Proportionality—a benefit to human rights? Remarks on the I·CON controversy

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Referring to the recent debate between Stavros Tsakyrakis and Madhav Khosla, this article highlights several important aspects of the proportionality test. It analyzes the relation between proportionality and the rights as trumps model, defending a weak trump model which combines the ideas of trumping and balancing. Furthermore, it demonstrates the proper place of moral considerations in proportionality analysis, and rejects the objection of incommensurability. Other arguments discussed in detail are the view that balancing boils down to mere mathematical calculation, and the problem of definitional generosity. In the last section, the authors examine the European Court of Human Rights' decision in Otto-Preminger-Institut v. Austria. *Overall, the article defends the view that proportionality is a rational and indispensable part of rights reasoning.*

1. Introduction

The International Journal of Constitutional Law has recently staged an exciting debate on the merits and detriments of proportionality.[1] Stavros Tsakyrakis attempted to unmask proportionality as "an assault on human rights,"[2] while Madhav Khosla maintained that Tsakyrakis failed to demonstrate any defect in the proportionality test.[3]

This debate is to be seen against the background of the dramatic spread of proportionality across the globe which we have witnessed in the past two decades.[4] Proportionality

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1 Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 Int'l. J. Const. L. (I·CON) 468 (2010) [hereinafter *Proportionality*]; Madhav Khosla, *Proportionality: An Assault on Human Rights? A Reply*, 8 Int'l. J. Const. L. (I·CON) 298 (2010) [hereinafter *A Reply*]; Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla*, 8 Int'l. J. Const. L. (I·CON) 307 (2010) [hereinafter *A Rejoinder*].

2 Tsakyrakis, *Proportionality*, *supra* note 1; Tsakyrakis, *A Rejoinder*, *supra* note 1.

3 Khosla, *A Reply*, *supra* note 1, at 298.

4 Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 Am. J. Crim. L. 463, 467 (2011) [hereinafter *Proportionality*].

has become "a central feature of rights adjudication in liberal democracies worldwide."[5] According to Kumm, proportionality analysis is perhaps one of "the most successful legal transplants in the second half of the twentieth century."[6] Proportionality is characterized as "a universal criterion of constitutionality"[7] and nothing short of "a foundational element of global constitutionalism."[8]

This "triumphant advance"[9] of the proportionality test, however, is contrasted by severe criticism. Tsakyrakis's passionate critique is by no means a singularity. To Webber, "there is much to suggest that there is no promise at all in proportionality reasoning."[10] On the contrary, he concludes that this success would result in "nothing short of a loss of rights."[11] Schauer has stressed that US constitutional law stands apart from the common standard of proportionality, and argued that the US model was "more mature."[12] According to this view, the proportionality test, indicating a less mature legal system, may only play a transitional role on the way towards a more mature constitutional law.

In order to shed more light on the intriguing tension between the triumphant success of proportionality and the severity of criticism, we would like to discuss five main objections against proportionality.

2. Rights, interests, and trumps

Tsakyrakis criticizes that balancing implied that fundamental rights competed "on a par with any of the other interests that individuals or the government have."[13] This rendered the constitution "futile," since the protection granted depended on balancing fundamental rights and public interests in each case.[14] Therefore, he continues, balancing leads to a situation where fundamental rights were not protected effectively

[5] Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification*, 4 Law & Ethics Hum. Rts. 141, 142 (2010) [hereinafter *Socratic Contestation*].

[6] Mattias Kumm, *Constitutional Rights as Principles*, 2 Int'l. J. Const. L. (I·CON) 574, 595 (2004) [hereinafter *Constitutional Rights*].

[7] David M. Beatty, The Ultimate Rule of Law 162 (2004).

[8] Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l L. 72, 160 (2008).

[9] Martin Borowski, *Limiting Clauses*, 1 Legisprudence 197, 210 (2007).

[10] Grégoire C. N. Webber, *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship*, 23 Can. J. L. Jurisprudence 179, 179 (2010).

[11] *Id.* at 202.

[12] Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States, in* European and US Constitutionalism 68 (Georg Nolte ed., 2005); Frederick Schauer, *The Exceptional First Amendment, in* American Exceptionalism and Human Rights 32 (Michael Ignatieff ed., 2005). For an account of the differing historical origins of balancing in the US and Continental Europe, resulting in "a very different place" of proportionality in both contexts, *see* Moshe Cohen-Eliya & Iddo Porat, *American balancing and German proportionality*, 8 Int'l. J. Const. L. (I·CON) 263 (2010).

[13] Tsakyrakis, *Proportionality*, *supra* note 1, at 471.

[14] *Id.* at 471, 470.

any more, and where "everything" was up for grabs.[15] In his opinion, rights should rather be treated as "trumps" than as mere "private interests."[16]

This criticism is partly correct. If fundamental rights were mere interests, the proportionality test would be applied as follows: Since the legitimate aim was any lawful aim, any interest could legitimately be pursued by a state's measure infringing a fundamental right. A wide range of aims would be allowed to play out as competing interests on the balancing stage. Rights and all public interests would compete on the same level.[17] Having a right thus would not mean having priority over competing considerations.[18] Constitutional rights of constitutional status could be outweighed even by minor interests without constitutional status. Fundamental rights would be deprived of their normative power.

Another possibility is to notion rights as "trumps,"[19] "side constraints,"[20] or as a "firewall."[21] This idea of trumping is based on a "priority to rights"[22] conception, a basic liberal intuition that rights enjoy some kind of special priority, which gives them lexical priority over other considerations.[23] Tsakyrakis prefers this understanding when he says that "by definition, any treaty for the protection of human rights gives priority to rights."[24] However, he does not present any particulars as to how rights can trump other considerations. He simply argues that a concept of rights as trumps was incompatible with balancing:

> in . . . balancing, there cannot be any concept of fundamental rights having priority over other considerations.[25]

This view is similar to Beatty's argument that, in proportionality, rights "have no special force as trumps," but are "just rhetorical flourish."[26] Likewise, da Silva argues that trumping is defined by the complete absence of balancing.[27] These authors understand the concept of a "trump card" as a categorical concept, rather than a classifying concept: It defeats other cards irrespective of their weight.

[15] *Id.* at 489. For similar critique *see* Grégoire C. N. Webber, The Negotiable Consitution 101 (2009).

[16] Tsakyrakis, *Proportionality*, *supra* note 1, at 473, 470. Similar distinctions are made by Aileen McHarg, *Reconciling Human Rights and the Public Interest*, 62 Mod. L. Rev. 671, 673 (1999); Mattias Kumm, *Political Liberalism and the Structures of Rights*, *in* Law, Rights and Discourse: The Legal Philosophy of Robert Alexy 131, 141 (George Pavlakos ed., 2007) [hereinafter *Political Liberalism*]; Tor Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 Eur. L.J. 158, 166–169 (2010).

[17] Kumm, *Political Liberalism*, *supra* note 16, at 142.

[18] Kumm, *Constitutional Rights*, *supra* note 6, at 582; Kumm, *Political Liberalism*, *supra* note 16, at 139; Kumm, *Socratic Contestation*, *supra* note 5, at 150; Harbo, *supra* note 16, at 166. *See also* McHarg, *supra* note 16, at 673; T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 945 *et seq.* (1987).

