

# *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*

VIRGÍLIO AFONSO DA SILVA\*

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**Abstract**—Balancing implies a comparison among goods, values, principles and rights that cannot be ranked on a single scale of measurement, ie there is no unequivocal measuring unit applicable to all of them. In such situations, it is common to state that one has to compare incommensurable things. Indeed, this issue has been mentioned by several authors as a strong reason in favour of abandoning balancing (and proportionality) as a rational form of judicial argumentation and decision-making. My article aims at arguing that this objection is based on fallacious assumptions concerning the relations among three concepts: incommensurability, incomparability and balancing. Initially, what is at stake is the analysis of the connection between comparing values (or principles) and commensurability. The results of this initial analysis were then used to provide greater analytical strength to the specific debate on balancing and comparing rights in order to show that incommensurability does not imply incomparability and that rational decisions are possible even when incommensurable values are at stake. Since balancing (and proportionality) implies comparisons, and since constitutional principles are doubtlessly incommensurable (for there is no common metric to measure them), arguing for the comparability of incommensurable principles is an unavoidable step if one aims at demonstrating that balancing may be a rational procedure after all.

**Keywords:** balancing, proportionality, interpretation, judicial review, incommensurability

\* Professor of Law, University of São Paulo, Brazil. Email: vas@usp.br. A very early draft of this article was presented some time ago at a colloquium at the University of Kiel, Germany. I would like to thank Robert Alexy and all other participants for their comments and criticisms. I would also like to thank Conrado H Mendes, Otavio Yazbek, Diogo R Coutinho, Rafael Bellem de Lima and Adriana Vojvodic for their comments on a more developed recent version. I also presented some ideas of this article at the VIII World Congress of the International Association of Constitutional Law in Mexico. I hereby would like to thank the chairs of the panel on proportionality, Rodrigo Uprimny and Bertrand Mathieu. The very final version of this article was written during a research stay at Humboldt University of Berlin. For this opportunity I would like to thank Dieter Grimm, my academic host in Berlin, and the Humboldt Foundation, which awarded me a Humboldt Research Fellowship for Experienced Researchers.

I can only repeat, we should not conclude because making some comparison is difficult (or even because we can hardly see how to start) that no comparison can be made. Making value comparisons requires refined perception. It takes practice.

Donald Regan<sup>1</sup>

Our powers of measurement may be limited. But our demand on measurements may also be limited. In the end, what we need to know is, rather, do our powers match our demands?

James Griffin<sup>2</sup>

## 1. Introduction

Incommensurability is pervasive in law. Yet, there is very little systematic work by legal scholars on the subject. This gap is even more astonishing considering the fact that balancing or weighing rights<sup>3</sup> is ubiquitous in law,<sup>4</sup> a dominant feature of the current legal discourse.<sup>5</sup> Since balancing or weighing presupposes comparisons of rights, which—especially in the case of the most basic rights—cannot be reduced to a single common measure, one could expect a deeper debate on the relationship of comparing, measuring and balancing within the legal realm.

How much satisfaction of the right to privacy is needed to justify a given restriction of freedom of expression and freedom of the press? How much economic development justifies a certain degree of environmental degradation? Can freedom of profession be used as a reason for a lesser degree of protection of the health of individuals? The answers to all of these (and several other) questions—very common within legal argumentation and judicial decisions—encompass comparisons among goods, values and rights which cannot be assigned on a single scale of measurement, ie there is no unequivocal measuring unit applicable to all of them. In such situations it is common to state that one must compare *incommensurable* things, and indeed this issue has been raised by authors as a strong reason in favour of abandoning weighing as a rational form of judicial argumentation and decision-making. Sometimes,

<sup>1</sup> Donald Regan, 'Value, Comparability, and Choice' in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press, Cambridge, MA 1997) 137–38.

<sup>2</sup> James Griffin, *Well-Being: Its Meaning, Measurement, and Moral Importance* (Clarendon Press, Oxford 1986) 80.

<sup>3</sup> In this article, the terms 'balancing' and 'weighing' are used synonymously, and are also to be understood as references to the third step of the so-called principle of proportionality.

<sup>4</sup> Robert Alexy, 'On Balancing and Subsumption: A Structural Comparison' (2003) 16 *Ratio Juris* 433–49, 436; Frederick Schauer, 'Balancing, Subsumption, and the Constraining Role of Legal Text' (2010) 4 *Law & Ethics of Human Rights* 34–45, 38.

<sup>5</sup> Jacco Bomhoff and Lorenzo Zuca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights' (2006) 2 *Eur Constitutional L Rev* 424–42, 424; see also Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale L J* 943–1005, 943–44.

however, this objection is based solely on intuition, as if it were sufficient to point out an alleged incomparability of apples and oranges.<sup>6</sup> It goes without saying that this is not sufficient.<sup>7</sup>

Even those who eventually go beyond the apple–orange example usually do not provide a sound justification as to why balancing presupposes an unequivocal measuring unit applicable to all constitutional rights. Alder, for instance, argues that speaking of balancing ‘is particularly troublesome since weighting presupposes a common scale which in the case of incommensurable values does not exist’.<sup>8</sup> More recently, Tsakyrakis also resorts to the incommensurability objection in order to reject the use of balancing and of proportionality standards in human rights adjudication. According to him, 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’.<sup>9</sup>

Such arguments are neither new nor directed exclusively against the recently growing use of balancing or of the principle of proportionality in European courts. Several decades ago, Frantz argued in a very similar way in his criticism of what he called ‘the Supreme Court’s use of an *ad hoc* “balancing of interests” test in free speech cases’.<sup>10</sup> According to him,

[a]s soon as he finishes measuring the unmeasurable, the judge’s next job is to compare the incomparable. Even if he has succeeded in stating the interests quantitatively (or thinks he has), they are still interests of different kinds and therefore they can no more be compared quantitatively than sheep can be subtracted from goats.<sup>11</sup>

Both debates—the older American one and the recent European one—have a common core. The insistence on the incommensurability of constitutional rights is the expression of the fear that assuming the possibility of commensurability could lead to an exaggerated use of balancing, which in turn would lead to an under protection of those rights. The similarities between Justice Black’s fear of rights being ‘balanced away’,<sup>12</sup> Habermas’ fear of ‘individual

<sup>6</sup> Christian Hillgruber, ‘Diskussionsbeitrag’ (2002) 61 VVDStRL 174–76, 175; Stavros Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7 ICON 468–93, 475.

<sup>7</sup> As Aleinikoff puts it, ‘[s]ome critics of balancing surely overstate their case by claiming that balancing, because it demands the comparison of “apples and oranges,” is impossible’ (n 5) 972 (emphasis added).

<sup>8</sup> John Alder, ‘Incommensurable Values and Judicial Review: The Case of Local Government’ [2001] PL 717–35, 717.

<sup>9</sup> Tsakyrakis (n 6) 471. Tsakyrakis argues further that ‘[i]f the moral discourse is lacking, there is no way to demonstrate that values, indeed, are commensurable, and it makes no sense, therefore, to pretend that the principle of proportionality allows us to do it’ (ibid 474).

<sup>10</sup> Laurent B Frantz, ‘Is the First Amendment Law? A Reply to Professor Mendelson’ (1963) 51 Cal L Rev 729–54, 729.

<sup>11</sup> Ibid 748–49. See also R George Wright, ‘Does Free Speech Jurisprudence Rest on a Mistake? Implications of the Commensurability Debate’ (1990) 23 Loy LA L Rev 763–89.

<sup>12</sup> See his dissenting opinion in *Konigsberg v State Bar of California* 366 US 36, 61 (1961).

rights [being] sacrificed',<sup>13</sup> and, most recently, Tsakyrakis' fear of 'an assault on human rights',<sup>14</sup> are no coincidence.

In this article, I will argue that the incommensurability-based objections to balancing have their roots in fallacious assumptions concerning the relation among three concepts that are central to my purposes: incommensurability, incomparability and balancing. Initially, what will be at stake here is the analysis of the connection between comparing values and commensurability (as well as incommensurability). The results of this first analysis will be then used to bring more analytical strength to the specific debate on balancing and comparing rights.

The decision to focus on balancing is based on two major premises. (i) As already stated, the ideas of balancing and weighing rights gradually occupies a central position in the legal realm.<sup>15</sup> (ii) There is a particular association between balancing, measuring and comparing, since balancing rights is the form of legal argumentation that is most clearly related to the necessity of comparing values (or principles, or rights) as a constitutive step in the process of judicial decision. The very metaphors of weight and balance denote the necessity of measuring and comparing.

The primary aim of this article is to demonstrate that this debate is marked by several terminological misconceptions, which blur many of its conclusions. It will be argued that incommensurability is neither a synonym of incomparability, nor does the former imply the latter. This means among other things that the presence of incommensurable values does not preclude the possibility of weighing or balancing rights; on the contrary, weighing or balancing rights is a procedure that increases comparability among principles. In order to demonstrate this, I will seek to establish a close connection between the recent developments in the so-called theory of principles<sup>16</sup> and the debate on commensurability, comparability and rational decision-making. Through linking both debates, it will be shown that the fact that a decision concerning the most basic constitutional rights may turn out to be a dilemma or a tragic choice does not imply that comparison and balancing have failed. I argue that, indeed, the contrary is the case, ie the identification of such a problem as a dilemma is the very outcome of comparing and balancing the rights at stake.

<sup>13</sup> Jürgen Habermas, *Die Einbeziehung des Anderen: Studien zur politischen Theorie* (Suhrkamp, Frankfurt am Main 1996) 368; see also Jürgen Habermas, 'Reply to Symposium Participants, Benjamin N Cardozo School of Law' (1996) 17 *Cardozo L Rev* 1477–557, 1531.

<sup>14</sup> Tsakyrakis (n 6).

<sup>15</sup> See above all Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP, Oxford 2002). See also Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 *Ratio Juris* 131–40; and Robert Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 *ICON* 572–81. See further Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *CLJ* 174–207; and Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Colum J Transnat'l L* 72–165.

