this type (incommensurable but rationally determined) are not really incommensurable, because the criterion that makes them rationally determined excludes other alternatives, and thus there is not even a comparison among choices, and therefore incommensurability does not even arise. As a way of speaking, one can say that there is no real choice because alternatives were excluded, precisely because the decision is rationally determined. This is just another way of expressing the same moral reality. It seems clearer to me to use the word 'compare' in the sense I have been using it all along (meaning to confront the different alternatives for option, prior to moral reasoning as to whether they are to be chosen or not), and to say that

the relation between the two alternatives is one of incommensurability even if the matter is settled by a conclusive reason in favour of one of them, if (and this is the moral phenomenon that my terminology makes explicit) it remains true that whatever intelligible advantage was in the alternatives discarded, these advantages were not commensurable with the conclusive reason(s) in favour of the alternative adopted.

But in some cases no other criterion will exist that will enable one to decide between incommensurable options. In those cases we are confronted with a choice that is rationally underdetermined. Incommensurability can be part of the reason why a choice is rationally underdetermined.

Incommensurable choices may or may not be rationally underdetermined. So, the possibilities of overlap in a choice between incommensurability and rational underdeterminacy are the following four. i) Incommensurable – Rationally underdetermined, ii) Incommensurable – Rationally determined, iii) Commensurable – Rationally Underdetermined, iv) Commensurable – Rationally determined.

The first two have been explained above. A decision between incommensurable alternatives can be a decision where there is no criterion (that is not related to commensuration) that serves as a conclusive reason in favour of choosing one of the alternatives, in which case, the choice is also rationally underdetermined; or it can be a decision where such a criterion exists, in which case the choice is rationally determined.

With regard to choices of the type iii), this is, choices that are both commensurable and rationally underdetermined, the temptation is to think that if two alternatives are commensurable, then the decision will be rationally determined precisely because commensuration will provide the kind of ordering between alternatives that determines reason, and thus there are no choices of this type. But there is logical space for choices that are both commensurable and rationally underdetermined. The most obvious cases is when two choices rank equally in fulfilling the relevant criteria according to which they are commensurated. When this is so, then commensuration does not determine choice, and thus the decision is rationally underdetermined, despite the alternatives being commensurable.

Choices of the type iv) require no special comment. Commensurability is a source of rational determinacy, which explains the attempts of many theorists to find commensurability in moral choices.

III.1.3. Incommensurability and the possibility of choice

The previous remarks shed light on the crucial question of how choice between incommensurable options can be made and justified. Does incommensurability imply that rational choice is impossible whenever incommensurable alternatives are at stake? If incommensurability is as pervasive as it seems to be—since we commonly face choices to which different criteria apply—then answering the question in the affirmative would commit the incommensurability thesis to denying something we immediately perceive as

true: that we make decisions all the time, even when multiple irreducible criteria bear on the decision, and, furthermore, that many times those decisions are not irrational ones.

But the fact is that there is nothing irrational in itself in deciding between incommensurable options.

Above I said that an incommensurable choice could be rationally determined or rationally underdetermined. If it is determined, then of course it is possible to choose and to justify choice even in the presence of incommensurability. If some other consideration that is not about commensurating provides sufficient reason for choosing one option in preference to the others, then that consideration will justify choice and provide rational guidance as to how to choose in the situation.

What if the decision is, as it is often the case, one between incommensurable alternatives, and it is also rationally underdetermined? It might seem that in these cases choice is always irrational: for choice to be possible it would have to be driven by instincts or whims, since there is no reason that could motivate choice in these cases. But that is not so. A decision is irrational if it does not follow any reason. Here, however, there are reasons that can guide, motivate and justify choosing each of the incommensurable alternatives. It is simply the case that other reasons guide, motivate and justify choosing other alternatives, and there are no conclusive reasons in favour of any of the alternatives. But the fact that there are no conclusive reasons does not entail that there are no other reasons at stake, or that these reasons are not still reasons, and thus reasonably motivate, guide and justify choice. As Anscombe remarked: ‘When I do action A for reason R, it is not necessary or

even usual for me to have any special reason for doing-action-A-rather-than-action-B, which may also be possible'.[5]

What creates the incommensurability is that the different irreducible criteria that bear on the decision point to different properties to be realised. Realising each property is rationally appealing, but the properties are irreducible to each other (or to some other, relevant property). If realising each of the properties is rationally appealing, then this means that this is a reason for choosing to realise the property—even if this reason is not a conclusive one. In the example of the house, it is perfectly reasonable for me to choose to buy a house that is pretty and big, and those attributes of the house (plus it being a house and me needing a house) are good reasons for me to choose that alternative. My choice is not an irrational one. It is guided by reason in that it is a choice to act in pursuit of an intelligible goal, that will deliver me a benefit, and when no other alternatives for my choice could realise that same goal and deliver something more. Of course, I could also choose to buy a different house (perhaps uglier but in a better neighbourhood), and that would still be reasonable, since other benefits will come from that choice. In situations such as these, I can choose based on feelings or other (legitimate—it would be immoral to choose based on, for example, hatred towards people of a certain race or religion) sub rational motives ('I just feel like having a pretty house for once!'). The decision will not be irrational, because it is ultimately warranted by reasons—the different alternatives must be

[5] GEM Anscombe, 'Philippa Foot on Double Effect: One Point', in Mary Geach and Luke Gormally (eds), *Human Life, Action, and Ethics: Essays by GEM Anscombe* (Imprint Academic 2005) 251.

supported by reasons, for them to be incommensurable according to reason.[6] The decision is rational (in the sense of acting on a reason) and reasonable (in the sense of acting on an appropriate assessment of all the reasons that bear on the situation).

III.1.4 The incommensurability objection

Equipped with these concepts, we can understand the idea of an incommensurability objection. Objections take place in an argumentative context; they are objections to something. The incommensurability objection is an objection against any theory or method that proposes or assumes that it is possible to commensurate what is in truth incommensurable—that proposes or assumes that one should choose the alternative that realises the different criteria at stake 'more' or 'to an overall greater degree', when the different criteria are irreducible to each other and alternatives are ordered differently according to the different criteria, so that some are better according to some criteria, but worse according to other criteria. The incommensurability objection is directed, then, against a particular kind of assessment of the different alternatives, which is characteristically quantitative. This kind of assessment of the alternatives seeks to find which alternative delivers 'more', in choices where incommensurability implies that there

[6] Feelings can be incommensurable attributes of alternatives as well (the pleasure I derive from option A is not more, nor less, nor equal to the one I derive from option B, because they are very different pleasures). If no reasons bear on the choice, and only feelings are at stake, the decision will obviously be an irrational one—not because of the incommensurability, but because of the lack of reasons for adopting any decision. But this is only a mental experiment, because some reason must apply to any choice situation. If reasons only support one alternative, there is no incommensurability according to reason. There is only incommensurability according to reason if there are reasons for both alternatives, in which case choosing between them, even when no reason is conclusive, is rational and reasonable.

is no alternative that realises 'more' in the relevant sense, but 'different'. 'More' here means 'more of the same property that captures all that is required by the different criteria bearing on the choice'. But incommensurability describes a situation where the different criteria require the realisation of different properties, which are irreducible to each other. This difference needs to be taken seriously. For practical reasoning, it implies that there will be no conclusive reason for choosing any of the alternatives based on a quantitative assessment in terms of 'which alternative realises more' of all the relevant properties.

The incommensurability objection opposes then any method that directly attempts to commensurate incommensurables. It claims that it is *senseless*, in the way it is senseless to ask whether a lot of happiness is more than a moderate amount of blue paint. The incommensurability objection also opposes any method for addressing incommensurable choices that does not explicitly commensurate the alternatives, but does compare the degree to which they realise different irreducible relevant properties and treats this comparison as a conclusive reason for deciding one over the other, thereby attributing a significance to this comparison that it does not have. It attributes to this comparison the significance it would have *if and only if these different realisations of different properties were commensurable*. The incommensurability objection claims that this method is *unfounded*. For example, in a choice between two alternatives, where the relevant criteria for choosing are to realise property X and to realise property Y, and one alternative realises a lot of X and the other realises not much of Y, the first alternative is chosen because the fact that it realises a lot of X while the other realises not much of Y *is treated as a conclusive reason for choosing it*. No explicit commensuration has occurred here, but the properties are treated as if they were commensurable, since this is what would be required for treating the expected greater

realisation of X in relation to Y as a conclusive reason for choosing the first alternative. But if the properties are not reducible to each other, the alternatives are incommensurable, and thus it is unreasonable to choose as if the alternatives were commensurable, because they are not—choosing in this way fails to take the difference between X and Y seriously.

As is clear from the discussion in the previous section, the incommensurability objection is not an objection against any decision that bears on incommensurable alternatives simply for bearing on incommensurable alternatives. Nor is it opposed to any method that presupposes a decision between incommensurable options, or that provides a decision-making procedure for choosing between incommensurable options. As was shown in the previous section, there is nothing irrational in itself in deciding between incommensurable options.

III.1.5. When and how it is possible to commensurate

It is also useful to remember that there is an important area of human affairs in which it is possible and legitimate to commensurate. This is the sphere of the technical, where one seeks to

> select the most efficient means for attaining an end, by comparing the costs of various options with their probable benefits. But the method works only when (a) goals are well defined, (b) costs can be compared with some definite unit (eg of money), (c) benefits also can be quantified in a way that renders them commensurable with one another, and (d) differences among means, other than their

efficiency, measurable costs, and measurable benefits, are not counted as significant.[7]

But for many choices, and for morally significant choices in particular, these conditions do not hold. Particularly when there are incommensurable alternatives it will not be possible to quantify costs and benefits in relation to a single property (let alone translate this property into a definite unit of measurement) that captures that in virtue of which the different kinds of costs and benefits are such.

It is also possible to commensurate by reference to prior commitments (see also below III.6). I can be committed to finishing my DPhil thesis. If I have that commitment I can commensurate different alternatives as more or less conducive or detrimental to that aim. The alternatives can still be incommensurable in themselves, but be commensurated by reference to that commitment. Because there is often value in undertaking commitments (either with other people or with ourselves), this form of commensuration is very common. But it does not deny incommensurability. If the alternatives commensurated by reference to a commitment are incommensurable, then even if they are being commensurated in this way, it remains true that they still deliver something different than what the other delivered (which satisfied a different criterion, realised a different value, etc.), and (at least in the case of one of the alternatives, for it to be a choice between incommensurables) will deliver something different than what is delivered by the alternative chosen for the sake of keeping the commitment

[7] John Finnis, Joseph Boyle and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (OUP 1987) 252.

Similarly, it is also possible, and in some cases reasonable, to commensurate artificially. This is often done in games, tests, sports, and other similar endeavours. Take the example of the decathlon. At the decathlon there are ten different events, and the winner is whoever scores more total points at the different events. A performance in one of the events is not commensurable with a performance in some other event—so we cannot say that a given performance in the 100mts race is better than, worse than, or equal to a given performance in the discus throw.[8] To allow for commensuration of these different performances for the purposes of establishing who is a better decathlon athlete, a sophisticated points system is applied, which consists in assigning points to the performance of the athletes in each one of the ten events, and for then commensurating by reference to (say, the sum of) these points the different performances at the different events. It is an *artificial* form of commensuration, precisely because in a way it treats as commensurable something that is indeed incommensurable. A performance in the 100mts that deserves X points is still neither better, nor worst, nor equal, than another performance that deserves X-1 points in the discus throw. 'Points' are not necessarily commensurable—they only are if they express attributes that are commensurable. Of course the numbers that express quantities of points (or of anything) can be compared quantitatively (and say that X is more than X-1), but points themselves, as any other unit of measurement, can be incommensurable if they express incommensurable attributes of alternatives (such as the different forms of achievement in performance in different athletic events): 700 points at

[8] Though there is a way in which one can say that one of these performances is better than the other. This way of talking does not imply commensuration, or even a direct comparison between the two performances, but only a comparison of their respective places in a ranking of performances *in the same event*. So, in that loose sense, I can say that the best performance at the discus throw is better than the performance ranked in the place 56 at the 100mts, if I only mean by that that one has place of more prominence in its own discipline than the other.

the 100mts race are not commensurable with 1,000 points at Pac-man. Nevertheless, the points achieved by each performance of the decathlon are treated as commensurable: they are compared quantitatively (X is more than X-1) and can be added up to yield a total that can be compared with other performances at the events.

Note that the purpose of the artificial commensuration here is *not* to establish which athletic performance is better across categories. The point here is not to choose who is the best athlete, whether the great runner or the great discus thrower, and to compare their two performances at these different sports to establish which performance was better. The artificial commensuration undertaken in the decathlon does not allow or commits us to bridging any incommensurability: to treating different performances at different events as better, worse, or equal than the other. '[T]he score-table does not allow us to say that an athlete who scores 1,100 in one event is a better athlete than one who scores 1,050 in another event.'[9] Rather, the artificial commensuration of the decathlon (represented by its score table) serves a narrow purpose: to establish who is the winner of this particular game, under this particular rules, points being computed in this particular way. Therefore the decathlon score-table 'only allows us to say that one who scores more in the ten events is better overall *as a track and field athlete*—a culturally determined category.'[10] Here, the form of commensuration that we need is not one that can allow us to say properly whether a performance in one sport is better than another one in a different sport, but only one for the

[9] *CEJF* IV 17 363.

[10] Ibid (emphasis in the original).

purposes of defining who is the 'best overall track and field athlete'. And thus, the challenge in building a score table that will allow to artificially commensurate is

> to devise a scoring system which (a) will not *give* any one type of performance a priority which it doesn't have relative to overall track/field athletic superiority, and (b) will not include criteria (eg, memory) which are irrelevant to track/field athletic prowess.[11]

What is relevant to understand for our purposes is that, as Finnis says, '[*T*]*his* sort of [artificial] cross-categorial commensuration has … only scant analogy with the problem involved in morally significant choices outside the frameworks of comparison established by prior commitments.'[12] Moral choices are about choosing alternatives or courses of action that are better or worse, more worthwhile or valuable, or less, just or unjust, etc. Precisely the kind of commensuration that would be needed in the realm of moral choice is the one that artificial commensuration such as the one in the decathlon cannot and does not attempt to perform. What would be needed is a commensuration that can establish which alternative is more and thus deserves to be chosen, or less and thus should not be chosen, and not the kind of ad hoc commensuration offered by artificial commensuration, at the service of a limited and artificially constructed purpose, such as choosing 'the best track and field athlete'. As David Luban remarks: 'What we want is not an ad hoc rank-ordering, but a rank-ordering induced by some significant or even essential property of the items.'[13]

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[11] Ibid (emphasis in the original).

[12] Ibid (emphasis in the original) 363-4.

[13] David Luban, 'Incommensurable Values, Rational Choice, and Moral Absolutes' (1990) 38 Clev St LR 65, 67.

Finally, prices, expressed in terms of money, allow for a number of legitimate commensurations. Money is a highly abstract and universal means of exchange. It can be exchanged for any good in the market, and thus it allows for efficiency and speed of exchanges in society. The price of goods and services reflects their rate of substitution in relation to all the other goods and services in the market that have a price. Prices and money therefore allow one to commensurate things, precisely because what is being commensurated is the same attribute of objects, expressed in the same unit of measurement. The unit of measurement is money, and the attribute that it expresses is the rate of substitution in the market of the different goods and services. Therefore, prices and money allow for comparisons of goods and services along one single criterion: their rate of substitution in relation to other things available in the market.

This kind of commensuration is rational, in that what is commensurated is something that can be commensurated. It is also a reasonable undertaking, so long as what is relevant for evaluating and choosing from a set of alternatives is only their rate of substitution for other goods and services. I can intelligibly say that this painting is worth less (in money) than a yacht, if by that I mean that its price is less than the price of a yacht. And I can say that this painting is worth 45,000 pounds. But it is not reasonable (because not true) to think or act as if this price was the only element relevant in the comparison, and thus one cannot say that an accomplished work of art such as the painting is less valuable all things considered than the yacht, or that the value of the painting is only an economic one expressed in its price. To do so is to miss much of the value in many different alternatives or goods that have prices.

III.1.6. Legitimate uses of language expressions that suggest quantitative comparisons

People commonly use expressions that sound as if some form of quantitative comparisons between alternatives had taken place, such as 'greater good' or 'lesser evil'. This may seem to suggest that, contrary to what incommensurability theorists tell us, we do commensurate in many cases where they think it is not possible to do so. But a closer look at these expressions shows that the commensurations or comparisons they refer to are not really the kinds that accepting the incommensurability objection would commit us to denying.

Grisez, Finnis and Boyle distinguish between moral and non-moral uses of these expressions. In relation to the non-moral uses, they provide a number of examples that, in my view, are all instances of comparisons by reference to one desirable aspect in isolation to any other factor:

> What is more suitable to human persons as organisms in an environment can be called 'better' in so far as it is felt to be emotionally congenial; what is unsuitable can be called 'worse' as felt to be repugnant .... . What is more effective in achieving one's purposes, whatever they may be, is a greater good in so far as it is a more effective means; what interferes less with the attainment of one's end is a lesser evil … . What is more perfect in the unfolding of the intellectual capacity is a greater good; whatever blocks that is a greater evil[14].

In these three types of examples, the expressions 'greater good' and 'lesser evil' are said by reference exclusively to one single criterion, in isolation from other considerations.

[14] Grisez, Finnis and Boyle (n 7) 261.

This is a legitimate use of those expressions precisely because it is qualified as referring only to comparisons along one single criterion (eg, in the examples above: emotional congeniality, effectiveness in achieving a certain aim, and furthering of the intellectual capacity). This does not entail commensurability, which would involve quantitative comparisons along different criteria. And again, it does not deny the fact that in some cases we might have to decide between alternatives that are desirable because they allow us to 'unfold our intellectual capacities', and others that, say, provide effective means to a different worthwhile aim (spending time with family)—and incommensurability will arise in those cases.

Similarly, in other cases, one can also say that some things are 'greater' than others: 'Values intrinsic to the human person are greater than those instrumental. … Realities higher in the chain of being are greater goods than inferior realities …'.[15] Again, there is no commensuration of incommensurables here. In the first case, there is no incommensurability because there are no different criteria for evaluating the alternatives. Instrumental values derive their 'value' from intrinsic ones, and in that sense, the former are said to be greater. In the second case, the reason why beings higher in the chain of being are called such can either be that they are ranked according to one single criterion ('realisation of the higher functions of reason and will') according to which some rank higher and some lower, and thus, again, there can be no incommensurability since there are no different criteria for evaluation; or because different criteria apply, but it just happens that all the beings occupy the exact same place in the different rankings produced according

[15] Ibid.

to the different criteria. The same occurs in the case of those who hold 'world views that espouse an objective order of values according to which "greater good" and "lesser evil" will have their most important uses.'[16] Either the comparison is made by reference to one single criterion (such as 'dedication to the worship of God': and thus in applying that criterion one could say that 'consecrated virginity is better than marriage'[17]) or that the different states of affairs under comparison occupy the same place in the different rankings produced according to the different criteria (and so one can say that 'a reincarnation might be more or less bad than Nirvana'[18], since Nirvana is superior to any reincarnation in all the orderings dictated by all the applicable criteria).

There is also a legitimate use of expressions such as 'greater good' or 'lesser evil'. All these uses 'are unified', in that all refer to situations 'in which the greater good is a morally good or better choice, and a lesser evil a non-moral evil or a less serious immorality.'[19]

Talk about 'greater' and 'lesser' good and evil with relation to comparisons between moral and non-moral goods and evils is not problematic for incommensurability. That talk is metaphorical, referring not to a quantitative comparison, but to a qualitative difference: precisely to the distinction between the moral and the non-moral. The moral is given

[16] Ibid 261-2.

[17] Ibid 262.

[18] Ibid.

[19] Ibid.

priority in the sense that has a claim on our actions that the non-moral has not. In that sense, it is legitimate to say that, for example, an injustice is worse than a natural disaster. Other than in this metaphorical sense, it is not appropriate to say that one is greater or lesser good or evil. They are neither better nor worse nor equal, but simply different, incommensurable.

What about use of expressions such as 'greater' and 'lesser' good as applied to comparisons between *moral* goods and evils, as when we say that '[a] murderous individual is less bad than a genocidal society; a happy family better than a happy man … vengefulness worse than laziness, etc.'[20]?

In some cases, as with the first example (murderous individual compared with genocidal society) the language simply reflects more instances of the same kind of moral evil. It reflects a quantitative difference in the two things compared. There is no incommensurability here. 'Greater' or 'lesser' evil (or good) here reflect no more than more/less instances of that good/evil.

In the case of the other example, what is compared are different kinds of goods or evils. This way of speaking reflects a type of comparison that is realised only within a moral system or theory, that establishes which actions are moral or immoral, and provides reasons for that. Within those moral systems, some actions can said to be a greater evil than others, or a greater good than others (both in the moral sense). Depending on the moral system we have in mind, the different goods and evils will be incommensurable or

[20] Ibid.

commensurable. In a moral system that has as its only moral principle or criterion that whatever furthers a single property (which in itself is not composed or dependent on other more basic properties) is good and what detracts from it is evil, then acts and dispositions can be said to be better or worse according to this single scale. Here there is commensuration—very probably at the expense of moral rationality or plausibility. But in a more complex moral system, one that does not hold as the only criterion for evaluating and justifying human action and choice the satisfaction of one single property, but rather proposes different basic criteria, there cannot be this kind of commensuration among all the goods or evils. There can be, among some: some things are more unjust than others—they rank differently along the same criterion, so there is no problem of incommensurability. Is it possible in a sense to talk intelligibly of 'greater' and 'lesser' good or evil in comparisons where there are different incommensurable criteria (values, virtues, principles, etc.) at stake? Yes, because that kind of talk does not necessarily refer to a commensuration of incommensurables. There are legitimate ways of talking of 'greater' or 'lesser' goods and evils. Examples of this are Aristotle's remarks that general justice is 'often thought to be the greatest of virtues', since it is 'the actual exercise of complete virtue', being more complete than the other virtues in that 'he who possess it can exercise his virtue not only in himself but towards another also'[21]; and Newman's claim that 'love is greater' than faith and hope,[22] the reason for it being basically that love is more fundamental than hope and faith, since 'faith and hope are not in themselves necessarily graces, but only as grafted on and

[21] Aristotle, *The Nicomachean Ethics* (WD Ross tr, OUP 2009) 81-2, 1129b25-1130a.

[22] John Henry Newman 'Faith and Love', in *Parochial and Plain Sermons* Vol IV (Longmans, Green and Co) 309.

found in love.' [23] Here, justice or love are not greater in the sense that they realise more of a single property than other virtues to which they can be compared, but either because they are more comprehensive, including the others (as with general justice) or because they are more fundamental than other virtues, in that it is necessary its presence for those other virtues to be 'good', and not 'worthless'.[24] In the example of justice, there is no commensuration of incommensurables (say, the different virtues): on one side there are all the virtues, and on the other there is a virtue that comprehends the others, and adds something (the exercise of virtue towards others). In the comparison between love, hope, and charity, the expression that one is 'greater' does not mean that one is more in a quantitative sense. There is still a plurality of 'graces'[25] (values, principle, criteria) at stake, since love is not the same as charity or faith; the latter contribute something different to the good life than the former. What it is meant by greater is simply that without the company of the former, the latter are 'worthless'. There is no commensuration.

There also may seem to be a quantitative comparison of different alternatives in cases of so called 'large/small trade-offs'. I address this issue bellow (III.6), arguing that cases commonly presented as large/small trade-offs are in reality cases were commensurations do not occur by reference to a quantitative comparison of different

[23] Ibid 310.

[24] Ibid.

[25] Newman is explicit on this: 'Love, then, is the seed of holiness, and grows into all excellences, *not indeed destroying their peculiarities, but making them what they are.*' Ibid 311 (emphasis added).

incommensurable criteria, but by reference to previous commitments; or they refer to cases where the choice is only in appearance one between incommensurables.

III.1.7. Value incommensurability

I will expand on incommensurability referring particularly to values, since debates on proportionality commonly refer to comparisons between values. Nevertheless, value incommensurability is but one example of incommensurability, and most of what follows is merely an application of what was said above of incommensurability in general.

Values provide reasons for choosing something, the reason being the realisation of the value. In that sense, reasons claim to bear on a decision—to become a criterion to consider in my evaluating the different choices I am confronted with. I might not have enough time to spend with both my friend and my laptop, but spending time with my friend realises the value of friendship, whereas spending time with my laptop, as such, does not realise that value, nor any other. I have a reason to spend time with my friend and no reason to spend time with my laptop as such.

But what if the choice is between spending time with my friend, or learning how a computer works? One choice realises the value of friendship, and the other realises the value of knowledge. If the choice were between instrumental goods that served the same value, we could say that, in a way, whatever is good in one of the instrumental goods is the same as what is good in the other, namely, its contribution to the realisation of the same

further value. And we could commensurate them by reference to that contribution, establishing which contributes more or less in the context of a given choice. But if what is ultimately at stake are basic values, values worth realising for their own sake—either because they are directly at stake in the decision, or because what is at stake are instrumental goods that serve different basic values—, then we cannot say that they both deliver the same. In our example, whatever is good in friendship is not the same as what is good in attaining knowledge. They provide different and specific opportunities for realisation that are irreducible to each other. The same irreducibility will obtain when we are confronted with a choice between many values, both at the personal level (health, moral character, etc.) and at the political level (freedom, equality, prosperity, etc.), and with respect to basic values, with respect to some different aspects of the same value,[26] and with respect to instrumental values at the service of different basic values or of different incommensurable instantiations of the same value.

I will understand value incommensurability in the following sense: 'Value' is not a single property X, such that in a choice regarding options that instantiate two or more different non-instrumental values or aspects of non-instrumental values (or instrumental values that serve different non-instrumental values; or different aspects of the same non-instrumental value), it is possible to rank the options based on whether they realise more or less or equally X in relation to the other options.

[26] There can be incommensurable instantiations of the same value, or of 'choosable instantiations of one and the same basic good. For instance what makes vacationing in the beach appealing and what makes vacationing in the mountains appealing—such alternatives are incommensurable in the sense that each possibility has some intelligible appeal not found in what makes the other appealing.' *CEJF* IV.17. 357. See also *NLNR* 422-3.

There is also a ground for value incommensurability, which for our purposes it is worth spelling out explicitly. It is that certain values are irreducible to other values. This is because whatever is good in realising one value, it is not the same as what is good in realising another one. It is not the case that all the values ultimately realise a supreme value, in relation to which they are all instrumental; or that they are all different manifestations of the same value, realising it to the same or different degrees. One can have a word to capture a state of general value-realisation (well-being, happiness, common good, etc), but this is not a higher value to which the other values are merely either means to, or manifestations of. What words such as well-being capture is a situation of realisation of different values, which are not reducible to each other, or to any other value to which they all are subordinated either as means or as instances of it.[27] If this is the case among a set of values, then there will be value incommensurability among the values in the set.

The incommensurability objection can then be understood in relation to values as an objection against any method for comparing different incommensurable instantiations of values that prescribed that one chose the alternative that realises more value overall. There is no option that realises 'more value' than choosable morally significant alternatives. For,

[27] It is possible to say that all values are such by sharing the property of contributing to, say, human fulfilment, in the same way that it is possible to say that all medicinal drugs share the property of contributing to human health. But this does not deny that what different values contribute to human fulfilment is essentially different, not reducible to a common property, in the same way that different medicinal drugs have different active ingredients, which produce different effects in our organism, thus contributing in different ways to health which are not reducible to each other. There is no common property shared by values in virtue of which they are all 'valuable', in the same way that there is no one active ingredient shared by all medicinal drugs in virtue of which they can all contribute to human health.

if there is incommensurability, the alternatives realise different values or different irreducible instantiations of a value. Such a method could be sound only if the different values or instantiations of a value at stake could be reducible to the same instantiation of a value. But if whatever is good in realising each value or instantiation of a value at stake is not the same as what is good in realising each of the others, then their respective realisations will be incommensurable, and pointing to that incommensurability will be an objection against that method.

And again, the incommensurability objection does not imply that it is impossible to choose when incommensurable values are at stake. It could be that a conclusive reason is at stake, and thus the decision will be rationally determined. And even if no conclusive reason is present, it is possible to choose reasonably, since the values themselves provide reasons for choosing each one of the value-incommensurable alternatives. Realising a particular value is a good reason for following the courses of action that those alternatives consist on. The fact that a different course of action, which would realise a different value or a different aspect of the same value was also available does not render the decision unreasonable.

III.2. Incommensurability and proportionality

Is the incommensurability objection an objection against the proportionality test? As said in the previous chapter, the underlying logic of the maximisation account of proportionality is that sacrifices to a human right or an aspect of the public good can be

compensated by reference to gains in the realisation of some other right or of the public good. Not any compensation will do, though. It is important that the sacrifice is 'enough', that it yields 'a net gain'.[28]

But we can only say that losses in something are compensated by enough gains in some other thing if there is a general way in which those two things trade-off against each other, so that I could say that a certain amount of one is less than a given fixed amount of the other, but a greater amount of the former does compensate for the amount of the latter, and an even greater amount of the former is more than the amount of the latter. For those two things to trade-off against each other in this way they must be commensurable: the gains must consist in realisation or non realisation of the same relevant property, so that the two alternatives can be compared along that same property as realising it more or less or equally. If a primary decision maker makes a sub-optimal decision by choosing an alternative that realises less of the relevant property than other alternative available, then that decision maker made an unreasonable decision, which we might want to correct through some form of review oriented towards establishing whether the decision was sub-optimal in realising the relevant property.

Thus, promoters of the maximisation account of proportionality need to show first that human rights and the public interest—or whatever other thing is at stake in human

[28] See Julian Rivers' formulation of the proportionality test in Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge LJ 174, 181; see also Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012) 8.

rights proportionality cases—are commensurable. They rarely attempt to show this directly.[29] Could they?

David Beatty's theory is premised on the idea that what morally matters in the human rights cases for which proportionality is applied is satisfaction of preferences or subjective interests (see II.1.2). It could be argued that subjective interests or preferences are commensurable in principle. It is possible that a particular alternative for choice satisfies more and/or stronger preferences or interests than other alternatives. Computing the strength or quantity of these interests or preferences will be challenging, and in some cases perhaps even impossible. But in others it might be possible to compute them. And, in any case, this does not change whether the incommensurability objection applies or not: in practice it might be hard to commensurate interests, but that does not make them incommensurable. Nevertheless, there will be incommensurability when different and irreducible criteria for satisfying preferences or interests apply to a given situation. What if a particular alternative satisfies more preferences or interests, but another one satisfies stronger preferences or interests? Here the alternatives will be incommensurable. Also if by 'interests' we refer not to subjective interests—desires or preferences, which can arguably be compared by reference to their strength; but objective interests, this is, things that are in the interest of someone, that are good for someone, then these things can be incommensurable: whatever is good for me in being able to (say) hold religious beliefs without being offended for that, it is different from the good that you derive from (say) being able to express your opinions freely and display the product of your creative work. If

[29] An exception is Virgilio Alfonso Da Silva. See III.5 bellow.

it is not true that those two kinds of interests can be reduced to a common property, or one to the other, then there will be a problem of incommensurability in human rights cases where those or other similar interests are at stake.

In any case, different objections apply more directly to Beatty's theory: if taken seriously, even illegitimate interests (such as the one of the racists in demeaning people from other races) should be taken into account, and, if stronger than the opposing interests, allowed to prevail. And, why should we take subjective interests and preferences so seriously? Why would that be what morally matters in human rights cases? I address these questions in the next chapter.

Most versions of the maximisation account of proportionality are aimed at maximising values or principles. In this sense, not every interest should count, but only those associated with values or principles. In Robert Alexy's theory, as said above, human rights are understood primarily as principles, this is, as optimisation requirements—'norms which require that something be realised to the greatest extent possible given the legal and factual possibilities.'[30] Principles, though, typically provide different and irreducible criteria for evaluating alternatives. The different principles prescribe that different properties be realised, which are not reducible to each other. A 'conflict of principles' is one where, if there are two alternatives, one alternative ranks higher than the other in relation to realising one principle, but lower in relation to realising the other principle. As seen in the previous section, in these cases there is incommensurability. This is the case

[30] *Theory* 47.

with Alexy's examples of collisions between principles: one principle requires realising freedom of expression, while another requires realising the rehabilitation of an offender, or the respect for the personality of a person offended; and one requires realising the freedom to pursue one's own profession, and the other the health of the population.[31] Alexy does not provide an explicit account of what is it that human rights as optimisation requirements attempt to optimise, but his work suggests that, at least in many cases, it is values, either directly or in the form of interests that promote a certain value.[32] If principles are optimisation requirements of something that is incommensurable (incommensurable values) the incommensurability objection will apply to attempts to optimise in cases of conflicts between principles.

Followers of Alexy refer to values as the object of the proportionality test. So does Virgilio Alonso Da Silva (see III.5). Likewise, in their proposal for a 'weak trump model' along the lines of Alexy's theory, Matthias Klatt and Moritz Meister present the choice that is evaluated by proportionality as a conflict between values: 'In this model rights as

[31] According to Alexy, these are the principles at stake in the *Leebach* and *Titanic* cases, and in the decision on health warnings of the German Federal Constitutional Court. See *Theory* 54-56, 100, 105 (on the *Leebach* case), and *Balancing and Subsumption* 437, 438 (on the *Titanic* and health warnings cases).

[32] Authors discussing Alexy's theory have assumed this, and not been challenged by Alexy. For example, Jürgen Habermas speaks of 'Alexy's proposal that we view the norms or principles thus transformed into values as optimising prescriptions whose intensity remains open', and says that 'principles manifest a value that one should optimally realize'. Jürgen Habermas, *Between Facts and Norms* (William Rehg tr, MIT Press 1996) 254. Similarly, in his summary of Alexy's theory, NE Simmonds explains that: 'To apply these ideas in adjudication we must (here I simplify very considerably) take the value served by the particular right that is in question, and the value pursued by the law that restricts that right.' 'Institutionalized Reason: The Jurisprudence of Robert Alexy' (2013) 129 LQR 292, 294.

constitutional values can only be overruled by other constitutional values.'[33] Similarly, for Aharon Barak balancing is not 'a factual problem', and 'one cannot negate the value-laden discretion of the balance'.[34] Balancing 'should be affected by the entire value structure of the particular legal system'.[35] For him, both human rights and the public interest (for the sake of which limitations to human rights can be justified) ultimately express or promote values.[36] Since all these accounts attempt to maximise values in the same way than Alexy's does (see II.2), the incommensurability objection applies to these accounts of proportionality in the same way that it applies to Alexy's.

There is no explanation on Alexy's theory on how incommensurability can be overcome (with the exception of the brief remarks on commensurating by reference to the constitution: see III.3). As seen above (II.1.1), for applying what he calls the 'substantial Law of Balancing', Alexy proposes a scale of light, moderate, and serious, in relation to which to assess the intensity of interference with each principle.[37] Alexy 'breaks the balancing process down into three steps', the first two consisting in establishing the

[33] Klatt and Meister (n 28) 23.

[34] Barak, *Proportionality* 357.

[35] Ibid 349.

[36] See ibid 351-53, 427.

[37] *Theory* 405-6. As said in the previous chapter, we must not be distracted by Alexy presenting the balancing exercise as assessing the weight of, on the one hand, the 'intensity of interference' that the measure produces to one principle, and 'degree of importance' of satisfying the principle in the way the measure does, since what it is meant by the latter is no more than the degree of satisfaction of the principle. Since Alexy equates the 'intensity of interference' with the degree of non-satisfaction with a principle, in the end what is compared are the degrees of satisfaction or non-satisfaction of the conflicting principles in relation to the measure that is being assessed by the proportionality analysis. See *Theory* 406-7, and above II.1.1.

intensity of interference with each principle at stake.[38] After analysing these two steps, Alexy says: '[T]he question is now how the third step can be carried out, in which the evaluations are to be set in relationship with each other.'[39] If incommensurability is taken seriously, this is the difficult question to answer. Alexy does not engage with this question, but rather, asserts, after posing the question, the circumstances under which one principle takes precedence over the other. As seen in the previous chapter, what Alexy's specification of these circumstances ultimately amounts to is that a principle takes precedence over another when that principle is interfered with more strongly than the other.[40] But if this is a choice between incommensurables, this conclusion is unwarranted. The alternatives are still between realising (more or less) of one principle, and realising (more or less) of something different, a different principle. [41] Both alternatives can contribute something different. The point of incommensurability is that this difference needs to be taken seriously (see above III.1.4). Recall the example of the houses (III.1.1.): if I have to choose between a pretty house that is small, or a big house that is ugly, and beauty and size are the relevant criteria for this choice, the fact that the pretty house is very, very, very pretty and the big house is just big, but not extremely big, is still is no conclusive reason for me to choose the first, since whatever is good in having a pretty house, it does not deliver the good that having a big house delivers. There would be a conclusive reason for choosing the principle potentially most interfered with if the alternatives at stake were

[38] Ibid 407.

[39] Ibid.

[40] See ibid.

[41] A similar point is made in *Negotiable Constitution* 92-3.

commensurable, so that it were the case that one alternative realised exactly the same in the relevant values and principles than the other, and something more. But this is not the case when the choice is between incommensurable alternatives, ie, alternatives that rank differently regarding the different and irreducible principles or values at stake. (I address this question again below in III.5-6.).

To be clear: the comparison that Alexy's method requires so far—ie, in applying the first Law of Balancing, of comparing the degrees of satisfaction and non-satisfaction of the opposing principles—is an intelligible one. It is possible to say that a principle has been interfered with very much, and than another has been interfered with little. The problem is in the priority rule for choosing which of the conflicting principles to give precedence, according to which the principle that should prevail is the one that has more at stake (the one that would be satisfied to a greater degree by a favourable decision). This comparison of degrees of satisfaction of principles does not have the significance Alexy attributes to it, and therefore the priority rule posited by Alexy lacks justification. This priority rule would be justified only if the degrees of satisfaction of the principles at stake were commensurable, since, if this were the case, realising the principle that would be satisfied to a greater degree would yield 'more' of the same relevant property than realising the rival principle. But since the degrees of satisfaction of the competing principles are incommensurable, the priority rule is not justified. Recall: the incommensurability objection also opposes any method for addressing incommensurable choices that does not explicitly commensurate the alternatives, but does compare the degree to which they realise different irreducible relevant properties and treats this comparison as a conclusive reason for deciding one over the other, thereby attributing a significance to this comparison that it

does not have. It attributes to this comparison the significance it would have *if and only if these different realisations of different properties were commensurable*—but they are not.

A different source of incommensurability arises from the different criteria proposed for making the comparison between the different alternatives. Defenders of some version of the maximisation account of proportionality specify this comparison as one between one or more of the following criteria: the abstract importance of the conflicting (many times different) principles, the degrees of satisfaction or non-satisfaction of the principles in the possible outcomes of the case (if the measure is implemented or allowed to subsists, or not), the reliability of the empirical assumptions regarding the satisfaction or non-satisfaction of the principles, and the reliability of the classification of the alternatives at stake according to the previous criteria.[42]

But, is it possible to compare gains and losses in different principles in terms of 'more' or 'less', ie, quantitatively, according to these different criteria? A first problem is how to bring into relation the different orderings of the alternatives that the different criteria require. If realising principle X is both more important and principle X has more at stake (it could be satisfied more than the rival principle by a ruling that favoured its realisation, and would be sacrificed more by a ruling that disfavoured it) than the principle promoted by the opposing alternative, say principle Y, then it would seem that on this account more is gained by choosing the alternative that realises X. But what if realising X where less important than realising Y, but X had more at stake than Y? If this happens, then there is no

[42] All these criteria are explained in Klatt and Meister (n 28). See especially the 'Weight formula in its complete form', at 11.

single property that could capture all that is relevant in the different criteria, so as to produce a single ordering of the alternatives in terms of which of them realise the property more and which less.

None of these incommensurabilities can reasonably be resolved through artificial commensuration (see III.1.5). Alexy undertakes this kind of commensuration in explaining what he calls the 'Weight Formula'. Above I have explained the Weight Formula (see II.1.1). The Weight Formula 'expresses the weight of a principle under the circumstances of the case to be decided'[43], this is, it expresses whether a principle is 'weightier' than (ie, should prevail over) the rival principle at stake in that concrete case. In the formula the different considerations that are balanced (the degree of satisfaction or non-satisfaction of the conflicting principles, their abstract weight, and the reliability of empirical premises regarding the satisfaction or non-satisfaction of the principles) are given numerical expression. Thus, a serious interference with a principle is assigned the values 4, a medium 2, and a light 1. Numerical values can be assigned in the say way to abstract weight. Regarding the reliability of premises, certain or reliable premises are assigned the value 1, plausible 0,5, and not evidently false 0,25. For Alexy, the complete Weight Formula looks like this:

$$W_{i,j} = \frac{I_i \bullet W_i \bullet R_i}{I_j \bullet W_j \bullet R_j}$$

[43] *Balancing and Subsumption* 444.

Where '$W_{i,j}$' means 'concrete weight of principle of principle '*i*' in relation to principle '*j*', and '*I*' stands for 'interference', or satisfaction or non-satisfaction of a principle, '*W*' for abstract weight, and '*R*' for reliability of empirical premises as to the satisfaction or non-satisfaction with the principles. Letters 'i' or 'j' as subscript indicate the principle to which the variables *I, W,* and *R* apply to. In a given case, the different numbers are to be introduced into the formula, which consists in a division. If the quotient of the division is greater than 1, then it means that principle 'i' is of greater weight than principle 'j', and thus should prevail over it in that case. If the quotient is less than one, it means that the latter principle should prevail over the former. If the result is 1, it means that there is a stalemate: both principles are of the same weight and thus there is discretion.[44]

But this artificial commensuration will not do, for a very simple reason: It commensurates using numbers that represent different things. As said above, points or other numerical expressions of representing a property can be commensurated if they refer to the same property. Three strikes in baseball is not more, nor less, nor equal than thirty three years, or twenty degrees Celsius, and it makes little sense to add them or do some other mathematical operation with them. Of course, one can create an ad-hoc category in relation to which one commensurates artificially the different incommensurables, as in the case of the decathlon, in which different performances at different events are commensurated for the purposes of applying the culturally constructed category of 'track and field athlete'. But this is not something that can be rationally done in morally significant choices (III.1.5.), because here the point is not to design a game or other such

[44] Ibid 440-8.

endeavour, but to choose reasonably, for which it is important to establish whether there is an alternative that is better or worse than the other.

