

Transnational Law and the Limits of Balancing

Neil Walker (early draft only)

A. Balancing's Infectious Appeal

1. The decision-making procedures and methodologies associated with so-called proportionality balancing (i.e. the three-stage test of capability, necessity and balancing *stricto sensu*) have assumed profound importance within constitutional adjudication and constitutional methodology more generally over the last 50 years. As Alec Stone Sweet has remarked, the spread of proportionality balancing has assumed a “viral”¹ quality. Its growth has been exponential. It has crossed over functional (from administrative to constitutional), national (from state to state) and vertical (from state to transnational - both supranational and international) jurisdictional boundaries, just as it has spread beyond its initial institutional domain of the judiciary to executive and legislative branches of government.

¹ A, Stone Sweet and J. Matthews, “Proportionality, Balancing and Global Constitutionalism” (2008) 47 *Columbia Jnl of Transnational Law* 27, 60. The authors note the influence not only of broad structural factors (see text at note 8 below) but also of key individuals, including theorists such as Robert Alexy and judges such as Aharon Barak and Jochen Frowein.

2. So proportionality balancing travels widely, but does it travel well? This is the question that frames the present paper. More specifically, are there certain types of transnational journeys to which proportionality balancing is more suited than others? If so, which journeys, and why? My basic proposition is that the very factors that make proportionality well suited to one type of transnational journey – in particular the journey *between* different state constitutional orders, also make it less suited, albeit variably so, to another type of transnational journey – namely the journey *beyond* state constitutional orders to supranational or international legal orders such as the EU, the ECHR and the WTO. This, however, should not be read, finally, as an argument against balancing at the supranational or international level. Rather, it cautions that the justification for balancing at the supranational or international level is rather different, more elusive and more fragile than it is at the state level.

B. Transnationalism, Universalism and Particularism

3. To develop our understanding of the mobility (or otherwise) of the decision-making procedure and methodology associated with the legal idea of proportionality balancing, we have to begin by asking what allows *any* aspect or dimension of law to travel. Consideration of that question produces the scheme of analysis set out in Table One below. Along the horizontal axis are arranged the two basic justificatory sources – and by implication justificatory reaches – of law, namely the particular and the universal. On the one hand, law's justification may be limited to a particular and by definition bounded community. This does not rule out travel, as the boundaries of the particular can be flexible and may be extended. In ways to be discussed below, the specific second-order

reasons why law in some of its aspects or dimensions is suited to a specific and bounded jurisdiction, and so to a limited population of recipients (e.g. all citizens or residents of a state, or of a province) possessing qualifying characteristics other than and additional to those first-order characteristics specified in the major premise of the precise rule(s) in question, may come to apply more generally. That is to say, the particular second-order reasons for law's writ may broaden their reach, but will still remain tied to a specific and bounded jurisdiction or set of jurisdictions. On the other hand, law may be mobile in some of its aspects or dimensions because it harbours some universal and so unbounded appeal and justificatory logic. That is to say, neither the source nor the destination of a universal law-claim is site specific, but based on an argument which if good at all is good for and across all conceivable jurisdictional contexts. If we turn now to the vertical axis of Table One, this is concerned with the different aspects or dimensions of law to which either or both of particular or universal justificatory logics might apply. These dimensions of law are in turn formal, substantive and structural. In each case, in ways to be considered below, the relationship between the universal and the particular justificatory logics and how this affects the mobility of the dimension in question is quite different. As we shall see, in terms of this analytical scheme, the idea of proportionality balancing falls within the structural dimension of law, and so is subject to the type of justificatory logic particular to matters of structure. However, in order to appreciate the distinctiveness of the structural dimension and of its justificatory logic we must first say something about law's formal and substantive dimensions.

TABLE ONE

Justificatory Source Dimension Of Law	Particular	Universal
Form	←	→
Substance	→	←
Structure	←	→