[19] Ronald Dworkin, Taking Rights Seriously 193 (1977).

[20] Robert Nozick, Anarchy, State and Utopia 28–33 (1974).

[21] Jürgen Habermas, Between Facts and Norms 254 (1996).

[22] Steven Greer, The European Convention on Human Rights 208 (2006).

[23] Dworkin, *supra* note 19, at 193; John Rawls, A Theory of Justice 42–44 (1972). A short overview can be found in Jeremy Waldron, *Fake Incommensurability*, 45 Hastings L.J. 813, 816–817 (1993–1994).

[24] Tsakyrakis, *Proportionality*, *supra* note 1, at 475.

[25] *Id.*

[26] Beatty, *supra* note 7, at 171.

[27] Virgílio Afonso da Silva, *Comparing the Incommensurable*, 31 Ox. J. Legal Stud. 273, 273–301 (2011).

Contrary to these assumptions, we will show that trumping and balancing can be combined in a concept of "soft trumping."[28] The idea of "soft trumping" presumes that rights can be given priority over other considerations according to their weight without assigning them a categorical priority.

2.1. Trumping and balancing combined

Both the proportionality test and balancing can incorporate the idea of trumping rights by means of two elements. The first element requires defining the legitimate aim a measure pursues. At this stage, the class of aims that are allowed to count as "legitimate" must be defined. Rights as constitutional values can only be overruled by other constitutional values.[29] This assumption leads to the first element of combining proportionality and trumping: Constitutional rights always trump any consideration except for considerations which enjoy constitutional status also. Only sufficiently important, i.e. constitutional values are considered as legitimate aims. It follows that only interests of constitutional value are allowed to play out on the balancing stage.

The second element refers to the balancing stage. Here it is possible to assign higher abstract weights to rights than to other considerations. In balancing, it is determined whether the importance of the aim pursued justifies the seriousness of the infringement with the right. The greater the degree of non-satisfaction of the right, the more important the competing interests must be.[30] Within this balancing exercise, the abstract weights of the colliding considerations play an important role. The abstract weight is the weight that a principle possesses relative to other principles, but independently of the circumstances of any concrete case. A constitution may well assign different abstract weights to its principles. It may, for example, assign the right to human dignity or the right to life a higher abstract weight than the right to property. One can assign higher abstract weights to rights than to other considerations. Alternatively, one can assign different abstract weights to different rights. Differences in abstract weights bring about a sort of trumping effect. The trumping effect of the abstract weight can be strengthened indefinitely. This relation can be expressed in the following *Law of Trumping*: The higher the abstract weight of a right, the more likely it will trump competing considerations. Assigning high abstract weights to rights is thus a proper way to combine proportionality and trumping.

To be sure, this trumping by assigning abstract weights does not determine the outcome of balancing. Contrary to Rawls's account,[31] the rights with a high abstract weight do not *categorically* trump colliding considerations with lower abstract weights. This is true because the abstract weights of the colliding considerations are just one of various variables in balancing. However, they establish a winning margin for fundamental rights. In other words: Abstract weights establish a "prima facie trumping," not a "definite trumping."

[28] Matthias Klatt & Moritz Meister, The Constitutional Structure of Proportionality ch. 2 (Oxford University Press, forthcoming 2012).

[29] Robert Alexy, A Theory of Constitutional Rights 185 (2002); Borowski, *supra* note 9, at 213.

[30] For the first law of balancing, *see* Alexy, *supra* note 29, at 102.

[31] Rawls, *supra* note 23, at 43. *See also* John Rawls, Political Liberalism 296 (1993).

We conclude that proportionality and trumping are compatible by means of two conditions: first, by requiring that the legitimate aim is of constitutional status; and, second, by assigning higher abstract weights to rights than to other considerations. Tsakyrakis's and da Silva's assumption that balancing and trumping were incompatible is thus incorrect.

2.2. Effective protection

The main aim of the rights-as-trumps model is guaranteeing effective protection. In our model, combining trumping and proportionality, we state that fundamental rights do not always trump any colliding consideration. Nevertheless, the combination of proportionality and trumping is capable of guaranteeing effective protection by means of three firewalls.

Firstly, as outlined above, only legitimate aims of constitutional status are considered to be able to compete with the right on the balancing stage. Minor interests fail to pass the initial legitimate aim test. Rights are given strict priority over every other consideration except for considerations of constitutional status.[32]

Secondly, at the balancing stage, the importance of fundamental rights is taken into account by assigning important rights high abstract weights enabling them to prevail over other considerations. The higher the abstract weight of the fundamental right, the more likely it trumps colliding considerations.

Thirdly, not "everything . . . is . . . up for grabs"[33] in our combined model. The rights' protection cannot be nullified completely. A center of resistance, a core content of the right, has to be left. Tsakyrakis's argument[34] that the idea of inviolable core content was incompatible with the idea of balancing rights against competing public interests is mistaken.

The essential core of a right "is what is left over after the balancing test has been carried out."[35] Limitations that pass the proportionality test do not infringe the core, "even if they leave nothing left of the constitutional right in an individual case."[36] However, an absolute minimum of protection can be guaranteed within the balancing model. Constitutional rights "gain overproportionally in strength as the intensity of interferences increases."[37] Very serious interferences can hardly ever be justified by raising the weight of the justifying reasons. The trade-off of one principle becomes increasingly difficult to justify as the trade-off of the other principle becomes greater.[38] As the satisfaction of a constitutional right diminishes, so even greater gains for the

[32] *Cf.* Borowski, *supra* note 9, at 213 n.71.

[33] Tsakyrakis, *Proportionality*, *supra* note 1, at 489.

[34] *Id.* at 492.

[35] Alexy, A Theory of Constitutional Rights, *supra* note 29, at 193. This is a relative core theory.

[36] *Id.*

[37] Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 Ratio Juris 131, 140 (2003).

[38] For the law of diminishing utility, *see* Alexy, *supra* note 29, at 103–105; Rawls, A Theory of Justice, *supra* note 23, at 37–40; Brian Barry, Political Argument 3–8 (1990). *See also* the Nash Social Choice Function in Paul-Erik N. Veel, *Incommensurability, Proportionality, and Rational Legal Decision-Making*, 4 Law & Ethics Hum. Rts. 177, 218 (2010).

justifying principle are necessary to balance any further loss of the rights, and vice versa. This means that something like a "center of resistance" exists which functions as a "fire wall" protecting minimum core contents of rights. Under certain conditions, it is reliable to a very high degree that no countervailing principle will take priority over the right. These conditions, then, define the essential core of that right.[39] The idea of essential core content is thus compatible with balancing. Taken together, these three firewalls ensure that even though rights do not trump all other considerations, they nonetheless provide effective protection.

