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Proportionality and Compromises

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Introduction

When individual rights, especially constitutional rights, compete with other rights or with a public good, judges and politicians involved in the legislative or jurisdictional process are expected to balance their decision in such a way that the gain from achieving the goal mitigates the costs of the resulting loss for the parties. Jurists speak of the doctrine of proportionality in connection to this process of balancing. The doctrine of proportionality presents a test to determine whether the coercive effects of the state's legislative action, by interfering with a constitutional right, are justified or not. Justification of the infringement of rights is offered when the loss on the side of the engaged right is compensated for by the benefits expected for the public good or for the competing right and when the infringement of the right is considered to be legitimate. I will come back to the details of this justification.

The procedure—that is the claim I am going to defend here—is similar to the procedure of reaching a compromise. In some cases, even, the proportionality procedure is itself a procedure of compromise. In the proportionality calculus, judges, as well as politicians involved in legislative processes, have to evaluate whether the impact on individual rights outweighs the public purpose pursued through a state's legal activity. Conflicts between rights, as well as conflicts between basic individual rights and the common good, inevitably occur. The harmonization of conflicting rights belongs to the classic field of work of the legislature. In some cases, compromises are rendered necessary by the impossibility to satisfy justified claims on both sides of the balance. The balancing of interests implies losses on both sides and requires concessions be made by each party concerned.

Legal experts, primarily the constitutionalists among them, are confident that the assessment procedure can lead to a solution that is compatible with constitutional law and that a consensual agreement will be reached among the parties responsible for a decision.[1] It is, however, questionable whether this confidence is always justified. It may occur in difficult cases, particularly in cases where

[1] For Germany, see for example, Gertrude Lübbe-Wolff's illuminating analysis of the cultural differences between the German and the Anglo-Saxon tradition within the Constitutional Court (Justice Lübbe-Wolff has been involved in the German Constitutional Court). Gertrude Lübbe-Wolff, 'Cultures of Deliberation in Constitutional Courts', in P. Maraniello (ed.), *Justicia Constitucional*, 1 (Resistencia, Chaco: ConTexto, 2016), pp. 37–52.

moral values and convictions are at the core, that decision-makers agree on a common denominator, although each individually maintains their original convictions, which deviate from the decision. This discrepancy between the grounds for the decision and one's own moral conviction, the fact that under some circumstance it is wise to vote for X despite being morally convinced that Y would be better, is the essential characteristic of the compromise.

The principle of proportionality in law offers a justification for limiting primarily constitutional rights. It is not a first-level principle authorizing actions but a secondary principle, which justifies the infringement of a right, provided the aim is legitimate and when the costs of the infringement are considered to be in appropriate relation to the aim[2]. Similarly, compromises are motivated by second-level reasons; parties have to agree on an arrangement that requires them to make concessions regarding their original demands, demands which they still consider justified.

The calculus of proportionality leads into a compromise decision in two cases:

1) When, after a thorough deliberation, the solution reached is merely a second best solution, the best that could be reached under the prevailing conditions. It requires the deciding authorities to support legislation they believe would be inappropriate if the demands on both sides of the conflict were able to be justly satisfied. A reconciliation of two competing interests cannot be found. More precisely, such a reconciliation can only be found by taking into account some incoherence within the law. I will illustrate what I mean by incoherence with reference to the German legislation on abortion.

2) There is another reason for bringing the legislative process close to compromise decisions. Disagreement over justice and rights is at the core of both judicial review as well as legislation. The intractability of disagreement, even among experts, i.e., the fact that there is *reasonable* dissent remaining even after the exchange of arguments, makes it necessary to consider procedures in order to find common ways out of dissension. The taking of a vote is a classic procedure and is often considered the paradigm of fairness in democracy. As a democratic procedure, it is valued because it offers a fair way to respect the principle of political equality. In a majority decision, however, the winner takes all. When dealing with a moral issue, such as the abortion issue, the minority is required to accept a solution they consider to be immoral. Compromise solutions are confronted with the same paradox. In moral compromise, people refrain from doing what they, for moral reasons, consider the right thing to do, settling instead for no more than a second-best course of action, simply because a compromise would be acceptable to the others involved. Compared to majority decisions, however, compromise solutions are fairer, since they require both parties to renounce (to waive) a portion of their demands. They are a result of a 'give and take', in which a middle position may suggest a way to give something to both sides.

