Bongiovanni G., Valentini C. (2018) *Balancing, Proportionality and Constitutional Rights*. In: Bongiovanni G., Postema G., Rotolo A., Sartor G., Valentini C., Walton D. (eds) *Handbook of Legal Reasoning and Argumentation*.

Springer, Dordrecht, First Online 03 July 2018
Print ISBN 978-90-481-9451-3
Online ISBN 978-90-481-9452-0

Balancing, Proportionality and Constitutional Rights

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1 Introduction

In the theory and practice of constitutional adjudication, proportionality review plays a crucial role. At a theoretical level, it lies at core of the debate on rights adjudication; in judicial practice, it is a widespread decision-making model that is increasingly characterizing the action of constitutional, supra-national and international courts. Despite its circulation and centrality in contemporary legal discourse, proportionality in rights adjudication is still extremely controversial with regard to its justification and limits, and also to its nature and distinctive features. As for the first aspect, proportionality raises questions of "justification," concerning the normative basis and limits of its use in rights adjudication; as for the second aspect, it raises questions of "identification," concerning its nature and distinctive features. So far, this second order of questions has remained in the background of analyses that have mostly been concerned with questions of justification and have tended to identify proportionality with its "standard" form—the prominent version in the theory and practice of rights adjudication—without dwelling on the other forms that proportionality can take. Indeed, important questions of identification are still open concerning what proportionality *is*, what forms it can take, and how these forms differ one from the other. These questions are relevant in the first place at a descriptive level, since capturing

Part I was written by Giorgio Bongiovanni and Introduction and Part II was written by Chiara Valentini. Chiara Valentini acknowledges support from the Spanish Ministry of Economy and Competitiveness ("Ramón y Cajal" fellowship—RYC-2012-12175).

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the distinctive features of proportionality is necessary for an adequate representation of the complex judicial practices based on proportionality review. Furthermore, these questions are relevant at a normative level because an adequate representation of proportionality review contributes to the analytical framework within which we can argue about the reasons for or against this review template.

This contribution will be divided into two parts. Part I centres on (a) the connection between the foundation of proportionality, balancing and theories of rights and (b) the critical aspects of this connection. Part II analyses the different forms of proportionality both (c) *in* review, as a template for rights adjudication, and (d) *of* review, as a way of defining the scope and limits of adjudication.

PART I

2 Rights, Balancing, Proportionality[1]

It is almost a truism in the contemporary legal debate that a link obtains between the constitutional adjudication of rights and proportionality. In this sense, as many authors have noted, it is possible to claim that "to speak of human rights in the twenty-first century is to speak of proportionality" (Huscroft et al. 2014, 1) and, in the same direction, that we can "describe" proportionality "as *the* central concept of contemporary constitutional rights law" (Gardbaum 2016, 1).[2] This centrality can be explained in relation to two main aspects, among others, that can be mentioned: on the one hand is the emergence of new theories on the nature of rights broadly understood, on the other is the resulting "shift from a culture of authority to a culture of justification" (Cohen-Eliya and Porat 2011, 463). The first aspect gives an account, from different perspectives, of the role and nature of rights and of the (necessary) processes of their implementation, while the second not only refers to a change in the legal culture but also highlights the changes that have taken place in contemporary legal systems (especially constitutional ones). These two perspectives have many points of contact, and in some respects, they engage each other: a "broad" conception of rights can be seen as one of the (necessary) conditions for developing a culture of justification (ibid.). These aspects refer to two different phenomena: while the theory of rights develops the fundamental justifications of this judicial method and the thesis of the connection between rights and proportionality, the analysis based on the culture of justification emphasizes the role of proportionality in processes by which decision-making power is legitimized. However, the theory of rights can also be used in the opposite direction, namely, to argue that there is no direct link between rights and proportionality and to highlight the shortcomings of the method. In this

[1] In this part, we use balancing and proportionality as terms that imply each other, that is as terms that are in a "close" relationship (Schlink 2012a, 721). For some authors on the contrary (*Infra* I, 2.2.), the two concepts should be separated as they express different ways of rights adjudication.

[2] Cohen-Eliya and Porat (2011, 465), note that "the spread of proportionality has been well documented, and is an undisputed fact."

Part (I), we will analyse the relation between theories of rights and proportionality, while the role of the culture of justification will be discussed in Part II.

The analysis of theories of rights will be developed in light of the relation between rights and proportionality: we will have, on the one hand, those who claim that, with different degrees of necessity, a connection does hold between these two elements, and on the other hand, those who argue that such a connection does not exist or at least is contingent, and that the judgment of proportionality maybe inadequate for the realization of rights. In the first case, we will refer to specific rights theories, while in the second reference will be made to the main problems that come with the use of a proportionality judgment.

3 Theories of the Connection Between Rights and Proportionality

3.1 Interest Theory and Balancing

One of the major aspects of the twentieth-century rights theory developed in the Anglo-Saxon context is the affirmation of the *interest theory* and of the general idea that rights are reasons. This idea marks the passage from the static theories of rights to the dynamic one and makes it possible to move beyond the so-called axiom of correlativity (Kramer 1998, 42), that is, the idea that a right exists if, and only if, there is a correlative duty.[3] On the interest theory, as is known, a right is viewed as a "cluster" of rights,[4] or as a "molecular" right (Wenar 2015),[5] and rights are crucially understood to have the function of protecting interests essential to the well-being of individuals or groups. Interest theory was developed in response to the *choice (or will) theory*,[6] in an effort to overcome the latter's limits.[7] As its name suggests, the

[3] A "dynamic aspect of rights" is described by Raz (1986, 171) as one that ascribes to rights an "ability to create new duties," an aspect that in his view "is fundamental to any understanding of their nature and function in practical thought." Kramer (1998, 41) underlines that the "the notion of strict correlativity between rights and duties does indeed obscure" this aspect. For Raz (ibid.), "unfortunately, most if not all formulations of the correlativity thesis disregards the dynamic aspect of rights. They all assume that a right can be exhaustively stated by stating those duties which it has already established."

[4] See Thomson (1992, 55), defining such clusters as "rights that contain other rights."

[5] A molecular right is a complex of Hofheldian normative positions. Wenar (2015) defines these rights as "atomic incidents [privilege, claim, power, and immunity] bond together in characteristic ways to form complex rights."

[6] Central to choice theory is the thesis that the function of rights is to ensure for the right holder, in relation to the duties of others, a choice respect to the fulfilment or not of a duty. Wenar (2015, referring to Hart 1982, 183) describes this position in this way: "Will theorists maintain that a right makes the right holder 'a small scale sovereign' […]. More specifically, a will theorist asserts that the function of a right is to give its holder control over another's duty."

[7] Its main shortcoming is that it fails to account for some situations involving rights. As noted by Besson (2005, 422), the will theory of rights does not account for the existence of rights we regard

theory identifies it as an "essential feature of the rules that attribute rights" that these rules are designed to guarantee of an interest: the aim of rights is the "protection or promotion of interests or individual goods" (Celano 2013, 58, my trans.). Raz (1986, 180), for instance, underlines that "to assert that an individual has a right is to indicate a ground for a requirement for action of a certain kind, i.e. that an aspect of his well-being is a ground for a duty on another person." As has been noted (Zanghellini 2017, 28), for Raz this interest can refer to both "an intrinsic and ultimate value" (i.e. people's well-being) and an instrumental value, that is, what may bring "beneficial consequences, either to the right-holder or others," and this includes "considerations of the general or common interest" (Campbell 2016). From this perspective, "to say that *X* is a right-holder is to say that his interests, or an aspect of them, are sufficient reason for imposing duties on others either not to interfere with *X* in the performance of some action, or to secure him in something" (ibid.). This means that "individual interests are grounds for rights, and rights are grounds for duties" (Zanghellini 2017, 26). Interest theory thus makes two claims in two steps: it shows that rights are reasons and that they are dynamic. With regard to the first claim, the existence of a right is established through a comparison of reasons, and that these reasons may therefore be different and in conflict with one another.[8] The dynamic dimension of rights, for its part, implies the possibility of realizing them progressively, meaning that a right maybe attributed even if it is not yet possible to identify all the circumstances of its application and not even the duty-holders. This implies that "the force of a right is not necessarily exhausted by any existing set of duties, etc., that follow from it, but maybe a ground for creating new duties as circumstances change" (Campbell 2016).

On this approach, as S. Besson (2005, 426) notes, "interests often conflict with one another and hence conflicts of interests lie at the foundation of rights." These conflicts, which "may arise at the level of interests, rights or duties," require extensive forms of balancing. This applies to (a) conflicts of interest in which "interests will be weighed against one another and rights will only be recognized in a limited way according to the resolution of this weighing"[9]; to (b) "*conflicts of rights stricto sensu*," which are mainly owed to the "dynamic nature of rights," when, for example, "new rights maybe derived from core rights and these rights may conflict with others;" and to (c) *"conflicts of duties*," which, in turn, depend on the "dynamic nature of rights

as inalienable and as linked to objective aspects of our well-being, and in particular it does not account for fundamental or human rights.