3. The moral infection of proportionality

Tsakyrakis argues that proportionality was "a specific judicial test that pretends to balance values while avoiding any moral reasoning"; it "pretends to be objective, neutral, and totally extraneous to any moral reasoning."[40] Webber has argued that proportionality would

> depoliticize rights by purporting to turn the moral and political evaluations involved in delimiting a right into technical questions of weight and balance. Yet, the attempt to evade the political and moral questions inherent in the process of rights reasoning is futile.[41]

We can call this the argument from the moral infection of balancing. There are two claims here: First, that balancing inevitably entails moral reasoning; second, that it pretends to be morally neutral. While the first claim is true, the second is false.[42]

It is true that balancing cannot do without moral reasoning. Only a very naïve approach would arrive at the conclusion that any legal reasoning could be value-free and deprived of any moral considerations.[43] Tsakyrakis is quite right in stating that balancing can only yield correct outcomes if it reflects its underlying moral concepts.[44] However, it is not true that the theory of balancing tends to disguise the moral foundations of the proportionality test. This may be true of some judicial reasoning in practice which does not meet up with the theory.[45] The theory of balancing has acknowledged its moral basis for a very long time. Moral reasoning is a necessary component of all constitutional rights adjudication.[46] We would like to demonstrate this with the help of the special case thesis and the distinction between internal and external justification.

[39] Alexy, *supra* note 29, at 195.

[40] Tsakyrakis, *Proportionality*, *supra* note 1, at 474. *See also id.* at 475: "tends to neglect any moral reasoning", "risks neglecting the complexity of moral evaluation"; Tsakyrakis, *A Rejoinder*, *supra* note 1, at 308 (2010): "reducing human rights adjudication to questions of relative weight in order to bypass the moral discourse on values and priorities."

[41] Webber, *supra* note 10, at 191.

[42] Klatt & Meister, *supra* note 28, at ch. 3.3.

[43] *Cf.* da Silva, *supra* note 27, at 288. As an example for an overly simplistic view, he refers to Beatty, *supra* note 7, at 160, 166, 169.

[44] Tsakyrakis, *Proportionality*, *supra* note 1, at 491.

[45] Tsakyrakis refers to two practical examples; *see id.* at 491–492.

[46] Ronald Dworkin, Freedom's Law 14 (1996); Beatty, *supra* note 7, at 25–33.

3.1. The special case thesis

The special case thesis was developed for legal argumentation qua syllogism, but it is likewise applicable to legal argumentation qua balancing.[47] It holds that legal discourse is a special case of general practical discourse.[48] This thesis suggests two points.[49] First, legal discourse is a case of general practical discourse for it is concerned with practical questions like turning on the obligatory, the prohibited, and the permitted. Second, legal discourse is a special case. For it does not attempt to answer these practical questions in an absolute or general sense, but rather within the framework of a specific legal system. The legal framework imposes restrictions on practical discourse by means of binding norms, precedents, and doctrines from legal dogmatics.[50] Legal discourse, then, is a special case because, contrary to general practical discourse, it has an institutional and authoritative character. What matters here is that due to the first point, balancing is an instance of moral reasoning. It is therefore not true that, as Tsakyrakis assumes, moral reasoning was lost in balancing.[51] Afonso da Silva has made this point very clear:

> [Tsakyrakis] completely ignores that, just as almost everything in legal reasoning, the definition of degrees of satisfaction and non-satisfaction of a principle will always be subject to fierce disputes, which will involve all types of arguments that may be used in legal argumentation in general, including the moral considerations he misses so much.[52]

3.2. Internal and external justification

The distinction between internal and external justification is concerned with the relation of balancing and reasoning.[53] Again, this distinction has been developed in

[47] On the differences between subsumption and balancing, *see* Robert Alexy, *On Balancing and Subsumption*, 16 Ratio Juris 433 (2003).

[48] Robert Alexy, A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification 212–220 (1989). Many objections have been raised against this thesis, most notably by Jürgen Habermas in his Facts and Norms; *see* Habermas, *supra* note 21, at 204, 206, 231–233; Klaus Günther, *Critical Remarks on Robert Alexy's Special Case Thesis*, 6 Ratio Juris 143 (1993). For Alexy's replies, *see* Robert Alexy, *The Special Case Thesis*, 12 Ratio Juris 374 (1999); Robert Alexy, *Justification and Application of Norms*, 6 Ratio Juris 157, 157 *et seq*. (1993). *See also* George Pavlakos, *The Special Case Thesis*, 11 Ratio Juris 126 (1998); Ingrid Dwars, *Application Discourse and Special Case Thesis*, 5 Ratio Juris 67 (1992).

[49] Robert Alexy, *Legal Philosophy*, *in* Legal Philosophy: 5 Questions 2 (Morten E. J. Nielsen ed., 2007).

[50] The fact that it does not matter here whether the restrictions stem form precedent or statutory law suggest that the account presented here is applicable to both civil and common law.

[51] Tsakyrakis, *Proportionality*, *supra* note 1, at 488.

[52] Da Silva, *supra* note 27, at 288.

[53] Robert Alexy, *The Weight Formula*, *in* Studies in the Philosophy of Law: Frontiers of the Economic Analysis of Law 9 (Jerzy Stelmach, Bartosz Brożek, & Wojciech Załuski eds., 2007); Alexy, Rechtsregeln und Rechtsprinzipien, *supra* note 49; Jerzy Wróblewski, *Legal syllogism and rationality of judicial decision*, 5 Rechtstheorie 33, 39–46 (1974). MacCormick uses the terms "first-order justification" and "second-order justification": Neil Maccormick, Legal Reasoning and Legal Theory 101 (1978).

the context of argumentation by means of the syllogism, but it is applicable to balancing as well, as has been demonstrated recently.[54]

Internal justification regards the question whether the balancing result can be deduced from the premises following the rules of arithmetic. The question of internal justification can be answered by looking to the formal structure of balancing as described by the Weight Formula.[55] As soon as the values to be assigned to the variables are determined, the result can be deduced by following the rules of arithmetic. As it is with the internal justification by means of the legal syllogism, which does not follow arithmetic, but logical rules,[56] it is entirely a matter of formal structure.

Neither legal syllogism nor the Weight Formula is concerned with the truth or correctness of the premises. Both are merely involved with the inferential relation of deducing a result from the premises. In contrast, external justification has the truth of premises as its object. It is concerned with giving reasons for the values inserted in the Weight Formula; it is, for instance, involved with the justification of evaluating the intensity of an interference to be "serious" or the weight of a competing principle to be "light."[57]

It is precisely the external justification where moral reasoning comes into balancing. Since balancing is dependent upon the evaluation of intensities and weights, it is clear that balancing must entail moral considerations. Courts cannot dispense with their responsibility to justify their decisions both internally and externally, and, hence, with engaging in the intricate moral complexities of the cases before them. The two voices cited by Tsakyrakis are mistaken in this point.[58]

3.3. Balancing and moral considerations

It is the very use of balancing analysis to help identifying the elements of the judicial reasoning which follow formally from given premises, and those elements which have to be externally justified. Thus, balancing does not at all "obscure the moral considerations that are at the heart of human rights issues."[59] On the contrary, it clearly lays open the moral discourse indispensable in balancing, and shows us which propositions exactly a Court has to justify in order to arrive at a rational judgment.[60] Here, we can concur with the last sentence in Tsakyrakis's rejoinder, stating that the reasoning of a court is clearer "the more explicit the moral considerations of a case are made."[61] Balancing helps to fulfill that task and facilitates more rationality in human

[54] Matthias Klatt & Johannes Schmidt, *Epistemic Discretion in Constitutional Law*, 10 Int'l J. Const. L. (I·CON) (2012).

[55] Alexy, *The Weight Formula*, *supra* note 53.

[56] Alexy, *On Balancing and Subsumption*, *supra* note 47.