4. The formal and substantive dimensions of law can be thought of as being located at either end of a continuum of abstraction from what we may consider to be generic to law, with the structural dimension situated somewhere in between. Grounded as they are in what is argued to be the very form of law, formal arguments are the least abstracted. They are also firmly located in the universal side of the matrix of justification, since they claim that the core idea and associated methodology of legality is that of universalizability. Law's defining, and so formal commitment is to the idea of a rule-based or normative authority - one in which *all* relevant cases falling under a rule are deemed apt for authoritative direction or resolution according to the rule. In turn, this provides the basis for various general claims that are made about the virtue of legal as opposed to other ways of shaping conduct. Prospectivity, transparency, clarity and relative stability provide the familiar 'thin' efficiency-centred litany of the Rule of Law.² But beyond that, the formal promise of universalizability harbours a broader 'civilizing' or 'socializing' potential for any legal order. It contributes significantly to law's claim to provide an authority that in its formal equality is impersonal and heteronomous, and so to supply an acceptable, indeed indispensable second-order framework for living together on the part of individuals or groups whose first-order ethics or interests or preferences diverge or clash.³ What is more, however, as indicated by the unbroken line across the universal and the particular in respect of the dimension of legal formalism in Table One, the universal justification is also necessarily congenial to the particular jurisdiction.

² Joseph Raz, "The Rule of Law and Its Virtue," *The Authority of Law* (Oxford: Clarendon Press 1979) p. 212-13.

³ See e.g. N. MacCormick 'The Concept of Law and 'The Concept of Law' *Oxford Journal of Legal Studies*, Vol. 14, No. 1 (Spring, 1994), pp. 1-23

This is so not only because the universal must apply to every particular, but more pointedly, because the efficiency-based arguments and still more the civilizing arguments, for all their universal resonance, presuppose a particular legal order and the community associated with it,⁴ however narrowly or broadly situated, as the location within which the formal benefits of the rule of law accrue.

5. For their part, *substantive* arguments about the justification of law involve a moral claim that is at once thicker and less law-centred. This is based on the idea that the law does or should incorporate certain substantive values whose origin is external to the law. Here, in other words, rather than harbouring its own quality, the law is simply the vehicle for an ethics whose claim and appeal is at least in part independent of – abstracted from – law. Certain types of natural law argument notwithstanding,⁵ law's substantive ethical claims, whether contained in a constitutional statement of values, or in rules of statute common-law, code, custom or equity, tend to emanate from the particular community. Indeed, even those parts of modern legal thought that are most resolutely anti-positivist and opposed to the idea of particular pedigree and local convention associated with positivism, tend to understand law's substantive moral dimensions first and foremost an accomplishment of the particular community.⁶ To be sure, modern law also sees many attempts to roll out ethics beyond the particular community, most prominently in the post second world war rights catalogues, but

⁴ This need not be a state legal order. It also includes the international legal order in general. Hence the popularity of liberal justifications of international order, with constituent states treated as the functional equivalent to individuals within the state legal order, with a stable framework of co-operation required to optimise the pursuit of each constituent state interest.

⁵ E.g. Finnis (*Natural Law and Natural Rights*, (Oxford, 1980)), following Aquinas. But even here, given that law is not an articulation of the presumptively universal 'basic goods' but merely a way of giving effect to those basic goods (i.e. social goods) that require the co-ordination of a number of people (e.g. life, health, knowledge), arguably the ethics of the particular community in designing and following the basic good-implementing provisions of law is of greater weight than the thin and abstract universal of the basic good itself.

⁶ Perhaps most notably, both Dworkin and Alexy.

this is typically presented or understood either as a still bounded attempt to expand the particular, as in the various regional human rights regimes, or if claimed as universal then only aspiringly, negotiably and constructively so.⁷ Whichever, the particular logic of justification remains central and catalytic as regards law's substantive values, and universalism remains a precarious and secondary logic of justification (and so the dotted line under the universal logic of justification in Table One)

6. What of the *structural* dimension?. This is the most elusive category, but clearly for present purposes also the most interesting. It refers to those attributes of law that, on the one hand, are neither intrinsic to nor necessarily implied by the very form of law, and on the other, are not simply rules of morality that happen to have been nurtured and institutionalized through law. Rather, we are concerned with those aspects of law that speak in system or structure--specific detail to law's generically systemic or structured quality and to the system-internal and system-external relations necessary to that systemic or structured quality. This covers everything from those system-internal aspects of law necessarily to its systemic self-definition and self-adjustment, including a framework of specialist and authoritative internal interpretation (i.e., a court system) and rules of constitutional self-amendment, to system-external aspects such as broader rules associated with mutual non-deference and mutual recognition between legal and political institutions(in particular the relationship between of judicial, executive and legislative powers), and the vertical distribution of powers within the totality of the legal and political order (e.g. subsidiarity) and - to come finally to matters relevant to proportionality balancing itself – to the optimal reconciliation of the various goods associated with a legal system and structure. Crucially, what these various structural