If the considerations at stake are incommensurable, then it makes no sense to treat them as commensurable and pretend that there is a conclusive reason for choosing one way or the other on the false ground that one alternative yields 'more principle realisation' than the other—as if it contributed everything than the other, plus more. This is not the case when the alternatives are incommensurable. Sound practical reasoning chooses differently, based on different methods and considerations, when it faces incommensurable choices than when it faces commensurable ones (see generally III.1.2-5). Since the values and principles at stake in human rights cases are different and irreducible to each other, creating incommensurable choices, sound practical reasoning needs to acknowledge this incommensurability, instead of ignoring or obscuring it.

III.3. Is there a common criterion for commensuration in proportionality cases?

Robert Alexy and, more recently Aharon Barak, have provided a similar argument for the commensurability of rights, principles, or values.

Alexy claims that incommensurability is not a problem because one can compare such things as human rights and public interests by reference to 'their importance for the

constitution'.[45] Barak accepts that for conducting the balancing exercise he advocates, a common denominator between the rights and values at stake on the different scales would be required.[46] But he also rejects the incommensurability objection, because for him

> a shared base—or a common denominator—exists; it is in the form of the marginal social importance in fulfilling the public purpose and the marginal social importance in preventing the harm to the constitutional right.[47]

Above I explained Barak's understanding of social importance, which, for Barak, is derived from various sources, such as 'different political and economic ideologies', 'the unique history of each country', and 'different social values.'[48]

But neither Alexy's nor Barak's account can escape the incommensurability objection. As Timothy Endicott said: 'Identifying a single criterion does not eliminate incommensurability, if the application of the criterion depends on considerations that are themselves incommensurable.'[49] Alexy's argument fails because it is the constitution that establishes the conflicting incommensurable values: applying the constitution to solve the question simply reproduces the problem of incommensurability. On Barak's account social importance is derived from normative sources such as philosophical traditions, social

[45] Ibid 442.

[46] *Proportionality* 483.

[47] Ibid 484.

[48] Ibid 349.

[49] Timothy Endicott, 'Proportionality and Incommensurability' (2012) 40 Oxford Legal Research Paper 1, 8.

evaluations, and the legal system. It includes not only the importance of pursuing a public purpose, but also the importance of the rights that are involved.[50] If rights or the values at stake in human rights conflicts are incommensurable, these sources will express those values, which will still be incommensurable. Being able to capture them with a word does not make them commensurable. 'Major incommensurabilities need [still] to be resolved in order to make the judgment Barak recommends.'[51]

III.4. Strong and weak incommensurability

Some defences of proportionality have relied on Jeremy Waldron's distinction between strong and weak incommensurability for responding to the incommensurability objection. So, Kai Möller relies on this distinction in his claim that his understanding of balancing is not affected by the incommensurability objection.[52] Klatt and Meister have seen in this distinction support for the idea that establishing an ordering of competing principles requires balancing.[53]

> For Waldron,
>
> [s]trong incommensurability is a radical and disconcerting prospect. It suggests that two considerations, A and B, figuring on opposite sides of a practical decision-

[50] *Proportionality* 365.

[51] Endicott (n 49) 9.

[52] *Challenging Critics* 719-24.

[53] Klatt and Meister (n 28) 62-3.

> problem might be genuinely incomparable. The true state of affairs might be as follows: it is not the case that A carries more weight than B, and it is not the case that B carries more weight than A, and it is not the case that they are of equal weight.[54]

When faced with strong incommensurability, 'there is no basis in our knowledge of value to say that one decision rather than the other was the correct one.' Waldron, insists that strong incommensurability 'is the sort of incommensurability that can leave us paralysed, not knowing what to choose' and that it 'leads to agony and paralysis in the face of immiscible values'.[55]

Weak incommensurability, on the other hand,

> is usually expressed in terms of a simple and straightforward priority rule. The claim that considerations A and B are incommensurable in this second, weak sense connotes that there is an ordering between them, and that instead of balancing them quantitatively against one another, we are to immediately prefer even the slightest showing on the A side to anything, no matter what its weight, on the B side.[56]

Waldron contrast this 'ordering' with 'utilitarian-style weighing and balancing'[57], and holds that the ordering can be explicated in at least three ways: as one value trumping

[54] Jeremy Waldron, 'Fake Incommensurability: A Response to Professor Schauer' (1993) 45 Hastings LJ 813, 815.

[55] Ibid 816.

[56] Ibid (emphasis in the original).

[57] Ibid.

the other, as side constraints imposed on the attainment of values, and as a lexical priority among values.[58]

The difference between strong incommensurability and weak incommensurability is that in the case of strong incommensurability 'the competing values cannot even be brought into relation with one another. They are genuinely incomparable in the practical realm';[59] whereas in the case of weak incommensurability 'the values can be brought into relation.'[60] The lack of commensurability in values that are weakly incommensurable 'refers only to the absence of a common dimension of measurement that would allow trade-offs between them in either direction.'[61] But a relation between the values can be established through other means, either by intuition or by reasoning.[62]

Waldron's distinction conveys an important truth, which supports my account of incommensurability in general. We might be confronted by a choice between two alternatives where, because they realise two values that are incommensurable, it will not be possible to decide between them by choosing the alternative that realises more of a certain property (Waldron's 'balancing alternatives quantitatively'). Nevertheless in some cases it

[58] Ibid 816-7.

[59] Ibid 817.

[60] Ibid.

[61] Ibid.

[62] Ibid 818. Though this refers to how we get to know the ordering between values and become convinced that it is right. Since intuition does not elaborate on why it favours one option rather than the other, the explanation on the justification for the ordering can only be established by reason.

will be possible to order the different alternatives and establish precedence of one over the other.

I think that the kinds of choices Waldron is attempting to describe with the ideas of weak and strong incommensurability can be more clearly expressed in terms of incommensurability and rational underdeterminacy. This is so because the latter ideas articulate more explicitly the features in the kind of choices that Waldron is concerned with that make it possible or impossible to rationally order or rank the different alternatives.

Waldron's weak and strong incommensurability refer to two of the different types of choices where incommensurability is present, which are characterised in turn by their relation to whether they are or are not rationally underdetermined. Strong incommensurability refers to choice situations where there is incommensurability among the different alternatives available, and the decision between them is rationally underdetermined. The features according to which Waldron characterises strong incommensurability do not show that it is 'strong' because there is more of incommensurability present in the decision, but because of the absence of some other rational criterion that can determine what is to be done—ie, the decision is rationally underdetermined. When this happens, there is no need to characterise the situation as leading us 'to agony and paralysis'[63]. 'Paralysis' is not the right word here, because the incommensurable values at stake provide reasons for action, and thus each can rightly motivate choice (see III.1.2, 7). 'Agony', again, is not a necessary feature of

[63] Ibid 816.

incommensurable choices that are rationally underdetermined. Whether there is agony will depend on how dramatic the choice is, but not on incommensurability. We are not only confronted with rationally underdetermined choices in dramatic situations. We face them every day, when deciding whether to study longer or spend some time with friends; or whether to go to the gym or for a walk in the park. And, of course, one can face a dramatic choice even when one knows what one has to do: like Jean Valjean's choice between letting an innocent man be imprisoned in his place, or to become an outlaw again.

Weak incommensurability refers to choice situations where there is incommensurability among the different alternatives, but the decision is not rationally underdetermined, because there is some moral principle at work—which can be expressed in the language of trumps, side-constraints, or lexical priority, or in some other way—that serves as a conclusive reason for choice and action.

Waldron's strong and weak incommensurability refer to only two of the four possible combinations of incommensurability and rational underdeterminacy (III.1.2).

It is important to highlight here that in deciding between two 'weakly incommensurable' values, one does not decide by reference to some form of commensuration of the values at stake. This is why 'weak incommensurability' is still 'incommensurability'. When it is possible to determine the ordering between choices for a given choice situation, it is through practical reasoning that does not consist on commensuration between values. Thus, there is an ambiguity in Klatt and Meister's claim that 'Waldron's weak incommensurability affirms the possibility of establishing an

ordering of principles, but … insists that the order must be established by means of balancing'.[64] They refer to the following statement by Waldron: 'The reasoned articulation of our moral principles and priorities inescapably involves what ordinary people might regard as weighing and balancing.'[65] But for Waldron 'when people talk about weighing and balancing … what they mean is not necessarily Benthamite quantification but any form of reasoning or argumentation about the values in question.'[66] For Waldron, addressing incommensurable values cannot be resolved through quantification of the values, precisely because they are (weakly or strongly) incommensurable. There is no support for commensurability or comparability in Waldron's distinction.

Kai Möller relies on the distinction between strong and weak incommensurability to defend his account of proportionality against the incommensurability objection. Möller argues that in cases where there is strong incommensurability the proportionality test should not apply, but he says those cases are very infrequent. It is the burden of those who want to discard proportionality based on strong incommensurability to show that it is significant.[67] Weak incommensurability does not pose a threat to proportionality. For Möller, weak incommensurability could only ground the following objection against balancing: '[b]alancing suggests that whenever two values are 'balanced', there exists a

[64] Klatt and Meister (n 28) 63.

[65] Waldron (n 54) 816, quoted in Klatt and Meister (n 28) 63.

[66] Waldron (n 54) 819.

[67] *Challenging Critics* 722-4.

common scale on which to compare the two. But such a common scale may not exist.'[68]

But if this is the objection, then

> the criticism [it] launches against proportionality is very limited. All it says is that proportionality has the potential to be misunderstood; that it may suggest a false simplicity of cost-benefit analysis, where balancing in the sense of moral reasoning is appropriate.[69]

I believe the objection has more sting than this. It does not only claim that proportionality can be misunderstood as requiring cost-benefit analysis. It shows why it is irrational to pursue that sort of analysis for deciding human rights cases, or any other method that relies on commensurating incommensurable alternatives, be they weakly or strongly incommensurable. The objection is directed against a genuine adversary: the maximisation account of proportionality. Möller's response to the incommensurability objection relies on abandoning the maximisation account of proportionality, against which the incommensurability objection was directed (see ch VI). Nothing in this refutes the incommensurability objection and its bearing on the maximisation account of proportionality.

III.5. Incommensurability and comparisons of degrees of satisfaction and non-satisfaction of principles

[68] Ibid 722.

[69] Ibid.

Klatt and Meister attempt to overcome the incommensurability objection by claiming that, though there is no common measuring unit between the values or principles at stake, it is still possible to compare them. Following Da Silva, they argue that:

> [T]he decisive point here is that incommensurability does not imply incomparability. Balancing works fine as long as comparability among the colliding principles is established, no matter whether they are incommensurable in the strong or the weak, or indeed, any other sense. Comparability can indeed be established by means of creating a common scale like Alexy's triadic scale which allows for comparing trade-offs between satisfaction viz non-satisfaction of colliding principles.[70]

Virgilio Da Silva claims that the debate on incommensurability is 'marked by several terminological misconceptions, which blur many of its conclusions'.[71] Da Silva is particularly concerned with authors confusing incommensurability and incomparability, or thinking that the former entails the later.[72] On his account, 'two goods are incommensurable if there is no common measure that can be applied to all of them'.[73] But even if two goods are incommensurable, we might still be able to compare them, 'for in

[70] Klatt and Meister (n 28) 63.

[71] Virgilio Alfonso Da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision' (2011) 31 OJLS 273, 276. Da Silva is right in pointing out, following Ruth Chang, that not all comparisons are made by means of measuring the compared objects—by commensurating them in the strict sense. (Chang (n 3) 1-2. In my use of the term, as well as in Waldron's, incommensurability is a term of art that refers to more than lack of a common measuring unit, extending also to the kind of comparisons of trade-offs that Klatt, Meister and Da Silva propose. It is appropriate to use the same word for referring to both types of situation, since it points to a similar feature in them: that there is no property according to which it is reasonable to compare the different alternatives so as to decide a situation where they are in conflict *by reference to a quantitative assessment* concerning which alternative realises the property to a greater degree.

[72] Da Silva (n 71) 276.

[73] Ibid 283.

order to compare goods or values it is not necessary to rank them cardinally. It is enough if we are able to rank them ordinally.'[74] In order to compare two terms, we need a 'covering or choice value', and the more precise the covering value is, the more precise the comparison can be.[75] Da Silva claims that 'the thesis of incomparability between basic values is not important'[76] since

> comparisons and balancing are always made among concrete alternatives and not among abstract values. When one balances between basic constitutional rights, she [sic] does not intend to compare the abstract values of, say, freedom of expression and privacy, or of economic development and protection of the environment. What one intends is always to compare the numerous possibilities of protecting and realizing such rights in a concrete situation and to weigh among them.[77]

This, for Da Silva, presents an opportunity for commensuration. Following Alexy, Da Silva claims that 'what is at stake' is the 'degree of satisfaction and non-satisfaction in this specific concrete case' of values or principles.[78] Degrees of satisfaction and non-satisfaction can be compared. For this he uses Alexy's scale of degrees of interference, which categorises interferences as 'light', 'moderate', or 'serious'. For Da Silva, what Alexy shows with his scale is that 'no matter which principles are at stake, what should be compared is the trade-off between the satisfaction of one principle and the non-satisfaction

[74] Ibid.

[75] Da Silva takes the idea of covering or choice value from Chang (n 3) 5: 'A "value" is any consideration with respect to which a meaningful evaluative comparison can be made. Call such a consideration the covering value of that comparison. … Most covering values have multiple contributory values—that is, values that contribute to the content of the covering value.'

[76] Da Silva (n 71) 285.

[77] Ibid 286.

[78] Ibid.

of the other one.' Da Silva concludes that this kind of 'trade-off analysis … makes comparisons easier and, by creating commensurability between what is to be compared, leads to the possibility of rational choices.'[79]

Da Silva does not engage with the possibility of introducing other variables for comparing the different principles at stake beyond 'degrees of satisfaction and non-satisfaction'—as authors working with Alexy's model do (see above III.2)—and the challenges this would pose for his model, which relies on commensurating (or comparing, in his terminology) the different principles along one criterion (their degrees of satisfaction or non-satisfaction in the given case). He only refers to one such variable, the abstract importance of a right, and briefly stipulates that the principles are of the same importance—'not because they are of the same value as such, but because they are both constitutional rights.'[80] Introducing these other variables would create new sources of incommensurability as shown above (III.2).

Even leaving this aside, Da Silva's argument would still fail to undermine the incommensurability objection. Grégoire Webber has argued that the degrees of satisfaction and non-satisfaction of each principle are 'taken only from the perspective of the principle being evaluated'.[81] Therefore, 'one should not assume that [for example] a light interference with one principle is of the same measure as a light interference with another

[79] Ibid 287 (citation omitted).

[80] Ibid 290.

[81] Grégoire Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 Can JL & Juris 179, 196, quoted in Da Silva (n 71) 289.

principle.'[82] Da Silva's reply to this objection is that they are in fact comparable. To illustrate this he provides a hypothetical based on a case mentioned by Webber: a conflict between the wish of some religious people to display religious signs in their houses, and a contractual prohibition of decorations, alternations, and construction on the balconies of co-owned property.

> Imagine that wearing a kippah or a veil would … be strictly forbidden, and in such a scenario, praying might also be forbidden if it might be heard from outside the flats. The goal of this clause would be, say, to promote equality among residents. Since not every resident has a religion and since not every religion has external signs, let us imagine that it was decided that equality among residents would be better protected through a ban of every sign of religion inside the building. Let us suppose that several residents filed lawsuits against this clause. In its report, the court states that the interference with the freedom of religion was serious, while the degree of promotion of equality was practically irrelevant. Until this moment, no comparison has been made.[83]

Leaving aside the complexities related to the fact that what is at stake is a contractual obligation,[84] for Da Silva it is obvious that the differences of satisfaction of the competing principles can be established. From this, he immediately draws the following conclusion:

> The evaluations of the degrees of interference and satisfaction were made completely independent of one another. Does this mean that we cannot compare them? Would it be irrational to decide that religious freedom should have precedence in this case? Webber's arguments are not convincing.[85]

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[82] Webber (n 81), quoted in Da Silva (n 71) 289

[83] Da Silva (n 71) 290.

[84] Ibid.

[85] Ibid 291.

But the conclusion does not follow. Even if one of the principles had more at stake than the other, from that it does not follow that it should prevail over the other. This I will address in the next chapter. Here I focus on the incommensurability objection. Da Silva believes that the different degrees of satisfaction of different principles can be compared. And in a way, they can. But they cannot be compared in the way that is necessary for overcoming the incommensurability objection.

It is intelligible to say that one value or principle would be more affected than another one if a certain choice did not favour it, in the same way that we can say that a person has more to lose in a given situation than another person. But this does not undermine the incommensurability objection, because if the principles (or the values they promote) are incommensurable, the choice between them is still a choice between incommensurables. To choose between a lot of one value, and a little of a different one, is still to choose between incommensurables. The temptation is to think that because there are different degrees of satisfaction or realisation of different incommensurable values, we can assert that one of the choices is somehow sub-optimal. That there is a net gain in choosing to realise the principle that has more at stake, instead of the principle that could be realised (or would be sacrificed) only a little. But this is not so. If it is still true that whatever is good in realising one of the values at stake is different from whatever is good in realising the other value, and that they cannot be reduced to each other or to some higher or common value, then there is no sub-optimal decision here. Therefore, as said above (III.1.4), that one value could be realised to a great degree and another to a reasonably small degree is no conclusive reason for choosing any of the alternatives, and the choice is still

underdetermined. It would be rationally determined if all that is valuable in one of the alternatives could be delivered by the other, plus something—this would be the case if the alternatives were commensurable and one was better than the other. But if this is not the case, then there is still reason for pursuing any of the incommensurable principles at stake, both delivering something valuable, worth achieving, which the other cannot deliver.

Da Silva's example can be misleading, though, in that he presents the degree of promotion of one of the principles at stake (equality) as 'practically irrelevant'. If that were truly so, then the incommensurability objection would not apply to that case, but not because of any commensuration or comparison of different values, but simply because there would be no opposing values at stake. A practically irrelevant gain is an irrelevant gain, and an irrelevant gain is no gain at all (III.6). But if the gain were real, then the incommensurability objection would still apply.

Da Silva is right in claiming that establishing degrees of satisfaction and non-satisfaction is not a purely technical enterprise, but also requires moral reasoning.[86] The problem is not that proportionality and balancing do not require any moral reasoning, but rather that it requires the wrong kind of moral reasoning, one that is too narrowly focused on considerations regarding degrees of satisfaction and non satisfaction of values, which, while intelligible, treat as commensurable what is incommensurable, and thus, are open to the incommensurability objection.

[86] Ibid 288.

III.6. False commensurability and Large/small trade-offs

Some challenges to the incommensurability objection consist in pointing to examples of cases where our common sense intuition is that we decide by commensurating what incommensurability theorists would consider incommensurable values or principles. The force of this challenge is not clear. Intuitions can be wrong. Because of this, we test our intuitions through rational debate, and try to provide a rational justification of the judgements that we arrive to by intuition. Even if we had no explanation for why our intuitions point in a different direction than the one suggested by reasoning, there is no reason to simply follow the intuitions and discard the reasoning. A dissonance between rational conclusions and intuitions is a reason for revising one or the other or both,[87] but it is not a reason for abandoning reasoned conclusions. One theory is not preferable to another simply by virtue of being compatible with common sense intuitions, if rational scrutiny establishes that it is flawed. Furthermore, in the context of scholarly debates, it should not be forgotten that it is the task of scholarship to provide a rational account of things. All this amounts to the following for the purposes of the incommensurability objection and the proportionality debate: even if it were shown that some of our intuitions point against the incommensurability objection in some cases, that would not be a reason to

[87] In the same spirit that a discrepancy between principles arrived at by a theory of justice and considered convictions of justice provides an opportunity for revising both, 'for even the judgements we take provisionally as fixed points are liable to revision'—as articulated by John Rawls' presentation of the idea of reflective equilibrium. See John Rawls, *A Theory of Justice* (rev edn, Harvard University Press 1999) 18.

abandon it, until there is a positive account of how moral reasoning does proceed by commensurating what incommensurability theorists regard as incommensurable.

In any case, I believe that the attempts to present cases where we do commensurate in the way that the incommensurability objection claims that we cannot, ultimately fail. This is so either because the example at stake does not require commensuration, or because the example does illustrate a commensuration, just not of the type that the incommensurability objection rules out.

The former is the case in an argument made by Da Silva. He claims that

> There are several examples which show that it is not only possible, but also necessary, to compare basic values. As for the example involving love and freedom [as involving two basic, and thus incommensurable and incomparable values], someone could be willing to forego a part of his freedom in order to live with the woman he loves, even if she lives in a country where human rights and basic liberties are not fully protected.[88]

But this reply misses the point entirely. The incommensurability objection, as said above, does not claim that it is impossible to choose between incommensurable values (III.1.3.)—it just claims that one cannot commensurate them (or compare them, in Da Silva's terminology). But his example is one of choosing between incommensurable values, not one of commensurating them. There is no commensuration in this case: the decision is not made on the grounds that the chosen option realises more value overall than the alternative. In the example there are two incommensurable values at stake. A mark of this

[88] Da Silva (n 71) 285.

incommensurability is that something is sacrificed: a degree of freedom. Whatever is gained in love does not compensate in kind the loss in freedom. Whatever reason one might have to make that decision, or the contrary, cannot be based on a method that attempted to quantify the potential gains derived from choosing each alternative, and determine which decision would yield a net-gain. Nevertheless, as Da Silva rightly says, 'someone could be willing to' choose one of the alternatives, and assume the cost in terms of the sacrifice from the perspective of the other value. But this does not imply that the decision had to be that one, or that the decision is based on commensuration.

There is a type of choice where our intuition seems to be that we decide between incommensurable values based precisely on there being a net-gain on one choice rather than the other. This is the case of clear large/small trade-offs. Da Silva illustrates this quoting a hypothetical from David Luban:

> A college athlete, who has no intention of playing his sport professionally after graduation, finds that he can become very slightly more proficient by undertaking a new, very time-consuming training schedule. He is already proficient enough to play his sport at a high level. His academic counsellor warns him that the extra time spent on training will have devastating effects on his studies. Is it rational for the athlete to undertake the program?[89]

Da Silva treats as evident that in the example 'there is no trace of incomparability, and it seems that a rational choice is not only possible, but rather clear', since for most of us it would be obvious that the athlete would be irrational in doing the extra training. For Da

[89] Ibid 287, quoting from Luban (n 13) 65. Luban presents other hypotheticals that Da Silva does not mention, and which I do not address here, since the point can be made well by discussing only the one above. A reply to each of the challenges presented by Luban to Finnis' incommensurability theory can be seen in *CEJF* IV 17, 357-69.

Silva it is obvious that '[t]he reason for this is the existence of a clear large/small trade off'.[90] He claims that '[t]he most important covering value in the procedure of weighing principles is the degrees of satisfaction and non-satisfaction of the rights protected by these principles'.[91]

But large/small trade-offs are not a cover value. As mentioned above (III.5) we would still need for something to compare the intensity of interference or sacrifice of different rival principles or values. Perhaps what Da Silva should claim is that when there is considerable difference between degrees of satisfaction and non-satisfaction between principles, no cover value is needed because it is obvious that we should pursue the principle that stands more to gain from a favourable choice. But a closer look at Luban's hypothetical shows that it is far from supporting Da Silva's point. It is not true that whenever we are faced with large/small trade-offs it is always rational to choose to pursue the value or principle that would be satisfied to a greater relative degree by a choice favourable to it. Elite athletes, for example, frequently make many sacrifices, some quite radical, like leaving school and accepting a discipline of life that sometimes takes them away from family and makes it harder to cultivate friendship in order to achieve what from someone outside that practice is a marginal improvement in their performance (running 100 metres in one second less, or so).[92] In Luban's example a particular commitment is

[90] Da Silva (n 71) 287. The term 'rational choice' is equivocal. For the different connotations it can have, see *CEJF* IV 17 358.

[91] Da Silva (n 71) 299.

[92] For an illustration of the kinds of sacrifices made by athletes and the (incommensurable) choices they face, see 'London 2012: Why do Olympic Athletes Push Themselves to the Limit?', blog post

presupposed by characterising the athlete as someone 'who has no intention of playing his sport professionally after graduation', and who thus presumably has adopted the life commitment of graduating, seeking a job in his area of studies, etc. As Finnis explains in his reply to Luban's paper:

> The commensuration we make or presuppose when we judge it irrational for this athlete to undertake the programme is made possible not by the size of the respective gains and losses in different basic goods, but by the plan of life which this athlete has already adopted (chosen)—by his commitments to whatever he needs his college studies for (medical practice… classical scholarship…). We could judge the very same gain in athletic proficiency and loss in scholastic performance rational if we were told that this young man is in college in order to get into the pro's.[93]

Once a particular life project is chosen, one can rank alternatives according to which ones are more helpful in realizing that project. This is what Luban's hypothetical illustrates. But it fails to show any comparability between values based simply in the idea of large/small trade offs.

Nevertheless, it is true that we have a sense that there are large/small trade-offs. Thus, it is useful to explore the ways in which it may seem that a decision is based on commensurating incommensurable alternatives, trying to find what other features of a given situation could be really rationally determining a decision, and thus doing the work that in appearance is being done by commensurating values.

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at The Guardian, 6 August 2012, at ‹http://www.guardian.co.uk/sport/blog/2012/aug/06/london-2012-olympic-athletes-limit› (accessed 19 May 2013).

[93] *CEJF* IV 17, 362.

One type of situation that may seem to involve commensuration of incommensurable values is what I will call 'value overflow'. It takes place when one alternative realises one value, and the other realises that value plus something. There is no incommensurability here, since the same value is realised by both choices, and one realises some other value. This is commonly the case when instrumental values are considered. You can have a job that does not allow you time to work-out, which you would like to do to stay healthy, but pays very well. So, the decision might seem to be one where you should choose between having money and being healthy. But if accepting the job will allow you to afford excellent healthcare, which, in your concrete circumstances, has a greater impact in your overall health than working out regularly (perhaps because you have some illness), then the decision is not between incommensurable alternatives: both realise the value of health, one to a greater degree than the other.[94]

'Value overflow' can also take place in a choice between different alternatives that directly realise different values, but for one of the alternatives the benefits of realising one value are such that, as a consequence some other values are realised as well, including those that would have been realised by the other alternatives, which are realised equally or to a greater degree by the former alternative. An example of this is the following: I could keep a very demanding study schedule, and lock myself in the library with my books, thus realising the value of knowledge. Or I could have a less demanding study schedule, and allow some time to meet some other students and make new friends. So one alternative directly realises the value of knowledge, and the other the value of friendship. But the

[94] Though if the value of working-out goes beyond its contribution to your health, the choice can be incommensurable.

second alternative may also realise the value of knowledge, because it allows me to participate more fully in an academic community, having interesting discussions about scholarly topics, helping and being helped by my academic friends in our studies, getting information on interesting talks and readings that I might have otherwise missed, etc. The second alternative realises the value of knowledge to a similar or greater degree than the first.[95] In this kind of situation the values are commensurable as well, and there are sub-optimal alternatives, but the commensurability is hidden precisely because the values more directly at stake are in fact incommensurable, and one needs to imagine or calculate the indirect consequences of a decision (something we will do perhaps as a habit, unconsciously) to see the possibility of commensuration.

Another type of situation that may mislead one into thinking that it involves commensuration of incommensurable values is what I call 'successive value realisation'. It is based on the idea that we sometimes consider, many times implicitly, the opportunities for realising the different values at stake. One chooses and participates in different values during a lifetime, and plans general schemes of action that allow one to participate in those values more fully given one's concrete circumstances. I could stay a few more hours at my desk and cease this rapture of inspiration for completing a poem, or I could go outside and contemplate the sunset. But the sunset will be there tomorrow while the conditions of

[95] Of course, one can befriend people only for instrumental reasons (eg, for learning from them). If so, in our example, even the illusion of incommensurability disappears, because it becomes clear that the same value is realised by both alternatives, and the question is one of degrees of realisation of the same value which may be compared—as when one is trying to learn a particular set of teachings, as is commonly the case with courses in taught degrees, and the question is whether one would learn that better in the library or in a combination of solitary study and friendly academic interaction. It could also be that what is at stake are incommensurable aspects of the same value—and then the choice is incommensurable.

inspiration that will allow me to make this a good poem might not present themselves again. Whatever is good in writing a good poem, it is not the same and does not deliver whatever is good in watching the sunset, so, there can be no commensuration between writing a good poem or watching the sunset. Here the values at stake are still incommensurable. But there is no need to choose: on one course of action both values could be realised at different moments (today and tomorrow), and on the other (on our best estimation, chances are that) only one of the values. At times we can confuse these situations for large/small trade-offs, because it is easy to confuse 'large' with 'exceptional' (they are often companions) and 'small' with 'ordinary'. But what justifies our sense that this choice is rationally determined is that on one course of action we could instantiate both values (ceasing the exceptional opportunity for instantiating one of the values now, leaving the ordinary opportunity for instantiating the other later), and on the other we could only instantiate one (the one that could be instantiated by the ordinary opportunity). Nevertheless, if there were a need for choosing to instantiate only one value (say, this will be the last sunset), it would be a choice between incommensurable alternatives.

A different way in which a decision can seem to be rationally determined in the way the idea of large/small trade-offs suggests is when the benefits derived from one alternative are so small that they become 'negligible' or 'trivial'. These terms, or other similar ones, are common in descriptions of purported large/small commensurations.[96] This situation is the reverse of 'value overflow', and I will refer to it as 'trivial benefits'. It is true that when there are 'trivial benefits' there is no incommensurability. But this is not because the

[96] Da Silva (n 71) 290, Endicott (n 49) 11.

incommensurable values can be commensurated, but because in this case there is not really a choice between different instantiations of value. Negligible or trivial benefits are no benefits at all. Those words mean that the benefits they designate, literally, do not matter. This is what 'trivial' means, and what 'negligible' (that I can treat as if it did not matter) implies. So, if I am confronted with two options, and one of them realises a value to a negligible degree, and the other realises a value, period, then I am not really confronted with a choice among incommensurable values, because one of the alternatives does not realise a value at all. The decision is clear and one of the alternatives is sub-optimal. There is no real trade-off. This can be illustrated through the example of the student athlete: is it worth it to decide to train when one can improve one's performance only to a trivial degree (assuming that the value of training is in improving performance), sacrificing study? Of course it is not, because there would be no value in the first option. But if we introduce some value in that choice (for example, the benefit of forming character by training a bit harder), the choice stops becoming intuitively obvious, because we will be confronted with a real choice among incommensurable values.[97]

There is no reason to think that it is possible to commensurate incommensurable values in the presence of large/small trade-offs. There is no good theoretical explanation for this possibility, and our examination of examples of situations where we seem to

[97] It is worth insisting that my point here is completely analytical. Words such as 'trivial' or 'negligible' imply that there is no realisation of value. I do not argue that in some cases that we think we are realising some value to a small degree we are actually not realising any value, or that small realisations of value do not matter. If both alternatives offer a (small) realisation of incommensurable values, then there will be incommensurability. My claim is only against a way of speaking of certain alternatives for choice as if they instantiated some value, when in effect it is meant that (and they are treated as if) they did not.

commensurate in the face of large/small trade-offs shows that they can be explained as instances of commensuration by reference to a commitment (itself not justified by reference to commensuration of the values at stake), 'value overflow', 'successive value realisation', or 'trivial benefits'. I do not know whether these categories of cases exhaust the ways in which it may seem that we decide by commensurating incommensurable alternatives. But they at least deal with the kinds of examples that are discussed in the literature on the proportionality test. Further examples might be provided for discussion, but it is the burden of those challenging the incommensurability objection to present them, and to show that they are in fact examples of commensuration of the kind ruled out by the incommensurability objection.

III.7. Commensurability in law?

It could be argued[98] that in law many legal doctrines consist either in a choice between incommensurable values, or allow courts to choose among things that are incommensurable. An example of the former is the prohibition of hate speech in some European countries, which some explain as an institution where the value of freedom of speech cedes to other values that would be threatened by hate speech.[99] Examples of the latter are the allocation of punishment for an offence or determining the amount of compensation for a civil wrong (see III.8 bellow). It could be argued that if the reason for

[98] Paul Craig made an argument along these lines in a meeting of the Oxford Law Faculty Public Law Discussion Group, in Hillary term 2013.

[99] See Klatt and Meister (n 28) 21. I engage with their account of hate speech in V.2.1.

abandoning the proportionality test is that the alternatives between which the test needs to decide are incommensurable, then we should also abandon many other established legal doctrines.

But this relies on a flawed understanding of the incommensurability objection. The incommensurability objection does not claim that one cannot or should not choose between incommensurable alternatives. It claims that one cannot justify that choosing in commensurating the values at stake. So, if some legal doctrines rely on a choice between incommensurable alternatives, or establish a procedure for choosing between incommensurable alternatives, this is not in itself challenged by the incommensurability objection. As emphasised above (III.1.3. and III.1.6.), when we are faced with incommensurable values each value does provide a reason for choosing it. It can also be the case that one ought to choose one of the incommensurable alternatives, because there is a further reason (that is not related to commensuration of the alternatives, like a promise) for choosing that alternative (III.1.2.). And it can also be the case, as it is commonly in the law, that there is a need for choosing one of the alternatives, even if there is no reason for choosing any of them in particular over the others. Accepting the incommensurability objection commits one to reject a particular method for establishing what to choose when confronted with certain incommensurable alternatives, but it does not commit one to reject any choice between incommensurable alternatives. Thus, we can reject the argument that accepting the incommensurability objection for the proportionality test would require that we reject any legal doctrine that relied on a choice between incommensurable alternatives or that postulated a decision making procedure for deciding cases where there are incommensurable options at stake.

III.8. Incommensurability in law

Can the proportionality test be saved from the incommensurability objection? In relation to the many cases where there is incommensurability, Timothy Endicott argues that 'we need to remind ourselves that courts often have to pull off such impossible feats.'[100] He provides as examples of this the fact that courts need to determine compensation for civil damages (to establish how much money would compensate for, for example, physical suffering) and criminal sentencing (to establish, for example, exactly how much time in prison a person should spend as punishment for a particular offence).

> The incommensurabilities in civil damages and in criminal sentencing are only particularly dramatic instances of this essential judicial role. Legal systems justifiably—and, in fact, necessarily—authorize judges to reconcile incommensurable considerations.[101]

I do not believe that the examples of criminal sentencing and compensation for civil damages are actually cases involving incommensurability.[102] But the general point

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[100] Endicott (n 49) 13.

[101] Ibid 14.

[102] I cannot argue for that claim here, which is not necessary for my broader argument. I can only suggest the following. Criminal sentencing does not need to require commensurating incommensurables if, 1) punishment is determined by reference to consequences (eg: deterrence), or 2) if, at some level of abstraction, we are punishing *in kind*: if we determine the punishment we are allowed to impose on an offender by reference to the suffering for which she is responsible, thus causing suffering on the offender as a retribution for the suffering caused by her. Of if we determine the punishment by reference to the freedom she illegitimately seized for herself, and thus we restrict her freedom in proportion to the illegitimate freedom she seized. Regarding compensation for civil

underlying Endicott's remarks is correct: we sometimes need legal systems to specify what reason leaves underdetermined (whatever explains why the issue is rationally underdetermined, be it incommensurability or some other feature of the situation). Does this save the maximisation account of proportionality from the incommensurability objection?

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damages: we do not need to interpret it always as an attempt to restore to the victim *in kind* what she lost because of the wrong committed against her, *through a payment of money or some commodity*. If we interpret all forms of compensation for civil damages that way, there would be a problem of incommensurability in all the cases where what is lost cannot be reduced to monetary value, as when someone losses a child or a leg. But the sense of loss in such cases even after compensation—the sense that there is no amount of money that can be equal to the loss of a child or of a limb—suggests that there is incommensurability in these cases, and that we are well conscious of it. An alternative interpretation could be the following: losing a child or a leg has an impact in one's life, sometimes in all aspects of one's life. It makes life harder. Money can help overcome some of those hardships, or live with them better: money makes life easier. If I get economic compensation for the loss of my child, I do not get my child back, but I can pay for therapy, I can donate money to a scholarship for other children to have better opportunities, I can take some time off to mourn, etc. The same with regard to the loss of a limb: I can get treatment, or I can buy the necessary equipment, etc. In this dimension, there is no incommensurability: there are burdens that come with an important loss, and there are certain material means that can help bear those burdens. Of course, what amount of money is equivalent to what would be needed to help substantially bear those burdens is something there is no precise measure for. Here one needs to settle for rough estimates. Also there is no rational calculus for establishing burdens and compensation. One needs to use one's imagination and feelings to imagine those burdens and imagine the kinds of goods and services that could help bear those burdens—one uses imagination and feelings for applying a reasonable principle. But there is no problem of incommensurability here. Not so for an interpretation of compensation for civil damages which understands it as being about restoring to the victim in kind what she lost. This interpretation, which presupposes that we need to commensurate what the victim lost with the pecuniary compensation she shall receive, makes the practice of pecuniary compensation irrational, when not immoral and insulting, by suggesting that loss of, say, a child, can be somehow equivalent to a sum of money. This immorality is well captured in the scene in Dicken's *A Tale of Two Cities* (Book the Second, ch VII 'Monsigneur in Town') where the carriage of a French aristocrat runs over a poor child. The aristocrat throws a gold coin to the father of the child, who is devastated, and continues his way. The problem, of course, is not that the gold coin is not enough, but assuming that a sum of gold could be enough—the attitude described by Dickens in terms of the aristocrat getting prepared to being driven away off the scene 'with the air of a gentleman who had accidentally broke some common thing, and had paid for it, and could afford to pay for it'. The legal practice of providing compensation for civil damages does not need to be interpreted in a way that makes it look like Dicken's aristocrat. It can also be seen in a different light. One in which the legal practice is not understood as comparing, say, the life of a child with money. More generally, one in which the losses caused by the wrongs are not assumed to be commensurable with money. Civil compensation does not need to be understood as requiring to commensurate incommensurables.

It does not. As said above (III.1.3.), it is possible to choose reasonably in cases where there are incommensurable alternatives. But proportionality does not only provide the opportunity for choosing, but also a method for doing so. Insofar as this method, on the maximisation account of proportionality, presupposes that the alternatives are commensurable, when they are not, it is an unsound method. Furthermore, if proportionality simply provided the opportunity for choosing between incommensurable alternatives, it would still be open to criticism. The proportionality test is not an institution established by the law to provide for an authoritative decision in cases where there is a rationally underdetermined choice. Proportionality is not a way of determining what is rationally underdetermined. Proportionality is a form of review of what others have determined. What justifies the authority of a court to review the choices of a primary decision-maker? In the case of proportionality, the reason must be that it increases the rationality of the decision: that it can correct decisions that are wrong. Methods for judicial review must meet a burden that decisions of primary-decision maker need not meet. The latter can be justified simply by reference to the need for an authoritative decision in a particular matter, even when this decision is rationally underdetermined. It is no argument against this reason for granting authority to a decision-maker to settle the issue that the decision between the different alternatives is rationally underdetermined, if there is still need for a decision to be made. But a method for judicial review claims to do more than authorise judges to settle matters that are reasonably underdetermined. It claims to establish whether the decision of a primary decision-maker that settled the issue was right or wrong. Proportionality should be evaluated on these terms. The incommensurability objection shows one way in which a particular method for judicial review, the maximisation account

of proportionality, fails in serving judges to establish whether a particular decision of a primary decision-maker was right or wrong, because it commits them to an unsound method that presupposes a commensuration of incommensurables.

III.9. Proportionality does not need to commensurate

Charles-Maxime Panaccio has argued that proportionality is not committed to commensurating in the form that would be ruled out by the incommensurability objection. For Panaccio proportionality is 'a heuristic tool for practical-moral reasoning.'[103] As such, '[i]t is substantively quite vacuous', and, as such it 'requires a normative theory to breathe life into it.' It is therefore open to the best normative theory that applies to the issues it addresses. If the best normative theory is one that accepts incommensurability, then proportionality will do so as well. Thus, for Panaccio, his account of proportionality 'can very easily accommodate theories of morality or practical reason which make space for the incommensurability or incomparability of values or action-options.'[104] Similarly Möller argues that

> [b]alancing suggests that whenever two values are 'balanced', there exists a common scale on which to compare the two. But such a common scale may not exist. Rather, it may be necessary to 'balance' the two values in the sense of reasoning about which of them ought to take precedence in the case at hand.[105]

[103] Charles-Maxime Panaccio, 'In Defence of Two-Step Balancing and Proportionality in Rights Adjudication' (2011) 24 Can JL & Jur 109, 119.

[104] Ibid 118.

[105] *Challenging Critics* 722.

Because for Möller the kind of balancing required by the proportionality test is 'balancing as reasoning'[106], which simply demands to consider all the relevant reasons, proportionality would not be committed to the kind of commensuration method that the incommensurability objection rules out.

Both Möller's and Panaccio's are defences not of the maximisation account of proportionality, against which the incommensurability objection is directed at, but of a different account of proportionality. I explain this further bellow (ch VI). Here it is enough to say that this account is the idea of proportionality as unconstrained moral reasoning, which I criticise in the second part of this thesis.

An ingenious attempt to avoid the problems that incommensurability poses for proportionality is Paul-Eric N Veel's. He argues that an application of the Nash Bargaining to social choice could be used for deciding proportionality cases. The advantage of the Nash solution is that it does not rely on any commensuration or comparison between the different preferences or values at stake.[107] Though I do believe that incommensurability does pose a problem for Veel's proposal, I will not engage with it here, but in the next chapter (IV.4), since my objections to it are not primarily related to incommensurability.

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[106] Ibid 715.

[107] Paul-Eric N Veel, 'Incommensurability, Proportionality, and Rational Legal Decision-Making' (2010) 4 Law & Ethics of Human Rights 177.

III.10 Conclusion

The incommensurability objection is an important challenge to the main versions of the maximisation account of proportionality. It shows that the method that these versions propose for assessing conflicts involving human rights relies on a type of quantitative comparison that generally cannot be rationally made in human rights cases. Attempts to overcome this objection are not successful. This does not mean that human rights cases cannot be solved reasonably, or even that there can be (though this is not necessarily the case always) one right solution to a case. It only means that a certain kind of method for arriving at those solutions is unsound: any method (commonly aimed at maximisation) in human rights cases that attempts to commensurate between incommensurables, be they human rights, public goods, interests or preferences, constitutional values or principles.

IV. Why Proportionality?

In this chapter I present the following objection against the maximisation account of proportionality: even if it were possible to strike a comparison of the kind proposed by theories of the maximisation account, between a human right and a conflicting human right or public good, there would still be no reason for treating this comparison as the morally decisive criterion for deciding the case. It is one thing for a criterion to be capable of application, another for it to be the appropriate criterion for deciding a particular matter. The criterion will be appropriate if it captures both the relevant moral considerations that bear on the situations to which the criterion is to be applied, and the relations between these considerations. This question is at the heart of what I have called 'the moral perspective': what is it that is of moral relevance for deciding a conflict in the human rights cases to which proportionality is applied? In particular, are the comparisons proposed by the theorists of the maximisation account of proportionality all that is morally relevant?