<sup>16</sup> Alexy, *A Theory* (n 15).

In such and other cases one can speak of stalemate, parity or rough equality among alternative decisions. Subsequently, it will be shown that when two or more alternative decisions are roughly equal (or on a par), an institutional element comes into play (an element not present in the philosophical debate): the democratic legitimacy of legislative decisions. Linking this democratic legitimacy with arguments from the incommensurability debate will then finally provide a justification for judicial deference in certain cases, a deference based on the possibility of parity and rough equality between alternative decisions involving balancing between constitutional principles.

## 2. The Concept of Balancing

The concept of balancing which underlies this article is that of the so-called theory of principles, namely the form developed by Robert Alexy.<sup>17</sup> According to Alexy, weighing is necessary whenever two principles collide. Principles are supposed to be optimization requirements, ie 'norms which require that something be realized to the greatest extent possible given the legal and factual possibilities'.<sup>18</sup> Therefore, unlike the conflict of rules, the collision of principles can be solved neither through the creation of a clause of exception, nor through the declaration of invalidity of one of the colliding principles. This type of collision requires rather the establishment of a relation of precedence. Since principles, as optimization requirements, demand that something be realized to the greatest extent possible, and since this realization may be hindered by other, colliding, principles, it is then necessary to weigh the principles at stake in order to establish this relation of precedence. However, the outweighed principle is not to be considered invalid, since it may itself outweigh the other principle in other circumstances.<sup>19</sup> This means that there is no place for unconditional and absolute relations of precedence when it comes to weighing principles.<sup>20</sup> The outcome of a balancing is always a conditional relation of precedence, because balancing is always case-specific.<sup>21</sup>

This conditional relation of precedence is expressed by preferential statements like (P1 **P** P2) C (ie: P1 takes precedence over P2 under the circumstances C). This preferential statement gives rise to a rule 'requiring the consequences of the principle taking precedence should the conditions of precedence apply'.<sup>22</sup> The connection between the relation

<sup>17</sup> Robert Alexy, *Theorie der Grundrechte* (2nd edn, Suhrkamp, Frankfurt am Main 1994); Alexy, *A Theory* (n 15).

<sup>18</sup> Robert Alexy, 'Zum Begriff des Rechtsprinzips' in Robert Alexy (ed), *Recht, Vernunft, Diskurs: Studien zur Rechtsphilosophie* (Suhrkamp, Frankfurt am Main 1995) 204; Alexy, *A Theory* (n 15) 47.

<sup>19</sup> Alexy (n 17) 79; Alexy, *A Theory* (n 15) 50.

<sup>20</sup> As will be seen later on (s 4A), some kinds of incommensurability are based on the idea of an absolute relation of precedence among values.

<sup>21</sup> Alexy, 'Constitutional Rights' (n 15) 137.

<sup>22</sup> Alexy (n 17) 83; Alexy, *A Theory* (n 15) 53.

of precedence and the rule derived from it can be expressed by the following formulation:

If principle  $P_1$  takes precedence over principle  $P_2$  in circumstances  $C$ : ( $P_1 \mathbf{P} P_2$ )  $C$ , and if  $P_1$  gives rise to legal consequences  $R$  in circumstances  $C$ , then a valid rule applies which has  $C$  as its protasis and  $R$  as its apodosis:  $C \rightarrow R$ .<sup>23</sup>

This so-called ‘law of collision’—along with the ‘law of balancing’, which will be analysed further on—is one of the foundations of Alexy’s theory of principles, for it expresses the nature of principles as optimization requirements, and, more importantly for the goals of this article, it also expresses that there is no absolute relation of precedence among principles.<sup>24</sup>

### 3. *Incommensurability*

Although there is no consensus on the concept of incommensurability, and although some conceptual discussions will be presented later, a useful working definition may be stated here. Two or more things (values, goods, rights and principles) are incommensurable if there is no common measure that can be applied to all of them.<sup>25</sup>

As pointed out in the introduction, this notion of incommensurability is—although sometimes only implicitly—at the heart of one frequent objection against balancing principles. This objection is based on a quite straightforward rationale: since solving problems of competing principles through balancing presupposes a comparison between them, and since there is no common measure that can be applied to all of them, then the outcome of such a balancing is merely the outcome of an irrational and fully subjective choice of those responsible for the decision (usually the judge).<sup>26</sup> Thus, according to some authors, balancing principles is nothing more than a disguised judicial decisionism.<sup>27</sup>

This objection is not new nor is it directed only against the theory of principles. In the philosophical realm, the debate on incommensurable values or goods has been long standing. Two examples suffice to illustrate what is at stake in this more general debate: one from Finnis and the other from Raz.

<sup>23</sup> Ibid; Alexy, *A Theory* (n 15) 54.

<sup>24</sup> Alexy (n 17) 84; Alexy, *A Theory* (n 15) 54.

<sup>25</sup> Thomas Nagel, ‘The Fragmentation of Value’ in *Mortal Questions* (Cambridge University Press, Cambridge 1979) 131; Cass R Sunstein, ‘Incommensurability and Valuation in Law’ (1994) 92 Mich L Rev 779–861, 796; Joseph Boyle, ‘Free Choice, Incomparably Valuable Options, and Incommensurable Categories of Good’ (2002) 47 Am J Juris 123–41, 123.

<sup>26</sup> Alder (n 8) 718.

<sup>27</sup> Ernst-Wolfgang Böckenförde, ‘Vier Thesen zur Kommunitarismus-Debatte’ in Peter Siller and Bertram Keller (eds), *Rechtsphilosophische Kontroversen der Gegenwart* (Nomos, Baden-Baden 1999) 85.

According to Finnis,

there are many basic forms of human good, all equally or incommensurably basic and none reducible to any or all of the others; . . . to commit oneself to one course of action . . . is to turn one's back on perhaps countless other opportunities of worthwhile action.<sup>28</sup>

Still according to him, basic goods would be commensurable only if '(a) human beings had some single, well-defined goal or function . . . or (b) the differing goals which men in fact pursue had some common factor, such as "satisfaction of desire"'.<sup>29</sup> Since he claims that only an 'inhumane fanatic' would think that humans are made to develop in only one way or for only one purpose, and since there is no common factor applicable to the differing goals which humans pursue, there is, thus, no possibility of rational choice among basic goods. In other words, incommensurability leads to the impossibility of rational choice.

Among several other examples, Raz resorts to a hypothetical comparison between two professional careers. A person must choose between two options: becoming a lawyer or clarinetist. 'He is equally suited for both, and he stands an equal chance of success in both'.<sup>30</sup> Assuming that neither career is better than the other, Raz concludes that it 'hardly needs arguing that in that case they are incommensurable'. Since for Raz incommensurability implies (or is synonymous with) incomparability,<sup>31</sup> then it is not possible to compare the careers at stake, at least not in a rational way. If two alternatives are incommensurable, one cannot defeat the other. Moreover, between two undefeated alternatives, there is no room for reasons and comparisons, but only for the independent will of the agent.<sup>32</sup>

In order to understand what these objections may mean and why they can only fail, it is necessary first to draw some conceptual distinctions. The first distinction is that between incommensurability and incomparability. The second is that between the 'absence of a common measure' as an obstacle to a rational decision and the difficulty in finding a solution to a problem. The former will be analysed, together with other conceptual issues, in the following sections, and the latter will be analysed later on.<sup>33</sup>

<sup>28</sup> John Finnis, *Fundamentals of Ethics* (Clarendon Press, Oxford 1983) 66–67.

<sup>29</sup> John Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford 1980) 113.

<sup>30</sup> Joseph Raz, *The Morality of Freedom* (Clarendon Press, Oxford 1986) 332.

<sup>31</sup> See Joseph Raz, 'Value Incommensurability: Some Preliminaries' (1985) 86 *Proc Aristot Soc* 116–34, 117; see also Raz (n 30) 322.

<sup>32</sup> Joseph Raz, 'Incommensurability and Agency' in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press, Cambridge, MA 1997) 125–27.

<sup>33</sup> See s 4C.

#### 4. Conceptual Issues

As previously mentioned, the debate on incommensurability—incipient as it may be in the legal realm—is marked by several conceptual and terminological misconceptions, which blur the terms of many of its outcomes. Three of the most important ones will be examined in the following sections. They are related to (i) an alleged distinction between weak and strong incommensurability; (ii) the necessary distinction, previously mentioned, between incommensurability and incomparability; and (iii) the indispensability of naming a covering value, with reference to which a given comparison will be made.

##### A. Weak and Strong Incommensurability

Waldron distinguishes two types of incommensurability: strong and weak.<sup>34</sup> According to him, there is strong incommensurability when it is not the case ‘that A carries more weight than B, and it is not the case that B carries more weight than A, and it is not the case that they are of equal weight’, whereas the claim that A and B are incommensurable in the weak sense means that ‘there is an ordering between them, and that instead of balancing them quantitatively against one another, we are to immediately prefer even the slightest showing on the A side to anything, no matter what its weight, on the B side’.<sup>35</sup>

Analysing Waldron’s distinction is important here firstly because it is a crucial tenet of a thesis concerning the application of the idea of incommensurability to the legal and not only to the philosophical realm, and secondly, because it establishes a direct connection between commensurability, comparability and balancing. Moreover, when defining his concept of weak incommensurability, Waldron melds some of the most important efforts of creating and justifying relations of precedence among rights (or rights and policies), particularly the one based on the idea of *trumps*<sup>36</sup> and the one grounded on the idea of a *lexical ordering*.<sup>37</sup> As will be shown later, all of these are incompatible with the thesis assumed in this article. Finally, it is important to analyse Waldron’s arguments because his conceptual distinction between strong and weak incommensurability has been adopted by some critics of balancing.<sup>38</sup>

Waldron begins by arguing that, even though incompatible with the notion of strong incommensurability, weighing rights is reconcilable with the idea of weak incommensurability. The two attempts mentioned above to establish a ranking among rights (trumps and lexical ordering) could be used to

<sup>34</sup> Jeremy Waldron, ‘Fake Incommensurability: A Response to Professor Schauer’ (1994) 45 *Hastings L J* 814–24, 815.

