

THE BALANCING METHOD ON THE BALANCE

Human Rights Limitations in the ECHR

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Introduction

Balancing is in vogue across Europe. Indeed not only does it seem that Europe is stuck in the age of balancing for some decades now, but there is also a marked complacency about it.¹ The European Court of Human Rights is by its own admission routinely balancing human rights against each other and against conflicting public interests. Even more characteristically, there are theories, which do not simply claim that balancing is the proper way of resolving human rights issues but that it is the only way, since the very concept of human rights implies balancing, is inseparable from it.

In this paper, I intend to reexamine this so-called balancing approach as the judicial method of resolving conflicts in human rights cases. Going against the tide, I aim to challenge the nowadays prevailing complacency about balancing by showing, first of all, that the term unavoidably tends to exclude from adjudication (or in any case obscure) the kind of moral reasoning that is best suited to claims of fundamental right, and, second, that it results in a narrow understanding of human rights and sometimes in highly controversial or unjustified rulings, as for example the *Otto-Preminger Institut* case. I will start by recalling the American debate on balancing in Part I as a way of clarifying what is meant by the term, and then proceed to examine in what context it is used by the European Court of Human Rights (Part II). Then, building on the negative or critical part of my analysis, in Part III, I will offer some elements of an alternative method of human rights adjudication. I will try to connect these elements to a broader moral conception of fundamental rights. It should be noted that it is not my purpose to debunk the idea of balancing wholesale, nor do I urge its abolition from our moral discourse. However, I

¹ T. Alexander Aleinkoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987)

believe that as a general method of human rights adjudication it fails. And even in the limited contexts where it seems more appropriate, we are better off not calling what we do 'balancing'.

PART I: The American debate on balancing

Balancing is a metaphor that claims to capture the right method of decision making.² According to this metaphor rational people place on one side of the scale the considerations in favor of a course of action, on the other side the considerations against it, they weigh them and they come up with a decision that follows the outcome of the balance. The metaphor is sufficiently vague to include a great variety of reasoning and human actions. Should I go to the movies tonight or not? To make up my mind and act accordingly I probably have to do some kind of reasoning. One way to describe this reasoning is to say that I balance the pros and the cons of going to the movies and if the first outweigh the second I go, if not I stay home.

In a sense balancing appears to be the basic way of reasoning and certainly the basic way of practical reasoning. This seems plausible only on the assumption that every thought or choice we make is (or maybe represented as being) in conflict with its opposite. This idea of everything in constant conflict with its opposite (something analogous of the Hegelian idea that every thesis has to be confronted with an antithesis) has the great appeal of simplicity and all inclusiveness. Every course of action can be represented as the outcome of a conflict between itself and its opposite. And every choice we make can be depicted as in conflict with countless alternatives; going to the movies is in conflict with a myriad of other activities I can pursue. The conflicts, especially those who concern courses of action, demand some kind of resolution. The method of balancing the pros and the cons of a choice seems to be a natural and reasonable method for resolution.

² The metaphor goes at least as back as the ancient Greeks who used to depict the goddess of divine law and order Themis as a blindfolded woman holding a pair of scales and cornucopia. The correlation of the scale with justice has an obvious ideological message.

Simplicity and over inclusiveness are not the only appeals of balancing. The metaphor suggests also precision. We weigh things and our decisions have the precision that metric weighing produces. The scale as symbol of justice expresses the ancient and well-known quest of investing judicial judgments with the precision of natural sciences.

For various reasons (political, sociological, and legal) the Supreme Court has started adhering to a balancing approach after the New Deal.³ But it was in the realm of the First Amendment that the issue was openly debated with the famous dispute between Justice Black on the one side and Justices Frankfurter and Harlan on the other over the meaning of freedom of speech. The dispute was often presented as one between absolutists against balancers. The stubborn insistence of Justice Black on the absolute character of the First Amendment was an easy target by the balancers who, confident that there is no such thing as an absolute right were quick to reach the conclusion that balancing was unavoidable.

But Justice Black and many scholars fiercely criticized the balancing approach revealing the ambiguity of the metaphor in many respects. They pointed out that it is not clear what is weighed (interests, principles, rights, considerations), how it is weighted (with what metric) and who is doing (or should do) the balancing (judges or legislators).

To the question of what is weighted Justice Frankfurter was replying that interests are weighted: “The demands of free speech in a democratic society as well as the interests in national security are better served by candid and informed weighing of competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problems to be solved”.⁴ The same answer was given by Justice Harlan: “Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances”⁵

³ See Aleinikoff, note 1

⁴ *Dennis v. United States* 341 U.S. 494, 524-25 (1951)

⁵ *Barenblatt v. United States* 360 U.S. 109 (1959).

The view of constitutional rights as nothing more but private interests whose protection depend every time upon the balance with competing public interests in reality renders the Constitution futile. Indeed if rights protect the same kind of interests as those of the government, and if the protection depends on considerations of some kind of relative “weight” of the conflicting interests, it follows that the protection accorded by the Constitution can never be stable but is always conditional on various circumstances and depends on the outcome of balancing. On this view it is not only doubtful whether the Constitution is some kind of law that includes stable and knowable propositions but simply renders the same idea of the Constitution futile. Laurent Frantz has made both of these claims when he was asking provocatively if the First Amendment was law at all⁶ and when he was asserting that “The balancing test assures us little, if any, more freedom of speech than we should have had if the first amendment had never been adopted”.⁷

It should be noted that in the crudest balancer’s view there cannot be any concept of fundamental rights having priority over other considerations. Interests protected by rights enter in the scale on a par with other interests that individuals or the government have. On this account the interests of the many tend to outweigh the interests of individuals and minorities. It is not surprising that, under the balancing approach, the outcome of most free speech cases that involved communist speech during the Cold War turned out against freedom of speech.⁸

The critics of balancing never accepted the either/or framing of the issue, that is either rights are absolute or balancing is unavoidable. They insisted that without some kind of