IV.1. Is proportionality 'rational'?

Much of the debate about Robert Alexy's influential theory of proportionality revolves around the question of whether proportionality is a rational form of adjudication, or, on the contrary, is an arbitrary one. It has been argued that proportionality would allow judges to address cases unconstrained by the law, thus deciding the case based on

subjective considerations, such as feelings or prejudices. On this basis, proportionality adjudication would be in a relevant sense arbitrary. Thus, Bernhard Schlink has argued that 'the balancing of rights, interests and values … is unavoidably subjective'.[1] Jürgen Habermas claims that because 'there are no rational standards' for bringing values associated with constitutional rights into a 'transitive ordering with other values from case to case … weighing takes place either arbitrarily or unreflectively'.[2]

Responses to these objections have been two fold. First, Frederick Schauer has pointed out that the critiques confuse 'unconstrained' with 'irrational'. Even if proportionality had the unconstrained character the critiques presuppose it has, from that it would still not follow that it is irrational as a form of adjudication. 'It is not as if we normally think of other open-ended decision-making approaches as irrational just because they involve some likelihood of variability.'[3] Open-ended moral reasoning does not need to be irrational, since it is possible to reason well even when one is not constrained in one's reasoning by legal materials. As Schauer says: 'A case could also be made for the rationality of a totally open-ended balancing process, in which decision makers simply make the best all-things considered decision.'[4]

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[1] Bernhard Schlink, 'Proportionality in Constitutional Law: Why Everywhere but Here' (2012) 22 Duke J Comp & Int'l L 291, 299. See also Bernhard Schlink, 'Proportionality (1)', in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 725.

[2] Jürgen Habermas, *Between Facts and Norms* (William Rehg tr, MIT Press 1996) 259.

[3] Frederick Schauer, 'Balancing, Subsumption, and the Constraining Role of Legal Text', in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 310.

[4] Ibid 316 fn 14.

I will engage with this sort of reply in the second part of this thesis, when I engage with the idea of proportionality as unconstrained moral reasoning. Alexy's own defence of his theory has followed a different path. It has focused on showing that proportionality does provide a method for addressing human rights cases (and thus does not amount to free, open-ended moral reasoning), and that this method is rational. As seen above (II.1.1), in the basic application of Alexy's method for balancing,[5] the question is whether the non-satisfaction of one principle is compensated by the satisfaction of the competing principle. Alexy resolves this by evaluating whether the degree of non-satisfaction of the principle affected by the measure under review is greater than the degree in which the measure satisfies the competing principle. For Alexy these different degrees can be assessed along a triadic scale (light, medium, serious), and thus compared by reference to that scale. In his reply to Habermas, Alexy notes how it is possible to rationally establish the different degrees of satisfaction or non-satisfaction of the principles at stake (whether the satisfaction is 'high' or the non-satisfaction or interference 'light', etc) in different cases. Alexy concludes that: 'The assumptions underlying judgments about intensity of interference and degree of importance are not arbitrary. Reasons are given for them which are understandable.' For Alexy, '[t]his disproves the thesis that balancing in the final analysis permits anything because it lacks rational standards. To that extent the Law of Balancing survives Habermas' objections.'[6]

[5] This is, when the different principles at stake are not of different abstract weight, and when the empirical premises regarding their satisfaction or non-satisfaction are equally reliable. The degrees of satisfaction or non-satisfaction are expressed in Alexy's 'elementary version' of the Weight Formula. See *Balancing and Subsumption* 444.

[6] *Theory* 405.

What Alexy seems to attempt to establish is that his method can be rationally applied, ie, that the method can inform a process of reasoning towards the solution to the case, without recourse to feelings, prejudices, or other irrational grounds, which eventually decide the matter; and, thus, that the correctness of the application of the method can be rationally assessed. This is what Alexy means by his theory of proportionality being 'rational'. If Alexy were right, proportionality would not mask or even allow for unconstrained moral reasoning.[7] It would be a method that is highly determined and that provides guidance as to how to reason and decide a case. The debate could be generalised to all the theories of the maximisation account of proportionality. The question here is whether the maximisation account of proportionality provides a distinct method for addressing human rights cases, and whether this method can be applied rationally, without resorting ultimately to the feelings or prejudices of the person applying it for deciding the matter.

Alexy's response provides a useful point of reference. He is right in saying that his theory does propose a distinctive method. And in saying that this method can be applied rationally to a large degree, at least in its simplest form. If the method consists in establishing and comparing degrees of satisfaction or non-satisfaction of rights, it is indeed one that can be rationally pursued, for it is intelligible to say that in a particular case a certain principle has been severely affected, and another principle has been promoted only a little. If the method proposed by Alexy amounts to establishing the principle that has been

[7] Schauer (n 3) 309.

affected the most, this is a rationally applicable criterion for deciding the issue. Similarly, it is possible to establish the party for whom the disputed matter has greater significance, ie, which party has a stronger interest in the outcome of the case. If so, the method provided by Beatty can also be applied rationally (II.1.2). For Alexy, problems begin when the principles are compared by reference to more than one criterion: not only degree of satisfaction or non-satisfaction of the principle, but also abstract importance of the principle, reliability of the premises, etc. Similarly for Beatty, if there are different criteria for establishing when a decision is more significant to a party. The same problem applies to Aharon Barak's idea of balancing by reference to the marginal social importance of realising the opposing principles (II.1.3). These considerations will be incommensurable, and, as seen in the previous chapter (III.2.), attempting to capture what is relevant in all of them so as to establish a single order of the alternatives will not be possible.

But the problem I want to focus on in this chapter is a different one—one which is already suggested in my treatment of the incommensurability objection, but is worth now spelling out. Even if it is intelligible to talk about different degrees of interference with different principles, there is no reason to decide to favour the principle more interfered with *as if* the greater potential realisation of this principle was somehow *more* than the potential realisation of the other principle at stake. The idea of incommensurability also implies that a great realisation of one principle or value contributes something different (not: more, or less, or equal) than a moderate realisation of *another* principle or value, and therefore, provides no reason for preferring the former realisation to the latter. If so, even if in their

simplest version Alexy's or Beatty's method[8] could propose an intelligible method that can be applied generally to human rights cases, those methods would still be open to the objection that applying the method is arbitrary, in that there are no reasons for adopting it.

This question has not been explicitly articulated by Alexy or Beatty. The debate on rationality and balancing, which takes as a point of reference Alexy's theory, raises two questions: first, whether Alexy's method or other similar accounts of proportionality amount to a simple invitation to the judge to perform moral reasoning about the right solution to the case, unconstrained by the law. The answer to this question is no. And second, whether proportionality is a method that can be applied by reasoning, yielding an outcome that is rationally determined by the method. The answer to this question is, as seen above, a qualified yes.

But there is one sense of 'rationality' that this debate has not addressed, for which some may prefer to use the word 'reasonableness'. This sense is not about whether the method can be applied by reason, but about whether it is reasonable to apply that particular method for addressing a certain type of problem. Suppose I have a method for deciding which watermelon I will take when I go to the market. I simply choose the biggest. This is a rational method in the sense that I can establish through rational means which watermelon is the biggest. It is not up to my feelings that day, and whether this or that watermelon is

[8] Not the method proposed by Barak, since Barak does not provide an equivalent simplified proposal that compares the different principles at stake in relation to only one criterion (degree of interference, for example). Barak always proposes to compare the (already incommensurable) principles along many (incommensurable) attributes, and thus his proposal cannot at all amount to a method that reason can in principle follow to arrive at a solution in those cases where alternatives rank differently along different attributes (see II.1.3 and III.2-3).

bigger does not depend on the person that is choosing. Other people can reconstruct my reasoning in choosing watermelons by applying my same method, and a mark of this is that they will be able to predict my decisions. Now, I suspect that I would not be considered irrational for choosing watermelons based on their size. The reason for this is because it is plausible that I have good reasons for using this method for choosing watermelons. If in fact I have those good reasons for using this method, then it is reasonable for me to do so. So, if my first priority is to feed all my children, and I cannot afford two watermelons, but only the bigger ones would suffice, then I will have good reasons for choosing watermelons based on the very simple method of choosing the biggest. But if I choose books on proportionality based on that same method, that would be unreasonable. This is not because reason cannot apply the method to decide which book to buy, or judge whether the application of the method is correct or not, ultimately having to rely on feelings or prejudices. People can assess which book on proportionality is the biggest in the store, and there is nothing subjective about that process. Yet it is wrong —unreasonable, if not irrational—to use that method because there is no reason to justify using that method for buying books on proportionality. Unless I want a book on proportionality to fill a gap in my shelf with books on proportionality, using that method would fail to capture what are the relevant considerations that apply to such a decision. Thus, using that method would be unreasonable even though it is true both that the method itself can be applied through reasoning and that the correctness of its application (whether the decision is really warranted by the method) can be rationally assessed.

IV.2. Quantitative Comparisons and Rights Adjudication

The question here is not whether it is possible to engage in the kind of quantitative analysis of which the balancing stage of the proportionality test (on the maximisation account of proportionality) is representative. The question here is rather whether proportionality, as understood in the maximisation account of proportionality, is appropriate for deciding cases regarding limitations of human rights. [9] This, in turn, depends on whether proportionality is able to capture the morally relevant considerations that should bear on the kinds of cases that we are assessing. As said before (II.2), the maximisation account of proportionality is aimed at maximising values, principles, interests or preferences. This supposes that what morally matters in human rights cases is precisely to maximise that which the proportionality test is aimed at maximising. But, is it?

The point relates to the kinds of quantitative comparisons that the proportionality test, and especially its balancing stage, is designed to perform for evaluating whether a purported interference with a right is justified or not. In the previous chapter the claim was that generally in human rights cases it is not possible to perform those comparisons. Here I

[9] This is a different question from the one posed by Gardbaum in relation to proportionality. He presents his argument as a normative case for a conception of constitutional or human rights according to which they can be limited (or, some would say, 'specified') by political authorities for the sake of important legitimate aims. His defence of 'balancing' rights (ie, of allowing that constitutional or human rights be limited or specified by political authorities) is based on democratic values, and aims at establishing an institutional claim, regarding the legitimacy of political authorities in limiting rights and the (high) degree of deference with which courts should review those decisions of political authorities. But he does not provide nor defend a method for establishing when a limitation with a right is disproportionate or otherwise unreasonable or unjust—as the theories I criticise in this chapter do. See Stephen Gardbaum, 'A Democratic Defense of Constitutional Balancing' (2010) 4 Law & Ethics of Human Rights 1. I believe that, except for the language on rights 'limitations' and 'balancing', the substance of Gardbaum's position is compatible with the institutional claims made by critics of proportionality such as Grégoire Webber. See *Negotiable Constitution* chs 4 and 5.

will argue that it is not morally pertinent to attempt to do so.[10] The two problems—whether it is possible to balance and whether it is pertinent to do so—are obviously related. The point of incommensurability theories is not that there is nothing commensurable between two different potential objects for choice. The point is rather that some considerations are incommensurable, and if these considerations are the relevant considerations in a particular choice situation, then the choice may be between incommensurable options, if the different options rank differently according to the incommensurable considerations. The considerations that are relevant for a given choice are not necessarily the considerations that can be commensurated. Whether they can or cannot be commensurated is not a criterion of relevance. Therefore, it is possible that the considerations that are relevant are incommensurable. As said in the previous chapter, this is the case with conflicts involving human rights. Here, the question is whether the considerations that maximisation accounts of proportionality try to capture (whether they can be commensurated or not, or compared on some level) are the properly decisive considerations for deciding human rights cases.

As in my example above, if I have to choose to get a book on proportionality, and can only choose a limited amount (say, one), I will normally be confronted by a number of alternatives that are incommensurable, since they realise to different degrees properties that are relevant for my choosing (some books are more original, some are more rigorous, some more exactly pertinent to my topic, etc). But I can adopt as a criterion for choosing books

[10] Kai Möller has previously manifested doubts about the pertinence of balancing in *Challenging Critics* 719: ' [i]t is not clear that even in cases where there is indeed a common scale balancing the conflicting goods on that scale is appropriate. … I believe that there are many cases where balancing on a common scale, while possible, would be inappropriate: but I cannot prove this point here'.

on proportionality 'always choose the biggest book you can afford.' That criterion makes commensurable the alternatives that would otherwise be incommensurable, and thus I can produce one ranking of the alternatives, categorising each alternative in terms of bigger, smaller, or of equal size than each other. So this criterion solves the problem of incommensurability, provides rational determination for choice, and as a consequence, provides predictability in the decision-making process, objectivity (it does not depend on me but on an impersonal standard), transparency (the decision making procedure can be rationally reconstructed by an observer), and neutrality (because the procedure is fact-based the personal values of the person applying it do not come into play).[11] The problem is that it is a silly criterion to apply. There is no reason for me to make that choice based on that criterion. I have better reasons to decide on the irreducible properties that specify desirable aspects of a book on proportionality.

This highlights an important premise for our argument: it is not enough to show that alternatives are commensurable in some aspect to make this aspect decisive in choosing between competing alternatives. Even conceding *arguendo* that a particular aspect of competing projects of action can be commensurated, a reason would still be needed for establishing why that particular aspect should be the morally decisive one when making a choice between different projects of action.[12]

[11] These features correspond loosely to the kinds of advantages that defenders of proportionality have seen in proportionality analysis. David Beatty expresses these different advantages, and argues for proportionality based on them (as opposed to Alexy, who argues for proportionality based on the nature of constitutional rights as principles) in *The Ultimate Rule of Law* (OUP 2004) ch 5.

[12] Note that Finnis' account, which both Veel and Da Silva take as representative and argue against in their articles, can account for the link between incommensurability and relevance for choice, since the first is explained by the second. Basic human goods are basic reasons for action, since

This applies to adjudication as well. Imagine that my eating a diet rich in vitamins is in conflict with your plan to travel to Patagonia (perhaps because you have a contractual obligation of providing the healthy vegetables that I need, and I cannot get them otherwise, but you cannot travel if you have to provide me with my vegetables). Perhaps we can find something commensurable in the two options: say, which choice will have the greater cost in terms of money over the next two years? But why would that question be the relevant one for deciding the issue?

Now, conflicts like the one in the previous example can just be a conflict of interests between different persons. But sometimes we take one of these conflicts to an impartial third party to adjudicate (a judge perhaps, perhaps a common friend, or a community leader), to decide whose position is to prevail in the conflict. This is a mark of the parties thinking that there is an additional feature to this conflict: they think that it involves that someone deserves that his preference prevails over the other's. If they think that the law provides for the preference to prevail, they will take the issue to a court of law. The relevant question is: why should the preference of one person prevail over that of another? Why it is due to one person to get what she is disputing with someone else, and why it is due for this other person to yield in his interests accordingly?

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they are constitutive of a good life. Those goods are the basic reasons to act for, since no chain of means and ends I may act to achieve can ultimately be justified without being related positively to one or more of these goods, whose instantiation or protection must appear as the final end of the chain. On Finnis' account basic human goods are incommensurable precisely (though not necessarily exclusively) because they are basic reasons for action: '[E]ach of the basic aspects of human well-being is equally basic … none is objectively more important than any of the others, and thus … none can provide a common denominator or single yardstick for assessing the utility of all projects: they are incommensurable'. Finnis, *NLNR* 112.

Even if ingenious attempts to commensurate the different interests of different people —in relation to different or the same objects that might be at stake in adjudication— were to succeed, this comparison would still not prove morally relevant. Suppose we can commensurate my subjective interest (the strength of my desire, for example) in eating vitamins with your subjective interest in a trip to Patagonia.[13] Even if we could compare the stringency of those interests and arrive at an intelligible account of preference satisfaction or optimisation in the concrete case, it is not clear why this would be relevant for moral or legal discourse.

[13] In a way akin to that proposed by Chris Kelly ('The Impossibility of Incommensurable Values' (2008) 137 3 Philosophical Studies 369) for comparing values by reference to the strength of the desire merited by the value. The similarity with Kelly's account is that Kelly claims that strength of desires can be comparable. An important difference is that in the formulation above I compare actual subjective interests or desires, and not 'the desire that a value *merits*'. It seems to me that by introducing the idea of merit, or some other normative component (such as how much a value 'should' motivate us, or talk about 'ideal desires'—other terms in Kelly's paper), Kelly is simply rendering analysis of the strength of desires irrelevant, since what would do the work of establishing whether a particular instantiation of a value should be chosen over some other is how desire-worthy the particular values are, which is what determines, according to his argument, the strength of the desire we should attach to it. Kelly wants to claim that a) the precedence one value should have in relation to some other in a particular decision, b) the strength of the desires associated with the values at stake, and c) the actual worth of the values, are related in the following way: b) follows from c), and b) allows us to perform the commensuration of values that is required for establishing a). But the introduction of desires in the normative way pointed above changes the relation, and would allow us only to claim that both a) and b) are consequences of c). And this puts the discussion back on c), ie, whether there are basic values that do not have more nor equal worth than others (and thus, for Kelly, do not deserve to be desired more strongly…), but that are simply incommensurable in relation to these other values; or, whether on the contrary, all values are commensurable. Furthermore, c) is not the only source that provides reasons for b). We might have reasons that do not relate exclusively to the worth of the value in question for desiring something more or less. For example, these reasons could be grounded in the desirability of forming character and of the dispositions of will that will help us live a good moral life. This would challenge the direct relation that Kelly postulates between values and how strongly we *should* desire them: ideal strength of desire would not necessarily be a good indicator of the worthiness of the value associated to it.

This is why the attempts made by defenders of the maximisation account of proportionality to defend the possibility of balancing are incomplete in an important respect. Showing that there is something comparable, or that there is a formula that allows for deciding between incommensurables, is not enough. They need to prove both that something can be balanced in the way they claim, *and* that balancing is the relevant criterion to solve the particular case. Why would the morally decisive consideration be, as Alexy's substantial Law of Balancing prescribes, the degree of satisfaction or non-satisfaction with the principles at stake, so that we should consider 'disproportionate' a measure that greatly interferes with a principle, but satisfies to a moderate degree a different one (that, probably, benefits a different group of people)? Why would the morally decisive consideration be, as in Beatty's theory, to establish for which party the decision is of greater significance—which party has a greater interest or stronger preference in the decision?

Alexy has provided a *doctrinal* explanation why we should apply the proportionality test to cases involving constitutional rights, ie, a reason based on implications of positive law or settled aspects of legal practice which are taken as given. This doctrinal explanation is based on the idea, crucial in Alexy's theory of rights (see above II.1.1), that constitutional rights and the public interest are principles, and principles are requirements to realise something 'to the greatest possible extent'. From this it follows that when two principles collide, there is a need to solve the conflict through proportionality, which is designed precisely to try to optimise both principles. Kai Möller challenges Alexy's idea that the principle component in constitutional rights logically implies proportionality and

balancing. For Möller, the idea that principles are to be realised 'to the greatest possible extent' must mean 'to the correct' extent.[14] Möller adds:

> If this is true, then it follows that, rather than balancing the two competing principles, we must make a moral argument as to which one takes priority: the outcome of our moral argument then dictates what is possible. … The necessity of a moral argument is a blow to Alexy's approach, which focuses on balancing straightaway. His theory would hold true only if making the moral argument always implied balancing the two competing principles. However, There are many ways to reason morally about conflicting considerations that are not based on balancing.[15]

I believe that Möller is right that Alexy's doctrinal explanation for applying proportionality does not follow. But, in any case, my argument here is not that there is no doctrinal reason for applying proportionality. What I am looking for is a different kind of reason: a normative or moral reason for applying proportionality in certain cases. By this I mean a reason that shows that the test is not arbitrary—that it captures what is of moral relevance in those cases to which the test is to be applied. If what the test captures—some form of maximisation—is all that morally matters, or the decisive moral consideration in those case, that would be a good reason for applying that test to those cases.

There are two obstacles for this enterprise of proving that what is morally relevant in human rights cases is maximisation of interests or preferences, as in Beatty's theory, or satisfaction of wide ranging principles, as in Alexy's theory.[16] Firstly, if what is to be

[14] Kai Möller, 'Balancing and the Structure of Constitutional Rights' (2007) 5 Int'l J Const L 453, 452.

[15] Ibid 453.

[16] Because, as shown above (II.1.3) Barak does not provide a precise account of what social importance is and of how it is determined, this objection cannot be directed at him precisely,

maximised are the interests or preferences of the parties, some of the interests or preferences could be unworthy of satisfaction. What reason would support the need to further the interests a racist has in promoting people from his race as morally superior? Vicky Jackson has shown how Beatty's account of proportionality cannot deal with this issue—unless one introduces an account of what interests are legitimate.[17] Similarly, wide broad principles such as those associated with constitutional rights in Alexy's theory can include many different interests, actions, and situations, some of which could also be unworthy of satisfaction.[18] Below (IV.2.), and in the next chapter (V.1), I address this point in more detail in connection with the relation between rights and values, and with Stavros Tsakyrakis' argument against proportionality.

Secondly, and more important for the purposes of the law, legal cases are typically not about maximisation (and morality does not command something different—not even

because there is nothing clear to direct it to. In the previous chapter I showed why Barak's method of balancing by reference to 'marginal social importance' runs against the incommensurability objection. Nevertheless, if he were to correct that aspect and accept that 'social importance' is nothing more than an empty concept that includes whatever is morally relevant in the case (and at time he seems to suggest this: see *Proportionality* 489-50), the objections I make in this chapter could not be directed against Barak's theory, because the objection I make here is that there is no reason for adopting a particular method for deciding human rights cases, and Barak's proposal would not amount to a method. Nevertheless, it would be open to the objections I make in part II of this thesis.

[17] Vicky C Jackson, 'Being Proportional About Proportionality' (2004) 21 Const Commentary 803, 828,

[18] See *Theory* 397, referring to 'the fact that the field of constitutional principles is practically unlimited'.

for sophisticated utilitarian accounts of legal adjudication[19]). Why should we expect that cases involving human rights are different?[20]

We should not. We can construct an analogous hypothetical to illustrate the point. Take a paradigmatic human right, like the right not to be subjected to torture. Suppose we are in a situation were we can torture a terrorist so that he provides information necessary for rescuing two journalists held hostages by a terrorist organization. If we fail to rescue them soon, the journalists will be tortured by the terrorist organization. So, in a case like this, there is something we can commensurate: one 'torture' against two 'tortures'. But the relevant criterion for deciding the case is not how to maximise lack of torture in the world, but whether we are entitled to use torture. Human rights documents provide for an absolute prohibition of torture precisely because the morally relevant criterion that applies to this case is that we are not entitled to treat a fellow human being in certain ways, and torture is one of those ways.[21] The aspect of the case that can be commensurated—outcomes considered as events and experiences, not precisely as deeds as such—is not morally relevant for deciding the question. Simply finding some aspect that is commensurable does not show that the decision has to be based on that commensuration. Even if there is a

[19] See John Rawls, 'Two Concepts of Rules' (1955) 64 The Philosophical Review 3, 6 – 13.

[20] Da Silva realises the greater complexity of cases involving not only one person deciding between incompatible goods for herself, but adjudicating between different persons. But he only analyses whether this different situation affects the possibility of comparing the different values at stake, leaving unaddressed the question of whether this more complex situation may be ruled by a criterion that renders irrelevant such comparison. Virgilio Alfonso Da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision' (2011) 31 2 OJLS 273, 284-5.

[21] See Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (OUP 2010) 232-4.

commensurable aspect, it need not be morally decisive in that case—or even morally relevant.

There is no reason to think that maximisation is the aim of the practice of legal adjudication, or that of human rights adjudication. Particularly if this aim is the one succinctly captured in the traditional formulation of doing 'justice according to law'. Justice is not about aggregating or maximising preferences or interests effectively or efficiently, but about distribution, ie, about who is entitled to what.[22] Legal adjudication is about establishing what in justice belongs to each party according to the law.[23]

This would still be the case even if one where to argue that human rights cases are not about maximising interests but *values*. Below I challenge the link between values and rights presupposed by this position. Here I wish to note that cases that involve rights are not only about realising a particular good outcome or a value. Sometimes what conflicts are two legitimate interests such that, independently of the conflict, the satisfaction of each of them would be good for the party whose interest it is, and valuable for society generally.

[22] See Jeremy Waldron, 'The Primacy of Justice' (2003) 9 Legal Theory 269, 276-8.

[23] Note that it is not controversial that after there is a moral assessment of what justice requires for that case, we can find commensurable or comparable alternatives when trying to establish which of those alternatives can fulfil better the standard set by criteria of justice. This can happen, for example, when the debtor is insolvent. In bankruptcy cases the judge or some other impartial third party, like a liquidator, might be given some form of administration over the goods of the debtor in order to pay the different creditors. It could be the case that under some alternatives the liquidator will raise more money and thus will be able to fulfil to a greater degree the obligations of the debtor. In this case some alternatives are comparable, and, indeed, even commensurable. But this is comparability by reference to a standard that is set with independence from any maximising exercise, since what is owed to the creditors is not grounded on any maximising enquiry, but on other considerations, such as fulfilment of contractual or familial obligations and pro rata equality between the creditors.

Rights, it must not be forgotten, are about justice, and justice supposes the question of 'what is due to each person'—and thus, in the context of adjudication,[24] supposes allocation of goods between different persons.[25] The question is not about maximising benefits for one person (even if this were possible), but to give what is due to each. This is crucial. Private law rights help illustrate this point: if I promised to pay Jane an amount X for a service that she did for me on the conditions agreed upon, then I have to pay her X if the conditions are satisfied. It is unjust for me not to pay her X. If I fail to pay, it would not be reasonable to ask whether there will be more marginal social benefit to my keeping my money or my paying my debt, or to ask which contending party has a stronger interest over the amount owed. The reason why Jane has a right that I pay her is that it is just that I pay her as promised for the service she performed and unjust that I do not (assuming that I am solvent). In case of non-payment, if the court were to choose on the basis of considerations of maximisation of values, it would be shifting its focus away from the requirements of justice in the case. The law typically acknowledges this and commands payment, and does not allow for a defence based on stringency of interests or inquiries into what would be more valuable for which party.

The point is not that human rights have necessarily the same structure as rights in private law (which are in themselves quite complex), but that conflicts involving justice are

[24] See *NLNR* 179: '[T]he act of adjudication itself is always a matter for distributive justice. For the submission of an issue to the judge itself creates a kind of *common* subject-matter … which must be allocated between the parties'. (Emphasis in the original).

[25] The idea was highlighted by an oft-quoted brief remark by John Rawls with relation to utilitarianism: 'Utilitarianism does not take seriously the distinction between persons'. John Rawls, *A Theory of Justice* (Rev edn, Harvard University Press, 1999) 24.

not simply about how we can attain certain goods or values, but about who should have precedence in a particular conflict, or which goods are to be given to whom, or who deserves to be deprived or given a particular good, etc. The question is rarely in law how to maximise some value or set of values, but what does each party deserve according to the law.

If this is so, we can conclude not only that a reason needs to be provided for applying proportionality to human rights adjudication. If this depends on whether proportionality gives expression to what is morally relevant in the cases to which it is applied, proportionality cannot be the appropriate method for deciding human rights cases: in those cases considerations of justice are the determinant ones, and not those relating to maximisation of interests, values, or principles. In the next chapter I further expand on how proportionality filters-out considerations of rights—the kind of considerations of justice more closely related to human rights cases. But now I want to return to the weaker claim: that there is no reason to apply the proportionality test to human rights cases. In the following section I shall assess a potential reason for considering that human rights cases are about maximisation after all, and that therefore a method aimed at maximisation, such as proportionality, is appropriate for deciding those cases.

IV.3. Legal rights are not values

IV.3.1 Values in general

I am interested here in one particular property that moral values are taken to have in debates on proportionality. Values are seen as unqualified goods, such that it is always better if there is more presence or realisation of that good. Values thus, according to this conception 'are, like utilities, goods which are sought to be maximised according to some choice rule.'[26] If, as for Alexy, human rights are principles, and principles are the counterpart on the normative level of values in the axiological level,[27] then the link between rights and values could be a reason for maximising rights. At least from the moral perspective, balancing would be addressing the relevant moral considerations: the values involved and the requirement to optimise them (though if the values are incommensurable, this would still rule out any kind of quantitative method for deciding among them by reference to which alternative realises more or less 'overall value': see III.1.7). Here I do not intend to take issue with this characterisation of values. My claim in this section is that even if (at least some) values are indeed to be understood as characterised above, human rights are not values.

We first need to distinguish between values and that (types of conducts, institutions) which typically realises or protects those values. Even if it were true that it is always better to realise the value more, and thus that there are reasons to maximise participation in the value, from that it would not follow that we have reasons to maximise that which typically realises the value. Friendship, for example, is a value. Calling someone to inquire about his health when he is ill is an action that typically instantiates and fosters friendship. But

[26] Paul-Erick N Veel, 'Incommensurability, Proportionality, and Rational Legal Decision-Making' (2010) 4 Law & Ethics of Human Rights 177, 198.

[27] *Theory* 92-3.

maximising the instances of calling someone who is ill to inquire about their health would be absurd, and potentially detrimental to friendship itself. Moderation, opportunity, and the manner in which one performs particular actions are central considerations to bear in mind when deliberating over a concrete course of action aimed at realising a value. Finding the virtuous mean is not about maximising—and it is harder.

Furthermore, it would be a logical mistake to assume that, if a particular value can be realised through a particular conduct of the type X, any time that someone does X the particular value is realised or engaged in some way. Not every time someone calls another person to inquire about his health the value of friendship is engaged.[28]

All this applies especially to the relation between values and legal institutions, particularly since the law works with types of conducts. As Hart put it: '[T]he law must predominantly, but by no means exclusively, refer to classes of person, and to classes of acts, things, and circumstances.'[29] A type of conduct may be promoted or protected by the law, and this might be justified by some instantiations of that conduct realising a value.[30]

[28] One could of course specify an action so precisely as to make its description always refer to conducts that realise the particular value. That would depart from common parlance. And it might be an impossible task—but for the trivial way of doing it by incorporating the notion of the realisation of the value into the act description itself ('calling a friend realising the value of friendship'). There is no guarantee that our limited language can provide the resources that we would need in every case, and our relative ignorance of facts, particularly, of the way certain conducts (or institutions, etc.) can engage certain values now and in the future, casts further doubts on whether this enterprise is possible. In any case, my argument is not affected by the possibility of further specifying the act. It is enough that the argument holds when the description of an act does not perfectly match with the realisation of the value—as is largely the case in law.

[29] HLA Hart, *The Concept of Law* (2nd edn OUP 1994) 124.

[30] The same could be said, *mutatis mutandis*, of conducts that harm values.

But depending on how vaguely the law refers to the conduct protected, it can include in its scope acts that do not realise that value. To be sure, vagueness is not always a deficiency: precisely the need for tailoring the description of the action or situation to the value in the particular case might counsel some vagueness so as to accommodate new facts that the lawmaker might not be able to foresee, or some other valuable aims that might be involved in the situation[31]. Relatively vague and general language might also be necessary for the law to guide effectively (since too detailed a regulation might be difficult, if not impossible, to apprehend and apply by those subject to it).[32] Law making is difficult among other reasons because one needs to closely limit legal propositions so as to make them precise enough to guide action effectively in a way that realises the values one is trying to protect through that norm, without encroaching on the realisation of other or the same values; while at the same time leave some room for adjustment when necessary and avoid unnecessary complexity. Thus, it is not surprising to find a law that is aimed at, say, protecting certain actions which under certain circumstances express or promote certain values, but because of the way that law is crafted, its semantic reach goes beyond those actions that actually realise that particular value, encompassing other actions which can fall under the same legal act description, but that do not realise that value or any value at all. The greater the semantic reach of the law, the greater the possibility that actions or situations which fall under it do not realise the same value, and that some do not realise a value at all.

[31] See ibid 128 ff.

[32] See Timothy Endicott, *Vagueness in Law* (OUP, Oxford 2000) 190.

The distinction between a value and that which typically realises it applies to human rights as well. When two actions fall under the semantic reach of a particular human rights norm, it is not necessarily the case that both realise the same value, or realise a value at all. When human rights are formulated in very broad terms, it is unlikely that the semantic reach of the human right will match the realisation of a single value by the type of action or situation comprehended in the semantic reach of the human right thus formulated.

Freedom of expression provides an illustrative example. If the right is formulated in general terms, so as to refer simply to 'expression', then it will reach semantically all sorts of different forms of expression. It will include political criticism, and it will include, say, sports commentary and child pornography as well. These three forms of expression might fall within the semantic reach of the right to freedom of expression. But they do not realise the same value, and one of the examples does not realise a value at all[33] [34]. For example,

[33] It could be objected that the value is something like 'self-expression'. But why would this be a value, with independence of the content of what is expressed? What one expresses, as with what one believes, can be good or bad for oneself and others, depending fundamentally on the content of the expression or belief. When the racist expresses the racism deeply enshrined in his heart, isn't he both expressing a message that is detrimental for society, and affirming for himself a belief that degrades him as a person? If so, then posing a putative value of self-expression is not a viable alternative to assessing (among other things) the content of an expression for the purposes of establishing its moral value. What if the value pursued is pleasure, or simply satisfying one's interests? As Alexy concedes, not any interest (and pleasure) one pursues is valuable (See *Theory* 87 fn 162). I engaged above with the question of 'maximisation of interests', in evaluating whether it is the morally relevant consideration in human rights cases. Bellow (V.1) I further analyse it in relation to Tsakyrakis' argument for the exclusion of spurious interests. Note that all this relates to the question of what is the particular link between a right and some values. It is a different question whether and under what conditions is the state allowed to affect an individual's autonomy.

[34] Some hold that one of the points of having human rights is to establish certain spheres of freedom that do not depend on the authorities' evaluation of whether the acts performed in exercise of those freedom are morally valuable or not (See below Kumm's account of the 'antiperfectionist' aspect of rights in the liberal tradition, at VI.2). If this is the case, then we have already abandoned the conception of rights as values, the conception whose deficiencies I am trying to show here, and have replaced the value-maximisation enquiry with some other kind of Kantian inspired enquiry

political criticism realises the values associated with democracy and good government. Sports commentary and child pornography do not realise those values. There is no reason to assume as a matter of logical or practical necessity that it is one and the same value that is always at stake in all the actions protected (or forbidden) by a particular human right.[35]

Thus, it would be unsound to maximise every instance of a right as if one were maximising a single value. If the reason for maximising human rights is that values ought to be maximised, then a more discriminating approach would be needed—one that could distinguish the value at stake in different human rights instantiations, and, crucially, those situations where there is no value at stake on the side of the right. This is crucial, because one problem associated with proportionality is its inability to filter-out illegitimate interests (V.1). This is not surprising, given the wide acceptance of the simplistic rhetoric of rights as values and interests. It is obvious why maximisation of interests can include illegitimate or spurious interest—since there are such things as illegitimate and spurious interests. It is less obvious why maximising rights as values would fail to filter-out illegitimate considerations. The problem lies in the confusion between values and the rights that protect some types of conduct that can realise values. Some conduct falling under a legally defined

aimed at establishing the spheres of freedom that one can have that is compatibly with the same sphere of freedom for everyone else. For some of the problems with a position committed to only limiting liberty for the sake of liberty, see HLA Hart, 'Rawls on Liberty and Its Priority' (1973) 40 University of Chicago LR 534.

[35] An additional example can be found in Rawls' discussion of the right to private property. Only certain forms of private property (personal property) are connected to [the values of] self-respect and a sense of personal independence. For Rawls private property over the means of production, for example, is not necessary for the realisation of those values (and through them, to what Rawls calls 'the moral powers'), and thus that particular conception of property will not be chosen as a basic liberty in the original position—whether it should be adopted by society is a question to be decided at the constitutional or legislative stage. John Rawls, *Political Liberalism* (Columbia University Press 2005) 289.

type of conduct can realise the value commonly realised by some instantiations of that type of conduct, while other conduct of the same or another type cannot. As Stavros Tsakyrakis has argued, this leaves plenty of room for spurious and illegitimate considerations to creep into reasoning about the right when attempting to maximise a particular right.[36]

Legal rights are not values. They are technical institutions of positive law, institutions the articulation and enforcement of which attempts to express and enforce a particular requirement of practical reason, reason which always has a value-orientation. The right is not exactly the value (or any of the values) at stake. The closest it can come to a value is in promoting or protecting instantiations of the value. Rights are ways to promote and protect, or prohibit, certain typical ways in which one instantiates or violates that value. Furthermore, what was said in the previous section applies here as well: sometimes rights can distribute something among different parties, something that would be valuable for both parties and society as well, because it is right for one party to have that particular good or opportunity.

IV.3.2. Political values

There are further difficulties in identifying rights with specifically political values, such as liberty and equality. Even if rights could be identified with these values in the relevant way, the problem would be that these values are clearly not the kind of goods that one would like to maximise indefinitely, as, for example, friendship. Take the example of

[36] Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 Int'l J Const L 468, 482-3.

equality. We can imagine different states of affairs in a community, in some of which people are more equal than in others. The most equal one is one were everybody dresses the same, has the same kind of job, the same number of friends, the same hobbies, and so on. If values are to be maximised precisely because they are unqualified goods, so that 'the more of them the better', then equality is not such a value, and thus is not to be maximised. Before maximising equality, we need to have a more precise and concrete understanding of the value as oriented to a specific state of affairs. For example: equal treatment under the law; or equality of opportunities; or some material form of equality, as for example equal access to education and health care. Shaping the value of equality into a more precise conception is a necessary and important part of any action that purports to realise that value.[37] Simple maximisation will not do.

Something similar happens with liberty. We can imagine a state of affairs in which there is complete lack of state coercion. People have the liberty to kill or harm other people, as well as the liberty to say whatever they want and hold whatever religious belief seems right to them. But again, it is not clear that one should move towards this state of affairs. Here there is a complexity that is not present in the previous example, in that one could argue that such a state of affairs is not more 'free' than one were one is protected from attacks from other people. The promotion of liberty requires the absence not only of state coercion, but also of coercion exerted by private individuals. Since the latter cannot be

[37] Note that in contemporary democracies the question 'what is the more precise conception of equality that should be furthered?' is the object of partisan political discussion. The same applies to the specification of liberty. An objection courts would face when applying political values is whether there is a reason for them to do so, when political institutions seem more apt to deal with these political debates that divide different sections of the population.

contained without some state coercion, one needs to find some sort of balance. If this is true, then one is freer in some situations were there is some state coercion than in other situations were there is none.

But this argument is troublesome, since there is no way to show that one has actually 'more' liberty when one is not constrained by the state than when one is. Talk about 'more' liberty suggests that there is some sort of quantitative calculus going on; it sounds as if for one particular state of affairs we could add the liberties of all the different individuals, and then discount the encroachment on their freedom by private coercion, and then compare this net result with some other alternative state of affairs—so that after all this, we could say in which state of affairs there is more liberty. This obviously cannot be done. If liberty means, for example, the ability to choose unconstrained, then we cannot calculate whether one has more of this ability or less in a situation in which there is no state coercion. To pass a moral judgement on whether this is a state of affairs we have reasons to pursue, we need a qualitative assessment on the kinds of options that we think are valuable and just, and those that are not. But if this is so, then, again, liberty is not something to be simply maximised. If liberty is understood as referring only to absence of state coercion, it is simply wrong, because there is a threshold starting from which we would not want more liberty thus defined. If liberty includes not only absence of state coercion, then the idea of maximising liberty, at least past a certain threshold, is senseless, because it requires a quantitative assessment that reason cannot perform.

In both cases of political values there is need for moral reflection on matters such as in what aspects we want to be equal, and up to what point, and for what particular decisions

we want to be free, what options should we have, and what options we think no one should have. The maximisation account of proportionality is premised on maximising a certain property, but debates about political values are not aptly portrayed as concerned with maximising those values, because the relevant question is about specifying those values. Once they are properly specified, the values can be maximised (though political values and even instantiations of the same value are often incommensurable, and, if so, one can try to maximise their realisation, but, in cases of conflict, it is not possible to decide among them by some form of quantitative method aimed at commensurating them. The incommensurability objection still applies here: see III.1.7).

Nevertheless, even once political values are properly specified, one cannot assume that they will correspond to human rights, so as to ground the claim that conflicts regarding human rights are about maximisation. This is for the reason already mentioned in relation to values in general: a value is different from that which typically promotes the value. Once political values are specified (so that it is clear what kind of equality or liberty we should aspire too, for example), we need to create legal rights and duties (among other institutions) that promote and protect those values by attaching certain legal consequence to forms of behaviour which typically promote (or harm) those values. The right is not the value and thus, even if the value should be maximised, this is not a reason for maximising everything that falls under the domain of the right. And, again, distributive considerations might be relevant so that the morally relevant question is not so much how to realise more value, but who deserves something valuable in this case.

From the preceding remarks we can draw two conclusions. Firstly, the idea of values as something to be maximised does not provide a justification for turning human rights adjudication into a matter of maximisation. Even if values are to be maximised, that which realises the value is not necessarily (and not commonly) to be maximised. If rights are not values, then it is wrong to claim that rights are to be maximised because values are to be maximised.[38] The objection made in this chapter still holds: Even if the incommensurability problem could be overcome, there is still no reason to apply a maximisation method. And secondly, we should be aware that rights typically include in their semantic reach actions or situations that do not realise a value, or do not realise a value that deserves protection as a human right. Identifying the right with the value risks treating actions or situations that do not engage the relevant value, as if they did. A method of adjudicating human rights must be able to cope with these differences—to which maximisation is blind.

IV.4. Proportionality and the Nash solution

Paul-Erik N Veel has provided a different proposal for applying proportionality. He interprets the incommensurability objection as implying that, in a given case, either a common metric is found 'along which to measure both the public interest and the right being infringed' or 'an arbitrary decision between the two values [is to be made].' Against

[38] One cannot get around this objection by claiming that 'the promotion and protection of fundamental rights is always valuable'. The claim is true, but it says nothing relevant about the content of those rights. In particular, It says nothing about whether they call for some form of maximisation or not.

this view, he argues that 'rational choice is indeed possible in the presence of incommensurable values.' Veel argues that this rational choice can be made applying a choice rule based on the Nash bargaining solution, which 'provides a normatively justifiable mechanism for decision-making among incommensurable values.' [39]

The Nash bargaining solution attempts to show the outcome of a bargain between two players in which *both of them* have played the best response to the other player's strategy. What for any player constitutes a 'best response' is the strategy whose outcome will yield the greatest payoffs for that player—will satisfy that player's preferences to a greater extent than the outcomes that would follow from pursuing a different strategy. Since the Nash solution was designed to yield a unique outcome for a bargaining problem, and not a social choice rule for deciding between pre-established alternatives, his insights have been adapted to reflect the latter scenario.[40]

Even though Nash's solution was not originally conceived for rights, but for utility, Veel claims that it can be applied to values as well, and, thus, since on Veel's account rights and public goods are values, Nash's solution can be applied to conflicts involving purported limitations of human rights.[41] Veel claims that the application of the Nash solution would not require any commensuration between values. What the solution requires, however, is to be 'able to place each value instantiated by different options along

[39] Veel (n 26) 180.

