

## **Weighing God in the Balance**

In the broad sweep of legal history, here is where we stand. The rule of law is an idea that has been around in one form or another for at least 4000 years. In the last 50 years it has undergone a great transformation.

Until the end of the Second World War, the United States of America was the only country in the world in which, as Thomas Paine famously put it, “law is the king.” Until then, only in the USA had courts been given the responsibility of marking out the boundaries of the legal authority of the state. In the aftermath of World War 2, the defeated powers -Germany, Italy and Japan- were made to adopt the American model; as was India as part of the price it was forced to pay for its independence from the British Raj. After the fall of the Berlin Wall in 1989, and the collapse of the ‘people’s democracies’ in Eastern Europe, the idea of having judges review the legality of legislation spread all over the world. By the new millennium, the practice of giving judges the job of enforcing the rule of law had become the defining feature of our generation’s definition of when the use of force is legitimate. In our time, coercion is lawful only if it can get the approval of the judge.

Making judges the supreme authority in defining the limits of legitimate government was a major innovation in the history of the rule of law. In the last fifty years, as the practice has been entrenched in more and more constitutions, another revolutionary change has occurred. Over the course of the last half century, as the judges have been given a more prominent place in the corridors of power, they have come to understand their own role very differently.

The traditional view, which was held by the U.S. Supreme Court for almost all of its first 150 years, was of judges interpreting a constitutional text in order to determine whether or not it had been adhered to by the politicians and their officials. The judges would read the constitution, settle on what it meant and determine whether the government had complied with its terms. In the minds of most American lawyers, the job of the judge was mostly a matter of interpreting what constraints a constitution imposed on the people and their elected representatives. It was all about providing definitions and drawing boundaries around what governments could and couldn’t do.

In the second half of the twentieth century, that changed. As judicial review was embraced by more and more countries, a different conception of the job of the judge has taken hold. On this new understanding, judges still look first to the words of the constitution but an act of interpretation rarely settles the case. Whether a government acted legally or not is more than a matter of words.

In many cases, the majestic, sweeping phrases characteristic of most constitutions are seen as throwing up competing rights or entitlements that have to be reconciled with each other. Testing the validity of segregation laws that command a separation of races, for example, requires weighing the freedom of blacks to associate against the freedom of whites to remain separate and apart. Similarly, the legitimacy of abortion laws pits the life of the foetus against the woman's freedom to control her own destiny. Finding the right balance, rather than the correct definition, has become the most important thing judges now do. Even in the USA, the last fifty years have been characterized as the age of balancing.

In thinking about ways to balance interests that unavoidably conflict, judges have made a lot of use of a principle of proportionality. The idea of the principle is to deny the status of law to any government action that is excessive; that inflicts a degree of harm that is out of all proportion to the good it can do. When racial segregation, capital punishment, and discrimination against gays, women, the poor and disabled have been outlawed by the courts, the primary reason has been because their treatment of the relevant interests was so imbalanced. The harm inflicted on those who are prejudiced by such laws was out of all proportion to the good they could do.

The idea of proportionality had been part of German administrative law long before human rights were entrenched in its post war constitution and so it was no surprise that soon after the Bundesverfassungsgericht (Constitutional Court) started hearing cases it gave the principle a prominent place in its jurisprudence. As bills of rights were entrenched in more and more constitutions, courts around the world followed suit.

Today the principle of proportionality has become a sort of universal fulcrum on which the scales of justice can be calibrated. As a practical matter, proportionality has become a litmus test of legitimacy in law making in Europe, Africa, Asia, North and South America and the Middle East. Within two generations, the principle has become an international standard of justice that distinguishes governments that adhere to the rule of law from those that don't.

Even with its long list of accomplishments, not everyone sees the evolution that has taken place in the judicial mindset as an unalloyed good. Indeed it is probably fair to say that a majority of legal experts remain sceptical. There is a feeling that balancing inherently lacks a clear, objective standard that will constrain the judges and allow them to retain their impartiality.

Many say balancing is really highly political. As they see it, proportionality is just another legal doctrine that allows judges to impose their own ideas of right and wrong. Landmark cases, like *Brown v. Board of Education* (outlawing segregation) and *Roe v. Wade* (guaranteeing a right to an abortion), which are cited as great victories

of social justice, are often explained, even by their defenders, as judges imposing their own values and/or doing what they think is politically correct.

The sceptics say there is no common scale of values available to the courts to balance the competing interests that are part of every high profile case. Weighing the life of the foetus and the freedom of women is like comparing apples and oranges.

Without any universal, neutral standards that can tell the judges who should prevail, the balancing model is seen to be doubly flawed. It is both highly undemocratic and an unreliable defender of people's rights. The sovereignty of the people and the rights of the individual are both vulnerable to the bias of the Bench. If there is no objective measuring device, there is no basis on which the ruling of a court can trump the decision of the elected representatives of the people. If segregation and abortion are just questions of personal preference of what's right and just, the sovereignty of the people (or a majority of people) must take precedence over the conscience of the judge.

The argument of the sceptics, that if judicial review is all about balancing it is highly undemocratic, resonates with lots of people. It appeals to liberals and conservatives alike. But it is based on a simple mistake. The fact there is no common currency to value the competing interests in a case doesn't mean judges can't be impartial. It doesn't mean they can't remain neutral in deciding whether, for example, the interests of the woman or the foetus ought to prevail. The fact life and liberty may be incommensurable values doesn't mean there is no objectively right answer in the case. The scales of justice, that are the universal symbol of the law, provide a measuring device that can accurately calibrate the weightiness of each.

To assess the two sides of a case, the judge places each on opposite sides of the scales. The scales of justice are balancing scales that reveal the relative weights of different objects without making any comparison of the value or uses to which they may be put. Everyone: rich and poor; black and white; men and women; counts the same. But the weight of their circumstances may be very different. If two boxes that are exactly the same size are placed on a set of balancing scales they will not strike an even balance if one is filled with feathers and the other with lead. Because lead is much denser, has more mass than feathers, it hangs heavier in the balance. On the same logic, on a set of balancing scales you can compare apples and oranges.