⁶ Laurent B. Frantz, *Is the First Amendment Law? – A Reply to Professor Mendelson*, 51 CAL. L. REV. 729 (1963);

See also Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962); Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1024 (1978)

⁷ Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALY L. J. 1424. 1448 (1962)

⁸ “I think it is more than mere coincidence that in the overwhelming majority of the major free speech cases in which the ad hoc balancing approach has been applied, the weighing of interests has come out on the side which opposes freedom of speech” Melville b. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. R. 935, 939-40 (1968). Of course this does not mean that balance always tends to favor restriction of rights. See Kathleen Sullivan, *Post-Liberal Judging: the Roles of Categorization and Balancing*, 63 U. Colo. L. Rev. 293 (1992) and Robert Nagel, *Liberals and Balancing*, 63 U. Colo. L. Rev 319 (1992)

definition (categorization) the whole idea of rights is without any meaning and they stressed that the ambiguity of balancing reaches every single of the elements in the process: what is the metric and who is doing it.

The most effective critique of balancing concerned the assumption of a common metric in the weighing process. The metaphor says nothing about how various interests are supposed to be weighted and that reveals the impossibility of measuring incommensurable values by introducing a mechanistic, quantitative common metric.⁹ The only way to attempt the introduction of a common metric is to subscribe to some form of utilitarianism, that is, to a moral theory which may provide some kind of common metric (money or happiness or pleasure) by which the conflicting interests can be measured. But, even if we assume that it is possible to find such a common metric, by adoption of a specific moral theory as the basis of balancing incommensurability of values resurfaces again as a main issue at a higher level. Characteristically the adoption of a certain moral theory undermines the whole philosophical background of many and conflicting values that are supposed to give rise to balancing in the first hand. .

Finally, the third point of criticism contests the legitimacy of judicial balancing. Assuming that human rights protection is the result of balancing interests, it is to wonder whether the judges should perform it and not the legislators. What is the meaning of judicial review? Replicate or supervise the balancing of the legislators? Or is it deference as Justice Frankfurter, a keen balancer himself, was arguing?

Free speech cases are not an exception to the principle that we are not legislators, that direct policy-making is not our province. How best to reconcile competing interests is the business of legislatures and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment.¹⁰

⁹ “The concept of “balancing” is itself both a metaphor and an abstraction. The metaphor is ambiguous. It describes both a process of measuring competing interests to determine which is “weightier” and a particular substantive outcome characterized as a “balance” of competing interests. The abstract concept of balancing, furthermore, tells us nothing about which interests, rights, or principles get weighted or how weights are assigned. Paul W. Kahn, *The Court, The Community and the Judicial Balance: the Jurisprudence of Justice Powell*, 97 Yale L.J. 1, (1987)

¹⁰ *Dennis v. United States*, 341 U.S. 494, 539-40 (1951)

And even more clearly:

Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress.¹¹

If we are not going to take metaphors very seriously,¹² we must start by altogether rejecting the myth of mathematical precision. Whatever else it may be, it is quite certain that judicial reasoning has nothing to do with going to the grocer's. Very few, if any, genuine and important values are amenable to any meaningful form of quantification. But even if they were, balancing them out would further require coming up with a way to compare their respective "weights", which hardly anyone but the most hard-nosed utilitarian would think is more than a chimera. In this sense, Justice Scalia is merely scoring an easy point, when he is saying that we cannot compare the length of a line with the heaviness of a rock.¹³

It is important to ward off a possible misunderstanding at this point. Scalia's statement might be taken to suggest that values are incommensurable in the sense that we could never rationally adjudicate between them, put differently, that we could never have rational grounds to prefer one over the other. This is not the position I will be defending. Rather, I want to side with Jeremy Waldron who argues that belief in such a "strong" incommensurability would lead to total agnosticism about morality, which goes against our most-strongly held intuitions about morality and the point of moral reasoning. Waldron has argued instead in favor of a "weak" incommensurability, which, while it acknowledges the lack of a common metric for "balancing", nevertheless permits us to bring values into relation with one another. He suggests that we do this intuitively when

¹¹ Ibid 525

¹² Frank N. Coffin urges us to remember the warning of Professor Shapiro: "Lawyers in general, and judges in particular, coin or adopt metaphors and then forget that they are only metaphors". Frank N. Coffin, *Judicial Balancing: the Protean Scales of Justice*, 63 N.Y.U.L. L. REV. 16, 4 (1988)

¹³ *Bendix Autolite Corp. v. Midwesco Enters*, 486 U.S.888, 897 (1988) (Scalia, J. concurring). See Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 Hasting Law Journal, 785, 787 (1994): "no one contends that length and weight can be reduced to a single measure, any more than people contend that color and smell can be measured along a unitary metric."

we say things like: “any reasonable person can see that saving an innocent child from a painful death is to have priority over the preservation of the statue that has fallen on top of her”.¹⁴ We also relate values when we propose ways of ordering them and putting them into a system. That is exactly, says Waldron, what Rawls, Dworkin or even Nozick do, when they insist on the lexical priority of basic liberties, on the rights as trumps or side constraints.