<sup>35</sup> *Ibid* 816.

<sup>36</sup> See Ronald Dworkin, ‘Is There a Right to Pornography?’ (1981) 1 *OJLS* 177–212.

<sup>37</sup> See John Rawls, *A Theory of Justice* (Belknap Press, Cambridge, MA 1971). Waldron also mentions Nozick’s concept of *side constraints* – see Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, New York 1974) – which is less important for the goals of my analysis and will therefore not be discussed here.

<sup>38</sup> See, for instance, Tsakyrakis (n 6).

demonstrate this. Conversely, thus, the presence of strong incommensurability would preclude the possibility of balancing. What I aim at demonstrating here is exactly the contrary, ie that the concepts of trumps and lexical orders are irreconcilable with what here, as well as in the case-law of constitutional courts of several countries, is known as balancing or weighing.

Waldron's central argument in his defence of the connection of weak incommensurability, balancing and the two above-mentioned attempts to create a ranking among rights (trumps and lexical ordering) is quite straightforward: the process that leads to a ranking based on trumps or lexical ordering implies balancing and weighing the rights at stake, ie the rights to be ranked. That is to say that when someone argues that right *x* trumps over right *y*, or that the relation between *x* and *y* is based on a lexical order (ie the fulfilment of *x* has precedence over the fulfilment of *y*), this implies that a *previous balancing* has been done to establish this trump relation or lexical ordering.<sup>39</sup>

However, despite Waldron's efforts to demonstrate that this process is what should be designated as balancing or weighing, his arguments are far from convincing. When he argues that there may be balancing among the trumps themselves (over-trumping), this may be true—if at all—only in a very weak sense of the concept of balancing, a sense which in any event is meaningless for deciding constitutional cases. Moreover, this sense does not correspond to the *actual use* of the term in the constitutional realm. The relation of over-trumping in bridge (an example used by Waldron himself) may be elucidating here: although the two of diamonds trumps over the ace of spades, it is always over-trumped by the three of diamonds. If this were underlying the idea of over-trumping in the legal argumentation, then a true balancing is definitely not present. If free speech and sexual freedom *always* trump over social and cultural values,<sup>40</sup> or if basic liberties *always* trump over other liberties or over reasons of public good,<sup>41</sup> then one will never truly weigh these rights against each other (or against public goods), no matter which concrete factual and legal possibilities are present in a given legal case. As has already been argued, since the concept of balancing requires that these possibilities be taken into account,<sup>42</sup> and since the outcome of this balancing may be influenced by them, then the relation of trumping—in the sense described by Dworkin and Waldron—is exactly the opposite of this idea.<sup>43</sup>

In short, the balancing or weighing that Waldron presupposes—if it is possible to call it balancing or weighing at all—is not the type of balancing or

<sup>39</sup> Waldron (n 34) 819.

<sup>40</sup> Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, MA 1977) 274–78.

<sup>41</sup> John Rawls, *Political Liberalism* (Columbia University Press, New York 1993) 294.

<sup>42</sup> See s 2.

<sup>43</sup> In the case of 'lexical orderings', the absence of balancing is even clearer, and it is Rawls himself who argues that 'a serial ordering avoids... having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception' (Rawls, (n 37) 43—emphasis added; see also, Rawls (n 41) 296).

weighing employed by courts when deciding concrete constitutional cases. When deciding such cases by means of balancing rights, courts necessarily take into account the factual and legal possibilities of each concrete case, which means that the same two rights can be ranked in opposite ways in two different cases. Trumping or similar relations cannot play a role here.<sup>44</sup>

Refuting Waldron's distinction between strong and weak incommensurability also fulfils another argumentative task in this article. Waldron uses the concepts of trumps, side constraints and lexical ordering because, according to him, they are necessary for establishing the ordering or the priorities that are embodied in weak incommensurability. Still according to him, in a case of strong incommensurability, 'the competing values cannot even be brought into relation with one another: They are genuinely incomparable in the practical realm'.<sup>45</sup> Hence, in order to escape the deadlock that he believes strong incommensurability causes, he changes his focus to weak incommensurability. Moreover, in order to establish an (absolute) ranking of rights, he called upon the two criteria previously mentioned. These steps, however, are not only unnecessary, but also misleading. First of all, incommensurability (even in the sense that Waldron calls 'strong') does not entail incomparability or deadlock. Secondly, it does not preclude balancing. Rather, it is exactly the cases involving incommensurable values or rights (in the strong sense) that, in order to be decided rationally, require both comparison and balancing.

In order to demonstrate this, the next section is dedicated to analysing the proper relation between the concepts of incommensurability and incomparability. Later on, I will analyse how these concepts relate to the concepts of balancing and of rational decision (section 5).

### B. *Incommensurability and Incomparability*<sup>46</sup>

The concepts of incommensurability and incomparability are often not clearly distinguished. Sometimes they are treated as synonyms;<sup>47</sup> sometimes as if one necessarily implies the other.<sup>48</sup> Both approaches are misleading.

<sup>44</sup> This does not mean that this kind of argument cannot be used at all in judicial decisions. What is meant here is only that, whenever an argument based on a trumping relation comes into play, balancing or weighing leaves the stage.

<sup>45</sup> Waldron (n 34) 817 (emphasis added).

<sup>46</sup> For a detailed analysis of this distinction, see Ruth Chang, 'Introduction' in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press, Cambridge, MA 1997). For an analysis of these and other terms like impossibility, incompatibility, uncomputability, uncertainty, see Brett G Scharffs, 'Adjudication and the Problems of Incommensurability' (2001) 42 *Wm & Mary L Rev* 1367–435, 1387 ff.

<sup>47</sup> See Raz (n 31) 117; Raz (n 30) 322; Nils Jansen, *Die Struktur der Gerechtigkeit* (Nomos, Baden-Baden 1998) 124; Steven Lukes, 'Comparing the Incomparable: Trade-offs and Sacrifices' in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press, Cambridge, MA 1997) 185; Richard Warner, 'Does Incommensurability Matter? Incommensurability and Public Policy' (1998) 146 *U Pa L Rev* 1287–325, 1287; Robert Alexy, 'Verfassungsrecht und einfaches Recht - Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' (2002) 61 *VVDStRL* 7–33, 218.

<sup>48</sup> See Lukes (n 47) 188; Elizabeth Anderson, 'Practical Reason and Incommensurable Goods' in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press, Cambridge, MA 1997)

As already pointed out above, two goods (or rights, values, principles) are incommensurable if there is no common measure that can be applied to all of them.<sup>49</sup> If incommensurability implies incomparability, the idea of balancing principles would be impossible: since balancing presupposes comparing,<sup>50</sup> and since there is obviously no single measuring unit applicable to principles like freedom of expression, privacy, freedom of religion etc, it would thus be impossible to weigh them in a case of collision. That this is not the case can be shown though a trivial example.

Is it possible to compare Johann Sebastian Bach and Madonna? Who composed better music? I do not think anyone would find it impossible to say that Bach's music is better (even though other people may disagree). Moreover, I do not think either that anyone would find it impossible to say that Madonna's music is better (even though other people may also disagree). The difference in opinion does not matter for now. What really matters is that it would be complete nonsense to state that Bach's music is 13.72 *x*-unit better than Madonna's music (or *vice versa*). Why is this so? Simply because there is no unit to measure the quality of music in such terms. In other words: the comparison between Bach and Madonna involves incommensurable values. However, we are nevertheless still able to compare them, for in order to compare goods or values it is not necessary to rank them cardinally. It is enough if we are able to rank them ordinally.<sup>51</sup> The possibility that one person thinks that Bach's music is better, while another thinks that Madonna's is better does not change this conclusion. Rather, this fact confirms the possibility of comparing two incommensurable things, since if it is possible—even though subject to disputes—to say that Bach's music is *better* or *worse* than Madonna's music, then this demonstrates that it is possible to compare them.

Even though trivial, this example is enough to demonstrate that incommensurability and incomparability are neither synonyms, nor does one imply the other.<sup>52</sup> Before moving to the discussion on the connection of incommensurability, incomparability and balancing, it is still necessary to analyse another conceptual issue: the idea of covering value.

103–104; John Broome, 'Is Incommensurability Vagueness?' in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press, Cambridge, MA 1997) 79; Warner (n 47) 1291.

<sup>49</sup> Nagel (n 25) 131; Sunstein (n 25) 796; Boyle (n 25) 123.

<sup>50</sup> Aleinikoff (n 5) 945.

<sup>51</sup> See Chang (n 46); James Griffin, 'Incommensurability: What's the Problem?' in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press, Cambridge, MA 1997) 35; W Bradley Wendel, 'Value Pluralism in Legal Ethics' (2000) 78 Wash U L Q 113–213, 144.

<sup>52</sup> See Michael Stocker, *Plural and Conflicting Values* (Clarendon Press, Oxford 1990) 175 ff; Bernard Williams, 'Conflict of Values' in *Moral Luck: Philosophical Papers 1973–1980* (CUP, Cambridge 1981) 77; James Griffin, 'Replies' in Roger Crisp and Brad Hooker (eds), *Well-Being and Morality: Essays in Honour of James Griffin* (Clarendon Press, Oxford 2000) 285; Gillian K Hadfield, 'An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law' (1998) 146 U Pa L Rev 1235–285, 1259.

