CENTER FOR INTER-LEGALITY RESEARCH

Working Paper No. 07/2021

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The Inter-Legality Working Paper Series can be found at

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Interlegality and Proportionality

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ABSTRACT: Balancing is closely related to paradigmatic cases of interlegality. This close relation between interlegality and balancing will be presented and discussed availing myself of two distinctions. One concerns implicit and explicit uses of balancing. The other refers to a contextual difference: multilevel settings on the one hand, and more horizontal constellations on the other hand.

I will first provide a brief word on how interlegality and balancing are rather congenial as they share the aim of considering all relevant reasons for a decision. Then, I will gather a working conceptualization of balancing in practical reasoning on the one hand, and proportionality assessments and other balancing models as its (more or less) standardized institutionalizations in legal reasoning on the other hand. It is on this basis that I will propose a distinction of two possible situations of intertwined legal orders (i.e., multilevel settings and other more horizontal constellations) which lead to balancing norms sourced in the different legal orders involved. I will then point out three of the core challenges related to the notion of interlegal balancing: the nature of jurisdictional collisions and competence norms, the comparability of norms sourced in different legal orders, and possible criteria for weighting and balancing across legal orders. I conclude with a summary and open questions.

KEY WORDS: Proportionality, balancing, standards of review, levels of scrutiny, Solange jurisprudence, conditioned primacy, regime collisions, law beyond the state

* PhD candidate at Scuola Superiore Sant'Anna. E-mail address: g.encinasduarte@santannapisa.it. This work builds upon the valuable discussion on July 9, 2020 regarding my presentation of a broader take on "Interlegal Balancing", as part of the webinar series in the Center for Interlegality Research, as well as Wei Feng's insightful reply paper. It has also particularly benefitted from the valuable feedback of Profs. Gianluigi Palombella and Edoardo Chiti for whose comments I am grateful. All the remaining errors are my sole responsibility.

Introduction

Balancing is closely related to paradigmatic cases of interlegality. In an important share of (judicial or otherwise) cases of "multilevel" settings such as the European legal space (or, e.g., the Inter-American and the UN systems for the protection of human rights), a review in terms of a structured proportionality assessment is prevalent regarding the decisions and norms of their member states. In a broader sense, in constellations emerging from the interconnectedness of certain subject matters, balancing characterizes the considerations on the applicability of norms sourced across different legal orders, legal regimes, or legalities.

This close relation between interlegality and balancing will be presented and discussed upon two distinctions. One refers to a contextual difference: multilevel settings on the one hand, and more horizontal constellations on the other hand. I will now briefly anticipate a related conceptual and linguistic choice on this point. "Multilevel" (also called "vertical") are two or more legal orders found in a situation of overlap owing to an intentional design.[1] This design provides them with a more "stable" quality in their relations in the sense of being reciprocally predictable and controllable through the subjects and officials of each legal order. Other constellations (including more "horizontal" relations, in the sense of having no presumption of primacy or a unified catalogue of "sources") are found in those legal orders which find themselves in a situation of overlap in lieu of an intentional design, owing instead to the dynamics and circumstances from "external" legal affairs, legally sensitive externalities,[2] transnational subject matters, or the like. I understand both contexts as equally important and as forming the broadest classification of interlegal situations.

Another distinction will be introduced as a step towards ordering the structural heterogeneity of balancing. It concerns three-tiered "structured" proportionality assessments, and other related standards of review. For this, I will consider both implicit and explicit uses of balancing. This way, an important premise of this paper is that, while interlegal cases may explicitly incorporate either proportionality assessments or other balancing methods as part of

[1] To be sure, this institutional design may leave certain matters (e.g., on authorities entitled to the so-called "final say") open, disputable, or otherwise complex enough to allow for *nearly unconditional* primacy in the decisions from certain legal order – unless e.g., defeated by fundamental constitutional reasons. For this formula of "nearly unconditional primacy" in the European Union, see (Borowski, 2011).

[2] See (Kumm, 2016), esp. at p. 244 and *ff*, on "justice-sensitive externalities" as cases where "outsiders may be affected in a way that raises concerns about whether their interests have been appropriately taken into account or whether others have unjustly burdened them" (p. 245).

their reasoning, balancing more generally can be found implicit in the categories and thresholds which serve as interfaces between different legal orders.

I will take the following steps. First, I will provide a brief word on how interlegality and balancing are rather congenial as they share the aim of considering all relevant reasons for a decision. Then, I will gather a working conceptualization of balancing in practical reasoning on the one hand, and proportionality assessments and other balancing models as its (variably) standardized institutionalizations in legal reasoning on the other hand. On this basis, I will propose a distinction of two possible situations of intertwined legal orders (i.e., multilevel settings and other more horizontal constellations) which lead to balancing norms sourced in the different legal orders involved. I will then point out three potential and open challenges related to the notion of interlegal balancing: the nature of jurisdictional collisions and competence norms, the comparability of norms sourced in different legal orders, and possible criteria for weighting and balancing across legal orders. My aim will be to delimit the scope of these challenges or objections. I conclude with a summary and open questions.

From the beginning, I must call attention to how interlegality and proportionality/balancing are, each in their own rights, remarkably complex and comprehensive fields of inquiry into current and emerging legal phenomena. In this light, the present work aims at a concise indication of a point of departure for further research which may hopefully be found interesting and plausible, thus disavowing a claim to presently sustain and demonstrate the only correct interpretation of such concepts and their practices, or a rebuttal of its potential and open questions.

1. Interlegality and weighted reasons

Interlegality insists on the *composite* legality which applies to affairs in our pluralized era, and to do this, it shifts our focus into cases at hand.[3] A case at hand is, among other things, a perspective which reveals straightaway how norms of several legal orders bear simultaneously on important and even fundamental *legal relations* (our rights and obligations in the broader sense).[4] To mention but the most evident examples, many human rights are vested with positive

[3] See the characterization of law as *composite* in (Palombella, 2019 p. 375 and *ff*; esp. at 379): "In a determined venue, the law surfaces as the composite legal nature of the issue under scrutiny. […] Such an operation […] should look instead to the potential *justice-related* function that belongs to things […]".

[4] A legal relation typically involves institutions able to authoritatively ascertain and enforce obligations – but see (Pavlakos, 2020) for an argument on how the interaction of autonomous agents already instantiates a legal relation

legal recognition and specifications across national, international, and regional legal orders at one and the same time; it is difficult for business, technology, and information to be delimited into one national legal order; and the nature of matters such as climate change, natural resources, migration, health, or the economy is inevitably transnational.