The idea of ordering values and assigning priorities to them is also a way of reasoning about more ordinary courses of action. I don’t go to the movies when I have a class and there is no balancing taking place in this case. Going to the movies is simply ruled out because having a class enjoys higher priority or, put differently, trumps the consideration of going to the movies. Now one could describe the reasoning of relating values or having priorities as of some kind of balancing. In fact, Waldron maintains that “often when people talk about *weighing* or *balancing* one value, principle, or consideration against another, what they mean is not necessarily Benthamite quantification but *any* form of reasoning or argumentation about the values in question.”¹⁵ He goes on to say that for “most ordinary people” elaborated moral arguments like those of Dworkin or Rawls seem like balancing. And because our moral reasoning certainly includes considerations in favor or against an argument his conclusion is that “the reasoned articulation of our moral principles and priorities inescapably involves what ordinary people might regard as weighing and balancing”.¹⁶

In the light of the foregoing remarks we may conclude that, even if we were to accept small pockets of strong incommensurability of values depending on our more general moral theory, a belief in strong incommensurability across the board would be an untenable position, because it effectively negates moral discourse altogether. But even setting strong incommensurability aside, it seems to me that accepting balancing- in the loose sense that Waldron proposes- as a method of adjudication is not without significant

¹⁴ “In a case of weak incommensurability –and this is why I call it “weak”- the values *can* be brought into relation with one another.” Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS LAW JOURNAL, 813, 817 (1994)

¹⁵ *Id.* at 819

¹⁶ *Id.* at 821

problems. The reason is that the very imagery of balancing unavoidably carries with it connotations of mathematical precision, or at any event alludes to some kind of quantification,¹⁷ Benthamite or other. I don't mean by this that just by adopting the idea of balancing we will end up thinking in terms of utility or consequences. We run the risk, however, of neglecting the complexity of moral evaluation, and especially the complexity of rights. More specifically, we tend to overlook, or at least not adequately appreciate, the fact that our moral universe includes ideas that are not amenable to quantification, the result being that these ideas are not given due regard in our reasoning. Importantly, as I am going to argue, among the moral concepts that balancers are likely to distort are fundamental individual rights.

These are large claims and I cannot fully defend them before I lay bare what I take to be the dimensions of rights that balancing is liable of not doing justice to. But maybe we can start identifying these dimensions by reference to real cases. This is what I will set out to do in the following part, taking as my main point of focus an emblematic freedom-of-speech case of the European Court of Human Rights, *Otto-Preminger-Institut vs. Austria*. *Otto-Preminger Institut* was also a very controversial decision, but in what follows it is not my primary purpose to challenge it on the merits. Rather, my aim is to use it as an illustration of the more general problems I believe the balancing methodology runs into. After *Otto-Preminger Institut* I will take a look at a more recent case to show how the faults to be found in the earlier case were not accidental but rather symptomatic of more pervasive shortcomings of the Court's methodological approach. The analysis of the two cases will then provide the stepping stone for the more positive analysis of human rights adjudication in Part III.

PART II: *Otto-Preminger-Institut* and its legacy

By definition any treaty for the protection of human rights gives priority to rights. Its goal is to protect certain individual fundamental interests not only from arbitrary state power

¹⁷ The same Waldron says “[...] “balance” also has connotations of quantity and precision, as when we use it to describe the reconciliation of set of accounts or the relative weight of two quantities of metal”. *Security and Liberty: The Image of Balance*, *The Journal of Political Philosophy*, 191, 192 (2003)

but also from collective interests. So, although accurate, it sounds somewhat strange to say, as did the former President of the European Court of Human Rights, Rolv Ryssdall, that “The theme that runs through the Convention and its case law is the need to strike a balance between the general interest of the community and the protection of the individual’s fundamental rights.”¹⁸ The former President was simply repeating almost verbatim the dictum of the Court that “inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”¹⁹ There is no doubt that the European Court of Human Rights is engaging in a balancing approach both as method of interpretation and as method of adjudication. This balancing approach known under the term of principle of proportionality “has acquired the status of general principle in the Convention system.”²⁰

Now, one should expect that the Convention itself represents such a balance, the outcome of which must be that human rights are to be protected before other interests are even taken into consideration. If that is so, what does it mean to say that the issue is to strike another balance between the general interest of the community and individual rights? At the level of interpretations? The obvious answer is that the vast limitations contained in articles 8 to 11 (the rights to respect of private and family life, home and correspondence, the right of freedom of thought, religion and conscience, the right of speech, and the right of association and assembly), namely restrictions necessary in a democratic society for the protection of public security, safety, protection of public order, health or morals and the right and freedoms of others²¹ give rise to new considerations and balancing. The concept of restrictions necessary in a democratic society is supposed to lead to the principle of proportionality, that is, a balancing approach that requires the intensity of the restriction not to be excessive in relation to the legitimate needs and interests, which gave

¹⁸ R. Ryssdal, *Opinion: The Coming Age of the European Convention on Human Rights*, EUROPEAN HUMAN RIGHTS LAW REVIEW, 1996, 18-29 at 26

¹⁹ Judgment of 7 July 1989, *Soering*, A.161, para 89

²⁰ P. van Dijk and G.J.H van Hoof, *Theory and Practice of the European Convention on Human Rights*, 1998, p.81

²¹ The list of restriction is not identical for all four articles. The most extensive restrictions are included in art. 10 (2), while the more lenient are to be found in art 9 (2). Note that Art 8 (2) includes the “interest of the economic well being of the country” as legitimate restriction.

rise to it. “The scale the Court utilizes seems to imply that the more far-reaching the infringement or more essential the aspect of the right that has been interfered with, the more substantial or compelling the legitimate aims pursued must be”²²

There are at least two controversial assumptions underlying this approach: first, that as a matter of principle public interests can always be measured against human rights and second, measures aimed at promoting a public interest may prevail unless they impose an excessive restriction compared to the benefit they secure (the violation seems to depend rather on the intensity of the restriction on its incompatibility with the right in case).

In the *Otto-Preminger-Institut v. Austria*²³ case a private non-profit art cinema complained about a violation of art 10 of the Convention because the Austrian authorities, at the request of the Diocese of the Roman Catholic Church in Innsbruck, had seized and confiscated a film that was scheduled to be shown to the public. The film *Das Liebeskonzil* (Council in Heaven) was based on a play written by Oskar Panizza in 1894 which portrayed God, Christ and Virgin Mary plotting with the Devil how to punish mankind and deciding to infect human beings with syphilis. The Devil's daughter assumes the task to spread it to the worldly powerful, to the court of the Pope, to the bishops, to convents and monasteries and finally to the common people. Panizza was found guilty of “crimes against religion” and was sentenced to a term of imprisonment in 1895 in Germany. But recent productions of the play were performed and the film was actually showing such a performance that took place in Rome with the addition of some small parts in the beginning and the end of the show with comments about the trial of Panizza. The show was depicting God, Christ and Virgin Mary in a diminishing way and contained also some erotic scenes and innuendos. The seizure and confiscation were based on article 188 of the Austrian Penal Law that sanctions the “disparage of a dogma, a lawful custom or a lawful institution of [a] church or religious community”.