In real cases, of course, judges don't try to measure physical weights. Conflicting interests and psychological states don't have any mass. On the scales of justice it's all about measuring harm. What is the gravity of the claims that have been put on opposite sides of the scales? How do the different possible outcomes weigh, mentally and materially, on the lives of those whose interests are most directly affected? How

heavy are the burdens that will be borne by the parties if the judges rule against them?

After determining how seriously a conflict bears on the lives of the people involved, judges apply the principle of proportionality. The principle provides that the people who will be hurt most, if they lose the case, deserve to win. The reason why the Supreme Court's ruling in *Brown v. Board of Education* was legally correct is because the psychological damage suffered by blacks from segregation is so much greater than the impact of integration on whites. Segregation sends a message of racial inferiority that slanders a whole people. Whatever scars are inflicted by forced integration are superficial by comparison.

In assessing the impact of different possible outcomes the two sides are judged independently. No ranking is made of the value or worthiness of the parties' interests. It is assumed they are equal. The judge focuses exclusively on the intensities of preferences and the significance of the matter for each side. The goal is to maximize the collective welfare of the parties by avoiding worst case scenarios. The principle of proportionality renders invalid laws that do more harm than good.

When judges exercise their powers of review through the lens of proportionality, the way they go about their job is similar to the way people behave when they are asked to pick the best dog in a show or the best athlete of the year. In competitions, like courts, no judgment is made about the relative merits of the different breeds of dogs or types of sport. Chihuahuas and Great Danes are treated the same as are golfers and basketball players. In both cases the judgment is about how the individual (dog, athlete) ranks within his or her own group, not about which breed or sport is 'better'. The judgment is about how he or she measures up to the standards of his or her own kind. The winner is the one that comes closest to perfection in his or her class. The difference between competitions and conflicts is that whereas judges of dogs and sports are looking for the best within each category, in law the winner is the one who would suffer the most if she lost.

### **The Clash of Cultures**

To get a better sense of the way the principle of proportionality goes about resolving conflicts, consider how it settles questions of multiculturalism and the rights of religious minorities. Conflicts between church and state run through the history of the rule of law and clashes with and between religious groups continue to plague politics around the world to this day. Conflicts between Muslims and secular authorities over religious clothing (headscarves), schools (funding) and personal law (Sharia courts) still fester and remain largely unresolved. Some disputes, like the publication of Danish cartoons that mocked the prophet Mohammad, turned violent and innocent people lost their lives.

History will not treat us kindly for how these disputes have been handled so far. The way the rule of law is now understood, there is no excuse for not doing better. Reconciling irreconcilable philosophical and religious values (like dogs and athletes) is exactly what the rule of law and the principle of proportionality are designed to do.

Two decisions of the Supreme Court of Canada illustrate how the principle of proportionality is able to mark out the limits of a state's legal authority to control the practices and activities of religious groups in a way that is unbiased and even-handed. In one, the Court ruled that parents did not have the right to stop state medical officials giving their child a medically prescribed blood transfusion even though, as Jehovah's Witnesses, it offended their religious beliefs. In the other, it recognized the right of an orthodox Sikh student, to wear his kirpan (a ceremonial dagger) at the public school he attended in a suburb of Montreal.

In the first case, the judges in Ottawa were asked to balance the right of parents, to ensure that the medical treatment practiced on their children is consistent with their religious beliefs, against the lives of the children that could be put at risk by the decisions their parents make. All of the judges were agreed that parents' sovereignty over their children does not extend to the point of putting their lives in danger, although they came to their conclusion for different reasons. Half the judges followed the traditional interpretive approach and said religious freedom does not go that far as a matter of definition. The other half applied the proportionality principle and said the life of the child hung heavier in the balance.

On the metric of proportionality the answer was clear cut. For that reason, most people find this to be an easy case. When the interests of the parents and the child are put on opposite sides of the balance it is not difficult to see the risk to the latter is weightier. If the parents' authority over the child is absolute and unconditional, the whole of the child's life may be lost. By comparison, only part (and a relatively small part at that) of the parents' natural authority and religious beliefs will be sacrificed if the state orders a transfusion to be performed. Putting the interests of the child ahead of the interests of the parents minimizes the harm in the case and ensures the balance is as even as possible.

The second case of the Sikh student who wanted to wear his kirpan at school, also involved the state (in this case a school board) claiming the right to prohibit a particular religious practice because of the threat it posed to the safety and security of others. And for many people the result in the case should be exactly the same. Even though the kirpan looms large in Sikh symbolism, (it is one of the five essential components of the uniform of a male Sikh), the threat it poses to the lives of other students and teachers leads a lot of people to the

conclusion that the school authorities were justified in banning it from their schools.

The Supreme Court of Canada disagreed. Again the decision was unanimous. Again the Court took it for granted that personal security and religious freedom were equally important values. Like different breeds of dog and kinds of sports, neither was treated as being superior or more important than the other. There was no hierarchy of rights. On the scales of justice, spiritual freedom and physical security were treated as being of equal worth and put on opposite sides of the balance. The question for the Court was which one 'weighed' the most. Who faced the biggest burden? Which side stood to lose more if the ban on knives was enforced as an absolute rule or an exception was made for Sikhs?

The court had no doubt that the right answer was that Sikhs faced the bigger loss. All the judges thought that the psychological harm that the student would suffer if he were not allowed to wear the kirpan was more substantial than the physical threat he posed to others. For all of them it was an easy case. Stripped of its legalese, the Court said that prohibiting the student from dressing the way his religion told him he should imposed a burden on him that was excessive compared to the loss of personal safety and security that would result if he were allowed to wear his kirpan in school. Outlawing the kirpan imposed a restriction on his life that was out of all proportion to the good it could do.

The evidence in the case was unequivocal that safety and security in the school would not have been significantly improved by outlawing the kirpan. The student himself had never exhibited any behavioural problems and there had never been an incident involving a kirpan in a Canadian school in over 100 years. The judges also noted that the kirpan was kept in a sheath that was sewn into the believer's clothing so that it was actually less dangerous than other potentially violent instruments, like scissors and baseball bats, which were left lying around the school and could easily be picked up by anyone.

The fact of the matter was that the threat posed by the kirpan was tiny and was of a kind that didn't concern the school authorities unduly. The fact that the school allowed other potentially dangerous objects like scissors and bats to be left unprotected showed it was willing to tolerate some risk. Its real interest was in being able to provide a reasonable measure, not an absolute guarantee, of safety and the evidence showed that the threat posed by a kirpan was minimal to non-existent.