### C. Covering Value

It is common to read that two things are comparable if and only if it is true that either one is better than the other, or that both are equal in value.<sup>53</sup> This definition is incomplete in two senses. Firstly, because whenever one must compare things, she compares them *relative to a covering or choice value*.<sup>54</sup> Secondly, this definition presupposes the concept of *transitivity*. In this section, I will briefly examine the first issue. The second will be analysed below.<sup>55</sup>

In order to be rational, comparisons must include a covering or choice value. This means that ‘I can choose x over y relative to some choice value, but I cannot choose x over y simpliciter’.<sup>56</sup> In addition, the more precise the definition of the covering value, the greater is the possibility of a rational decision. In the example mentioned above, the covering value was simply the ‘quality of music’. The vagueness of the covering value makes comparison more difficult. However, if the covering values were a ‘contribution to the western music culture’ or ‘suitability for club dancing’, the comparison would be much more precise. Several cases of incomparability are rendered more readily apparent when the covering value is precisely defined. Below, I will return to the importance of defining a covering value when balancing rights.<sup>57</sup>

## 5. Incommensurability and Weighing Rights

In the legal realm, the presence of incommensurable values (rights, principles) and the need to balance them may be more complex than they already are within the philosophical debate. Unlike the examples used above (Raz’s example is maybe the most emblematic), which illustrate comparisons between the values of two goods (in Raz’s example, two professional careers) for only one person, who is also the one responsible for the decision (autonomous decision), what is at stake when basic constitutional rights are balanced against each other is the incommensurability of two (or more) rights in an at least triangular relationship. In most cases, this is about assessing the satisfaction of the right of one person to the detriment of another right of another person. Generally, thus, what is good for one is bad for the other. Moreover, the decision is to be made by a third party, who does not directly participate in the relation (heteronomous decision). Thus, in the case of weighing rights, the

<sup>53</sup> See Aleksander Peczenik, ‘Weighing Rights’ in Neil MacCormick and Zenon Bankowski (eds), *Enlightenment, Rights and Revolution: Essays in Legal and Social Philosophy* (Aberdeen University Press, Aberdeen 1989) 191; Raz (n 30) 322; Jansen (n 47) 124; Wolfgang Enderlein, *Abwägung in Recht und Moral* (Karl Alber, Freiburg im Breisgau 1992) 113. Although some of these authors do not clearly distinguish incommensurability from incomparability, it is possible to use their definitions as a definition for incomparability.

<sup>54</sup> See Williams (n 52) 79 ff; Chang (n 46) 5; Ruth Chang, ‘Comparison and the Justification of Choice’ (1998) 146 U Pa L Rev 1569–598, 1575.

<sup>55</sup> See s 5D.

<sup>56</sup> Chang (n 54) 1575; Virgilio Afonso da Silva, *Grundrechte und gesetzgeberische Spielräume* (Nomos, Baden-Baden 2003) 176.

<sup>57</sup> See s 6B.

trade-offs are much more complex. They do not imply *me* losing something in order to win another thing (*me* giving up a career in order to embrace another one), but *me* foregoing a certain amount of a basic right in order to help *someone else* to obtain a certain amount of another basic right.<sup>58</sup> Does incommensurability, in such circumstances, necessarily lead to incomparability and to the impossibility of rational choice? The answer is *no*. The reasons for this negative answer will be analysed below.

### A. Abstract and Concrete Comparisons: Measuring Trade-offs

Although the question posed in the end of the last section was concerned with weighing two different rights of at least two different people, I will—in order to make my line of thought clearer—go back a little and begin with an example of weighing between two values for one person only.

According, not only, to Finnis,<sup>59</sup> but also to other authors,<sup>60</sup> there is no possibility of comparisons (and thus of balancing) when the values at stake are basic (ie not merely instrumental). Basic values ‘are incommensurable because they provide ultimate reasons for choice and action’ and ‘inasmuch as they provide ultimate reasons for action, [they] are irreducible to one another or to some common underlying factor’.<sup>61</sup> According to this point of view, basic values are either truly incommensurable and incomparable, or they are not basic at all.<sup>62</sup> Between love and freedom, for instance, there could be neither comparison nor balancing.

What I argue here is that the thesis of incomparability between basic values is not important. There are several examples which show that it is not only possible, but also necessary, to compare basic values. As for the example involving love and freedom, someone could be willing to forego a part of his freedom in order to live with the woman he loves, even if she lives in a country where human rights and basic liberties are not fully protected.

Broome objects by arguing that such are not cases of comparisons between values, but between events or situations that realize certain values.<sup>63</sup> He is surely right. However, contrary to what could be thought at first sight—and unlike Broome’s own goal—his objection actually does not run counter to the thesis I am arguing for here. Rather, his claim reinforces and clarifies my point,

<sup>58</sup> See David Luban, ‘Incommensurable Values, Rational Choice, and Moral Absolutes’ (1990) 38 Clev St L Rev 65–84, 78.

<sup>59</sup> Finnis (n 29).

<sup>60</sup> See Lukes (n 47) 188 ff; Robert P George, ‘Does the “Incommensurability Thesis” Imperil Common Sense Moral Judgments?’ (1992) 37 Am J Juris 185–95, 186–87.

<sup>61</sup> George (n 60) 187. See also Finnis (n 29) 92: ‘none (of the basic values) can be analytically reduced to being merely an aspect of any of the others, or to being merely instrumental in the pursuit of any of the others’.

<sup>62</sup> Lukes, who used the expression ‘sacred values’ instead of ‘basic values’, argues: ‘To be sacred is to be valued incommensurably’ (n 47) 188.

<sup>63</sup> John Broome, ‘Incommensurable Values’ in Roger Crisp and Brad Hooker (eds), *Well-Being and Morality: Essays in Honour of James Griffin* (Clarendon Press, Oxford 2000) 22.

since it emphasizes that comparisons and balancing are always made among *concrete alternatives* and not among abstract values. When one balances between basic constitutional rights, she does not intend to compare the abstract values of, say, freedom of expression and privacy, or of economic development and protection of the environment. What one intends is always to compare the numerous possibilities of protecting and realizing such rights in a *concrete situation* and to weigh among them.<sup>64</sup>

Having said that, it becomes clear that what is at stake is not to compare or weigh abstract values or rights, but to compare trade-offs in concrete situations.<sup>65</sup> It is not a coincidence that Alexy's 'law of balancing' indicates exactly the same idea. According to this law, 'the greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other'.<sup>66</sup>

Although Alexy does not mention the idea of trade-off, this is precisely what underlies his 'law of balancing'. His previously mentioned 'law of collision' also implies this notion. If the solution to a collision of principles is to be found by assigning a relation of precedence between them in a concrete case—(P1 P P2) C—what is at stake cannot be the abstract values of these principles, but rather their degree of satisfaction and non-satisfaction in this specific concrete case.<sup>67</sup>

In defining his two 'laws' in this manner, Alexy creates a type of commensurability between competing principles.<sup>68</sup> It may be a weak type of commensurability, but it is still an important one. Actually, what becomes commensurable are not the competing principles as such, but—as the 'law of balancing' clearly expresses—their degrees of satisfaction and non-satisfaction. Comparing these degrees of satisfaction and non-satisfaction is exactly what is meant here by measuring trade-offs.

## B. Creating Scales

This possibility of measuring trade-offs allows the comparison of the most basic values and rights in constitutional cases. As soon as we abandon the idea of comparing abstract values and embrace the idea of measuring trade-offs, balancing values and rights turns out to be open to rational choice. The following example—used by Luban to challenge Finnis' thesis of the

<sup>64</sup> See, for instance, Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 U Toronto L J 383–97, 393.

<sup>65</sup> See Luban (n 58) 75 ff.

<sup>66</sup> Alexy (n 17) 146; Alexy, *A Theory* (n 15) 102; Alexy, 'Constitutional Rights' (n 15) 136.

<sup>67</sup> This does not imply that one has to deny the possibility of abstract comparisons at all, or that when balancing principles in a concrete situation their abstract weight never comes into play. For the goals of this article, however, these two issues may be set aside. For the possibility of comparing values in abstract, see Mozaffar Qizilbash, 'Comparability of Values, Rough Equality, and Vagueness: Griffin and Broome on Incommensurability' (2000) 12 *Utilitas* 223–40, 229; for the possibility of including the abstract weight of principles when balancing them in a concrete situation see Alexy (n 4) 441 and 446, especially the inclusion of the abstract weight in his 'weight formula'.

<sup>68</sup> *Ibid* 442.

incommensurability and incomparability of basic values—may illustrate my point:

A college athlete, who has no intention of playing his sport professionally after graduation, finds that he can become very slightly more proficient by undertaking a new, very time-consuming training schedule. He is already proficient enough to play his sport at a high level. His academic counsellor warns him that the extra time spent on training will have devastating effects on his studies. Is it rational for the athlete to undertake the program?<sup>69</sup>

Since there is no common measure for both knowledge and excellence in play (two goods Finnis argues to be basic), it is possible to state that they are incommensurable and, in abstract, incomparable. Therefore, there would be—still according to Finnis—no possibility of rational choice between them. However, in the concrete example provided by Luban, there is no trace of incomparability and it seems not only that a rational choice is possible, but also that the rational choice is rather clear. As Luban argues, ‘contrary to Finnis... most of us probably believe that the athlete is irrational to do the extra training’.<sup>70</sup> The reason for this is the existence of a clear large/small trade-off.

The latest developments in Alexy’s theory of principles—at least as I understand it—are based on the same rationale. In order to make clearer what was already implicit in the law of collision and in the law of balancing, Alexy developed a scale with the stages ‘light’, ‘moderate’ and ‘serious’.<sup>71</sup> What Alexy tries to show with this scale is that, no matter which principles are at stake, what should be compared is the trade-off between the satisfaction of one principle and the non-satisfaction of the other one. Alexy’s conclusion is very similar to the idea expressed by Luban’s ‘large/small trade-off’, only Alexy’s model also includes a middle stage. This means that there is a definitive reason for a decision establishing a relation of precedence of P1 against P2, if there is either a large/small, or a large/medium, or a medium/small trade-off, the first element being the degree of satisfaction of P1 and the second element the degree of satisfaction of P2.<sup>72</sup> On the other hand, there is a definitive reason for a decision establishing a relation of precedence of P2 against P1, if there is either small/large, or a medium/large, or a small/medium trade-off between their degrees of satisfaction and non-satisfaction. Trade-off analysis thus makes comparisons easier and, by creating commensurability<sup>73</sup> between what is to be compared, leads to the possibility of rational choices.