²² Vav Dijk and Van Hoof, p.537

²³ *Otto-Preminegr-Institut v. Austria*, Judgment 20 September 1994

The Court (with a majority of six out of nine) held that there was no violation of freedom of speech. At the outset it examined whether the seizure and confiscation of the film constituted interference in pursuit of a “legitimate aim”. It found that these measures were aiming “to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons”²⁴ and thus it came to the conclusion that the impugned measures pursued a legitimate aim under Article 10 (2) of the Convention, namely “the protection of the rights of others”. Then it proceeded to examine whether the measures were “necessary in a democratic society”. It referred to its case law on freedom of speech and its finding that it includes not only “information or “ideas” that “are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of population” (*Handyside v. United Kingdom* judgment of 7 December 1976). But it went on to stress that those who exercise their freedom of speech also undertake duties and responsibilities and “among them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs”.²⁵ Finally, having established that states may sanction improper attacks on objects of religious veneration, the Court proceeded to a final balancing examining whether the seizure and the confiscation of the film were restrictions proportionate to the legitimate aim pursued.

On this final balancing the Court was not unanimous. The majority dismissed various arguments to the effect that many precautions were taken to prevent offending the feelings of the believers. The film was to be screened in a cinema, and was addressed to a specific audience interested in avant-garde culture, the public was to pay a ticket to see the film, persons under 17 were not admitted, and there was an information bulletin

²⁴ para 48

²⁵ para 49

helpfully describing the theme of the film in detail,²⁶ so there was no danger of anyone being exposed against his will to material he would find offensive. The majority reasoned that because the film was advertised and precisely because there was sufficient public knowledge of its content, the expression had been made “sufficiently” “public to cause offence”. Without elaborating the majority accepted the judgment of the Austrian courts that the film lacked any artistic merit that could outweigh the offence to the public and pointing out that the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans (87%) thought that the authorities they did not overstep their margin of appreciation by the seizure of the film wanting to ensure religious peace and prevent that some people feel offended in their religious feelings. On the contrary a minority of three judges out of nine was of the view that the seizure and confiscation of the film far from being the less restrictive solution amounted to a complete prevention of freedom of expression which could be accepted only if the speech was so abusive as to come close to a denial of freedom of religion of others. Arguing that “there was little likelihood [...] of anyone being confronted with objectionable material unwittingly”,²⁷ the minority found that “on balance [...] the seizure and forfeiture of the film in question were not proportionate to the legitimate aim pursued”.²⁸

In what follows I wish to focus on two problematic aspects of the decision. The first has to do with the specification of the items that the Court put on the balance and the second with the way the “weight” of those items was compared in the balancing exercise. Let’s take each of these aspects in turn.

a. What is to be compared?

So before we discuss the balancing stage, let’s see how the Court has structured the case up to that point. There is no need dwelling on the question whether there was interference in the first place. Nobody can deny that there was an obvious (and I would say brutal)

²⁶ The bulletin concluded by saying that “trivial imagery and absurdities of the Christian creed are targeted in a caricatural mode and the relationship between religious beliefs and worldly mechanisms of oppression is investigated”.

²⁷ Para 9

²⁸ Para 11

interference with the applicant's speech-rights. What is more interesting is to examine how the court next inquired whether the purpose of this interference was formally included in the vast categories of restrictions that article 10 (2) provides for. The Court seems to have treated this as little more than a kind of formal inquiry, as mere taxonomy. Thus, for the majority the interference fell under the "protection of the rights of others" restriction. The minority, by contrast, pointed out that "The Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinion of others"²⁹ But, and this is really important, although the minority rejects the right to have one's religious feelings protected, it does not have any difficulty accepting the proposition that such protection is "legitimate" since "the democratic character of a society will be affected if violent and abusive attacks on the reputation of a religious group are allowed". So, regardless of whether limitations of the kind in question are premised on a right or not, both sides agree that "it is necessary in a democratic society to set limits to the public expression of such criticism or abuse".

Is it so trivial to affirm or deny the existence of a right? Does it make so little practical difference whether we will decide to ground a limitation of speech-rights on a public interest or on a competing right? Maybe for the balancers it does, since the methodology they will recommend will be the same, whichever way we go. But the truth is that at the level of moral theory at least we do attach great importance to right claims and we do want to distinguish such claims from claims based on mere public interest, so before we go along with the balancers' suggestion, we should pause to think.

Let's then see how someone could come to the conclusion that there is a right of protection of religious feelings. The majority inferred it from the right to freedom of religion but since it did not elaborate its reasons for thinking so, we have to reconstruct them ourselves for the sake of argument. Here is how the claim might go. One might say that since I am free to believe in some religion and since religious beliefs typically arouse

²⁹ Joint Dissent Opinion of Judges Paml, Pekkanen and Makarczyk, para 6

strong feelings, I should be somehow protected from verbal attacks against my religion; if I am not protected, such attacks will hurt my feelings and hence impede my religious life. Against this line of argument we can of course argue, with the minority, that freedom of religion includes the right of others to advocate their own religion and express critical views about my own religious beliefs. The mere fact that there are people who don't share my religious beliefs may hurt my feelings but I obviously cannot seek any protection against this sort of discomfort without denying others their freedom of religion.

Considerations of the same kind apply to other feelings we may have. We may for example have strong feelings about some political ideas and opposite opinions may deeply hurt our feelings. I may be deeply distressed (terrorized) by the advocacy of the dictatorship of the proletariat but I can't have any claim to be protected against this kind of distress if I am willing to accept a right to free speech at all. I may have strong feelings about a person. I may be in love with Jennifer Lopez, for instance. But the strength of my feelings for her does not entitle me to any special protection. For instance, it doesn't give me the right to demand that she not make provocative photo-shoots.