[8]Raz (1986, 181–182), states, "an interest is sufficient to base a right on if and only if there is a sound argument of which the conclusion is that a certain right exists and among its non-redundant premisses is a statement of some interest of the right holder, the other premises supplying grounds for attributing to it the required importance, or for holding it to be relevant to a particular person or class of persons so that they rather than others are obligated to the right holder. These premisses must be sufficient by themselves to entail that if there are no contrary considerations then the individuals concerned have the right. To these premisses one needs to add others stating or establishing that these grounds are not altogether defeated by conflicting reasons. Together they establish the existence of the right."

[9]Besson (2005, 426) underlines that "conflicts of interests are essential in determining whether one has a right in the first place, and hence whether this right can conflict with others later on."

and the possible generation of successive duties due to the diversity of the interests protected or changes of circumstances" (ibid.). As mentioned, the need to weigh reasons has been highlighted by Raz (1986, 184), arguing that in order to establish the existence of a right we have to consider the "conflicting considerations" that can "defeat" or "weaken" "the interests of the would be right holder," both in general and "on some but not on all occasions." In the example offered by Raz (ibid.), the fact that "there is a necessary conflict between free speech on the one hand and the protection of people's reputation or the need to suppress criticism of the authorities in time of a major national emergency on the other" means that "a general right is, therefore, only a prima facie ground for the existence of a particular right in circumstances to which it applies. Rights can conflict with other rights or with other duties, but if the conflicting considerations defeat the right they cannot be necessarily co-extensive in their scope." As this approach has been summarized by Zanghellini (2017, 37), "the resolution of rights disputes involves the quantitative method of balancing concrete weights."[10]

3.2 Rights as Principles: Robert Alexy's Theory

Robert Alexy's theory is undoubtedly the one that most strongly establishes a direct relation between rights and proportionality. This approach is developed on the basis of the vision of fundamental rights as principles that express values and that, "as a consequence of the principled quality of fundamental rights" (Schlink 2012a, 730), can take effect only through the balancing and use of the proportionality tool. In fact, fundamental rights as principles "require optimization of the values they express, their realization to the greatest extent possible," and they therefore "unavoidably conflict with other fundamental rights that require optimization of their own sets of values [and] with the principles that guide the state in pursuing its goals" (ibid., 730–1). The idea that fundamental rights are principles derives both from the observation of the structural complexity of contemporary legal systems (operating on the basis of several types of standards) and from the idea that the legal form of principles (as opposed of that of rules) is more appropriate for the legal formulation of rights. Structural complexity refers to the introduction of a set of values in contemporary constitutions, and the idea is that this introduction necessitates the normative form of principles. Alexy (2010a, 86ff., 92–3) argues for the structural identity between the principles and values, considering their application to be isomorphic: just like values, principles have application forms that make it necessary to look at them

[10] According to Zanghellini (2017, 37), assuming we see rights as exclusionary reasons, Raz's theory can be a useful approach to resolving rights disputes through "qualitative methods" such as the criteria of "internal relation" (as Waldron 1989 proposes) and the "harm principle" (as Möller 2012a proposes). From the opposite point of view, and proceeding from the idea of incommensurability, Verdirame (2015) refers to Raz's theory to highlight the limits of balancing and of recourse to the proportionality criterion.

in comparison (especially when the problem is to determine whether something is "good" or "best").[11]

Principles are distinguished from rules in virtue of their features under three main headings (Alexy 2010a, 44ff.)[12]: (a) their normative dimension, (b) their formulation, and (c) their collision and the process of resolving their conflict.

(a) Unlike rules, which are definitive commands (*definitive Gebote*), principles are characterized as "optimization requirements" (*Optimisierungsgebote*) (Alexy 2010a, 47–8). As an expression of (moral) values, principles are norms that prescribe that something be done to the greatest possible extent, this consistent with what is legally possible (that is, with the other principles and rules of the legal system) and with what is factually possible. From this perspective, principles can be realized to varying degrees on the basis of these possibilities, while rules can only be followed or not.

(b) Principles have an "open" formulation, meaning that their premises, and above all the conditions of their application, are sometimes not defined. This leads to principles being not only open from a semantic point of view (and principles are therefore generic and vague) but also undetermined from a deontic point of view, i.e. they do not define how they can be realized (e.g. whether through abstention or through action).[13]

(c) The conflict among principles does not affect the validity of norms (and therefore is not configured as an antinomy among standards), but has to do with the weight and importance that the various principles (or aspects of a principle) may have with respect to the specificity of the concrete case at hand (Alexy 2010a, 48ff.).[14] If a principle prohibits some behaviour and another one permits it, it will be necessary to determine which one is more relevant to the case and thus outweighs the other. Unlike conflicts between rules (solved by the criterion of formal validity and the criteria for working out antinomies), those between principles requires weighing (balancing). That one principle prevails over another does not entail that the latter is invalid, nor does it mean that an "appropriate exception" has been found: the principle that does not prevail

[11] Alexy (2010a, 162–70, 378) argues that, when it comes to application, principles and values, "are the same thing."

[12] As is well known, the distinction between rules and principles was introduced in the contemporary debate in Dworkin (1977).

[13] This aspect is clarified by Alexy (2010a, 33ff.) in relation to Art. 5 of the German Constitution (*Grundgesetz*): the different possibilities for applying this article (on freedom of science, research and teaching) depend not only on the "semantic" indeterminacy of the term *science* but also on whether this freedom is achieved by virtue of the state refraining from action (abstention) or actively intervening to protect it (action).

[14] The distinction between rules and principles is seen by Alexy (2000, 44) as "the basis for a theory of constitutional justification and a key to the solution of central problem of constitutional rights doctrine." Similarly, for Alexy, "without it can be neither an adequate theory of the limitation of rights, nor an acceptable doctrine of the conflicts of rights, nor a sufficient theory of the role of constitutional rights in the legal system."

retains its validity and may even become prevalent in other cases. Balancing is thus the way in which principles are typically applied.

These aspects of principles, and in particular the need for balancing, are directly linked to proportionality: Alexy points out that conflicts between principles and the resulting limit on the realization of a competing principle implies the dimension of "proportionality." The conception of principles as optimization requirements leads to a conceptual relation to "proportionality": as Alexy notes (2000, 247), "the principle of proportionality […] follows logically from the nature of the principles and is deductible from it." Viewed as optimization requirements, principles are therefore bear a "necessary" connection (Alexy 2014) to a judgment based on proportionality.

3.3 Rights and Limitations: Barak's Analysis

The relation between rights and proportionality is analysed by A. Barak on two levels: on the one hand is the distinction between rights "grounded in the constitution" and the limitations that can be posed "by a sub-constitutional norm (such as an "ordinary" statute or common law rule)"; on the other hand, is the distinction between "the scope of a constitutional right and the limitations to which it is subject" (Barak 2012a, 739). This dual distinction is intended to demonstrate the need to resort to the canon of proportionality: the first distinction—between laws on different hierarchical levels (constitutional and sub-constitutional)—establishes this need in working out the relationship between "democracy, separation of powers and constitutional rights" (ibid.), while in the second the same need emerges from the exigency not to compromise the scope of rights and their realization. As Webber (2016) has noted, at the basis of this reflection we find the idea that rights "cannot be realized to [their] fullest extent" and that a "limitation on a constitutional right by law […] will be constitutionally permissible if, and only if, it is proportional" (Barak 2012b, 27, 3).

For Barak, proportionality must be seen "as the standard for determining the constitutionality of a sub-constitutional norm that limits a constitutional right" (Barak 2012a, 739). In this sense, proportionality is the tool for assessing whether a sub-constitutional rule unduly covers the scope of a right, namely, the "area that it covers—its content and its boundaries—[and that] can be changed only by constitutional amendment" (ibid.). Proportionality therefore makes it possible to assess whether a "sub-constitutional (statutory or common law) norm" does not go beyond "the limitations on a constitutional right" that can be explicitly or implicitly imposed by a limitation clause establishing "the constitutional conditions under which the right maybe less than fully realized" (ibid.).[15] It is proportionality that makes it possible to determine whether these conditions are met. The distinction between scope and limitations "establishes two stages of constitutional analysis. At the first stage,

[15] Barak (2012a, 739) notes that "in some legal systems, relative rights have a core that cannot be limited; that core is absolute. That a constitutional right is relative does not mean, however, that it is a prima facie right. A relative right is still a definite right."

the inquiry pertains to whether a constitutional right is limited by a sub-constitutional norm […]. At the second stage, the inquiry considers whether the limitation on the constitutional right is proportional" (ibid., 740).[16]

This twofold assessment is articulated in the four elements of proportionality: "proper purpose," a "rational connection" between means and purpose, "necessity," and "balancing" (ibid., 742ff.). The function served by evaluating these aspects is to "ensure that a sub-constitutional norm limiting a constitutional right fulfils its four elements. If those elements are not fulfilled, the sub-constitutional norm will lack the force to limit the constitutional right, for a higher norm trumps a lower norm" (ibid., 741).