<sup>69</sup> Luban (n 58) 75.

<sup>70</sup> Ibid 76.

<sup>71</sup> Alexy, *A Theory* (n 15) 402; Alexy, ‘Constitutional Rights’ (n 15) 136; Robert Alexy, ‘Die Gewichtsformel’ in Joachim Jickeli and others (eds), *Gedächtnisschrift für Jürgen Sonnenschein* (de Gruyter, Berlin 2003) 773.

<sup>72</sup> Alexy, *A Theory* (n 15) 407–408.

<sup>73</sup> As Elijah Millgram, ‘Incommensurability and Practical Reasoning’ in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press, Cambridge, MA 1997) 151 points out, ‘commensurability is the result, rather than the precondition, of practical deliberation’.

However, arguing that the comparison of trade-offs creates a type of commensurability means neither that principles become necessarily commensurable in abstract, ie detached from a concrete situation, as already explained above, nor that this procedure involves a reasoning that is value-free, purely logical, and immune to any subjective influence and to any moral consideration. Only an extremely naive approach to the problem would believe that such type of reasoning is possible. The faith that balancing as well as the principle of proportionality turn ‘the review process into a relatively straightforward exercise of logical or syllogistic reasoning’<sup>74</sup> or that subjective points of view ‘never come into play’,<sup>75</sup> is an example of such a naive approach.<sup>76</sup> Treating the concepts of balancing and of proportionality as a neutralizing formula only serves to cloud the debate.

Bearing this in mind, I assume that the incommensurability-based objections that Tsakyrakis raises against the principle of proportionality—and against the balancing it encompasses—are at least to a great extent directed against this type of innocent approach advanced by Beatty, since one of Tsakyrakis’ main goals is to demonstrate that mathematical precision is impossible in legal reasoning.<sup>77</sup> Thus, when Tsakyrakis argues that, if balancing implies assuming that conflicts of values can be reduced to issues of intensity or degree, this also implies assuming that balancing ‘pretends to be objective, neutral and totally extraneous to any moral reasoning’,<sup>78</sup> he 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. Just as the justification of the premises in the most trivial legal syllogism is not a value-free logical procedure,<sup>79</sup> neither is the decision that a given limitation in a constitutional right is light, moderate or serious.

<sup>74</sup> David M Beatty, *The Ultimate Rule of Law* (OUP, Oxford 2004) 169.

<sup>75</sup> *Ibid* 166.

<sup>76</sup> Beatty’s account of the proportionality as ‘the solution’ for all problems is not limited to the debate on its rationality. According to him, the tension between constitutional review and democracy simply disappears when proportionality is used. In his own words: ‘Making proportionality the critical test of whether a law... is constitutional or not separates the powers of the judiciary and the elected branches of government in a way that provides a solution to the paradox that has confounded constitutional democracies for so long’ (*ibid* 160).

<sup>77</sup> This goal is pointless for two reasons: first, because the statement that mathematical precision is impossible in legal reasoning is a commonplace proposition that nobody denies; and second because defenders of balancing (apart maybe from very naive approaches) do not claim any sort of mathematical precision. It is actually Tsakyrakis himself who repeatedly insists that this is a claim raised by the defenders of balancing. But he is actually the one speaking of ‘calculation’, of ‘the myth of mathematical precision’, or that the ‘imagery of balancing unavoidably carries with it connotations of mathematical precision’ (Tsakyrakis (n 6) 469, 472, 474). Since he does not indicate who raises these claims, it is sometimes difficult to identify which kind of defence of balancing he is arguing against.

<sup>78</sup> *Ibid* 474.

<sup>79</sup> See for that matter Jerzy Wróblewski, ‘Legal Syllogism and Rationality of Judicial Decision’ (1974) 5 *Rechtstheorie* 33–46.

Webber is not convinced by such arguments.<sup>80</sup> According to his objection to Alexy's model, defining interferences as light, moderate or serious does not create commensurability because the measurement 'is taken only from the perspective of the principle being evaluated'.<sup>81</sup> Still according to him, 'given that the measure of the intensity of interference with a principle is evaluated for each principle without comparison with the other principle, one should not assume that a light interference with one principle is of the same measure as a light interference with another principle'.<sup>82</sup> In order to illustrate his point, he uses the case decided by the Supreme Court of Canada in *Syndicat Northcrest v Amselem*.<sup>83</sup> In brief, what was at stake in this case was the conflict between the wish of members of the Jewish faith of setting up of a succah<sup>84</sup> on the balcony of their flats for a period of nine days a year, and the contractual prohibition of decorations, alterations and constructions on balconies of the co-owned property.

According to Webber, if one assumes that the setting up of a succah is a non-obligatory precept of the Jewish faith, then one could consider any interference with this precept as light. The competing principle, still according to Webber, is aesthetic harmony. Since the period of time during which the succah were set up would be short, and since the number of erected succahs would also be very small, interference with the principle of aesthetic harmony would also be light.<sup>85</sup> After defining both interferences as light, Webber asks: 'Would it follow that both "light" interferences are commensurate?' He promptly answers: 'Of course not'.<sup>86</sup> As mentioned above, according to him, the fact that the degrees of interferences are measured only from the perspective of the principle being evaluated, without comparison with the other principle, leads to the impossibility of considering that a light interference with one principle is of the same measure as a light interference with another principle.

The example used by Webber is quite problematic. Firstly, because it involves balancing a human right that is constitutionally protected (religious

<sup>80</sup> Grégoire Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 Can J L & Juris 179–202, 195–96.

<sup>81</sup> Ibid 196.

<sup>82</sup> Ibid 195.

<sup>83</sup> [2004] SCC 47.

<sup>84</sup> The decision mentioned provides the following definition of succah: 'A succah is a small enclosed temporary hut or booth, traditionally made of wood or other materials such as fastened canvas, and open to the heavens, in which, it has been acknowledged, Jews are commanded to "dwell" temporarily during the festival of Succot, which commences annually with nightfall on the fifteenth day of the Jewish month of Tishrei. This nine-day festival, which begins in late September or early- to mid-October, commemorates the 40-year period during which, according to Jewish tradition, the Children of Israel wandered in the desert, living in temporary shelters' (*Syndicat Northcrest v Amselem* (n 83) para 5).

<sup>85</sup> In another work (Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (CUP, Cambridge 2009) 92), Webber classifies the degrees differently, arguing that the interference with the religious precept is moderate and the interference with the principle he calls 'aesthetic harmony' is light. In my analysis, however, I will stick to his latest conclusion (Webber (n 80) 195–96), ie that both interferences are to be classified as light.

<sup>86</sup> Webber (n 80) 196.

freedom) against a very diffuse and non-constitutionally guaranteed interest (aesthetic harmony). Not that both cannot be compared and weighed against each other—this article has already claimed that this would be no problem. The tricky element in the example (at least in the way it was used) is ignoring that the simple fact that religious freedom is a constitutional right, and aesthetic harmony is not, changes the whole scenario (at least within the legal realm). Secondly, the balancing that this case demands is actually not one between religious freedom and aesthetic harmony, but rather between religious freedom and *freedom of contract*. It is thus a typical case of what is usually called horizontal effect of human rights.<sup>87</sup> That such cases are not to be decided in the same manner that courts decide cases of constitutional review of legislation is a widely acknowledged fact,<sup>88</sup> and it is sometimes even contested that such cases require balancing at all.<sup>89</sup>

However, leaving aside these two issues and concentrating on Webber's thesis, according to which the independent measurement of the degrees of satisfaction and non-satisfaction of the principles involved in balancing impedes the commensurability between them, one cannot help but ask: why is this so? If two rights or principles have the same abstract value—not because they *are* of the same value as such, but because they are both constitutional rights—why are their degrees of concrete realization not comparable?

Still leaving aside the problematic issues of Webber's example, one could, nevertheless, ask whether the 'feeling' of incommensurability would persist if the contract regulating the use of the co-owned property prohibited any form of religious expression in shared areas inside the building (corridors, elevators, entrance hall, garden, garage etc). Imagine not only the erection of a succah, but also that wearing a kippah or a veil would therefore be strictly forbidden, and in such a scenario, praying might also be forbidden if it might be heard from outside the flats. The goal of this clause would be, say, to promote equality among residents. Since not every resident has a religion and since not every religion has external signs, let us imagine that it was decided that equality among residents would be better protected through a ban of every sign of religion inside the building. Let us suppose that several residents filed lawsuits against this clause. In its report, the court states that the interference with the freedom of religion was serious, while the degree of promotion of equality was practically irrelevant. Until this moment, no comparison has been made.

<sup>87</sup> Although not explicitly mentioning the concept of horizontal effects, the dissenting opinion by Justice Binnie is informed by this idea (see *Syndicat Northcrest v Amselem* (n 83) para 183 ff.). For an account of this decision as an example of horizontal effects see Pierre-Olivier Laporte, 'La Charte des droits et libertés de la personne et son application dans la sphère contractuelle' (2006) 40 *Revue Juridique Thémis* 287–351.

<sup>88</sup> Among the vast literature on the subject, see for instance Daniel Friedmann and Daphne Barak-Erez (eds), *Human Rights in Private Law* (Hart, Oxford 2003) and Andrew Clapham, *Human Rights in the Private Sphere* (Clarendon Press, Oxford 1998).

<sup>89</sup> See Virgílio Afonso da Silva, *A constitucionalização do direito: os direitos fundamentais nas relações entre particulares* (Malheiros, São Paulo 2005).