Of course one could imagine cases where verbal attacks against one's religious feelings may constitute a genuine burden on the exercise of one's freedom of religion. Imagine the following situation: A group of non-believers parade every day outside a church shouting inimical slogans against the religion of the believers. But, as so often in law and morality, "context is everything". In the example just mentioned our moral reaction stems not from the mere fact that someone holds views, whose content can hurt the religious feelings of other people, but rather from the circumstances in which these views are actually expressed with the purpose of intimidating the believers.

This is no more than a rough outline of a much more complex argument that challenges the claim that religious feelings in themselves give rise to a right on the part of those who have them to be protected from the expression of views that may hurt them. My aim in rehearsing it was to show that the existence of such a right must be premised on certain

assumptions, themselves contestable and in need of argumentative support, about what is worthy of being included in the ambit of a right. When I say that such assumptions stand in need of justification, I mean that they must draw on broader conceptions of the nature of rights and of how an alleged right must fit with other rights recognized in the Convention and with more general moral principles that we happen to hold. These assumptions may prove to be mistaken (as I think they are in the case of an alleged right to have one's religious feelings protected), the result being that the case for the existence of a certain right must fail.

Now, this form of reasoning lies in stark contrast to the majority's rather cavalier approach toward the meaning of freedom of religion. However we may choose to characterize it, though, the majority's approach is in line with one of the basic methodological principles of the balancing approach, which we may call the *principle of definitional generosity*.³⁰ According to this principle the interpreter assumes a broad definition of what can conceivably count as an instance of the exercise of a certain right. He asks: What can count as expression? What can count as religion? Value judgments about the importance of a right or the salience of one form of its exercise may inform this stage, but not necessarily in any particularly demanding way, the interpreter's purpose being merely to assess whether a given act or behavior will be *prima facie* included within the ambit of a provision safeguarding, say, freedom of expression or freedom of religion. Since the threshold is not demanding, the normative implications that the specification of a right carries with it are correspondingly limited. The interpreter can be generous at the stage of specification, safe in the knowledge that all the crucial normative issues may be deferred to the balancing stage.

But is he really safe? After all, if there is no such thing as a right to have one's religious feelings protected, then it makes no sense to speak of balance in the first place, since we seem to lack what we are supposed to balance freedom of speech against. This I take to be an embarrassing implication of the balancing method. In response, the balancer can

³⁰ This generosity fits with Robert Alexy's theory that "rights based on principles are *prima facie* rights" in *Rights, Legal Reasoning and Rational Discourse*, 5 *Ratio Juris* 143, 145 (1992). For a full account of his theory see *A Theory of Constitutional Rights*, translated by Julian Rivers, Oxford University Press, 2002.

always point to the strictures of the balancing stage as his safety net, but if the balancing stage is supposed to remedy a confusion that the balancer's approach itself has engendered, you start thinking whether it's better to scrap the approach altogether. We will pursue this point further in Part III.

At any rate, as we have said, the issue whether the protection of religious feelings was a matter of right or not did not seem to make much difference anyway in *Otto-Preminger-Institut*, since the minority considered that it constitutes a public interest worth balancing against the right to freedom of speech. So, let's now examine whether the principle of definitional generosity is more at home in the specification of the concept of public interest.

While we are familiar with the idea that there are different theories about rights, we sometimes pay little attention to the fact that there are also different theories about the concept of public interest.³¹ The reason is that we assume that public interest is the interest of the majority and, hence we can tell whether something is in the public interest just by looking at what the elected representatives of the people vote for. The Court seems to favor this understanding, when it assumes that the interest of 87% of the Tyrolese not to be offended constitutes a public interest, stressing that it "cannot disregard the fact that the Roman Catholic religion is the religion of the overwhelming majority of Tyrolese".³²

But suppose for a moment that 87% of the Tyrolese hated the Eskimos. Suppose that when Eskimo plays are staged or Eskimo films screened, the 'overwhelming majority' of Tyrolese feel stirred by violent feelings of moral indignation and uncontrollable fear. Would we be willing to include protection of these feelings within the ambit of public interest? If not, it is probably because we have to be more discriminatory in our

³¹ See Aileen McHard, "Reconciling Human Rights and Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" 62 *Modern Law Review* (1999) 671.

³² *Otto-Preminegr-Institut v. Austria*, Judgment 20 September 1994, para 56

specification of what counts as public interest.³³ Unsurprisingly, the set of assumptions that we need to bring to bear in this exercise are very similar to the assumptions driving our specification of rights. Our conception of public interest must incorporate or flow from normative ideas about the relationship between individual and society, the importance of rights in structuring this relationship and so forth.

b. Balancing in the strict sense

I said earlier that the balancing stage is the balancer's last ditch. But considering its importance within the balancing methodology, it's rather surprising to see the dearth of argument that supports the court's balancing exercise in *Otto-Preminger-Institut*. Admittedly, once you jettison the idea that values are quantifiable and concede that the weight-talk is no more than a metaphor, it is hard to imagine what shape arguments at the balancing stage must take or, put differently, how we should tailor arguments to fit the balancing methodology.

One of the professed advantages of the balancing approach is its rigor. But rigor is one thing, and elegant formal structures are quite another. *Otto-Preminger Institut* amply demonstrates that the balancing approach fails spectacularly to deliver what it promises. At the very least, we would expect that the balancing approach would throw some light on the "black box" of comparisons between weakly incommensurable values. What we get instead is a characteristically *impressionistic* assessment of the relative weights of competing considerations, which does not lend itself to a rational reconstruction of the argumentative path that has led to a particular decision. The reasoning is terse and fails to identify the contribution that different considerations make to the outcome.