[57] The criticism of Alexy's approach to the analysis of the concept of "proportionality" is usually based on this limitation. *See* Webber, *supra* note 10, at 184–186 (2010).

[58] McHarg, *supra* note 16, at 681; Frank N. Coffin, *Judicial Balancing*, 63 N.Y.U. L. Rev. 16, 22 (1988).

[59] Tsakyrakis, *Proportionality*, *supra* note 1, at 493.

[60] *Cf.* Alexy: "The Law of Balancing tells us what it is that has to be rationally justified," Alexy, A Theory of Constitutional Rights, *supra* note 29, at 107.

[61] Tsakyrakis, *A Rejoinder*, *supra* note 1, at 310.

rights reasoning. The model of balancing "ties the formal structure of balancing to a theory of legal reasoning, which includes a general theory of practical reason."[62] Mattias Kumm has looked closely into this and argued that

> [t]he metaphor of "balancing" should not obscure the fact that the last prong of the proportionality test will in many cases require the decision-maker to engage in theoretically informed practical reasoning, and not just in intuition-based classificatory labeling. At the level of evaluating the relative importance of the general interest in relation to the liberty interest at stake, the weights can be assigned and priorities established as required by the correct substantive theory of justice.[63]

In his reply to Kumm, Alexy has also stressed this point and argued that proportionality, although being a central feature of rights reasoning, were in need of supplementation by considerations from substantial political morality.[64] Alexy agreed with Kumm and stressed that

> [p]roportionality analysis is, as the weight formula shows, a formal structure that essentially depends on premises provided from outside.[65]

All in all, these considerations allow us to see clearly what proportionality's claim to neutrality means: It is as neutral as possible as far as its formal structure is concerned. As such, it is "a universal criterion of constitutionality."[66] But this formal structure must be filled with moral arguments and considerations of weight and value that vary according to different perspective: "Proportionalities vary directly with the weight and values people place on the relevant interests."[67]

4. Incommensurability

Tsakyrakis argues that the metaphor of balancing "says nothing about how various interests are to be weighted, and this silence tends to conceal the impossibility of measuring incommensurable values."[68] To him, the argument from incommensurability is frequently considered to constitute "the most effective critique of balancing."[69]

This argument was not taken up by Khosla in his reply.[70] It is nonetheless important since several scholars contest the assumption of a common metric as a basis for balancing.[71] The argument comes in two variants: The first points to the fact that "our

[62] Alexy, A Theory of Constitutional Rights, *supra* note 29, at 109.

[63] Kumm, *Political Liberalism*, *supra* note 16, at 148 *et seq*. *See also* Kumm, *Constitutional Rights*, *supra* note 6, at 575.

[64] *Cf*. Kumm, *Political Liberalism*, *supra* note 16, at 132.

[65] Robert Alexy, *Thirteen Replies*, *in* Law, Rights, and Discourse, *supra* note 16, 344.

[66] Beatty, *supra* note 7, at 162.

[67] *Id*. at 167–168.

[68] Tsakyrakis, *Proportionality*, *supra* note 1, at 471.

[69] *Id*.

[70] Khosla, *A Reply*, *supra* note 1, at 298.

[71] *Cf*. John Finnis, *Natural Law and Legal Reasoning*, *in* Natural Law Theory: Contemporary Essays 146, 151 (Robert P. George ed., 1992); Aleinikoff, *supra* note 18, at 972–976; Lorenzo Zucca, Constitutional Dilemmas 55–60, 85–90 (2007).

moral universe includes ideas not amenable to quantification."[72] The second challenges the assumption that interests are "ultimately reducible to some shared metric" and that, "once translated into this common standard, they can be measured against each other."[73] While the first variant of the argument refers to single principles alone, the second relies on the relation between at least two principles.[74]

4.1. Lacking quantifiability

The first objection is certainly true in pointing to the fact that principles are amenable to quantification to varying degrees. All rights that are linked to the monetary dimension, e.g. the right of property, are much more suitable for quantification than rights that lack this dimension. However, balancing does not depend upon assigning an exact, mathematical quantification to the colliding principles. Rather, it works fine as long as it is possible to assign weights to them with the help of the triadic scale "light, moderate, and serious." It is sufficient to rank the colliding principles ordinally, rather than cardinally.[75]

Contrary to Tsakyrakis, we hold that many principles used in moral and legal reasoning are, indeed, amenable to this triadic scale, despite their lacking amenability to mathematical quantification. To put it more clearly: Their lacking amenability to quantification is not an argument against balancing those principles, but is the very reason for applying a scale to them. It is precisely the hard cases which are counting in favor of the model.[76]

Clearly, the assignment of any weight in a given case may be disputed. But this is a matter of the external justification of balancing and does not count against the use of the triadic scale as such. At this point, we can see clearly that the first objection boils down to Habermas's objection of irrationality. At bottom, it denies the possibility of making rational propositions on weights and values. Thus, the first variant of the objection is not exactly a discrete argument. The use of the triadic scale would only be irrational if it were impossible to decide upon the weight-assignments on rational grounds. To assume this impossibility, however, is not convincing. It would amount to denying any possibility of rational moral and legal reasoning, and, thus, not only to a far-reaching skepticism, but also to giving up the idea of constitutional law scholarship as a rational enterprise.[77]

According to Tsakyrakis, balancing "erodes [the] rights' distinctive meaning by transforming them into something seemingly quantifiable."[78] This argument mistakes quantifiability for comparability. Furthermore, Tsakyrakis does not make clear

[72] Tsakyrakis, *Proportionality*, *supra* note 1, at 475 (2010).

[73] *Id.* at 471.

[74] Klatt & Meister, *supra* note 28, at ch. 3.5.

[75] James Griffin, *Incommensurability*, *in* Incommensurability, Incomparability, and Practical Reason 35 (Ruth Chang ed., 1997); da Silva, *supra* note 27, at 283 [hereinafter Incommensurability].

[76] *Cf. id.* at 282.

[77] *Cf.* Alexy, *The Weight Formula*, *supra* note 53, at 18.

[78] Tsakyrakis, *Proportionality*, *supra* note 1, at 488.

what he means by referring to a "right's distinctive meaning." From the context of his argument, however, it becomes clear that he refers to the ability of rights to function as shields or trumps against certain reasons. This ability is independent of the problem of quantification. This point, therefore, does not concern the argument from incommensurability per se, and has already been discussed above.[79]

Tsakyrakis argues further that the use of scales would tend to privilege certain considerations which are more amenable to quantifications over those which are not, and to "assign them a role in the reasoning process that they would otherwise lack."[80] It is unclear what "otherwise" means: If a certain principle is relevant from the standpoint of the constitution, it has to be included in the balancing process. It cannot be left unconsidered. And if it was included, it would have exactly the role which follows from the weight assigned to it. This role is not to be changed unless by reasons justifying assigning a different weight.

The core of this objection, then, seems to be the fear that quantifiable considerations could be privileged over non-quantifiable considerations. This danger, however, does not exist. Once two principles are compared on a common scale, there is no room for privileging one over the other for the reason of different amenability to quantification. The assignment of a light, moderate, or serious weight to a principle has to be justified externally. To be sure, the external justification can be debated, and this happens frequently. But this aspect is not sufficient to demonstrate any differences between quantifiable and non-quantifiable principles, provided that they are measured on the same scale and, thus, from a common point of view.