[40] See ibid 198.

[41] Ibid 198-200.

a scale which represents the degree of realization of that value with cardinal significance.' Also, the units that represent the realisation of the different values 'must also have some *intrascale* significance.' Veel proposes as a rule for realising this cardinal ordering the 'zero-one rule', which

> entails creating a scale which identifies the percentage degree of realization of a value. It entails first identifying the complete realization of a particular value and defining this as one, and similarly identifying the complete non-realization of a value and defining this as zero. With these bounds set, the goal would be to place all relevant instantiations of this value along this zero-one scale.[42]

Veel explains that the axioms that specify when the Nash social choice rule applies are fulfilled by situations where a decision between conflicting values needs to be made,[43] and argues that at least in an important number of proportionality cases the axioms would be fulfilled and thus the Nash rule could be applied.[44]

But Veel's proposal has the flaws that have been addressed in this chapter. Like Alexy, Veel attempts to show how his method (the Nash choice rule) could be applied to cases of legal adjudication and, more broadly, of conflicts of values, so as to yield one single answer. But that it is possible to apply the method is not a reason for applying it. What needs to be shown is not only that the method can be rationally applied, but also that the method captures what is morally relevant in the situation, so that it allows one to make a reasonable decision based on all the relevant moral considerations. Veel does not argue this

[42] Ibid 201.

[43] Ibid 204-214.

[44] Ibid 224-7.

point. As with Alexy's and other proposals, Veel's proposal is blind to one type of consideration of crucial importance in legal adjudication: considerations regarding what is due to someone, ie, considerations of justice. This is a reason for not using Veel's method for addressing a human rights case.[45] Furthermore, his equation of rights and values is also problematic, as shown in the previous section. It cannot be assumed that rights are values, and that everything that falls within the boundaries of the right realises a value, or realises the same value. Veel's application of the Nash formula is premised on a flawed understanding of the relationship between rights and values.

There are also problems that are peculiar to Veel's proposal. One important problem, as Timothy Endicott points out, is that the rule depends on a cardinal measurement of the degree of realisation of the values at stake, but this cardinal measurement cannot be produced.[46] This is for a number of reasons. First, because the 'zero-one rule' that Veel proposes for creating this cardinal scale requires 'identifying the complete realization of a particular value.'[47] But this cannot be done with values. What would be the 'complete realisation' of, for example, the value of friendship or respect for

[45] Veel could perhaps accommodate this objection by pointing out that the base level of realisation of a value in relation to which gains in a value are measured does not need to be zero. This base level 'will be determined by the theoretical framework inside which the Nash social choice functional is applied.' Ibid 203. Thus, one could establish as the base level the just degree of realisation of the value for the party to which that realisation of the value is owed in that concrete case. This will result in that any distribution that realises that value for that party bellow that base level will be ruled-out by the formula. But if this is done, what is the use of the formula? The result to the case would have been achieved through an independent consideration, that later is introduced as an input to the formula, which would then merely reproduce that same outcome achieved through an assessment of considerations to which the formula does not contribute at all.

[46] See Timothy Endicott, 'Proportionality and Incommensurability' (2012) 40 Oxford Legal Research Paper 1, 6 fn 14.

[47] Veel (n 26) 201.

human dignity? Values are not concrete projects that could be realised to different degrees.[48] Though perhaps Veel could accommodate this in his formula by applying it not to intrinsic values, but to some concrete conditions for the common good (such as, for example, that no one is forced to convert to a religion, or that people are given a fair trail: this would require Veel to adopt an understanding of human rights as specified requirements of justice, instead of conceiving them as broad open-ended values, [49] as he does throughout his paper). But even in this case, no cardinal unit will be available, because there is no way to quantify differences in degrees of realisation of a value. Furthermore, a cardinal ordering requires that at least a single ordinal ordering be possible. But this is also not the case with respect to realisation of values, and this is because incommensurable considerations are at stake when ordering realisations of a value in terms of greater or lesser. Extension and intensity, for example, will be two irreducible criteria that will bear on defining whether a value is realised more or less. For example, a realisation of a value for more people and a deeper realisation of that same value for only one person cannot be put in a single order by reference to 'greater realisation of value' which captures all that is relevant for determining the degree of realisation of a value.[50] Veel only asserts that the cardinal ordering could be done according to the 'zero-one rule' but he does not show

[48] This contrast is drawn in *NLNR* 155.

[49] For this contrast, see *Negotiable Constitution,* chs 2 and 4.

[50] Berlin notes this in relation to the value of freedom, pointing to five factors on which 'the extent of my freedom seems to depend' and concluding that 'it may well be that there are many incommensurable kinds and degrees of freedom, and that they cannot be drawn up on any single scale of magnitude.' Isaiah Berlin, 'Two Concepts of Liberty' in *Liberty* (Henry Hardy ed, OUP 2002) 177 fn 1.

himself how such a cardinal ordering could be brought about through the application of that rule. There are strong reasons for thinking that this is not possible.

IV.5. Conclusion

Despite the attempts of some defenders of proportionality to establish the rationality of the version of the test they defend, these defenders have failed to prove a more basic point: that proportionality is pertinent for addressing human rights cases; that it is reasonable to apply the methods they propose to the solution of human rights cases, whether the method itself is one that reason can apply to arrive at one solution, or whether, rather, the method in the end collapses into subjective preferences. This depends in turn, on whether the method they propose captures what is morally relevant in the cases to which it would be applied. Since the method is premised on the postulate that some form of maximisation is what is relevant, the question is whether in human rights cases the morally decisive consideration, or the only relevant consideration, is maximisation in the form specified by any of the theories of proportionality. There is no reason to think that this is the case. Legal cases are typically not about maximising, but about what is due to each, this is, about justice. Furthermore, the relation between human rights and values is not such that would be necessary for establishing that the kind of quantitative assessment recommended by theories of proportionality is what is morally at stake in human rights cases.

V. Proportionality, Rights, and Legitimate Interests

In the previous chapter I argued that the theories of the maximisation account of proportionality are incomplete in that they fail to provide an argument showing that the method they propose is appropriate for deciding human rights cases—they fail to show that the method they propose captures what is morally relevant in the cases to which it is applied. I suggested that there is at least one type of consideration that is typically crucial for the law that the maximisation account does not capture: considerations regarding what is due to each party, ie, considerations of justice. I also challenged the idea that rights are values, and that therefore the relationship between rights and values could justify treating conflicts involving rights as conflicts about maximising value realisation.

In this chapter I intend to extend those insights into the realm of human rights, and show more concretely how the maximisation account of proportionality fails to consider two important moral considerations that bear on human rights cases: first, the special force of human rights (which is the specific way in which the maximisation account fails to account for considerations of justice at the level of human rights); and second, the distinction between those legitimate interests that are related to the public good, and those that are not, or are not even legitimate. I will also engage with defences of proportionality that attempt to show that proportionality can accommodate these considerations. This in turn will show the tension between the two different main accounts of proportionality, and thus provide a transition to the discussion of the idea of proportionality as 'unconstrained

moral reasoning' in the second part of this thesis. I will develop my argument mainly in dialogue with the so called 'I.CON debate'[1] between Stavros Tsakyrakis and Madhav Khosla, which has become a point of reference in debates on proportionality.

V.1. Tsakyrakis critique of proportionality

Stavros Tsakyrakis' illustrates the kinds of moral considerations that are relevant to human rights cases and argues that some forms of proportionality are oblivious to them. His main contention is that proportionality 'risks neglecting the complexity of moral evaluation', and, most importantly, 'among the moral concepts that [proportionality] is likely to distort are fundamental individual rights'.[2]

He shows this by analysing some cases of the European Court of Human Rights.[3] In *Otto-Preminger-Institut v Austria* the court had to decide whether the seizure and

[1] See Matthias Klatt and Moritz Meister, 'Proportionality—a Benefit to Human Rights? Remarks on the I•CON Controversy' (2012) 10 Int'l J Const L 687

[2] Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 Int'l J Const L 468, 475.

[3] In his reply to Tsakyrakis' paper, Madhav Khosla challenges Tsakyrakis' use of cases such as *Otto-Preminger v Austria* and *IA v Turkey* because in such cases the court typically applies the 'margin of appreciation doctrine', and, according to Khosla, 'it is this doctrine, rather than proportionality, that has created the outcome in both cases'. Madhav Khosla, 'Proportionality: An Assault on Human Rights?: A Reply' (2010) 8 Int'l J Const L 298, 303. It is true that the doctrine of margin of appreciation is doing much work in both of these cases. But that does not entail that proportionality is not at stake as well. In these cases we see in action the doctrine of what George Letsas has called the 'structural margin of appreciation', according to which the European Court defers to state authorities because it recognises that they are better placed to assess the relevant facts (See George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, Oxford 2007) ch 4.). But note that the court defers to state authorities because they know better the *facts* that are relevant for the case. These facts relate, for example, to what is considered offensive or against morals in a particular society. But what makes these facts relevant is precisely

consequent order of destruction by the Austrian authorities of the film 'Das Liebeskonzil' was compatible with article 10 of the European Convention on Human Rights—the right to freedom of expression. The film was publicised locally and was to be shown by a non-profit institute dedicated to cinematography. It was to be screened in private, paid, sessions, and restricted to those over seventeen according to the Austrian legislation.[4] The film 'depicted God, Christ, and the Virgin Mary in a demeaning way and also contained some erotic scenes and innuendos'[5]. It was considered offensive to Catholics—the great majority of Tyroleans—and, after a private screening of the film, the Innsbruck Regional court granted a seizure order against the film for disparaging religious doctrines. A subsequent order for the destruction of the film was made.[6]

A majority of six out of nine judges of the European Court chamber held that there was no violation of article 10, since they deemed the decision of the Austrian authorities

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proportionality analysis. In these cases the margin of appreciation doctrine is simply filling in the blanks presented by the proportionality formula, so to say. Thus, proportionality is at stake in these cases, despite the use of margin of appreciation. Furthermore, the cases analysed by Tsakyrakis are representative of a considerable line of cases using margin of appreciation doctrine in connection with proportionality analysis. See for example: 'By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the "necessity" of a "restriction" intended to protect from such material those whose deepest feelings and convictions would be seriously offended'. W*ingrove v United Kingdom* (App no 17419/90) (1997) 24 EHRR 1 [58]. The same statement is repeated in *Murphy v Ireland* (App no 44179/98) (2004) 38 EHRR 13 [67], and a similar one in *Müller and Others v Switzerland* (App no 10737/84) (1991) 13 EHRR 212 [35], *Handyside v United Kingdom* (1979-80) 1 EHRR 737 [48], and *Otto-Preminger Institute v Austria* (App no 13470/87) (1995) 19 EHRR [Hereinafter *Otto-Preminger*] [56].

[4] Tsakyrakis (n 2) 477.

[5] Ibid 477. *Otto-Preminger* [22].

[6] Otto-Preminger [9]-[19].

proportionate to achieve the legitimate aim of protecting the 'rights of others', in this case, religious liberty.[7] The minority took the view that, considering the measures taken by the applicant and the protection of the Austrian legislation to those under seventeen, 'on balance … the seizure and forfeiture of the film in question were not proportionate to the legitimate aim pursued.'[8] Both majority and minority decisions relied on proportionality analysis.

Tsakyrakis notes that the court was rather quick in asserting that there was a legitimate aim for the prohibition, and that this aim was the protection of a *right*. The majority, says Tsakyrakis, 'seems to have treated this as little more than a kind of formal inquiry, as mere taxonomic exercise'.[9] The minority treated this point more ambiguously. They asserted that there was no 'right to protection of religious feelings', but at the same time, accepted that the aim sought by the measure was legitimate since 'the democratic character of a society will be affected if violent and abusive attacks on the reputation of a religious group are allowed'.[10] Both majority and minority agreed that the measure had a legitimate aim, and for at least the majority, that aim was the protection of a right (presumably in the minority's position it was a right as well, since otherwise it would be unclear what consideration among those listed in article 10(2) was the measure taken to protect).

[7] Ibid [47-8], [56].

[8] Ibid (dissent) [11].

[9] Tsakyrakis (n 2) 479.

[10] *Otto-Preminger* (dissent) [6], quoted in Tsakyrakis (n 2) 479.

But whether there exists such a right on the side of those that benefited from the Austrian authorities' measure, and its content, is, for Tsakyrakis, a contestable matter. Why is this particular action included in the ambit of the right? Is any expression that happens to offend or disturb a believer by reason of her faith a violation of religious liberty? Surely not. This would seem too broad an interpretation of religious liberty. The court did not elaborate much on these questions, but it did provide more sophisticated criteria than what one would gather from Tsakyrakis' account. For the court, there cannot be a general right not to hear one's religious beliefs being criticised, but there has to be some protection from some methods of opposition to religious beliefs aimed at inhibiting people from expressing and holding those beliefs.[11]

Tsakyrakis is right, though, in that the court makes notably little effort to assess how the above categories apply to this case, or to justify them. For Tsakyrakis this is linked to a common feature of proportionality, which he calls 'the principle of definitional generosity'. According to this principle

> the interpreter assumes a broad definition of what can conceivably count as an instance of the exercise of a certain right …The interpreter's purpose, here, is merely to assess whether a given act or behaviour will be prima facie included within the ambit of a provision safeguarding, say, freedom of expression or freedom of religion.[12]

[11] Otto-Preminger [47].

[12] Ibid 481.

Furthermore, and this is crucial, not much seems to depend on whether the legitimate aim at stake is a right—and what kind of right, human or some other perhaps less important one—or some other public interest.

> Since the threshold is not demanding, the normative implications that such a specification of a right carries with it are correspondingly limited. The interpreter can be generous at the stage of specification, safe in the knowledge that all the crucial normative issues may be deferred to the balancing stage.[13]

This under-specification of rights is problematic, and it affects not only the scope of the right (eg: is this particular form of speech protected?), but, crucially, its strength (eg: can this act of speech be impaired? What reasons can justify the impairment, and what reasons cannot?). Tsakyrakis observes this in relation to the *IA v Turkey* case[14]. In that case the applicant ran a publishing house that in 1993 published a novel addressing a number of theological issues. He was convicted of blasphemy and sentenced to two years imprisonment and a fine, but the prison sentence was commuted for a fine, so that the applicant only had to pay a total fine equivalent to $16. With respect to proportionality in the narrow sense, the Court said it was 'mindful of the fact that the domestic courts did not decide to seize the book, and accordingly considers that the insignificant fine imposed was proportionate to the aims pursued.'[15]

[13] Ibid.

[14] *IA v Turkey* (App 42571/98) (2007) 45 EHRR 30 [Hereinafter *IA*].

[15] *IA* [47].

This form of reasoning risks 'losing sight of the battles of principle with which human rights law is so intimately intertwined'.[16] Tsakyrakis does not propose or defend a complete conception of what legal rights are, but he proposes to link them to the moral status of persons, and relies on the fact that we have an 'intuitive understanding of its implications in political argument: it removes some issues from the table, or it trumps competing considerations'.[17] The reasoning of the court displays little interest in assessing this pre-emptive force of the right.[18] On the contrary, 'the balancing approach … is committed to a view whereby everything, even those aspects of our life most closely associated with our status as free and equal, is, in principle, up for grabs.'[19] In this sense, the balancing approach cannot accommodate

> the position that there is an inviolable core content of the right [which] implies a substantive moral assessment about what is right and wrong. Once we have accepted that this core content cannot be compromised under any circumstance we have left behind the idea that the right at stake can be weighed against competing public interests.[20]

The problems of lack of specification apply not only to rights. What counts as a public interest, deserving to be put on the scale against the engaged right (say, here, of

[16] Tsakyrakis (n 2) 485.

[17] Ibid 489.

[18] This pre-emptive force can be understood in different ways. Waldron, for example, illustrates it with relation to three ideas taken from legal and political philosophy: the ideas of rights as trumps, as side-constraints, and as signalling some form of lexical priority. See Jeremy Waldron, 'Fake Incommensurability: A Response to Professor Schauer' (1993) 45 Hastings LJ 813, 816-7. See bellow V.2.1.

[19] Tsakyrakis (n 2) 489.

[20] Ibid 492.

freedom of speech and communication), is also treated by the court without much analysis (and we can use here 'public interest' as a working label that includes other similar concepts such as 'public order', 'morals', etc). Tsakyrakis notes that the court saw a public interest affected in a potential offense to the great majority of Tyrolese.[21] In fact the court did suggest that there was more than an individual right involved.[22] But, what counts as part of the public interest? [23] Would an absurd or evil preference (such as hate for a particular race) have the same importance as a legitimate one?[24] What preferences should count? There is need for moral reasoning to discriminate between different interests and preferences. But by adopting the principle of definitional generosity courts save themselves the effort of undertaking this task. And by doing so, illicit justifications can end up being

[21] Ibid.

[22] Otto-Preminger [56].

[23] For an analysis of different possible understandings of the public interest, and of its relation to rights, see Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 The Modern LR 671, 673-83.

[24] Tsakyrakis introduces this point with a hypothetical: 'suppose … that 87 percent of the Tyrolese hated the Eskimos. Suppose that when Eskimo plays are staged … the "overwhelming majority" of Tyrolese feel stirred by violent feelings of moral indignation and uncontrollable fear. Would we be willing to include protection of these feelings within the ambit of public interest?' The hypothetical serves to prove the narrower point Tsakyrakis is mentioning at that stage: that the 'interest of the majority' (understood as what the majority thinks is in its interest) is not the same as the 'public interest'. It does not serve as an analogy of the facts of Otto-Preminger, because in that case the measured challenged was affecting a positive action whose purpose was (arguably) to ridicule and shock people of certain beliefs. It is absurd to feel offended if an Eskimo passes by. It is not absurd to feel offended when someone tries to offend one, or at least ridicule one or what one holds sacred. Now, this position would require showing: a) that purpose is relevant in this kind of cases, and b) whether that purpose is present in the facts of the case, and (and this I believe is the crucial step) c) that that kind of offence is the kind of wrong we would want to protect people from through religious liberty—ie, that it is *the kind of wrong that human rights are concerned with*. We do not need to address these questions here. What matters for us is that this discussion reinforces Tsakyrakis' point: there is more moral reasoning to do before arriving at the conclusion that something is in the 'public interest' or protected by 'the rights of others'. See Tsakyrakis (n 2) 481-2.

'weighed' together with other preferences, interests, and, rights, instead of being weeded out.[25]

Seen from the moral perspective, Tsakyrakis' argument makes much sense. Human rights cases involve moral considerations that are more complex than what courts seem to capture. He does not intend to show in detail the particular considerations that should bear on each particular human rights case—nor do I—but instead to offer an overview of the kinds of considerations that we should expect to see involved in human rights cases. His point has more to do with highlighting the relevance of critical morality in human rights adjudication, particularly in discerning which interests should be considered, which of these interests are protected by rights and thus accorded pre-eminence, and which interests do not deserve to be considered or accorded pre-eminence, or, perhaps, even deserve reproach.

Critics of Tsakyrakis, such as Kai Möller and Madhav Khosla have pointed out that a bad application of proportionality does not count against proportionality itself.[26] It could be that a court applied the test wrongly. It could even be (as Tsakyrakis suggests) that some courts generally apply the test wrongly. None of this, according to the critics, would count against proportionality itself. Bellow I engage with this argument (VIII.2). It is true that a particular judicial decision that applied proportionality is not necessarily representative of the test. My argument has proceeded against a different target: I have engaged with the theories of those that defend the proportionality test and proposed accounts of what the test

[25] See ibid 488.

[26] See Möller, *Challenging Critics,* 710-1, 718, 722, and 728. For a similar argumentative strategy see Khosla (n 3) 302-306.

consists in and of the reasons why it should be adopted by courts. Tsakyrakis' insights are relevant for the purposes of my critique. The main points Tsakyrakis makes against some applications of the proportionality test by the courts can also be made against some general theories of the maximisation account of proportionality:[27] Not any interest can be protected as a legitimate interest, and not any legitimate interest can be considered a 'public interest', since an interest must be connected somehow to the common good in order to be part of the latter. Not all interests (not even all those legitimate or connected to the common good) deserve to be protected as human rights. Justice demands differentiation. It demands the protection of some interests in a special, stricter way. But not all interests that we have are linked to justice in this way. And those that are, have a certain pre-eminence over other considerations, as justice has a particular pre-eminence over other considerations related to interests.[28]

All this is a very basic, but an important part of our moral vocabulary, precisely because it allows for expressing some relevant moral distinctions. If there are certain particularly stringent requirements of justice that ground certain claims that everybody has in virtue of being human, then proportionality analysis fails by not considering the particular force these claims have. This is candidly acknowledged by Beatty, when he claims that proportionality 'makes the concept of rights almost irrelevant',[29] and that in the

[27] Though I have my reservations about Tsakyrakis' proposal for replacing the proportionality analysis with more moral reasoning in adjudication, as will become clear in the next part of the thesis.

[28] For a defence of the 'primacy of justice' thesis, see Jeremy Waldron, 'The Primacy of Justice' (2003) 9 Legal Theory 269.

[29] David Beatty, *The Ultimate Rule of Law* (OUP 2004) 160.

proportionality analysis rights 'have no special force as trumps … They are really just rhetorical flourish.'[30] Nevertheless, if there are such requirements of justice, then not acknowledging their importance is a deficiency of his theory. In the same way, if what a theory of proportionality claims should be maximised includes legitimate interests and preferences and illegitimate ones, and interests that should be protected as rights and others that do not deserve this protection, then this theory is at fault for not differentiating between claims that differ from one another in morally significant ways and deserve different treatment. This is the case with all three main theories of proportionality. In Beatty's case it is most evident, since the criterion for deciding (significance for the different parties) does not discriminate between legitimate or illegitimate interests, and between mere interests and rights. Similarly in Aharon Barak's case, the concept of social importance includes all these different considerations.[31] Also in Alexy's account of proportionality the special force of rights is lost—principles are 'weighed' against each other—and, because of the breadth principles have, different types of interests are included in them, some legitimate and some not, but nothing in Alexy's method is designed to discriminate between them. His 'laws of balancing' merely propose ways of relating conflicting principles by reference to the degree they have been affected, abstract weight, and degree of reliability of the premises concerning their interference (see II.1.1). As seen above, the conflation between rights and values invites this kind of undiscriminating approach (IV.3.1). Important moral

[30] Ibid 171.

[31] Though perhaps, because of the vagueness of the idea of social importance, it could accommodate moral reasoning that discriminated between the different considerations and acknowledge the different moral implications of the different considerations. Since Barak's theory does not establish how this is to be done, it would have the problems of 'proportionality as unconstrained moral reasoning', which I address in the second part of this thesis.

considerations at stake in human rights cases are not aptly captured by the methods proposed by the maximisation accounts of proportionality.[32]

V.2. Do rights depend on balancing?

V.2.1. Balancing and the special force of rights

Defenders of proportionality could argue that the pre-eminence of rights is itself a function of an underlying balancing. This would follow from the idea, held by many defenders of balancing, that the limits of rights are the product of an implied balancing.[33] Thus, for example, Klatt and Meister argue that 'narrow definitions [of rights] rely on balancing'[34]. They illustrate this with the example of hate speech:

> Assuming that the right to freedom of speech is absolute and, by definition does not protect hate speech, then this definition is the outcome of a balancing test that takes both interests into account, namely, the right of the freedom of speech, *and* the

[32] To be sure, rights and what constitutes the public good are not the only normative elements that can be morally relevant in cases involving human rights. The preceding discussion simply shows some distinctions that are typically morally relevant in human rights cases. Different cases will involve different sets of relevant moral considerations that cannot be reduced to maximising interests or values. Timothy Endicott, for example, has argued that the idea of responsibility is crucial in assessing immigration cases. Timothy Endicott, 'Proportionality and Incommensurability' (2012) 40 Oxford Legal Research Paper 1, 22.

[33] See for example Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012) 21; *Theory* 209-10 and 74-6; Jud Mathews and Alec Stone Sweet, 'All Things in Proportion-American Rights Review and the Problem of Balancing' (2010) 60 Emory LJ 797, 869 (though referring only to the American case-law).

[34] Klatt and Meister (n 33) 21.

> interests of the addressed person. It then overweighs the rights of the insulted person over the freedom of speech.[35]

Balancing is therefore considered 'unavoidable' and the question is only if it 'takes place in a hidden way' or openly.[36]

But from the mere fact that an ordering of interests or values has been established, it does not follow that balancing (as understood by any of the theories of the maximisation account of proportionality) has taken place. This ordering could be a product of a different form of reasoning. Broadly speaking, there are two ways of resolving a conflict between different claims.[37] First, it could be argued that the reasons that ground the normative force of a claim do not apply to the concrete circumstances of the conflict; therefore, there is no real conflict, since only one of the claims is valid. A second way of resolving the conflict is by acknowledging that there are two valid claims, and resolving which one is to prevail over the other in the concrete case. This can be done in a number of ways, being the kind of quantitative assessment recommended by theories of the maximisation account of proportionality only one among many possibilities. The fact that an ordering was achieved does not imply that some balancing must have taken place, unless the word 'balance' is deprived of its more precise content, as specified by the theories of the maximisation

[35] Ibid.

[36] See ibid.

[37] I take this distinction from Jeremy Waldron's analysis of the conflicting claims in hate speech in *The Harm in Hate Speech* (Harvard University Press 2012) 145-6.

account, and it is taken simply to mean 'assessing the reasons in favour and against a particular ordering of interests, values, claims, etc.'[38]

Furthermore, balancing in the form promoted by theories of the maximisation account cannot produce the characteristic force that rights are taken to have. It is characteristic of the theories of the maximisation account that a limitation with a right is considered justified by reference to enough gains in some other property (see II.2). This is the underlying logic in all theories of the maximisation account. The prevalence of one principle or the other may depend (as with Alexy's first Law of Balancing, and with Da Silva's proposal) on it being affected to a greater degree than the rival principle; or (as with Beatty's theory) on its realisation in that case being more significant for the party that benefits from it than the realisation of the rival principle would be for the other party. For these accounts the protection granted by a right is contingent on the fact that under a particular set of circumstances the relevant properties (the degree of satisfaction of the principles at stake, or the significance of their realisation for the parties party) are realised to a greater degree by respecting the right. But an increase in the degree to which the opposing principles or interests realise the relevant property could alter the limits of the right—this increase could mean that the right does not grant protection in those particular circumstances.

[38] Note that Klatt and Meister are equivocal in this respect. They claim that a definition of a right must rely on balancing 'since the definition is based on reasons for and reasons against the protection.' See (n 33) 21. But this is not the idea of balancing proposed by their theory, which follows Robert Alexy's account of balancing, and thus refers to something different from merely considering 'the reasons for and the reasons against' something.

But this is not what rights are about. The particular normative force that defines rights, and that links them with considerations of justice and dessert, is different from that of the unstable pre-eminence that a principle or interest has over another under the balancing model. Whether we explain rights as trumps, or as side-constraints, or in the form of lexical priority (to take the well-known accounts of Ronald Dworkin, Robert Nozick, and John Rawls, respectively),[39] the result is the same: rights are claims that need to be satisfied, regardless of certain types of opposing considerations. The right has pre-eminence over these considerations. It trumps them (under the rights as trumps model); or it signals that those considerations cannot be satisfied by measures that affect the right (and thus establish side-constraints to the satisfaction of certain goals); or it requires that the interest or value or claim protected by the right be satisfied first, and only then the other considerations can be addressed as well. For our purposes what is noteworthy in all these different ways of accounting for the structure of rights is that they all operate categorically. The question is whether a particular interest or claim belongs to the category of interests or claims that are protected by a right, and whether the opposing considerations belong to the category of considerations that the right trumps, or of those that can only be satisfied respecting the side-constraint that the right consist in, or of those that can only be satisfied once the right has been satisfied.[40]

[39] See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) xi; Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974), 29; and John Rawls, *A Theory of Justice* (rvd edn, Harvard University Press 1999) 214.

[40] As has been noted, most authors stop short of claiming that rights can never be overcome by the opposing considerations they are supposed to 'trump', constrain, or have priority over. Authors allow for the possibility of rights being overcome in cases of a 'moral catastrophe'. See Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (OUP 2010) 31. But this does not deny that rights work in the categorical way described above. They do work like that in normal circumstances. Another way to put this is to say that rights describe moral requirements

This kind of ordering, where one type of consideration has this strict pre-eminence over another, cannot be justified by reference to balancing, because balancing does not capture the qualitative dimension that is crucial for a mode of practical reasoning that works categorically, as rights-reasoning does. Balancing cannot establish that a category of considerations has pre-eminence over another category, because the method of balancing is not one that singles out or uncovers the quality of things (determining to which category they belong to) and their moral significance, but the quantity of things: what principle has been interfered more with, what interest is more stringent, what is more significant, etc. From a quantitative ordering one cannot produce a qualitative ordering. It is not surprising that, as seen in the previous section, these categorical forms of reasoning have no place in balancing and rights cannot be properly assessed in balancing analysis. For the same reason—because balancing is not concerned with questions regarding categories of considerations that deserve some form of pre-eminence over other categories of considerations—rights cannot be grounded on an implied balancing test.

Even if we understood rights as having less stringent force, such as they have according to Frederick Schauer's conception of 'rights as shields', it would still be the case that balancing (as understood by the theories of the maximisation conception) cannot justify even these weaker rights, nor reflect their strength. For Schauer 'A right to Ø … *is*

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that are perfectly valid in normal circumstances. It is only expected that some requirements are no longer valid, and others take their place, in exceptional circumstances. Nevertheless, it is also not obvious that in exceptional circumstances, ie, in the face of a moral catastrophe, we would apply something like balancing reasoning. In any case, rights still can be rightly said to have their full normative force in normal circumstances, and that rights reasoning is to be distinguished from balancing in those circumstances.

the right to have the state not restrict the ability to Ø without showing a compelling state interest or the like. … Rights, as shields, may be thought of as having genuine force, even though they may not be absolute.'[41] For Schauer these rights are distinguished from balancing in that usually their application is not a matter for balancing. Usual cases will still be—as he notes they commonly are—'far more focused on the right and its contours, and far less on the interests that might conceivably outweigh it.'[42] It is only when there is some particularly strong justification that the right may be outweighed by these considerations and thus some form of balancing needs to be undertaken.[43] Schauer's account presupposes 'a certain psychology of decision making' according to which 'a decision maker can presumptively, but not conclusively, ignore some factor', remaining 'open to the possibility that [that] factor might be relevant in a few extraordinary cases but still does not take it into account unless it appears to a particularly great degree.'[44] The kind of softer pre-eminence that rights have under Schauer's model still cannot be established through balancing. For one thing, it still relies on distinguishing a category of considerations for special treatment. Furthermore, it is framed explicitly as providing greater protection than mere balancing would provide—it is aimed at ruling out balancing in most cases. How could balancing

[41] Frederick Schauer, 'A Comment on the Structure of Rights' (1992) 27 Ga LR 415, 429.

[42] Ibid 432.

[43] Ibid 428-430. Though it does not follow from Schauer's argument that this assessment of whether the right is legitimately interfered with should be undertaken through balancing in the way proposed by the maximisation account of proportionality. As has been insisted here, there are other forms of moral reasoning beyond balancing. In other works Schauer seems to support the different, incompatible, understanding of proportionality as 'unconstrained moral reasoning'. See Frederick Schauer, 'Balancing, Subsumption, and the Constraining Role of Legal Text', in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (OUP 2012) 307.

[44] Schauer (n 41) 432.

itself justify this protection?

V.2.2. Balancing and absolute rights

The inability of the balancing model to reflect appropriately the special force of rights becomes particularly clear when we see the efforts made by defenders of proportionality to accommodate absolute rights (rights that allow for no exception) into balancing reasoning.[45]

For Alexy, absolute constraints (which he calls 'categorical constraints') can be 'grasped by means of the weight formula.' He argues that this can be done by 'giving them an infinite value.' Here, we would have reached the 'limits of balancing', though '[t]he fact that balancing has limits of this kind is not to say … that proportionality does not remain at the centre of rights analysis.' Alexy reminds us that '[p]roportionality analysis is, as the weight formula shows, a formal structure that essentially depends on premises provided from the outside.'[46] If moral reasoning establishes that some claim is absolute, then this can be reflected in balancing by attributing an infinite weight to that claim in the Weight Formula.

[45] Though some defenders of proportionality have acknowledged that it cannot reflect absolute rights, and thus should not be applied to cases where absolute rights or absolute duties are at stake. See Kumm, *PL* 162-4, and Barak, *Proportionality* 471. Though Kumm has since changed his position. See bellow VI.2.

[46] Robert Alexy, 'Thirteen Replies' in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart 2007) 344.

But this solution does not capture what absolute claims are about. Absolute rights reflect requirements that must always be complied with. Therefore, they are negative requirements: requirements of not doing something. They reflect things that should never be done to a person. The right not to be tortured is a paradigmatic example.

This kind of absolute claim is distorted when it is inserted into the Weight Formula. The Weight Formula is premised on the idea that enough gains on one principle justify the interference with another one. This is what the formula reflects by comparing losses on one principle with gains to the other, establishing which principle prevails by reference to the quantity of these gains and losses. The Weight Formula *reflects a comparison*, and attributes to this comparison a normative consequence: the determination of whether a principle can be infringed or not. By simply expressing a claim (any claim) in terms of the Weight Formula, what is implied is that gains that are large enough will justify disregarding that claim in a concrete case. This can be allowed when the value of the opposing principle is equally great. When this is the case, there is a stalemate, and thus, for Alexy, the primary decision-maker has discretion. As a matter of logic, the Weight Formula always allows for the possibility that a principle will be justifiably interfered with.

But absolute rights reflect an incompatible moral requirement: that *whatever happens,* those rights must be fulfilled, regardless of the benefit that could be derived from a measure that infringes them—the benefit will never be big enough. Or, more precisely, a comparison between the infringed right and the benefit derived from the measure that infringes it is not pertinent. A claim cannot be absolute in this sense, and at the same time,

as the Weight Formula necessarily expresses, allow for the possibility of a justified interference with it.

All this is not only of theoretical but also of practical consequence. Once human rights cases are seen as regarding not the specification of choices and actions that are regarded as unjust and therefore impermissible, but a comparison between degrees of interferences with principles or interests, then it is not impossible that some rivalling principle or interest will be found that will be of equal weight that the absolute right, as specified by the balancing methodology. Take the example I used in the previous chapter: we could torture a person so as to get the location of a terrorist cell and prevent the torturing of two other persons. Torturing a person infringes the right not to be tortured (or the interests associated with that right) at least to the same degree as the torture committed by the terrorist over two persons. If so, then respecting the right not to be tortured in this case would be of equal weight than the principle for whose sake it is being infringed. If we attribute to the former, following Alexy, infinite value, we should attribute to the rivalling principle the same value, since it is the same right that it is being affected in the same way. In this case there is a stalemate, and thus the decisionmaker has discretion. Therefore, infringing the right not to be tortured of the person interrogated would not be disproportionate—it would be legitimate. Of course, on Alexy's model the lack of reliability of premises regarding the likelihood of preventing the torture of the two victims of the terrorist cell could affect the balancing so as to tip the scales in favour of not allowing the policy. But in any case, this is not what absolute rights are about, which simply rule out certain actions and choices, regardless of the benefits associated with them

or the likelihood of those benefits occurring. The balancing methodology cannot reflect absolute rights.

For similar reasons Klatt and Meister claim that there are no absolute rights:

> That the state should not torture a person, to cite Webber's example, is only an apparently categorical claim, since we know for certain that in nearly all situations this claim is true. Still, in 'in most extreme circumstances' the principle of human dignity might be outweighed. Thus, the absoluteness remains to be relative to colliding principles, rather than being absolute. There is no such thing as an absolute principle.'[47]

For Klatt and Meister the reasons for this are to be found in the nature of balancing principles:

> To establish an absolute priority or unconditional precedence is, however, impossible, since it is impossible to balance principles abstractly, without referring to concrete cases. Rather, the very idea of establishing precedence among principles already buys in the dimension of weight, and, thus, balancing. Balancing, however, may only take place relativized to concrete cases.[48]

The problem here is that, again, it is assumed that any precedence between principles must be established by reference to what they, following Alexy, understand by 'balancing'. As I argued in this and the previous chapter, there is no reason for this. Nevertheless, if one accepts this view as a premise, then it follows that rights cannot be absolute, because balancing cannot justify that kind of strong preference between principles.

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[47] Klatt and Meister (n 33) 31-2 (citation omitted).

[48] Ibid 32.

Klatt and Meister thus discard as 'futile' the idea of 'establishing unconditional priorities of purported absolute rights'. Instead, they call for integrating 'the predominant abstract weight of highly important rights into the balancing scheme.'[49] But what is 'futile' is not the idea of establishing unconditional priorities, but to attempt to express unconditional priorities through the balancing formula. This shows a fundamental problem in the way Klatt and Meister argue for the method they propose. Instead of showing how their proposal can reflect the moral requirements that bear on human rights cases, they rule out as irrelevant the moral considerations that cannot be captured by the method they propose.

The contrary should be case: the fact that proportionality filters out morally relevant considerations counts against it. Even if proportionality were not applied to cases regarding absolute rights such as the right not to be subject to torture, it will be applied to cases regarding other rights. If those rights possess a special force, a kind of pre-eminence, then proportionality will filter that special force or pre-eminence out. Defenders of proportionality cannot claim that those rights are the product of proportionality analysis—this claim cannot be sustained because proportionality cannot justify those rights as claims possessing the said special force or pre-eminence.

[49] Ibid.

V.3. A Transition: Accommodating Morality in Proportionality

In his reply to Tsakyrakis' paper, Madhav Khosla raises two points that are of interest in analysing proportionality from the moral perspective. Engaging with his argument will help to show a shift in the conception of proportionality at stake. Once the idea of proportionality as embodying balancing and maximisation is challenged, the temptation is to object to the initial characterisation of proportionality, replacing it with one more open to moral reasoning concerning rights and other considerations filtered out by the maximising approach.

The first point Khosla makes is that 'while Tsakyrakis is right to consider certain types of balancing objectionable, he is wrong to conclude that proportionality necessitates them'[50]. He stresses the value of the other subtests in proportionality. He does this crucially by showing how in some relevant examples discussed in the literature it is the assessment of the legitimate aim (the first stage in proportionality analysis) that would do all the work. This, he argues, would be the case in the famous case *Brown v Board of Education,* in Tsakyrakis' Eskimo hypothetical, and the Israeli Supreme Court decision in *Public Committee Against Torture*. In all three cases the measure would have an illegitimate aim: discriminating, on the first two, and torture on the third. Leaving aside the fact that these are not proportionality cases,[51] a problem with Khosla's argument is that it trades on the

[50] Khosla (n 3) 298.

[51] Brown is about whether 'the plaintiffs and others similarly situated … are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment'. *Brown v Board of Education*, 347 U.S. 483, 495 (1954) (Chief Justice Warren). In The Public Committee Against Torture v Israel HCJ 5100/94 the question was whether

ambiguity of the term 'legitimate aim'. If understood as an assessment of all the requirements of justice and morality that bear on the case, then it is not clear why we would need to even apply the rest of proportionality analysis. If so, then the disagreement with Tsakyrakis is only apparent. Non-balancing proportionality would have none of the distinct features of proportionality analysis that Tsakyrakis identifies and criticises.

But in proportionality decisions the idea of 'legitimate aim' is more modest.[52] It refers to the objective sought by the authorities' measure. In the case of *Otto-Preminger*, for example, the ultimate objective of the state was not to limit the right to freedom of expression. The limitation was seen as a means to achieve something, and it was that something that constituted the aim of the state—to stop offence to the Tyroleans, and an infringement with their rights. These are the legitimate aims of proportionality analysis. If we understand legitimate aim in this modest way, which is the way it is understood in proportionality cases, then Khosla's argument that proportionality analysis should not be confused with balancing, and that you can have the former without the latter, does not

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the interrogation methods used by the Israeli General Security Services (GSS) were legal. The question was not addressed through proportionality at all. Discussion of 'necessity' refers to the Criminal Law 'state of necessity' (see [33]). As closing obiter dicta the court mentioned the question of whether it could be desirable that the GSS had that legal authority, and thus whether Israeli society should strike the balance between security and liberty in a different way. But this was taken to be an issue 'that must be decided by the legislative branch.' [39] (President A Barak).

[52] The 'legitimate aim' test seems more ambitious in the landmark Canadian *Oakes* case. Here the test requires that the objective promoted by the state be of 'sufficient importance to warrant overriding a constitutionally protected right or freedom.' *R v Oakes* [1986] 1 SCR 103 [69] (Dickson CJ). It has been noted that 'in practice … [it] has not played a large role', and that it was 'quietly replaced with the less demanding requirement that the objective merely be "valid" or "sufficiently important".' See, respectively, Julian Rivers, '*A Theory of Constitutional Rights* and the British Constitution' (translator's foreword to *Theory*) xxxii; and Sujit Choudhry, 'So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1' 34 Sup Ct LR 501, 509-10.

really undermine Tsakyrakis argument. It would only mean that in some proportionality cases there is no legitimate aim at stake (even in the modest sense), and thus there is no need to proceed to the further stages. This is correct, but it does not undermine any normative critique of the further stages. But even this claim is undermined by Tsakyrakis criticism of proportionality, crucially, by the idea of the 'principle of definitional generosity', according to which courts are willing to accept the aim proposed by the government without assessing its legitimacy, in the knowledge that whatever spurious elements enter the analysis at that stage, they can be dealt later in the following stages. This 'generosity' in the interpretation of legitimate aims (and also of rights) is also a feature of theories of proportionality.[53]

The second point relevant for our purposes in Khosla's argument is that even though he concedes that 'certain types of balancing [are] objectionable'[54], he seems to support the idea that generally the balancing part of the proportionality test responds to a moral requirement to balance in certain cases. He says:

> The importance of [the balancing stage] is demonstrated by Dieter Grimm's illuminating hypothetical. Imagine a law permitting the police to shoot someone to prevent him from destroying property. Here, the purpose is appropriate as it aims to protect property; there is a rational connection, since the shooting will stop the perpetrator; and the means are narrowly tailored, as there is no other way to stop the destruction. In this situation, without the final stage, 'the balance between life and property could not be made.'[55]

[53] See *Theory* 209, and Klatt and Meister (n 33) 45-9.

[54] Khosla (n 3) 298.

[55] Ibid 299 (citation omitted).