By comparison, telling a Sikh he could not wear what his religion prescribed was a big deal. The kirpan is one of the core symbols of Sikhism. It is central to Sikh identity. It one of the religion's 5 'Ks'; kesh (uncut hair), kanga (wooden comb), kara (steel bracelet), kaccha

(cotton shorts), and kirpan. In the case of the particular student who questioned the school board's authority, his religious commitments were so important in his life that, rather than being stripped of his kirpan, he left the public school system. He was, in effect, forced to attend a private school and pay for his religious beliefs.

The Supreme Court of Canada's rulings on blood transfusions and religious daggers show that when judges use the principle of proportionality to balance the competing interests in a case, their decisions will be impartial and even handed and untainted by any of their personal beliefs. There is no need for an overarching consensus of common values that transcend the interests of the parties. Nor is there a place on the scales for the judges' views about the value of physical security and religious faith. Only the value the parties place on their own interests counts.

In each case it is a purely factual question how important the threat to each of the parties really is. There is no general, abstract value to life that figures in how either case should be resolved. With the proportionality principle it all depends on the facts of each case. In the case of blood transfusions, the medical evidence was that the threat to child's life posed by the parents' religious beliefs was more serious and so it prevailed. In the kirpan case, the school authorities had shown, by their relaxed attitude towards other potentially dangerous objects, that these kinds of threats really didn't matter very much and so this time the state's interest in protecting life lost out.

### **Exceptions that prove the rule**

Some people find the logic that leads to permitting students to bring knives to school counterintuitive. As they see things, the decision of the Supreme Court of Canada is crazy. They say that making exceptions to general rules—like no knives in schools—for religious reasons is the antithesis of objectivity and impartiality and the rule of law. They argue that allowing people to put their religious commitments ahead of the community's rules makes them a law unto themselves. It puts religion above the law. It turns everyone into a personal theocracy.

That in fact is what the US Supreme Court told a group of Native Americans who sought an exemption from the state of Oregon's drug laws so that they could use peyote in their spiritual ceremonies as their religion encouraged them to do. Making an exception in their case would, the Court said, lead to anarchy. It would amount to a private right to ignore public laws whenever it suited one's conscience. In the mind of Antonin Scalia, who wrote the judgment of the Court, a legal order of that kind, defied common sense.

Contrary to the opinion of the US Supreme Court, rules and exceptions are as compatible and inseparable as two sides of the same coin. The

truth is there are exceptions to every rule. No rule is absolute. ‘Thou shall not kill’ does not proscribe taking another’s life in self-defence. In a rule of law state exceptions, like killing in self-defence, must be recognized whenever they satisfy the principle of proportionality. When the harm an exception averts is significant and does little to undermine the purpose of the prohibition, it is perfectly compatible with the rule of law.

Making an exception for Sikhs is consistent with—it proves—the general rule outlawing knives in schools. The general prohibition against knives in schools meets the requirements of proportionality in the standard case. So does the exception for Sikhs. Their spiritual beliefs make knives more important in their lives and less dangerous than they are in the hands of the general student population.

On the same logic, Sikhs have a right to an exemption from the general requirement that motorcyclists wear safety helmets to protect them from the risk of sustaining serious head injuries in an accident. For Sikh men it is another mandatory rule of their faith never to put anything over their turban, which in their religion is a symbol of spirituality and piety.

In some ways helmets are even an easier case. Here the biggest risk of allowing Sikhs to follow their religious beliefs is not to others (as with blood transfusions and kirpans) but to themselves. We allow people to engage in all kinds activities that are dangerous and potentially life threatening (mountain climbing, skiing, sky diving, rafting, motor racing) and we owe Sikhs the same freedom to determine for themselves what risks they will take.

It is true that making an exception to the helmet law for Sikhs will lead to more deaths and cases of serious trauma and that will result in the state having to provide more medical services than would be the case if everyone wore a helmet. These extra fatalities and incapacitating injuries will also impose emotional and economic costs on the families and dependents of the victims. But on the scales of justice, these burdens are not so weighty. In fact they are insignificant compared to the additional costs society pays for allowing people to ride motorcycles in the first place.

The accident rates and injuries suffered by motorcyclists in general are much much greater than the additional loss that is caused by those few motorcyclists who (like Sikhs) can provide a compelling reason for not wearing a helmet. If the state is willing to accept the very significant costs that motorcyclists as a group impose on the state and their families, it cannot consistently say the additional losses that would be caused by Sikhs riding without helmets outweigh the importance of their religious beliefs. If the economic and emotional losses caused by motorcycles are not serious enough to override the freedom of those who want to ride them, they cannot outweigh the freedom of Sikhs to

take a slightly greater risk so that they can remain faithful to those religious beliefs that are most important to them.

The way Sikhs have been treated by Canadian law shows that making exceptions is not inconsistent with following rules. Quite the contrary. Indeed, if you sit back and think about it, we make exceptions for religions all the time.

It is, for example, a common feature of human rights codes that religious organisations can refuse to employ people who do not share their faith. We also tolerate acts of blatant discrimination against women and gays by religious institutions. No one questions the authority of the Pope to tell women they can't become priests or of the Anglican General Synod to refuse to ordain gay bishops. On the scales of justice the imbalance is clear. As hurtful as all discrimination can be, losing the right to appoint its clergy would be worse for the church.

Church fathers have been fighting to maintain control over clerical appointments for a thousand years. It was in the winter of 1077, it will be recalled, that Pope Gregory 7<sup>th</sup> made Henry 4<sup>th</sup>, the Holy Roman Emperor, stand in the cold doing penance for three days for claiming the authority to appoint bishops. The stakes for the church couldn't be higher.

To allow the state to impose its will on gender equality in the priesthood would mean the Church losing sovereignty on one of the most fundamental matters of any faith. Forcing the Church to admit women into the priesthood would transform how it governs itself and how orthodoxy and church doctrine are fixed. It would reverse two thousand years of history and allow outsiders tell Catholics how to run their church.

On the other side of the balance, tolerating a church rule against women in the priesthood does not do equivalent damage to the cause of gender equality. Though discrimination in the Church does do harm, both to individual women and to women generally, the costs are relatively contained.