Compromises have a bad reputation and are often regarded as a stopgap solution. On moral issues, they involve some form of moral loss or require even that we compromise moral convictions. On important matters of social policy, we expect from the experts that their decisions be backed by law or that they are grounded in an elaborate deliberative process. When dissent among the parties outlast a thorough deliberation between parties, however, compromising can be defended as a means of reducing political conflict or even as an attempt to preserve what is most valuable in competing positions.

In the following, I will address these two cases.

The doctrine of proportionality

The doctrine of proportionality is familiar to us from ethics and from the just war theory. Generally, it is used in law when rights, especially constitutional rights, are being limited as the result of com-

2 See also Reinhard Merkel, ‚Die ‚kollaterale' Tötung von Zivilisten im Krieg. Rechtsethische Grundlagen und Grenzen einer prekären Erlaubnis des humanitären Völkerrechts', *Juristen Zeitung*, 23 (2012), pp. 1137–1145, p. 1139.

petition with other rights or with the public good. As already mentioned, it presents a test to determine whether the infringement of constitutional right by the state's jurisdiction is justified. Whereas the proportionality doctrine has a long-standing tradition in international law, it was only later introduced into the domain of public and criminal law. In Germany, it took until 1963 for the Constitutional Court to recognize its applicability in all cases where there is an infringement of fundamental freedoms.[3]

At its core, the test is about the resolution of a conflict between competing rights or interests, which is ultimately resolved at the balancing stage.[4] The criteria of justification must take into consideration 1) the fact that the interference with the right pursues a legitimate end;[5] 2) that the means be necessary to promote the objective pursued and that no other less intrusive means exist that could likewise reach the end. 3) The third step "requires a balancing between the fundamental rights interests and the good in whose interest the right is limited".[6] The act under scrutiny must be "adequate", i.e., "the prejudice to the freedom or property right in question must not be inadequate in comparison with the weight of the interests supposed to justify the intervention."[7] A law can fail to pass the proportionality test if it goes too far in limiting a fundamental right or does too little to protect it. It is left to the judgment of apex courts of justice to determine whether this is the case.

Justification of the infringement of rights is offered when the loss on the side of the engaged right is compensated for by the benefits expected for the public good or for the competing right. It is above all in respect to this third step that we can speak of a proportionality calculus. In it, a comparison is made between the loss of the right infringed by the law on one side and the comparative loss of the value protected by the law on the other to determine whether the fundamental right prevails.

The proportionality test is confronted with two main challenges.

First, judges, and politicians involved in legislative processes, mostly deal with goods, values or options which are not quantifiable. And when law or public policy encounters unquantifiable values in crucial decisions, justification of the infringement of rights is made particularly difficult due to the fact that losses and gains on each side cannot be measured, and that it cannot be said if an adequate compensation has been offered for the limitation of the right in question. As an example, we may consider the much-discussed decisions on illegal immigration. The European Convention on Human Rights guarantees a right to respect for private and family life.[8] When judges decide whether an illegal immigrant and his or her family may be lawfully deported, the judge has to evaluate whether the impact on the family outweighs the public purpose pursued through deportation. The decision of the judges is backed by a corpus of laws, but the European Convention has held that the responsibility to decide whether one good outweighs the other lies in the hands of judges alone. The problem, however, is that there is no quantification at their disposal to compare the items on both sides of the equation.

Can we argue that the form of balancing implied is analogous to a search for compromises?

The thesis is that when judges or politicians employ a proportionality calculus of consequences to decide whether they should infringe the rights of the concerned parties to balance conflicting fundamental rights or individual constitutional rights with collective interests, they are involved in a form of compromise, insofar as they weigh various considerations for and against, thereby seeking to take due account of the interests on each side. As has been said, the idea of proportionality is based on the idea of substitution and compensation: that an item can be replaced by another that is quite (proportionally) as good and indemnifies the claimant for a loss. Similarly, compromises depend upon the exchangeability of goods, upon trade-offs between items. We commonly think that when we ask about the fairness of compromises, we have to consider if the concessions made by each party are more or less equivalent. We think that a compromise, which requires one party to give up much more than the other, is not fair. Fair compromises, therefore, require a level of comparability between the

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See Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence', *University of Toronto Law Journal* 57 (2007), pp. 383–398, p. 385.