Tsakyrakis replies that the scrutiny at the first stage—what counts as a legitimate aim—can either 'embrace the more searching analysis of the competing rights from the perspective of political morality', or not. If it does, he argues, then 'the balancing stage is rendered redundant'. [56] This is surely right, since *ex hypothesi* the first stage addresses the problem including all the relevant moral considerations. But this is not how the legitimate aim subtest of proportionality is understood under the maximisation account of proportionality, or in the cases Tsakyrakis criticises. Now, if the first stage of the scrutiny does not embrace the more searching analysis he mentions, then according to Tsakyrakis, 'it leads us to the balancing stage without the appropriate theoretical resources to resolve the conflict between [say] the right to life and the right to property.'[57]

This last statement is confusing. It is unclear what he means by the 'appropriate theoretical resources'. But if he means the conceptual tools we would need to give an answer to the question asked, so to say, in each stage, then it is not clear why would there be a deficiency in that any stage of the proportionality test leads us to the next without 'the appropriate theoretical resources' to solve it. One would think that we address a complex problem through different stages precisely as a way of separating conceptually the different kinds of considerations involved. If so, there is no reason why the first or any other stage should provide the resources to address the following stages.

[56] Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?: A Rejoinder to Madhav Khosla' (2010) 8 Int'l J Const L 307, 309.

[57] Ibid 309.

Tsakyrakis missed the point. We will achieve no clarity in the debate by arguing about which stage should the 'balancing' take place at. The relevant question here is what are the kinds of considerations that are relevant for addressing this sort of cases involving human rights and public interests. It is in addressing straightforwardly this particular question that we see all the ambiguity of the word 'balancing' pointed to above. It is not clear whether Khosla refers to balancing in the sense the term has in the context of the different theories of the maximisation account of proportionality, referring to balancing interests, principles or values; or to merely balancing reasons—simply assessing the reasons in favour and against a particular measure that engages a right.

If the former, then all the objections I have put forward in this and the previous chapters apply, along with Tsakyrakis' point that, as an interpretation of the practice of human rights it is deficient, since it distorts human rights' distinct meaning.[58] Khosla will probably reject this interpretation of balancing, since he concedes the moral importance of rights and wants to accommodate them in proportionality discourse. But to do this he has to avoid the more precise notion of balancing defended by the theories of the maximisation account of proportionality.

If the latter (if the word 'balancing' is taken simply to refer to 'assessing the reasons in favour and against a particular decision'), that would be so abstract that it must be correct from the moral perspective. But then the balancing stage is not saying much. It is not a 'test' that helps us clarify whether the decision is right or wrong. The same would

[58] Tsakyrakis (n 2) 488-9.

occur if the 'legitimate aim' test were taken to include an assessment of the moral aptitude of the whole measure under review. In that case, the other stages of the test would be superfluous, and the test itself would be remarkably vague, hardly a 'test' but simply an opportunity to assess the legitimacy or moral aptitude of a measure through open-ended moral reasoning. Would this be a deficiency, or an advantage? This is the kind of question that we have to address from the technical perspective, and to which I will turn in the second part of this thesis.

What is interesting about Khosla's argument is that it allows us to show a particular ambiguity in the defence of proportionality. What Khosla seemed to be defending was that which Tsakyrakis was criticising: some vices of proportionality associated with the maximisation account. But Khosla's reply relies on changing some of the terms of the debate by challenging the understanding of the test that is being discussed. The changes are important. The inclusion in the 'legitimate aim' prong of a general assessment of the legitimacy of the measure, ie, an assessment of whether the measure is a *legitimate mean* for attaining the legitimate aim, is telling, since a remarkable feature of the maximisation account of proportionality, and of the doctrinal formulation of the proportionality test, is that there is no test for directly assessing the legitimacy of the means employed (see above II.2). Their legitimacy is assessed by reference to their relation with the aim, and by reference to the general importance of satisfying the aim in relation to the costs it has on the right engaged. This shows that Khosla's defensive strategy relies on reconceptualising proportionality. As we will see, Khosla is not alone in this.

V.4. Conclusion: abandoning the maximisation account

The maximisation account of proportionality fails. It is open to all the objections I have made in the previous chapters. It is open to the incommensurability objection, because it attempts to commensurate incommensurable rights or principles, and because it attempts to strike this comparison along variables that are themselves incommensurable (intensity and extension of interests; or degree of satisfaction of principles and reliability of premises regarding their satisfaction, etc). Furthermore, there is no reason to justify the application of the method proposed by the theories of the maximisation account of proportionality to human rights cases. Defenders of proportionality have not provided such reason, and they cannot do so because the method filters out considerations that are morally relevant, such as those regarding the special normative force of rights and (at least for some accounts) the distinction between legitimate and illegitimate interests. The different objections show that human rights cases are more complex than what the maximisation account of proportionality supposes.

In the face of the objections presented against the maximisation account, there has been a tendency in some authors to abandon it. This is exemplified in our discussion of Khosla's arguments above. Proportionality is defended from its critics by way of reconceptualising it. This reconceptualisation attempts to abandon the problematic methodologies proposed by the maximisation conception. Instead—as Khosla does ambiguously, and others have done explicitly—it empties proportionality of distinct content as a legal test, and conceives it as a tool for demanding justification for a measure of a particular authority that affects a human right, and for allowing the court to assess this

justification through open-ended moral reasoning, unconstrained by the law. If proportionality is conceived in this way, then it is not affected by the objections made against it in this and the previous chapters. Proportionality would be able to accommodate whatever are the morally relevant reasons. But this would come at the price of providing no legal direction—a hefty price to pay. I now turn to the analysis and critique of this different understanding of proportionality, in the second part of this thesis.

PART II

VI. Proportionality as unconstrained moral reasoning

As said in chapter II.2, the general structure of the proportionality tests makes intuitive sense when seen from the prism of maximisation. Once the maximisation account of proportionality is discarded, can the tests be saved by taking advantage of the vagueness of human rights language, and of the proportionality tests in particular, and reinterpreting it, so that it can incorporate the relevant moral requirements that bear on human rights cases, such as the special importance rights are taken to have, or the distinction between legitimate and illegitimate interests?

An account of proportionality that has gained prominence in the writings of recent defenders of the proportionality test can avoid the critiques made to the maximisation account of proportionality. This account I call 'proportionality as unconstrained moral reasoning'. This account is characterised by the following. First, the account presupposes an expansive view of human rights, according to which human rights are taken to encompass a great number of interests, including (on some accounts) trivial or even immoral interests. Second, human rights thus conceived can be limited by a government measure that aims to promote some other right or public interest; when rights are limited, they require that the government presents reasons that justify this interference with rights. Third, this justification is assessed through the proportionality test. Fourth, proportionality is understood as allowing for any morally relevant reason to be assessed in establishing

which of the values, principles or interests in conflict should prevail; particularly the last balancing stage will demand not the application of a concrete method (such as those proposed by the theories of the maximisation account of proportionality), but that the judge engages directly with the reasons given by the parties and assesses them through practical reasoning, unconstrained by a particular legal method or other legal categories.

In what follows I will describe the main theories that defend this account, I will situate this account in the proportionality debate, and introduce objections to it, which will be developed in the subsequent chapters.

VI.1. Theories of proportionality as unconstrained moral reasoning

Some theorists have claimed that one of the main advantages of proportionality is that it allows citizens to demand from public authorities justifications for their actions. Cohen-Eliya and Porat see this feature as part of greater trend, a 'profound shift in constitutional law on a global level', which they characterise following Etienne Mureinik,[1] as 'a shift from a culture of authority to a culture of justification'[2]. A culture of justification would 'require that governments should provide substantive justification for all their actions, by which we mean justification in terms of the rationality and reasonableness of

[1] Etienne Mureinik, 'A Bridge to Where: Introducing the Interim Bill of Rights' (1994) 10 S Afr J HR 31.

[2] Moshe Cohen-Eliya, Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 2 American Journal of Comparative Law 463 [hereinafter *PCJ*], 466.

every action and the trade-offs that every action necessarily involves, ie, in terms of proportionality'[3]. Proportionality thus is taken to be central to the enterprise of public authorities having to justify their actions before courts, which have to 'assess those justifications *on the basis of reason*'.[4]

Cohen-Eliya and Porat oppose a culture of justification to a culture of authority. A culture of authority, they claim, 'emphasises the need for finality', whereas a culture of justification emphasises that of rationality of decisions[5]. In a culture of justification the judicial methods used to evaluate government's measures have to allow for a direct assessment of justifications. Adherence to text is secondary and can be ignored if necessary to directly assess justifications.[6] Another feature of the culture of justification is that

> rights are viewed as values—substantive goods—that reflect aspirations to progress and rationality. Rights, to use a common philosophical terminology, are viewed in 'perfectionist' terms as positive values to be promoted and respected as much as possible by governmental action.[7]

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[3] Ibid 466-7.

[4] Ibid 488 (emphasis added).

[5] Ibid 479.

[6] 'In a culture of justification, the judiciary's role is to demand that the government justify its actions. Such a conception downplays the importance of the text. The text allows for "outward" legitimacy, and secures the public status of the court, but it is not essential to the court's authority to review governmental action and demand justification. This authority is derived directly form the court's function, and from the idea that government action is not legitimate unless it is justified.' Ibid 479. See also 490: 'While it is true that the texts of new constitutions direct judges to assess whether the limitations are "justified in a democratic society," this amounts to an authorization by the text to downplay the text, ie, to engage in the assessment of justification, rather than textual interpretation'.

[7] Ibid 478, citation omitted. The authors associate term 'perfectionist' with the philosophy of Joseph Raz, but their understanding of it differs from Raz's.

The immediate effect of this conception of rights is 'the expansion in their scope'[8], which allows for an increase in the actions that can be taken to affect a particular right, and thus be challenged. Proportionality is assumed—though this is not argued for—to be a highly flexibly judicial method that allows precisely for courts to do this kind of unbounded assessment of reasons.[9]

Kai Möller provides a similar account of proportionality and balancing. Möller argues for a general right to autonomy, which he defines as 'a right to everything which, judged from the perspective of the agent's self-conception, is in his interest.'[10] This right therefore includes not only important interests, but also trivial or even evil ones (as an interest a person can have in murdering another).[11] What this right amounts to is that it only serves to trigger a demand for justification, whereby the government is required to provide 'sufficiently strong reasons' for limiting a person's autonomy interest.[12] In this sense 'one can speak of the right to autonomy as a "right to justification"'.[13]

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[8] Ibid.

[9] 'Proportionality is the central legal device to ensure the flourishing of this legal culture [a culture of justification]'. Ibid 482.

[10] *Global Model* 73.

[11] Ibid 78-9.

[12] Ibid 86-7.

[13] Ibid 87.

This approach grounds an institutional design where courts can review measures enacted by public authorities that affect persons' interests generally through the two-step analysis that is so common in many jurisdictions. The first step only asserts that there has been an interference with a right and the second whether this interference is justified. On Möller's account, the first step should be interpreted broadly, so as to include any autonomy interest. Therefore, for Möller, 'nothing would be lost in theory by simply acknowledging one comprehensive prima facie right to personal autonomy', instead of 'a set of distinct constitutional rights' (though Möller ultimately leans towards bills of rights based on two practical advantages they have: they can 'single out some particularly important aspects of personal autonomy', and can leave out 'those rights which will rarely or never survive the justification stage, thus avoiding to some extent unrealistic expectations').[14]

The second step concerns the justification of the limitation of the right. Because the first 'prima facie stage … does not operate as a filter … most of the hard analytical work, separating successful from unsuccessful rights claims, must be done at the justification stage'.[15] The doctrinal tool for deciding whether a limitation of a right is justified or not is the proportionality test. A policy that interferes with a person's autonomy 'is proportionate and therefore justified if it resolves a conflict of autonomy interests in a reasonable way'.[16]

[14] Ibid 89-90. Note that this type of 'pragmatic' consideration provides reasons for establishing more precise legal positive human rights, which would challenge the model based on a general right to autonomy that Möller promotes. This will be explored in the next two chapters.

[15] Ibid 178.

[16] Ibid.

Proportionality and balancing (the latter being part of the former, but analysed separately by Möller) are conceived as doctrines that, 'because of the high level of abstraction at which they are formulated, offer no immediate guidance as to what makes a measure disproportionate or how to conduct the balancing.'[17] Balancing, in particular, should not be equated with 'autonomy maximization'.[18] Instead, it 'ought to be understood in the sense of "balancing all the relevant moral considerations."'[19] Möller provides a typology of different senses of the word 'balance'[20]. Depending on the considerations that bear on the case, some forms of balance may be appropriate and not others. Deciding which form of balance is appropriate in a particular case is part of the moral reasoning that needs to be done by the judge applying the proportionality test at the balancing stage. The idea of balancing, as a technical doctrinal category, 'does not without further argument give us guidance other than that a moral argument about the correct balance between the competing values has to be made.'[21]

Möller and Cohen-Eliya and Porat draw important insights from the original account of proportionality provided by Mattias Kumm. Kumm too sees proportionality as allowing for a practice of demanding justification of government action—what he calls

[17] Ibid 100. This is contradicted by Möller's assertion that proportionality 'provides a *structure* which guides judges through the reasoning process'. See ibid 179 (emphasis in the original). Bellow I address this tension (VI.4).

[18] Ibid 141.

[19] Ibid 134.

[20] Ibid 137-40.

[21] Ibid 140.

'Socratic contestation'.[22] And he endorses a similar view of human rights. Rights have two characteristics, according to Kumm: 'First, a rights-holder does not have very much in virtue of having a right. … An infringement of the scope of a right merely serves as a trigger to initiate an assessment of whether the infringement is justified.'[23] Though he immediately acknowledges that the fact that 'rights are not trumps does not mean that they provide no effective protection.'[24] They can still be 'formidable weapons'[25]. The second characteristic 'is the flipside of the first. Since comparatively little is decided by acknowledging that a measure infringes a right, the focus of rights adjudication is generally on the reasons that justify the infringement.'[26]

This dovetails with the proportionality test:

> The four prong structure of proportionality analysis provides little more than a structure which functions as a checklist for the individually necessary and collectively sufficient conditions that determine whether the reasons that can be marshalled to justify an infringement of a right are good reasons under the circumstances. Assessing the justification of rights infringements is, at least in the many cases where the constitution provides no specific further guidance, *largely an*

[22] See generally Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 2 Law & Ethics of Human Rights 142 [Hereinafter *Socratic*].

[23] Mattias Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in G Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart 2007) 131, 139 [Hereinafter *PL*]. The same formulation in *Socratic* 150 and in Mattias Kumm, 'Constitutional Rights As Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 Int'l J Const L 574, 582 [Hereinafter *CR*].

[24] Ibid *PL* 139. See also *Socratic* 150 and *CR* 582.

[25] Ibid *PL* 140. See also *Socratic* 150 and *CR* 582.

[26] Ibid. See also *Socratic* 150 and *CR* 582.

exercise of general practical reasoning, without many of the constraining features that otherwise characterise legal reasoning.[27]

Proportionality's 'open-ended structure' allows for a direct assessment of the reasons that would justify government authority—what he calls 'the turn from legal interpretation to public reason oriented justification'[28].

It is not clear which, if any, of the traditional legal constraints would remain for this account of proportionality. Kumm says that 'arguments relating to legal authorities—text, history, precedence, etc.—have a relatively modest role to play', the 'heart' of most human rights cases being the proportionality test.[29] Text is not seen as constraining legal reasoning, since it 'typically provides very little guidance for the resolution of concrete claims'[30], serving 'merely as a basis for an authorization for courts to engage in open-ended inquiry'[31]. The ideal of a culture of justification 'downplays the importance of the text'[32]. Little is said about the status of precedent for this account. Cohen-Eliya and Porat do not mention the word at all in their article.[33] Similarly, Möller does not mention it once in his

[27] Ibid. See also *Socratic* 150 and *CR* 582 (emphasis added).

[28] *Socratic* 142.

[29] Ibid 144.

[30] Ibid 153.

[31] Ibid 146.

[32] *PCJ* 479.

[33] *PCJ*.

book providing the most comprehensive account of his theory.[34] Kumm mentions precedent only to contrast legalistic reasoning—described as 'strongly focused on text, history and precedent'—with the proportionality analysis that allows for Socratic contestation. He remarks—though does not prove—that 'the conceptual structure of legal doctrine more often than not distorts public reasoning while it professionalizes legal discourse.'[35] It seems as if a practice of following precedent, or any positive legal source for that matter, could do little more than hamper the task of demanding and assessing reasons from public authorities—the task of Socratic contestation courts are to perform, and for which they are so well suited on Kumm's account.

All these accounts of proportionality have the same features described at the beginning of this chapter. They understand proportionality as a tool for realising the requirement of justification that applies to government's interference with persons' interests, and as giving the opportunity for courts to evaluate those interests based on a direct engagement with the reasons presented by government, unmediated by legal categories. In this sense, they conceive the proportionality test as requiring open-ended moral reasoning for the purposes of establishing which of the values, principles or interests in conflict should prevail.

This unconstrained aspect of proportionality can be further explored by engaging with Kumm's claim that proportionality is not incompatible with some of the

[34] *Global Model*.

[35] *Socratic*, 157-8.

characteristics rights are taken to have in the liberal tradition. Even though I do not agree with all of Kumm's characterisation of rights[36], I will not challenge it here. Instead, I will focus on the way Kumm can incorporate these characteristics of rights into the proportionality analysis. Engaging with his arguments helps illustrate how proportionality can deal with some of the moral requirements seen in the previous chapter, particularly the special force that rights are taken to have. The way in which Kumm incorporates the moral force of rights to the proportionality scheme can be used to include whatever is considered relevant from the moral perspective. Therefore, the implications of his argument go beyond Kumm's liberalism and what he presupposes are the relevant moral considerations, as articulated by recent liberal theories. Thus, it is important to understand that promising alternative.

VI.2. Can proportionality reflect the characteristic features of human rights?

For Kumm there are three characteristic features of human rights, according to the liberal tradition. The first is that rights 'protect individuals from strong paternalist impositions relating to how they should live their lives. … It is not within the jurisdiction of public authorities to prescribe what the ultimate orientations and commitments of an individual should be'.[37] Reasons based on perfectionist values then should be excluded from justification of rights infringements. Kumm holds that proportionality can accommodate this aspect of liberal rights. It does so

[36] For example, I think it is imprecise to conflate perfectionism and paternalism, as Kumm does.

[37] *PL* 142.

> both at the first prong of the proportionality test, since [perfectionist ideals] are not a legitimate purpose that can justify infringements of individual liberty, and at the level of balancing, since furthering a particular perfectionist ideal is not a reason to weigh when assessing the proportionality of a measure furthering some other legitimate purpose.[38]

In Kumm's account, the idea of excluded reasons is not implied by proportionality. Rather, proportionality and the idea of excluded reasons are 'complementary structural features of rights in a liberal constitutional democracy'[39]. Furthermore, he concedes that focus on 'proportionality alone' can 'obscure' some 'core structural features of liberal constitutional practice' that the idea of excluded reasons helps illuminate.[40]

The second characteristic of rights in the liberal tradition according to Kumm is what he calls 'anticollectivism'. Rights 'are believed to enjoy priority … in relationship to collective goods or "the general interest"', though the priority cannot be absolute: 'under any plausible account of rights the liberty interest will have to yield at some point'[41]. For Kumm, proportionality can easily incorporate this characteristic of rights. Here, the open-ended structure of proportionality is presented as the crucial aspect of proportionality that allows for the priority of rights to be reflected in the proportionality analysis:

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[38] *PL* 145.

[39] *PL* 147.

[40] *PL* 146.

[41] *PL* 148. This way of understanding rights is not the only one. For an account of rights as 'in all cases … absolute', see *Negotiable Constitution* ch 4.

> The metaphor of 'balancing' should not obscure the fact that the last prong of the proportionality test will in many cases require the decision-maker to engage in a theoretically informed practical reasoning … At the level of evaluating the relative importance of the general interest in relation to the liberty interest at stake, the weights can be assigned and priorities established as required by the correct substantive theory of justice. The last prong of the proportionality test then *provides a space for the reasoned incorporation of an understanding of liberties that expresses whatever priority over collective goods is substantively justified.*[42]

The proportionality test can accommodate this second characteristic of rights because the balancing stage is understood as allowing for general practical reasoning in assessing which of the interests, values or principles should have priority in a given case.

The third characteristic is related to what Kumm calls 'anticonsequentialism'. 'The basic idea is that there are restrictions connected to the idea of the inviolability of persons that impose constraints on actors seeking to bring about desirable consequences.'[43] This characteristic is fundamentally linked with the idea of 'means-ends' relationships. It involves not using persons merely as means, at least given certain circumstances. Kumm provides a general overview of issues associated with this characteristic, such as torture and terrorism, and explores some of the criteria that apply to such cases, in particular the difference between 'using' a person as 'enabler' or 'disabler'[44]. There is no need to

[42] *PL* 148-9. Emphasis added.

[43] *PL* 153.

[44] *PL* 153-162. This distinction Kumm takes from Alec Walen, 'Doing, Allowing, and Disabling: Some Principles Governing Deontological Restrictions' (1995) 80 2 Philosophical Studies 183, quoted in *PL* 154 fn 50. The well-known trolley example helps explain this distinction. A runaway trolley will kill five people if a bystander does not: (First scenario) divert it into another track, where it will only kill V. (Second scenario) push V into the track to stop the trolley. In the first case V's claim purports to 'disable the otherwise permitted scenario'. On the second scenario, 'V makes a claim that he should not be used [merely] as a means to enable the rescue of others'. The claims of disablers are weaker than those of enablers. For Kumm claims of disablers are subject only to

reproduce that discussion here. What is interesting for our purposes is whether proportionality can express these kinds of considerations. Kumm concludes that proportionality cannot reflect this characteristic of liberal rights. His reason is that

> proportionality analysis and the balancing test in particular … systematically filter out means-ends relationships that are central to the understanding of deontological constrains. Yet the nature of means-ends relationship can be key. Whether the claims made by the rights-bearer … are made as an enabler or a disabler … [is] often [a] morally decisive feature of the situation. These questions only come into view once the structure of the means-ends relationship becomes the focus of a separate enquiry.[45]

But there is an inconsistency here. The other two characteristics of liberal rights were incorporated on the grounds of their reasonableness. Because they are reasonable, they deserve to be incorporated in the proportionality analysis and shape or correct the maximising procedure. Why not incorporate everything reasonable? This would raise the question of whether proportionality as a technical category is formal enough to accommodate this type of absolute claim. But Kumm already showed how an aspect of liberal rights that establishes an absolute priority can be incorporated in the proportionality analysis—the antiperfectionist aspect of liberal rights. Whatever the gains in perfectionist values, that cannot justify a particular measure that affects a right. This is as absolute as deontological anticonsequentialists constrains. [46] If the last prong of proportionality can

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proportionality, while those of enablers are protected by deontological constraints that forbid using a person as enabler, ie, merely as means.

[45] *PL* 162-3. Barak follows Kumm in believing that proportionality can accommodate the two first aspects of rights according to the liberal tradition, but not the third. See *Proportionality*, 468-72.

[46] Someone could argue against this premise of Kumm's analysis: that anticonsequentialist constrains are absolute, ie, that they specify certain acts that whatever the consequences at stake, can never be done. Jeremy Waldron has noted that 'most philosophical theories which oppose

'provide a space for the reasoned incorporation of liberties that expresses whatever priority over collective goods is substantially justified'[47], it can also 'provide a space for the reasoned incorporation of liberties that expresses whatever anticonsequentialist prohibitions on treating persons merely as means is substantially justified'. Proportionality could also accommodate this characteristic in the first prong of the test as well—legitimate aim—in the same way as the feature of 'excluded reasons' was accommodated within the test, and for the same reasons.

We can make an even more general point: any reasonable moral idea can be incorporated into the proportionality analysis. This is implied by the idea that proportionality as an open-ended structure allows for unconstrained practical reasoning, where all the relevant considerations are taken into account and related in the most reasonable way.[48] If all three characteristics of liberal rights are reasonable, then they can be accommodated in the proportionality analysis in exactly the same way the second was, and for the same reasons.

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routine trade-offs between rights and consequences nevertheless toy with the idea of some sort of "out" to avoid *ruat caelum* absolutism.' Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (OUP 2010) 31. Kumm himself seems to share these apprehensions with absolute moral requirements, when referring to a 'baseline' relating to 'torture and terrorist killings' as implying 'something close to' (but not simply 'a') categorical prohibition. See *PL* 163. If certain particularly dire circumstances could justify violating anticonsequentialist constrains, then the difference between those constrains and anticollectivist constrains would be only a matter of degree, and the 'change in the baseline' of which Kumm speaks would not be significant enough for excluding anticonsequentialist constrains from proportionality. See *Proportionality* 472. For a defence of moral absolutes, even on the face of a (then realistic) catastrophe, see John Finnis, Joseph Boyle Jr and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (OUP 1987).

[47] *PL* 148.

[48] *PL* 140, 151, *CR* 582, *Socratic* 146, 147 fn 12, 150, 174.

This is why Kumm's conclusion in his article on *Political Liberalism and the Structure of Rights* shows an inconsistency. Kumm claims that 'a structure of rights that is *exclusively focused* on proportionality' does not *adequately reflect* two of the central commitments of 'the tradition of Political Liberalism'[49]. Those two 'central commitments' are the antiperfectionist (operationalised through the idea of excluded reasons, according to Kumm) and the anticonsequentialist aspects of Political Liberalism—though the former can be accommodated in the 'legitimate aim' and the balancing part of the test, as explained above[50]. 'The anticollectivist aspect … on the other hand, is appropriately reflected in the proportionality structure.'[51] But the expression 'adequately/appropriately reflected' is being applied inconsistently, according to two different criteria. Understanding the difference between the two is crucial for evaluating the idea of proportionality as allowing for unconstrained moral reasoning.

The two different criteria are designated by the verbs *express* and *accommodate*. A technical legal category can *express* or can merely *accommodate* a moral consideration. A legal category expresses a moral consideration when the legal category provides guidance as to how to act or decide in a particular case so as to comply with the moral consideration. A legal category can merely accommodate a moral consideration when the legal category is not guiding action in a way necessarily consistent nor necessarily inconsistent with the moral consideration, so that the person applying the legal category can be consistent or

[49] *PL* 164.

[50] *PL* 145.

[51] *PL* 164.

inconsistent with the requirements of the moral consideration, without disregarding the legal category. A legal category can express or accommodate a moral consideration in different degrees.

With respect to the anticollectivist aspect of liberal rights, Kumm says that proportionality can adequately reflect it because proportionality analysis can *accommodate* that moral consideration. It is said that proportionality 'provides a *space* for the reasoned *incorporation* of an understanding of liberties that expresses whatever priority over collective goods is substantively justified.'[52] We can *incorporate* something only if in some way is not yet there. But with respect to the antiperfectionist and anticonsequentialist aspect of liberal rights, Kumm seems to set a higher standard. Proportionality does not adequately reflect these aspects of rights because it does not *express* them. This is particularly clear in relation to the antiperfectionist aspect of liberal rights, the relation of it to proportionality being one of 'complementary structural features of rights in liberal constitutional democracy'[53]. The antiperfectionist aspect can be accommodated into the proportionality analysis, as Kumm suggests. As seen above, the same could be said of the anticonsequentialist aspect of rights.

If proportionality requires considering all the relevant moral considerations that could potentially apply in the case, it can accommodate all these aspects of rights, and any other consideration. Proportionality thus characterised cannot be reductionistic. Not

[52] *PL* 148-9. Emphasis added.

[53] *PL* 147.

surprisingly, Kumm's later work on the matter emphasised the unconstrained character of proportionality reasoning and omitted mentioning the purported limitations in capturing certain relevant moral considerations (viz, anticonsequentialist considerations) that proportionality was taken to have in his earlier work.[54] Later on, Kumm came to reject the idea that proportionality could not accommodate deontological constraints (what he called 'human dignity exceptionalism'[55]), since 'balancing … requires the decision-maker to take into account everything relevant'[56], arguing that

> [h]uman dignity exceptionalism is false. Whereas it was right to insist that the structure of political morality is not automatically captured [ie, expressed, in my terminology] by the four prongs of the proportionality test … the proportionality test and the idea of balancing in particular is flexible enough to allow [accommodate] for the structural complexities of political morality to be taken into account … [T]he balance will have to make appropriate reference to constraints that arise out of what is required to respect dignity.'[57]

VI.3 Proportionality as unconstrained moral reasoning and the proportionality debate

If proportionality is understood as allowing for unconstrained moral reasoning, it is immune to the objections made in the first part of this thesis against the maximisation account of proportionality. These objections ultimately amount to the claim that

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[54] See *supra* fn 148.

[55] Mattias Kumm, Alec D Walen, 'Human Dignity and Proportionality: Deontic Pluralism in Balancing' (2013) New York University School of Law Public Law and Legal Theory Research Papers 2. Available at < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195663> accessed June 2013.

[56] Ibid 20.

[57] Ibid 2-3.

proportionality does not properly capture the relevant moral considerations that bear on human rights cases. It filters out some relevant moral considerations—such as the special force of rights, and, on some versions, the distinction between legitimate and illegitimate interests—, and the method is problematic in that it relies on an implicit or implicit commensurability of considerations that are incommensurable. The way proportionality analysis can incorporate the morally relevant considerations is by opening its scope as a technical category. If proportionality allows for open-ended moral reasoning without committing itself to a particular method for addressing human rights, then it can, in principle, allow judges to address human rights cases considering the moral considerations that the maximisation account fails to capture in its methodology.

It is not surprising that for Möller the different critiques made to proportionality are unsound. For him, they rest on mistakenly assuming that proportionality must rely on 'interest balancing'—maximisation of interests—, while instead it demands 'balancing as reasoning'.[58] Thus, Möller can easily dismiss some of the main objections raised against proportionality: For example, that proportionality pretends to be technical and morally neutral.[59] Quite the contrary, it calls for moral argument and reasoning.[60] Or that proportionality does not discriminate between legitimate and illegitimate interests (and, we could add, between these and rights). On the contrary, sound practical reasoning should

[58] *Challenging Critics* 715.

[59] Möller engages with this argument as made by Tsakyrakis and Webber. I do not argue for this objection because I agree with defenders of proportionality that at least on Alexy's and Barak's version of proportionality some moral evaluation is necessary.

[60] Ibid 716-8.

consider these distinctions.[61] He can also dismiss the objection that proportionality requires commensurating incommensurables. There is no need for doing this commensuration if proportionality is not committed to maximisation, and thus Möller rightly stresses that two alternatives that instantiate different values can be put into relation to each other, and attribute preference to one over the other, based on general practical reasoning.[62] Similarly, Panaccio has proposed a similar response to critics of proportionality. Proportionality cannot be accused of being a merely technical test that ignores the need for moral reasoning in human rights, since, as a test, it is 'substantively vacuous', requiring 'a normative theory to breathe life into it'. [63] It is a 'heuristic tool for practical-moral reasoning.[64] Proportionality can therefore accommodate any moral theory, including those postulating incommensurability.[65]

All these objections, as the ones made in the first part of this thesis, are objections to proportionality as such, this is, to the idea of proportionality. This must be distinguished from objections made to concrete applications of the proportionality test by courts. Möller also engages with objections of this kind. Stavros Tsakyrakis argues that proportionality

[61] Ibid 718.

[62] Ibid 719-24. Though one may call this 'weak commensuration' (see III.4). Regardless of the terminology, it is a different kind of method from the aggregative and maximizing one that the incommensurability objection is aimed at.

[63] Charles-Maxime Panaccio, 'In Defence of Two-Step Balancing and Proportionality in Rights Adjudication' (2011) 24 1 Can JL & Jur 109, 118.

[64] Ibid 119.

[65] Ibid 118.

'gets the moral questions wrong'.[66] This critique is based on analysis of cases where Tsakyrakis thinks the court does not properly assess the moral questions involved. But for Möller one cannot 'blame the principle of proportionality for this'. One can only blame the court for not applying proportionality properly.[67] The same applies to the charge that proportionality is impressionistic, ie, that proportionality decisions do not articulate the reasons that justify them. Möller answers that the fact that certain decisions that apply proportionality are impressionistic does not mean that proportionality as such must be so; further, he argues, moral reasoning is not easy and sometimes courts must rely on their intuitions if they are to reason on their own about what is the morally best outcome of the case.[68]

All this has an important consequence for the proportionality debate. When proportionality is conceived as unconstrained moral reasoning, all the objections that were aimed against proportionality as such seem to lose their force. This is because they were aimed at a different account of proportionality, and also because proportionality as unconstrained moral reasoning does not propose a substantive test for addressing conflicts involving human rights—one cannot point to any intrinsic shortcomings with the way it addresses conflicts involving human rights, because it does not propose any distinctive way of addressing those conflicts. All the possible deficiencies one can find in applications of proportionality are just that: a court failed to 'balance reasons' properly, ie, failed to

[66] On Tsakyrakis' objections, see above V.1. Möller's defence is in *Challenging Critics* 718.

[67] Ibid.

[68] Ibid 727-730.

understand the reasons at stake in the case and act accordingly. And these deficiencies in applications of proportionality seem not to count against proportionality as such, but only against a particular decision. Assuming that a bad application of proportionality does not count against proportionality itself justifies Möller's insistence on distinguishing critiques of a decision or a version of proportionality and critiques of proportionality as such[69].

VI.4 How much guidance does the proportionality test really give?

So far I have emphasized the open-ended aspects of the different versions of the idea of proportionality as allowing for unconstrained moral reasoning, since these aspects are the most prominent in the writings of the theorists that defend proportionality, and the ones that allow this account to avoid the objections made to the maximisation account of proportionality. Nevertheless, at moments some authors suggest that there is another aspect to this account of proportionality: proportionality would be composed of tests that provide relevant legal direction for solving human rights conflicts. Thus, Möller claims that 'proportionality guides judges through the reasoning process as to whether a policy does or does not respect rights'[70], quoting Kumm, who claims that proportionality can be seen as a 'check-list of individually necessary and collectively sufficient criteria that need to be met for behaviour by public authorities to be justified in terms of reasons that are appropriate in

[69] See Ibid 710-1, 718, 722, and 728. For a similar argumentative strategy see Madhav Khosla, 'Proportionality: An assault on human rights?: A reply' (2010) 8 Int'l J Const L 298, 302-306.

[70] Ibid 276. See also *Global Model* 179.

a liberal democracy.'[71] Möller further claims that proportionality allows judges to 'be *analytical*, that is, breaking one complex question ("Is the interference with the right justified?") into several sub questions that can be examined separately.'[72] It would seem that even though the balancing stage consists of open-ended moral reasoning, and thus, it would require reasoning that is unaided by legal direction, the previous stages do provide at least some guidance, so that 'in many cases, important moral work has already been done when reaching the balancing stage.'[73]

But there is a tension between guidance and opportunity for engaging in open-ended moral reasoning. Because constraint is the necessary consequence of guidance (if the law guides the judge towards a particular solution to the case, then other alternative solutions are excluded), the more specific the guidance provided by proportionality, the more it will constrain the reasoning of the judge, and thus the less it will allow for open-ended moral reasoning oriented towards justification. Defenders of proportionality as unconstrained moral reasoning never directly address this tension between guidance and unconstrained moral reasoning. But if proportionality did provide specific guidance, then it would not allow for open-ended 'balancing as reasoning', nor would make any sense to talk about a 'turn from legal interpretation to public reason oriented justification'[74], since the solution to

[71] See *Socratic* 144, quoted in *Challenging Critics* 726.

[72] *Challenging Critics* 727 (emphasis in the original).

[73] Ibid.

[74] *Socratic* 142.

the issue would be provided (at least to a considerable degree) by the law, and would thus depend on the interpretation of the relevant legal materials.

Note that the whole structure of the proportionality test (according to its doctrinal formulation as a four-pronged test) by focusing on means-ends rationality, and then on a comparison between the gains of the different possible policies, presupposes that interferences with the right must and can be justified *by reference to the gains achieved by some other right or public aim.* It is telling that though the test explicitly addresses the question of whether the measure that affects a right pursues a legitimate *aim*, it does not ask whether the measure is a legitimate *means* for furthering that aim. The issue is about consequences: whether the measure is adequate and necessary to pursue the aim, and whether bringing about that aim compensates for the loss on the side of the right. As said above (II.2), this links the proportionality test with the maximisation account of proportionality: the less open-ended we conceive the test to be, the more it will invite judges to the kind of maximisation inquiry that was the target of the objections raised against proportionality, which Möller and other theorists of proportionality wish to avoid.

And they succeed in avoiding these objections, precisely because on their account, proportionality is understood as a particularly flexible test, allowing for open-ended moral reasoning. Despite Möller and Kumm's remarks suggesting the contrary, their version of proportionality offers almost trivial aid for addressing the issues to which it is applied, far less than what the law generally offers (or aims to offer) judges. This is the case with the balancing prong, of course, which on their account requires assessing the reasons in favour and against the justification of a measure. What about the other prongs?

In assessing the tension between open-endedness and guidance in the theories of proportionality as unconstrained moral reasoning, we need to bear one crucial distinction in mind. It is one thing what proportionality as a technical legal category directs us to. It is another what are the morally relevant requirements that, for some theorist, should bear on the case and thus should be taken into account in the proportionality assessment. Take the legitimate aim prong. What counts as a legitimate aim is not determined by proportionality. It is typically not determined with precision by limitation clauses, which, if at all, refer to broad categories of social goods such as national security, protection of morals, rights of others, etc. Webber has noted that in a given case there are commonly 'different possible characterisations' of the legitimate aim at stake, but the proportionality test does not offer guidance as to which of these characterisations should be used for the purposes of applying the test.[75] Möller's own examples show this. What counts, for example, as a legitimate aim for the purposes of banning euthanasia or abortion? Legal sources do not tell us. Möller goes some way, as does Kumm, into identifying considerations that would fail the test, relying on John Rawls' idea of public reason.[76] But antiperfectionism—which is still quite abstract—is one moral position among others[77]. As a technical category, proportionality would allow judges to follow that moral position, or other moral positions—as they have

[75] Grégoire Webber, 'Rights and the Rule of Law in the Balance' (2013) 129(Jul) LQR 399, 411.

[76] See *Challenging Critics* 725, and *Socratic* 159.

[77] For examples of rival positions see Michael Sandel, *Public Philosophy: Essays On Morality In Politics* (Harvard University Press 2005) ch. 23, and Joseph Raz, *The Morality of Freedom* (OUP 1986) part. II.

done on different occasions.[78] The antiperfectionism of Möller and Kumm is not trivial, though. If they are right, a judge applying proportionality should follow their proposals. But, as it stands, a judge following proportionality is not directed (guided and bound) by the law in this respect. And even if they were bound by some form of antiperfectionism, this still would be too abstract to provide effective guidance in most cases, since being within the domain of public reason, even Rawlsian public reason, is a minimal requirement and not a seal of reasonableness or correctness. That something falls within the confines of Rawlsian public reason does not mean that it is right, or that it is not fallacious, or that it relies on a good interpretation of the relevant data, or that it is not leaving out of sight some relevant moral or prudential consideration, or that it is the aim pursued for the sake of this policy and what the moral value of that aim is. It simply means that it is cast in a certain way so as to appeal to 'public values expressed by a political conception of justice.'[79] Therefore, the assertion that policies whose aim cannot be justified in terms of Rawlsian public reason fail the legitimate aim test does not provide much guidance. This certainly applies to Möller's examples of abortion and euthanasia. If—as Rawls believed in relation to the abortion debate[80]—those arguments favouring a ban can be and often are presented as arguments relating to the respect of the rights of others, without relying on comprehensive views on the good life, then they would be compatible with the idea of public reason. This does not mean, as Rawls also remarks, that those positions are more

[78] See, for example, *Handyside v United Kingdom* (1979-80) 1 EHRR 737 para 52, and fn 23 in ch VIII.

[79] John Rawls, *Justice As Fairness: A Restatement* (Harvard University Press 2001) 91.

[80] See Rawls' example of what he considers an argument 'clearly cast in the form of public reason' against 'a decision to grant a right to abortion' in John Rawls, *Political Liberalism* (Columbia University Press, paperback edn. 2005) liv fn 32.

reasonable than other positions against them.[81] And the same can be said of arguments supporting liberalisation of euthanasia and abortion. The implications of this for our purposes is that even if antiperfectionism became part of the law, more precision would still be needed to guide judges in addressing complex moral and political debates.

Something similar occurs with the necessity and adequacy prongs. They do seem to direct to something more precise: to an assessment of whether a certain measure is in fact apt for achieving the legitimate aim, and whether there are other less intrusive means that could be used to attain the aim. Nevertheless, as Möller acutely observes with relation to the necessity prong, '[t]he traditional formulation of the necessity test … is simplistic. The problem is that often there exists an alternative policy which is indeed less restrictive but has some disadvantage'[82], like, for example, being less effective, more expensive, or imposing burdens on third parties.[83] The question is then 'whether the additional gain of the more restrictive policy … justifies the additional burden on the right holder.'[84] But this is a question whose answer requires more than establishing whether a certain mean will attain a particular end, or whether there are other less restrictive means that could equally attain the end. It requires a normative assessment of the kind that is performed at the balancing stage. And this is why, as Möller observes, it is clearer to assess this question at

[81] Ibid liv-lv.

[82] *Challenging Critics* 714.

[83] Ibid 714

[84] *Global Model* 196.

the balancing stage.[85] This does not mean that the necessity and adequacy stages cannot be interpreted as having a precise, technical meaning. But it greatly diminishes the importance of that assessment, since in all cases but the trivially easy ones, the relevant question is not so much the one addressed by the necessity and adequacy test, but whether those adequate and necessary means are justified in light of alternative policies that could realize other similar ends through other means[86]. This requires the kind of enquiry characteristic of the balancing stage, which, as has been established, provides no legal direction.

The relation between the structure of the proportionality test and its allowing for open-ended moral reasoning is best understood following some of the insights of Dénise Reaume's work on proportionality. The first three tests (legitimate aim, adequacy, and necessity) can be seen as establishing a conflict between particular rights, values, principles, or interests. The legitimate aim test identifies the value that conflicts with the right infringed. This will require more or less open-ended moral reasoning in specifying the aim, and in assessing whether an aim is legitimate or not, or in the public good, or part of a restricted aspect of the public good as specified by some limitation clause—eg, national security. The adequacy prong requires establishing exactly what the two values or principles or interests are that are in conflict: it requires assessing whether a particular 'objective is not in play in this situation.'[87] The necessity prong can, if interpreted strictly,

[85] *Challenging Critics* 714; and *Global Model* 194-5.

[86] See *Global Model* 196: 'The proper way to handle such a situation must be to assess all possible policies relative to each other.' Citation omitted.