Every other vocation remains open to women (including being part of the clergy in other Christian churches) and there are other (admittedly less powerful) roles women can play in the Catholic Church. Even if one included the burden women bear as a result of church doctrine (for example on abortion) being formulated exclusively by men, the cost to women of being excluded from the priesthood is simply not of the same magnitude as the impact on the Church of losing control over how questions of religious doctrine are settled. Even if gender equality does not reign supreme in the City of God, it can still be the governing rule in the City of Man.

An even more dramatic example of the compatibility of religious exemptions and secular rules is our toleration of parents who physically mutilate their children in initiation rituals. Few question the right of Jewish parents to circumcise their sons eight days after their birth. Male genital mutilation (MGM) is a textbook case of why religious exemptions, even to laws of assault and battery, may be compatible with the rule of law.

From the perspective of a Jewish parent, male circumcision was God's first command. It marks the inclusion of the child in the covenant between God and Abraham and his descendants. The religious symbolism is huge. Without the cutting, the child is not part of the club.

On the other side of the balance, the costs to the child are not nearly of the same magnitude. Unlike female genital mutilation, the procedure is not particularly invasive and the consequences for the infant's health and future sex life are not nearly as severe. The religious significance of the 'bris' is much weightier than the physical and psychological pain that it inflicts.

From all the cases of religious exceptions that satisfy the proportionality principle it is apparent that the question isn't whether exceptions can consistently be included in a rule, it is how broadly they should be drawn. Making an exception for Sikhs to the 'no knives in school' rule doesn't mean they can wear the kirpan on a plane. It doesn't follow from the fact that male genital mutilation is compatible with the rule of law that families can circumcise their daughters as well. Each exception must be measured on its own facts against the principle of proportionality. After 9/11, no one has a right to take any potentially dangerous object on a plane and in a world of gender equality, female circumcision that poses a danger to health and sexual pleasure should never be tolerated.

As a general rule, religious exceptions are consistent with the principle of proportionality whenever they provide significant benefits to some members of the community without compromising the objective the rule was meant to serve. Proportional exceptions simultaneously maximize the rights of religious minorities and the reach of the rule of law. Precisely because they satisfy the most rigorous expression of the rule of law, they guarantee religious minorities can enjoy the greatest freedom to live their lives according to their religious beliefs.

The compatibility of rules and exceptions is so obvious and straightforward, it is natural to ask how the US Supreme Court failed to recognize one in the Native Americans' case. On the facts, an exception seems like a no brainer. Peyote was an important part of the religious celebrations of these Native Americans and virtually irrelevant to the state's war on drugs. The evidence was that peyote was not a drug that was widely used or trafficked and 23 other states

had legalized its use in religious ceremonies without any adverse effects.

The reason why the Court refused to mandate an exception was that five of the nine judges who sat on the case simply refused to evaluate the interests of the Native Americans and those of the community at large to tell them which hung heavier in the balance. They wanted nothing to do with balancing. They didn't think this is what they were paid to do. Instead they stuck to the traditional, interpretive model of judicial review and for the most part justified their decision as a matter of following the Court's own earlier precedents.

The Court's ruling in the peyote case is typical of how it has handled requests for religious exemptions over the years. Because it looks for answers in the meaning of words, rather than in how the scales of justice are balanced, the Court's judgments can be wide of the mark as often as not. Sometimes, as in the peyote case, the Court refuses to recognize an exception when one should be given. Other times, because it does not take the time to measure the weight of the interests involved, it validates an exemption that is wider than it needs and ought to be.

That is what happened when the Court gave its opinion on the question of who should control appointments in the church. This time it went to the other extreme. Religious organizations were given a virtually unfettered discretion in making all their hiring decisions, not just in deciding who could become a priest.

In one case the Court ruled that the Mormon Church had the right to deny a person employment as a building engineer in a gymnasium that was not connected with any religious activities, simply because he was not a member of the Church of Jesus Christ of Latter-day Saints. It gave great weight to the Church's interest in having unfettered control in deciding which jobs were related to its religious activities and never even considered the other side of the balance. As a result, in the United States it is possible for a person to lose his job because of his religious affiliation even though it has no bearing on what he does.

The US Supreme Court has arguably the worst record of any of the major courts that possess the power of reviewing the actions of the elected branches of government when it comes to the question of religious exemptions. It would be misleading however to leave the impression that the judges in Washington are the only ones who make mistakes or that they never get it right. Occasionally they have, and even judges who embrace the proportionality principle with enthusiasm and expertise sometimes get it wrong.

For example, when the South African Constitutional Court considered whether to recognize an exception to the country's drug laws, to allow for the ceremonial use of cannabis by members of the Rastafarian faith,

it too failed to stand up for the freedom of religious minorities. This was, undoubtedly, a tougher case than the one the Americans faced. Unlike peyote, cannabis was widely used in the general population and constituted a major part of the illicit trade in drugs. On the scales of justice, the interest of the state in controlling marijuana carried a lot more weight.

The decision was a close one. It was decided by a single vote. The difference between the two sides was whether it was possible to craft an exemption that would not interfere with the state's war on drugs. The majority said it was not, in part because they thought that if there was an exemption it had to extend to all the ways Rastafarians use cannabis. It couldn't go only part way. For them, it was all or nothing.

But as Albie Sachs wrote in his dissenting opinion that can't be right. The fact the Rastafarians could not be given everything they wanted was no reason for giving them nothing. Half a loaf is better than going hungry.

Moreover, as Sachs pointed out, the state had already crafted a permit system that allowed cannabis to be used for medical purposes and for scientific research so that it shouldn't have been a lot of trouble to create a parallel set of procedures for its use in communal religious ceremonies. In the same way that easy access to scissors and baseball bats put the risk of kirpans in its proper measure, so the medical and research programmes showed that making a similar exception for the religious use of marijuana would not put the public interest in jeopardy. If the Americans could create a religious exemption in the prohibition laws for the Catholic Church in the 1920s, the South Africans ought to have been able to do the same for the Rastafarians.

### **A Right Answer in Every Case**

The way in which the principle of proportionality handles questions of religious exemptions provides more evidence of its objectivity and evenhandedness. But it doesn't prove that it will always be right. You don't have to be Aristotle to know that one swallow doesn't make it summer. The question remains whether proportionality is a universal solvent that can settle any dispute

To say it is capable of providing a right answer in every case is a very bold claim that even fans of the balancing model find hard to accept. Even legal scholars who are favourably inclined towards the principle don't believe it is omnipotent. Even if everyone concedes it is a useful tool, most people think there are limits on how much good it can do.

