

Principled Balancing

By

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1. I have just completed the draft of a book (in Hebrew) on proportionality in constitutional law. One of my conclusions is that, although proportionality is not an ideal methodology, it is the best that we have for resolving questions related to the infringement of constitutional rights. Nevertheless, there is room for improvement. In this short paper, I would like to present one idea in this direction.
2. The "Substantive Law of Balancing" according to Prof. Alexy states that "[t]he greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other." This rule is supplemented by an "Epistemic Law of Balancing", whereby "[t]he more intensive an interference in a constitutional right is, the greater must be the certainty of its underlying premises." The balancing is determined by means of Alexy's "Weight Formula," which distinguishes between degrees of satisfaction or non-satisfaction (detriment) (e.g. light, moderate, and serious.)
3. A close examination of the Law of Balancing indicates that, while one side of the scale measures the degree of importance in satisfying a given

principle (the public interest or an individual right), the other side measures the degree of detriment or non-satisfaction of a competing principle (e.g., a constitutional right), – without any reference to the importance of that principle, or rather the importance of preventing the non-satisfaction or detriment to the principle. It seems to me that, in this sense, Prof. Alexy's approach reflects that of German constitutional law, whereby all constitutional rights are of equal importance. This is also the approach of Canadian law. But this attitude is not universal. A different view states that not all constitutional rights are of equal importance. This is the case in the Israeli legal system as well as in that of several other countries. According to this second approach, a distinction must be made between the normative ranking of a principle and its importance. Normatively equivalent constitutional rights may be characterized by different degrees importance. According to this view, the key measure of an infringed right is its importance, or, more correctly, the marginal importance in preventing its non-satisfaction or infringement. Thus, both sides of the scale share a common denominator, i.e., the marginal importance of satisfying one principle and the marginal importance of preventing the non-satisfaction of, or detriment to, another principle.

4. The importance of a right is determined by both external and internal considerations. External considerations, i.e., contextualized considerations, relating a particular nation's unique historical and

cultural context, the extent of past infringements of the right, and the current social status of the right. For example, based on these considerations, the great importance of human dignity in Germany and equality in South Africa is obvious. Internal considerations relate to the nature of the right itself and the relationship between various conflicting principles. When one right is a precondition for a second right, the former may be perceived as more important than the latter. Thus, life is more important than liberty. Equality and freedom of expression are prerequisites for many other political and social rights and therefore more important than these other rights. Needless to say, a full scale of priorities is impossible to achieve. A given right could be granted varying degrees of importance in different societies and at different periods of time in the same society.

5. If, in Alexy's balancing equation, we replace "the greater the degree of non-satisfaction of, or detriment to, one principle" with "the greater the degree of *importance in preventing* the non-satisfaction of, or detriment to, one principle," it would have a major impact on the doctrine of proportionality. This enables an abstract or principled evaluation of both sides of the scale. Not only would we be able to evaluate the abstract or principled importance of satisfying one principle, but also the abstract or principled importance of preventing interference with a competing principle. Consequently, in addition to Substantive and

Epistemic Law of Balancing on the one hand and the concrete and ad-hoc balancing on the other hand , we are provided with a third, intermediate level of abstract or principled balancing. The significance of this new intermediate level of balancing is reflected in the fact that it would compare the relative importance of the marginal satisfaction of one principle (e.g., public order or privacy) with the marginal non-satisfaction or detriment of a competing principle (in our case, a constitutional right, such as freedom of expression). This would offer a principled manner for balancing between the two marginal effects (a “Principled Balancing Formula”). Of course, there would be several principled balancing formulas, reflecting the relative marginal importance of different competing principles.

On the side of the scale measuring the satisfaction of the principle, the importance of the infringing statute’s underlying objective must be taken into account along with the extent of harm that would be caused to this objective if the competing right is not limited. Moreover, the probability that this harm will actually materialize must be considered. This analysis must also include an epistemic and normative evaluation concerning the realization of the underlying benefit that the statute is designed to achieve. Thus, for example, when freedom of expression is infringed in order to protect public order, it is necessary to examine the importance of that aspect of public order in need of protection (e.g., protecting the public from racist expressions), the

likelihood that harm will actually be caused to the public interest (e.g., if the racist expression is not prohibited), and the normative threshold of this harm (e.g., a clear and present or immanent danger, and not just a remote or reasonable possibility).

Likewise, on the side of the scale measuring the non-satisfaction or detriment at the infringed principle (e.g., the right to freedom of expression), it is necessary to examine the importance of the right, the importance of preventing its infringement, the likelihood that it will be infringed, and the normative threshold for determining whether or not it has been infringed.

Thus, a legal system may provide that a light and immediate infringement of a very important right (e.g. a statute forbidding "hate demonstrations" in sensitive locations) may be justified only by the imminent probability that serious detriment will effect a less important right or public good, (e.g. hearting the feelings of a non captive audience).

6. There are several advantages underlying an abstract or principled examination of both sides of the scale. First of all, principled balancing offers guidance to the branches of government (legislative, executive, and judicial) and the members of society regarding how to balance conflicting principles. In this way, it contributes to certainty and consistency. The balancing process becomes more transparent and

tangible, and its rational aspects are highlighted. The extent of judicial discretion is somewhat reduced, since judges operate within a framework of principled balancing that is known and fixed in advance. Secondly, principled balancing brings the laws of proportionality closer in line with American case law regarding the limitation of constitutional rights. This promotes the development of a constructive dialogue between different legal systems, without blurring their differences. Thirdly, principled balancing is particularly important when constitutional rights are placed on both sides of the scale. Principled balancing poses an identical question with regard to both sides of the scale – what is the degree of importance in preventing a marginal harm to one constitutional right as compared to the degree of importance of marginal protection of another constitutional right. The posing of this question allows for a coherent approach regarding the relation between the state’s obligation not to infringe one right and its obligation to protect another. Fourthly, the Weight Formula will carry equal significance on both sides of the scale. It will compare the degree of importance in preventing a marginal harm to one principle with the degree of importance in promoting a marginal benefit to another principle based on the same three steps (light, moderate, or serious).

7. I am well aware of the problems underlying my proposal. One of these is the difficulty in ascertaining the proper criteria for determining the

importance of a given constitutional right. Nevertheless, this is not an impossible task. The existing Law of Balancing already takes account of the "greater importance of satisfying" a given principle. There should be, thus, criteria to evaluate the importance of satisfying a principle. In the United States this issue has been addressed and, eventually, a criterion has been found for distinguishing between rights according to their importance. Despite this, I do accept that the very introduction of a new conceptualization of principled balancing engenders a natural difficulty. Increased clarity might be replaced – and not just in the short-term – with a lack of clarity and added complications. Nevertheless, it seems to me that there is no escape from renewed thinking in the direction that I have indicated. This is so primarily in those legal systems that make a distinction between constitutional rights of greater importance and constitutional rights of lesser importance. This is the case in Israel, where principled balancing worked nicely prior to the constitutionalization of human rights. At present, following this process of constitutionalization, renewed thinking is necessary in Israel with regard to the proper place of principled balancing. Even in countries where this conceptualization does not exist, it is advisable to examine the question of whether it is proper to assume that all constitutional rights are of equal importance. Doesn't it entail a certain degree of artificiality? I believe that if a legal system adopts the principled balancing formulas then, following a short period of time, what appears

complicated and difficult to apply will seem natural. This was the case with the doctrine of proportionality itself, upon its introduction into various legal systems, and it is to be hoped that this will also occur with respect to its reexamination. It would reinforce the internal coherence of proportionality, its analytical structure, and the built-in and limited discretion that it grants to each branch of government.