The preceding analysis suggests one possible explanation for this opacity. According to the principle of definitional generosity it is perfectly conceivable that items will make their way into the balancing process that are not genuine. Go back to the Eskimo

³³ See Dworkin's external preferences argument in Ronald Dworkin, *Taking Rights Seriously*, ch. 12, p. 277 (1977)

example. I claimed in my analysis of that example that the preferences of the Eskimo-haters should not be taken into account at all. But a balancer would arguably let them play out in the balance. How then would he assign a value to such preferences? Presumably, he would assign them a very low value that would make them easily overrideable by competing considerations. But that sounds hopelessly ad hoc. It is not that the preferences of the Eskimo-haters should count, only they count for little. It is that they don't count at all.

In fact, even in those cases where the court does attempt to specify with more precision the distinct contribution of different considerations, the result it reaches is far from self-evident. Take the following example. The minority in *Otto-Preminger Institut* held that although some restrictions might be thought necessary in order to further the stated public interest (protection of religious feelings), nevertheless the measures in question (seizure and confiscation of the film) restricted the applicants' freedom of speech in a manner disproportionate to the benefit thereby achieved. The minority, therefore, meant to suggest that although in principle restrictions on freedom of speech for the protection of religious feeling are legitimate, they ought not to go too far. If a less severe restriction can achieve the same goal, it must be preferred.³⁴ At this point, though, one might wonder what a less severe restriction would look like. Here's one suggestion. The minority seemed to favor taking precautions with regard to the time and manner of expression over seizure and confiscation. But if we take the offense to one's religious feelings to stem from the mere knowledge that some people are engaging in this kind of speech, then no precautions concerning the time and manner of expression can cure it. The idea that some people may depict my God in a diminishing way can in principle hurt my feelings, whether they do it in private or in public. The only way to be protected from such an offence, it seems, is to restrict that kind of speech altogether. This is not, of course, to suggest that the majority approach is preferable. Rather, it serves to point out that the problem lies less with the severity of the restriction and more with the justifiability of imposing a restriction on the grounds that it offends one's religious

³⁴ The test of proportionality, as construed by both the minority and the majority in *Otto-Preminger Institut*, focuses on an assessment of the necessity of the measure and of whether that measure causes minimum impairment of the competing right.

feelings in the first place. By deferring all the crucial judgments to the final stage, the balancing approach clouds the real problem and provides crude resources to resolve it.

The I.A. v. Turkey case: Balancing unraveled

In our analysis of *Otto-Preminger Institut* we pointed out the failure on the part of the court to carefully articulate the competing considerations and their normative import to the determination of the outcome. I believe that this failure is far from restricted to that particular case. Rather, it permeates the court's methodological approach. To illustrate this, I want briefly to consider a more recent case, *I.A. vs. Turkey*, where the restriction of freedom of speech for the protection of religious feelings was again at issue. The case is interesting, not because it brings out novel aspects of the issue, but rather because it shows how the balancing approach can unravel and produce decisions that are hardly recognizable as adjudicating human rights questions.

The applicant, a publisher, had published a novel (entitled "The forbidden Phrases") that was printed in two thousand copies. The content of the book contained critical remarks about religion in general and the Muslim religion in particular. The most "provocative" passage was the following:

Some of these words, moreover, were inspired in a surge of exultation, in Aisha's arms. ... God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual relations with a dead person or a live animal.

The applicant was indicted on the basis of blasphemy (according to a Turkish law that punishes blasphemy "against God, one of the religions, one of the prophets, one of the sect or one of the holy books") and was convicted to two years' imprisonment and a fine. The Turkish Courts commuted the prison sentence to a fine, so that the applicant was ultimately obliged to pay a total fine of the equivalent of 16 US dollars.

A majority of the Court (four out of seven) relying on its previous rulings in *Otto Preminger* constructed the case as a clash between two fundamental freedoms, "namely

the right of the applicant to impart to the public his views on religious doctrine, on the one hand, and the right of others to respect for their freedom of thought, conscience and religion, on the other hand”³⁵ and “therefore” explicitly engaged in balancing. It held that there was no violation of freedom of speech because the law of blasphemy was a measure intended to provide protection against offensive attacks on matters regarded sacred by Muslims and thus was a reasonable measure meeting a “pressing social need”.

While there is nothing new in the reasoning (except maybe it shows how far the slippery slope argument can reach) it does include some striking thoughts about the fine imposed. Thus, the majority said:

As to the proportionality of the impugned measure, the Court is mindful of the fact that the domestic courts did not decide to seize the book, and accordingly considers that the insignificant fine imposed was proportionate to the aims pursued.³⁶

I am not saying that the severity of the penalty should never be a consideration in moral and legal reasoning. In fact, in some cases it makes all the difference in the world. But when we are preoccupied with this form of exercise, we risk losing sight of the battles of principle that human rights law is so intimately intertwined with. We also risk losing sight of the characteristic attitude that recognition of a right is supposed to display and the message it is supposed to convey. Imagine, by way of contrast, what attitude toward individuals the following statement displays: “Why do you make so much fuss over 16 dollars?”

It may, of course, be objected that we can always discard this piece of the Court’s jurisprudence as a grotesque mistake. This is an objection that we will tackle head-on in the last Part. But for the time being we cannot fail to note that, even if reference to the fine imposed in *I.A.* were thought to be an unfortunate mistake, it is still true that the balancing approach must feel more at home with considerations that seem at least *prima facie* amenable to some sort of scaling, like the severity of the penalty, and

³⁵ Judgment 13 September 2005, Case of *I.A. v. Turkey*, para. 27

³⁶ *Ibid* para 32

hence that adherents of this approach will tend to privilege such considerations or, at any rate, assign them a role in the reasoning process that they would otherwise lack.