The evaluations of the degrees of interference and satisfaction were made completely independent of one another. Does this mean that we cannot compare them? Would it be irrational to decide that religious freedom should have precedence in this case? Webber's arguments are not convincing. Nor is his assessment of the example he used.

Yet, one element in his example may be useful. Until now, I dealt with examples in which the trade-offs were clear. In his example, the degrees of satisfaction and non-satisfaction turn out to be the same: light/light. When the trade-offs are either large/large, or medium/medium, or small/small—Alexy<sup>90</sup> calls these 'stalemate cases'—the possibility of comparison and of a rational decision are a little more controversial. However, before dealing with this more problematic issue, I want to highlight what the examples and arguments used thus far show us. If, when confronted with a clear small/large trade-off, one is able to compare and weigh between the actions that fulfil the values involved (no matter how incommensurable these values are in abstract), and thus rationally decide which action is to be taken, this can only mean that incommensurability does not imply incomparability or impossibility of weighing. This finding is actually substantial enough to reject the objections to balancing that are based on the idea of incommensurability. If abstract commensurability were decisive to balancing, it would be always impossible to balance between incommensurable values. As shown thus far, this is not the case, at least not when a clear small/large trade-off occurs. When a clear small/large trade-off occurs, the balancing procedure is able to point out to a single answer. This answer is the outcome of a comparison, a comparison between trade-offs.

Before going further, and in order to avoid misunderstandings, it is necessary to explain what is meant here by 'a single answer'. Contrary to what some types of criticism seem to suppose, the assumed goal of balancing (and of the principle of proportionality) is not to deliver a single right answer with which everyone should and/or would agree on, an answer in terms of an objective truth. As stressed previously, only an idealized approach to the issue (or a criticism based on misunderstood premises) could raise this type of claim (ie that proportionality leads to an objective truth). Here, 'single answer' means nothing more than an answer that cogently derives from accepted premises. Just as a logical syllogism has a cogent, single right answer only if the justification of its premises has been previously accepted as valid, balancing provides a single answer only under the same conditions (and, as pointed out above, if its outcome is not a stalemate). Bearing this in mind, it is pointless to argue that balancing is problematic because it is possible that one person

<sup>90</sup> Alexy, *A Theory* (n 15) 408; Alexy (n 4) 443.

evaluates an interference as light while another evaluates the same interference as moderate.<sup>91</sup> Disagreement is ubiquitous in legal argumentation and it would make no sense whatsoever to expect that balancing or proportionality could make it disappear.

### C. Parity

Problems may arise when we face stalemate situations, ie when the trade-offs are either large/large, or medium/medium, or small/small. However, if problems may arise, they have nothing to do with the incommensurability among the values involved, but rather because it may be more difficult (or impossible) to us to identify which action is better than others (either because our cognitive capacity is limited, or because no action is really better than another).<sup>92</sup> In such cases, it is common to speak of dilemmas or tragic choices, depending on which values are at stake and of what we lose on one side in order to win on the other.

For the goals of this article, these so-called stalemate situations are of interest also due to their ramifications for the relationship between court and legislator. According to Alexy,<sup>93</sup> such situations lead to a structural discretion in balancing. I contend that this discretion should be understood as a justification for a judicial deference in cases involving balancing of constitutional rights. In the following sections I will analyse this idea by resorting to the concepts of *rough equality* and *parity*. My reasoning is based on the following pattern: if in stalemate situations balancing does not determine a result<sup>94</sup> because the trade-offs are equivalent for several answers to a given constitutional issue, courts thus cannot claim to have a better answer than the legislator (even if the court's hypothetical answer is different from the actual one, ie the legislator's decision).<sup>95</sup>

An objection to Alexy's defence of a structural discretion based on the existence of balancing stalemates is the claim that this type of stalemate is a trick, since there is always at least a slight difference between degrees of satisfaction and non-satisfaction. If this were true, it would be impossible to speak of a legislative discretion, because if there is always at least a slight difference between degrees of satisfaction and non-satisfaction, there will also be always a right answer for every problem, and since constitutional courts

<sup>91</sup> See for instance Webber (n 85) 95.

<sup>92</sup> See next section.

<sup>93</sup> Alexy, *A Theory* (n 15) 408, 410.

<sup>94</sup> Alexy (n 4) 443.

<sup>95</sup> In other words: in order to declare enacted law unconstitutional, judges must be able to demonstrate that the legislator was completely wrong, ie that either the outcome of the balancing should have been exactly the opposite of what the legislator thought to be the case, or that it was not a stalemate situation. In both cases, judges must be able to demonstrate that there is an answer to this particular case that features a clear large/small (or large/medium or medium/small) trade-off.

have the last word,<sup>96</sup> they (and not the legislator) will always be the responsible for finding this correct answer. In other words: if judges have a different answer to a given problem, this answer must be better than the one provided by the legislator. Hence, there would be no room for discretion (and for judicial deference). Arguing for legislative discretion in weighing and for the possibility of judicial deference presupposes, therefore, the demonstration of the possibility of parity, ie the demonstration that instead of a single correct solution there may be a range of correct solutions.<sup>97</sup>

Alexy concedes, on the one hand, that if stalemates exist ‘they are extremely rare’.<sup>98</sup> However, as stressed above, if this is true, then it is also true that in almost every case there would be a single correct answer, for there would always be an (at least slight) asymmetry in the trade-off.

I propose a more sound justification for balancing stalemates. This justification, as we already know, is based on the concept of *parity*.

#### D. Parity and Transitivity

Those who claim that there is always at least a slight asymmetry in the trade-off between competing principles, goods or values, accept—often not explicitly—the trichotomy thesis. According to this thesis, there can be only three types of relations between two values: ‘better than’, ‘worse than’ and ‘exactly equally good’. The trichotomy thesis may be defended by several means, the most common being the association of the concept of transitivity to arguments from small improvements.

The concept of transitivity is widely used in attempts to demonstrate the incommensurability and incomparability between values or goods. If the relation among the values (or goods, or rights) *A*, *B* and *C* is transitive, then the following must hold: if *A* is exactly as good as *B*, and *C* is better than *A*, then *C* is better than *B*.<sup>99</sup> Thus, if one finds out that *C* is actually not better than *B*, then *A*, *B* and *C* are incomparable, since their relation is not transitive.<sup>100</sup>

The arguments from small improvements may be illustrated by adding a new element in the previously mentioned comparison between the career as lawyer

<sup>96</sup> I speak here of a ‘last word’ because constitutional courts are usually viewed as having the last word in every constitutional issue. Challenging this assumption is here not necessary and for the sake of argument, this view is simply assumed as a matter of fact. For a comprehensive analysis of this issue, see Conrado Hübner Mendes, ‘Is It All About the Last Word? Deliberative Separation of Powers’ (2009) 3 *Legisprudence* 69–110; Conrado Hübner Mendes, ‘Not the Last Word, but Dialogue: Deliberative Separation of Powers II’ (2009) 3 *Legisprudence* 191–246.

<sup>97</sup> See TK Seung and Daniel Bonevac, ‘Plural Values and Indeterminate Rankings’ (1992) 102 *Ethics* 799–813, 802, 805. See also da Silva (n 56) 194 ff; Grimm (n 64) 390.

<sup>98</sup> Alexy, *A Theory* (n 15) 412.

<sup>99</sup> See John Broome, *Weighing Goods* (Blackwell, Oxford 1991) 12; Broome (n 48) 68; John Broome, *Weighing Lives* (OUP, Oxford 2004) 51; Raz (n 32) 120–21; Anderson (n 48) 90; Waldron (n 34) 816; Millgram (n 73) 151.

<sup>100</sup> Because if *C* is as good as or worse than *B*, it has to be as good as or worse than *A*, since *A* is exactly as good as *B*. But *C* is better than *A*.

and the career as a clarinettist. The career as a lawyer is at least as good as the one as clarinettist. Now let us imagine an additional clarinettist career, which is in all aspects equal to the original one, except for the fact that the monthly salary is 10 Euros higher. The additional career is therefore better than the original one, albeit to a minimal extent. Would it be possible to argue that this new career is for this reason also better than the lawyer career? I doubt it. For authors like Raz<sup>101</sup> or Broome<sup>102</sup> this relation is not transitive and therefore the careers are incomparable. Yet, this point of view is only cogent to those who cling to the trichotomy thesis, ie to those who insist that there are only three possible relations between two values: either is *A* better than *B*, or *A* is worse than *B*, or *A* is exactly as good as *B*. What does not fit in this scheme must necessarily be incomparable.

The arguments from small improvements may also be illustrated through a modified example from Alexy.<sup>103</sup> Let us suppose a duty to place a warning label ('drink responsibly') on alcoholic beverages, and that this warning should be at least 2 x 1 cm in size. This would be a minor interference in the freedom of profession (just as, in Alexy's example, the duty to put warnings on tobacco products is also a minor interference).<sup>104</sup> Let us suppose that this type of warning fosters the protection of the health of individuals also to a minor degree. It fosters this protection to a minor degree since few people take it seriously and drink less because of it. That would be then a minor/minor (or small/small) trade-off or, in Alexy's terminology, a stalemate. Should the warning label be 2 x 1.5 cm in size instead of 2 x 1 cm, it is nonetheless possible to suppose that this difference of 0.5 cm would not change the stalemate situation: it is still a minor interference in the freedom of profession and it fosters the protection of the health of individuals also to a minor degree. Nevertheless, how is it possible to still claim that this is a stalemate situation if it is clear that the larger a health warning label on a product, the greater the interference in the producer's freedom of profession is?<sup>105</sup>

For a critic of the theory of principles, the situation described above can only mean one thing: a balancing stalemate occurs neither in the original nor in the modified health warning case, because degrees of health protection and degrees

<sup>101</sup> Raz (n 32) 120.

<sup>102</sup> Broome, *Weighing Lives* (n 99) 166.