Sympathetic sceptics don't question the model's capacity for right answers. Most would probably agree that the blood transfusion and kirpan cases prove that when judges are faced with conflicting claims of spiritual and physical freedom, they can strike a balance that

maximizes freedom overall. What the sympathetic sceptic finds hard to believe is the claim that the proportionality principle is comprehensive and universal in scope.

To put all the doubts of the sympathetic sceptic to rest is an unrealistic ambition. The number of issues that can be used to test the principle is potentially infinite. One can always think of another case to see how well proportionality can perform.

With a potentially unlimited number of cases that could test its parameters, the only way to see whether proportionality is a universal rule for solving disputes is to examine how it works one case at a time. You just have to pick one conflict and take a hard look at its facts.

On that strategy, the rulings of the Supreme Court of Canada on blood transfusions and kirpans were as good a place as any to start. In addition to establishing the integrity of the balancing model of judicial review, they are timely and topical and speak directly to a number of hot button issues that challenge politicians all over the world.

Of all the recent skirmishes between governments and religion, the clash over how Muslim women dress in public comes the closest to the kirpan case. It raises virtually the identical issue of whether a person can follow the rules of her religion in deciding what to wear or must dress as she is told by the state. In a number of countries in Europe, as well as in Turkey, the issue has generated a lot of passion and anger and still leaves a bitter after taste.

In France almost 50 students were expelled from school following the adoption of a law in 2004 that prohibited the wearing of conspicuous religious symbols in public schools. Most of the students were Muslim girls who wanted to cover their hair with a headscarf. Three were Sikh boys who wore turbans.

Outside of France, the position of the French government shocked a lot of people. (Not presumably the US Supreme Court which once ruled an Air Force officer who was an Orthodox Jew had no right to wear his yarmulke when he was performing his duties as a clinical psychologist in uniform.)

Certainly, if the French law were tested against the principle of proportionality, it could not possibly be sustained. That was the unqualified opinion of the UN Special Rapporteur on Freedom of Religion, who concluded that the rights of those who freely chose to wear a religious headscarf or a turban had been violated.

Like the school regulation that prohibited wearing a kirpan, the law against religious headscarves and turbans forced students to choose between their right to a public school education and their right to live according to the fundamental precepts of their faith. Unlike their

Catholic classmates who were allowed to wear small crosses, the law didn't allow Muslims and Sikhs to have both. To remain faithful to their religious beliefs, the government forced them to give up a public school education.

On the other side of the balance, the government had nothing of equivalent weight. In terms of protecting the secular character of the state, public order, and the rights of others, the evidence suggested that if religious symbols like headscarves and turbans were allowed in schools, little or nothing would be lost. As one commentator put it, the Fifth Republic wasn't going to collapse if some students wore religious clothing. In fact, allowing everyone the choice of whether to cover their hair is more consistent with the core French values of liberty, equality and fraternity than telling everyone they must dress "*a la mode*".

The Government's assessment of the weight of its case seemed badly overstated. While it is certainly true that the principle of *laicite* is fundamental to the character of French society, the evidence showed it tolerated, even supported, a lot of religion in its public life. Most of its public holidays, for example, celebrate important dates in the Christian calendar. Catholic schools receive massive subsidies from the state, as do churches in some 'departements' and overseas territories. Catholic students are permitted to wear the Christian symbol of the cross if it is suitably discreet.

Having shown its willingness to compromise the secular character of the French state for Christianity, the government authorities cannot consistently claim that allowing students of other religions to wear symbols of their faith would be a big deal. The experience of Muslim women in institutions of higher learning, where headscarves are tolerated, shows that there is room for religious symbols in the public domain. The universities' experience teaches that wearing religious symbols does not disqualify people from simultaneously embracing core values of French citizenship and participating in the formation of a 'general will' for the school. If headscarves can be accommodated in universities, how can high schools be that different?

Nor could it be said that allowing headscarves in schools would have constituted a major threat to public order and/or the rights of others. From 1989 when the Conseil d'Etat, the country's highest administrative court, first ruled that wearing headscarves in schools did not violate the principle of *laicite*, until 2004 when the ban was introduced, it appears schools were able to operate normally and other students were not pressured to follow suit. Disputes that arose (like what clothing could be worn in a gym class or a science lab) were settled peacefully with the help of state mediation. During this period France's experience was no different than any of the other countries in Europe that have allowed headscarves to be worn in public schools without disruption to or interference in the lives of others.

At the time of its enactment, many supporters of the French law defended it as an appropriate and timely response by the state against sexism and the subordination of women. Too often, they said, students were pressured by males in their families to submit to Islam in the way they dressed. Secularists and feminists said that the freedom of young women who didn't want to cover their hair was just as important as those who did. They defended schools as public spaces in which future citizens are given the means to free themselves of the religious and ethnic chains of their families.

Protecting people from being forced to wear religious clothing is certainly a legitimate concern for any government. The question is whether the French pursued it in a balanced and even-handed way. Were the circumstances of young girls who were made to wear a headscarf against their will so pressing that they justified overriding the freedom of women who chose voluntarily to cover their hair? Was an absolute ban that forced some girls to leave school a proportionate response?

The wide scope French law gives parents to impose their spiritual and moral values on their children suggests that it isn't. If, as it does, French law allows parents to indoctrinate their children into any of the major religious faiths, what is gained by excluding from their authority the right to insist their children dress in a way their religion encourages? Even in a culture that puts a lot of emphasis on appearances, can clothes be that important? In a society that allows parents to circumcise their male children in the name of religion, recognizing their right to dress their offspring according to their faith seems like small potatoes.

The French government is caught by the same kind of contradiction that undermined the position of the Montreal school authorities who tried to keep the kirpan out of their schools. In both cases, the state showed that its interest in safety and secularism was not absolute and unyielding. Such significant concessions had already been made that nothing much would be lost if students were allowed to follow their faith in deciding how to present themselves in public.