PART III: Putting human rights back in focus

a. Lessons from the case-law

What is at stake when we debate theories of human rights adjudication? A theory will not be deemed satisfactory just by being elegant or neat. So what are we looking to find in a theory of human rights adjudication? The guiding idea is the notion of legitimacy. We are trying to find a theory of human rights adjudication that ensures so far as possible that human rights disputes are resolved in a legitimate manner. In a sense, of course, this is the guiding idea behind all law. But it becomes particularly relevant in the context of human rights adjudication. Let me point out three commonly cited reasons why this is so:

- 1) First, as is well known, human rights are typically enshrined in fairly abstract propositions.³⁷ Human rights law may include some hard-and-fast rules, but they are the exception. This means that human rights provisions cannot be applied automatically but require considerable interpretive effort.
- 2) Second, human rights adjudication inevitably draws on or is at any rate sensitive to the widely divergent moral attitudes and views different interpreters hold. As a result, the content of human rights guarantees is notoriously contestable. Reasonable people are likely to disagree over their meaning and implications in specific cases.
- 3) Human rights law reserves a significant role for judges. Judges, either at the domestic or the international level, are typically called upon to decide whether a certain measure or policy unduly interferes with human rights. When they make

³⁷ In a similar vein, Mattias Kumm writes: “[C]onstitutional rights provisions tend to be comparatively indeterminate”. See his “Constitutional rights as principles: On the structure and domain of constitutional justice” (Review essay on *A Theory of Constitutional Rights*) 574. I have refrained from using the term ‘indeterminate’, because I want to maintain that there are right answers to human rights questions. Kumm most probably agrees, but the term indeterminacy is liable to mislead.

such a finding, they are often equipped with the power to strike down the measure or policy in question (as in the case of the US), or award compensation (as in the context of the ECHR). In this sense, human rights law seems to pit judges against the primary decision-makers, notably the democratically elected legislature.

The combined effect of the aforementioned well-known facts is that human rights adjudication has traditionally been taken to raise serious legitimacy concerns. How are we to justify individual rulings? What must a judge say to the rights-claimant, if he dismisses his claim? And how can he justify to the broader society a decision frustrating a goal that enjoys majority support, in order to claim the majority's allegiance? The purpose of asking these questions, it should be noted, is not to silence all disagreement; disagreement is likely to survive even the most elaborate and well-argued defence. It is primarily to fend off the charge of arbitrariness.

With its claim to rigor, the balancing approach seems to provide a response to the problem of legitimacy. Undoubtedly, employing a rigorous reasoning process carries great significance. It increases transparency and accountability, if not the likelihood of actually reaching the right decision. But the balancing method achieves rigor at the cost of distortion. In the previous part I sought to show the distorting effects of the balancing method by reference to real cases. In this section I wish to bring together and expand on some of the themes of the preceding discussion.

First, the balancing method does not pay sufficient attention to the specification of the items it purports to place on the balance. It rests content with a *prima facie* specification of the ambit of a human right or of the public interest that is set against it. I said that this strategy is grounded in the principle of definitional generosity. The motivation behind this principle is that by keeping an open mind about what is to go in the balance, you do not exclude some claims from the outset and hence you do not unduly restrict the range of claims you undertake to consider. But in this way the balancing approach trades inclusiveness for superficiality. The proper specification of the content of a human right is a specification guided by an understanding of its importance, the point in awarding it this unique status; it is sensitive to the important evaluative questions that recognition of

a right raises. This involves coming to terms with what we value about that right and firmly placing the right in the constellation of our other political and moral values. In short, it involves a good deal of moral reasoning. This reasoning is likely to be lost when our analysis at the first stage is not fine-grained.

One particularly way in which the principle of definitional generosity fails to capture the importance of the items it puts on the scales is by not weeding out at the first stage interests and preferences powered by *illicit justifications*. There are some types of justification that are not just less weighty than the right with which they conflict. Rather, their invocation is incompatible with recognition of that right. It goes against the very core of what it is that we value in the right. Freedom of speech, which was at issue in *Otto-Preminger Institut* provides a useful illustration of this point. Before we decide to balance the protection of religious sentiment against freedom of speech, we have to examine whether this goal can ever be ground for prohibiting freedom of speech. But my reason for believing this is not that in such cases religious sentiment loses out in its comparison with freedom of artistic expression; it is that part of what we hold dear about freedom of expression is fatally compromised whenever the state prohibits one view in order to support another. Religious sentiment and freedom of expression can never be put on the scale, whatever we take that scale to be like. The balancing approach, by contrast, reduces conflicts between rights and other rights or the common good to comparisons of relative weight and thus overlooks the justification-blocking function of rights.

Now, of course, this is a controversial claim. Reasonable people (like the majority in *Otto-Preminger Institut*) would reject the view that religious feelings cannot ever be protected against irreverent speech. They would thus argue that the balancing approach has the advantage of bypassing this disagreement, without denying any claim, however frivolous, its day in court. Weak claims, they would go on, are adequately dealt with at the balancing stage, since they will not carry much weight and thus be easily overridden.

In response, the following can be said: Even if there may be room for reasonable disagreement in the case of protection of religious feelings, there are other cases, which

self-evidently fit in the category of illicit justification. My example was the feelings of the Eskimo-haters. Does it make sense to say that feelings like those may be allowed to play out at the balancing stage? To say that it does is to miss out on the distinctive moral status that a claim of right presupposes and affirms. We could say, following Dworkin, that this is the status of being entitled to equal concern and respect, or, following Nagel, that it is the status of inviolability.³⁸ However we decide to characterize it, we have an intuitive understanding of its implications in political argument: It removes some issues from the table, or it trumps competing considerations.³⁹ The balancing approach, by contrast, is committed to a view, whereby everything, even those aspects of our life most closely associated with our status as free and equal, is in principle up for grabs. This is echoed in Robert Alexy's famous distinction between rules and principles. Alexy writes that "[r]ules are norms that, given the satisfaction of specific conditions, definitively command, forbid, permit, or empower. Thus they can be characterized as "definitive commands". [...] Principles [...] are commands to optimize." [...] They are norms commanding that something must be realized to the highest degree that is actually and legally possible".⁴⁰ Principles are optimization requirements; they can be satisfied to varying degree that depends on the legal and factual possibilities, while rules are always either fulfilled or not.⁴¹