<sup>103</sup> Alexy, *A Theory* (n 15) 402. Alexy uses a concrete decision of the German Federal Constitutional Court as an example (BVerfGE 95, 179) concerning the duty to place a health-warning label on tobacco products.

<sup>104</sup> It is surely controversial whether this is really only a light interference (see Webber (n 85) 94–95), but this is irrelevant to the argument I am putting forward here. The argument would still be valid if one decides that the interference is moderate or serious.

<sup>105</sup> One could argue here that the intensity of the protection of the health of individuals increases in the same proportion of the warning's size. But this would be a flawed conclusion, because the reason few people take such warnings seriously (and drink less because of it) is not primarily related to its size, but to its content and to their predisposition to drink irresponsibly. However, in order to avoid misunderstandings, I want to stress that I do not mean that size of such warnings does not matter. It usually matters, sometimes a lot. What I am arguing is something different, namely that such a general warning ('drink responsibly') hardly becomes more effective merely by increasing its size.

of freedom of profession are simply incomparable, since the situation has proven to be intransitive ( $A$  and  $B$  are equal;  $C$  is slightly worse than  $B$ ; but one cannot say that  $C$  is worse than  $A$ ). If they are incomparable, there is no possibility of rational choice between them and thus balancing turns out to be an irrational operation.<sup>106</sup>

Alexy's answer—as pointed out at the end of the last section—is based on the roughness of his scale. Since his model is a triadic one (light, moderate, serious), it is incapable of capturing finer differences between degrees of satisfaction and non-satisfaction.<sup>107</sup> He argues that a finer scale would probably 'do the job', but the finer the scale, the more difficult its application would be.<sup>108</sup> Using the vocabulary of the debate on commensurability and comparability, one could say that what Alexy means, perhaps, is that the degrees of satisfaction and restriction in  $A$ ,  $B$  and  $C$  may be roughly equal,<sup>109</sup> or on a par,<sup>110</sup> or based on an indeterminate ranking.<sup>111</sup> In a nutshell: Alexy's balancing stalemates are thus based on the idea of rough equality or parity.

I do not think that it is necessary to delve deeply into in the philosophical debate on the grounds of the rough equality or parity situations. Among other things, it is controversial whether the roughness is in the values (or rights) themselves,<sup>112</sup> or in our incapacity of perceiving fine differences, or is the result of some other type of indeterminacy or vagueness.<sup>113</sup> Although there is a vivid debate on these issues in the philosophical realm,<sup>114</sup> for the goals of this article, it is not relevant to decide whether the rough equality that may hold between

<sup>106</sup> Even though without using the vocabulary of transitivity, the objection of irrationality is a common one against weighing rights and against the theory of principles (see for instance Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp, Frankfurt am Main 1992); Friedrich Müller, *Strukturierende Rechtslehre* (2nd edn, Duncker & Humblot, Berlin 1994); Ernst-Wolfgang Böckenförde, 'Grundrechte als Grundsatznormen: Zur gegenwärtigen Lage der Grundrechtsdogmatik' in Ernst-Wolfgang Böckenförde (ed), *Staat, Verfassung, Demokratie: Studien zur Verfassungstheorie und zum Verfassungsrecht* (Suhrkamp, Frankfurt am Main 1991); Bernhard Schlink, 'Freiheit durch Eingriffsabwehr - Rekonstruktion der klassischen Grundrechtsfunktion' (1984) 11 *Europäische Grundrechte-Zeitschrift* 457–68. Although it is not my goal here to refute these specific objections, I do think that the arguments used throughout in the article against the incomparability between values or rights could fulfil at least a part of this task.

<sup>107</sup> Alexy, *A Theory* (n 15) 412.

<sup>108</sup> *Ibid* 413.

<sup>109</sup> See Derek Parfit, *Reasons and Persons* (2nd edn, Clarendon Press, Oxford 1986) 431; Griffin (n 2) 80; Thomas Hurka, *Perfectionism* (OUP, New York 1993) 87; Qizilbash (n 67); George Harris, 'Value Vagueness, Zones of Incomparability, and Tragedy' (2001) 38 *Am Phil Q* 155–76, 155.

<sup>110</sup> Ruth Chang, 'The Possibility of Parity' (2002) 112 *Ethics* 659–88, 661; see also Ruth Chang, 'Parity, Interval Value, and Choice' (2005) 115 *Ethics* 331–50, 331 ff. For Chang, the concept of rough equality and that of parity are not exactly the same. For the purpose of this article, however, it is not necessary to make further distinctions between them.

<sup>111</sup> See Seung and Bonevac (n 97) 802.

<sup>112</sup> Griffin (n 2) 81; Seung and Bonevac (n 97) 802.

<sup>113</sup> See Timothy Endicott, *Vagueness in Law* (OUP, Oxford 2000) 41 ff; Ashley Piggins and Maurice Salles, 'Instances of Indeterminacy' (2007) 29 *Analyse & Kritik* 311–28, 317 ff.

<sup>114</sup> Especially because it is argued that if roughness is only epistemic, then rough equality (or parity) cannot be considered a fourth relation between two values, since it would still hold that either  $A$  is (at least a little) better than  $B$ , or  $A$  is (at least a little) worse than  $B$ , or  $A$  is (exactly) as good as  $B$ , even though we cannot detect precisely which one of these three relations is true. For a thorough account of this debate, see Broome (n 48), Griffin (n 51); Chang (n 46) and Qizilbash (n 67).

degrees of satisfaction and non-satisfaction of constitutional principles is a result of the roughness that exists in the principles themselves (ontic roughness),<sup>115</sup> or is due to limitations in our cognitive capacity (epistemic roughness) or even to the type of scale used to measure trade-offs (methodological roughness). It is a fact that the roughness—even if only epistemic or methodological—exists and that we cannot overcome it. In order to overcome epistemic roughness, we would need to be able to identify even the slightest differences between interference degrees, which—except maybe for Dworkin’s Judge Hercules—is an impossible task. In order to overcome a methodological roughness, we would need a scale that would be so fine that it would lead us back to the epistemic problem.

Thus, assuming that rough equality (or parity) exists means accepting that the balancing procedure is only able to point out to a single answer when rough equality (or parity) is not present. As already explained above,<sup>116</sup> a single answer is only feasible when it is possible to identify a clear difference between degrees of satisfaction and non-satisfaction.

That the ideas of parity and of rough equality are not a trick to artificially create stalemates is something that can be clarified through the distinction between intra- and cross-categorical comparisons. Though slight differences among goods of the same category (in my examples, 10 Euros more in the salary or 0.5 cm in a health warning) may authorize us to evaluate one as better or worse (or more or less efficient) than the other, this intra-categorical difference cannot be automatically transferred to a cross-categorical comparison. This leads to the answer to the objection stated above. Firstly, because arguing that stalemates do not exist is to ignore the idea of rough equality or of parity within cross-categorical comparisons (and as will be shown later on, it is exactly the concepts of rough equality and of parity that guarantee some type of discretion when weighing rights). Secondly, because claiming that degrees of satisfaction and of restriction (non-satisfaction) of principles are incomparable because the relation among them is intransitive, and to argue consequently that balancing is an irrational procedure, is to ignore that in order to reach the conclusion that two things (here, the degrees of satisfaction and non-satisfaction of constitutional rights) are ‘on a par’, one must compare them first. There is no intrinsic difference between a comparison in which the result is a clear small/large trade-off, and a comparison in which the result is rough equality (or parity or a stalemate). In both cases, one must compare (and balance) before reaching a conclusion. Hence, those who claim that the stalemates are the result of an incomparability must also argue that it should

<sup>115</sup> For an ontological account of vagueness see, for instance, Dominic Hyde, *Vagueness, Logic and Ontology* (Ashgate, Aldershot 2008).

<sup>116</sup> See the end of s 5B and s 5C.

also be impossible to compare between a huge restriction in one principle and an irrelevant satisfaction of the competing principle. Yet, it seems clear to me that such a claim is as unreasonable as it will be, in Luban's example,<sup>117</sup> if the college athlete, even if being aware of the devastating effects on his studies, decided to undertake the highly time-consuming training programme in order to become very slightly more proficient.

Therefore, arguing that the relation between two values or rights is one of rough equality, or of parity, or of stalemate is clearly the result of a comparison. To illustrate this (and also to illustrate how possibility of parity may lead to judicial deference) I will use the decision in the case *Evans v UK* of the European Court of Human Rights (ECtHR, Grand Chamber), from April 2007.

## 6. Parity and Deference

Using the *Evans* case fulfils three goals here. The first is to show the possibility of parity in hard cases. The second is to introduce the institutional element into the comparison debate. This institutional element is important in order to answer the question—posed above—on the difference between autonomous and heteronomous decisions.<sup>118</sup> The third is to demonstrate the possibility of a sound judicial deference in cases of parity.

### A. The *Evans* Case: The Possibility of Parity

On 12 July 2000, Ms Evans and her partner, J, began a procedure for 'in vitro fertilization' ('IVF') at an assisted conception clinic in the UK. In October of the same year, she was informed that preliminary tests had revealed that she had serious pre-cancerous tumours in both ovaries, and that her ovaries would have to be removed. However, since the tumours were growing slowly, it would be possible to extract some eggs for IVF, but this would have to be done quickly.<sup>119</sup> Ms Evans and J had to sign a form consenting to the IVF treatment and agreed that, in accordance with the provisions of the Human Fertilization and Embryology Act 1990, it would be possible for either one to withdraw his or her consent at any time before the embryos were implanted in Ms Evans' uterus.<sup>120</sup>

On 12 November 2001, six embryos were created and consigned to storage. Two weeks later, Ms Evans underwent an operation to remove her ovaries. She was told that she should wait two years before attempting to implant any of the embryos in her uterus.<sup>121</sup>

<sup>117</sup> See s 5B.

<sup>118</sup> See s 5.