Moreover, even if the government could establish that protecting the freedom of children to override their parents' objections in choosing their clothing was pressing and substantial, the law would still fail the proportionality test because it wasn't focused precisely on that objective. Proportionality requires not only that an interest be sufficiently weighty, but also that it be pursued in a way that does as little damage as possible to the interests of others. Even if protecting the right of children to dress as they choose is the most significant matter in the case, it must be achieved by using the least burdensome means possible.

Rather than a law that banned all headscarves, the prohibition should have been limited to the targeted group. To conform to the principle of proportionality, the law should have made an exception for girls of a certain age and maturity, who wanted to wear a headscarf, and who could show that their choice was voluntary and uncoerced.

The way the French lawmakers struck the balance between church and state was weighted unfairly in their own favour. Another example, perhaps, of French “exceptionalism”; of an historic preference for universal truths and resistance to pluralism and the sovereignty of each person. It leaves little room for personal choice. It substitutes one absolute rule for another and, for that reason, lacks any measure of proportion.

Although the principle of proportionality works in favour of male Sikhs and Muslim women, it should not be assumed that in every conflict over personal costumes, religious minorities will always prevail. Change the article of clothing and/or the place it is worn and it is easy to imagine cases where the community’s loss will prove to be heavier in the balance. To repeat, after 9/11, Sikhs do not have the right to wear their kirpans on planes.

Or, consider the cases of police officers, prosecutors, and judges who want to wear a *niqab* or *burka* at work. In Britain, senior members of the judiciary issued guidelines instructing counsel that full face veils should not be worn in court and in Pakistan women lawyers were ordered by the Chief Justice of the Peshawar High Court to keep their faces uncovered.

The community’s right to insist everyone, including Muslim women, must show their faces is strongest when the force of the law is involved. The importance of openness and transparency in the legal system is paramount in the western idea of justice. The requirement that justice must not only be done, but be seen to be done, is considered an essential characteristic of a rule of law state.

On the other side of the scales, the sacrifice of religious beliefs that would result from banning face veils from police stations and courthouses seems comparatively less burdensome. Dress codes are not one of the five pillars of Islam. The Koran’s injunction to dress modestly is generic. It does not specifically direct women to cover their face or their hair. The fact that most Muslim women believe that they can satisfy the Koran’s requirements by wearing a headscarf shows it would not constitute a major compromise of a person’s faith if, instead of wearing a veil, she did the same.

The balance seems to be similar in the cases of teachers and students in the U.K. who wanted to cover their faces in school. Again, because of the headscarf alternative, the sacrifice of religious beliefs in not being

allowed to wear a face veil should not be excessive. On the other hand, the sacrifice of community values would again be substantial.

Facial expression is as important in teaching and learning as it is in police interrogations and cross-examination in the courts. Looking at a student's face helps a teacher see whether she is engaged. Veils make it harder to know if the message is getting across. Their purpose after all is to impede communication. Even in Islamic countries, teachers talk to their students face to face.

If veils were allowed in schools, they would take away some of the familiarity and personal connection that is an important part of the learning experience. There would be a barrier in communication, a rejection of a certain level of reciprocity and trust between teachers and their students and among teachers themselves.

Veils are inconsistent with the idea that public schools are communities in which teachers and students can look at each other and treat each other in a supportive, non-threatening way. They are based on assumptions about relations between the sexes that stereotype and are demeaning to men. They are at odds with our commitment to a culture of employment equity in which both sexes are expected to work together in an environment of mutual respect.

Telling a Muslim teacher that she cannot cover her face in school is a restriction of her religious freedom, but it is neither unjustified nor discriminatory. Community control of what people wear is not limited to religious clothing. At the same time as Muslim women are made to uncover their faces, nudists and anarchists (Doukhobors) are told to put on some clothes. In conventional western morality, at least in schools, the first is too much clothing and the second is not enough. Anti veiling and nudity laws are aimed at countering opposite extremes.

The fact that the rule of law allows governments to insist that Muslim police officers, judges and teachers show their faces at work proves the even handedness of proportionality once again. In disputes between church and state about what people can wear, neither side is going to win every time. In these cases, the community's value of transparency weighs more heavily in the balance. But, as we have seen, when the interest of a religious minority is the weightier of the two, an accommodation must be made.

The length of this discussion on what Muslim women can wear in public reinforces the truth that balancing is a detailed, fact gathering process that takes time. But it also shows that if it is done carefully the principle can make a difference. It can settle what has been a very divisive issue in a way people with radically different ways of seeing the world can accept. At a minimum, it is an improvement on how France's political elite handled the case.

Even the most fashion conscious sceptics would probably concede that when it comes to questions about what people should wear in public proportionality passes the test. If we move on, and try to resolve some of the other culture wars we have recently faced, we will find more of the same. In each case, proportionality shows it has the capacity to settle seemingly intractable conflicts between irreconcilable values while remaining value free itself.

In fact, the more passionate people are about an issue, the greater the principle's potential to keep the harmful fallout from multicultural conflicts to a minimum. Consider the collision of western freedoms and Muslim pieties that was triggered by a series of cartoons, published initially in a Danish newspaper in the fall of 2005, which made fun of the Prophet Muhammad. Some, but not all, included a drawing of his physical person. In a couple he was depicted as a warrior or terrorist. One had him wearing a headscarf in the shape of a bomb.

Muslims everywhere were offended. Some were really upset. In some places the cartoons provoked violent demonstrations. Danish embassies were attacked and set on fire. Lives were lost, property destroyed.

The Danish authorities didn't think the cartoons were that serious. They recognized publication of these images could be insulting and hurtful, but they defended them as being in the nature of political satire. There was no intention to offend they said and so the intervention of the state wasn't warranted.

They insisted people in Denmark have a right to express themselves in whatever way they want even when it hurts other people. Danes, it seems, care as much about their freedom to say anything that pops into their heads as the French worry about other people's clothes.

At no stage of the conflict did the politicians provide any leadership. Rather than testing free speech and freedom of religion on the scales of justice, they tried political posturing and traditional diplomacy instead. Both proved to be dead ends. Hamid Karzai, the President of Afghanistan, demanded an apology that Anders Fogh Rasmussen, the Prime Minister of Denmark, refused to give. There never was a satisfactory resolution.