⁷ Think, for example, of Dworkin's version of constructivism, or Habermas's discourse ethics.

features of law have in common is the equiprimordial quality they attach to universal and particular forms and levels of justification. The structural values of a legal system, like the formal values, admit of a general level of articulation that is common across systems. Yet this operates at a high level of abstraction and the fleshing out of these bare structural bones is highly system dependent in a manner more reminiscent of the ethical particularity of substantive values. So the structural values associated with legal autonomy – self-interpretation and self-adjustment, can be satisfied by a whole range of judicial structures and rules of constitutional change. The values associated with the appropriate co-articulation of law and politics can be satisfied by relatively strict notions of the separation of powers, or more holistic ideas of institutional balance. The value of making decisions at the right level – of subsidiarity, can be satisfied by everything from a purely efficiency-based criterion to minority-nation or region - conscious institutional devolution to fully blown federalism. And – to return again to the case in point - the idea of the optimal reconciliation of the goods associated with a legal system can be achieved in different ways, with different emphasis upon different branches of government as better or worse arbiters of the good ranging from those highly deferential to the executive or highly empowering of the legislature on the one hand to more judge-centred approaches on the other; and, relatedly, with different methodological lodestars ranging from a relatively executive-friendly reasonableness doctrine on the one hand to forms of rights fundamentalism on the other, with a proportionality balancing approach somewhere in between.

7. It is the importance yet high variability of the detailed articulation of structural principles which accounts for the dotted line at the level of the particular jurisdiction in Table One.

Structural principles speak to certain universal questions that legal systems have to address. That is why these principles, including those associated with proportionality balancing, travel so easily between legal systems. But the answers required are highly underdetermined by the abstract principles provided, and so much depends on the site-specific detail of implementation and on the particular justifications that can be supplied for this

C. **Justifying Balancing at Transnational Sites.**

8. Problems arise not with the fact of variability of detailed implementation of structural principles between jurisdictional sites *per se*, but with the absence of appropriate site-specific justifications for whatever variation on the structural theme is found at that site. This is the challenge facing proportionality balancing as a response to the structural problem of the optimal reconciliation of the goods of the legal system in the case of those transnational legal systems – in particular the EU, the ECHR and the WTO – that have made that choice. In brief, if we consider the sorts of particular justifications normally associated with proportionality balancing at particular sites, in particular *democratic* and *cultural* justifications, these are simply much less readily available at transnational sites than at national constitutional sites. If we consider the main alternative justification that might be offered – namely the *epistemic* – this too offers little comfort at the transnational level. If we turn finally to what we might call *counterfactual* justifications – that is to say the justification of balancing in comparison to alternative options for dealing with the structural problem of optimal realization of goods – then a case can still be made for the prominence of balancing at the transnational level, but it remains a precarious one. Let us develop these various stages of argument in turn.

9. Let us start with the democratic argument. As Alec Stone Sweet argues,⁸ the so-called ‘new constitutionalism’ which has been responsible for ushering in proportionality balancing at the state level, has a strongly democratic pedigree and so a strong democratic legitimacy. What we find under this model – typified by democratic renewal in Germany, South Africa and Central Europe, or by large-scale rights-conscious adjustment of the existing democratic settlement in Canada or Israel (or, to a lesser extent, the UK⁹), is a democratically endorsed constitutional contract which continues to assign ultimate electoral or plebiscitary power to the collective people but which requires the everyday exercise of public authority to take place in accordance with an extensive catalogue of constitutional rights and other legally recognized public goods. The protection and negotiation of that catalogue (including protection and negotiation against the public authorities themselves) requires a framework of constitutional justice under the ‘trusteeship’ of a court of supreme legislative and administrative review, which combination of strong judicial mandate and rich rights-based range of matters deemed fit for constitutional protection creates the general disposition towards balancing. Of course, as has historically been the case with social contract theory generally, the idea of the democratic credentials of a constitutional contract can always be attacked as a kind of fiction – as a merely juridical imputation by which democratic pedigree is elaborated as construct rather than verified as a genuine (pre)condition of the constitutional settlement. However, that would be to ignore three things; first, the genuine importance of democratic process in the making of certain constitutional settlements; secondly, the importance of the constitutional settlement not just as the reflection but also as the

⁸ See note 1 above.