The proportionality test "is a framework that must be filled with content." For Barak, this content "will be determined by a set of considerations that are external to proportionality and that inform it. That content therefore may vary from one legal system to another" (ibid.). However, there is a definite point that highlights the decisive role of the proportionality test: this test "is not neutral with respect to human rights, and it is not indifferent to their limitation. It is grounded in the need to realize human rights" (ibid.). This applies to the higher hierarchical level of constitutional rights and their limitations. For Barack, "democracy is based on human rights, and the restriction of those rights cannot become routine." For this reason, "the limitations that proportionality imposes on the realization of constitutional rights" require "continuing justification, grounded in public reason" (ibid., 749). This also applies to the scope of rights: "the elements of proportionality reflect the idea that a sub-constitutional norm may impose limits on a constitutional right, but that those limits are themselves bounded. This is the concept of 'limits on the limitations'" (ibid., 741).

3.4 Kai Möller: The Global Model of Constitutional Rights

The global model is "a morally reconstructive theory of rights" (Möller 2014, 5) that offers an account of how rights have evolved since the second half of the twentieth century. It is not intended as philosophical or theoretical account of rights, but as a reconstructive one, since its purpose is primarily to be compatible with this evolution (which is claimed to point to the "existence" of global model): "it is a theory of the actual practice of constitutional rights law around the world" (Möller 2012a, 20). For Möller, this theory "must meet two criteria: first, it must 'fit' the global model sufficiently well to be rightly considered a theory 'of' that practice, and second, it must be morally coherent" (Möller 2014, 2). This second aspect (the

[16] Barak (2012a, 740), stresses that at the first stage "the burden of proof is on the party asserting the limitation," while at the second "the burden of proof […] is on the party asserting proportionality."

moral reconstruction) "aims at finding moral value in a practice: something which makes it worth continuing with that practice" (Möller 2012a, 21).[17]

From the first point of view, it is necessary, for Möller, to overcome the traditional theories of rights that fail to take current legal practice into account. What he calls the "dominant narrative of the philosophy of fundamental rights" supports a number of arguments that are largely overcome. These are in particular the theses for which (a) "rights cover only a *limited domain* by protecting only certain *especially important* interests of individuals"; (b) rights have only a "vertical" domain (they "operate only *between a citizen and his government*") and "impose exclusively or primarily *negative* obligations on the state"; and (c) "rights enjoy a *special normative force*, which means that they can be outweighed, if at all, only under *exceptional circumstances*" (ibid., 2). Reality and legal practice are instead totally different and are marked by "rights inflation, positive obligations and socio-economic rights, horizontal effect, and balancing and proportionality" (ibid.). In this sense, it can be said that the current legal practice—which "sees rights as protecting an extremely broad range of interests but at the same time limitable by recourse to a balancing or proportionality approach"—directly contradicts "the conceptions of rights proposed by most if not all moral and political philosophers who agree that rights protect only a limited set of especially important interests while enjoying a special, heightened, normative force" (ibid., 1). Particularly important is the fact of "rights inflation," attesting to the plurality of interests and needs that, in the contemporary context, are defended as rights.

From the second point of view, this approach aims to be "general in that it does not focus on specific issues or rights but aims at identifying features of their moral structure which are shared by many or all constitutional rights" (ibid., 2).[18] It wants to answer two main questions. The first is: What are the values protected by rights? The second is: What limits are the rights based on these values subject to.[19]

The value that rights refer to is that of autonomy. Autonomy is to be understood in a broad sense inclusive of all the activities that are "valuable *from the perspective of the agent*," which means that something is valuable if "the agent has an autonomy interest in the activity that must be protected by a right" (Möller 2013, 10). It is not possible to define such interests through a "threshold model" that selects these

[17]Möller (2012a, 21) notes that "it is of course possible that there is no such moral value, in which case this would have to be acknowledged by adopting the perspective of what Dworkin calls the internal sceptic; the consequence is that the practice ought to be discontinued."

[18]Möller (2012a, 1–2) stresses that his "theory follows a *substantive moral approach* in that it is grounded in political morality," and therefore that his approach "can be contrasted with a formal theory such as Robert Alexy's influential theory of rights as principles or optimization requirements."

[19]Möller (2012a, 1) points out other question that his theory seeks to answer: "(1) Which *theory* or *conception of rights* explains best the global model of constitutional rights, including the questions of which values are protected by rights and what are their limits? (2) How does the judicial enforcement of *this particular conception* of constitutional rights relate to the value of *democracy*? (3) How does it relate to the value of the *separation of powers*, in particular to considerations of the *relative institutional competence* of courts on the one hand and the elected branches on the other?"

interests in a "qualitative" manner, because this would lead to arbitrary choices (ibid., 17).

This does not mean that "anything goes," but simply that it is necessary to distinguish "between prima facie rights and definite rights." Whereas a "definite right to engage in a particular activity […] grounds a duty of non-interference on the side of the state," this is not the case for "the prima facie right [that] grounds a different duty: the duty of the state to take the respective autonomy interest adequately into account" (ibid., 13). Recognition of a wide range of interests as rights highlights the link between law and proportionality: the possibility of interfering or limiting these rights can only take place if there are "sufficient, and proportionate, reasons to do so" (Huscroft et al.2014, 9).

4 Proportionality and Rights: The Critical Theses

Despite its spread, proportionality has often been seen as something that is not always congruent with rights adjudication. By making it possible to limit rights, recourse to proportionality would amount to a "weakening" and an "emptying" of rights (Pino 2014a). As has been noted, one of the strongest criticisms is that "an understanding of rights that makes the existence of a definitive right dependent on applying a proportionality test undermines the very idea of rights" (Kumm and Walen 2013, 1). Proportionality test would not represent a true protection of rights as "rights are awarded no special priority," and "are reduced to defeasible premises in reasoning about proportionality" (Webber 2013, 4, 9), that is "to defeasible interests, values, or principles" (ibid., 9). The proportionality judgment is therefore seen as tantamount to a "dilution" or a "relativization" of rights: "a right or freedom is protected only to the extent that a state does not have a legitimate interest that requires its intrusion or limitation" (Schlink 2012a, 732).[20] At best, proportionality can be seen as one of the tools that, contingently, can be used in rights adjudication.

Criticism of proportionality/balancing has been raised at different levels of generality: the most important refers to the teleological/consequential dimension of the proportionality judgment, while other criticisms concern more specific aspects of rights. Without any claim to be exhaustive, we will consider (a) the limits of proportionality as a teleological judgment and (b) the problem of specific types of rights (such as "positive" and "horizontal" rights) and the possibility of different judgments on rights.

[20] Schlink (2012a, 732) underlines that "proportionality analysis is a reasoning process in which, prima facie, everything can be argued for or against the suitability or necessity of a means and the balance of the means and the end."

4.1 *Proportionality as a Teleological Approach: Rights as Fungible Goods*

One of the main arguments against the use of balancing and proportionality as decision-making tools in judgments on rights relates to their teleological dimension. One of the first criticisms made in this respect is that of Jürgen Habermas (1996) who, referring to Alexy's doctrine of rights as principles,[21] and relying on part of the German constitutionalist theory, argues that in a balancing/proportionality judgment, rights would be considered as fungible goods subject to a "cost-benefit analysis" in which "functionalist arguments then gain the upper hand over normative ones" (ibid., 259). Considering rights as the object of balancing "converts such rights from deontological legal principles into teleological legal interests or goods" (ibid., 258). This means that "in cases of collision *all* reasons can assume the character of policy arguments." If this happens, "then the firewall erected in legal discourse by a deontological understanding of legal norms and principles collapses" (ibid., 258–9). This means that "as soon as rights are transformed into goods and values in any individual case, each must compete with the others at the same level for priority," and this is reflected in the fact that "every value is inherently just as particular as every other, whereas norms owe their validity to a universalization test" (ibid., 259). This amounts to reducing rights to a competition between values or interests: in balancing, "values can only be relativized by other values; this process of preferring or pursuing values, however, resists attempts at logical conceptualization" (ibid., quoting Denninger 1990, 147). Rights, for Habermas, require a "deontological" consideration, that is, they need to be treated as "norms." In this way, they base their "validity" on a "universalization test" and are therefore "universally binding" (Habermas 1996, 259). Only this perspective makes possible their "unambiguous specification," and makes it unnecessary "to decide to what extent the competing values are respectively optimized" (ibid., 260). On Habermas's analysis, balancing is therefore seen as "a consequentialist form of reasoning that does not fit the deontological nature of at least some rights" (Kumm and Walen, 2013, 4).

This criticism offered by Habermas, summarizing a number of critical points of the balancing method,[22] carries three significant corollaries.

In the first place, the relativization of rights translates into the arbitrariness of decision-making, and ultimately into the irrationality of balancing. As we have seen, balancing should be regarded as irrational, as "there are no rational standards" on which to base it, and "weighing takes place either arbitrarily or unreflectively,

[21] Reference is being made here to Alexy's identifying values and principles in his theory of rights. Habermas rejects this identification, arguing that, while legal principles are deontological, values are teleological.