Both sides thought the other behaved badly. Their mutual mistrust was reinforced. Despite the benign intentions of the journalists, Muslims said they still felt as though their religion had been attacked. The western press claimed the enlightenment project of challenging religious pretensions was under threat. The embers of the conflagration still smoulder.

The cartoon controversy is another ugly story. If the Danish authorities had been fully committed to the rule of law, they would have handled things very differently. Once again, on the scales of justice, there is no

comparison in the weight of the interests at stake. We cannot claim to have moved much beyond the mindset that launched the crusades when our chattering classes insist on the right to insult the spiritual leader of their neighbours' faith, for the sake of a laugh.

For Muslims, there was no doubt of the gravity of the offence. Their spiritual leader had been mocked and maligned. On this, the whole Muslim community, Sunni and Shi'a, were agreed. Physical depictions of the Prophet Muhammad are forbidden. They are sacrilegious. Among the faithful they are universally considered a mark of disrespect.

It was not just religious fanatics who regarded the cartoons as an affront to one of the central rules of their faith. As Hamid Karzai told the western press, for those who believe in the Prophet, God is no laughing matter. As an art show organized by the Iranian Government in Tehran was intended to show, mocking the Prophet is of the same order of offensiveness for Muslims as holocaust denial is for Jews.

On the other side of the balance, the restraint that is entailed in outlawing such publications is comparatively insignificant. As we have already noted, no right is absolute and that includes freedom of speech. You can't shout fire in a crowded theatre, as Oliver Wendell Holmes once said in another of his punchy aphorisms. There are already laws in most countries in the west, including Denmark, that prohibit messages that cause hatred towards people on the basis of their religion or sex or race. Child pornography is another subject that is recognized all over the world as being beyond the bounds of legitimate speech.

Within these existing limits, adding religious slurs to the list of things that people can't say in public would compromise freedom of expression only slightly. Cartoonists would lose the liberty to depict their ideas through images that were really offensive but would still be free to get their message across in ways that were less wounding. Cartoons that respected Islam's strong aversion to physical representations of the Prophet, (which was true of a couple of those that were published), would stand a better chance of passing the test.

Proportionality calibrates the scales of justice in the case of the cartoons in exactly the same way it addresses the question of what Hindu men and Muslim women should be allowed to wear. It is highly sensitive to context. Each case (cartoon) must be judged on its own. Like screening every movie to ensure children are not exposed to scenes of violence and venom.

Constraining speech that is disrespectful of others doesn't mean people can't publicly express their views on controversial issues like Islam's tolerance of violence against non Muslims. They can and Pope Benedict 16<sup>th</sup> did, a couple of years after the cartoon controversy, in the course of an academic lecture. So too, there is nothing wrong in

expressing views that are critical of the treatment of women in Muslim society. That is what Fatima Mernissi does in her writing.

Both jihad and gender are subjects that people have a right to talk about so long as they don't do it in a way that demeans others and treats them with disrespect. What was wrong with most (but not all) of the cartoons was the gratuitous insult of making their point through a physical depiction of the Prophet Muhammad. That is a cardinal sin for all Muslims.

In the end, what can be said, like what can be worn, all depends on how and when and where it is done. Again, context is everything. Where a depiction of naked women and sexual imagery to illustrate the Prophet's teaching on relations between the sexes would be very offensive, a similar drawing of a Hindu Goddess (given the sexual imagery that appears in Hindu texts and temples) probably would not. The scales of justice only proscribe doing and saying things that inflict an inordinate amount of pain.

### **Proportionality and Democracy**

Another similarity between the cartoon and headscarf cases is that the imbalance in the weights of the conflicting interests was relatively large in both. These are, for the most part, easy cases. You don't have to be a lawyer to figure them out. While the French were guilty of excessive interference with the religious freedom of their Muslim compatriots, the Danish Government didn't do enough to protect its Islamic minority from speech that was humiliating and hurtful.

The glaring nature of the imbalance in both cases is surprisingly (and sadly) not all that uncommon. Often the most controversial cases are very one sided. The kirpan case actually set off a huge hue and cry in some parts of Quebec. Unless politicians and public officials consciously keep the scales of justice fixed in their minds they can miss the imbalance completely.

Not all multicultural conflicts, however, are as uneven and obvious as those involving dress codes and cartoons. More often than not the interests are more evenly balanced. The importance of an issue for each side is more or less the same.

That seems to be true, for example, of the question of the extent to which the church and the state should set the rules that govern relations within families. As the Archbishop of Canterbury discovered when he suggested recognizing some parts of Sharia law in Great Britain, this is another potentially incendiary issue. For some people, there is no place where their religion is more important than in establishing rules and settling disputes in their families. Indeed, for most of recorded history, family law has been within the domain of the church.

In the last 100 years legal authority over family relations has undergone a seismic shift. In the west and even some Muslim countries family law is now formulated mostly by the state. The reason for this sudden transformation is not difficult to understand. If anything is surprising it is that the revolution didn't come any sooner.

The model of family relations that was and still is favoured by many religions is highly patriarchal. The law of marriage, divorce, inheritance and custody almost always favours the guys. In Islam, in particular, men can enter polygamous marriages, unilaterally decree a divorce, keep most of the property and ultimately get custody of the kids.

With the enfranchisement of women in the west at the beginning of the 20<sup>th</sup> century, church law over the domain in which women lived most of their lives was doomed. In the liberation movements that spread around the world, equality in the family came first. Patriarchy was the most egregious example of gender discrimination in a world of equal human rights.

Resolving conflicts between patriarchal and egalitarian models of family relations is especially difficult because both sides care intensely about the issues. Patriarchy is the divine model of human relations for Muslims as much in the manor as the mosque. Western feminists began their long march to freedom at the doorsteps of their homes. On most questions of family relations, Imams and western political leaders feel equally strongly about their visions. In these cases, unlike the others we have looked at so far, the two sides of the scales of justice appear more or less evenly balanced.

Even here, however, there may be exceptions. Even on questions of family law, it may be possible to say that one side cares more deeply about a particular issue than the other. On the status of polygamous marriages in secular societies, for example, the fact Sharia law permits, but does not prescribe (or indeed even recommend), its practice as part of family life seems decisive. Polygamy is not a core value of Islam the way equality of the sexes is for a modern rule of law state. It's optional in a way equality between men and women is not. The weightiness of the competing interests is completely different.