4.2. Lacking common scale

Balancing, Tsakyrakis argues, conceals "the impossibility of measuring incommensurable values by introducing the image of a . . . common metric."[81] Since a common metric was not existent, a comparison of the respective weights was impossible. This second variant of the argument from incommensurability holds that, even if it were possible to assign values to all relevant principles per se, these values do not belong to a *common* scale.[82]

This argument is correct insofar as any comparison indeed presupposes a choice value common to the principles.[83] It is important to note, however, that Tsakyrakis does not claim incommensurability in the strong sense. Rather, he sides with Waldron's weak incommensurability. Weak incommensurability (at least in Tsakyrakis's understanding) acknowledges the lack of a common scale for balancing, but holds that it was possible to have rational grounds for preferring one principle over the other.[84] However, Tsakyrakis continues, establishing such priorities requires moral

[79] *See supra* section 2.
[80] Tsakyrakis, *Proportionality*, *supra* note 1, at 485.
[81] *Id.* at 471.
[82] *Cf.* Webber, *supra* note 10, at 194.
[83] On Covering or Choice Values, *see* da Silva, *supra* note 27, at 280, 284, 299.
[84] *Cf.* Tsakyrakis, *Proportionality*, *supra* note 1, at 473–475.

reasoning, and balancing, he holds, pretends to be "totally extraneous to any moral reasoning."[85]

It is important to note that weak incommensurability does not argue that any preference order between principles was irrational. Rather, it argues that establishing preferences requires moral reasoning. We have already shown above that the assumption that balancing would pretend to be morally neutral is not correct. Balancing indeed provides for moral reasoning and, what is more, it demonstrates exactly at what stage and to what extent such reasoning is necessary in legal argument.[86] We can therefore agree with Tsakyrakis that establishing priorities between principles depends on moral argument. Tsakyrakis argues that "if the moral discourse is lacking, there is no way to demonstrate that values, indeed, are commensurable."[87] We agree with him here. But the opposite is also true: If the moral discourse is integrated (as it is in the concept of proportionality's external justification), than there is no way to demonstrate that values were incommensurable. We can conclude, therefore, that proportionality allows for a common metric qua moral reasoning.

There is another point here. Although referring explicitly to Waldron, Tsakyrakis does not capture the most important feature of Waldron's weak incommensurability. In Waldron's definition, the dependence on moral reasoning is less important. Rather, Waldron refers to a "simple and straightforward priority rule."[88] According to Waldron's weak incommensurability, the ordering between principles is established by trumping, side constraints, or lexical priority, *including* weighing and balancing. Thus, contrary to strong incommensurability, Waldron's weak incommensurability affirms the possibility of establishing an ordering of principles, but, unlike the usual account[89] of weak incommensurability, insists that the order must be established by means of balancing.[90]

Afonso da Silva, drawing on recent development in the general theory of practical reason,[91] has lucidly demonstrated that neither strong nor weak incommensurability exclude balancing, since a distinction must be made between incommensurability and incomparability.[92] This distinction draws on the *type* of scale which is used in balancing. Balancing requires an ordinal ranking, securing comparability, and does not depend upon a cardinal ranking, which would guarantee commensurability.[93]

The decisive point here is that incommensurability does not imply incomparability. Balancing works fine as long as comparability among the colliding principles is established, no matter whether they are incommensurable in the strong or the weak or, indeed, any other sense. Comparability can be established by means of

[85] *Id.* at 474.

[86] *See supra* sections 3.2 and 3.3.

[87] Tsakyrakis, *Proportionality*, *supra* note 1, at 474.

[88] Waldron, *supra* note 23, at 816.

[89] Usually, weak incommensurability is excluding any sort of balancing: *see id.*

[90] *Cf. id.* at 821.

[91] Ruth Chang, *Introduction*, *in* Incommensurability, *supra* note 75, at 1; Griffin, *supra* note 75.

[92] Da Silva, *supra* note 27, at 282–283.

[93] *Cf.* Chang, *supra* note 91, at 1.

creating a common scale like Alexy's triadic scale which allows for comparing trade-offs between the satisfaction viz. non-satisfaction of colliding principles. This is exactly the task that constitutional law and, indeed, practical reason in general leaves us with in hard cases. This is meant when Alexy argues that the constitution provides a common point of view and thereby indirectly establishes comparability.[94] In this sense, incommensurability is the starting point, rather the dead end, of balancing. This has lucidly been highlighted by Elijah Millgram:

> Commensurability is the result, rather than the precondition, of practical deliberation.[95]

We conclude that incommensurability, be it strong or weak, does not hinder establishing rational preference relations among principle by means of balancing.[96]

5. Balancing as calculation

Tsakyrakis argues that balancing lacked a precision as found in natural sciences. It stuck to the "illusion of some kind mechanical weighing."[97] Balancing, according to Webber, purports that constitutional rights could be "transformed into management and mathematical measurement."[98]

Afonso da Silva has argued that this objection was pointless since "the statement that mathematical precision is impossible in legal reasoning is a commonplace proposition that nobody denies" and, in particular, "defenders of balancing . . . do not claim any sort of mathematical precision."[99]

Nonetheless, the principles theory's model of balancing may seem to be liable to this objection, since it operates with numbers inserted into the weight formula.[100] We must not misunderstand, however, this model for identifying balancing with some kind of mechanical or mathematical activity.[101] That balancing does not claim an overly precision is very clear if one looks at the distinction between internal and external justification already mentioned above.[102] Balancing can only be precise to that degree to which the external justification of the premises may be precise. Hence, balancing inherits any weaknesses of the justification of a certain degree of interference or of the importance of the justifying principle.[103] This is not detrimental of the model. On the contrary, it is an advantage since the model allows for seeing these weaknesses more clearly.[104]

94 Alexy, *On Balancing and Subsumption*, *supra* note 47, at 442.
95 Elijah Millgram, *Incommensurability and Practical Reasoning*, *in* Incommensurability, *supra* note 75, at 151.
96 *See also* Veel, *supra* note 38, at 227–228.
97 Tsakyrakis, *Proportionality*, *supra* note 1.
98 Webber, *supra* note 10, at 191.
99 Da Silva, *supra* note 27, at 288 n.77.
100 *Cf.* Alexy, *The Weight Formula*, *supra* note 53.
101 Robert Alexy, *On Constitutional Rights to Protection*, 3 Legisprudence 1, 9 (2009).
102 *See supra* section 3.2.
103 *Cf.* Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 Int'l. J. Const. L. 572, 577 (2005) [hereinafter *Balancing, Constitutional Review*]: "balancing is as rational as discourse."
104 Klatt & Meister, *supra* note 28, at ch. 3.4.