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See Kai Möller, 'Proportionality: Challenging the Critics', *International Journal of Constitutional Law* 10 (2012), pp. 709–731, p. 711.

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The German Constitutional Court understands the term 'legitimate' to be the fact that the purpose of the law is not prohibited by the Constitution. This requirement serves as a starting point for fulfilling the test. See Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence', p. 388 ff.

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Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence', p. 387 ff.

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See Gertrude Lübbe-Wolff, 'The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court', *Human Rights Law Journal*, 34/1–6 (2014), pp. 12–17, p.13.

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European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, ("European Convention"), Article 8. Cited in: Timothy Endicott, 'Proportionality and Incommensurability', *University of Oxford Legal Research Paper Series*, 40/2012 (2013). Electronic copy downloaded February 2017: http://ssrn.com/abstract=2086622.

alternatives at stake. That is what is expressed through the idea that compromises "split the difference" between the options. So we think that the justification of compromises implies the justification of a choice is given by a comparative fact about the alternatives. Compromises are thus considered to be fair if the chosen alternative for each party is not as good as the option they had wished for in the first place, but is for both parties *comparably* less good.

However, when goods are held to be principally beyond the logic of exchange, the idea of proportionality, or fair compromise, is made almost impossible. I say "almost", because ultimately incommensurability may not preclude any form of compensation or compromise. Even if no adequate sum of money can indemnify the expelled immigrant and his or her family, who are forced to leave a country after having settled for years, he or she might prefer not to remain with empty hands and accept a compensation. Perhaps the judge has a plausible rationale for suggesting a form of compensation the person concerned has good reasons to accept. The judge can make an ordinal evaluation between options and come to the conclusion that public purposes ultimately justify interfering with individual rights, even where the interference has severe consequences for the person. What doesn't remain at disposal is a cardinal function that renders it possible to evaluate *how great* each party's concession is and how much better one option is compared to another.

The second difficulty confronting the proportionality test is that in some cases no compensation for a loss can be made. This fact confronts the legal system with a problem greater than the challenge resulting from the imponderables of equilibrated goods. For if there is no compensation available for the limiting of a constitutional right, the limitation can, in principle, not be justified. In this case, the principle of proportionality is vacuous. It justifies something, which cannot be justified.

The difficulty has been very clearly analysed by Reinhard Merkel in the context of the just war theory, the court decision on the German Aviation Security Act and the legislation covering "embryonic research on human embryos".[9] All of the cases have in common that they require of the law a justification for a radical restriction of a basic right, which is unenforceable due to the death of the addressee of the justification.

The problem is perfectly illustrated in the justification of killing innocents in a just war, a standard case for the logic of proportionality. The principle of discrimination makes civilian immunity a core element of the just war theory and is clearly reflected in the protocol of the Geneva Conventions. This principle categorically prohibits the deliberate killing of civilians. Since it does not protect against inadvertent killing in military combat, it needs to be supplemented with the principle of proportionality, according to which the means deployed must be commensurate with the pursued goal and the positive effects must exceed the negative impact. This means that military attacks, in which casualties among the civilian population are expected but which keep in line with the proportionality principle, are lawful. However, if one follows the logic of justification, it must be demonstrated to *the party, whose rights have been damaged* by a measure in the interest of the collective, that the restriction is not disproportionate and/or is reasonable and acceptable. Reasonable and acceptable implies that it is justifiable to everyone, above all those whose rights are being impinged. The problem, however, is "Whatever may grow out of a deadly attack as an advantage, can, needlessly to say, only result to the benefit of the survivors. Therefore it does not a limine suffice for a justification".[10]

Compensation for inflicted damage is also out of the question for the same reason. This would suggest that the attack cannot be considered to be proportionate. Nevertheless, the law treats it as admissible, based on the logic of proportionality. The real reason is that were one to take the requirement for proportionality seriously, every war that unavoidably kills innocent people would have to be considered as being prohibited. Not even wars of defence, and also no humanitarian interventions, could be justified.

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Merkel, „Die ‚kollaterale' Tötung von Zivilisten im Krieg"; Reinhard Merkel, *Forschungsobjekt Embryo. Verfassungsrechtliche und ethische Grundlagen der Forschung an menschlichen embryonalen Stammzellen*. (Munich: dtv, 2002). See also Reinhard Merkel, ‚Rechte für Embryonen', in C. Geyer (ed.), *Biopolitik. Die Positionen* (Frankfurt/Main: Suhrkamp, 2001), pp. 51–72.