Since some decades, such a condition is the new normal from a legal perspective. Despite this recurrent regularity of composite legality, traditional legal doctrines such as *monism*, *dualism* (and even certain more recent varieties in *global constitutionalism* or *global legal pluralism*) presuppose an exclusionary "tunnel vision".[5] This, in the sense of assuming a system-bound delimitation of applicable norms and arguments lying "outside" or "beyond" the legal orders which form the object of such doctrines (regardless of whether these are "one, two, or many" legal orders).[6] The autonomous and self-enclosed character of each legal order becomes a criterion taken for granted, even at the cost of substantive justification. However, the autonomy or "self-enclosed" character of legal orders is not a basic fact beyond dispute but depends instead on normative arguments on behalf of serving the important values of legal certainty or predictability (generality, clarity, publicity, non-retroactivity, *inter alia*). This is why an exclusionary "tunnel vision" falls short, by its own lights, of serving a more complete and possible legal justice that accounts for all the legal norms which actually apply to a case and which are expected (or foreseen) by all those who find themselves subjected to plural authorities.

Interlegality involves an epistemic shift towards taking into account all such relevant legal norms, "considering the reasons and ideas of justice embedded in conflicting legal claims" (Klabbers & Palombella, 2019, p. 4). In this sense, interlegality looks at the intertwinement of legal orders as offering different reasons which contribute for an all-things-considered legal decision. This difficult task is congenial to balancing, understood broadly as an argumentative

(non-institutionally). If sound, both dimensions (institutional and non-institutional) surely interact in our legal relations.

[5] On the "tunnel vision", see Shany (2019). Global constitutionalism and (global) legal pluralism admit of more "radical" and more "moderate" conceptions. It is possible to match, in terms of a "scale", the considerations on interlegal balancing as here presented with an argument on behalf of recasting the moderate versions of these current theories:

"Radical pluralism"	**"Moderate pluralism"**	**"Moderate constitutionalism"**	"Radical constitutionalism"
No hierarchy between legal orders		Hierarchy (presumption)	Hierarchy (absolute)
Subsumption	Balancing		Subsumption

I have taken some initial steps in this direction in (Encinas, 2020). However, here I will otherwise set aside this broader argument, focusing directly on the contexts which are conducive for interlegal balancing.

[6] This formulation derives from the title of David Kennedy's (2007) article ("One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream").

form for justifying a legal decision and incorporating different contributory reasons, or those which outweigh other colliding reasons.[7] This paper may only attempt a theoretically minded stocktaking of the situations and challenging questions which follow from this intuition, to introduce the notion of *interlegal balancing* as a general framework.

Notwithstanding the prospective character of this paper, it must be stressed that interlegal balancing, especially in proportionality assessments which "incorporate" legal norms sourced in different legal orders, is both a fact and a salient legal practice. That said, the key question here asks what it may mean to "incorporate" these norms of diverse origins.[8] The scope of possible answers on this "incorporation" ranges from mere enunciation as a fact, through serving as argumentative or comparative "inspiration", making normative claims of different strength, until being recognized as applicable or valid, even overriding other considerations. This has the closest relation to the open variety of balancing uses and models for interlegality.

2. Balancing

Although this topic may only be touched upon, we benefit from a working conceptualization on balancing as the more general type of practical reasoning, and proportionality assessments and other balancing models as its institutionalizations in legal reasoning (although the latter are certainly found at variable degrees of "standardization"). Balancing is the broader concept. In this broader sense, it is prevalent even beyond legal theory, in practical reasons directed at what one ought to do, such as when one "balances" the pros and cons of a decision or when comparing two distinct items or courses of action.

This general meaning of balancing in practical reasoning can be contrasted with subsumption, or syllogistic reasoning. Subsumption refers to the question of the applicability of a particular (factual) instance within the scope of a general norm.[9] A collision of different

[7] See a broad characterization of balancing along these lines in (Hage, 2017, p. 99). An objection holds that balancing is no more than an argument on the full priority or applicability of one norm over the other(s). See a recent statement in (Martínez-Zorrilla, 2018, p. 174). However, a conciliatory dimension between colliding reasons or norms may well be justified through balancing: "[…] the principle left aside can be used as a reason to justify the formulation of explicit exceptions to the norm which is the product of balancing, or as a reason to consider non-constitutional only a part of the set norms that can possibly be the object of the constitutional review." (Sardo, 2012, p. 70); *cf.* (Scoditti, 2017, pp. 188 and *ff.*)

[8] I thank prof. Edoardo Chiti for pointing me to the salience of this question here.

[9] "General" here only implies that a norm is "generic", "impersonal", and applying to more than one individual instance; it does not require neither a more abstract nor a more concrete scope of application of the norm (as per what I will here term a "norm-taxonomical" conception of balancing).

general norms is thus not a typical question of subsumption as a mode of reasoning.[10] Instead, it is balancing which directs us to strike a contrast between two or more colliding reasons which entail different courses for action.[11] In its turn, within legal reasoning, one may distinguish among the main types of argumentative models which involve balancing.

While certain legal orders have developed their own versions of balancing (or functionally equivalent standards of review), most have adopted a version of proportionality structured around three main successive stages.[12] The three stages require assessing: (1) the suitability of chosen measures to promote legitimate ends; (2) necessity, i.e. choosing the less restrictive means or least damaging alternative; and (3) proportionality ("in the narrower sense") of the interference vis-à-vis the importance of the prevailing norm. A four-stage model distinguishes a previous stage concerning the legitimacy of the aim or ends to be promoted.[13] Balancing takes place mainly in the last stage; namely, "proportionality in the narrower sense", judging whether the intensity of an interference is akin to the degree in which another norm or value is protected. This argumentative framework frequently, but not necessarily, has basic rights and the justification of their restrictions as its object of scrutiny.

Balancing may also refer to a broader camp which includes a balancing of interests (personal and governmental) developed in the USA.[14] Among other possible models, one may also point here to the *reasonableness* tests prevalent in common law jurisdictions.[15] The latter

[10] However, as (Alexy, 2003) points out, collisions of norms may be solved either through a "meta-subsumption", or through balancing. With "meta-subsumption", Alexy refers to deciding the applicability of one of the "rules" or maxims of precedence: *lex superior*, *lex posterior*, or *lex specialis*. Now, a decision among those maxims is necessary, and whether this resembles (meta-)subsumption or balancing, however, is an open question. In any case, it should suffice here to note that this is not the "typical" function of subsumption but is more like a case of exception.