The numbers in the weight formula are only a heuristic tool *representing* evaluations of, e.g., an infringement with a right as light, moderate, or serious. Thus, they help making explicit the internal structure of balancing, thus giving more rationality towards the whole process.[105] But the model works fine without any use of numbers. It does not claim any sort of mechanical, let alone mathematical character of the activity. Rather, it simply helps to understand what different steps balancing consists in. Another aspect that counts against the alleged over-precision is that balancing allows for discretion, both in the epistemic and in the structural dimension.[106]

6. The problem of definitional generosity

Tsakyrakis argues that the balancing approach implied the "principle of definitional generosity."[107] According to this principle, the interpreter assumed a broad definition of the limitation clauses and thus of the legitimate aims that are allowed to limit a right. Since most limiting clauses allow rights to be restricted because of the rights of others, rights would be defined broadly. Therefore, these interests, once defined as legitimate aims, in turn played out on the balancing stage.[108] Insofar, the specification of the items taken into account at the balancing stage was "insufficiently fine grained."[109] This critique leads to the question whether rights as limiting reasons should be defined rather narrowly or broadly.

The problem of definitional generosity concerns the question whether a third person has to be protected since she holds a right as well. The question if the limitation clause should be defined rather narrowly or broadly is thus identical with the question how the scope of fundamental rights should be defined.

There are four arguments why broad definitions are preferable.[110] Firstly, narrow definitions are only seemingly free of balancing. The outcome of a narrow interpretation of a fundamental right is always based on balancing, since it relies on reasons for and reasons against the protection.[111] A striking example for this mistaken view is Greer's proposal concerning the case *Wingrove v. UK*.[112] He argues that

[105] Alexy, *Balancing, Constitutional Review*, *supra* note 103, at 576.

[106] On the relation between balancing and discretion, *see* Alexy, A Theory of Constitutional Rights, *supra* note 29, at 394–425; Julian Rivers, *Proportionality, Discretion and the Second Law of Balancing*, *in* Law, Rights and Discourse, *supra* note 16, at 167; Julian Rivers, *Proportionality and Discretion in International and European law*, *in* Transnational Constitutionalism: International and European Perspectives 107 (Nikolaos K. Tsagourias ed., 2007). For a recent account of epistemic discretion, *see* Klatt & Schmidt, *supra* note 54.

[107] Tsakyrakis, *Proportionality*, *supra* note 1, at 480. Similarly, about the ECHR, *see* Armin von Bogdandy, *The European Union as a Human Rights Organization?*, 37 Common Mkt. L. Rev. 1307, 1332 (2000).

[108] Tsakyrakis, *Proportionality*, *supra* note 1, at 482 and 488.

[109] *Id.* at 488.

[110] *See* Klatt & Meister, *supra* note 28, at ch. 3.1.

[111] Alexy, A Theory of Constitutional Rights, *supra* note 29, at 208–210.

[112] Wingrove v. The United Kingdom, App. No. 17419/90, Eur. Ct. H.R. (1996).

> the right to freedom of expression can plausibly be defined as excluding the right to cause gratuitous insult to religious . . . sentiments, while the right to freedom of thought, conscience and religion can plausibly be defined as limited to protection only from gratuitously insulting criticism.[113]

This definition, he continues, was "not an exercise in 'balancing' as such."[114] If, however, the right to freedom of speech is defined by saying all speech but hate speech is protected, the outcome relies on balancing free speech against the prevailing rights of the person the speech addresses.[115] A broad definition of the right including hate speech at least prima facie recognizes that balancing is unavoidable.[116]

Secondly, narrow definitions are structurally deficient. They cause "major problems with regard to the structural and conceptual distinction between scope and justification."[117] Since narrow definitions rely on hidden balancing, the rights' content and the rights' restrictions are mixed up. Both, however, must be treated separately, since they concern different logical procedures. The right's content is to be defined by interpreting the constitutional text. Competing interests are not to be taken into account at this stage. The competing interests come into play within the rights' limitations, in particular in applying the proportionality test with balancing.

Thirdly, narrow definitions lead to legal uncertainty. Since narrow definitions rely on a hidden balancing, the scope of the right is not predictable. Broad definitions, in contrast, define the rights' scope without taking competing considerations into account. The prima facie protection is broad and thus predictable.

One might be inclined to object that, using broad definitions, while the very broad scope of a right was certain, still the outcome of the case was not, since it would depend on balancing the right with other rights and interests. This objection, however, neglects two important aspects. First, narrow definitions must, as well, rely on balancing; they only pretend to avoid it. How, after all, could one arrive at a specific narrow definition without using balancing for delineating the scope of the right? And if, on the other hand, this delineating is done indeed without considering colliding principles—how, then, could it claim to be rational? Second, the balancing account defended here is by no means an invitation to incorporate irrational and subjective means into rights reasoning. Rather, it entails structural, rational and logical rules[118] that limit the uncertainty of the outcome of a case in the best possible way.

Fourthly, the hidden balancing approach reduces the state's duty to justify rights' restrictions. It empowers authorities to deny protection by arguing that a certain

[113] Steven Greer, *Balancing and the European Court of Human Rights*, 63 Cambridge L.J. 412, 424 (2004).

[114] *Id.*

[115] Janneke Gerards & Hanneke Senden, *The Structure of Fundamental Rights and the European Court of Human Rights*, 7 Int'l. J. Const. L. (I·CON) 619, 628 (2009), however, insist that it is possible to exclude pure hate speech from the right to speech without balancing.

[116] Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 Cambridge L.J. 174, 190 (2006).

[117] Gerards & Senden, *supra* note 115, at 627.

[118] For a full account of the structure of the balancing exercise, *see* Alexy, *On Balancing and Subsumption*, *supra* note 47; Alexy, *Constitutional Rights, Balancing, and Rationality*, *supra* note 37; Alexy, *Balancing, Constitutional Review*, *supra* note 103; Klatt & Meister, *supra* note 28, at ch. 1.

rights' content does not protect the behavior in question, e.g. by treating limitations of rights as a specification of the right's scope.[119] Protection can be denied without justifying this. Broad definitions, in contrast, lead to a broad prima facie protection,[120] and thus to the duty to justify for infringements at the justification stage.[121] This avoids "black holes" of non-protection.[122] The state faces a duty to give reasons for not protecting rights only if certain behavior is protected prima facie.

7. Case analysis

Both Tsakyrakis and Khosla frequently refer to *Otto-Preminger-Institut v. Austria*.[123] In this last part we will analyze this case, too, in order to exemplify our arguments presented above.[124]

In this case, a non-profit organization called "Otto-Preminger-Institut," which was operating an art cinema in Innsbruck, Austria, announced six public showings of the film "Das Liebeskonzil." The film portrayed God the father, Jesus Christ, and the Virgin Mary in a critical way. They team up with the devil to punish mankind with syphilis. The Austrian authorities seized and confiscated the film due to the domestic penal law. The applicant association complained about a violation of article 10 of the European Convention on Human Rights (ECHR) which states:

> (1) Everyone has the right to freedom of expression. . . .
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such . . . restrictions . . . as are prescribed by law and are necessary in a democratic society, . . . for the protection of the reputation of rights of others. . . .

Since there was no doubt that the seizure and forfeiture of the film were interfering with the applicant's right to freedom of expression, and since the measures were prescribed by domestic law, we focus on the question whether the infringements were justified under article 10(2) ECHR since they pursued a legitimate aim and were necessary in a democratic society. Prior to this, we will present the reasoning of the court.

7.1. The judgement

The court first of all determined whether the seizure and forfeiture were aimed to protect a legitimate aim under article 10(2) ECHR, particularly the right to respect for one's religious feelings.[125]

[119] For the approach of "Limitation as Specification," *see* Webber, *supra* note 15, at 123–133. For critique, *see* Julian Rivers, *Book review: The Negotiable Constitution*, Pub. L. 217, 215 (2011).