In a sense the *I.A.* can be characterized as an optimization enterprise. The "light" interference (an insignificant fine) still lets somehow freedom of speech in place and at the same time serves public interest, in other words optimizes the competing values. This idea assumes that human rights guarantee degrees of liberty; the more liberty they

³⁸ See Thomas Nagel, *Personal Rights and Public Space*, 24 *PHILOSOPHY & PUBLIC AFFAIRS* 83 (1995) "The recognition of rights, even if they make more difficult the achievement of a good or the prevention of an evil, expresses that aspect of morality which sees persons not only as objects of benefit and protection but also a inviolable and independent subjects, whose status of the moral community is not exhausted by the inclusion of their interests as part of the general good". At 86

³⁹ See Ronald Dworkin, *Rights as Trumps*, in *Theories of Rights* 152 (Jeremy Waldron ed. 1984).

⁴⁰ Robert Alexy, *Rights, Legal Reasoning and Rational Discourse*, *RATIO JURIS* 143, 145 (1992). See the critique of Jurgen Habermas, *Between Facts and Norms*, tran. W. Rehg, 1996

⁴¹ For an account of Alexy's theory see Matthias Kumm, *Constitutional Rights as Principles: on the Structure and Domain of Constitutional Justice*, *International Journal of Constitutional Law*, 2004, Steven Greer, *The European Convention of Human Rights* p. 203-213, 2006. For a critique of Alexy's optimization approach see Kai Moller, *Balancing and the Structure of Constitutional Rights*, 5 *International Journal of Constitutional Law*, 453 (2007)

guarantee the more the right is affirmed. On the other hand, less severe interferences are not negating the right altogether but accommodate public interest.

This view contrasts with the idea that human rights are not merely quantities of freedom but protect some basic needs of people as moral agents. As Dworkin puts it: “If we have a right to basic liberties is not because they are cases in which commodity of liberty is somehow especially at stake, but because an assault on basic liberties injures us or demeans us in some way that goes beyond its impact on liberty, then what we have a right to is not liberty at all, but to the values or interests or standing that this particular constraint defeats”.⁴² One might think that the 16 dollars fine is not a big restraint of the freedom of speech for the Turkish publisher; he may continue to publish controversial books and every time pay an insignificant fine. But there is a way to see this sanction in a much deeper sense: as assault on him as a moral agent who has a right not to be sanctioned because of his ideas.

The balancer may reply to this that it is wrong to view the balancing approach as anything more than a handy heuristic device. Its purpose is not to articulate any deep moral truths or to be faithful in all its detail to our most considered judgments about individuals and their relationship to society. If it helps us find the right answer, it achieves everything it purports to. In fact, the balancer will go on, it has an additional advantage over its rivals: It provides a simple, structured and manageable method to adjudicate human rights issues that doesn't embroil judges in deep moral questions with all their complexity and contestability –and the legitimacy problems they raise, when they are decided by judges. In this vein, some have pointed out that it is not possible to demand from judges to engage every time in a full-scale moral discourse that calls upon all our basic moral values before they reach a decision. “To expect judges to develop their own unifying theory [...] is simply unrealistic – a task for Hercules perhaps, but not ordinary judges.”⁴³ Judge Frank Coffin has made the same claim more emphatically: “When we try to see what would be substituted for all balancing in the areas covered by the first ten and fourteenth amendments, we are told only to ‘give up feigned

⁴² Ronald Dworkin, *Taking Rights Seriously*, 1977, p. 271

⁴³ McHarg, p.681

mathematical precision and objective constitutional science for serious theoretical investigations on the meaning of constitutional language and structure'. We are urged to 'begin again a lively discussion about the fundamental principles that we believe undergird our political system'. Finally we are entreated to begin to search for new liberating metaphors. As a practicing judge with a backlog of opinions to write and cases to decide, I hope for forgiveness if, pending the result of theoretical investigations of the meaning of the language and structure, I continue to resort to balancing."⁴⁴

One obvious objection to this line of thought is that a methodology is unlikely to yield correct outcomes, unless it does reflect as far as possible the true nature of our moral concepts. But even if we set this problem aside, we must note that the balancing methodology is no less taxing on the intellectual powers of judges than the full-scale moral argument they want to steer away from. It is noteworthy that, after having disparaged the alternatives as unfit for "a practicing judge with a backlog of opinions to write and cases to decide", Judge Coffin goes on to explain how balancing must be properly conducted. He suggests two prerequisite qualities (openness – carefulness) and then 6 stages of balance! The whole process does not sound much easier than the Herculean task of the Dworkinian judge. It becomes easier only if we skip all these and we rush to compare apples and oranges.

NOTE. This paper is more the outline of my ongoing project than a final draft. I am aware that there are many issues I have to deal with both at the research and at the argumentative level. Let me state some of them. In Part I, I must consider arguments in favor of a more sophisticated balancing, which claims that a utilitarian discourse cannot be ruled out altogether in the human rights adjudication. Maybe is not basic, maybe the anti-utilitarian idea of human rights is valid as a starting point but somehow a utilitarian discourse should not be excluded from the periphery of the right. (Waldron)

⁴⁴ Coffin, p. 22

In Part II, there is a lot of research to be done in two directions: A) how balancing works in other cases and especially in the ambit of the “formally unqualified rights” (Article 2 [right to life], Article 3 [right not to be tortured] and Article 4 [right not to be held in slavery, or servitude, or subject to forced labor]). B) Most importantly I must consider the Court’s theory of the margin of appreciation, which might be considered as another kind of balancing. This issue relates to the character of the European Convention, as an international agreement to guarantee a core or a minimum of fundamental rights.

In Part III, I would like to focus more on the principle of proportionality (Alexy, Beatty) and attempt a constructive argument based on a more clear idea about a theory of human rights.