[11] One could recall the discussion of *prima facie* duties in (D. Ross, 2002 [1930]), but certain similar elements also may be found in other characterizations of practical reasoning, e.g. in (Taylor, 1985) who described its contrastive character, or complementarily to (Aarnio, 1987) who posed a *teleological* note across practical reasoning in terms of choosing means for relevant goals. More recently, a compelling argument has been raised for the inclusion of "weighted" reasons (in contrast to "all things considered" judgments) in practical reasoning in (Lord & Maguire, 2016). See also the account of balancing in general practical reasoning provided in (Sieckmann, 2012,. pp. 49 and *ff*); *cf.* (Moller, 2012, pp. 715–716).

[12] See generally, including contrasts between "German proportionality" and "American balancing", the overviews in (Stone Sweet & Mathews, 2008); (Cohen-Eliya & Porat, 2011); (Barak, 2012); (Jackson, 2015); *cf.* (Duncan Kennedy, 2011).

[13] One of the reasons that proportionality assessments are delimited upon three stages is that the stage of legitimacy may be presupposed. However, (Kumm, 2007, pp. 143-148) gives special importance to this stage to incorporate a threshold of *excluded reasons* such as those which do not promote public reasons (such as religious justifications). A different emphasis is presented in (Barak, 2012, pp. 530-533) who proposes to incorporate a "threshold" at this stage of a "compelling" or "pressing" public interest. *Cf.* (Alexy, 2017, pp. 19-20) for a critique of the latter.

[14] See (Duncan Kennedy, 2011).

[15] Besides the overviews in note 5, see *inter alia* (Aleinikoff, 1987) and (Schlink, 2011) on the balancing doctrines developed in the USA; (Petersen, 2013) and (Borowski, 2013) on the comparison of balancing proportionality and

employs a threshold of *reasonableness* which may aim at reducing the stringency of (judicial) scrutiny. Indeed, a common notion is that the "structured" version of proportionality assessments as stated above tends, in turn, towards an elevated level of scrutiny of decisions by other authorities. This consideration is especially relevant when the threefold structure of proportionality assessments, as employed during the review of restrictions to fundamental rights, is compared with other standards of review which are either structurally delimited (e.g., to assess only the necessity of a measure but not its proportionality), or with a lower level of scrutiny (e.g. when only taking into account that certain measures are not overly disproportionate or so, instead of optimally proportionate). However, one should also mention that proportionality assessments structured upon the three stages may also incorporate different levels of scrutiny. Nothing impedes "proportionality in the narrower sense" to be delimited, e.g., into only looking at the plausibility of a decision instead of looking for the optimal decision.[16] For this purpose, institutional design may establish adequate categories, bearing for example in the relation between the parliament and the judiciary.

Another relevant assumption will be that different balancing models are independent of the question whether basic rights are structured through strict rules, or through flexible principles (or other types of norms).[17] This choice depends on substantive practical and legal arguments.[18] Relatedly, nothing in the structure of norms necessarily precludes balancing rules (e.g. in cases of defeasibility, especially owing to countervailing fundamental principles or values), or subsuming principles.[19] This latter point represents a challenge for the eminent

English *Wednesbury* reasonableness assessments; (Veel, 2010) highlighting the similarities between proportionality and the Canadian (*Oakes*) variant of reasonableness assessments; (Stone, 2020) distinguishing the Australian variant of reasonableness assessment. See also (Stelzer, 2018); (Crow, 2019), critically contrasting the diffusion of proportionality assessments with the different senses of proportionality in international law; *cf.* more optimistic accounts in this context in (Peters, 2017a); (Cottier et al., 2017); (Rauber, 2018).

[16] On proportionality and the development of different levels of scrutiny see (Rivers, 2006); (Barak, 2012, p. 509 and ff); (Fahner, 2018, pp. 190-192). See further (Klatt, 2015b) and (Borowski, *manuscript*) with different models to incorporate different levels of scrutiny within proportionality assessments. This way, limited review may be achieved under proportionality (just as other models of balancing or related standards of review may develop a strict scrutiny in turn). (Kennedy, 2018, pp. 47-53) proposes a comparable model, at least insofar as he recommends assigning a variable "weight" to "deference" as a consideration to be incorporated with the balancing of substantive principles.

[17] This is recognized *inter alia* in (Alexy, 2003, pp. 131-132): "There are two main constructions of constitutional rights: one is narrow and strict, a second, is broad and comprehensive. The first of these can be called the rule construction, the second, the principles construction. These two constructions are nowhere realized in pure form, but they represent different tendencies and the question of which one of them is better is a central question of the interpretation of every constitution that provides for constitutional review".

[18] Paradigmatic in this regard is the constitutional protection of human dignity. While the stringent formulation in the German constitution has merited its characterization as an *absolute right*, in other legal orders this right has been recognized as a framework (or an implicit one).

[19] Among others holding this view, see the concise exposition in (Martínez-Zorrilla, 2018, pp. 178-180) citing the example of free speech as a principle which is applied by subsumption in a case where no conflict is apparent, as

conception of balancing developed by Robert Alexy,[20] as this conception builds a strict dichotomic taxonomy of norms (either rules or principles, *tertium non datur*) into its theoretical premises.

Certain conceptions of balancing oriented upon this dichotomy aim at deflating cases of mismatch between normative typology (every norm is either a rule or a principle) and the basic operations of legal reasoning (subsumption or balancing). To maintain that only principles can be balanced (and therefore rules may only be subsumed), the claim has been introduced that in such cases one never balances rules but only their background principles. This raises the question of how (and which) rules and principles connect with each other. Here, however, is not the place to rehearse the related difficulties around the different revisions Alexy has introduced in the concept of principles.[21] Instead, I will only recall the heterogeneity of principles in law beyond the state,[22] as well as the plausibility of an alternative point of departure: the distinction in legal reasoning of subsumption and balancing (instead of the strict and binary taxonomy of norms).[23]

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in a physician describing the main symptoms of the flu. A question which remains open is a separate, normative one; namely, whether and how balancing *should*, in the light of certain (formal) values, be restricted for more open-ended norms or in absence of exact rules, or so.

[20] Owing, no doubt, to the remarkable diffusion of Alexy's theoretical system, balancing is regarded in some disciplinary circles as a "gateway" not only to his theory of principles but also towards his broader non-positivist legal philosophy. This subject lies far beyond the scope of the paper so I will limit myself to state my assumptions in this regard, leaving their discussion for another occasion. The application of balancing (or its alternatives) cannot determine by itself a choice between varieties of legal positivism or non-positivism. This may only follow at a further step, from the theoretical explanation for the question on the standards of objectivity for the different premises in balancing.