⁹ Under the Human Rights Act 1998 which provides for a form of incorporation of the ECHR but without lexical priority over or entrenchment against competing legislative provisions.

continuing sponsor of democratic processes and structures within the polity; and thirdly, and to some extent following on from the second point, the importance of the developing ongoing democratic culture and system as a form of continuous affirmation of the constitutional settlement which sponsored the democratic culture and system, or even as a form of homologation of the pre-constitutional and pre- or proto-democratic form of the emerging polity.

10. None of these democratically constitutional conditions are true of the EU, the ECHR or the WTO. In all cases, the relevant legal orders and associated ‘polities’, including the relevant trustee courts, are set up by international treaty rather than by constitution. The democratic credentials of such treaties are of course limited. The states themselves, rather than the disaggregated people living under the relevant regime, are the principals, and their agreements can only be considered democratic in a highly derivative and delegated sense, stemming from their own internal democratic credentials *qua* states.¹⁰ And since in all cases the relevant polities carry out extensive functions previously retained by the states themselves (negative integration in the European region in accordance with the four market freedoms and competition law together with positive integration across a range of market-impinging social policies in the case of the EU; rights protection in the European region in the case of the Council of Europe and the ECHR; and global negative integration in accordance with market freedoms in the case of the WTO) and empower their key courts (the ECJ, the European Court of Human Rights and the WTO Appellate Body respectively) to make binding decisions even against the authority of the

¹⁰ For a recent treatment, see Hans Agné “The Myth of International Delegation: Limits to and Suggestions for Democratic Theory in the Context of the European Union” (2007) 42 *Government and Opposition* 18-45

principals themselves, the link to the democratic source of the state is simply too attenuated to be seen as in any way equivalent to the credentials offered by a direct democratic constitutional settlement. Indeed, it was precisely the aspiration of a democratic baptism, and the hope of thereby extending the particular¹¹ boundaries of the legally and politically particular community, that provided one of the motivating factors behind the attempt to develop a written Constitutional settlement for the EU in 2004-5, just as it was the double-failure not only to agree on the first-order question of just what that settlement should look like but also the second-order question of whether, (as a supranational and so multi-state entity) the EU was (yet or ever) an appropriate body to be the subject of a democratic constitution in a manner equivalent to or analogous to a state constitution, that led to the eventual failure of that project.¹² What is more, if we look to the other two democratic features of the new constitutionalism at the state level, these too are deficient or entirely lacking in the case of these transnational bodies. With the partial exception of the EU Treaty structure, which provides for a reasonably strong directly elected Parliament (albeit with no monopoly of legislative initiative and limited powers of accountability), the parliamentary bodies provide for by the Treaty structure of these polities have very little popular input or influence over the direction of the polity. In addition, as was one more message of the failure of the Constitutional Treaty in the EU (given that one of its avowed purposes was to ratify and purify a 50 year legacy of quasi-*constitutional* activity), there is no sense of there having emerged incrementally a meta-

¹¹ See para. 5 above

¹² See e.g. N. Walker, "Not the European Constitution" (2008) *Maastricht Journal of European and Comparative Law* 15 135-141

democratic culture and consensus to homologate the idea of these polities as properly democratically constituted.¹³

11. To the extent that there is a cultural argument in favour of an intra-polity proportionality balancing procedure centred on the judiciary, again this does not travel well to the transnational level. In the well known debate between Habermas and Alexy on the need for pre-balancing constitutional guarantees of rights, Habermas has claimed (in favour of such guarantees) that weighing at the third stage where the detriment or non-satisfaction of one principle must be balanced against the importance of satisfying the other principle (balancing *sensu stricto*) tends to take place “either arbitrarily or unreflectively, according to customary standards and hierarchies.”¹⁴ Alexy’s response has been to stress that the process of argumentation in the courtroom and in the judicial chambers ensures a more reflective approach than Habermas allows.¹⁵ Be that as it may, argumentation itself clearly takes place within a particular cultural-ethical context, and this is reinforced in the case of legal argumentation on account of the weight typically attributed to precedent. We cannot deny, therefore, that the cultural dimension plays some part in the resolution of questions of balance between high constitutional principles. And if that is the case, then it is arguable that the state polity provides a more homogeneous political-cultural space than the transnational polity. This is not, or not significantly, a question of deep ethical consensus at the level of the state polity.¹⁶ To the extent that there is such a

¹³ On the political as well as institutional impediments to the development of ‘normal’ democratic politics in the EU, see S. Hix, *What’s Wrong with the European Union and How to Fix it* (Polity, 2008).