[22] Following Habermas's line of reasoning, Tsakyrakis (2009, 487) argues that the "balancing approach, in the form of the principle of proportionality, appears to pervert rather than elucidate human rights adjudication. With the balancing approach, we no longer ask what is right or wrong in a human rights case but, instead, try to investigate whether something is appropriate, adequate, intensive, or far-reaching." The teleological/consequentialist dimension of balancing is often associated with a utilitarian perspective.

according to customary standards and hierarchies": the practice of balancing increases "the danger of irrational rulings" (ibid., 259).

In the second place, further specifying the problem of irrationality, the balancing/proportionality method "requires the weighing of incommensurables lacking a common metric" (Jackson 2015, 3156): this is "to compare the length of lines to the weight of stones" (Petersen 2013a),[23] or "apples and oranges" (Borowski 2013). The problem lies not only in the impossibility of comparing cardinal numerical values but also in that of an ordinal comparison: all this would result in "an unacceptable level of indeterminacy" (Jackson 2015, 3153). As has been noted (Petersen 2013b, 3), if we treat balancing as a "cost-benefit-analysis," then we need to be prepared to accept that "the limitation of an individual right passes the constitutional muster if the marginal benefit of the state measure for a public purpose outweighs the marginal restriction of the constitutional right." The problem is that this comparison "usually requires that the compared goods can be measured in one common normative currency, i.e. they are commensurable." This commensurability appears "often lacking when it comes to the resolution of conflicts of competing constitutional rights and values" (ibid.).[24]

In the third place, balancing/proportionality seems to contradict the liberal rights tradition, that is, the idea that rights have a core immune from the state's decisions. If we see "the practice of proportionality justification" in a teleological sense, it is evident that it appears "as antithetical to the very idea of constitutional rights" (Thornburn 2016, 309–10). In this sense, one can argue that "rights subject to limitation under a general proportionality test should be viewed with suspicion across the wide spectrum of liberal theories of fundamental rights that reject consequentialism" (Verdirame 2015, 349). The liberal position requires that there be a sharp distinction "between the logic of ordinary public policymaking and the logic of rights" (Thornburn 2016, 311): "rights must not be amenable to the balancing of interests. Instead, they must act as firm and impenetrable constraints […] on the ordinary logic of state action" (ibid.).[25] As has been noted (Klatt and Meister 2012, 16), in part of the literature on rights, balancing seems to contradict the "basic liberal intuition that rights enjoy some kind of special priority, which gives them lexical priority over other considerations, in particular over any public interest."

[23] Jackson (2004, 3156–7) attributes this phrase to Justice Scalia in *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988)

[24] Endicott (2014, 9ff., 20ff.) distinguishes between "radical" and "vague" incommensurability and points out (starting, however, from the premise for which "the incommensurabilities in human rights cases […] do not necessarily lead to arbitrary decision-making" and that "proportionality reasoning is not generally pathological in human rights cases") six potential pathologies in the judicial appraisal of incommensurabilities. Möller (2012b, 719ff.), analysing "whether […] incommensurability poses a threat to the principle of proportionality," distinguishes between "strong and weak incommensurability."

[25] Thornburn (2016, 310) recalls the conceptions expounded by Nozick (side constraints), Dworkin (trumps), Schauer (shields), and Habermas (firewalls), among others.

4.2 *Proportionality and "Positive" and "Horizontal" Rights*

A less general criticism highlights how proportionality cannot be used for an important class of rights. As has been pointed out by Gardbaum (2016, 1), the fact that "the actual practice of rights adjudication around the world reveals that there are limits to the use of proportionality" seems to be linked to "two newer types of rights": "positive" rights (which include "social and economic rights") and "horizontal" ones. These two types of rights, which would be one of the examples testifying to the spread of the "global model of constitutional rights" (Möller 2012a), require a different jurisprudential treatment and an analysis not linked to the idea of proportionality. This thesis is argued on a twofold level: on the one hand, Gardbaum points out that in the "practice of Courts" having jurisdiction in cases involving constitutional rights (and this applies in particular to the European Court of Human Rights, the German *Bundesverfassungsgericht*, and the South African Constitutional Court)[26] proportionality is not used as a basis of adjudication; on the other hand, he highlights the need to more accurately distinguish between rights-conflicts and the ways in which they can be solved them. On this reconstruction, there are two main types of conflict: one that assumes a "relationship" between conflicting rights and one that instead does not assume this relationship. In the first case, what is to be considered is the relationship between the advantages that can derive from limiting a right and the disadvantages this involves (for another right),[27] while in the latter, we have to choose between "values" that do not stand in any relation to one another.[28] In the case of a conflict between values and of "positive" and "horizontal" rights, the logic of proportionality does not appear appropriate: it is linked to a "means-end relationship," which therefore assesses the proportionality of a measure limiting a right, and which does not apply in the absence of such relationship. As Gardbaum (2016, 7) points out, therefore, "not all balancing is the same," and thus "not all balancing involves proportionality; i.e. it can be, and is, done without."

[26] Referring to the ECtHR, Gardbaum (2016, 13), notes that "what we find when we look at the ECHR's leading positive rights cases is essentially no use of proportionality. Rather, the court focuses almost exclusively on the first stage issues of determining the content and scope of the right, and whether it has been infringed."

[27] Gardbaum (2016, 9) stresses that "proportionality is a relational concept."

[28] Gardbaum (2016, 7–9) exemplifies the two types in this way. On the one hand (a) we have conflicts that require us to evaluate a disproportionate act like that proposed by Schlink (2012b, 293), in which "a crippled homeowner sitting on his porch shoots a child stealing apples from his tree after the only other ways of protecting his property open to him—calling to the child to desist—fail." In this hypothetical case, "balancing the value of the child's life against that of the saved apples on any relevant metric results in the conclusion that the means used were massively disproportionate and hence the action clearly unjustified" (Gardbaum 2016, 7). On the other hand (b), we have conflicts that, by contrast, do *not* require us to make a proportionality evaluation, a case in point being a "person who has promised to meet a friend for coffee but shortly before the appointed time learns that his wife has just been admitted to an emergency room." In this case, "balancing is not used to evaluate the proportionality of the means employed as the two duties are independent values: there is no means-end relationship between them to assess the proportionality of."

The basic thesis is therefore that in the context of a general judicial task of assessing the reasonableness of legislative measures,[29] conflicts between values not linked by a means-end relationship require another type of assessment: something close to the test of the "reasonableness review" the South Africa court employs for "socio-economic rights." This is an assessment that does not involve analysing the proportionality of a measure, but "in positive rights cases at least" seeks to see, for example, if "an omission *is* a violation" of a social right (ibid., 35).[30]

PART II

5 Proportionality and Rights Adjudication

Proportionality review was introduced in Germany,[31] and spread across the rest of Europe and beyond, becoming a distinctive feature of the "post-war paradigm" of rights adjudication (Thorburn 2016, 305): a dominant justificatory practice deployed by national, supra-national and international courts in reviewing the legitimacy of acts that interfere with rights.[32]

The most prominent version of this practice structures the judicial analysis so as to "focus on the same questions in the same order" (Jackson 2015, 3094), determining whether the acts under review are justified according to criteria of (1) suitability, (2) necessity and (3) proportionality stricto sensu. More precisely, this version of proportionality review—call it the *standard version*—devises a three-step analytical sequence[33] aimed at assessing (1) the suitability of the institutional act under review relative to its (legitimate) purpose (suitability test); (2) the necessity of the act in relation to the accomplishment of that purpose (necessity test); and, finally, (3) the

[29]For Gardbaum (2016, 5) the task "of judicial review in a democracy" is that "of policing the boundaries of the reasonable."

[30]This position is, however, open to challenge: Klatt and Meister (2012, Chap. 5) argues for the full applicability of proportionality to "positive" rights, while Young (2012, 219) stresses that "the constitutional doctrine of reasonableness [in South Africa] […] uses a form of proportionality reasoning."

[31]The first decision applying the proportionality principle is reported (for instance, see Grimm 2016, 172; Alexy 2010a) to be BVerfGE 3, 383 (1954); followed by BVerfGE 7, 377 (1958); BVerfGE 13, 97 (1961); BVerfGE 16, 194 (1963); BVerfGE 19, 342 (1965).

[32]Proportionality standards are applied in rights adjudication from Germany to Canada, from Israel to Colombia and South Africa; furthermore, the use of proportionality review has been spreading at a transnational and international level, being adopted, among others, by the European Court of Human Rights and the European Court of Justice. On the wide circulation of proportionality standards in rights adjudication, see, among many, Stone Sweet and Mathews (2008, 80) defining proportionality as a "global constitutional standard"; Barak (2012b, 175–210), Jackson (2015), Beatty (2004, 162), defining proportionality as "a universal criterion of constitutionality"; Cohen-Eliya and Porat (2013, Chap. 1).