[21] (Sieckmann, 1990, p. 65) has convincingly argued from within Alexy's own framework that legal principles as "optimization commands" are applied as rules. This occurs when a legal principle may only be either applied or not, like rules. Accepting this objection, Alexy introduced a further distinction: between the command itself on the one hand and its object on the other hand. The latter is an "ideal ought" to be optimized in the case of principles. Given that this presupposes that principles are a type of rules, to then argue for the specificity of their object, it becomes unnecessary to retrace the arguments regarding the "ideal ought" of norms to see that this does not ground a strict dichotomy between rules and principles. See the account of the extensive exchange with Robert Alexy in (Poscher, 2020).

[22] See e.g., Goldmann (2014), positing a taxonomy of principles in international law into "general principles of law" (as recognized in Article 38(1)(c) of the Statute of the International Court of Justice), "doctrinal general principles", "guiding principles", "emerging principles", and "structural principles". *Cf.* Rauber (2018, pp. 207-228), defending the applicability of Alexy's strict distinction between rules and principles against a series of objections, although relying on the "inversion thesis" (holding that principles function as reasons for rules), ultimately explaining rules (and principles) in light of balancing.

[23] See (Sieckmann, 2012, esp. at p. 11 fn 39): "[…] the distinction between rules and principles on which it [balancing] is based seems to be artificial with regard to the diverse uses and connotations of these terms, and without any clear relation to the characteristics of normative arguments that figure as reasons in balancing. […] The following analysis will distinguish between normative arguments, judgements and statements, leaving aside the discussion of rules and principles." See also a comparison with the principles theory of Alexy in (Sieckmann, 2013). One may as well employ a finer-grained normative typology, such as e.g., the one proposed by (Atienza & Ruíz Manero, 1998), and still account for the relevance of balancing.

This way, the unavoidable question in this regard concerns how might either subsumption or balancing be suited or unsuited depending on a given context of reference.[24] In other words, unanchored from the strict dichotomy of norm types (either rules or principles), how can we discern an appropriate instance of balancing from an undue exercise of discretion? On the one hand, my intuitions join those who conceive the appropriateness of balancing upon the following three pragmatic types of hard cases: (1) in absence of a subsumable norm, (2) in a contested presence of such a subsumable norm, or (3) even where such a norm is present but also in presence of conflicting values recognized by the involved legal order (or orders).[25] On the other hand, I remain aware that this move relocates the question on the appropriateness of balancing, especially regarding the identification of axiological gaps. However, this seems to be a necessary point of departure if we aim to integrate explanations on the defeasibility of rules with balancing as a general type of practical and legal reasoning.

Therefore, as a working conceptualization, balancing will be taken as a general type of practical reasoning which differs to subsumption, or syllogistic reasoning. Balancing of this general sort may also take place "implicitly", at the justificatory level of legal reasoning, (e.g. in drawing legal categories).[26] It does not require a particular label by a given legal system or legal theory. Balancing in this general sense also serves an explanation for the contrastive reasoning undertaken in examining the reasons which justify or not introducing an exception into a rule[27] – even if this may be conceptualized in terms of defeasibility, "axiological gaps", or application discourses.[28]

This way, proportionality assessments and other balancing frameworks and comparable standards of review for legal reasoning count as specific cases of balancing in practical reasoning. These are explicit instances of balancing. And yet, they display a variety of uses in legal reasoning, especially in our focused sense of interlegal balancing (i.e., taking norms sourced in different legal orders into account). Owing to their contextual and institutional background, balancing as employed by a constitutional court may often not be structured the

[24] I thank prof. Gianluigi Palombella for pointing out the relevance of this question in this context.
[25] This threefold typology adapts (Atienza, 2010, p. 54)
[26] An instance of implicit balancing is a point of issue in the question of drawing limits of fundamental rights (the "internal" and "external" theories on the limits of fundamental rights, in the terms of German legal dogmatics). See the related discussion in (Scarcello, 2020, esp. at p. 14), on the often "hidden" nature of balancing, relating the matter on the limits of fundamental rights with creating legal categories.
[27] See (Hage, 2017).
[28] On defeasibility, see especially the overview in (Bäcker, 2010). On defeasibility and "axiological gaps", see (Guastini, 2010). On the distinction of justification discourses and application discourses see (Günther, 1993); *cf.* (Bustamante, 2006, esp. at p. 89) remarking how application discourses and balancing seem to be interchangeable.

same as the review undertaken by an arbitral tribunal. To formulate this more clearly, two main constellations of interlegality will now be proposed.

3. Contexts of interlegality

As anticipated, two main contexts bear upon the type of balancing which may be performed in cases of interlegality. One may be called *multilevel* or *vertical*.[29] It refers to the presence of a presumption of primacy (hierarchy) between different "levels" of legal orders, through the question of applicable norms (and potentially also regarding a more or less harmonized catalogue of sources of law). An approach oriented on hierarchy has been traditionally applied to the relations between the national and the international legal order. Today, a similar concern counts as a point of departure to characterize the relations between the legal order of the European Union (EU) and those of its Member States, as well as those between the EU legal order and international law. As it has been widely noted, the *Kadi* judicial saga paradigmatically set such questions on primacy at the forefront.[30]

The other constellation may be called *horizontal*. In this case, a case at hand presents no clear presumption of primacy (hierarchy) – at least not in the same *ex ante* sense. Along these lines, a case of interlegality may involve the legal orders of two different states, the legal orders of different special regimes of international law, or even other formats of legality beyond the state.[31]

[29] As here proposed, the two contexts of interlegality (multilevel and horizontal) are not to be confused with the threefold classification of proportionality into "vertical", "diagonal" and "horizontal" versions as presented in (Peters, 2017a).