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Merkel, ‚Die ‚kollaterale' Tötung von Zivilisten im Krieg', p. 1139.

In this respect, the principle of proportionality presents a compromise solution. Theoretically, the radical stricture of the right to life cannot be justified; it is not lawful. However, since the killing of innocent people is unavoidable, given the current state of war, a prohibition would ultimately result in a prohibition of any form of war. The search for a justification based on the principle of proportionality to keep the damage within limits, is, accordingly, none other than a second best solution. A solution that, in view of the crude reality, must make do with the second best under the given circumstances. However, the damage inflicted on the victims cannot, with good conscience, be allowed to be termed 'proportionate' or acceptable. The killing is not justified, it may at best be pardoned.

Compromises within multimember courts

We should not underestimate the fact that disagreement is almost as much at the heart of law as it is in politics. Disagreement in law takes place already at a very early stage, such as about what it means to call something a right or what rights we have and what they are based on. And even if there is a rough consensus on a set of basic rights, philosophers and lawyers disagree sometimes ferociously about what this consensus entails, so far as concrete applications of the rights are concerned.[11]

There is, accordingly, another sense in which we might establish a parallel between the balancing of competing rights or interests and the search for compromise. It is the meaning we commonly give to intersubjective compromises. In a classical intersubjective compromise, parties have preferences that they express and the solution of compromise results from a bargaining between preferences which don't match. Compromise, in that sense, is the result of negotiation in which at least two parties declare their readiness to be satisfied with less than their desired outcomes, both because they cannot agree on a solution to the conflict, and because a continuation of the disagreement might otherwise have severe consequences for both parties. Hence, compromises are arrived at when, in spite of the efforts of those participating to mediate and defend their position in a rationally acceptable manner, each party remains with their judgment while, at the same time, a decision must be made without further delay. A compromise is, therefore, testimony to the preparedness of each party to partially forego the full realization of their interests, even in cases where the division does not necessarily divide equally. Neither party alters its beliefs. Each party's support for the solution remains conditional on the other party continuing to advocate its conviction.

Within a multimember court of justice, when the process doesn't take place *within* the mind of the judge but *between* judges, whose moral opinion on important issues of public policy might differ radically, judges may be "compromiser trimmers", as Cass Sunstein argues. The word "trimming", he reminds us, comes from the seventeenth century Trimmers, "who tended to reject the extremes and to borrow ideas from both sides in intense social controversies." Sunstein differentiates between two kinds of trimmers: those who are *compromisers* "believing that the middle position is presumptively best, compromisers try to give something to both sides," and those who are *preservers*. These "attempt to identify and to preserve what is most essential, deepest, most intensely felt, and most valuable in the competing views."[12] Both kinds of trimmers can be said to be fair compromisers, trying to steer between poles, giving each side of the conflict its proportional due. Both might have different reasons for trimming. They might trim for strategic reasons. In the case of illegal immigrants, for example, giving immigrants' claims too strong a weight (by advising legalisation of all illegal immigrants, for example,) can reinforce racist discourse and increase the popularity of right-wing political parties. A trimming judge might, therefore, seek to minimize social conflict and its possible political negative bias. The judge might also trim for heuristic reasons when con-

11 See Jeremy Waldron, *Law and Disagreement* (Oxford: OUP, 1999), pp. 11–12.

12 Cass Sunstein, 'Trimming', *Harvard Law Review*, 122/4 (2009), pp. 1049–1094.

fronted with expertise making radically differing recommendations on the basis of differing statistical predictions on the impact of the economic and social costs of illegal immigration for the country and judging that she/he has incomplete information, she/he may avoid the extremes. "A judge who is unsure might choose the average position, on the ground that it is most likely to be right".[13] In all the cases involving trimming, judges are engaged in the search for compromise.