But many conflicts over whose rules should prevail in the area of family law are more or less evenly balanced. Claims of religious freedom and equality of the sexes are equally felt. They are like zero sum games. Gains and losses cancel each other out.

When the competing interests in a case weigh more or less the same, and the scales of justice are roughly balanced, the principle of proportionality has done all that it can. At that point it gives way to majority rule. Once a law is properly proportioned, the force of the

principle has been spent. When the people on the opposite sides of a case care about the outcome about the same, it's time to take numbers into account.

The logic of accepting the equal value of each person's view of the world, means more personal autonomy is better than less. If we are forced to choose between two irreconcilable rules that are of equal value and weight, the right answer is to go with the one that satisfies the largest number of people. This is when majorities should rule. It is the solution that does the least harm.

This means of course that the rule of law is compatible with family law being controlled by either the church or the state. It all depends on which the majority prefers. It will be different in Sudan than South Africa. It may change in one country from one generation to the next, (as it did not long ago in Ireland on the question of divorce). So long as they remain true to the principle of proportionality, any of them might be adopted by rule of law states.

As a matter of conforming to the rule of law, the substance of the law doesn't matter. Proportionality is a purely formal requirement of legal legitimacy, not a normative theory of personal relations. It can't command religiously inspired people to abandon their faith. It is a universal standard for measuring the legitimacy of law that is as relevant in India as it is in Iran.

If the logic of the proportionality principle means the majority in each country has the right to choose the kind of personal law it prefers, it may seem like it's stating the obvious to say that the election laws that are used to choose the Government must guarantee that the majority really does rule. In most countries this is not a problem because they have adopted some model of proportional representation.

Electoral laws that conform to the principle of proportionality guarantee that supporters of each party get roughly the same proportion of seats in the legislature as they represented in the popular vote. A religious party with 20% of the vote would be entitled to occupy 20% of the seats in the legislature; a secular party that has the backing of 30% of the electorate has a right to 30% of the seats. In the result, Governments are formed by coalitions of parties that make up the most stable majority and the idea of family they enact into law will reflect the values that the majority thinks are right.

Surprisingly, however, some of the world's oldest and most established democracies don't meet this basic standard. In fact, in the United Kingdom and some of its former colonies including India, Australia and Canada, it frequently happens that a minority group controls the Government and the majority sits in opposition. (A similar result occurred in 2000 in the United States when George W Bush was elected President even though he received fewer votes than Al Gore.)

The reason why the election laws in these countries generate such counterintuitive results is because they operate on a principle of 'plurality rule', which gives the party that wins the most (but not a majority) votes in an election a disproportionate number of seats in the legislature (or in the case of the Americans, the electoral college). In all of these countries it is not uncommon that a party will win an election with 40% of the popular vote and gain control of between 50 and 60% of the seats in the legislature.

Election laws based on the plurality principle can't guarantee that the majority will rule because they assign every seat in the legislature to a separate geographic area and then award each seat to the candidate who tops the poll. In any election that is contested by three or more parties, few winners will attract the support of the majority of voters. When this result is repeated in each electoral district, it becomes highly likely that one party will control a majority of the seats in a legislature even though only a minority of the people supported it.

In Canada, in fact, this is what usually happens. More often than not Governments rule with the consent of less than half the population. Indeed, on occasion, it has happened that, like the Bush-Gore presidential election, the party that comes second in the overall popular vote wins the most seats in the legislature and control of the Government.

The plurality rule is known as "first past the post" (FPTP) or "winner take all" and it is fundamentally at odds with the idea of proportionality. It grossly distorts the value of people's votes. In addition to the disproportionate number of seats it awards to the party with the most votes, it favours parties whose supporters are concentrated in specific regions rather than those (like environmentalists or pacifists) who appeal to voters across a country.

In countries like Canada, where ethnic and religious groups are often concentrated geographically, FPTP exacerbates regional polarization. In recent elections it has allowed a separatist party from Quebec to win up to twice as many seats as its percentage of the popular vote. By comparison, in the federal election that was held in the fall of 2008, the Green Party received almost 7% of the votes but was denied any seats in Parliament.

Electoral systems based on the plurality principle are incompatible with the rule of law because they don't treat the interests of voters equally. They are also an anathema to democracy. In the most recent Canadian election the Greens were effectively disenfranchised. In terms of representation in the legislature they have no voice. As a result, debates about environmental policy in the legislature will not match the talk in the streets.

The way in which the principle of proportionality leads logically to majority rule, and the requirement that election laws conform to some variant of proportional representation, brings our discussion full circle. Our focus has been solving conflicts between religious minorities and majority cultures that coexist in the same state. Proportionality has been able to identify to a right answer in every case.

Collectively, the cases we have examined make for an impressive body of work. They illustrate perfectly the way proportionality calibrates the scales of justice and confirm the objectivity and impartiality of the resulting balance. They show how tyranny can be checked without compromising democracy and the majority's right to rule.

In practical terms, the cases show that, with proportionality as its rule of conflict resolution, multiculturalism is a viable way of reconciling the competing authorities of clan, church and country. It maximizes the control that people have over their lives and treats everyone the same. In a multicultural country, the result is a kind of internal federalism where law making powers are delegated to non territorial (linguistic, religious) groups.

In addition to proving the objectivity and impartiality of the principle of proportionality, the everyday, mundane cultural collisions we have been considering provide strong evidence that it really is a universal principle of conflict resolution. In theory, there is no dispute beyond its reach. In principle, proportionality should be able to resolve moral and cultural conflicts wherever they occur. These sorts of cases can and do transcend the borders of the nation state in either direction. Values collide on the international stage as well as in each of our homes.

The scales of justice should work the same way whether a conflict is centred in a corner of the world that constitutes a country, or a province in a larger state, or a local neighbourhood or in the brain of someone's head. Finding the right balance between two independent states or between federal and provincial governments is no different than drawing lines between a church and the state or resolving a personal moral dilemma. Rules of war or migration or secession or intervention throw up the same conflict of values as the question of how one should distribute one's personal wealth or whether it is right to eat the flesh of other living beings.

With the certainty that proportionality provides an objective and impartial standard for resolving religious and cultural conflicts it is to these larger and more basic issues that we should turn. The doubts of sceptics would surely soften if proportionality could point us towards just solutions on these questions as well.

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