[30] This complex saga concerned the listing and freezing of assets in virtue of resolutions form the United Nations Security Council and implementing regulations in the European Communities / European Union, regarding Yassin Abdullah Kadi (suspected of links with al-Qaeda). While its literature is challenging to overview, see the proposal in Avbelj & Roth-Isigkeit (2016), with further references. It knew four rulings (and related opinions) which are the subject of much discussion and nuance. The first was provided by the then Court of First Instance (Case T-315/01, Kadi v. Council & Commission, 2005 E.C.R. II-3659) granting primacy to the UN system but recognizing the possibility of its defeating due to the violation of *jus cogens* norms (which was not found to be the case). In appeal, the European Court of Justice (Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council and Commission, 2008 E.C.R. I-6351) overturned the contested implementing regulation, highlighting the European legal order as autonomous from international law and as particularly bound by its fundamental principles including the respect of human rights and the rule of law (stylizing these as internal principles, and also setting aside the issue of the lack of legality of the original resolution for being part of a separate legal order). This was followed by a new implementing resolution, its contestation, and a ruling from the General Court (Kadi v European Commission (T-85/09) [2010] ECR II-05177 (General Court)) which found grounds for reviewing the effective judicial protection under the Security Council's procedures ("so long as the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection", ¶128). This judgment was appealed and confirmed by the CJEU (C-584/10 P, C-593/10 P and C-595/10 P, 18 July 2013), especially in the conditional ground for review.

[31] See e.g. (Pulkowski, 2014, esp. at pp. 329 and *ff*).

3.1. Multilevel settings

Within multilevel settings, two different uses of interlegal balancing may be further distinguished. One is the employment of proportionality assessments by international courts and other adjudicative organs as part of their review of the legal decisions by national authorities and courts. Certainly not without raising important questions on doctrines regarding "deference" such as the *margin of appreciation* or the intensity of review upon certain issues,[32] this use is otherwise relatively continuous with the more familiar practice of proportionality in judicial review within a national legal order.[33] Here, questions of primacy and the applicability of different norms remain in the background – foregrounded are three main *loci* of discretion.[34] One is the margin of choice among different possible means for reaching set goals. (For example, given the goal of protecting health, which measures should be taken in airports and screening methods?) Another refers to the "culturally" or otherwise contextually variable scope and means of protection assigned to different human rights and other values across different polities.[35] (For example, whether and to which extent may some countries assign a higher value to health in the previous sense, and others assign a higher value to intimacy or other freedoms.) Finally, discretion is salient in the empirical expertise related to the subject matter of hard cases. How certain are the empirical premises in certain measure? Which risks do they entail? (To continue our example: in the efficacy of certain screening methods, or the probability of an expected outcome, a greater margin of error tempers the disposition to adopt intrusive measures).

Interlegality is streamlined in a different argumentative employment of proportionality. Given that multilevel settings are characterized in terms of a presumption of primacy, balancing may feature as the explanation for defeating this presumption owing to substantive claims of justice. Still, such balancing may be either explicit or otherwise remain

[32] See (Fahner, 2018, pp. 197-198) noting how these different standards of review are often conflated, adding to the difficulty of defining them precisely.
[33] In this sense, (Cottier et al., 2017, p. 634).
[34] See (Rivers, 2007, esp. at pp. 114 and *ff*) who identifies these three types of discretion as "policy-choice", "cultural", and "evidential", respectively. Interpretation always involves some exercise of discretion, especially under a conception of interpretation as ascribing meaning to a text, and thereby choosing among the possible norms which can be derived from a normative sentence. Arguably, the issue here goes beyond interpretation and enters the creation of new legal normative sentences and norms. See the concise distinction between "interpretation strictly so called" and "legal construction" (including "the specification of principles") in (Guastini, 2015: §§1.1-1.2). In a different regard, these *loci* of discretion need not concern competences shared among legal orders (in contrast to the sort of "interlegal balancing" which is related to the review of *ultra vires* decisions, as mentioned *below*, in this section, under "c").
[35] See in turn (Clérico, 2020) for an overview on how the *margin of appreciation* doctrine has been disavowed in the Inter-American human rights system.

implicit, as a more general framework. To see this, it is helpful to take stock of how case-law and the literature on the conditional primacy of the EU over Member States' laws point out three main categories which may defeat its presumption of primacy.[36] These are: (*a*) the protection of constitutional rights, (*b*) safeguarding constitutional identity, and (*c*) the review of *ultra vires* acts.[37]

Regarding the protection of constitutional rights (*a*), paradigmatic is the so-called *Solange* jurisprudence of the German Federal Constitutional Court (GFCC). As long as there was no precise catalogue and protection of constitutional rights as provided by the German constitution, the European level would remain subject to review by the GFCC.[38] It has been held that this conditional recognition of primacy instantiates a preference relation of the sort that balancing arguments strike.[39] However, balancing occurs at a limited level. The crucial point where balancing is necessary is to justify a threshold on the level of protection of constitutional rights. This follows more generally the logic of categorization: balancing is necessary to set certain conditions which once in place may be subsumed.[40] In our case, once determined, and if found adequate, this threshold on the protection of fundamental rights is applied syllogistically (subsumed): either the threshold is met or not, and this entails whether the presumption of primacy holds or whether the acts are reviewable.

Regarding the safeguard of "constitutional identity" (*b*), we find a similar structure. Balancing becomes necessary to establish a scope of application and a degree of interference with constitutional identity. Once settled, this threshold serves as a standard to be subsumed. To be sure, this leaves open the key question on what the correct understanding of constitutional identity is. The concept tends to overlap with the issue of the protection of constitutional rights, and perhaps in an especially acute manner, with the converse issue of *constitutional commitments* entailing restrictions to rights (as well as policies more generally). Further adding

[36] It is especially important to note the high threshold which this presumption of primacy enjoys. See especially (Borowski, 2011) who speaks of "nearly unconditional primacy".
[37] See (Kumm, 2005, pp. 264-265; 294 and *ff*).
[38] BVerfGE 37, 271 [1974] ("*Solange I*"); 12 years later in BVerfGE 73, 339 [1986] ("*Solange II*"), this state of affairs was found to be provided, and it was ruled that the GFCC would not exercise a review of constitutionality as long as this essentially similar level of protection of constitutional rights would hold up.
[39] See (Portocarrero Quispe, 2013, pp. 232–233); (Klatt, 2015, pp. 203-204).
[40] Paradigmatic of categorization in legal reasoning is the case law on the protection of freedom of speech and its limitations: a case is reviewed considering different categories or "priority rules" (very roughly: "Is the communication under review beneficial for the public interest?", "Does it affect intimacy unnecessarily?", etc.). See Atienza (2010, pp. 57–58), on the Spanish case and more recently Sardo (2020) on the ECtHR. Arguably, these categories are the result of a balance of considerations which have been crystallized as paradigmatic, settled cases. Still, many cases may come up calling into question the appropriateness of certain preceding categories and which call for distinguishing, or a more open balancing of the counterposed reasons.

to the complexity of the issue of constitutional rights and restrictions, references are often combined with unamendable provisions of constitutions where present (or otherwise to a material core which approximates the idea of a *basic structure of the constitution*) and the particular values and expectations stemming from the history of a constitutional state.[41]

Regarding the review of *ultra vires* acts (*c*), we face questions concerning how to identify acts which go beyond conferred competences. The questions which arise here may be presented by pointing to the following tension. On the one hand, it is necessary to incorporate substantive value-laden considerations on constitutional rights and the delimitation of shared goals (i.e. the material scope of a competence) with more formal considerations on jurisdictional standing. On the other hand, this is vexing given that competence norms have a complex nature which typically seems unfit for balancing, especially with an eye to the principles of legality and conferred powers. Thus, competences include substantive and formal considerations, as well as a typically rather rigid, rule-like character. Whether and how this structure may be fit for balancing is a question that will be taken up in a next section (*below*, §4.1).