I will last turn to a more controversial claim. As already emphasized, we should not underestimate the fact that disagreement is almost as much at the heart of law as it is in politics. Disagreement is about what it means to call something a right or what rights we have and what they are based on. And even if there is a rough consensus on a set of basic rights, philosophers and lawyers disagree "about what this consensus entails so far as detailed applications are concerned."[14]

Clearly, the legal enterprise reflects reasons for adopting or rejecting proposals for actions, public or private, and in thus doing it aims at making the total set of laws morally coherent. Decisions of the German Federal Constitutional Court, for example, "are based on extensive, consensus-oriented discussion. [...] [W]herever views differ, extensive effort is made to find common ground and get at a decision without separate opinions, and the normal result is considerable convergence."[15]

Nevertheless, judges may disagree in their interpretation of the law and constitutional law, above all when moral convictions are at stake, and disagreement may stand out thorough exchanges of arguments. "Judges vote when they disagree and [...] many important U.S. Supreme Court cases are settled by a vote of five to four among the Justices, even when the Court is reviewing legislation and deciding whether to overturn the result of a majority vote among elected representatives."[16] The reasons evoked for justifying the majority procedure are reasons of political equality and of efficiency. Epistemic reasons are also mentioned, majority being envisioned as a way to get closer to the truth or to a well-founded position. It is, however, very questionable whether there is any intrinsic link between the weight of numbers and the quality of decisions, above all when moral convictions are at stake. On issues in which there is a possibility to acquire an expertise, an important majority among experts might well deliver a suitable indicator that contrary views can be dismissed as wrong. But, as Waldron points at, it is not at all clear that the epistemic argument can survive for cases in which there is a bare majority (five to four for example).[17]

Other procedures besides majority rule could as well be defended, which are connected to criteria of epistemic quality, for example, giving more votes to senior judges who have more experience. Or more votes to junior judges, if we think that they are likely to represent popular opinion.[18] Counting votes, all the same, leads to a 'winner takes it all' solution and, as I said earlier, when dealing with a moral issue, the minority is required to cope with a solution they consider immoral. That is particularly true regarding decisions about the abortion legislation, or about the legislation concerning research on embryos, for the parties defending a pro-live conception based on the conviction that embryos are moral persons.

The question I would like to raise, therefore, is why a compromise solution aiming at splitting the difference and trying to find a middle way between the positions should be banned? Suppose that, to take an example from David Luban,[19] half the people in a community defends an "each according to his need" view on justice and the other half "each according to his work". Each vehemently rejects the view defended by the other party. They eventually agree on a compromise solution, "each according to his work, unless his work does not suffice to meet his most basic needs. Then we keep him afloat with transfer payments". Each side considers that the compromise violates what she or he considers to be the right conception of distributive justice and sees it as being morally wrong. Nevertheless, the solution, we may argue, finds a middle position between two substantial demands. It is fairer than a majority decision because it imposes on both parties a restriction with regard to their interests, while making at the same time substantial concessions to both sides.

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Sunstein, 'Trimming'.

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Waldron, *Law and Disagreement*, pp. 11–12.

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Lübbe-Wolff, 'Cultures of Deliberation in Constitutional Courts', pp. 40–41.

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Jeremy Waldron, 'Five to Four: Why Do Bare Majorities Rule on Courts?', *The Yale Law Journal*, 123 (2014), pp. 1692–1729.

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Waldron, 'Five to Four: Why Do Bare Majorities Rule on Courts', p. 1713.

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Ronald Dworkin, Response. *90 B.U.L. Rev.* 1059, 1086 (2010). Quoted in: Waldron, 'Five to Four: Why Do Bare Majorities Rule on Courts', p. 1703.

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David Luban, 'Bargaining and Compromise: Recent Work on Negotiation and Informal Justice', *Philosophy and Public Affairs*, 14/4 (1985), pp. 397–416, p. 415.

When dealing with divisible goods or with quantifiable issues, splitting the difference sometimes offers a practicable way out of a conflict. In order to regulate the traffic in a city when the air pollution is too high, authorities might, for example, one day let in the automobiles with even number plates and the other day those with odd number plates. With regard to moral or important political issues, however, we intuitively condemn such a procedure because it lacks a foundational ground and might lead to absurd results. DWORKIN gives some examples of legislation leading to what he calls "checkerboard statutes", statutes resulting from compromises made upon the content of what is at stake on the first-order level, without recurring to any higher levelled or overarching criterion. Imagine if the people of Alabama disagreed about the morality of racial discrimination and had a law that permitted discrimination in restaurants but not in buses. It would give something to each side of the claimants and each body of opinions would be equally represented for equality's sake. As in the case of automobiles, the compromise suggests a fair principle of distribution of an item, as if it were a quantifiable commodity to be distributed equally.[20] On the same line of thought, we could imagine in the matter of abortion that the legislation would forbid abortion only for pregnant women who were born in even years. It would treat a moral issue according to a bare quantitative standard, bracketing what is at stake.