¹⁴ J. Habermas *Between Fact and Norms* (Polity, 1995) 259.

¹⁵ R. Alexy *A Theory of Constitutional Rights* (English trans. Julian Rivers)(2002) 405.

¹⁶ Recall the importance attributed to the formal rule of law virtue of second order rule-based resolution of first order disputes at *all* polity levels. See para. 4 above.

consensus, it will often fall short in hard question of balance between deep and equally respected ethical principles. Rather, it is a question of the relative integrity of the *political* culture. The difficult questions we find at the state constitutional level about the extent of legislative and executive discretion are in the final analysis question about competing values and competing senses of institutional prerogative, but always arbitrated against the backdrop of a singular polity with a single constitutional reference point. At the transnational level, the dispute over values and over institutional prerogatives is underscored and reinforced by a sense of their being a plurality of polities and of constitutional or quasi-constitutional reference points. If we think, for example of the continuing strength of the ‘margin of appreciation’ doctrine before the European Court of Human Rights, this is not just a question of weighing legislative and executive prerogatives against judicial ones, but of weighing the claims of national polities against that of the supranational. A similar point could be made about key national public interest exceptions to market-making rights and freedoms in the context of both the EU and the WTO. In all cases, the political culture that the judges draw upon and which indeed informs the proportionality balancing approach that provides the implicit (and sometimes explicit) register of communication with the other branches is itself polarized and so fractured in ways which are not true of the national political culture.

12. The epistemic argument for balancing comes in a number of varieties, from none of which may the transnational judge draw particular comfort. In its strongest form, it might be argued, in Dworkinian mode,¹⁷ that balancing is in principle capable of providing one

¹⁷ For a strong recent statement of the Dworkinian position whose particular relevance lies in the fact that it considers and rejects (in favour of value monism) the kind of non-relativistic value pluralism of Isaiah Berlin

right answer in every case. This, however, is a position that Robert Alexy himself, as the leading contemporary theorist of balancing, explicitly rejects. Instead, he maintains the more modest thesis that “one outcome can be rationally established through the use of balancing, not in every case, but in at least some cases.”¹⁸ The transnational judge, then, even in theory still less in practice,¹⁹ cannot elevate his role in balancing beyond legitimate challenge by resort to the sheer strength and completeness of his knowledge claims.

13. A rather weaker form of the epistemic argument would focus on the judges themselves as part of a community of expertise – a worldwide college gradually honing their expertise in matters of balancing across an ever broader range of contexts and against an ever deeper well of experience – national and transnational.²⁰ However, there are at least two objections to this. First, practical wisdom cannot overcome the limits set by epistemic uncertainty. However wise the judges are and however well they learn from each other, they can never be wiser and they can never learn more than the framework of relevant

which seems philosophically congenial to the balancing approach, see his *Justice in Robes* (2006) ch.4. For a sympathetic criticism of Dworkin from a strongly pro- proportionality balancing position – one which chides Dworkin for not having a method adequate to his convictions due to his concentration on the controversies of textual interpretation rather than the (balancing) practice and dynamics of judicial review itself, see D. Beatty *The Ultimate Rule of Law* 2004) ch.1

¹⁸ Alexy, above p402. Alexy’s specific target in this passage is the critical position of Bockenforde according to which balancing, if carried to extremes of epistemological certainty, would lead to a position where Parliament, and by extension the political process, would lose all autonomy.

¹⁹ Jeremy Waldron repeatedly reminds us of the irrelevance of theories of moral objectivity in a world where we contest the claimed, and theoretically defended objectivity of the preferred answer of another simply as part and parcel of our general contestation of that other answer. In a world of unavoidable political contestation over what is properly legal, he argues, unilaterally avowed theory can never trump practical disagreement, and so can never provide the requisite authority to guarantee overcoming that disagreement. *Law and Disagreement* (Oxford, 1999)

²⁰ For a view sympathetic to this position, see L. Weinrib, “The postwar paradigm and American exceptionalism” in S. Choudhry *The Migration of Constitutional Ideas* (Cambridge, 2006)

argumentation and knowledge allows, and as we have seen the practical knowledge supplied by balancing is far from comprehensive. Secondly, and returning directly to the question of the gap between universal structural principle and contextual application,²¹ it is any case highly questionable how cumulative judicial knowledge can be across different sites in the context of balancing. If all turns on the particular weight to be attributed to the contending principles in the context under scrutiny, then in the framework of proportionality balancing, the “graduating” dimension (and its weight formula) of legal reasoning will always be more appropriate than the more familiar “classifying” dimension (and its subsumption formula) of legal reasoning.²² And since it is through refinement of classification that we typically accumulate, thicken and generalize doctrinal knowledge, then there is simply little scope for the transfer of ‘thick’ judicial reasoning on proportionality balancing across judicial sites.