In principle, these three categories conditioning primacy can be generalized beyond the relation between the EU and its member states and into other multilevel structures (e.g. the EU and the UNSC, or the Inter-American system of human rights and its Member States). A possible objection would be to assert that such structures may include a strict, unconditional primacy of international or regional law. Even in this case, however, there remains a possibility for balancing, although in a closer sense to defeasibility of primacy (e.g., through considerations from *jus cogens* norms).[42]

3.2. Horizontal constellations

Multilevel constructions are not exhaustive of interlegality. Interlegality also relates to other, more horizontal constellations which do not necessarily involve a presumption of hierarchy. This occurs among the different specific or sectorial regimes of international law, as

[41] On the concept and its potential despite accusations of its proneness to abuse, see (Scholtes, 2020).
[42] *Cf.* the consideration in the judgment in the *Kadi* saga held by the then-Court of First Instance of the European Communities in 2005: "None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible." (Case T-315/01, Kadi v. Council & Commission, 2005 E.C.R. II-3659: ¶226).

well as among the regulatory orders which form the object of the *Global Administrative Law* scholarship.[43] In principle, even the relation between the legal orders of states could be included in this context.[44]

In contrast to the previous two employments of proportionality in multilevel structures (either as part of a review of domestic decisions or as part of the considerations for defeating a presumption of primacy), the employment of balancing is here more open-ended in character. Candidates include not only the structured assessment of proportionality balancing (in reviewing decisions concerning fundamental rights and their collisions or their limitations), but also potentially different uses of "proportionality", as well as comparable standards of review.

On the one hand, potentially different uses include notions more similar to "equity" such as, e.g., proportionality in delimiting maritime boundaries,[45] or proportionality in state countermeasures.[46] On the other hand, comparable standards of review (which arguably serve the functions of balancing even though they may vary in their structure or intensity) include, e.g., the review and incorporation of extra-trade concerns through the "necessary to" clauses of Article XX GATT,[47] review under "public policy" concerns as per Article V(2)b of the New

[43] On *Global Administrative Law*, see the founding conceptualizations in (Cassese, 2005; Kingsbury et al., 2005). See further a recent comparison with related theories in (Alvarez, 2016).

[44] On the applicability of proportionality to the field of private international law or conflict of laws in the EU, see (Heymann, 2014). The key point concerns the horizontal effect of human rights – where rights are more broadly construed, proportionality assessments become necessary parts of the justification; conversely, where rights are more narrowly construed, there is a greater resistance towards the applicability of proportionality assessments. A further issue within these more horizontal constellations concerns the standing of diverse types of non-state law *within* the state (and, in its case, the applicability of proportionality assessments to them). Such matters, however, will be left pending for current purposes.

[45] The law of maritime delimitation lends itself for an arguably different sense of "proportionality" which, if not without balancing colliding reasons, at least has a more technical, mathematical consideration of the respective coastal lengths. See the overviews in Tanaka (2001, 2018), pointing how the ICJ's Tunisia/Libya case (Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) [1982] ICJ Rep. 18) marked a point of departure from previous uses into an *ex post* review of avoiding inequity in a decision on delimitation. See also Linderfalk (2013), comparing different uses of proportionality in maritime delimitation law, state responsibility law and the European Convention on the Protection of Human Rights and Fundamental Freedoms.

[46] In this area, the assessment of proportionality in the use of force by states in self-defense is structured both through necessity and proportionality, but "[i]t does not seem to include an examination of the requirement of suitability and fitness which is assumed." (Cottier et al., 2017, p. 640). On this topic, see generally (Canizzaro, 2001; Franck, 2008).

[47] On "weighing and balancing" as a standard of review of said "necessary to" clauses, see e.g., the WTO Apellate Body's *dictum* in *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (WT/DS161/AB/R; WT/DS169/AB/R, Report December 11, 2000, ¶164): "In sum, determination of whether a measure, which is not "indispensable", may nevertheless be "necessary" within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or export." See a discussion of different levels of deference in this context in (Fahner, 2018, pp. 96–102).

York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC),[48] or the incorporation of human rights or environmental concerns under opening clauses in international investment law.[49] This expansive scope presents questions such as, respectively, whether the use of the term "proportionality" may be a mere coincidence, or whether the different standards of review are comparable.[50]

Relatedly, and as widely noted, international law differentiates into special treaty regimes which respond to different issues such as trade, investment, health, cultural heritage, climate, or the protection of the environment. These different issue areas conform something like an "inner rationality" for each regime. This functional or substantive sort of differentiation counts as only one of the components of the "fragmentation" of international law, along with its institutional and regional plurality. Recent takes move beyond the diagnosis of *fragmentation* to look at the *refinement* of international law into regimes which remain under a presumption of unity (under general international law) and subject to argumentative techniques such as proportionality balancing.[51] Anne Peters speaks of the integration of norms from different regimes in an arbitral balancing of rights which "would also have to be made by law-appliers if all relevant norms were united in one single treaty."[52]

[48] See an overview in Pirker (2016), submitting that arbitral tribunals tend towards a narrow interpretation of "public policy" and a less intensive standard of review.