[87] Denise Réaume, 'Limitations on Constitutional Rights: The Logic of Proportionality' (2009) 2009 26 Oxford Legal Research Paper Series 1, 10.

show whether 'there is a real conflict'.[88] Up to this point, the most that the legitimate aim, adequacy and necessity subtests can do is to clarify what are the values, interests or principles in conflict. The crucial question of which of the conflicting values, interests, or principles at stake will have priority is resolved at the balancing enquiry, where the proportionality test requires unconstrained moral reasoning. Thus, we could say more precisely that the account of proportionality explained in this chapter is one that understands proportionality as allowing for unconstrained moral reasoning *in establishing what are the rights, principles, values or interests involved, and particularly in deciding which of the conflicting rights, principles, values or interests takes priority in the concrete case.*[89]

VI.5 Introducing the objections

One important argument against vague legal methods is that they are opposed to the ideal of the rule of law. The values associated with it—such as certainty and predictability in human relations—are severely harmed, if not sacrificed, when we make law through

[88] Ibid 11.

[89] In any case, Möller in other parts of his work readily acknowledges the idea that proportionality provides little legal guidance. So, for example, as a rebuttal to the objection that 'proportionality is morally neutral and thus avoids the moral issues', he claims that '[t]he application of the proportionality principle must also be moral reasoning'[89]. After illustrating this claim with the *Odievre* case of the European Court of Human Rights, he says: 'One might say that your job as a judge is to apply the Convention, not to develop free-standing moral arguments. … *But it is one of the crucial features of the proportionality test that it simply directs judges to assess the weights of the respective rights and interests without giving them further instructions.*' Möller *Challenging Critics* 716-7 (emphasis added). The lack of guidance provided by proportionality, and particularly by the balancing test, is also acknowledged by Möller in his engagement with the objection that balancing is 'impressionistic'. Ibid 727-8.

legal categories that are so vague that they allow judges to reason morally on what is the best solution to the case, without any effective constraint imposed by the law. The law then becomes uncertain and unpredictable, and there is no guarantee that state power will be bound by clear and previously established legal rules, known by its subjects, and applied equally to those in the same situation. Grégoire Webber has already explored insightfully the abandonment of the ideal of the rule of law by certain doctrines of proportionality, as well as its costs, in a recent article. He argues that 'by appealing to general practical reasoning, the principle of proportionality offers too many channels and too many directions to guide the legal subject's and legal official's practical reasoning and so fails to satisfy the rule of law.' [90]

Holding those important costs in mind, one can feel tempted to think that there is a trade-off between, on the one hand, formal rule of law values (such as certainty and predictability), and, on the other, substantive values (such as justice and respect of people's dignity).[91] Furthermore, the defender of proportionality as unconstrained moral reasoning could say that, since that trade-off exists, the question is how to relate those values in the best way in each case, which is precisely the task of the judge deciding a case through unconstrained moral reasoning. Formal rule of law values should be also assessed, together with substantive values.

[90] See Webber (n 75) 416.

[91] Webber is aware of this possible argument against his position, though he declines to pursue it, only suggesting that it 'carries a special burden'. Ibid 400, 419.

One possible reply to this defence is to question whether courts are more likely to assess those different values than other institutions, and thus, whether it makes sense that courts review the decisions of those institutions. Or to question whether courts are more able to issue the necessary kinds of directives, at the right time and in the right manner, than other institutions. These two possible replies concern the issues of the epistemic advantages and institutional capacities of courts as compared to legislatures or the executive.[92] Another potential reply is that the rule of law would suffer harm even if courts never decide to sacrifice it for the sake of substantive values—the mere fact that they can do so and are always prepared to abandon the rule of law when there is a greater gain on the side of the substantive values creates uncertainty. Though the risk of harm to the rule of law may be significantly reduced by a stable practice of courts of awarding a great weight to rule of law values.

I intend to provide an objection to proportionality as unconstrained moral reasoning that circumvents these issues by challenging the premise implied by them—that there is a trade-off between formal rule of law values, and substantive values such as justice in the particular case. When evaluating proportionality and contrasting it with other legal methods, one should not be distracted by the mere logical possibility of a case where, for example, there is a trade-off between predictability and justice. What matters is which institutions and legal methods make it more likely that justice and other relevant values at stake in adjudication will be served. My claim is that from this perspective, there is no

[92] On an analysis of courts' epistemic advantages and disadvantages, see Adrian Vermeule, *Law and The Limits of Reason* (OUP 2008). On the problem of institutional capacities see Cass Sunstein & Adrian Vermeule, 'Interpretation and Institutions' (2003) 101 Michigan LR 885.

trade-off in adjudication between rule of law values, and substantive values. This is because adjudication guided by relatively precise and authoritative legal categories which are prior to the case, is not only required by the ideal of the rule of law, but also greatly increases the likelihood of arriving at the substantively most reasonable solution. Legally directed adjudication is better than unconstrained moral reasoning both for the rule of law, as well as for justice and other substantive values involved in the case.

VII. The Need for Legally Directed Adjudication

VII.1. Introduction

As seen in the previous chapter, recent trends in human rights law seem to advocate for judges to engage in legally unconstrained open-ended moral reasoning when adjudicating human rights cases. The traditional conception of legal reasoning as constrained by positive sources (such as statutes and precedents) has been regarded as characteristic of a culture that values respect for authority. This is contrasted with the kind of legal reasoning that is more characteristic of a culture that places greater value on reason and justification. From this perspective, adherence to statutes, doctrines or precedent is seen as little more than an obstacle to the realisation of substantive values.

This position is not without intuitive appeal. It is easy to imagine positive law and technical legal categories as detached or even opposed to what justice requires. The sometimes cryptic legal categories that only lawyers understand can seem (especially to the lay person) to be removed from actual questions of justice. This is why time and again there have been proposals for freeing legal adjudication from the constraints of the technical legal categories of lawyers, and allowing judges to engage directly with questions of justice. Part of the German ‘free law’ movement in legal theory advocated for legally

unconstrained adjudication.[1] It was also commonly promoted by those that favoured the idea of the 'people's justice', as with those advocating for revolutionary understandings of legal adjudication, of which communist Cuba provides one of the most emblematic examples.[2] And now, as we have seen, some proposals in the area of human rights propose a similar form of adjudication that proceeds with independence of technical legal categories. These are perhaps the more radical and explicit versions of an idea which in a more moderate form suggests simply leaving matters for judges to decide on a case-by-case basis, with a great degree of discretion. The exact proposals are not my concern here, but the general idea that grounds them.

This idea is a particular view of legal reasoning and of the role of doctrinal legal categories in adjudication that is implied in some academic accounts of legal reasoning, and, I believe, is consistent with widely shared views of legal practice in society at large. It

[1] See W Friedmann, *Legal Theory* (5th edn, Stevens & Sons 1967) 344.

[2] 'The tribunales embodied the notion that "men will be tried by their peers, that justice will be done by the people." The new order entrusted the common man with the administration of justice and the ability to reach the "'right' decision."' Paul Bernstein, 'Cuba: Last Look at An Alternative Legal System' (1993) 7 Temp Int'l & Comp LJ 191, 196 (quoting from Ian McColl Kennedy, 'Cuba's Ley Contra La Vagancia-The Law on Loafing' (1972) 20 UCLA LR 1177, 1186, 1244.). There were many different motivations at work in socialist revolutionary reforms of legal systems. Only one of them is to better pursue justice by getting rid of legal 'formalism'. Other motivations commonly at work are the destruction of pre-revolutionary institutions, the incorporation of working classes into roles of authority, the education of the citizenry in the values of the revolution, overcoming problems associated with the lack of enough legal professionals, and taking power away from a class (lawyers) associated with the ideas of the pre-revolutionary state. All these motivations were at work in the Cuban case. See Luis Salas, 'The Emergence and Decline of the Cuban Popular Tribunals' (1983) Law and Society Review 587, 597-600. Here it is particularly interesting to note that eventually, in the 1970's, reforms were implemented to make legal adjudication again formal, legalistic, and applied by lawyers. See Ibid 607-9, and Bernstein (n 2) 197. A similar process occurred in China, with proposals for overcoming legal adjudication's legalism under Mao, and a subsequent return to more legalistic forms of legal adjudication after his death. See Shao-Chuan Leng, 'Role of Law in the People's Republic of China As Reflecting Mao Tse-Tung's Influence, the' (1977) 68 J Crim L & Criminology 356.

consists of three elements. The first element is an understanding of reasoning according to the law and moral reasoning as largely independent. This understanding accepts that on occasion moral reasoning can fill gaps in the law, and that law can specify what is morally underdetermined, but it nonetheless conceives legal and moral reasoning as different and separated forms of practical reasoning, which can yield different outcomes for the case.[3] The second element is a view of legal rules and doctrines (of legal categories in general) that conceives them as obstacles in the path of moral reasoning towards justice and substantial values. Legal categories are seen as curbing moral reasoning. Judges could reason about the morally best solution to the case, but in doing so they face the constraint of legal rules, which can foreclose what would otherwise seem the more just or reasonable decision.[4] And the third element is attributing distinct values to both forms of reasoning. Moral reasoning about the right outcome of the case is oriented to realising justice and other substantive values. Reasoning according to doctrinal legal categories, on the other hand, is necessary for the realisation of formal, rule of law-like values, such as 'definability of interpersonal issues and determinability of human disputes'.[5] Thus, for this view, there is a trade-off: the more one reasons according to law, the less the guarantee of a substantively

[3] This is implied in Shapiro's distinction between 'legal reasoning' and 'judicial decision making', or in Raz's distinction between 'reasoning about the law' (or, more recently 'formal legal reasoning') and 'reasoning according to the law'. See Scott Shapiro, *Legality* (Harvard University Press 2011) 248; Joseph Raz, 'On the Autonomy of Legal Reasoning', in *Ethics in the Public Domain* (OUP 1996) 326, 332 ff, and 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 321, 369. David Lyons draws this distinction explicitly in 'Justification and Judicial Responsibility' (1984) 72 Cal L Rev 178. For Lyons, it is the duty of the judge to perform both kinds of reasoning, and, if the legal outcome is not morally acceptable, then it should be discarded—thus, there are no easy cases, since legally easy cases would still need to be assessed from the perspective of morality.

[4] See bellow VII.5.

[5] Neil MacCormick, *Rhetoric and the Rule of Law* (OUP 2009) 151.

reasonable outcome; in turn, the more one engages in moral reasoning, the less the likelihood of certainty and predictability.

If one accepts this picture of legal adjudication, one has reasons to propose to free adjudication from the constraints of rules and other legal categories, so as to allow for a better engagement by the judge with moral considerations on how to realise justice and other values in the case she is deciding—to propose that legal adjudication turns 'from interpretation to public reason oriented justification'[6]. Or, if those legal categories were indispensable (because they realise some important other value, like certainty), to create and interpret legal categories in a way that allows as much room as possible for open-ended moral reasoning about the right solution to the case.

I believe that this is a distorted view of the role that legal categories have in legal adjudication, and the specific contribution they make. It overlooks the ways in which legal categories can aid judges in arriving at substantially reasonable decisions in the circumstances of real world adjudication. Legal adjudication does not face the dilemma of (i) following authoritative legal materials and realising rule of law values, or (ii) engaging in unconstrained moral reasoning and realising the substantial values at stake in the case.

I will contend that there are good reasons for adjudication and legal reasoning to be largely constrained by positive sources and articulated through legal categories—what I will refer to as 'legally directed adjudication'—and will attempt to provide a general

[6] Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 Law & Ethics of Human Rights 142, 142.

explanation of these reasons. These reasons relate not only to the need for certainty and predictability (important as they are: see below VII.3.6), but also to the realisation of justice and other moral values through adjudication. My aim is to provide a normative reconstruction of legally directed adjudication, which, I hope, can illuminate the relation between adjudication according to law and the realisation of justice and other values through legal adjudication.

VII.2. Berta the Judge

There are reasons for adjudication to be legally directed. These reasons consist of benefits that adjudication can achieve when it is legally directed. These benefits greatly increase the likelihood of legal adjudication (as it takes place in the circumstances of real cases) arriving at a just result, while at the same time realising some other values at stake in the practice of adjudication.

These benefits can be understood as remedies to deficiencies that adjudication would have if it were not legally directed. Thus, I will start by explaining these deficiencies. I will do these through an allegory of a judge who has to decide cases without any guidance of law or doctrinal categories. The allegory tells the story of a community of survivors of a shipwreck that settles on a desert island. When the first conflicts arise, they realise that they need someone to decide them. They choose Berta. Berta has no knowledge of law, but she is chosen as the judge of this community on account of her known honesty, thoughtfulness, and patience. But Berta will encounter several problems in performing her task.

One day Jill and Ted come to Berta with the following complaints. Jill claims that Ted has not been a good neighbour. He said he was going to give Jill a big seashell: now it has been six months since he promised. Ted quickly interjects that the agreement was that he would give Jill a seashell if she gave him ten bananas on Sunday, but instead she gave them to him on Saturday. Ted found this unacceptable and returned the bananas. But Jill's allegations continue. Ted has been generally impolite, and furthermore, he should be punished since the reason she wants a new seashell is because the one that she had was destroyed when Ted leaned his boat against Jill's wall, causing the wall to collapse and destroy Jill's beautiful seashell. Jill also wants to complain that Ted has not delivered a Jane Austen novel he saved from the shipwreck, which he had promised long ago to give to Jill. Instead, he gave it to Stacey. Ted pays too much attention to Stacey, neglecting his poor dog that walks around all dirty and hungry.

If you are a lawyer, you have a sense of how to order this confused account of facts. You know what this conflict is about (while reading the paragraph above you probably intuitively think: 'this is a tort', 'this is about contracts', 'here the question is whether there has been a punishable offence', etc.), and what it is not about (it is not about 'who is a good neighbour', or 'who is nice', or whether Stacey is a bad influence on Ted). You also have a sense of the different considerations that are relevant to address the different issues (you would apply different tests to establish whether there was an obligation in tort to compensate for the seashell, than you would to establish whether Jill or Ted breached a contractual obligations, or whether Ted needs to be punished for an offence) and what

further questions would need to be asked to know other relevant facts that, while not mentioned by the parties, are crucial for deciding the case.

Each one of these issues has a complexity of its own. Take, for example, the question of whether Ted must compensate Jill on the grounds of him destroying Jill's seashell. This depends on a number of considerations, which have been systematised by legal doctrine in different legal systems. Though the way these considerations are expressed and ordered by legal doctrine varies from jurisdiction to jurisdiction, developed legal systems attempt to give expression to similar considerations. Legal learning allows you to know these considerations. In the example, the first question is whether Ted committed a wrong against Jill (if Ted's making Jill worse-off was not the product of him wronging her [imagine the seashell was Ted's, just that Jill really liked to look at it], then he shouldn't have to compensate her). To establish this we need to first answer the question of whether Ted owed Jill a duty of care—a duty to contemplate that he could cause harm to Jill or her property by leaning his boat against Jill's wall, and take reasonable measures to avoid that. This in turn depends on a number of factors: Could Ted have foreseen that his actions would cause the wall to collapse and destroy Jill's seashell? Yes he could, since Jill's is a weak wooden wall that collapses easily. Was it reasonable for him to lean the boat on the wall? No it was not, since there was no reason for leaning the boat there instead of somewhere else. Did Ted make Jill worse-off, or simply omit an action that would have made her better-off? Clearly the former. Was the harm serious, or did he merely cause some distress? Yes it was serious, affecting Jill's property. If it is decided that Ted owed a duty of care to Jill, would this expose Ted to having to bear responsibility for damages disproportionate to his guilt? There is no reason to think that. He would just have to

compensate for the seashell, which he actually destroyed. Would deciding that Ted owed a duty of care to Jill weaken the sense of responsibility of the people under Berta's jurisdiction; would it affect negatively the general interest of people living in the island? Not at all.

Once it is established that Ted owed Jill a duty to take care not to lean his boat against Jill's wall, we should establish whether Ted breached that duty. In the case it is clear he did. So, it becomes clear that Ted committed a wrong in relation to Jill. Then, it must be established whether Jill suffered some kind of loss as a result of Ted's wrong (which she did, since as result of Ted's leaning his boat against Jill's wall, the wall collapsed and destroyed Jill's seashell). Thus, Ted should compensate Jill for her loss of the seashell.

Further questions might be raised in relation to how this compensation should be made, and in relation to all the other issues involved in the case. All this shows the complexity of the case Berta has to decide. But since Berta does not possess any legal learning, she does not know the doctrinal categories that would help her make sense of these complex issues. Furthermore, Berta does not have the additional benefit of the issue being presented by lawyers. In a typical court case the lawyers present the facts already organised in a logical order in accordance with the legal categories that apply to the case, and the decision is expected to turn on the application of those categories. But Berta cannot count on that either.

Thus, the first problem she meets is an epistemic one. The facts and the claims of the parties are disorganised and complex, and she has to find out what is morally relevant and irrelevant in the case, and how to relate the morally relevant considerations. This might not be a problem for Dworkin's Hercules[7], but it is for Berta. She is a conscientious judge, but not a moral genius, and she is under severe time and resources constraints. Thus, we should expect Berta to be confused when trying to decide cases, failing to understand which are the relevant considerations, including irrelevant ones, and giving poor reasons for her decisions. In this story she is confused. She wonders whether it should make a difference that Jill delivered the bananas one day late and whether that justifies Ted not giving her a new seashell. But, and this Berta is sure of, impoliteness is always a bad thing. Perhaps the general impoliteness of Ted should be a reason to find that Jill is right and make Ted give her a new seashell. Furthermore, he should have given the Jane Austen novel to Jill, who is a much better girl than Stacey, who, furthermore, has already a couple of books she saved from the shipwreck. Perhaps all that bad news about Ted amounts to an intuition: that Jill is right and Ted is wrong. But Berta would have a hard time explaining precisely the reasons why she is deciding in favour of Jill, or clearly establishing the exact extent of Ted's responsibility.

Perhaps some other person in Berta's position could make a better job at responding to the morally relevant aspects of the case.[8] But there is no reason to think that they will, if

[7] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) 105. See also Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 239 [hereinafter *LE*].

[8] Though we should not be very optimistic. An illustration of lay judges adjudicating without knowledge of the law (when not with direct contempt for it) is the series of stories that The New York Times published in 2006 on New York's town and village courts ('justice courts'), where, it

they are not legally trained. They do not need to know when a contract is considered unfulfilled, and what are the possible responses to that situation; nor do they need to know the conditions under which one has a duty to compensate someone for making them worse-off; nor do they need to know the conditions for a promise to be binding, etc. If you do not know these legal categories, it is unlikely that you will be able to give order to the facts and understand the different considerations at stake, and the proper response to them. What is likely, then, is that Berta—or any other person that does not know the law enough—is confused when faced with the case, or, worst, that a less conscientious judge greatly

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reported, abuse and injustice is widespread. What is remarkable for our purposes is the vivid connection in the stories between abuses and injustices, and that adjudication in these courts was largely not directed by the law, due to the fact that the judges were lay people with almost no legal training, and also due to some judges thinking that enforcing their own views on justice would be better than following the law. Thus, for example, one of the judges, 'who cursed at defendants and jailed them without bail or a trial', among other abuses, is reported as saying: 'I just follow my own common sense. And the hell with the law.' The story reports that '[l]ike many small-town justices, he said many of his decisions were down-to-earth solutions.' Another judge, 'in what the Commission on Judicial Conduct called “a shocking abuse of judicial power,” ... single-handedly went after a man he decided was violating local codes on the keeping of livestock ... The judge interviewed witnesses out of court, tipped off the code-enforcement officer, lobbied the town board to deny the man approval to run a trailer park, then jailed him for 10 days without bail — or even a chance to defend himself'. The judge said ‘the commission seemed to be chasing legal technicalities rather than real justice.' Many judges seem to have requested more legal training. One of them, 'a meat cutter who routinely jailed defendants in Tupper Lake to coerce them into pleading guilty, neatly summed up his insecurities in one closed hearing: “I’m almost like a pilot flying by the seat of my pants.”' Basic procedural rights were denied as well: A judge, 'fretted that she did not “really have the time to puzzle this out” when a criminal defendant argued that evidence had been seized illegally. So she had the prosecutor write her decision, the commission said.' Another decided in favour of a defendant that had not even formally appeared before the court, after, on his own initiative, the judge went to personally interview the defendant and witnesses, and told the defendant he would throw out the case. The judge 'told the commission that he had never heard of the elementary legal rule that bars a judge, except in the most extraordinary circumstances, from secret contact with one side of a case. “It’s not even explained in my manual,” he said'. The same judge displays the underestimation of the law characteristic of some of the judges in this story, affirming that his interest in the law 'does not include a fascination with the technicalities that occupy lawyers. “If you look at the laws, it’s all common sense,” he said.' See The New York Times, 'Broken Bench - In Tiny Courts of NY, Abuses of Law and Power', 25 September 2006, available in http://www.nytimes.com/2006/09/25/nyregion/25courts.html?pagewanted=all&_r=0, and 'Broken Bench - Small Town Justice. With Trial and Error', 26 September 2006, available in http://www.nytimes.com/2006/09/26/nyregion/26courts.html.

simplifies the issues at stake and hands down an unreasonable or unfounded decision. I will call this the 'problem of the confused judge'.

Berta faces another problem. She is not so sure about what would be the just outcome of this case, but she has a sense that at least Ted was not obliged to give the Jane Austen novel for free. But this is an important issue for Jill. And Jill is a very well respected member of the community. Many people have approached Berta to tell her they think Jill is completely right, and that that mean fellow Ted deserves to be punished severely. Berta is not sure whether Ted deserves any punishment, or whether Jill is right about anything at all. What she is sure of is that many people in the community will be enraged with her if she does not decide in favour of Jill. And Ted has friends too, who will feel angry at her if she decides against him. She feels under more pressure to make a decision in favour of Jill though, or, and this seems the perfect solution, promote an agreement between the two, lest she have to bear the burden of an unpopular decision (and figure out a solution to a problem she feels might be too complex for her anyway). Perhaps Jill will be willing to give another ten bananas, and, if so, perhaps Ted will be willing to repair the wall? This may not be just. But it might maximise the preferences of the parties, and thus reduce dissatisfaction with the decision. I shall call this 'the problem of the unduly influenced judge'.

Berta is thoughtful and cares for justice. But, like everybody, she has passions that can cloud her good judgment. Good passions, since Berta is a good person. For example, she cares very much about animals, and feels very mad when people mistreat them. These are generally good feelings that arise out of compassion and a sense of responsibility. But

her anger affects her evaluation of this case. Ted has neglected his dog—the poor animal. Berta feels more than willing to give a lesson to Ted. Perhaps he should deliver a seashell, and something extra for the nuisance, and also give to Jill the Jane Austen book, plus any other book that he has. That will teach him a lesson not to neglect his dog and be more careful. This, I call 'the problem of the passionate judge'.

From the perspective of Ted there is another problem. He is subject to another person: Berta—perhaps to her whims, or perhaps to her more rational opinions. He remembers that in the place were he grew up people would say they were ruled by laws and not by men. But Ted is ruled by another person. Even if everybody agreed on Berta being the judge of the village, and even if it is true that Berta is generally a thoughtful and honest judge, it remains true that Ted is subject to the unbound will of Berta. Which is a problem in itself—since it departs from a valuable ideal—, but also has concrete bad consequences. These consequences become clear if we imagine that the town of shipwreck survivors has grown and now they have appointed three more judges, besides Berta, and have sent them to different places of the island to do justice. Since each of those judges is deciding cases with independence of the others, following their better judgement, there is no consistency among the different rulings of the different judges. So, Ted is not so happy with his ruling once Berta decides that he should give Jill a new seashell. He knows that last week judge Albert did not made James pay for anything when he accidentally broke a plate that belonged to Peter. And judge Cindy has a completely different style of addressing these cases, promoting talking about the issue and letting the parties come at a solution. So Ted thinks it is unfair that he has to compensate Jill, while others in similar circumstances do not have to. This I shall call 'the problem of the subdued party'.

A related problem has to do with Ted not acknowledging Berta's authority. Why would he? Why would he acknowledge Berta's superior standing on these matters? What is so special about her after all? He does not see reason to attend the trial nor obey Berta's rulings. Others in the community feel the same. This I call 'the problem of legitimacy'.

Now, Robert the entrepreneur has an idea. He knows that many people want to read the Jane Austen novel. He wants to buy or rent it from whoever has a right over the book, and make some copies of it, and then sell them to the public. At the same time Orson the philanthropist wants to buy some copies and give them to the school, so that children can benefit from the few books that were rescued from the shipwreck. They would like to enter into an agreement right away (and with Orson's money, Robert could go ahead and order some pens and paper to be made, for the copyists he will hire). But they do not know what Berta will decide in relation to the book. For all they know, Berta could even decide to destroy the book—the source of conflict. Orson also does not know what Berta would decide if Robert decided to keep the money, claiming that it is not his fault that the book was not copied. Thus, they decide to wait until Berta decides about the book, and then, perhaps, Orson will be willing to take the chance of paying Robert in advance so that he can buy the materials and get started with producing the book. This I call 'the problem of uncertainty and unpredictability'.

Under these circumstances it is unlikely that Berta will be able to adjudicate well. She is faced with obstacles that, if she does not possess talent, character, and charisma to an outstanding degree, will make it very unlikely that she will be able to hand down a good

decision and provide the appropriate reasons for it. And even if she did, some of the problems—like the problem of the subdued party, or the problem of uncertainty—will remain.

VII.3. The benefits of Legally Directed Adjudication

The story of Berta illustrates some of the obstacles that adjudication is likely to encounter. These problems are not peculiar to particular types of cases, parties, or judges, but rather arise from the circumstances in which adjudication typically takes place. For example, we can expect parties or other people to care about outcomes and be willing to exert some form of pressure (not necessarily illegitimate) on the judge. We can expect judges sometimes to be influenced by their passions or ideologies. And so forth.

In what follows I will further explain the obstacles that adjudication must face. I will also explain what means can be deployed to overcome them. We can expect of judges that they be conscientious and honest, but we cannot expect of them that they be geniuses, heroes, or charismatic leaders. Those are qualities difficult to find, and few posses them. Thus, if we want to increase the likelihood of adjudication succeeding in overcoming the obstacles I identified, we cannot put our hopes in looking for better people to adjudicate. We need institutions and practices that can increase the likelihood of the judge adjudicating well. There is one particularly powerful aid that legal adjudication typically has: legal direction.[9]

[9] There can be others. For example, rules that guard against partiality on behalf of the judges, prohibiting them to see a case where they or someone close to them has an interest. Or the

By adjudication being legally directed I mean that it is based on reasoning that is constrained by positive sources (such as precedent and statutes), and articulated and guided by *technical doctrinal legal categories*—which can be gathered from positive sources or from the tradition of legal thought and practice. 'Legal categories' refers to all those legal concepts that apply to different situations, determining the legal significance of the facts, and its legal consequence—a broad class that encompasses legal definitions, requirements, prescriptions of different kinds (such as rules, principles, or standards), attributions of competence, etc. Aided by legal direction, adjudication is well equipped to face the obstacles that I presented through Berta's example.

There are two kinds of obstacles or problems. The first is that of 'outcome-related' problems. They make it less likely that the conscientious judge can arrive at a reasonable or correct solution. The second kind is composed of problems that are not outcome related. They point to deficiencies generated by the way the issue is decided, whatever the outcome, and I call them 'intrinsic problems'. The benefits of legally directed adjudication consist of its potential to be a remedy to all these problems. So, I will explain them in relation to the problems.

The problems are the following:

I. Outcome-related problems:

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institutions that express the rule of law idea that the office is to be distinguished from the person that on a particular occasion holds it.

a) Problem of the confused judge.

b) Problem of the unduly influenced judge.

c) Problem of the passionate judge.

II. Intrinsic problems.

d) Problem of the subdued party.

e) Problem of legitimacy.

f) Problem of uncertainty and unpredictability.

I will explain at greater length the first benefit of legally directed adjudication, which is related to 'the problem of the confused judge'. I will do so because the first benefit of legally directed adjudication explains how the law makes it more likely that judges and lawyers will engage with the relevant reasons, and do so well. This is important for establishing that in settling for this form of adjudication there is no trade-off between substantive values and other rule of law or formal values, which, in turn, is important for my argument against proportionality as unconstrained moral reasoning (see above VI.5). Legally directed adjudication can increase likelihood of both kinds of values being realised through legal adjudication. On the other hand, the explanation I will provide of the other benefits of legally directed adjudication will be relatively brief, since they are not controversial and have been explained by others. I also focus almost exclusively on the benefits of legal direction *for legal adjudication*. This does not mean that what I say on legal direction does not bear on the application of law more generally, outside the courtroom. But I do not explore that here.

Outcome-related problems

VII.3.1. The Problem of the Confused Judge

VII.3.1.1. Complexity and Legal Knowledge

Berta does not have something that judges typically have: knowledge of legal categories. These categories are typically learned through a legal education that comprises not only statutes and court decisions as positive sources, but also doctrine and generally a tradition of thought about legal problems and institutions. Legal categories can guide the judge through the complexity of the concrete case, expressing what is relevant from the perspective of practical reason and what is not for a given type of case.

Legal categories are sometimes complex because the problems they address are complex. They provide guidance because there is a need for guidance. This accounts for the sense of perplexity when one confronts a new case without the conceptual tools to understand it, as the allegory of Berta portrays. This is so because even ordinary legal problems are not trivially easy.[10] They are composed of a more or less complex array of

[10] Weber held that the complexity of cases increased with the advent of modern capitalism (which, in turn, increased the need for a more technical, rationally formal law). Max Weber, *Economy and Society* (University of California Press 1978) 977. But this does not imply that cases in less complex societies are so simple that the problem of the confused judge does not arise. Weber himself notes that, for example, in primitive societies there is no distinction between civil redress and criminal punishment (even if, we could add, this distinction is morally relevant). Ibid 647. This inability to differentiate properly is to be expected in societies where legal learning has not

facts and when presented for solution they raise countless potentially relevant considerations. To solve the problem correctly,[11] one has to give order to those facts and select which are the relevant facts and considerations. If this task can be difficult for the average judge, it is perplexing for the layperson. What are we to do with the two men who agreed one to sell and the other one to buy 'Babieca', one thinking this was a horse and the other one an ox? Or with the parents who dispute custody of the child, one basing his claim on his ability for better providing for the child's needs, and the other on the fact that she has devoted much more time and effort to the care of the child? Or with the board of directors of a company that is being sued for an illegal transaction made, without the board of director's knowledge, by an employee of the corporation? And, finally, with the man that killed a burglar who, he thought, posed a great threat to his family?

In all this cases, we seek a practically reasonable solution.[12] If you are a lawyer you will instinctively think of the legal categories that apply to these cases (you will think of common mistake; of the principle that the best interest of the child is paramount; of the reach of the board's duty of monitoring; and of the conditions for pleading legitimate

developed enough to serve as an effective guide to the judge and the community, or in societies where the judge is to decide according to his own moral judgment (what Weber calls 'Kadi-justice'), or according to some kind of concrete revelation (Weber's 'charismatic justice'). Ibid. 976.

[11] This is, to give a reasonable solution to the case. What I have to say on the benefits of legally directed adjudication does not depend on (nor I see it as being in tension with) any of the contesting views on the debate on whether there is normally one right answer to hard cases.

[12] We could say that in all these cases we want to achieve a 'just' solution. 'To do justice according to law'. But I think we want more than that. Other considerations might be relevant as well. For example, if decision X does justice to the parties, but it would create uncertainty on the markets on the limits of certain responsibilities, thus increasing the cost of business enterprises and the amount of possible litigation, and decision Y also does justice to the parties, but at the same time it crafts a more precise ruling that would not have as a result the increase of costs for business and would not increase litigation, then we would like judges to hold these considerations in mind and decide Y.

defence). This is, you already know to some extent—sometimes completely—what is relevant: to what kind of things you should pay attention to, and to what you should not. Legal categories point to what 'you should pay attention to'. And, at least in developed legal systems, what the law tells you to pay attention to is not arbitrary. It tries to express what practical reason demands in that particular problem, what justice, morality, economic efficiency and other considerations that could bear on the problem demand. If the law is successful in doing this, knowledge of the law is a relevant practical knowledge for solving the kind of conflicts brought before judges. If you do not know much about law, then we should expect you to be somehow puzzled by these conflicts, not knowing how best to go about them. This will be the case, at least, if you are relatively smart. If you are not, we should expect you to inadvertently provide a solution to the case that underestimates the moral complexity of the problem.[13] And certainly, if you are a moral genius then yes, you might not need any help from rules or traditions of thought to arrive at a just solution.[14] But if you are not, if you are a person of limited talent, like the overwhelming majority of mankind (including judges and lawyers), then providing the more reasonable solution to the conflict brought before you, under constraint of time and resources, will typically be an extremely difficult task.

[13] See above n 8.

[14] Though you would still need to know the authoritative decisions that are binding in your society. See below VII.3.1.2 the second kind of knowledge expressed by the law.

In this respect, law is similar to medicine.[15] You have an annoying symptom (say, earache). You do not know very well why or how to cure it, though you might have some hypothesis. You go to the doctor and start talking about your problem. You will typically say a number of things that are not really relevant, though you think they are, or have doubts whether they could be (eg: I caught a cold last week, and then I got the earache). The doctor, on the contrary, knows what is relevant. He knows what to discard of your explanation, and what questions to ask (eg: while you sleep, is there any grinding of your teeth?). Because he has the relevant knowledge he is more likely to understand and solve the problem correctly (eg: your earache is caused by something that is swollen because of your grinding your teeth at nights. The solution is not related to your cold; what you need to solve is the bruxism problem—use a dental guard). And we have good reasons to submit to his authority on health matters and do as he says, precisely because he has that particular knowledge that makes it more likely that he will get it right, and thus, by following his dictates, I have more chance of recovering from my illness.[16] Of course, a non-physician of infinite medical talent and with infinite time and resources at his disposal to conduct research and experiments might also reach the right answer. But since we do not know such

[15] The analogy is suggested by Aristotle in his enumeration of forensic arguments in the *Rhetoric*: '[I]t does not pay to try to be cleverer than the doctor: for less harm comes from the doctor's mistakes than from the growing habit of disobeying authority. Or that trying to be cleverer than the laws is just what is forbidden by those codes of law that are accounted best'. 1375b (W. Rhys Roberts tr, Dover 2004).

[16] I take this way of presenting the problem of authority from Joseph Raz, *The Morality of Freedom* (OUP 1986) ch 3.3 ('normal justification thesis').

people, and anyway the nature of the problem does not allow for infinite time, medical knowledge becomes crucial.[17]

But in the legal context, the complexity of the problem and difficulties it implies for a normal person who is not a legal expert tend to go unnoticed. They are obscured precisely because when lawyers start to reflect about the kinds of conflicts they have to deal with they have already been introduced to the problem through certain conceptual categories present in the law. We learn the law, and learning the law we come to think about the problem the law is dealing with. And sometimes we deal with a new problem, of course, but we already have a repository of concepts there, available to make sense of it. And if none of the categories available seems appropriate to deal with a new problem, then we deem it to be of an extraordinary complexity and difficulty. Well, imagine we had no legal categories: would not all problems seem difficult[18]?[19]

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[17] Similarly in literature. TS Eliot argued in his essay 'The Possibility of a Poetic Drama', that an inherited form is essential for minor poets to be able to do something 'worth doing': 'To create a form is not merely to invent a shape, a rhyme or rhythm. It is also the realization of the whole appropriate content of this rhyme or rhythm. The sonnet of Shakespeare is not merely such and such a pattern, but a precise way of thinking and feeling. ... We should see then just how *little* each poet had to do; only so much as would make a play his ... When there is economy of effort it is possible to have several, even many, good poets at once. The great ages did not perhaps *produce* much more talent than ours; but less talent was wasted. Now, in a formless age there is very little hope for the minor poet to do anything worth doing... Under the present condition the minor poet has too much to do. And this leads to another reason for the incompetence of our time in poetic drama.' TS Eliot, *The Sacred Wood: Essays on Poetry and Criticism* (Methuen 1960) 63-4.

[18] I avoid at this point talking of 'hard' and 'easy' cases, since in the literature those terms are associated with whether the decision 'flows almost inexorably from a relatively straightforward application of plainly applicable and identifiable legal rules contained in easily located pre-existing legal materials' Frederick Schauer, 'Easy Cases' (1985) 58 S Cal LR 399, 410. See Dworkin, *Taking Rights Seriously* (n 7) 81, and *LE* 255-6. I also avoid the terms 'clear' and 'problematic' to avoid implications with MacCormick's pragmatic way of distinguishing them—a case is problematic if it is 'a case in which a problem has been raised'. See MacCormick (n 5) 51. I prefer to use non-technical terms like 'complex' ('not easy to analyse or understand; complicated or

If all legal problems seemed difficult, if perplexity, confusion, or simplification were expected in legal adjudication, then this would show that there is an asymmetry between the difficulty of cases and the talent and resources of the person who has to decide them. This asymmetry is a problem for which a solution is needed. The solution is legally directed adjudication.

VII.3.1.2. What Lawyers Know

intricate', according to the Oxford English Dictionary [OED]) and 'difficult' ('needing much effort or skill to accomplish, deal with, or understand', according to OED).

[19] It could be objected that there are some very simple cases nevertheless, which do not give rise to the problem of the confused judge. This would concern cases such as standard assaults, unpaid debts, murder, etc. Even if this were true, the problem of the confused judge would reach a large number of cases. But I think that the standard cases hide a complexity of their own as well, as the story of Berta shows. For example, murder might seem uncontroversially wrong, and deserving punishment. But, what counts as murder? If I kill in self defence? If someone dies product of my conduct, but without me willing his death? If I did not kill the person, but paid someone else to do it? How can we answer these questions in a principled way that allows for consistency in the reasons that justify our punishing different crimes through time? The different legal categories of the criminal law that apply to murder show the complexity of the considerations that we need to assess in order to aptly decide whether someone deserves punishment for murdering someone else, and the magnitude of the punishment. Or take the relatively simple example concerning an unpaid debt. By framing the issue as 'concerning the payment of a debt' over the background of our legal culture, we are already presupposing a set of considerations that will be relevant for deciding the issue and others that will be irrelevant. For example, on a very basic level, we tend to treat this kinds of problems as involving an issue of justice, and not (as is the case among the indigenous Amazonian tribe of the Panará) as being concerned with the bad character of the person who did not pay the debt—which is irrelevant for answering the question of whether the debt should be paid. Moreover, the law informs the response that is to be given to such a situation—excluding, for example some measures, like imprisonment, thus giving expression to other requirements of practical reasoning. All this is to say that legal direction is at work in a non-trivial way even in these cases, that are easy precisely because they are 'standard', ie, they fully fall into the type of cases for which the law has provided clear direction on how to act. But this direction is not trivial and the fact that older or current less developed legal systems treat it differently (in ways that we would not approve for our own) attests to that.

Legal direction is a way of overcoming the problem of the confused judge. This is the specific advantage of lawyers. They know the law and how to reason with legal categories, and thus they know how to adjudicate according to the law.

But what is 'knowledge of the law', or its synonym 'legal learning'? What is this knowledge of?

I. The first kind of knowledge we can see in the law is one that derives more directly from moral reflection. There are things that moral reasoning identifies as right or wrong, as violating a duty or a right, as demanding the intervention of some person or organ, or as legitimising use of force. The law has to consider these reflections that are the product of deduction from basic moral principles and its logical application to concrete cases to which the law has to apply. It uses this knowledge to create the technical legal categories that will express the relevant moral considerations that bear on a given issue, and thus secure or at least make more likely that they will be given due consideration in the reasoning and decision of the case. An example of this is mens rea. It is unjust to punish someone without attending to what he actually chose, ie, to the structure of means and ends he considered and intended. Criminal law has to consider this moral demand and express it in its categories.[20] Moreover, there are choices that are more wrong and thus deserve more punishment than others: choosing directly to harm another person is graver than choosing a course of action hoping that others will not be hurt but without taking due precautions that

[20] Though the relevance of intention has been at times contested or forgotten. For a defence of the moral relevance of intention and a discussion with views that challenge the traditional understanding of action in criminal law, see John Finnis, 'Intention and Side Effects' in *CEJF* II 10 173-97.

this will not happen. Criminal law has also to consider these distinctions because they are morally relevant. And it typically does in developed legal systems—though criminal lawyers from different jurisdictions might find different categories to express these moral distinctions in a coherent and complete form.[21]

II. Not everything in the law derives in this more direct form from practical reflection. Some issues are left underdetermined by practical reason. Some alternatives might be excluded as unreasonable, but there remain many reasonable alternatives all of which are equally acceptable. There might be a need, though, for choosing one option. This need is commonly the need for coordinating collective action. Reasons of fairness can also compel us to have a general norm that decides the issue for all similar cases (eg: even though there is a reasonable range of amounts we could give person X in accordance to principle Z, we want to settle for one particular and defined amount for everyone who is in the same situation that X, so that all of them receive the same). Here the pertinent authority has to settle for one (or perhaps more, but a definitive list) of the reasonable alternatives. This decision is usually made through a legal norm. Once the decision of the authority has

[21] It is not disputed that in some occasions legal categories can fail to express the relevant moral requirements that should bear on the case. Jeremy Waldron has illustrated this with the US Supreme court decisions on abortion, where the court, according to Waldron, engaged in a detailed discussion on the previous case-law and other related positive sources, all of which left untouched the two crucial issues in the debate: the moral personality of the unborn and whether the woman has a right to autonomy such that could ground a claim to perform an abortion. Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2005) 115 Yale LJ 1346, 1382-6. I think that this case should be seen as a departure from the norm; as a pathology. What I am trying to provide is an account of what such cases are a pathology of, and of why, despite the all too evident risks of crafting categories deficiently, there are reasons to pursue this task. (See below VII.3.1.6). Furthermore, in Waldron's example what might have impelled the court to stretch certain categories beyond their proper ranges of application is precisely the attempt to overcome one of the problems of legally unaided adjudication, namely, the problem of legitimacy. See bellow n 61 and text attached.

been made the problem ceases to be reasonably underdetermined, since the decision made by the authority is grounded on a collective need for which it is the solution, and thus there are reasons for respecting it.[22] Knowing the relevant authoritative determinations that bear on the case is also part of the relevant practical knowledge that those who know the law posses. Examples of this kind of considerations are countless: traffic regulations provide some of the more often mentioned examples (what should be the exact speed limit?); settling the exact amount of a compensation or a fee is another such rule that embodies not only knowledge of the reasonable frame, but, crucially, of the relevant authoritative choice.

III. Knowledge of the law is also the knowledge of how things can go wrong. There are typical ways in which people can fail to comply with the moral requirements set in the law. The law can foresee this, and can alert to those possible breaches, and establish a proper response. So, for example, in bankruptcy we can expect that one of the creditors might try to get his payment independently of the process of bankruptcy (probably trying to enter into an agreement with the insolvent debtor before it is manifest that the latter is insolvent). This would be unfair to the other creditors, and so bankruptcy laws commonly refer to this possibility and establish some legal response: eg, one can request that that payment be declared void.