[33]In some versions (see, for instance, Barak 2012a; Grimm 2007) there is a further, initial, analytical step, specifically devoted to verifying whether the aim pursued by the act under review is legitimate. In the standard version, however, the inquiry into the legitimacy of the aim pursued by the act comes with the suitability and necessity tests.

proportionality of the act, that is, whether the relevance of the interests protected by the act and the extent to which they are satisfied can justify sacrificing the rights at stake.[34] Under the third test, proportionality analysis enters the sphere of judicial balancing: it requires to balance the interests realized by the act under review against the rights to be sacrificed; to this end, the reasons for interfering with a right should be weighed against the reasons that underlie its protection, so as to satisfy the former without disproportionately sacrificing the latter.

This version of proportionality—the standard version—has so far had the greatest visibility and impact on the theory and practice of rights adjudication. There are, however, further versions of proportionality, which for the most part differ by the order and/or the characterization of the proportionality sub-tests—especially the balancing test—and/or the emphasis placed on one or the other of these tests.[35]

In fact, proportionality is not *a unitary* justificatory practice but a *family* of such practices that deploy a range of different argumentative paths to rights adjudication. These practices share an approach to rights adjudication—call it *proportionalism*—characterized by recourse to judicial tests by which to assess whether interferences with rights are an adequate instrument for realizing legitimate ends (that is, they do not exceed what is required to realize those ends). However, proportionalist practices diverge in designing these tests, especially when it comes to weighing the interests that underlie the act under review against the interests protected by the rights at stake.[36]

The following sections are aimed at sketching the different forms of proportionalism, taking into account a distinction between two dimensions of rights adjudication. On the one hand is an "internal" dimension, relating to the judicial assessment of acts that interfere with rights; on the other hand is an "external" dimension, relating to the grounds for, and the limits of, adjudication.

In these terms, a distinction maybe drawn between proportionalism *in* review and proportionalism *of* review.

In the first form, proportionalism is a way of structuring judicial analysis in order to test whether the acts under review are legitimate in their interfering with rights. More specifically, proportionalist models of review require that we verify that these acts pursue legitimate objectives and are proportionate means for the realization of those objectives. On some models, then, the judicial analysis should also test

[34]This is the *proportionality as such* (Jackson 2015, 3094) or *proportionality* stricto sensu stage. According to Alexy (2003, 436–7) the proportionality stricto sensu principle establishes that: "The greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other." Under this sub-principle the "Law of Balancing" requires three steps by which to establish (a) the degree to which a right or principle has fallen short of being satisfied or has been sacrificed; (b) the import that can be associated with satisfying a right or principle in conflict with the one that has been sacrificed; and (c) the importance of satisfying the second principle as justification for sacrificing or failing to satisfy the first.

[35]For an overview and analysis of different versions of the proportionality review template see, among many others, Jackson (2015), Stone Sweet and Mathews (2011), Grimm (2007).

[36]See, among many, the proposals of Luterán (2014) and von Bernstoff (2014).

whether the acts under review carry a sacrifice for rights that is commensurate with their relevance, given the relevance of conflicting interests.

In the second form, proportionalism is a way of handling the institutional dimension of rights adjudication. In particular, proportionalist approaches to rights adjudication aim at determining the scope and intensity of judicial scrutiny so as to combine the protection of rights with the respect owed to political decisions, taking into account the weight they carry from time to time.

Based on this distinction, I will first discuss proportionalism *in* review as a way of getting the "measure" of the protection the different interests at stake deserve, and then I will turn to the forms taken by proportionalism *of* review as a way of getting the "measure" of judicial action.

6 Proportionalism *in* Review

Proportionalism *in* review can be defined as a set of approaches to rights adjudication that are aimed at testing the suitability and necessity of interference with rights in light of the relevance of the various rights/interests involved. Proportionalist approaches, then, mostly diverge with regard to the assessment of such relevance.

More specifically, the different versions of proportionality *in* review primarily differ in two respects: (1) the connection between proportionality analysis and balancing, and (2) the understanding of balancing as a form of practical reasoning about legal questions.

(1) On the one hand, there are versions of proportionality analysis that require a balancing test aimed at weighing the various interests and rights at stake; on the other hand, there are versions that only require a means-ends analysis guided by criteria of suitability and necessity, but that do not entail a specific balancing step in order to weigh the different rights/interests against one another.
(2) In the background, the different versions of proportionality analysis rely on different accounts of balancing as a form of legal reasoning. Some versions qualify it in strong terms, that is, as a specific, distinctive form of legal reasoning presenting features that distinguish it from other forms of legal reasoning, notably subsumption (Alexy 2003). Other versions qualify balancing in weak terms, as a merely prudential attitude in legal reasoning, one that makes judicial review sensitive to the different interests and factors that are relevant to a decision but does not call for any specific test (Luterán 2014).

Of course, the two aspects just mentioned are connected, since the relation between proportionality and balancing also depends on how the latter is conceived: when conceived in weak terms, its ties to proportionality analysis only call for a prudential attitude in review, but do not require the review to follow a specific route by performing specific tests. By contrast, when balancing is conceived in strong terms, as a *specific* kind of legal reasoning, its ties to proportionality analysis become more

"stringent"—requiring that a sequence of specific analytical steps be followed—and hence more controversial (ibid., 24–6).[37]

In the first case, balancing qualifies, not as a separate stage in the decision-making process, but rather as the judicial attitude of taking into account the different interests at stake, an attitude that different review paradigms can express in different terms. Indeed, this judicial attitude may result in a cost-benefit analysis—disconnected from more complex analytical frameworks—as well as in a standard proportionality analysis, framing the balancing test as one of the three, separate, analytical steps. When balancing is conceived in weak terms, it is quite uncontroversial that it somehow characterizes judicial reasoning and does not point to the adoption of any specific argumentative template. From this perspective, the balancing attitude should characterize any and all of the tests adopted so as to assess the legitimacy of the act under review.

In the second case, by contrast, balancing is conceived as a distinctive form of legal reasoning, pointing to the establishment of a normative equilibrium among different constitutional protections under a criterion of proportionality stricto sensu. In these terms, judicial balancing is a *specific* way of solving normative conflicts that involve rights, and it marks the conclusive step in a structured analysis, placing specific argumentative constraints on the judicial decision-making process. In this case, the role of balancing in rights adjudication is more controversial: first, it is controversial that this form of legal reasoning is a necessary component of proportionality review; second, it is disputed that judicial recourse to a balancing test is legitimate and acceptable.

Concerning the first aspect, we will analyse the different role of balancing in the two main versions of proportionality review; concerning the second aspect, we will point out the problems of legal certainty raised by the judicial application of a balancing test within the proportionality review template.

6.1 Proportionality Balancing and Means-Ends Proportionality

In both the theory and the practice of rights adjudication, proportionality review tends to be identified with its standard version—the version that, as mentioned, envisages a three-step sequence of judicial tests guided by the criteria of suitability, necessity and proportionality stricto sensu.

[37] As pointed out by Luterán (2014), a conception of balancing in strong terms underlies the accounts of proportionality of Alexy (2003, 2010a), Barak (2010), Möller (2013), whereas a "weak" conception seems to underlie the analysis of Gunn (2005).

Other versions, however, characterize proportionality review in different terms. In fact, at least two fundamental versions of proportionality *in* review can be identified: *proportionality balancing* and *means-ends proportionality*.[38]

Proportionality balancing is the standard version, the prominent one in both the theory and the practice of rights adjudication. It requires, first, a means-ends analysis of the act under review, that is, a scrutiny of the suitability and necessity of the act as a means for realizing a certain end. Second, it requires a test aimed at balancing the weight of the interest(s) underlying the act under review against the weight of the right(s) at stake. Indeed, the criterion of proportionality stricto sensu governing this latter step calls for the establishment of an equilibrium among the different interests/rights that come into conflict in a given case.

The most influential model of *proportionality balancing* is the one put forward by Robert Alexy. This model, in a nutshell, constructs constitutional rights as "double aspect constitutional norms" combining the level of rules with the level of principles (Alexy 2010a, 84–6). From this perspective, as we have seen, constitutional rights are "optimization requirements," that is, principled norms "requiring that something be realized to the greatest extent possible, given the factual and legal possibilities at hand" (Alexy 2010b, 21). Rights are thus construed as prima facie principles (Alexy 2010a, 57)[39] that may conflict with other rights or interests interfering with their full realization. From this feature of rights there logically follows the principle of proportionality: it "is implied by it and vice versa" (ibid., 66).

Indeed, the proportionality principle expresses the idea of optimization and requires us to assess what conflicting principles demand in concrete cases, this by "testing" their optimization under the criteria of suitability, necessity and proportionality stricto sensu. According to the criteria of suitability and necessity, the optimization of principles is tested by what is *factually* possible. According to the criterion of proportionality in the narrow sense, the optimization is tested by what is *legally* possible, that is, by competing principles.[40] The latter test, performed according to the criterion of proportionality stricto sensu, is decisive: it is aimed at balancing the non-satisfaction of a principle with the importance of satisfying the other principle with which it is in conflict. As Alexy put it in the *Law of Balancing*: "The greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other" (ibid., 102). The result is a "conditional relation of precedence" among the principles at stake.