[49] A case serving as a point of reference in this context is the *Tecmed v. Mexico* arbitral award from 2003 (*Técnicas Medioambientales TECMED S.A. v. United Mexican States*, International Centre for Settlement of Investment Disputes Case No. ARB (AF)/00/2) in the framework of a bilateral investment treaty between Mexico and Spain. This award is characterized by Van Aaken (2009, p. 507) as "[t]he first tribunal to use the proportionality test in indirect expropriation", which, as a "very indeterminate legal term" constitutes potential "opening windows" for the consideration of human rights and environmental concerns. The case involved a Spanish-owned company (constituted in Mexico as CYTRAR), operating under a government license for the containment (landfill) of hazardous industrial waste in Hermosillo, Sonora, which was not renewed by the Mexican National Institute of Ecology (apparently among certain infractions to the initial license and opposition from the public). Most relevantly for our purposes, independently of its merits, a proportionality assessment (directly invoking the structure developed in the case law of the European Court of Human Rights) was employed to determine whether the cited institute's rejection of renewal amounted to "indirect expropriation" (finding that it did, and that therefore "fair and equitable treatment" had been lacking).

[50] Although such questions cannot be settled here, my research interests regard a common element in the function of arguments; namely, the justification of decisions involving different (frequently colliding) contributory reasons, as per the working conceptualization provided above (and perhaps more oriented towards the cited instances of comparable standards of review). *Cf.* a helpful typology of the functions of proportionality in international law in Peters (2017a), identifying "horizontal proportionality" (regarding conflicting state interests, as in countermeasures, or the law of the sea), as well as "diagonal proportionality" and "vertical proportionality" (both of which regard the particular interests of a state and those of an individual which coincide with a regime of international law, including human rights law and investment law). However, the labels of "horizontal" and "vertical" do not correspond to the present use in this paper.

[51] See especially (Peters, 2017b; Van Aaken, 2009).

[52] (Peters, 2017b, p. 678). For overviews on proportionality balancing in the areas of international economic and investment law. See (Schill, 2012), (Bücheler, 2015), and more recently, (De Brabandere & da Cruz, 2020).

This way, regarding the collision of sectorial regimes of international law, proportionality balancing has been proposed as an interpretative method to "*defragment*" international law.[53] The doubt which immediately emerges regards the different inner rationalities of each regime or legal order. According to a forceful objection, in contrast to the context of the constitutional state, balancing becomes hopelessly indeterminate given that there is no common objective standard among the regimes of international law.[54] Furthermore, even if a balancing decision were taken, each regime would reach a different decision structurally biased towards its own ends, revealing balancing as ineffective regarding the differentiation of specific regimes and legal orders.[55] This objection will in turn be briefly looked at, along with a related question on the contextual considerations which constrain balancing, not only in the sense of a "bias", but also regarding the standards of review which may be adopted.

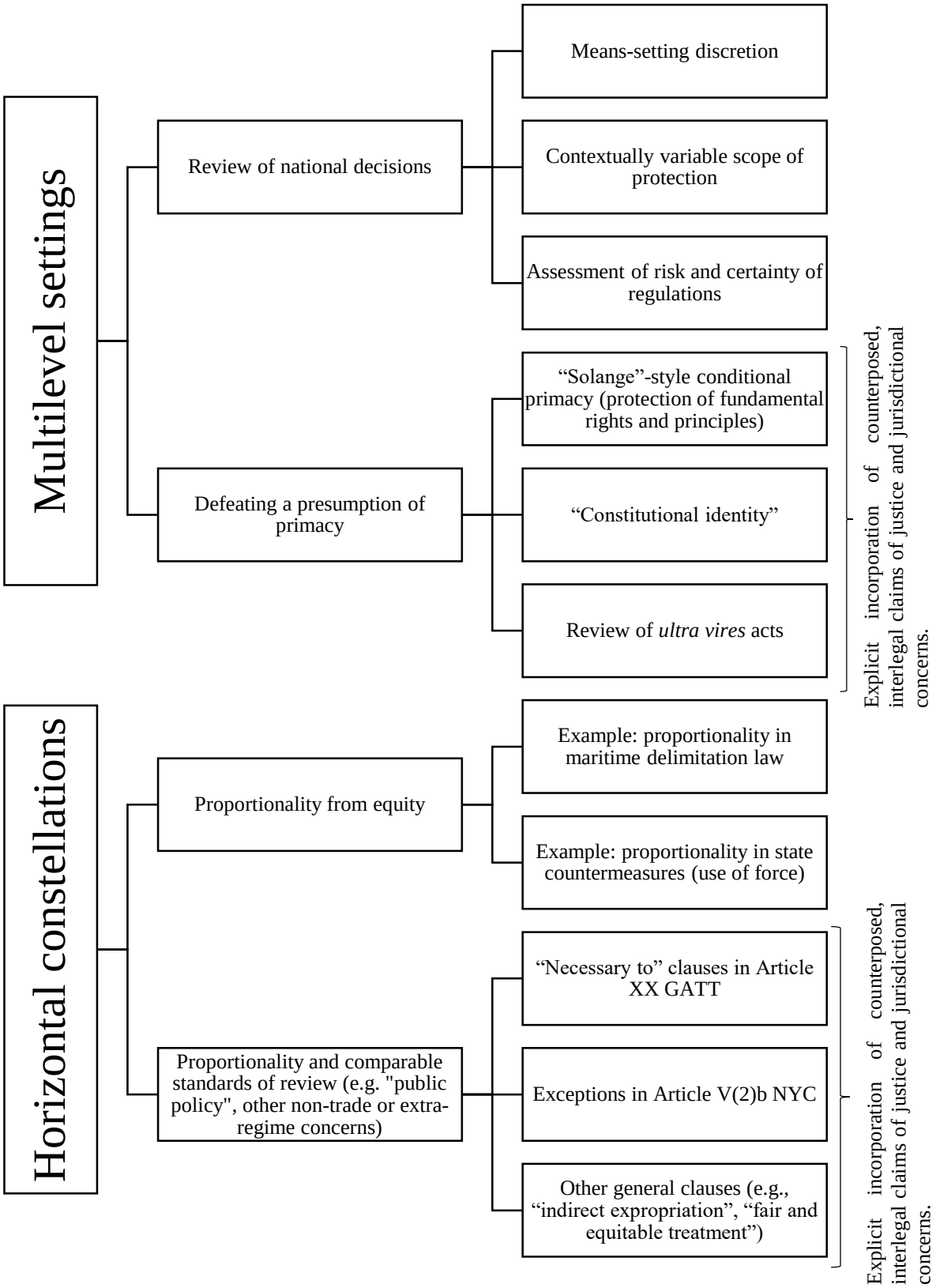
Before turning towards an anticipation some of the main areas of potential dispute regarding interlegal balancing, the core structure of the considerations in this section may be represented in the following diagram:

[53] (Peters, 2017b; Van Aaken, 2009). (Kleinlein, 2012) criticizes the term "defragmentation" for not reflecting the value-based reasoning involved in balancing, but the core idea of the application of balancing among special regimes of international law is accepted. (Kuo, 2018) argues for a conception which extends the applicability of proportionality balancing to conflicting norms among regimes of "global governance" which includes formal and informal "actors", i.e., both the special regimes of international law and the regulations of Global Administrative Law.