14. Thirdly and finally, the epistemic argument might instead focus on the object of analysis.

It might suggest that that the zone of contestation - of what might be put in balance - is simply more modest in the specialist regimes of transnational law than in the general regime of national law, and so there is more scope for a kind of fenced-in technocratic judicial expertise than in the open fields of national constitutionalism. However, such an argument would have been a weak one at any point in the history of our three transnational organizations, as they have each from the outset sought to reconcile basic rights both *inter se* and with matters of national public interest/ And it has become an

²¹ See paras. 6 and 7 above.

²² See R. Alexy, ‘On Balancing and Subsumption: A Structural Comparison’ (2003) 16 *Ratio Juris* 433.

ever weaker one as both the functional jurisdiction and the territorial jurisdiction of the polities in question has been extended, and with that their potential for deep contestation over question of practical reason. More generally, it is precisely the range of different principles at play, and their irreducibility to any single metric of value, which gives rise to the need for balancing in the first place, and so once the threshold of balancing is crossed, any claim for a more restricted order of balancing from some regimes would seem to be misconceived. As we can see by looking at the perennially controversial jurisprudence around Article 28-30 EC (prohibition of non-tariff barriers to trade and their public interest exceptions) in the EU context or Article XX GATT (general exceptions to tariff-free trade)) in the WTO context,²³ there is simply no scope for ‘balancing-lite’, particularly given the transversal quality of many (principle-generating) rights and their capacity to intrude into even narrowly defined sectors of legal policy.

15. None of this means, however, that proportionality balancing is ultimately inappropriate to transnational legal orders. The causal account of the development of proportionality balancing that stresses its suitability in response to the combination of value-plural policy regimes at the transnational level, the empowerment of a transnational judiciary and the attribution of quasi-constitutional status (in terms of the ranking and entrenchment of the norms if not necessarily their social legitimacy) to the founding treaties and basic texts of these transnational regimes, also alerts us to the absence of obvious alternatives. It was noted earlier that if balancing is seen as one exemplar of a more basic structural principle generally concerned with the reconciliation of a plurality of sovereign values within a legal and political order, then it is of course possible to

²³ See extended discussion by Stone Sweet and Matthews, note 1 above, Part IIIB.

imagine different exemplars of that general principle. These would include articulations that are more executive-friendly (e.g. promoting a less intrusive 'reasonableness; standard of review) or which, on the other side, claim an even greater priority for rights against other interests and place even greater epistemological confidence in the ability of judges to give voice to that priority. Yet such alternative solutions, however open to criticism at the national level, would seem even less suited to the transnational level. It was argued above that a key underlying feature of transnational legal orders, and a factor militating against their development of a common political culture, is the persistence of different underlying polity influences. To opt systematically in favour of national executive discretion would be to defer systematically to one of the constituent polity influences (i.e. the national one) , whereas to insist too rigidly upon an approach which protected transnational rights and their adjudication by transnational judges with no or little reference to national interests would be defer just as systematically to the uncompromising authority of the supranational or transnational text and the supranational polity whose credo that text represents. In either case, the decision to choose other than a balancing formula would be in danger of undermining the very accommodation on which the new transnational polity was based.

16. This counterfactual analysis suggests two somewhat paradoxical conclusions. First, proportionality balancing is perhaps *least* dispensable in the arena – namely the transnational - where it struggles *most* for general justification. Secondly, this 'least bad' justification sits uncomfortably with one of the proclaimed virtues of proportionality balancing. It has been persuasively claimed of proportionality balancing that, unlike

many other approaches, including more dogmatically rights-centred approaches, it “does not camouflage judicial law-making” Rather “properly employed, it requires courts to acknowledge and defend – honestly and openly – the policy choices that they make, when they make constitutional choices”²⁴ Candour always comes at a cost, of course. But when judicial candour must proclaim its own naked virtue in circumstances devoid of the kinds of democratic and cultural supports associated with the national constitutional context, it requires a perhaps unprecedented boldness.

²⁴ Stone Sweet and Mathews, note 1 above, at p4.