The standard version of proportionality review is challenged by models that qualify proportionality review as a two-step *means-ends* analysis aimed at testing the

[38]This distinction draws on the analysis of Luterán (2014, 22 ff.). Proportionality in review is associated with balancing by many theories of rights adjudication (see, for instance, Alexy 2003, 2010a; Barak 2010; Webber 2010, 2013). There are, however, accounts of proportionality review that do not associate it with balancing (see Luterán 2014 and also—in different terms—Rivers 2006).

[39]On the prima facie character of principles Alexy makes reference to Ross (2002) and also K. Baier (1965) and Hare (1985).

[40]The idea that a neat distinction can be drawn between questions of fact and questions of law in this kind of review has been challenged: see Pino (2014b, 606).

acceptability of the means adopted to achieve the aims pursued by the institutional act under review. This scrutiny comprises a suitability test and a necessity test but does not include a separate balancing test proper.

Some authors defend this version of proportionality review as the authentic form of proportionality—the one closest to its "lost meaning" (Luterán 2014). The origins of proportionality, from this perspective, go back to the doctrine of "double effect," specifying the conditions under which a human behaviour is morally permissible by looking at both the positive and negative effects associated with that behaviour (ibid.).

The doctrine, in other terms, explains the permissibility of an action causing serious harm as a "side effect" (or "double effect") of bringing about a good result "even though it would not be permissible to cause such a harm as a means by which to bring about the same good end" (McIntyre 2014).

More specifically, according to the doctrine of double effect an act is morally permissible if it meets four conditions as follows: (a) the act itself must be morally good or at least indifferent; (b) the agent may not positively will the bad effect but may permit it. If he could attain the good effect without the bad effect he should do so. The bad effect is sometimes said to be indirectly voluntary; (c) the good effect must flow from the action at least as immediately (in the order of causality, though not necessarily in the order of time) as the bad effect […]; (d) the good effect must be sufficiently desirable to compensate for the allowing of the bad effect (Connell 1967, 1021).

The standard of proportionality would be at work with regard to the latter condition, guiding the appraisal of the act's bad effects under the requirement that such effects "must not be disproportionate in the given circumstances" (Luterán 2014, 20). In legal reasoning, proportionality would perform the same function, since rights-adjudication deals with problems presenting the same structure as the problem of the double effect. The institutional actions under judicial review, on the one hand, claim to pursue legitimate ends and, on the other hand, give rise to negative effects consisting of interferences with rights. This double-effect problem "provides the intellectual bridge between the idea of proportionality in ethics and law" (ibid., 31). From this perspective, proportionality *in* review grounds a test that requires judicial reasoning to "identify as precisely as possible the intentional state action and the negative effect complained of," differentiating the kind of analytical route to be followed on the basis of the different kinds of conflict at stake (ibid., 41).

Beyond the theoretical proposals, a means-ends version of proportionality review to some extent characterized the case law of the European Court of Human Rights[41] until the 1980s, as well as the case law of the European Court of Justice.[42]

[41]This along the lines defined by the European Court of Human Rights in the *Case* "*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*" *v. Belgium*, 1968, interpreting the proportionality requirement as concerning a "relationship of proportionality between the means employed and the aim sought," and, more precisely, calling for a "reasonable relationship of proportionality between the means employed and the aim sought to be realized."

[42]The Court made use of a proportionality review template for the first time in Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle* [1070] ECR 1125. In broader terms, on

Furthermore, the means-ends version is in certain respects close to the tier-scrutiny template adopted by US courts (with all the difficulties of comparing judicial frameworks adopted in different jurisdictions).[43] Indeed, the dominant approach to rights adjudication in Europe is characterized by the use of proportionality analysis, mostly in the proportionality-balancing version; in the United States, by contrast, courts do not resort to proportionality review but rather apply a *tier scrutiny* of the means-ends rationality characterizing the act under review. Indeed, in the United States, "the closest thing […] to a common rubric for reviewing claims across different substantive areas—is the set of standards that make up the 'tiers of scrutiny'" (Stone Sweet and Mathews 2011, 104). This set of standards defines a review template requiring the judicial scrutiny of (i) governmental interests, (ii) the effectiveness of the means chosen to realize these interests and (iii) the alternatives to these means (so as to determine whether less-restrictive means are available for furthering the governmental interests in question). This scrutiny, then, can be exercised at different levels of intensity: the "three tiers" of strict scrutiny, intermediate scrutiny and rational basis review.[44]

Two features of this review template need to be pointed out. First, it is not connected to the idea of proportionality, at least not explicitly. In fact, the judicial analysis deployed in tier scrutiny resembles the means-ends version of proportionality but is not explicitly tied to it. And, second, tier scrutiny includes a suitability and a necessity test but does not incorporate a specific balancing test. Balancing, indeed, stands as a judicial mechanism of its own and is not embedded in a specific structured template. On this basis, some Authors (Cohen-Eliya and Porat 2010, 2013; Stone Sweet and Mathews 2011) contrast the European approach to judicial balancing with the US approach: the first integrates balancing into a structured proportionality analysis, whereas the second frames it as a less structured, policy-oriented judicial test (Cohen-Eliya and Porat 2013, 60). From this perspective, the first approach reflects a constitutional culture—the European culture—characterized by "epistemological optimism," (Cohen-Eliya and Porat 2013, 59) thus framing judicial balancing as an interpretive mechanism bound to a "pyramidal, objective system of values" (Bomhoff 2008, 124). The second approach, by contrast, is presented as reflecting a different constitutional culture—such as the US culture—that is more pragmatic and characterized by "epistemological scepticism," and which disconnects judicial balancing from structured argumentative templates, such as the proportionality framework (Cohen-Eliya and Porat 2013).

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the use of review templates guided by standards of proportionality in EU law, see Emiliou (1996), Ellis (1999), Arai-Takahashi (2002), Harbo (2010).

[43] The proportionality review template adopted by the Canadian Supreme Court is also closer to the means-ends template, rather than the proportionality-balancing template adopted by the German Constitutional Court; it contemplates a balancing test, but the analytical emphasis is on the suitability and necessity tests. According to Grimm (2007, 393), indeed, "The most striking difference between the two jurisdictions is the high relevance of the third step of the proportionality test in Germany and its more residual function in Canada. Here the German Court argues at length, whereas the Canadian Court mostly presents a 'résumé' of previous analysis."

[44] See Chemerinsky (2011, 687 ff).

The divergence between these approaches, then, ultimately draws on different constitutional traditions, representing in very different ways the role and limits of constitutional justice and, in the background, the relation between democracy, constitutionalism and rights. Proportionality analysis is grounded in a "culture of justification"[45] that characterizes European constitutional systems in contrast to a "culture of authority" that serves as the basis for non-structured balancing approaches (Cohen-Eliya and Porat 2013).

Indeed, in a culture of authority the legitimacy of governmental action is based on the fact that "the actor is authorized to act," whereas in a culture of justification this authorization is not sufficient and the essential requirement for the legitimacy of governmental action is that it be justified in substantive terms (ibid., 112).

From this perspective, the use of proportionality review in rights adjudication reflects a culture of justification and, moreover, is a *constitutive* condition for expanding and enhancing this culture. Indeed, proportionalism in review is conceived as an essential component of a constitutional culture of justification, one that is based on a fundamental (meta)-right of everyone to justification (Kumm 2010; Forst 2012; Cohen-Eliya and Porat 2013). The idea is that proportionality review institutionalizes the right to justification—a right that is linked to a conception of legitimate legal authority on which the "law's claim to legitimate authority is plausible only if the law is demonstratively justifiable to those burdened by it in terms that free and equals can accept" (Kumm 2010, 143). In other terms, a culture of justification requires that governmental actions are substantively justified "in terms of the rationality and reasonableness of every action and the trade-offs that every action necessarily involves, i.e. in terms of proportionality" (Cohen-Eliya and Porat 2011, 463).

This idea of a "constitutive" link between proportionality review and a culture of justification is not just relevant in descriptive terms, as a way to explain how the widespread of the former has contributed to the establishment of the latter. Indeed, this link is also normative in its import, serving as a basis for a non-instrumental justification of proportionalism in judicial review (Cohen-Eliya and Porat 2013): proportionality review is the institutional embodiment of—or *constitutes*—the right to justification and, in this sense, it is inherently valuable.

In these terms, we can go beyond a justification of proportionality review as an instrument for promoting "flexibility, political stability, efficiency, judicial legitimacy, or simply judicial power" (Cohen-Eliya and Porat 2013, 111). Indeed, the value of proportionality depends not only on the merits of the decisions it makes it possible to arrive at but, more fundamentally, on the role it plays in *constituting* a condition for the fulfilling the right to justification (ibid.).[46]

Although schematic, the juxtaposition just sketched out allows us to point out the traditional disconnect between the European proportionality-balancing approach and the US balancing approach, which is mostly due to a strong resistance to explicit recourse to proportionality analysis in the United States.