[120] Kumm, *Political Liberalism*, *supra* note 16, at 141: "subject practically all acts of public authorities that affect the interests of individuals to proportionality review."

[121] To the aspect that the proportionality test promotes the state's duty to justify for infringements of rights see Cohen-Eliya & Porat, *Proportionality*, *supra* note 4; Kumm, *Socratic Contestation*, *supra* note 5, at 168–170.

[122] Cohen-Eliya & Porat, *Proportionality*, *supra* note 4, at 477–479.

[123] Otto-Preminger-Institut v. Austria, App. No. 13470/87, Eur. Ct. H.R. (1994).

[124] *See also* Klatt & Meister, *supra* note 28, at ch. 7.

[125] Otto-Preminger-Institut v. Austria, *supra* note 123, paras 46 *et seq*.

The majority of six judges stated that the measures aimed to protect the religious feelings of the population guaranteed under article 9 ECHR and thus a legitimate aim.[126] It argued that article 9 ECHR indeed didn't protect believers from all criticism,[127] but that "extreme cases" of critique engaged "the responsibility of the State" to protect the religious feelings.[128] And in the present case, the religious feelings could "legitimately be thought to have been violated by provocative portrayals of objects of religious veneration."[129] A minority of three judges, however, argued that a right to have one's religious feelings protected could not be derived from article 9 ECHR, since article 9 ECHR rather included a right to express views critical of the belief of others.[130] Nevertheless, the measure could be justified to secure the "democratic character of a society" from "violent and abusive attacks on the reputation of religious groups."[131]

The court then turned to the question whether the measures were necessary in a democratic society. The majority ruled that the seizure and forfeiture were "necessary to protect public order against the film," since the film was an attack on religion.[132] It argued that the precautions taken by the cinema—five of six showings should take place at 10 p.m., an information bulletin informed about the contents of the film, persons less than seventeen years of age were excluded, the targeted audience was art-interested and had to pay an entrance fee—were not sufficient to prevent unwarranted offence, since the film was "widely advertised" and there was "sufficient public knowledge" of the film.[133] Finally, the majority engaged in "weighing up the conflicting interests."[134] Here, the majority argued that the margin of appreciation left to the national authorities had not been overstepped since the Austrian authorities have had "due regard to the freedom of artistic expression."[135] Therefore, the majority concluded, article 10 ECHR had not been violated.

A minority of three judges, however, disagreed. They argued that the cinema had taken sufficient precautions to give religiously sensitive people the opportunity to stay away from the film.[136] The cinema thus limited the offence to others as far as it could reasonably be expected.[137] Therefore, "on balance," the minority concluded that the measures were "not appropriate."[138]

We now want to determine how the case would have been solved by applying the proportionality test properly.

[126] *Id.* para 48.
[127] *Id.* para 47.
[128] *Id.*
[129] *Id.*
[130] *Id.* dissenting opinion, para 6.
[131] *Id.*
[132] *Id.* para 52.
[133] *Id.* para 54.
[134] *Id.* para 55.
[135] *Id.* para 56.
[136] *Id.* dissenting opinion, para 9.
[137] *Id.*
[138] *Id.* dissenting opinion, para 11.

7.2. Legitimate aim

According to article 10(2) ECHR, a measure that infringes the right to freedom of expression can only be justified if it pursues a certain legitimate aim. Article 10(2) ECHR limits the margin in end-setting granted to the member state by stating a prescribed list of legitimate aims. The state is thus not free to identify the legitimate aim freely. This is in accordance with the understanding of rights developed above, which holds that only aims with a special status may limit a constitutional right.[139]

The majority held that the measures legitimately pursued to protect the religious feelings of others guaranteed in article 9 ECHR and thus a legitimate aim under article 10(2) ECHR.[140] The minority, however, stated that a right to have one's religious feelings protected cannot be derived from article 9 ECHR.[141]

The decisive question is thus whether article 9 ECHR protects the religious feelings of a person. Above, we have discussed the advantages of broad definitions and the disadvantages of narrow definitions.[142] Excluding religious feelings from the protection, as the minority did, leads to a rather narrow definition of article 9 ECHR.

We can demonstrate the disadvantages of such a narrow definition in the present case. The exclusion of the protection of religious feelings must be justified. For Tsakyrakis, the reason for not protecting religious feelings is that they are simply not important enough to be protected by a fundamental right:

> Religious feelings are not "worthy of being included in the ambit of a right."[143]
> The definition must rely "on broader conceptions of . . . how an alleged right must fit with other rights recognized in the convention."[144]
> An "analysis of the content of the right that is more closely attuned to its moral point would yield priorities between rights and interests."[145]

These are balancing considerations. Religious feelings are considered to be less important than most of the other rights, and therefore they should not be protected at all. Tsakyrakis's approach is structurally deficient, since he mixes up interpreting the text of a human rights catalogue and balancing. Furthermore, since the reasons for the non-protection are not presented openly, the argumentation is not traceable. The minority simply stated that "such a right cannot be derived from the right to freedom of religion."[146] No further reasons were presented. A broad definition of article 9 ECHR, in contrast, protects religious feelings at least prima facie. The reasons against the protection could then be dealt with openly, rational, and traceable at the balancing stage.

[139] *See supra* section 2.1.
[140] Otto-Preminger-Institut v. Austria, *supra* note 123, para 48.
[141] *Id.* dissenting opinion, para 6.
[142] *See supra* section 6.
[143] Tsakyrakis, *Proportionality*, *supra* note 1, at 480.
[144] *Id.*
[145] Tsakyrakis, *A Rejoinder*, *supra* note 1, at 308.
[146] Otto-Preminger-Institut v. Austria, *supra* note 123, dissenting opinion, para 6.

We therefore conclude that, due to the advantages of broad definitions as spelled out above,[147] the majority was correct in confirming that religious feelings are protected by article 9 ECHR.

7.3. Suitability

Neither the majority nor the minority of the court dealt with the question whether the seizure and forfeiture of the film was suitable for protecting the religious feelings of the people. Admittedly, it is obvious that it was. The film could have violated the religious feelings of the population. The seizure and the forfeiture of the film inhibited the scheduled showings of the film. The measures were thus suitable for pursuing the protection of the religious feelings of the population.

7.4. Necessity

The question whether the seizure and forfeiture of the film were necessary was highly controversial within the court. The decisive point was whether the precautions taken by the cinema were less restrictive measures to pursue the legitimate aim. The majority ruled that they were not since the film was "widely advertised" and since there was "sufficient public knowledge" of the film.[148] The minority, however, argued that the cinema had limited the offence to others as far as it could reasonably be expected.[149]

Both the majority and the minority consider the necessity incompletely. Only if an alternate measure is less restrictive *and* at the same time as suitable as the measure that was taken by the state, the taken measure is unnecessary.[150] In the present case, the precautions taken by the cinema were undoubtedly less restrictive measures. But the less restrictive measures were not as suitable as the seizure and the forfeiture. The seizure and forfeiture inhibited the film to be shown at all. The risk that any person would be insulted in her religious feelings was therefore almost not existent. The risk that persons would have been insulted in their religious feelings would have been much higher if the film had been shown in the scheduled way. The precautions taken by the cinema were thus indeed less restrictive, but not as suitable as the seizure and forfeiture. We conclude, therefore, that the seizure and the forfeiture were necessary.