A special and very relevant kind of knowledge is that of authoritative decisions made by a competent body when the decision is not completely morally underdetermined, and, especially, when that competent body has epistemic advantages over courts. This is

[22] On *determinatio* see *NLNR* 284-90.

relevant for the setting up of complex schemes of social cooperation. Given the fact that an important role of the law is to solve complex coordination problems[23], and that many times those schemes of cooperation are set up by a competent body that has epistemic advantages over courts, it is worth elaborating on this. This involves knowledge of the three types. Knowledge of the reasonable and complex enactments of authority, which the court would not have been able to make, or would have made worse, is part of the relevant knowledge present in the law. This is not only knowledge of the second kind (knowledge of *determinationes* made by the competent authority on what reason leaves underdetermined) but also knowledge of the first kind (knowledge of what is determined by reason) and of the third kind (of probable injustices and breaches). By following the enactments of a competent authority courts can benefit from the epistemic advantages of that authority. An example can be provided by the general taxation scheme. In every society there is a need for a general, coherent, efficient, efficacious and fair taxation scheme sanctioned by authority. In designing that scheme, the authority needs to take into account a complex array of considerations of justice, economic policy, expediency, etc. A court could not set up such a scheme. Not only because of the kind of norms the court can create, which lack the generality required by a taxation scheme; nor only because of the constraints court face in relation to the timing of their decisions (since they can only decide an issue when a case that gives rise to that issue is presented to them). An important reason why a court would not be able to set up a good taxation scheme is because it does not have the epistemic resources to engage with many of the considerations that are relevant for setting up such a

[23] Ibid 276.

scheme, such as policy considerations.[24] The legislator is typically better suited for engaging with those considerations aptly. Nevertheless, once the scheme is set up, by knowing the legal framework that rules the tax scheme, courts can decide, for example, whether an action contradicts that scheme. In doing so, the court is helping to preserve the scheme by contributing to its efficacy. But in order to do so the court does not need to fully understand the reasons behind each of the rules that constitute the legal framework of the tax scheme. It is enough that it knows those rules and the general principles of the system. This is, that it understand primarily what these rules require of each person, and, roughly how the system work, so as to better apply those rules. And in applying those rules it is solving a particular case in accordance with a reasonable scheme of cooperation, and thus providing a reasonable solution to a concrete case—a solution that, because it is consistent with the scheme of cooperation, it is more sensible to the requirements of practical reason (which require the existence of a reasonable tax scheme of certain characteristics) than it would be had the court been left without the guidance of the authoritative decisions that realized those requirements by setting up the tax scheme. Knowledge of the law is also knowledge of what constitutes a concrete reasonable scheme of cooperation and of how to act in accordance with that scheme.

This is particularly relevant in the circumstances of legal adjudication, where it is too easy for the judge to see only the interests and claims of the parties, without considering adequately the general impact of the ruling in the interests and claims of other persons.

[24] On courts' limited ability to assess complex policy considerations, particularly in the form of empirical research and statistical analysis, see Paul Yowell, 'Empirical Research in Rights Based Judicial Review', in Peter Huber and Katja Ziegler (eds), *Current Problems in the Protection of Human Rights: Perspectives From Germany and the UK* (Hart 2013)155-186.

Knowledge of reasonable schemes of cooperation and of what actions are consistent with them helps courts to adjudicate in a way that is more responsive to the interests and claims of all the relevant persons—because these interests have been considered in establishing a particular scheme of social cooperation—and avoid over focusing on the interests and claims of the parties.

IV. A fourth kind of knowledge present in the law has to do with the sustainability of the system. It is the kind of knowledge that tells us the way to act in order to keep the system 'working well'. This is a more modest knowledge, since it is far removed from considerations of principle. But it is relevant nevertheless, to keep the order and decorum needed for a proper administration of justice. Once the decision is made, where is it published? Where are the records kept? How do judges and lawyers refer to one another and to the parties? Legal learning also provides answers to these 'smaller' questions. Note that one could subsume this last kind of knowledge into the other three. But I think it is clearer to single it out, since otherwise its humbler nature may cause it to go unnoticed.[25]

Legal doctrinal categories attempt to express all these sorts of considerations, and relate them in a coherent and clear way. In this sense, the knowledge conveyed by the law is moral knowledge. It is knowledge relevant for deciding conflicts justly, and for regulating a particular situation according to justice and the common good. From the perspective of adjudication, all this knowledge we can find in the law is indispensable, because of the problem of the confused judge. The complexity of typical problems that

[25] See above n 8 for examples on the relevance of this knowledge, and the consequences when it is not present.

courts have dealt with over centuries is matched by knowledge of doctrine and institutions that are the product of reflection—not only by courts, and not necessarily only in the context of adjudication—on moral and prudential considerations that bear on those same problems.

Thus, the law can be seen as a source of knowledge[26] that can aid average—even mediocre—judges, with limited time and resources, in solving complex moral problems by clarifying what are the relevant practical considerations that are at stake in the case through technical categories that allow the judge to know which precise questions he needs to answer to give a just solution to the problem. The technical categories of the law will normally allow the judge to 'break' the complex problem into more discrete and manageable relevant questions, thus making it more probable that the judge will address the issue and decide it in a way that is responsive to all the relevant demands of practical reason that should bear on the case.

If the law expresses what is relevant in the concrete case, it also has a way of expressing what is irrelevant. One of the main features of legal reasoning is the exclusion of a number of considerations.[27] Legal reasoning is a special kind of practical reasoning that

[26] And thus a judge can speak of a 'definite system of accepted knowledge or thought' for which 'judgments and other legal writings are evidence of its content' S Dixon, 'Concerning Judicial Method' (1956) 29 ALJ 468, 470.

[27] Honoré refers to a 'canon of unacceptable arguments', the existence of which constitutes 'the essence of the Roman gift to modern Western civilization'. Anthony Honoré, 'Legal Reasoning in Rome and Today' (1973) 4 Cambrian LR 58, 64.

is characteristically constrained by legal sources and categories.[28] This is the constrained aspect characteristic of legal reasoning. Constraint is the flipside of guidance; the law can guide as to which are the relevant considerations that should bear on the case only if it can single them out, if it can draw a contrast between what matters and what does not. This is done through the legal technique of crafting legal categories. Legal adjudication can then be seen as concerning the faithful application of those legal categories through legal reasoning, this is, a form of reasoning that is articulated through these legal technical categories. Thus the law excludes from sight what is not expressed in legal categories, which in turn provides a valuable service for the judge when (and legal practice and scholarship devotes enormous amounts of time and energy to this) legal categories are well crafted so as to express what is relevant in the case.[29]

VII.3.1.3. When the Law Does Not Guide

Difficult cases will remain, to be sure. But even in difficult cases, the question is usually narrower than it would have been without the guidance provided by the law. As John Finnis has remarked: '"[E]asy legal reasoning" is a very important element in the

[28] See Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (OUP 1989) 212.

[29] What is said here on the knowledge conveyed by the law should not be confused with a particular stance on the question of the grounds of authority. Epistemic advantages are only one of the reasons that can justify that a particular body is granted authority over a particular domain. Other reasons have to do, for example, with the need for social coordination, and with the value of self-determination. It remains true that there can be epistemic advantages in following an authority, even when reasons related to the epistemic advantages of following it are not regarded as sufficient or even relevant for justifying it being an authority.

structure of almost all hard cases: the "hard" issue in such cases is usually quite distinguishable from many other, more or less easy issues which are present in the case.'[30]

Furthermore, in cases where the law resorts to vague terms, such as 'reasonable', 'fair', or 'due care' it is not necessarily opening a gap of discretion. Lon Fuller noted that those terms can provide much guidance in certain contexts. Fuller's example is commercial practice, where such terms 'can take a definiteness of meaning from a body of commercial practice and from the principles of conduct shared by a community of economic traders.'[31] The term 'reasonable', for example, can provide much guidance if it is used in relation to a practice where it is relatively clear what is reasonable and what is not ('the reasonable care that carriers typically employ in transporting fragile goods'). The same is true for other such terms.

It should be further noted that these terms can be used to point to one discrete element in the issue, one particular fact sensitive question where the law leaves the judge unguided. There is a difference between a norm that says to the judge 'when X, decide what is reasonable', and a norm that says 'when X, the person who was obliged to transport the agreed items will have to redress the owner if he did not acted with *reasonable* care in transporting the items'.

[30] *CEJF* IV.17 372.

[31] Lon Fuller, *The Morality of Law* (Revd edn, Yale University Press 1969) 64.

This shows that the presence of vague legal standards is not a sign of complete lack of legal direction. The standard could be used in a context where it does afford relatively precise guidance. It could also be the case that it does not provide any guidance, and thus affords the judge full discretion, but only in relation to one discrete aspect of the decision.

Knowledge of the law is still of valuable assistance in cases where the law that applies to the case leaves some gap underdetermined. An example is the case *Mitchell and Anor v Buckingham International plc*[32]. The details of this insolvency case need not worry us. It concerned an application by judgment creditors to be given precedence over other creditors. The case required the application of two remarkably vague sections of the Insolvency Act 1986. One, s 168(5), allowing the court to reverse or modify a decision by the liquidator 'as it thinks just', and the other, s 183(2)(c), providing that 'the right conferred on the liquidator may be set aside by the court in favour of the creditor to such extent ... as the court thinks fit'. Counsel characterised the powers given to the court as those of a 'Cadi sitting under a palm tree', and Harman J noted, referring to s 183(2)(c) that the 'wholly undirected width of the whole sub-section does seem to me unhelpful'.[33] What is interesting for us the resources with which the judge filled the gap. He argued that 'the thrust of the decision must be based upon doing justice in the sense of holding an even balance between the interest of the applicants on the one hand and the interest [….] of all the other unsecured creditors of the company in liquidation on the other hand.'[34] He

[32] [1998] BCC 943 Ch.

[33] At 951.

[34] Ibid.

acknowledged that the applicants had been 'very badly treated' by Buckingham International, but that 'the conduct which frustrated their entitlement was not the conduct of the unsecured creditors, or any of them'.[35] The general rule must apply, then. '[T]he statutory scheme of pari passu distribution amongst all creditors of the same class at the date of liquidation was the overriding principle.'[36] No precedent provided an exception for this rule.[37]

It is interesting for our purposes how even in cases where there is some lack of guidance in the law that applies to the issue, the general legal categories in that department of law can provide assistance to solve the conflict. Harman J is in a much better situation than Berta. He knows the general institutions of insolvency law, and understands the idea of fairness embodied in the scheme of pari passu distribution among creditors. Furthermore, he has the resources to frame the issue not as one concerning the applicants and the company that wronged them, but as one concerning the applicants and the other creditors of that company—whom are not responsible for the company's actions and who would see their interests harmed by any preference given to the credit of the applicants. Legal guidance can be more or less direct, but even when the norms that apply more directly to the case provide little guidance, other legal categories that apply generally to that kind of issue can help the judge in dealing with the complexity of cases.

[35] Ibid at 952.

[36] Ibid at 953.

[37] Ibid.

VII.3.1.4. Departments of the Law

What has previously been said on the epistemic benefits of legal direction can help us provide an explanation of the practice of dividing law into departments. This relates to the important issue of the need for highly differentiated legal categories.

Ronald Dworkin provides an account of compartmentalisation. This is relevant for his theory since Hercules' interpretation must try to 'fit' the materials that are closest to the case, as defined by the areas or departments of the law to which the categories that apply to the case belong, which gives 'some kind of local priority' to such departments.[38]

His explanation for the practice of dividing law into departments runs as follows: it starts from the premise that 'the boundaries between departments usually match popular opinion'. So, for example, 'many people think […] that the state needs a very different kind of justification to declare someone guilty of a crime than it needs to require him to pay compensation for damage he has caused.'[39] The reason for dividing the law in different departments is that:

> to match that sort of opinion promotes predictability and guards against sudden official reinterpretations that uproot large areas of law, and it does this in a way that promotes a deeper aim of law as integrity. If legal compartments make sense to people at large, they encourage the protestant attitude integrity favours, because

[38] *LE* 250.

[39] Ibid 252.

> they allow ordinary people as well as hard-pressed judges to interpret law within practical boundaries that seem natural and intuitive.[40]

It is far from obvious that lay people have such knowledge of the different departments of the law. This probably depends largely on whether we are talking about people in a more legally informed culture or in one that is less so. The fact that in pre-modern legal cultures some of the very distinctions that Dworkin mentions (between punishment and compensation) are blurred[41] suggests that the distinction is not immediately obvious for people with independence of their knowledge of the law. But even in places where people are largely uneducated and do not know much of the law, law is still taught and organised in departments. Should the division of the law in departments be abandoned in these places?

There is surely value in the law being clear, and for that it can help if the law expresses widely shared moral convictions and does not depart too much from them[42]—though of course this does not provide a definitive reason for following them always, even when they are wrong. But people have moral judgements and intuitions about the substance of the law, about its particular requirements, but not necessarily about how the law is organised in different departments. And in any case, the benefits of clarity are achieved when the law orders its subjects to do something they can understand and be guided by

[40] Ibid.

[41] See Weber (n 10) 647.

[42] See the discussion on 'moral clarity' in John Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 Cambridge LJ 502, 513.

(which occurs more naturally when the requirements of the law are consistent with moral judgements and intuitions), not by the division into departments.

Furthermore, we should expect that some divisions would be better known than others by the population at large, when, for example, the departments at issue are well known in that particular culture, and they address issues that are different enough for the lay person to see a clear difference between them (eg: contract and criminal law). But some of the departmental divisions will be completely ignored by the lay person, even in countries with a strong legal culture, as for example is the case with those that relate to more technical areas of the law that are typically only known to lawyers or persons with special interest (eg: conflicts of laws), or those areas that are new (eg: elder law, biotechnology law). Then how can the need to track popular conviction explain the existence of departments, when some come to existence before public opinion can be aware of them, and others, because of their highly technical nature, are expected to be known only by lawyers, and there seems to be no deficiency in this?

I propose a different explanation and justification for the compartmentalisation of the law. Different moral and practical considerations apply to different kinds of conflicts and social affairs. It is not only that '*many people think* […] that the state needs a very different kind of justification to declare someone guilty of a crime than it needs to require him to pay compensation for damage he has caused'[43]. The state *does* need a different kind of justification in both cases. The moral principles that apply to questions of compensation

[43] *LE* 252 (emphasis added).

are different form those that apply to the question of punishing grave attacks to the physical integrity of persons or to their property. And these are different as well from the principles and other considerations that apply to issues regarding the conflicts related to voluntary exchanges and agreements, or to the collective administration of a business owned by many different persons.

If technical legal categories try to give expression and concretion to these moral or prudential considerations, then it is only expected that there will be very different legal categories for different kinds of issues. Only at the highest level of abstraction we can find common principles ('do not harm'). But not much guidance can be given at such level of abstraction. Furthermore, there is no reason to expect that all the relevant considerations that bear on all the different issues that the law regulates can be reduced to a simple set of abstract principles to be specified in each area of the law.

If we need to craft institutions that are able to guide judges by expressing the different relevant moral and prudential requirements that bear on the different kinds of cases, we will need to express through the law the specific way in which the abstract principles bear and apply to the different kinds of issues, as well as the rest of the relevant considerations that are more specific to the issue. There is a need for the law to be differentiated enough: to provide different legal categories to different kinds of problems. Legal problems cannot be solved through 'one size fits all legal categories'—legal categories that apply equally to different kinds of problems that give rise to different kinds of moral and practical issues. 'One size fits all' legal categories cannot do this, because

they can only 'fit all', if at all, by being very abstract, and thus, cannot offer much guidance.

So, we will have different technical legal categories aimed at expressing the relevant moral and prudential considerations that apply to different areas of social life. Sets of categories will give shape to one particular institution (eg, bankruptcy), and this in turn will relate to some other institutions and categories in trying to regulate one relatively distinctive area of social affairs or practice. Because legal categories that apply to the same area often interrelate, and because there is a need to know what is the law in a determinate area, legal doctrine attempts to systematise technical legal categories by dividing them into departments, bringing together and ordering the different technical legal categories that apply to a similar type of issues.[44]

VII.3.1.5. The Burkean paradox

It could be argued that a difficulty for the view defended here is Adrian Vermeule's 'Burkean paradox':

> The paradox is that if many participants in the line of precedent or tradition followed the precedent or tradition …, then the informational value of the line of precedent or tradition is lower to that extent; there are fewer independent minds contributing to the collective wisdom. … The sting in the problem is that a strategy that is individually rational for judges at any given time—following precedent—is

[44] Dworkin hints at this explanation in ibid 406.

> harmful to all if followed by all, because it drains precedent or tradition of any epistemic value.[45]

According to the Burkean paradox, then, if a judge follows received legal categories (as, bellow, I argue they should so as to achieve the benefits of legally directed adjudication: see VII.4), she is not improving the law, and thus, if all judges do the same, the law would not develop, and thus it would be unable to guide judges and help them overcome the problem of the confused judge.[46] On the contrary, if judges improve on the law, they do so at the expense of not being guided by the law, and thus not benefiting from legal direction. Is this a problem for the view defended here?

It is not. It must first be noted that those developing the tradition need not be the same as those applying it. The 'Burkean paradox' has little sting outside the common-law tradition. In the civil law tradition there is a greater (though, granted, porous) divide between those that apply legal categories (courts) and those that develop them (legislatures and, crucially, commentators). Vermeule proposed the Burkean paradox as part of his argument against what he calls 'epistemic legalism': the view that 'the limits of reason support judicial lawmaking over lawmaking by other institutions—legislatures, executive

[45] Adrian Vermeule, *Law and the Limits of Reason* (OUP, 2008) 76.

[46] Though if there already exists a relatively sophisticated tradition of legal knowledge, then judges and lawyers can benefit from it even if they have done nothing to contribute to it—it is not a 'bring and share' party. Mediaeval judges and lawyers had at their disposal the legal tradition of Roman law, from which they could benefit, and would have been able to do so even if they had not contributed at all to its development. Though of course if no one contributes to the tradition, then it is likely that it will be unable to improve, and to address new situations. In that case we could say that lack of contribution to the tradition 'drains' tradition of epistemic value, because it becomes less helpful to address conflicts occurring in society.

officials, and administrative agencies.'[47] But my argument is agnostic about that debate. If some argument, based on the Burkean paradox or on something else, was successful at establishing that courts are not well suited to both apply legal categories and develop them, this would not affect my argument here, which aims at establishing that adjudication needs to have legal direction, and thus there is a need for courts to apply legal categories that are already given. Both arguments would be complementary, one establishing the need for legal direction, and the other establishing who is better (or worst) suited for crafting the legal categories that should guide courts.

In any case, the Burkean paradox does not provide a reason for courts to abandon the task of crafting legal categories. The judge deciding a case does not face a dilemma of whether only to apply received legal categories, or only contribute through his invention to the stream of precedent. In between those radical alternatives, lies a common phenomenon: development of and within the tradition. The judge can frame the issue and evaluate the claims of the parties in the way it is dictated by received legal categories, but once the issue has been framed, some question might still remain unanswered, or there might be some need to make a particular legal category more discriminating and precise, or of simply abandoning it if, for example, it is giving expression to illegitimate considerations. Judges can still do this and still benefit from legal direction. Though of course, the more they depart from the received categories, the less they are benefiting from them. But benefit from legal direction is usually considerable even in landmark cases.

[47] Ibid 2.

And this should not come up as a surprise. A comparison might help clarify the issue. It is possible to improve on something that has already been made, as, for example, it is possible to fix a door in a house. And, as in the example of a house, it is typically easier to improve on something than to build it from scratch, and thus, one still benefits from the building even if one changes it a little. But one can truly improve it. Furthermore, many people are able to improve little by little their houses. Very few could build it from scratch. The same applies to law and legal development. Courts can apply the bulk of received legal categories to a case, and still find some small (in relation to the rest of the legal categories that are not challenged) aspect of the law that needs improvement. In those cases the court can both contribute to legal tradition and benefit from it.

Therefore, it is an exaggeration to claim that 'Burkean praise for precedent and tradition is self-defeating.'[48] I also think it cannot be claimed on the abstract that '[t]he best contributions to the stream of precedent or tradition are those in which individual judges, or small groups of judges, exercise their unaided reason.'[49] It depends on how we define 'best'. Vermeule seems to have in mind that the 'best' contributions are the more original ones, those that add something genuinely new to the stream of precedent or tradition. But there is no reason to stress novelty so much. I would say that the 'best' contributions are those more able to improve or create legal categories that are able to make better sense of the case, that can better express the requirements of practical reason that bear on the cases for which they apply. Novelty, in the sense of adding to received legal categories is

[48] Ibid 77.

[49] Ibid.

important, since this is what constitutes a contribution. But it should be noted that for making that kind of contribution, judges do not need to create ex-nihilo. Many times they will improve on legal categories based on general principles or on ideas drawn from other legal categories,[50] which in turn helps preserve the consistency of the legal categories that bear on that area of law. If judges face the epistemic limitations I have explained above, we should expect that the best contributions (in this sense) come from judges working with the aid of the direction provided by the law. There is no necessary or probable opposition between contributing to a stream of precedent and benefiting from the legal direction provided by it.

We do not need to go further into this discussion. My argument does not need to challenge Vermeule's basic position—that legislation has better epistemic credentials than judge-made law for the purposes of deciding constitutional matters. My point is at a more basic level: there is a need for adjudication to be legally directed, and this explains why an important part of the legal practice is related to crafting legal categories that can direct adjudication aptly. Though, of course, the fact that there is a need for legal categories does not imply that judges and legislators will never craft them wrongly, ie, craft legal categories that obscure or directly violate some important moral requirement that ought to be realised in the kind of situation the categories are to be applied to. In relation to judge-made law, the Burkean paradox does provide a valuable lesson. United with an awareness of the problems

[50] As in the example in n 32.

of legally undirected adjudication, it gives a powerful reason for courts to develop the law slowly, timidly, improving bits and pieces one at a time.[51]

VII.3.1.6. Bad Legal Categories

There is such a thing as bad legal categories—legal categories that fail to fulfil their task of expressing the requirements of practical reason that apply to the situation, and that perhaps obscure those requirements, or even express a principle which is plainly immoral. This is all possible. Bad and unjust laws are not a figment of the imagination. Bad legal categories are a reality and a permanent possibility as well. There is no guarantee that legal categories will always guide adjudication towards a reasonable solution—they could well deflect the reasoning of the judge towards a less reasonable or unjust solution.

[51] An important aspect of any apt description of legal development, which Vermeule leaves largely unexamined, is the role played by epistemic leaders. Law does not work democratically, so to say. Not all opinions matter the same and it does not aim to collect different impressions regardless of whose impressions they are. The law has never been about collecting the thoughts of 'many minds'. The qualities of the minds, and discriminating between better and worst qualified minds, has always been crucial. Since Roman times an important aspect of the legal practice is identifying the people or bodies that are better able to understand the relevant moral considerations that bear on cases, and craft the required legal categories that can help judges make sense of the cases. The law develops largely through the work of these identified authorities. Different legal systems use and institutionalise in different ways the work of epistemic leaders. A typical way of doing so is by appointing people qualified to serve as epistemic leaders (or people who already are, as influential scholars) as judges of upper courts. This could provide reasons for judges from upper courts to be less constrained by received legal categories than judges from lower courts—though they should also remember the important problems for which legally directed adjudication is a solution, and avoid overestimating their intellectual and moral powers. Here I am not concerned with explaining the concrete mechanisms through which legal categories are created so as to contain the relevant knowledge that can give judges an epistemic advantage. Therefore I do not examine this issue further.

Bad legal categories can do great harm precisely because of the trust we put in them. Take a simple illustration: a judicial decision spouses, without giving much argument, a legal principle that is based on the wrong considerations, and which thus modifies existing legal categories for the worse—for example, that certain acts that should be considered torture, will not be considered torture and sanctioned accordingly. At that point you have legal doctrine: a legal category (a bad legal definition of torture) that will guide further decisions. Because legal direction unburdens judges from revising what has been already established,[52] further decisions dealing with the issue can rely on that precedent without again opening for debate whether the legal categories applied are reasonable ones. The decision can be arrived through technical legal reasoning, and thus the immorality or other imperfections of the legal categories applied may not be assessed.

Above I have shown how legal categories can be an important aid to proper legal adjudication. Now I show how legal categories can go wrong and become an important obstacle for proper legal adjudication. Are these latter remarks a good reason for abandoning legally directed adjudication and replacing it for unconstrained moral reasoning, where there is no risk of bad legal categories distorting the reasoning of the judge?

At the outset it must be pointed out that some of the benefits of legally directed adjudication would still apply even with respect to bad legal categories. Sure, there may be features of the case that make a particular benefit provided by legal direction pointless. For

[52] See Cass Sunstein, *Legal Reasoning and Political Conflict* (OUP 1998) 42.

example, it is not clear that anything is won by judges being able to deflect the pressure exerted by the parties or public opinion by attributing the decision to the law, when the decision is morally wrong anyway. Though there might be benefits. Perhaps the outcome is still not as bad as it could be if the judge yielded to the pressures of interests groups. In any case, some benefits will still fully apply, as for example the benefits related to certainty and predictability.

But the main points are two. First: legal categories are, at least in developed western legal systems, for the most part successful in aiding adjudication. By 'successful' I do not mean perfect. I mean that they can increase the likelihood of adjudication realising justice and other relevant values in the concrete case. This I presuppose here. To fully prove this, one would have to engage in the Herculean task of assessing one by one all legal categories in a given legal system (or at least a substantial portion of them—perhaps the most widely used?) and analyse what considerations they express, how successful they are in doing so, and whether these considerations are in fact morally relevant or important, or not important, or even immoral. Yet for the purposes of the point I am assessing here I can provide an indirect reason for the aptness of the bulk of legal categories. Legal categories have the potential to confuse legal reasoning precisely because we (judges and the legal community) trust them. The more unclear, imprecise, contradictory, or simply wrong the legal categories are, the more pressure there is for resort to extra legal considerations—typically in the form of more ambitious forms of interpreting the sources, where, instead of being guided and 'taught' by the law on what is of relevance in the case, the judge is guided by his own moral reasoning, which is dominant over the sources. Were legal categories systematically wrong there would be no reason for trusting them, and judges would feel a

need to revise those categories over and over again. If this were the case, there would be no harm in bad legal categories. The fact that they can deflect the judges reasoning shows that legal practice assumes that legal categories are generally sound and thus relying on them is generally safe.

Second: regardless of the value of current legal categories, the remarks on the problems of legally undirected adjudication show that there is a need for legal categories guiding adjudication. The fact that there is a need does not prove that there is a remedy for that need, or that the remedy works. Hunger is not bread. But it does show that leaving adjudication unguided is not an option. Therefore, it is right for the legal community to have engaged for millennia in the task of crafting legal categories, devoting substantial knowledge and energy to evaluating received categories, thinking of ways of improving them, and crafting new ones. The real possibility of bad legal categories is not a reason for unconstrained moral reasoning in adjudication. It is a reason for thinking of an intelligent institutional design able to correct bad legal categories promptly and efficiently.

VII.3.2. The Problem of the Unduly Influenced Judge

In legal cases there is commonly pressure on the judge to decide the case in one way or the other. The pressure can come from the parties, some other person—including other state authorities, and generally powerful people, corporations, parties, etc.—, or public opinion, and it can be considerable. The legal system has ways of dealing with illicit forms of pressure. For example, you cannot threaten or bribe a judge. But some degree of

pressure from the parties or sometimes from society at large is unavoidable. Legally directed adjudication helps judges to divert some of that pressure, by imputing the decision of the case to the law and not to the judge's own legally unaided evaluation of the merits of the case.

Without the direction of the law that allows for the judge to impute the decision to it, the judge would have to bear the whole responsibility for the decision. In a world where not everybody is a hero, this would affect legal adjudication. It puts a strong incentive for judges to change the criteria by which they decide cases, from seeking to do justice, to trying to accommodate the will of the parties and other stakeholders, promoting—as is commonly the case in primitive forms of adjudication—some sort of bargained compromise among those involved. In this sort of bargaining we should expect the more powerful party to have a great advantage. Legally directed adjudication, on the contrary, allows the judge to divert the pressure by imputing the decision to the law. When there is enough legal direction, the judge does not need to be a hero.

VII.3.3. Problem of the Passionate Judge

In dealing constantly with different forms of human misery and injustice, the pressure against reasonable decision-making comes not only from external sources, but also 'from within', so to speak. The passions of the individual human judge can also play a role

against proper adjudication—something pre-modern theorists where keenly aware of.[53] Criminal law provides countless examples of cases where the alleged deeds of the accused would infuriate or scare any normal person, and make him prone to punish the accused in a vindictive way. Adjudicating based on previously settled rules also helps remedy this feature. In cases like those mentioned, the judge ideally should not have to decide how to punish the guilty, but apply the punishment that the law establishes for the deed (or decide within a restricted frame that typically not only sets bounds on the quantity of the punishment, but also on the kind of punishment).

Intrinsic problems

VII.3.4. Problem of the subdued party.

An important aspect of the ideal of the rule of law is being ruled by laws and not by other person. Endicott refers to this as the 'best feature of a concern for the rule of law: the determination not to subject parties and the community to the arbitrary will of an official'.[54] One would not depend on the whims of others, and hopefully not as well on other preferences that, even though more rational, are not pertinent to the issue nor in some way

[53] *CEJF* IV 5 127, referring to Aquinas Summa Theologiae q95 a4, and to John Finnis, *Aquinas : Moral, Political, and Legal Theory* (OUP, 1998) 307-12.

[54] Timothy Endicott, 'Legal Interpretation', in Andrei Marmor ed., *The Routledge Companion to Philosophy of Law* (Routledge 2012), 110.

embodied in the impartial standards of legal norms.[55] Legal direction reduces judicial discretion, thus increasing the area of affairs where the parties can trust that they will be given a decision based on a previously settled general standard.

This enhances the legitimacy of the procedure (see next subsection), and, it protects the freedom of citizens subject to the power of judicial authorities. According to Weber, 'formal justice [adjudicating based on pre established abstract rules[56]] is thus repugnant to all authoritarian powers […], because it diminishes the dependency of the individual upon the grace and power of the authorities.'[57] The underlying thought is that power that is not exercised in accordance with general rules is an absolute power whose exercise depends only on the will of the person who detents it.[58] Restraining absolute power in society requires legally directed adjudication.

Subjecting the parties to the rule of another person, and not of the law, creates further problems, which are related to the need for coordination between *different* courts, and over time. When the judicial decision consists of the judgment of an individual, unconstrained by law, then it is expected that different individuals will decide similar cases

[55] This is why discoveries of statistical relations between judges' decisions and their political views, for example, cannot fail to have a controversial tone, as suggesting a scandal, or at least a deficiency. Of course, these kinds of findings should not appear as a complete surprise. But we are right of thinking of these problems as deficiencies that we want to reduce.

[56] Weber (n 10) 657.

[57] Ibid 812 (reference omitted).

[58] See John Locke, *Two Treatises of Government* (first published 1689, Peter Laslett ed, CUP 1988) II sec 137.

differently. If the decision is dependent only on the subjectivity of the judge, then we should expect that different judges will decide differently, even when confronted with similar cases. This is to be expected because different people have different values and sensibilities, but also because of the outcome-related problems mentioned above. If legal problems were easy, then there should be a salient alternative so that it would be obvious what to decide for every judge deciding the case, and thus we should expect that different judges would decide similarly. Because legal problems are not usually easy, but rather, as seen above, they are difficult and complex, there is no reason to expect that different judges will coordinate and deal with cases in a similar way. Pressure of the parties or other persons will typically depend on the contingent interests of the parties and others involved. The same happens with the passions of the judge that could distort her judgment of the case. All this suggests that different judges will not deal with cases in a similar way. This has at least three moral deficiencies: first, it is unfair that people in the same situation (having committed the same crime, or being bound by a similar contract) receive a different judicial treatment only because a different judge decides the case; second, it is arbitrary 'if the best explanation of an individual's suffering a certain adverse legal outcome is that a particular standard happened randomly to be applied to his case'[59], as is the case with the judge that decides the case, which depends largely on chance; and third, it does not allow for certainty and predictability (see below problem of certainty and predictability).[60] Since the contrary would be desirable, a coordination problem arises: how can we coordinate different courts, over time, to decide similar cases similarly?

[59] Jeremy Waldron, 'Lucky in Your Judge' (2008) 9 Theoretical Inq L 185, 191.

[60] I take the three moral deficiencies from ibid 190-1.

Legal direction addresses this coordination problem. By providing guidance for all the different courts as to how to resolve different kinds of cases, legal direction greatly increases the likelihood of different courts over time arriving at a similar result in similar cases, since the same law is directing them all. Here we need to be cautious. Because legal direction is a matter of degree, and it can never be total (offering complete guidance for addressing all cases), some disparity between the decisions of different courts is to be expected. But an excessively sceptical view would also misrepresent the reality of adjudication. Take the straightforward example of determining sentences for offences. Jeremy Waldron exemplifies the problems of different judges dealing with cases differently with the example of two judges deciding criminal sentences, who are 'given discretion to decide between a sentence of zero years in prison and a life sentence and absent any posited "sentencing guidelines"'[61]. In this example we should expect great disparity in the decision of the judges. But in real life adjudication the law does provide limits as to the different sentences that correspond to different types of offences and sentencing guidelines, all of which substantially constrain the decision of the judge and allow for similarity in the decisions of similar cases by different courts. This illustrates the potential of the law for guiding adjudication and remedying the deficiencies mentioned in this section.

VII.3.5. Problem of legitimacy

There is a legitimacy in law; in norms that we have consented to (like contracts and, albeit subject to some caveats, democratically approved institutions), and, arguably, in

[61] Ibid 208.

shared authorities (even epistemic) that we acknowledge as such. Legally directed adjudication benefits from these sources of legitimacy. Legally undirected adjudication is not necessarily illegitimate, but it can give rise to issues of legitimacy, particularly in connection with the ideal of the rule of law and the previously mentioned problem: if I am to be ruled by laws and not men, and in our society legitimacy of state authorities is achieved through law, why would it be legitimate for this man to decide my case when he decides it according to his own judgment?

It could be said that the mere holding of the office is enough to grant legitimacy. I do not intend to establish on a normative level under what conditions a judicial decision is legitimate. Rather, I will make two points, one normative and one more pragmatic. The normative one is that given the legitimacy of the law, a judicial decision can increase its legitimacy by partaking of the legitimacy of the law through legally directed adjudication. The pragmatic one explains why this would be relevant. Legitimacy is easy to challenge, particularly in the face of undesired decisions. Therefore, courts may need and often benefit from the added legitimacy that the law brings to judicial decisions, even when no one disputes that the judge is (as is the case with Berta) the person appointed by the community for making that sort of decision, and the moral importance of her mission. As Jeremy Waldron notes: 'Courts are concerned about the legitimacy of their decision-making, and so they focus their "reason-giving" on facts that tend to show that they are legally authorized—by constitution, statute, or precedent—to make the decision they are proposing to make'.[62] [63]

[62] Waldron (n 21) 1383-4

VII.3.6. The problem of uncertainty and unpredictability

Legal direction gives certainty and predictability as to what the decision in particular conflicts will be. It also allows for greater social coordination, which otherwise would be unlikely. Certainty and predictability sound less morally appealing than justice or other values that could be at stake in adjudication. But it is crucial for people being able to participate in values that are important to their own lives. It allows for planning and predicting; for citizens to be able to order their lives according to the plans and long-term projects they have themselves adopted. Therefore, '[a]n important element of most theories of the Rule of Law is that those who make and administer state policy should do what they can to diminish its unpredictability and provide a solid and reliable basis for calculation by ordinary citizens.'[64]

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Justice is fragile. It can only blossom under particular circumstances. It is difficult to know what it requires, and, once known, it is difficult to realize. Legal direction helps address these difficulties, increasing the likelihood of justice being done. Thus, the task

[63] It is instructive to observe the kinds of issues that can arise in relation to legitimacy in the context of less developed forms of law, as in a Turkish village where people do not take their conflicts to the *muhtar* and the village council (who are invested with dispute-settling powers) one possible explanation being that villagers 'resent the power of fellow villagers to enforce arbitrated outcomes, and that taking a case to the council acknowledges the superior rank of council members.' June Starr, 'Turkish Village Disputing Behavior', in Laura Nader and Harry F Todd, *The Disputing Process: Law in Ten Societies* (Columbia University Press 1978) 137.

[64] Waldron (n 59) 191.

traditionally imposed on judges of doing 'justice according to law' is a good description of the legal practice of adjudication, which captures both its aim and the technical legal direction that improves substantially the odds of that aim being attained, and of other moral requirements that bear on adjudication being realised.

Legal direction in adjudication is a matter of degree, and thus the benefits that arise from it (or the deficiencies that are not remedied when there is not enough legal direction) are also a matter of degree. How much is enough is something that cannot be said in the abstract. But we can assert a link between legal direction and certain important benefits of which good adjudication largely depends in the circumstances of the real world.

VII.4. Achieving the Benefits of Legally Directed Adjudication

Legal direction is a matter of degree, and so is the enjoyment of the benefits derived from it. It will be enjoyed more when the law is able to guide more, and when the judge adjudicating the case allows himself to be guided by it. The degree to which the legal system benefits from legally directed adjudication thus depends on how the law is made and on how it is applied.

The practice of the law is not only about applying the law and of bringing about justice, but also about crafting good law—thus, increasing the likelihood of justice being brought about by the application of the law. And thus, in the same way that we need an understanding of how to interpret and apply the law well, we need an understanding of how to craft the law well. The idea of legally directed adjudication is a crucial part of the latter.

Those who craft the law—both legislators and judges—, and those who influence that practice—such as commentators—, need to be aware of the relevance and purpose of the technical enterprise of crafting law so that it can provide appropriate guidance, and see it as a crucial part of the task of law-making.

In relation to this, we also need an account of what institutions should craft what aspects of the law, so as to better bring about its benefits. Do legislatures or courts do generally better at crafting the law? This question cannot be fully answered on the abstract, since it depends on the particular aspect of the law at stake, and on the particular situations of different societies. For example, in some places the legislature is or may well be corrupt, and it might be preferable that norms are, as much as possible, judge-made instead of enacted by the legislature. I do not here explore this question. Just one caveat is in order: what was said about the epistemic benefits that legal direction has in relation to the problem of the confused judge does not tilt the balance in favour of judge-made law, as crafted through precedent. It is true that promoters of judge made law, as opposed to parliamentary legislation, often rely on the ideas of tradition in the field of law.[65] But I agree with Adrian Vermeule that there are generally no greater epistemic benefits in judge-made law than there are in parliamentary legislation.[66] A legislative body can benefit from legal learning as much as a court. Codification in civil law jurisdictions is a good example of this. Civil codes were not created from scratch. Not even those that were drafted by very few experts—or even only one expert. This is the case of the Chilean Civil Code. Written in the

[65]Vermeule (n 45) ch 2.

[66] Ibid.

XIX century, it has been used by many countries throughout Latin America. It is the work of the genius of one man, Andrés Bello, who drafted the code that was later, with few emendations, enacted by parliament. Nevertheless, even in this extreme case, it benefits from received legal knowledge, drawing from sources in Roman law, German law, medieval Spanish law, colonial law, and French civil law, among others.[67] Codification was a matter of selection, emendation, and formulation of these categories—many of which were valid law before the code was enacted—into an ordered and coherent body. This task is a valuable one, and can only be achieved by a body able to issue general prescriptions for the common good—as is the task of the legislature.

But achieving the benefits of legally directed adjudication is not only a matter of crafting good law, but also of how to adjudicate so as to be able to benefit from legal direction. There is no need to add here one more theory of interpretation to legal scholarship. It will suffice to make a general distinction between two modes of adjudication: adjudicating according to legal categories, and adjudicating according to values. The distinction lies in the way judges see their task (and not, as it might seem, on the relative vagueness of the norms that apply to the case). When judges adjudicate according to legal categories, they try to think which legal categories apply to the case, and how these should be interpreted. This is not necessarily a mechanical exercise. Sometimes a great deal of interpretation is needed to understand a particular legal category. In those cases, the judge might do a number of things: she can resort to legislative history, or see whether there is some analogous institution that solves the case. She also might try to see

[67] Alejandro Guzmán Brito, Andrés Bello Codificador. Historia De La Fijación Y Codificación Del Derecho Civil En Chile (Ediciones Universidad de Chile 1982) 407-427.

that legal category in its best light, trying to understand what is its purpose and thus get an insight on how it should bear on a difficult case. But even in this case, the question is always about making sense of a particular legal category.

The reasons for seeing the primary task of the judge in adjudication as one of making sense of the applicable received legal categories so as to make 'justice according to law', point to what legal reasoning should be so as to achieve the benefits of legally directed adjudication. At the core of this view of adjudication is the particular way in which the judge relates to legal materials, to received legal categories. But this is not the only way in which one can understand the relation of the judge and the legal categories that apply to the case. A rival alternative I call 'adjudicating according to values'. This view sees the task of the judge as one of realising values to the greatest extent possible. The question the judge asks herself when adjudicating is a different one from the traditional view in which the judge does 'justice according to law'. Here, the primary question is how can certain values that are at stake in the case be furthered as much as possible. The question is many times, when there is a conflict between values, how much should a certain value prevail against opposing values. The relation with the sources is therefore different. To the extent that there are legal sources that apply to the case, these sources are seen as trying to give expression to a value. The task of the judge is to uncover the value behind the sources, and then use her own powers of reasoning to figure out how should that value be instantiated in the case under her consideration.

Adjudication according to values might seem the best way to realise substantive values in society. But this is wrong. Adjudication has greater chances of arriving at morally

reasonable solutions if it is legally directed. Therefore, adjudication must follow the first model. It is only thus that the benefits of legally directed adjudication can be brought about.

VII.5. Gaps in Law and Legally Directed Adjudication

My argument for legally directed adjudication does not imply that legal categories completely determine the outcome to every case. Sometimes legal direction will be substantial, but not complete, thereby still performing a valuable service for legal adjudication (see VII.3.1.3). In other cases, such as those dealing with new problems and questions, the only available legal categories may be remote from the issue, such as general legal principles providing very abstract (and perhaps trivial) guidance. It is necessarily true that legal direction cannot be complete for every possible case, given the limitations of our foresight and the limitations of our language.[68] It would be impossible to know and to express everything that would matter in every possible case, so as to determine completely the outcome of every possible legal question. In the real world, lack of complete legal determination (and therefore, guidance) for every possible case is desirable. The attempt to determine future legal issues beyond what can be reasonably known and expressed would render legal categories useless and prejudicial for many cases.[69] Therefore, there will be

[68] See above ch IV nn 31 and 32.