<sup>119</sup> *Evans v UK* (2008) 46 EHRR 34, paras 13–14.

<sup>120</sup> *Ibid*, [15].

<sup>121</sup> *Ibid*, [17].

In May 2002, the relationship ended, and two months later J wrote to the clinic requesting the embryos be destroyed. The clinic notified Ms Evans that it was under a legal obligation to destroy the embryos, according to paragraph 8(2) of schedule 3 to the 1990 Act. Among other judicial procedures which are of less interest here, Ms Evans sought a declaration of incompatibility under the Human Rights Act 1998 to the effect that section 12 of, and schedule 3 to, the 1990 Act (consents to use of gametes or embryos) breached her rights under Articles 8 (right to respect for private and family life), 12 (right to marry) and 14 (prohibition of discrimination) of the Human Rights Act 1998.<sup>122</sup>

Stated briefly, what was at stake was to balance between Ms Evans' right to have a child and J's right not to become a father. It is not necessary to analyse here all the possibilities of such a balance. For the goals of this article, it is sufficient to analyse the Court's decision. According to the majority opinion, the ECtHR 'does not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J's right to respect for his decision not to have a genetically-related child with her'.<sup>123</sup> However,—and this is central for the argument—the Court did not consider that J's right to respect for his decision not to become a father should be assigned greater weight either. It seems clear that the decision may be reconstructed as a clear example of parity between two forms of satisfying two competing rights. In the vocabulary of the theory of principles, one would speak of a stalemate.

Before moving to the next sub-section (on the relation between parity and legislation) it is important to stress that the conclusion for a parity or a stalemate (or a rough equality) does not imply abandoning balancing, unlike some authors have suggested.<sup>124</sup> Bomhoff and Zucca argued, for instance, that in the *Evans* case 'the majority gives up its favourite tool ever, the balancing technique', and that 'in a highly unusual move, the majority regarded the central issue of the case—the actual dilemma—as better dealt with by the national (United Kingdom) parliament, thus forsaking concrete proportionality review and *ad hoc* balancing'.<sup>125</sup>

Bomhoff and Zucca seem to suppose that, when courts engage in a balancing operation within a case of constitutional review of legislation, the outcome must be necessarily different from that of the enacted law. This becomes even clearer when they state that, although the Court 'did not abandon the language of balancing', it in effect abandoned balancing 'as a decisional tool'.<sup>126</sup> This conclusion implies that using balancing as a decisional tool is incompatible

<sup>122</sup> Ibid, [18–19].

<sup>123</sup> Ibid, [90]—emphasis added.

<sup>124</sup> See Bomhoff and Zucca (n 5) 430; see also Steven Greer, "Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate' (2004) 63 CLJ 412–34, 418, 423.

<sup>125</sup> Bomhoff and Zucca (n 5) 429.

<sup>126</sup> Ibid 430.

with accepting that the legislator may be right. In other words: it implies that ‘using balancing as a decisional tool’ is incompatible with situations of parity, rough equality and stalemates, suggesting that there is always a single correct answer in collisions between rights. This seems also to be what Greer has in mind when he argues that ‘there can... be no margin of appreciation on the part of national authorities on the question of how a given Convention right is to be understood. It is, instead, the responsibility of the European Court of Human Rights authoritatively to unpack the implications of the “rights” principle’.<sup>127</sup>

### B. Parity, Legislation and Judicial Deference

The supposition implicit in Bomhoff’s and Zucca’s arguments is incompatible not only with what has been argued in this article thus far, but also with the argumentation of the ECtHR in *Evans v UK*. That the Court did not abandon balancing between competing rights is evident in several excerpts of the decision, especially those that mention ideas like ‘fair balance’, ‘having a greater weight’ and so on. As has already been stressed above, in order to reach the conclusion that two things are ‘on a par’, one must compare them first. This is exactly what the Court did.

Just as in everyday life one may face a dilemma that does not disappear despite having balanced all the relevant aspects of a given situation, courts may also be (and frequently are) confronted with similar situations. The difference between the everyday life decision and the judicial decision (at least in those cases of constitutional review) is that the first is an autonomous one and the second a heteronomous.

As has already been pointed out above,<sup>128</sup> balancing rights does not imply *me* losing something in order to win another thing, but *me* foregoing a certain amount of a basic right and *someone else* obtaining a certain amount of another basic right. In such situations, autonomous decisions are not feasible, except in cases of altruism.<sup>129</sup> The question posed above was: would it be the case, which in such circumstances incommensurability leads to incomparability? The answer was *no*.

That the relation between two goods, values or rights may turn out to be incommensurable is a platitude. It has been shown throughout the article that this does not lead to the incomparability of such goods, values or rights. They can still be compared relative to a certain covering value. The most important covering value in the procedure of weighing principles is the degrees of satisfaction and non-satisfaction of the rights protected by these principles (as expressed by the ‘law of balancing’). If balancing between two rights (or, more

<sup>127</sup> Greer (n 124) 423.

<sup>128</sup> See section 5.

<sup>129</sup> See Luban (n 58) 78–79.

precisely, between two or more events or situations that realize or limit these two rights) leads to the conclusion that both are 'on a par', this does not imply their incomparability, but rather a discretion in deciding. As Luban puts it, it is not the case (contrary to what Finnis argues) that in such cases one cannot identify a reason for either option.<sup>130</sup> What one cannot identify is which reason is stronger. This means that one has certainly identified a reason for both options.<sup>131</sup> This—the identification of equivalent reasons for two competing options—is the ground for a discretion in deciding. In a democracy, this discretion should be exercised by the legislator.

This is exactly what the ECtHR recognised. Facing a parity situation, the Court decided that the solution should lie primarily in the hands of the Parliament of the United Kingdom. Again: not because the Court gave up the balancing of rights as a decisional tool, but because this balancing leads to a stalemate. The Court clearly summed up the whole idea in the following excerpt:

The Court accepts that *it would have been possible for Parliament to regulate the situation differently*. However, as the Chamber observed, the central question under Article 8 is not whether different rules might have been adopted by the legislature, but whether, *in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it* under that Article.<sup>132</sup>

Since it was a matter of parity between different possibilities, the Court accepted the possibility of regulating the situation differently. However, it also granted that it was up to parliamentary discretion to decide which possibility was more adequate. Parity as a ground for discretion is even clearer at the end of the excerpt, where the Court mentions the 'margin of appreciation' afforded to the Parliament. In short, the Court decided that there had been no violation of Article 8 of the Convention since the domestic rules were clear and brought to the attention of the applicant and they struck a fair balance between the competing interests.<sup>133</sup>

<sup>130</sup> Ibid 81. See also Seung and Bonevac (n 97) 802.

<sup>131</sup> See also Alexy, *A Theory* (n 15) 411: 'If the reason for the interference is just as strong as the reason against it, the interference is not disproportionate'. This is only a general approach to the problem and is not sufficient to provide an answer for all cases. This is why Alexy supplemented it with the 'law of diminishing marginal utility' (Alexy (n 17) 147; Alexy, *A Theory* (n 15) 103). Here again one could find similarities between Alexy's idea and certain concepts from the debate on comparability. Stocker, for instance, argues that certain balancing cannot be performed 'by a simple hinged beam balance or a sliding beam balance', because 'differing amounts of a given element can have the same effect depending on their location'. To illustrate this, he suggests the idea of a 'pan suspended on a cord through its centre' or 'a sphere or a still higher-dimensioned object suspended at its centre' (Stocker (n 52) 148). Although this idea cannot be further developed here, it must be taken into account whenever one argues that the degree of satisfaction of one principle is 'on a par' with the degree of restriction of another principle. A small example may illustrate this. A moderate degree of industrial development is not 'on a par' with a moderate degree of environmental degradation in a country where industrial development is already very advanced and where the environment has already been submitted to considerable devastation. Placing both on a hinged beam balance would surely not provide an adequate result for the balancing operation.

<sup>132</sup> *Evans v UK* (n 120) [91] (emphasis added).

<sup>133</sup> Ibid.

## 7. Conclusion

In this article, I have tried to establish connections between the arguments used by the supporters of balancing in the legal realm (above all those coming from Alexy's theory of principles) and the arguments used within the debate on commensurability, comparability and rational decision-making. Since the concepts of incommensurability and incomparability underlie (at least implicitly) most of the objections concerning the rationality of the balancing procedure, one important aim here was to analyse the effects of these phenomena (incommensurability and incomparability) on the debate on balancing and proportionality.

In the dispute on the rationality of balancing principles, the objections based on alleged incommensurabilities or incomparabilities are usually superficial. Many authors generally settle for suggesting that the most basic constitutional rights are incommensurable and incomparable, without justifying this claim. As mentioned in the introduction, this type of objection is often based solely on intuition, as if it were enough to point out the incomparability of apples and oranges. Just as it is possible to compare apples and oranges relative to a given covering value (vitamin content, for instance), it is also possible to compare and balance constitutional rights relative to a given covering value: their degrees of satisfaction and non-satisfaction. The fact that these rights may be incommensurable in the abstract does not alter their comparability in concrete situations.

The connections that were established here between the arguments used by the supporters of balancing and the arguments used within the debate on commensurability and comparability also led to the finding that many of the analytical developments from the debate on comparability and rational decision-making may be used—with great analytical benefit—to make Alexy's arguments on the rationality of the balancing procedure even sounder. Especially as far as the recent developments in the theory of principles are concerned, there is a visible convergence between both debates. This convergence—so it seems to me—has not yet been sufficiently explored.

Neither the existence of difficult decisions, hard cases and even tragic choices, nor the likely emergence of dilemmas, stalemates and parity alter the comparability between goods, values or rights. The complexity of making comparisons does not preclude the possibility of rational decision-making. As stressed by the epigraph of this article,<sup>134</sup> the fact that balancing may be difficult does not imply that no balancing can be achieved. Balancing requires refined perception. It takes practice.

<sup>134</sup> Regan (n 1) 137–138.