7.5. Proportionality in the narrow sense

The decisive question is therefore if the seizure and the forfeiture were proportional in the narrow sense. Here, a balance must be struck between the conflicting rights. Indeed, both the majority and the minority of the court pretended to deal with this

[147] *See supra* section 6.

[148] Otto-Preminger-Institut v. Austria, *supra* note 123, para 54.

[149] *Id.* dissenting opinion, para 9.

[150] Alexy, A Theory of Constitutional Rights, *supra* note 29, at 68; Khosla, *A Reply*, *supra* note 1, at 299; Kumm, *Socratic Contestation*, *supra* note 5, at 148–149; Rivers, *Book review: The Negotiable Constitution*, *supra* note 119.

question. The majority engaged in "weighing up the conflicting interests,"[151] and the minority argued that "on balance" the measures were not appropriate.[152] But in effect, both failed to balance properly.

The majority, on the one hand, simply concluded that the measures were proportionate since the Austrian authorities had not overstepped their margin of appreciation.[153] The margin of appreciation is thus used as an argument in order to forgo any substantiated balancing. In the end, as Khosla has it, it is "this doctrine, rather than proportionality, that has created the outcome."[154] It is vital to note that this contradicts the court's statement that "the supervision must be strict" in the present case.[155]

The minority, on the other hand, mixed up the necessity test and the test of proportionality in the narrow sense. It stated that the seizure and forfeiture must be "proportionate to the legitimate aim pursued," that actions were generally not proportionate if a "less restrictive solution" was available and that, since a less restrictive measure was available in the present case, the seizure and forfeiture were "not appropriate."[156]

We can conclude that neither the majority nor the minority of the judges balanced properly. Tsakyrakis is right: there was a "dearth of argument" at the balancing stage.[157] But Tsakyrakis is not right to conclude that, therefore, "the balancing approach fails, spectacularly, to deliver what it promises."[158] Rather, Khosla is right in arguing that "it seems strange to suggest problems with proportionality by studying cases where it was poorly applied."[159]

So let's have a look at how the case should have been decided if balancing would have been applied properly. This requires determining whether the importance of pursuing the legitimate aim can justify the seriousness of the infringement of the applicant's right.[160]

First of all, it is important to be aware of the fact that the abstract weights of the conflicting rights can be neglected in the present case, since both rights are equally important from an abstract point of view, i.e. irrespective of any concrete cases.[161]

Thus, we can start to determine how intense the infringement with the applicant's right was. For this task it is necessary to engage in an external justification which inevitably includes moral reasoning.[162] In the present case, the Austrian authorities

[151] Otto-Preminger-Institut v. Austria, *supra* note 123, para 55.
[152] *Id.* dissenting opinion, para 11.
[153] *Id.* para 56.
[154] Khosla, *A Reply*, *supra* note 1, at 303.
[155] Otto-Preminger-Institut v. Austria, *supra* note 123, para 50.
[156] *Id.* dissenting opinion, para 11.
[157] Tsakyrakis, *Proportionality*, *supra* note 1, at 482.
[158] *Id.*
[159] Khosla, *A Reply*, *supra* note 1, at 302.
[160] On the first law of balancing, see Alexy, A Theory of Constitutional Rights, *supra* note 29, at 102.
[161] Otto-Preminger-Institut v. Austria, *supra* note 123, para 47, 49.
[162] *See supra section 3.*

seized and forfeited the film. The cinema was not able to show the film at all. Moreover, the seizure and forfeiture were not limited in time or place. One can thus assume that the seizure and forfeiture of the film were serious infringements. Interestingly, neither the majority nor the minority of the judges made clear how serious the infringement actually was. They simply concluded that the seizure and forfeiture amounted to an infringement at all.[163] This shows how the clear structure of the proportionality test, followed properly, may enhance the rationality of the legal reasoning, since it ensures that all relevant premises are dealt with in due depth.

Now, the question rises how important the pursuing of the legitimate aim was in the *concrete* case. Again, we must engage in external justification which includes moral reasoning.[164] We can conclude from the court's considerations that it holds the protection of the religious feelings to be important in the present case. The Court argued that the film was "widely advertised" and that there was "sufficient public knowledge of the . . . film to give a clear indication of its nature." It concluded from this that "the proposed screening of the film must be considered to have been an expression sufficiently 'public' to cause offence."[165]

We do not agree to this reasoning of the majority. Rather, we follow the dissenting judges, who pointed to a list of circumstances that convincingly count against a great importance of the legitimate aim in the concrete case.[166] There are several (external) arguments why the protection of the religious feelings of the population wasn't that important here: The film addressed only a small group of people who were interested in creative and experimental films, not the public in general. Furthermore, the potential viewers were warned about the film by an information bulletin. Five of the six showings were scheduled to be shown at 10 p.m., which prevented unintended attention. The audience had to pay an entrance fee to watch the film, and people under seventeen were excluded. Taking all this together, one can resume that it was not highly important to protect religious feelings in the present case.

We conclude that the seizure and forfeiture were inappropriate. On the one hand, there is a serious infringement of the applicant's right to freedom of expression. On the other hand, the protection of the religious feelings of the population was not important in the present case due to the precautions taken by the applicant. The low importance of pursuing the legitimate aim cannot justify the serious infringement of the applicant's right.[167]

The importance of pursuing the legitimate aim could have outweighed the infringed rights only if it would have been very high. Since it did not reach this high level of the triadic scale, the seizure and forfeiture of the film violated the applicant's right guaranteed under article 10 ECHR.

[163] Otto-Preminger-Institut v. Austria, *supra* note 123, para 43.
[164] *See supra* section 3.
[165] Otto-Preminger-Institut v. Austria, *supra* note 123, para 54.
[166] *Id.* dissenting opinion, para 9–11.
[167] *Cf. id.* dissenting opinion, para 7.

8. Results

Proportionality and balancing do not, as Tsakyrakis would have it, "distort"[168] fundamental rights. On the contrary, they are the most sophisticated means to solve the very complex and intricate collision of human rights with competing principles. Rights adjudication must necessarily rely on balancing; and the proportionality framework offers "the best available procedure for doing so."[169]

Our analysis of the five objections against the proportionality test has shown that neither of them is convincing. All in all, proportionality is a structured approach to balancing fundamental rights with other rights and interests in the best possible way.[170] It is a necessary means for making analytical distinctions that help identifying the crucial aspects in various cases and ensuring a proper argument. The principle of proportionality "embodies fundamental standards of rationality"[171] and has been described correctly as "a very powerful rational instrument."[172] It is thus not unjustified to assume that proportionality may play a role as an element of a common language of global constitutional law.[173]

[168] Tsakyrakis, *Proportionality*, *supra* note 1, at 475 and 490.
[169] Alec Stone Sweet & Jud Mathews, *All things in proportion?*, Working Paper 1, 5 (2010).
[170] Rivers, *Proportionality and Variable Intensity of Review*, *supra* note 116, at 176.
[171] Borowski, *supra* note 9, at 210.
[172] *Id.* at 232.
[173] *Cf.* Cohen-Eliya & Porat, *Proportionality*, *supra* note 4, at 466.