"If there must be compromise because people are divided about justice"—Dworkin argues—"then [...] it must be compromise about which scheme of justice to adopt rather than a compromised scheme of justice." In other words, in order to be acceptable, a compromise should be grounded on a shared principle. Notwithstanding the question whether such a compromise can still be named as such, it cannot be excluded, although even among experts there is no shared view on which scheme of justice should be adopted. Dworkin's argument against 'splitting the difference' is that this form of internal compromises hurts our expectation, according to which the system of law should satisfy the principle of integrity. According to Dworkin, "Checkerboard statutes are the most dramatic violation of the ideal of integrity"[21].

Dworkin's principal argument in defence of 'law as integrity' is that we want to understand what the justification is behind a normative code infringing the scope of our liberty. We want to make sure that what is allowed today will not be outlawed tomorrow out of an arbitrary logic. Laws must be predictable for comprehensible and acceptable reasons. The justifiability must work in both directions, backward as well as in the prospect of what we intend to do. This requirement, according to Dworkin, is expressed in the notion of 'equality before the law': similar cases are to be treated similarly, according to a well-grounded justification. "Integrity is flouted [...] whenever a community enacts and enforces different laws each of which is coherent in itself, but which cannot be defended together as *expressing a coherent ranking of different principles of justice or fairness or procedural due process*."[22]

Keeping this assertion in mind, we may be surprised that on another occasion Dworkin is not troubled by the fact that the American Constitution grants states sovereignty over internal legislation on the death penalty. The different treatment of the convicted resulting from federalism, in Dworkin's view, is grounded on a higher-order decision on the division of power between the national level and the state level.[23] Accordingly, the solution is no checkerboard solution. From a moral point of view, however, it means that the principle of federalism operates as a higher-order principle that trumps a human right to be treated equally before the law. If we believe Dworkin, "[T]he Supreme Court relies on the language of equal protection to strike down state legislation that recognizes fundamental rights for some and not others."[24] A citizen from Texas, however, doesn't enjoy equal protection from being 'legally killed' by the state if he is proven guilty of murder. For those radically opposed to capital punishment, federalism doesn't offer a better *moral* justification for tolerating a violation of a core value than a quota solution would do by limiting the number of executions to slightly under the yearly global average in the United States.

20 Dworkin, *Law's Empire*, p. 178.

21 Dworkin, *Law's Empire*, p. 184.

22 Dworkin, *Law's Empire*, p. 184. I underline, VZ.

23 Dworkin, *Law's Empire*, p. 186.

24 Dworkin, *Law's Empire*, p. 185.

Coming back to the question of abortion, the point I want to make is this: the very understandable requirement for a commonly acceptable justification of new legislation aiming at the coherence of the body of laws doesn't explain Dworkin's radical ban on compromises in normative issues.[25] When what is at stake is precisely which scheme of justice should be adopted, a common value doesn't remain available. In that case, the parties have to agree upon a procedure for solving the problem. They may choose to take a vote. But they may also go for a compromise, since it offers a fairer solution than the 'winner-take-all' formula. Splitting the difference needs not necessarily be as absurd as to forbid abortion only for pregnant women who were born in even years. We could imagine instead a system of quotas for abortions, establishing a maximum number each month, which is statistically slightly lower than the average of abortions in the previous years. From a consequentialist as well as from a deontological point of view, if the criterion for exemption results in even a slight reduction in the number of abortions, it may offer a valuable justification for the persons defending the intrinsic value of human life from the moment of the nidation on. It may offer an acceptable justification as well for those who defend women's right to decide, unconstrained, about their bodies if the criterion helps to contain the interdiction of abortion within some limits. Moreover, as already stated, the criterion satisfies the requirement of fairness, in that it gives each side of the conflict a roughly equal share of control over the decisions made by parliament or congress.