[45] Drawing on the idea of a "culture of justification" advanced by Mureinik (1994).

[46] More broadly, for a non-instrumental justification of judicial review based on the idea of a right to a fair hearing, see Harel and Kahana (2010).

In spite of this aversion, however, the evolution of the US case law, at least in some contexts, reveals a latent use of judicial frameworks resembling proportionality review (Cohen-Eliya and Porat 2009; Jackson 2015; Yowell 2014). As Justice Breyer noted in *District of Columbia v. Heller*, "contrary to the majority's unsupported suggestion that this kind of 'proportionality approach' is unprecedented, the Court has applied it in various constitutional contexts, including election-law cases, speech cases and due-process cases."[47] In this respect, there are also scholarly analyses that emphasize, in the first place, how proportionality review has in fact been applied by US Courts in many contexts, and, in the second place, how—in contexts in which it has *not* been applied—proportionality would have been a valid alternative to the review templates which have so far been adopted and which result in categorical rules that are "increasingly uncertain and complex" (Jackson 2015, 3129).

This emphasis on proportionality shows how it has come to be a dominant approach in the theory and practice of rights adjudication, not only in Europe but also in the United States—an essential part of a *global* constitutionalism (Stone Sweet and Mathews 2008), albeit with some differences among proportionalist models.

6.2 *Proportionality Between Ad Hoc and Definitional Balancing*

As noted in the previous sections, the connection between balancing and proportionality review is of crucial relevance in two main respects. First, the inclusion of a balancing test in the review template forms the basis for a distinction between two, fundamental, versions of proportionality *in* review, that is, proportionality balancing and means-ends proportionality. Second, when the proportionality-review template incorporates a balancing test, questions arise about the nature of this test and about whether it is a legitimate instrument of review. Judicial recourse to balancing raises many deeply controversial questions, not least of which whether it is compatible with legal certainty. In this respect, the main criticism is that the balancing test incorporated into proportionality review is ad hoc and therefore leads to unstable, uncertain outcomes.

Indeed, according to a widely applied distinction, balancing in adjudication can take two different forms. It can be ad hoc, that is, narrowed to the case at hand, or *definitional*, when its outcomes in a concrete case serve as the basis for a general rule aimed at covering subsequent cases of the same kind (Nimmer 1968; Aleinikoff 1987). Ad hoc balancing only provides a particular solution to the conflict arising among the principles involved in the case at hand, while definitional balancing points to a general solution applying to future conflicts among the same principles.

[47] District of Columbia v. Heller, 554 US 570, 690 (2008).

The chief difference between ad hoc and definitional balancing, then, is that from the latter "a rule emerges" and this rule can be applied in future cases "without the occasion for further weighing of interests" (Nimmer 1968, 945).[48]

The distinction between these two forms of balancing has been at the centre of a wide debate.[49] On the one hand, the judicial use of ad hoc balancing techniques is criticized for producing unstable results, whereas definitional balancing is presented and defended as the appropriate way of coping with conflicts arising between fundamental rights/interests, as in the case of conflicts between free speech and other constitutional values (ibid.).[50] On the other hand, definitional balancing is criticized for its false promises: it wouldn't be able to generate rules that apply to future cases without further weighing the interests at stake (Aleinikoff 1987). Definitional balancing, from this perspective, does not deliver the legal certainty it promises due to the fact that "new situations present new interests and different weights for old interests," and "if these are allowed to re-open the balancing process, then every case becomes one of an 'ad hoc' balance, establishing a rule for that case only." From this perspective, the distinction between definitional and ad hoc balancing is "artificial": balancing can be definitional only "if the Court stops thinking about the question" (ibid., 980).

However, this distinction is relevant for our analysis because, as mentioned, the standard version of proportionality *in* review—Proportionality balancing—is criticized for incorporating an ad hoc version of balancing, thereby yielding instability and uncertainty in judicial decision-making. The problem would be that application of the stricto sensu proportionality test narrows the scope of judicial balancing to the case at hand (Moreso 2012, 38–9; von Bersntorff 2014; Bernal Pulido 2007, 194–9). Indeed, the resulting decisions would be based on balancing that courts are called on to do from time to time, on the basis of the weight that rights carry in the specific circumstances of the case at hand: the outcomes would be neither general nor predictable.

This criticism, however, overlooks the "definitional" features of Proportionality balancing. In fact, this review template combines the assessment of the concrete weight carried by rights—and the balance struck among them in specific cases—with the production of general, defeasible rules. On this point, Alexy (2010a, 51–2) argues that the solution to a conflict among principles results in the establishment of a "conditional relation of precedence" between them, which takes the circumstances of

[48] It is the existence of such a rule that "makes it more likely that the balance originally struck will continue to be observed despite new and perhaps otherwise irresistible pressures" (Nimmer 1968, 945).

[49] This dispute loomed large in the debate on the US Supreme Court's adjudication of cases regarding the protection of free speech and mainly focused on the viability, and desirability, of a "definitional" approach to balancing. See Nimmer (1968), Schauer (1981), Aleinikoff (1997).

[50] According to Nimmer (1968, 942), definitional balancing is "a third approach which avoids the all or nothing implications of absolutism versus ad hoc balancing […]. That is, the Court employs balancing not for the purpose of determining which litigant deserves to prevail in the particular case, but only for the purpose of defining which forms of speech are to be regarded as 'speech' within the meaning of the first amendment."

the case into account. This is defined a *conditional* relation because the decision about the conditions of precedence among rights/interests is based on the circumstances of the case, such that, when these conditions change, so does the relation of precedence. Even so, the preferential statement establishing a precedence among principles "gives rise to a rule requiring the consequences of the principle taking precedence, should the conditions of the precedence apply" (ibid., 53, 101). From this perspective, Alexy frames under a *law of competing principles* the connection that holds between conditional relations of precedence and rules: "The circumstances under which one principle takes precedence over another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence" (ibid., 54).

In other terms, the results of balancing serve as the basis of a rule under which subsequent cases can be decided. And such rules are prima facie rules, in the sense that it is possible to incorporate exceptions into them, with the result that they loose their definitive character. But the prima facie character of rules is different from the prima facie character of principles. A principle is "trumped when some competing principle has a greater weight," while a rule is not automatically trumped when the underlying principle has less weight than a competing principle applying to the same case. In fact, there are also formal principles that must be weighed, like the one establishing that the "rules passed by an authority acting within its jurisdiction are to be followed" or the one under which we "should not depart from established practice without good reason." The strength of the prima facie character of rules, then, depends in part on the weight of formal principles (Alexy 2010a, 57–8). In these terms, proportionality balancing is neither ad hoc nor definitional, but seeks to combine flexibility with legal certainty: a case-by-case assessment of conflicting norms with the production of rules that can guide future assessments.

7 Proportionalism *of* Review

Proportionalism *of* review comes in two fundamental versions: *optimizing proportionality* and *state-limiting proportionality* (Rivers 2006; Young 2014). These two versions are grounded in different conceptions of judicial review and its limits.

Optimizing proportionality is a review model aimed at establishing a balance among fundamental rights and other rights/interests "in the best possible way" (Rivers 2006, 176). *State-limiting proportionality* is a model essentially aimed at protecting rights and enforcing their primacy in the constitutional system on the basis of a conception of judicial review "as a set of tests warranting judicial interference to protect rights" (ibid., 176). In the first case, the focus of judicial review is on the degree of protection deserved by rights in light of how relevant the protected interests in conflict are. In the second case, the judicial focus is on the limits on state action deriving from the primacy of rights.

The main difference between these models lies in the judicial attitude towards normative conflicts involving rights. On the optimizing model, judicial review

determines, from time to time, the extent to which rights can be optimized and protected against illegitimate state interference. On the state-limiting model, judicial review expounds and sets the limits that rights place on state action, defining the scope of the latter on the basis of the scope of the former.

On the basis of this reconstruction, *optimizing proportionality* characterizes the outcomes of judicial review as "open-ended" and requires us to draw a distinction between two orders of issues: on the one hand, are the substantive issues concerning the legitimacy of interferences with rights designed to protect conflicting interests; on the other hand, are the formal issues relating to the responsibility of courts in ensuring that such interferences are justified (Rivers 2006, 177).

On the *optimizing proportionality* model, judicial balancing lies at the core of an "open-ended" review of the reasons that may justify sacrificing a right to satisfy conflicting interests/rights. There are no substantive constraints on the outcomes of this review, which may differ depending on the weights the different interests at stake are found to carry on each occasion.

The *state-limiting proportionality* model, by contrast, places substantive constraints on judicial review, since it requires judicial scrutiny to ultimately preserve the primacy of rights by identifying, and enforcing, the limits on state action that derive from it. This model on the one hand provides courts with solutions that place heavy substantive constraints and on the other hand entrusts courts with a role as state-limiting actors. In these terms, the state-limiting version of proportionality review does not come with any clear distinction between substantive and formal issues in rights adjudication: the solution to the former—namely the primacy of rights—stands as a solution to the latter—a "default" state-limiting function that courts are called on to perform (id.).