[69] It is also possible that given the limitations of agents that apply those categories, legal categories that are too complex can create confusion and lead to mistakes in their application. This suggests that on occasions it might be better to offer less legal guidance, or to provide legal guidance that is complete but that is less sophisticated than possible (ie, that that the set of legal distinctions that it provides is less than the set of the morally relevant distinctions that can be foreseen and can be expressed aptly through legal categories). Though this last consideration about the limits of the ability of those applying the law for handling complexity should be assessed bearing in mind that in

'gaps of legal guidance': relevant legal questions for which there will be no legal categories that can provide their solution. Lawyers and judges experience these gaps frequently.

The existence of gaps of legal guidance holds regardless of whether (1) there is always some law that applies to any issue for which legal determination is required, or (2) there are gaps in the law, so that sometimes there is no applicable law for addressing a certain issue, and thus discretion is granted to whoever needs to decide it. The idea of gaps of legal guidance is obviously not in contradiction with the latter position. It is also not in contradiction with the former one, since the proposition that for any case there is applicable binding law does not imply that there will be legal direction capable of guiding completely as to how to decide every case. Suppose it is true that there can be no gaps in the law, and the reason is that there are always general legal principles that apply to the issue.[70] It is still possible that legal direction will be incomplete (or even almost absent) if nothing but

complex modern societies where labour is divided and functions differentiated, most of the application of the law is mediated by legal experts, precisely so that the necessary legal complexity can be dealt with appropriately. This allows for the law to be applied competently even when it is of great complexity.

[70] A different argument for why there are no gaps in the law is that 'it is always logically possible, although sometimes inadequate, to apply the legal order existing at the moment of the judicial decision'. Hans Kelsen, *General Theory of Law and State* (first published 1949, Transaction Publishers 2005) 149. There are no gaps in the law because when there seems to be no legal rule that applies to the matter, then the issue is simply not regulated and thus there are no legal rights and obligations in that respect. Talk of gaps in the law would simply signal situations where the application of the current law would have an 'unsatisfactory result'. A new norm is needed, which can create a distinction for the particular case so that the result is satisfactory. The fiction of gaps in the law would serve to restrict 'the authorization of the judge to act as legislator' in correcting the law. Ibid 148-9. There will still be gaps of legal guidance in establishing when the result of applying the applicable legal categories would be unacceptable, and what norm would be necessary to enact so that the result could be acceptable.

abstract principles apply to the matter. There are gaps of legal guidance in determining how those principles are specified in the concrete case.[71]

What has been said in this chapter on legally directed adjudication does not deny that there are gaps of legal guidance My point has not been a conceptual one about necessary features of the law, but a normative one about certain benefits of a specific legal practice: the practice of crafting precise legal categories capable of providing substantial guidance to judges, and of adjudicating according to those categories. One can hold that there are gaps of legal guidance, and also hold that legal guidance provides important benefits, and that an important degree of guidance is crucial for avoiding the problems of legally unaided adjudication.

Three final remarks can further clarify the relations between the benefits of legally directed adjudication and the gaps of legal guidance. The first is that the problems of legally undirected adjudication do not arise whenever there is a gap of legal guidance. As discussed above, legal direction may provide much guidance in solving an issue, running out only with respect of some discrete aspect of it (VII.3.1.3). When this happens, lack of legal direction in that respect may not be a real problem. Some of the problems of legally undirected adjudication may not arise—or not rise to the level where they make it unlikely that adjudication will succeed in realising justice and other values—depending on the amount of guidance provided and of the nature of the issue to be decided. For example, the problem of the confused judge does not arise if the law does not guide in respect to a

[71] '[I]ndividual principles do not determine results … they incline a decision one way, though not conclusively'. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 35.

discrete aspect of an issue, and this aspect is simple enough for a normal person to address. The problem would arise if there were no legal direction, or very little. But if there is enough legal direction to aid judges and lawyers in understanding the different considerations at stake in a given issue, with legal direction running out with regard only to some easier or simpler aspect of the issue, then the problem of the confused judge will not arise, not even to a proportionate small degree. Ingesting a whole whale may kill someone, but eating a little chunk of it does not need to kill 'a little', nor harm anyone. Depending on how much legal guidance is provided with respect to an issue, and on some characteristics of the specific problems for which there is no guidance (their difficulty, how controversial the topic is, whether it is likely to arise the passions of the judge, etc) the different problems of the legally unaided judge will each be present to a smaller degree, and some perhaps not at all, even when there is no legal direction with respect to some aspect of an issue. But, again, if trivial or no guidance is provided, then adjudication will face all the problems of legally undirected adjudication.

The second remark is that the question of legal direction is different from the question of whether a particular issue should be decided or reviewed by a court or not. Even when there is no legal direction with regard to a particular issue, there may still be good reasons for having a court decide a particular matter. Such reasons may relate to concrete circumstances of the issue to be decided or of the society where the issue arises: if in that society judges are more trustworthy for making particular kinds of decisions, perhaps because they are less corrupt, or more diligent than other potential decision-makers, that would be a reason for them to decide those kinds of issues, even if they do not possess the advantages that legal direction would provide. An answer to this question

should be given with awareness of the benefits legal direction provides and the realisation that without it courts will lack some of the institutional advantages they would otherwise possess. But bearing that important cost in mind, we may still prefer that in a particular society courts decide a certain type of issue, even without legal direction.

The third remark, which is important for the general argument of this thesis, is that we should not be complacent about the problems of legally unaided adjudication, even in those situations where it is preferable to other institutional alternatives. . These problems still need to be overcome where possible. Therefore, there are reasons for attempting to produce a body of legal categories that applies to those different situations, so as to provide the needed legal direction—at least to the degree that it is reasonable to do so, considering the limitations on our ability to craft legal categories mentioned above in this section. These reasons are connected to the benefits of legally directed adjudication. The practice of crafting precise legal categories and of adjudicating according to them, the practice for which I have been arguing in this chapter, should be pursued even where initially there are no legal categories that apply to the issue.

VII.6. Legal Categories and Legal Reasoning

Above (see VII.1.) I said that the idea that grounds proposals for unconstrained moral reasoning in legal adjudication has three main elements. The first element is the idea that reasoning according to the law and moral reasoning about the more just or reasonable solution to the case are largely independent. The second element is an understanding of legal rules, and of legal categories in general, that conceives them as curbing moral

reasoning, at times foreclosing what would otherwise seem the more just or reasonable decision. The third element was assigning distinct values to both different forms of reasoning: justice and the realisation of other substantive values would be realised by moral reasoning; and certainty and predictability, or other similar rule of law values, would be realised by reasoning according to legal categories.

Though there is some truth to these elements, the picture they convey of legal reasoning and of the role of legal categories is a distorted one.

Take the second element. Frederick Schauer has insisted that rules '[screen] off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account.'[72] Rules 'gain their ruleness by cutting off access to factors that might lead to the best resolution in a particular case', and they 'function as impediments to optimally sensitive decisionmaking.'[73] To be sure, Schauer's statement is correct in so far as it captures the *force* of rules: they are binding even if one thinks that an alternative course of action would be more reasonable than doing what the rule requires one to do. And it is also true that because law is couched in general terms, a legal rule can apply to cases unforeseen by the drafters of the rule, where the rule may yield an unjust or inefficient outcome.[74] But to focus solely on the force of rules leaves something important out of the picture: the

[72] Frederick Schauer, 'Formalism' (1988) 97 Yale LJ 509, 510.

[73] Ibid 539. See also 537. See also Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-based Decision-making in Law and in Life (OUP 1991) 1.

[74] See Paul Yowell, 'Legislation, Common Law, and the Virtue of Clarity' in Richard Ekins (ed), *Modern Challenges to the Rule of Law* (LexisNexis NZ 2011) 102-3.

purpose of having rules, and, more generally, of authoritative doctrinal legal categories. What a legal system aims for is that legal rules and other legal categories capture the reasons relevant in a particular situation, and leave out the irrelevant ones; that they establish requirements that would increase the likelihood of the subjects of the law (including those that apply it) conforming to those relevant reasons. That is what we aim for when designing legal categories. When we realise that something relevant was not captured, we think that that is a good reason for modifying or replacing that legal category. Much of legal practice (be it at the legislative level, or through legal adjudication, or in academic doctrinal commentary) is devoted to this enterprise of better adapting the legal categories that apply to a type of situation to the morally relevant considerations that bear on that kind of situation. While it is true that it is not possible that, given the limitations of our foresight and language, rules will always succeed in capturing all the relevant reasons and exclude irrelevant considerations for all cases, it is a crucial part of the aims of the legal practice that they do so as much as possible, and at least to a substantial degree and for a substantial number of cases. It is not a necessary feature of a legal rule to curb moral reasoning, if by necessary we mean that it is a feature that it is always present in any application of the rule. The point and purpose of legal categories is realised when this is not the case, and, instead, legal categories discipline practical reasoning according to the relevant moral and prudential considerations that bear on the case. Jurisprudential accounts on the role of rules in legal reasoning and adjudication must consider this, if they want to fully understand the purpose of rule-constrained and guided adjudication, and evaluate proposals on the role that rules and rule-following should have in legal adjudication.[75]

[75] Schauer acknowledges this in Schauer (n 73) 101-2.

The third element, the idea that technical legal reasoning about legal categories and moral reasoning realise different values, is unfounded. When the benefits of legally directed adjudication are considered, particularly the outcome-related ones, one can see that legal reasoning structured through legal categories greatly improves the likelihood of securing justice and realising other substantive values through adjudication by making it more likely that the relevant moral considerations are featured in the decision of the case, and by helping judges overcome undue pressure and their own sub-rational motives that could run against a reasoned decision aimed at doing justice and realising other values at stake in the case.

What I have said in this section suggests a particular phenomenology of judging, which relates to the first element. It is not necessarily the case that judges think of a reasonable way to decide the case, and of good reasons to justify that decision, and *then*, in a separate mental process, remember that there are legal categories that they need to apply, think how they would bear on the case, allowing them to curb their initial moral reasoning and perhaps even requiring them to settle for a decision less reasonable than the one they had first thought about.[76] If, as argued above, it is true that legal issues are generally difficult and complex; and if legal categories generally provide guidance as to how to deal with the difficulty and complexity of cases, a guidance that is needed by judges of limited talent and resources; then, it is likely that the phenomenology of legal reasoning is a different one: lawyers and judges typically see themselves confronted with a complex array

[76] This phenomenology is supported by Schauer in Frederick Schauer, 'Balancing, Subsumption, and the Constraining Role of Legal Text' (2010) 4 Law & Ethics of Human Rights 35, 44.

of facts, and they resort to their knowledge of legal categories to find a way of making sense of those facts, and to think about the problem in an ordered fashion that allows the relevant considerations to be properly assessed, arriving at a reasonable solution. Surely sometimes they might realise that a particular legal category runs counter to what morality requires. Much has been made in discussions on law and morality about this possibility. But in the bulk of cases (and even with respect to most of what constitutes a hard case[77]) the relation of the moral reasoning of the judge and legal doctrinal categories is not one where the latter curbs the former, but one where the latter guides the former not only with respect of 'how to think about this problem within the boundaries of the artificial system of the law' but also on how to aptly assess all the relevant moral considerations at stake. The phenomenology of legal adjudication I propose here is one that acknowledges that in many cases the judge's and the lawyer's moral reasoning about the right solution to the case, and their legal reasoning about the application of legal categories, are commonly instantiated in *one reasoning* about the right solution to the case, which is guided by legal categories. When this happens moral reasoning and legal reasoning can still be distinguished for analytical purposes. But there are no reasons to think that this distinction occurs necessarily, or even usually, in reality.

VII.7. Conclusion

Given the circumstances in which adjudication occurs, it is likely to face several obstacles. These obstacles make it unlikely that adjudication will succeed in delivering a

[77] '"[E]asy legal reasoning" is a very important element in the structure of almost all hard cases.' *CEJF* IV.17 372.

decision that is just, reasonably argued, and able to realise other important values at stake in the case. They ground the need for adjudication to be legally directed.

From what has been said above we can derive the following conclusions on (good) law-making and legal adjudication.

First: There is a need for adjudication to be directed by legal categories able to express the relevant considerations that bear on the case, show how these considerations should relate to each other, and do all this *with enough precision and detail* so as to guide effectively the judge to a reasonable solution to the case.

Second: Since the relevant considerations are different for different types of cases, and are generally complex, there is a need for the legal categories to be complex and differentiated as well (ie, there is a need for different bodies of different legal categories that apply to different types of problems).

Third: There is also need for these legal categories (or the bulk of them) to be backed by some form of authority—be it positive law or established doctrine, which makes the judge's decision a decision supported by those authorities.

A body of authoritative legal categories can provide direction as to how to solve a particular type of case, and this legal direction greatly aids judges in overcoming the obstacles that threaten adjudication. It makes likely that average judges will be able to

adjudicate well. For judges to benefit from legal direction, they must comply with the following standard:

Fourth: The legal practice of adjudication needs to relate to the authoritative legal categories in a certain way. It needs to allow itself to be constrained and guided by the legal categories.

If we craft and apply the law in this way, we will have a legal practice that is not different from the one we have now, and which we have had for centuries. There will be different departments of law, each of them composed of different authoritative legal categories that are relevant for different types of situations, and which are applied by judges who see their task as that of doing justice through the application of those authoritative legal categories. What I have presented here is an explanation of the reasons for legal practice to be so. Understanding these reasons should lead us to a renewed appreciation for characteristic technical modes of legal reasoning and the sources that should guide it.

VIII. Proportionality and the Problems of Legally Unaided Adjudication

VIII.1. The objection to proportionality as unconstrained moral reasoning

The problem of proportionality as unconstrained moral reasoning is that it dissipates the benefits of legally directed adjudication. The conclusions of the previous chapter set standards for law-making and legal adjudication. In relation to law-making, the standards point to the desirability of having legal categories that are 1) precise, in that they provide enough guidance in relation to what is to be done or decided in the situations to which they are applied; 2) differentiated, since what is morally and prudentially relevant is different in different situations, and, if the legal categories are to express what is relevant in those situations, they need to reflect this difference; and 3) authoritative, in that they need to be backed by legitimate authority binding on the judge and the community. If legal categories that fulfil these standards are available, then legal adjudication must also meet a standard: 4) it must adjudicate according to these legal categories. If these standards are met, legal adjudication benefits from legal direction, which, as shown in the previous chapter, is crucial not only to realise rule of law values such as certainty and predictability, but also to realise justice and other substantive values at stake in adjudication.

Proportionality as unconstrained moral reasoning does not meet these standards. It realises them to the almost lowest degree possible. As said above (VI.4), on this account, proportionality provides almost no guidance. This is the price that is paid for it allowing for

unconstrained moral reasoning. Thus, as a legal category (or set of legal categories) it falls bellow the standard 1 above. As a consequence, it also falls bellow standard 2. Only very abstract guidance can apply to such a broad range of situations as those regarding limitations with broadly conceived human rights under the proportionality approach. Different moral and prudential requirements will be at stake in these situations, and thus only abstract, trivial guidance—such as 'act proportionally', strike a 'fair balance' between the considerations at stake, or decide on an overall 'balance of reasons'—can apply to all these situations. More precise guidance would require differentiation. As for the third standard, it must be noted that even though authors defending proportionality as allowing for unconstrained moral reasoning elaborate on some abstract moral requirements that should be taken into account in human rights cases (see VI.2, 4), these elaborations (or the moral theories that articulate them) are not authoritative, in the sense that they are not backed by legitimate authority binding on the community. It is not even proposed to turn them into precise, differentiated authoritative legal categories able to provide guidance to judges. They are left in the domain of moral theory, from where they may (or may not) inspire judges in their open-ended moral assessment of the reasons presented in favour and against a measure limiting a right. As for adjudication, because of the lack of guidance offered by legal categories under the model of proportionality as unconstrained moral reasoning, it cannot properly adjudicate according to legal categories, and thus achieve the benefits of legally directed adjudication. Furthermore, proposals for understanding proportionality as unconstrained moral reasoning also rely on a view of adjudication that downplays the role of text, precedent, and of legal authorities in general, favouring instead

an understanding of adjudication as concerned primarily with moral reasoning about the realisation of values (see VI.1).[1]

A doctrinal legal category that allows for and requires unconstrained open-ended moral reasoning is law badly crafted; or, worse, a useless category that leaves judges in no better position than in a pre legal state, with none of the aid that law is supposed to give them. Proportionality conceived in this way comes at the price of forgoing the benefits of legally directed adjudication. In adopting the account of proportionality as unconstrained moral reasoning, adherents to proportionality sacrifice the ability of proportionality to bring more rationality to the political process and generally to adjudication, leaving human rights adjudication exposed to the problems of the legally unaided judge, which, as we have seen, are important obstacles that make it unlikely that justice, the rule of law, and other important values be realised through legal adjudication. Law can do much better.

VIII.2. Negative effects

Aharon Barak defends proportionality against a related claim. He argues that to sustain claims that proportionality grants courts 'too wide a discretion' one would have to show 'that the use of this seemingly too wide a discretion leads to negative effects. This

[1] See Grégoire Webber, 'Rights and the Rule of Law in the Balance' (2013) 129(Jul) LQR 399, 400, arguing that 'standards of proportionality and balancing … exacerbate rather than attenuate the weak guidance offered by bills of rights'.

kind of proof was not given and it is unlikely that it exists.'[2] The problem I am trying to show is not exactly that there is too much discretion. Discretion is a consequence of the problem, which is lack of legal direction in adjudication. Now, before concluding whether lack of legal direction in proportionality has negative effects or not, one needs to know what kinds of negative effects to expect. Some negative effects will not be manifested in the outcome of the decision, but in some other intrinsic problem with the way the outcome is reached, as is the case with the intrinsic problems of legally undirected adjudication mentioned in the previous section: the problem of the subdued party, the problem of legitimacy, and the problem of uncertainty. We should also expect judges to encounter the outcome-related problems mentioned above: to encounter pressure and to find it harder not to yield to it—though it will be difficult to gather from the decision whether the outcome is influenced by pressure. More visibly perhaps, we should expect judges to have problems reducing the complexity of particular cases, leaving out important moral considerations, including irrelevant ones, over-simplifying the issue, and failing to provide a clear explanation of the reasoning that leads to their conclusion, among other ways in which one can fail to assess correctly the moral complexity of a particular case.

This last negative effect is addressed in Tsakyrakis' critique of proportionality (V.1). He devotes substantial effort to showing the lack of moral sophistication in the courts' analysis when dealing with human rights cases as if they concerned only unspecified interests, without discriminating which of them are actually legitimate as public aims, which of them are protected by a right; and what the special normative force of such a

[2] *Proportionality* 487.

right would require.[3] This lack of sophistication in analysis is precisely what we should expect of individual judges dealing with complex moral problems under constraints of time and resources. A related vice that illustrates this particular 'negative effect' is the 'black box' phenomenon that some authors detect in proportionality. Tsakyrakis says that in proportionality cases we find a 'characteristically impressionistic assessment of the relative weights of competing considerations, which does not lend itself to a rational reconstruction of the argumentative path that has led to a particular decision'.[4] Timothy Endicott has tackled this particular issue more directly, in response to scholars who claim that proportionality is a structured form of enquiry and who present this as one of its characteristic advantages. Endicott observes that

> [T]he crunch point is the final, crucial node in the structure, where the judge decides whether the impact on the claimant is *too much*. The attractive structure of the judicial role crumbles at that point into an unstructured, opaque choice, when the task involves 'balancing' the unbalanceable.[5]

Leaving aside the problems with incommensurability that Endicott raises at the end of the quoted passage, he is correct in that at this crucial point of the enquiry proportionality is devoid of any structure and consequently of any of the putative

[3] Tsakyrakis is not alone in this claim. Finnis notes the European Court of Human Rights' notable lack of sophistication in dealing with the governmental aims in the *Hirst* case. *CEJF* III 1, 44-45. Elsewhere, in relation to the English *Begum* case he remarks: 'The conceptual slackness of human rights law in action is impressive'. 'Endorsing Discrimination Between Faiths: A Case of Extreme Speech?' in I Hare and J Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009), 430, 433.

[4] Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 3 Int'l J Const L 468, 482.

[5] Timothy Endicott, 'Proportionality and Incommensurability' (2012) 40 Oxford Legal Research Paper 1, 19.

advantages that structure would bring to legal reasoning (see VI.4). Furthermore, this black box phenomenon increases the likelihood of the third deficiency of legally unaided adjudication: that the parties depend on the whims or personal opinion of the judge, and not on a previously settled and general law.

Möller acknowledges this in his engagement with the objection that balancing is 'impressionistic', in the sense just described. For Möller

> the principle of proportionality does not provide a substantive test as to how to conduct the balancing: rather, it directs judges to 'balance' all the relevant considerations in order to decide whether the policy in question is proportionate or not.[6]

Again, this amounts to proportionality offering trivial legal guidance. This is the starting point of Möller's reply to the objection:

> As a matter of moral reasoning, it is often not evident why the balance between two values in a given case ought to go one way or the other. A comprehensive argument about this would require a general, substantive moral theory of balancing, that provides guidance about how to conduct a balancing operation correctly; however, such a theory does not, to my knowledge, exist yet.[7]

I interject: Up until this point, Möller is simply acknowledging the lack of legal direction provided by proportionality, and the epistemic problem which that generates—what I called 'the problem of the confused judge' (VII.3.1). To overcome the problem, though, more is needed than a 'theory of proportionality', but authoritative legal categories

[6] *Challenging Critics* 727.

[7] Ibid 728.

that express with greater precision than a theory the specific requirements of practical reasoning that bear on the type of issue to which they apply. But let us continue with Möller.

> As long as this remains the case, all of us, including judges, have no choice but to rely to some extent on our intuitions when striking a balance between a right and a competing value.[8]

The explanation for the impressionistic character of balancing is that 'the issues are complex, in fact, too complex to be resolved in a theoretically satisfactory way at the moment when we have to decide the case.'[9] We can now see that Möller's reply to the objection that balancing is impressionistic is not a reply. It is simply an explanation of how some of the 'crucial features of the proportionality test'—the way it 'simply directs judges to assess the weights of the respective rights and interests without giving them further instructions'[10]—produces the defect that the objection points to. This, if anything, reinforces the objection. It shows a problem with the proportionality test from the technical perspective: that when proportionality is applied it is unlikely that the relevant moral considerations at stake in those cases, whatever they may be, will be aptly engaged by the court deciding the case.

Möller seems to believe that the epistemic 'problem of the confused judge' is somehow mitigated in proportionality cases by the help we could receive from our

[8] Ibid.

[9] Ibid 729.

[10] Ibid 717.

intuitions. He says: 'Fortunately, however, in many cases we have moral intuitions to which we are sufficiently strongly committed to feel confident in saying that the balance between the two values should go one way or the other.'[11] I believe this is an overly optimistic view. There is no reason to think that human rights cases are easy, and that intuitions can guide us through their complexity—particularly if human rights are interpreted in the generous way Möller interprets them, as embodying a general right to autonomy and therefore to anything that the agent believes is in his interest. Furthermore, people have different intuitions as to the right solution to cases: the fact that there is often (heated) disagreement on human rights cases attests to this. This also relates to our fourth problem of legally undirected adjudication—the problem of the subdued party—in that we expect to be a community ruled by law, and not by some person's intuitions.

This is not the place for an exhaustive study of how proportionality cases can display some or more of these negative effects. Any study of such nature would run into the difficulty that proportionality is understood in different ways, and these ways of understanding proportionality have different vices. Moreover, a concrete defect in a legal decision can be the product of the shortcomings of either account of proportionality. For example, a decision that does not acknowledge that a particular interest falls within the domain protected by a right, and the implications of this for practical reasoning as to the priority of that interest in relation to other considerations, can be the product of both a method committed to filtering out considerations of rights (as in the maximisation account of proportionality) or of the confusion to be expected when there is no legal direction (as in

[11] Ibid 729.

the account of proportionality as unconstrained moral reasoning). At this point my aim is to illustrate what kinds of negative effects we should expect to see in legal decisions if proportionality were the kind of test proposed by the defenders of the idea of proportionality as unconstrained moral reasoning. I do not claim that proportionality is today the kind of test that Möller, Kumm and others claim it is, or should be. My argument is at a conceptual level, and a normative one: if proportionality were equivalent to unconstrained moral reasoning, it would come at a grave price. It is this grave price that connects some structural deficiencies of proportionality as unconstrained moral reasoning with certain defects that other authors have seen in proportionality decisions.

This brings us back to the way proportionality as unconstrained moral reasoning was thought to avoid the objections made against proportionality. I said that Möller's defence of proportionality relies on a distinction between objections to proportionality as such and objections against the deficiencies of a particular application of the proportionality test (see VI.3). Examples of the former are the ones made in the first part of this thesis against the maximisation account of proportionality: the incommensurability objection, and the idea that the method fails to capture what morally matters in human rights cases, particularly considerations regarding the pre-eminence of human rights. These objections and other similar ones do not apply to proportionality as unconstrained moral reasoning, since it can allow for all the relevant moral reasons to bear on the case.

The second kind of objection points to deficiencies in some application of the proportionality test. Examples of these deficiencies are that proportionality conceals the moral reasoning of judges with technical parlance, that proportionality reasoning is opaque

or (as said above) impressionistic, and that proportionality analysis gets the moral questions wrong. It would be easy to dismiss these objections (or some version of them) as a problem of a particular judicial decision that applied proportionality wrongly, and thus, as not relevant for assessing the merits of proportionality as such.[12] This would be a mistake. We can now establish a closer connection between these kinds of deficiencies and the idea of proportionality as unconstrained moral reasoning. The point here is this: the deficiencies that those objections refer to are no more than the likely consequence of adjudication that is not legally directed enough. If proportionality is conceived as allowing for a form of adjudication that is not legally directed, then it is likely that the court's decision will have these deficiencies.

Take the objection that proportionality conceals the judge's moral reasoning. We should expect courts to take refuge in technical parlance, because of the heavy costs associated with acknowledging that they perform their own moral analysis of the case. These costs can be associated with all the intrinsic problems of legally undirected adjudication (lack of legitimacy, lack of respect for the ideal of being governed by law and not by men, and lack of certainty), but also with outcome related problems. Because these cases are morally difficult, the judge might be uncertain about the outcome and the reasons that justify it, which creates incentives for adopting a technical parlance under which one can hide the moral complexity of the case. Even a genius judge able to deal with the moral complexity of the case might realise that her moral views are not shared by everybody in

[12] Ibid 728, and 718.

society, and that they perhaps touch on issues that are intensely debated.[13] This creates costs for overtly engaging in moral reasoning in the decision, costs that relate to the possibility of criticism and to challenges to the judge's legitimacy. This also creates incentives for adopting technical parlance. These incentives do not need to relate only to the judge's self interest—in her not being criticised, in her reputation, etc. A conscientious judge could realise as well that legally undirected adjudication leaves her open to pressures from the parties and society: a way to divert this pressure, so as to make it easier to judge impartially, would be to indicate that the decision is driven by technical reasoning, and thus it is objective and the judge has little discretion.

Or take the objection that proportionality is opaque, that when judges apply it they don't make clear their reasons. The cause of this could relate to the kinds of incentive structures that I mentioned in the previous paragraph. Or, as explained above, it could simply be a function of the complexity of the cases. It can be extremely difficult to make clear your reasons for solving a complex problem. Legal academics can devote many months, if not years, to provide a clear argument for one precise problem—and we do not always succeed. In a situation where the problems and their variety are multiplied, and where there are more severe time constraints, clarity in argument becomes less probable. The same principle applies to the objection that proportionality gets the moral questions wrong. It is difficult to consider comprehensively the complex array of interests[14] and

[13] For an account of legal norms as settling moral disagreements, see Larry Alexander, Frederick Schauer, 'Law's Limited Domain Confronts Morality's Universal Empire' (2006) 48 Wm & Mary LR 1579, 1583ff.

[14] Aleinikoff notes that courts applying balancing tests often purport to be assessing all the relevant interests, but they seldom do, leaving out of their reasoning the interests of one or more persons.

moral considerations at stake. It is improbable that an average, and even competent person, under time and resources constraints, will be able to consider all these interests and moral requirements, let alone put them in the most reasonable relationship, without some guidance.

What needs to be placed in the forefront of the analysis is the idea that the problems arising from lack of attention to the moral complexity of cases and opaqueness in reasoning (as well as others less apparent in judicial decisions), are not exotic. They are precisely what we should expect of normal human beings dealing with complex moral and political conflicts. What is artificial is the clarity and guidance that the law typically gives in adjudication. Remove that guidance, and we should expect obscurity and reductionism to be the rule, when not simple bargaining and compromise.

Without legal direction, legal adjudication loses many of the advantages that would make it an appropriate institution for demanding justification of almost every conceivable act of political authority, as Möller, Kumm, Cohen-Eliya and Porat propose. Unconstrained moral reasoning on behalf of judges has costs. These costs will be latent in all cases, and manifest themselves with greater strength in the more complex, those where there is more pressure, and those where the judge has a particular personal opinion or interest in the outcome.

Alexander Aleinikoff, 'Constitutional law in the Age of Balancing' (1986) 96 Yale L.J. 943, 977.

VIII.3. Justification and the problems of legally unaided adjudication

The problems of legally unaided adjudication can be seen more clearly by analysing a more precise matter. For the argument of this chapter it is particularly interesting to see how these problems affect proportionality's ability to bring about the benefits its defenders argue it can bring. Kumm has argued that judicial review and proportionality—in his understanding of the test as allowing for unconstrained moral reasoning—allow for a healthy practice of demanding justification for authorities' acts, evaluating whether they can be justified in terms of public reason. This practice of demanding justifications he calls 'Socratic contestation', which he characterises as an activity that, first, 'forces a certain type of enquiry onto others',[15] an enquiry that, in the case of courts engaging in judicial review, Kumm describes as one of 'compel[ing] public authorities into a process of reasoned engagement.' Second, the role of the court is not the construction of theories nor the elaboration of answers, but mainly the 'examination of reasons'—'asking questions … and assessing the coherence of the answers' and their plausibility. And third, the process is independent from ordinary politics.[16]

But a practice of demanding justification through courts does not have much value if it is asking for the *wrong* reasons. It risks striking down relevant pieces of legislation or policies for failing to provide arguments related to considerations that were not the morally relevant or decisive ones in that case. Surely a culture of healthy scepticism towards state

[15] *Socratic* 154.

[16] Ibid 154-5.

authority cannot harm—bearing in mind that judicial authorities are also state authorities. But the moral idea of the need for public authorities to justify their acts needs an institutional counterpart that asks what kinds of institutions should realise this practice of justification, how should they be designed, and, whether it is courts that should bear this burden through legal adjudication. Then we need to think as well of what technical legal categories would better direct judges to reasonable outcomes and increase the likelihood of the relevant practical considerations being correctly assessed. We need to consider whether this particular institution, applying these particular doctrinal categories and judicial methods, is likely to be able to discharge this function that moral reflection identifies as valuable in a democracy. In this respect, the benefits that arise from legally directed adjudication have to be considered, since without them it will be less likely that courts will be able to fulfil their role properly.

And in this respect, Kumm's proposal has an important deficiency. If proportionality is to allow for unconstrained moral reasoning, it will have deficiencies that will reduce the likelihood that Socratic contestation, in the form of proportionality review, will be able to make the concrete contribution that Kumm expects.

Kumm claims that Socratic contestation can help remedy four pathologies of political decisions, namely:

- The inclusion in the decision making process of reasons that are not legitimate and thus cannot ground a legitimate decision by an authority (like those based on prejudice, or simply in 'convention, tradition, preference' not supported by reasons[17]).

- The inclusion of reasons 'relating to what it means to live a good, authentic life' (such as reasons based on religious beliefs or other 'comprehensive conceptions of the good'), which 'may not qualify as the kind of reasons that can be invoked in a liberal democracy to justify rights infringements'.[18]

- 'Lack of serious engagement [on behalf of the authorities] with the realities to which the law [or the decision of some political authority] applies'.[19] Instances of this pathology can range 'from government hyperbole to ideological radicalization'.[20]

- '[T]he capture of the democratic process by rent seeking interest groups.'.[21]

The first three are referred as 'forms of thoughtlessness',[22] and all four of them point to deficits of rationality in the authorities decisions (though it is highly contested whether the second one is a pathology at all—a point not addressed or defended by Kumm[23]). By

[17] Ibid 158.

[18] Ibid 159-60.

[19] Ibid 160.

[20] Ibid 161.

[21] Ibid 163.

[22] Ibid 160, 163.

[23] For examples of rival positions see Michael Sandel, *Public Philosophy: Essays on Morality in Politics* (Harvard University Press 2005) ch 23, and Joseph Raz, *The Morality of Freedom* (OUP 1986) II. Particularly in some cases where the law requires considering the well being of children, it seems somehow unavoidable for legal reasoning to include some understanding of what constitutes

demanding justification from the authority that made the decision, Socratic contestation would increase rationality by ensuring that the authorities' decision only survives if supported by appropriate reasons. But the deficiencies of legally unaided adjudication will creep into these putative remedies as well.

The first two 'pathologies' would be remedied by proportionality's ability to exclude inappropriate reasons. 'One important function of proportionality analysis is to function as a filter device that helps to determine whether illegitimate reasons might have skewed the democratic process against the case of the rights-claim'.[24] In an earlier article Kumm had noted that the idea of 'excluded reasons' is a 'relatively pervasive feature of moral reasoning'.[25] But it must be noted that, as seen above (VII.3.1.2) it is a pervasive feature of legal reasoning as well. It is good that the law works in this way; it brings about the benefits of legally directed adjudication that I mentioned above. There is nothing remarkable in proportionality if it purports to exclude some reasons, since the law commonly does this. The constraints that the law imposes on legal reasoning have precisely that function: to exclude. The question from the technical perspective is how successful a

a good life. For a recent example, see *Re G (Children)* [2012] EWCA Civ 1233. 'Very recently, Herring and Foster have argued persuasively […] that behind a judicial determination of welfare there lies an essentially Aristotelian notion of the "good life". What then constitutes a "good life"? There is no need to pursue here that age-old question. I merely emphasise that happiness, in the sense in which I have used the word, is not pure hedonism. It can include such things as the cultivation of virtues and the achievement of worthwhile goals, and all the other aims which parents routinely seek to inculcate in their children.' [29] (Munby L.J.). Perhaps awareness of this unsettled debate explains Kumm's remarkably hesitant characterisation of this 'pathology' as consisting of reasons that '*may* not qualify' as acceptable reasons (emphasis added).

[24] *Socratic* 160.

[25] Mattias Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in George Pavlakos (ed), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart 2007) 165.

given legal doctrine is in excluding reasons that should be excluded, and in including reasons that should be included, putting them in a correct relation to each other, and in doing all this with precision and clarity. Here the problems of the legally unaided judge become relevant. If proportionality allows for unconstrained moral reasoning, then it does not exclude anything. It is for the judge then to do all the 'excluding', and to discriminate by himself between what counts as a good reason for that particular case and what does not—a task whose moral complexity should not be underestimated, as I explained above in relation to the 'problem of the confused judge' (VII.2, 3.1.1). Proportionality offers no help in this task of excluding reasons.

The third pathology relates to lack of serious assessment of the facts because of hyperbole or ideological radicalisation. This points to the heart of a real political problem, whose impact is pervasive in almost every political context. Politics is a realm of intense feelings, disagreements, debates, pressures and expectations. It is decisive that the political process can manage this intensity. This is why Max Weber said that one of the three 'pre-eminent qualities' of the (good) politician was 'a sense of proportion', which he distinguished from the other two (passion and a feeling of responsibility) by calling it 'the decisive psychological quality of the politician'.[26] And to achieve a sense of proportion, detachment from the situation is crucial. Thus, '[l]ack of distance *per se* is one of the deadly sins of every politician.'[27] Detachment and a consequent sense of proportion and perspective are thus important for proper political action grounded on an adequate

[26] Max Weber, 'Politics as a Vocation', in HH Gerth and C Wright Mills (eds), From Max Weber: Essays in Sociology (Routledge 2009) 115.

[27] Ibid.

assessment of reasons—against which the realities of politics that pull towards hyperbole and ideological radicalisation conspire.

However, Kumm does not tell us how proportionality-based judicial review can be an effective remedy against this pathology. He moves from briefly characterising the pathology, to conceding that 'courts might not be particularly good at analysing complicated means-ends relationships or striking balances between competing goods', followed immediately by the assertion: 'But there are sufficiently common instances of pathologies ranging from hyperbole to ideological radicalization that judicial intervention is reasonably good at detecting'.[28]

Kumm does give us a brief exposition of an example of courts undertaking this role in relation to the US government counterterrorism measures after 9/11. But one example is not an argument. Not because more examples are necessarily needed (it could be a representative example), but because the fact that a court remedied that pathology in one case or in a set of cases does not show that courts are apt to do so. An argument should explain why they are generally well fitted to do so—why the example should be seen as the rule and not the exception. It should explain what is it about a court that makes it more likely that it will resist better than the political system the allure of ideological radicalization or hyperbole or other similar vices in a given situation. An argument is needed because, after all, courts are composed of human beings as well, living in societies,

[28] *Socratic* 161.

and thus are exposed to the same ideologies, passions and fanatic doctrines as the rest of their fellow citizens.

There is actually one characteristically legal way through which courts achieve the necessary detachment from the situation so as to avoid being caught in the impulsive or radical feelings that lead to lack of careful consideration of the reasons at stake. This is legally directed adjudication, which consists precisely of having general norms that control (at least to a considerable extent) the outcome, and which have been established *before* the actual case the judge is facing. In this way, crucial aspects of the final decision of the case were adopted by a process that is 'detached' of the contingent pressures and passions aroused by the concrete case, because previous to it.

But if proportionality is understood as requiring unconstrained moral reasoning, that particular benefit of legally directed adjudication is lost, and with it is lost the characteristic feature of legal adjudication that would allow it to resist Kumm's third pathology.

Something similar happens with relation to the fourth and last pathology, related to the 'capture of the democratic process by rent-seeking interest groups.'[29] In this case there is a reason for thinking that courts are in a better comparative position to deal with this pathology, since they have less of a dependency of interests groups to preserve their position as authority compared with democratically elected representatives. Courts do not

[29] *Socratic* 163.

typically have constituencies or need access to money or the media to be able to stay in office.

This deserves three caveats: Firstly, I said courts have 'less of a dependency', because judges in many jurisdictions are promoted through a system that to some degree depends on the decisions made by political authorities, and thus the pressure that interest groups can put on politicians can indirectly be placed on judges. Secondly, if courts are to have a greater role in making decisions that affect interests groups (an inevitable consequence of the expanded role Kumm and other proportionality defenders attribute to courts in a culture of justification), those interest groups will have a stronger incentive to seek to pressure the judiciary, either directly or indirectly through politicians that appoint them. Thirdly, the more discretion judges have, the more we should expect them to be the object of pressure, since, after all, they can make the decisions that interest groups want. As mentioned above (VII.3.2), legally directed adjudication aids judges in resisting external pressures. When the decision of the case is largely controlled by previously settled law and doctrine, external pressure can only play a diminished role, since courts have less discretion anyway, and they can attribute the decision to the law. But again, legally unrestrained adjudication cannot receive this aid from the law, and thus, it has less ability to deal with this particular pathology.

VIII.4. Conclusion

Proportionality as characterised by Kumm, Möller, and others, is an appealing idea. In terms of institutional design, it is an institution that can achieve the most perfect justice,

precisely because of its unrestrained character. But the same freedom that allows for the most perfect justice can allow for the gravest injustice. We should pay more attention to a different question: does proportionality make it more likely in the circumstances of the real world that justice and other relevant values will be achieved? The technical perspective bears on this question, given the potential of technical legal institutions to help achieve justice in adjudication. This potential is realised to a great degree by legally directed adjudication. This chapter and the one before were aimed at showing the price it is paid when leaving adjudication legally unaided.

IX. Conclusion

The objections raised here against the maximisation account of proportionality show that human rights cases are morally complex. It is misleading to imagine these cases as only or primarily involving some sort of quantitative comparison, as the metaphors of 'scales' and 'balancing' suggest. They involve careful consideration of the different interests at stake, discriminating between legitimate and illegitimate interests, assessing the different potential realisations of incommensurable values, establishing the different relationships of justice that hold between the people whose interests are involved in a case, and assessing the particular normative force that the rights and duties that constitute those relationships have, among other considerations. This moral complexity is not properly captured by the maximisation account.

Legal systems have a specific way of dealing with the problems that moral complexity pose to adjudication, by providing judges, officials, and generally the subjects of the law with legal direction. This legal direction is provided by a precise and differentiated body of authoritative legal categories that attempt to express the relevant moral considerations that bear in different situations. Proportionality as unconstrained moral reasoning does not provide, and cannot take advantage of, legal direction. It is thus open to all the problems of legally unaided adjudication, which severely affect the likelihood of justice and other relevant values being realised through adjudication.

The two accounts of proportionality have important flaws that make them unsuitable as a general doctrinal test for deciding whether a limitation with a human or constitutional right is justified or not. So, where to go from here?

This thesis does not propose an alternative to the views criticised here. Nevertheless, I think that the argument made in the previous chapters can illuminate the kind of alternative that is needed. The temptation is to think that the next step should be to provide a better account of proportionality—or, if this is not possible, to replace proportionality by some other test. The new understanding of proportionality, or the new test proposed, would have to serve as a general doctrinal test for deciding whether a limitation with a human right is justified or not, and do so fulfilling two conditions, so as to avoid the deficiencies of the main accounts of proportionality. First, it would have to provide enough legal guidance. And secondly, it would have to do so through legal categories that can capture what is morally relevant in the kinds of cases to which it will be applied.

This is impossible. There is no test or understanding of proportionality that could perform the function assigned to proportionality (establish whether limitations with human rights are justified), and at the same time fulfil the two conditions just mentioned.

The reason for this is the same reason why we do not have one single test to decide whether a person should be punished or not and how, or whether a person should pay compensation—and if so, how much—for making someone worse off. The function we want the test to perform requires that it be applied to a great variety of cases—particularly

considering the ever expanding domain of current human rights law—which give rise to different moral and prudential considerations. To fulfil the conditions posed above, the new test or understanding of proportionality would have to provide enough legal guidance for addressing these different cases. This can be done through legal categories that capture the relevant considerations that bear on those cases. But if the relevant considerations are different in the different cases, a variety of legal categories are needed. No one test, be it proportionality or something else, will suffice. What is needed is many different tests, definitions of rights, rules that establish their priority, standards for public authorities, rules of deference, among other legal categories—not an abstract and comprehensive legal category, but many precise and differentiated legal categories. What is needed, then, in place of proportionality, is not a new test, but—and there should be nothing original or unexpected about this—a *body of law*.

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