My argument is that, for pro-life defenders, the quota solution is not *morally* worse than a solution authorizing abortion during the first trimester of pregnancy. Indeed, for those considering that life begins with nidation, abortion represents as much an attempt on human life in the second month as later on. Accepting the 'time phase' solution is tantamount to accepting that murder be legally authorized. From the point of view of *their moral conviction regarding the embryo*, it doesn't make a difference if the selection is made on the basis of a prescribed time for lifting the interdiction or on another criterion. It does make a difference with regard to other considerations. It does make an important difference, for example, if we consider that exceptions should be made in case of rape. It also makes a difference with regard to our well-grounded expectancy that the system of law should be predictable and allow us to plan our life. A quota solution would introduce an element of arbitrariness in an important dimension of our life. These considerations, however, do not concern the moral conviction itself. They impose, at most, side-constraints for asking if the compromise should be taken into consideration.

Regarding the German legislation on abortion, the solution doesn't satisfy the requirement of the doctrine of proportionality. For those who consider that embryos are persons, the infringement of the embryo's right to life permitted by the time phase solution doesn't fulfil the requirement of justice. Indeed, those whose rights are being violated cannot be compensated and no justification for the infringement of their basic right can be given. Moreover, we may have some doubts that the solution fulfils the requirement of integrity either, if we consider the commitment of constitutional law to the dignity of the individual, a commitment extended explicitly to embryos.[26] However, it can be argued that the compromise solution offers a good, *pragmatic* solution to an unsolvable moral conflict.

I don't want to argue that a compromise introducing a quota solution is a morally good solution. Splitting the difference certainly cannot offer a general strategy for resolving differences over principles. It would be a repulsive idea to systematically entrust logarithms with the function to decide upon issues of ethical and social importance. Imagine, for example, "a legislative structure that would produce compromise statutes mechanically, as a function of the different opinions [...] among the various legislators".[27] But that is the wrong way to formulate the problem. Whenever dissensions about justice can be solved through a consensual decision, consensus should be aimed at. Internal compromises must remain a last option when no consensus is hoped for. In the absence of shared

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When speaking of compromises, I refer to what Dworkin terms 'internal' compromises, namely compromises which are not grounded on common principles, whatever this last notion exactly means.

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The 1975 justification makes it explicit: "The life which is developing itself in the womb of the mother is an independent legal value which enjoys the protection of the constitution" (Article 2, Paragraph 2, Sentence 1; Article 1, Paragraph 1 of the Basic Law). The 1993 decision confirms: "The Basic Law requires the state to protect human life, including that of the unborn. [...] Even unborn human life is accorded human dignity." BVerfG 39, 1 ff (1975); E 88, 203 ff. (1993).

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Dworkin, *Law's Empire*, p. 182.

principles, people may postpone the decision on the level of the procedure and decide to toss a coin, to recur to a majority vote or to go for an internal compromise. In that case, the decision is grounded on the very fact of the irreconcilable disparity between conceptions of justice.

Verhältnismäßigkeit und Kompromisse

Individuelle, zumal konstitutionelle Rechte geraten gelegentlich in Konflikt mit anderen Rechten oder einem öffentlichen Gut. In solchen Fällen erwarten wir von Richtern und Politikern, die in Legislative oder Rechtsprechungsverfahren verwickelt sind, dass sie eine Abwägung vornehmen. Sie haben darauf zu achten, dass die Gewinne aus der Sollerfüllung den daraus entstehenden Verlusten für die beteiligten Parteien die Waage halten. Juristen sprechen im Blick auf diesen Abwägungsprozess von der Wahrung des Verhältnismäßigkeitsprinzips.

Im Verhältnismäßigkeits-Kalkül müssen sowohl Richter als auch Politiker, die in legislative Prozesse involviert sind, einschätzen, ob das öffentliche Ziel, das mit dem Staatshandeln verfolgt wird, die Auswirkungen auf die Rechte von Individuen überwiegt oder nicht. Dabei treten unweigerlich Konflikte zwischen Rechten auf, zumal solche zwischen individuellen Grundrechten und dem Allgemeinwohl.

Ich argumentiere, dass dieser Abwägungsprozess dem Prozess der Kompromissfindung ähnelt. Genauer gesagt stellen Kompromisse einen Sonderfall des Verhältnismäßigkeitsprinzips dar – und in manchen Fällen ist das Verhältnismäßigkeitsverfahren selbst ein Kompromissfindungsprozess.