Further elaborating on the distinction between optimizing-proportionality and state-limiting proportionality, Young (2014) argues that these two versions of proportionalism are not alternative but complementary. The first version aims to determine the degree and the scope of rights protection by balancing rights against other conflicting rights/interests; the second version aims to determine the limits within which institutional action can legitimately impact on rights, given a certain relation of precedence among rights and conflicting interests. The first version therefore relies on an interest-based conception of rights, as protections of interests that may or may not prevail over interests of a different sort; the second version instead relies on conceptions of rights that ascribe a strong lexical priority to them (ibid., 51). Nonetheless, these two paradigms of rights adjudication are not incompatible, but rather allow judicial review to perform different functions that can be combined. In the case of optimizing proportionality, judicial review performs the function of contributing to the determination of the scope and degree of protection accorded to rights in constitutional systems in which they are still uncertain. In the case of state-limiting proportionality, judicial review performs the function of specifying the limits imposed on institutional action by the scope and degree of rights protection in those contexts in which they are already fixed and established.

In these terms, the two models of proportionality work at different levels of abstraction. State-limiting proportionality operates in contexts in which the degree

and scope of rights protection are determined; therefore, it works at an intermediate level of abstraction as a model of adjudication requiring that rights be taken as "intermediate conclusions,"[51] without entering into the question of their basis or justification. Otherwise, in the case of optimizing proportionality, judicial reasoning unfolds at a higher level of abstraction because it operates in contexts where the degree and scope of rights protection are not yet established: it must elaborate those intermediate conclusions to determine the content and degree of rights protection (Young 2014, 63–6; Luterán 2014, 24–5).

The option for one or the other form of proportionality, and their possible combinations, depends on the role that constitutional justice is called on to play in a specific context, taking into account the extent to which the content and level of protection of rights are determined and established.

In these terms, the differentiation between optimizing proportionality and state-limiting proportionality highlights two relevant aspects.

First, it points out the distinction between the substantive dimension and the formal dimension of rights adjudication, that is, between issues relating to the acceptability of interference with rights and the issues relating to the scope and intensity of the judicial scrutiny of such interference. Second, it draws attention to the ductility of proportionalist adjudication, not only in the substantive dimension, where it grounds and combines different argumentative frameworks, but also in the formal dimension. In the latter dimension, proportionalism covers a range of different models of rights adjudication, so that the scope and intensity of judicial review can be *proportionally* adjusted—in optimizing and/or in state-limiting terms—depending on the context in which courts adjudicate interferences with rights.

From this perspective, proportionalism not only guides the review of conflicts among rights/interests at a substantive level but also provides (meta-) judicial guidelines for setting—and justifying—the scope and intensity of judicial review at a formal level. Proportionalism, more precisely, provides justificatory frameworks for judicial action, requiring courts to adjust—and account for—their action in terms of proportionality, that is, as the adequate means for the realization of a legitimate end.

Along these lines, proportionalism—with the nested balancing mechanisms—has been identified as the appropriate approach to formal questions concerning judicial review and, in particular, to the conflicts among constitutional competence norms that come about at a formal level and regard the exercise of judicial review (Klatt 2015). The idea is that such norms, like constitutional norms that protect rights, are norms of principle that can come into conflict and thus need to be optimized by means of balancing. Therefore, when a conflict arises among competence norms with respect to the exercise of judicial review, this conflict should be settled by balancing those norms against one other, to this end taking into account the weight carried by the different institutional reasons at stake in a given case.

In other terms, the "institutional problem" concerning the determination of the scope and intensity of judicial review is presented as a conflict between formal

[51] The reference is to Raz's (1986, 181) idea of rights as "intermediate conclusions in arguments from ultimate values to duties."

principles of competence, that is, between the political competence to decide on certain issues and the judicial competence to review those decisions (Klatt 2015). From this perspective, "if it is correct that the institutional problem of judicial review is a conflict of formal principles, rather than of rules, then the solution of that problem is not to be found by means of interpreting competence norms. Rather, a balancing procedure has to be employed" (ibid., 364). And this procedure brings into the formal dimension of rights adjudication those balancing mechanisms that we already analysed as the core components of the standard proportionality template that is widely applied in the substantive dimension of the judicial review.

8 Alternative Approaches

If, and how, courts should engage in proportionalist adjudication is very controversial, especially when it comes with the application of a balancing procedure.

On the one hand, proponents of balancing, and of proportionality, claim that this is a rational procedure and that, given the structure of constitutional rights, it makes it possible to appropriately deal with conflicts among such rights. From this perspective, balancing provides judicial reasoning with an argumentative structure and leads it to acceptably justified decisions (Alexy 2010a; Barak 2010; Beatty 2004; Klatt and Meister 2012; Kumm 2010). On the other hand, critics of judicial balancing argue, among other things, that it is impossible to either do it rationally or characterize its results in general and predictable terms as required by legal certainty. Therefore, the judicial balancing of constitutional rights would be an arbitrary and illegitimate exercise of judicial power (Habermas 1996; Tsakyrakis 2009; Webber 2009, 2014).

In general, proportionalist-balancing approaches characterize judicial review as aimed at expounding the normative reasons expressed by rights, weighing them in light of the factual and legal circumstances and protecting them as much as their weight requires, being balanced against the weight of conflicting/competing rights/interests. These approaches, as we saw, are grounded in a "broad" construction of constitutional rights conceived as principled norms that can come into conflict. These norms have an open-ended structure and a weight dimension, and therefore require to be weighed and balanced against one another. If we follow this route, then, balancing can take different forms, and its justification can be more or less distant from the circumstances of the case at hand.

The alternative approaches to proportionality-balancing take a different route. They ground two main adjudicatory strategies, namely categorization and specificationism, that are both based on a conception of constitutional rights norms as rule-like norms. When these norms "compete" for application to a case, the appropriate specification of their scope makes it possible to identify which among the competing norms covers the case and must be therefore applied. In other terms, both strategies

rely on the idea that the proper determination of the scope of rights "dissolves" such conflicts as seem to emerge among them.[52]

The first strategy—categorization—draws attention to the content of rights and requires us to proceed by narrowing that content so as to conceptually isolate rights from other potentially conflicting interests and to grant them full protection. This strategy, then, characterizes the judicial activity as aimed at "labelling and classifying" (Sullivan 1993, 241) the many facets of rights, along with the limits they place on the institutional action: the resulting taxonomy would allow courts to rely on a conceptually predetermined scope of rights and to identify what pertains to it and what doesn't.[53]

The second strategy—specificationism—focuses on the scope of rights and requires us to progressively expound and specify its boundaries, as implied by the scope of other rights/interests (Wellman 1995; Richardson 1990; Scanlon 2000; Moreso 2012; Webber 2009; Oberdiek 2004). In these terms, specificationism sets out to "reduce the scope of principles by preserving their stringency," which "amounts to conceiving the formulation of principles as incomplete and expanding them in a manner that, conveniently hedged, the scope of principles remains different and yet they are not in conflict" (Moreso 2012, 36).

In both cases, the adjudicatory approach is to take as fully protected what is covered by the scope of rights, whether identified in positive or negative terms. As a result, we arrive at rules forbidding actions that violate such rights and permitting actions that do not.

However, it is controversial that the categorical and the specificationist approaches ground a balancing-free judicial review. Indeed, the task of specifying the content/scope of rights seems to require us to define their boundaries *in relation* to the boundaries of other rights/interests. This task can be hardly presented as free of balancing without paying the price of disguising the interaction among the different reasons that must be assessed in order to establish what falls within the scope of a right (Alexy 2010a, 208–9; Klatt and Meister 2012, 46–7).[54]

Rather, what seems to be at work is a sort of "exclusive" balancing, namely, a balancing that proceeds by isolating the reasons that fall within the scope of rights from those that fall outside, so as to hide the latter and give full visibility and protection to the former. In this way, a "residue" of reasons gets lost and there is the problem of accounting for the difference between violating a right and infringing a right (Thomson 1986; but also Oberdiek 2004). From this perspective, the outcomes of

[52] From a specificationist perspective (Wellman 1995, 279), "the only way to make sense of apparent cases of conflicting rights is to assert that, despite initial appearances, (at most) only one party in fact has a right in this relationship."

[53] According to Sullivan (1993, 241), "[c]ategorization is the taxonomist's style—a job of classification and labelling […] Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial balancing of the claimed right against the government's justification for the infringement." On categorical and balancing approaches to review see also Schauer (1981).

[54] "The outcome of a narrow interpretation of a fundamental right is always based on balancing, since it relies on the reasons for and reasons against the protection" (Klatt and Meister 2012, 46).

categorical and specificationist approaches to rights adjudication serve as a basis for rules that do not fully capture *all* the different reasons involved in judicial decision-making and therefore do not allow for their proper consideration, as is necessary if we are to make sense of the evolution of case law.

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