[54] (Michaels & Paulwelyn, 2011) argue generally in this sense, also considering the absence of a common and objective standard among states. Similarly, (Kuo, 2018) adopts this argument for the domain of "global governance", although ultimately embracing a provisional "management of regime-induced conflicts" (pp. 814-815).

[55] See (Michaels & Paulwelyn, 2011, p. 368): "[…] in the absence of a common, objective standard (available essentially only within a single "system") the value judgments involved in balancing are likely to lead to different results […]".

Diagram of uses of interlegal balancing (illustrative and non-exhaustive, esp. regarding "horizontal constellations"):



4. Challenges in interlegal balancing

I suggest that the perspective of interlegal balancing stands as a plausible framework from which to account for the challenge of interlegality. Especially in harnessing the intertwinement of norms from different legal orders which demand their consideration in judgment, proportionality and related standards of review are helpful argumentative structures. And yet, I will turn in this section to some potential areas of dispute for this sort of operationalization. Two of them were announced before and address, respectively, concerns on the norms on competences and the comparability of values across legal orders and legalities. Besides these two questions, this section will briefly mention the issue area of the criteria for weighting colliding norms sourced in different legal orders.

My intention will be to enunciate the main possible challenges that I foresee, along with some necessary nuances and delimitations on the scope of such challenges. Their rebuttal, however, would demand a longer and detailed engagement which must be left pending for further works.

4.1. The nature of legal competences and jurisdictional conflicts

As mentioned above, one of the more salient uses of balancing in multilevel structures relates to the review of *ultra vires* acts. *Prima facie*, the conflict of jurisdictional claims seems to place us straightaway in a context of interlegality. However, under the perspective here adopted, a mere conflict of jurisdictional claims *as such* is insufficient as it could in principle also be raised without conflicting substantive results,[56] or without any pretension to protect fundamental rights, or it could be resolved by rules on applicable law or jurisdiction.[57] Instead, interlegality regards conflicting reasons and ideas of justice which, to be sure, are intertwined with a claim to competence or jurisdiction. This mixed character must be kept in mind to see how interlegal balancing is relevant for the review of *ultra vires* acts (in multilevel settings) as well as for incorporating jurisdictional considerations in collisions of regimes (in horizontal constellations).

Regarding multilevel settings, our point of departure must be that competence norms have a complex nature. Not only do competences have both a definitional (or constitutive)

[56] *Cf.* especially the taxonomy proposed in Klatt (2015, pp. 199-201, esp. at 200).
[57] An important question which cannot be pursued here regards whether and how may such rules on choice of law correspond to categories which embody a balancing of substantive claims of justice.

dimension and a deontic dimension,[58] competences also have at least personal, procedural, and substantive conditions.[59] This way, in a competence norm, a determinate authority is empowered to create legal norms and other legally valid acts, and this always occurs through procedural conditions and in relation to a certain scope of substantive ends or objects yet to be concretized. These three different conditions entail that "if an attempt is made to exercise competence *ultra vires* (outside the scope of the competence) no legal norm is created."[60]

At least under the modern principle of legality, a competence norm should be treated as a definitive command so that those potentially subjected to it may foresee the deontic norms of conduct to which they are liable, and which structure their legal relations.[61] Therefore, one could hold that competences are paradigmatic *rules* which should not be balanced.[62] This certainly holds for both personal and procedural conditions of competence. However, a telling point resides in the fact that competences incorporate a substantive *scope* for their possible exercise. Although this scope is never completely open-ended and may even receive a highly specified formulation, its determination in hard cases provides for the possibility of a proportionality assessment regarding the use or exercise of competences.

Along these lines, Article 5 (1) TEU establishes that proportionality governs the use, but not the limits, of Union competences. Their limits are "governed by the principle of conferral".[63] In this sense, a proportionality assessment may enter the picture only after determining the fulfilment of "personal" and "procedural" conditions of competence, i.e. once that it has been decided that an authority is competent, and in order to ensure that "Union action shall not exceed what is necessary to achieve the objectives of the Treaties."[64] Proportionality is therefore required in order to determine that the exercise of competences remains within the substantive scope of conferred competences. In contrast, it has been remarked that in its judgment of May 5, 2020 concerning the Public Sector Purchase Program ("PSPP"), the

[58] (Villa Rosas, 2018).
[59] (A. Ross, 1968, p. 130).
[60] (A. Ross, 1968, p. 131).
[61] An exchange with Wei Feng (2020) has been of great help to think about these issues. On the principle of legality in relation to the challenges of interlegality, see (di Martino, 2019).
[62] See especially (Azevedo Palu, 2019, pp. 371 and *ff*).
[63] Article 5 (1) TEU: "1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. […]."
[64] Article 5 (4) TEU: "4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality."

German Federal Constitutional Court required a more capacious application of proportionality, extending to competence norms *as such* (and not just their exercise).[65]

Arguably, matters stand differently under horizontal constellations. Among the special regimes of international law and among the regulations of Global Administrative Law, the principle of conferred competences is displaced by a more fluid understanding of jurisdiction along with a thin version of the principle of legality. Operating under the imperatives of subject-matter expertise (which results in a specified scope), an outcome-oriented legitimacy, and an epistemic source of authority, the exercise of special regimes is legitimate insofar as it does not contravene legality – instead of only legitimate where strictly following from a legal mandate (as it in the state-delimited version of the ideal).[66] This may well be unavoidable in these relatively new legal realities. A self-evident centralized site of authority from which to regulate transnational and emerging issue areas is absent just as much as there is scarce possibility of reliably foreseeing all the (national or otherwise) legal orders which may become involved. As a result, regulation and control in this context necessarily takes both a more open relation towards different legalities, as well as a more independent relation towards any singular legal order.

This way, a greater responsiveness to other involved legalities corresponds well with the above mentioned "thin" interpretation of legality or the jurisdictional constraints of this constellation. Interestingly, however, a reported effect is that, on the contrary, adjudicative bodies (especially arbitral tribunals) in such contexts tend to employ limited proportionality assessments, in the sense of being either less intensive or otherwise restricted into their own areas of expertise – in contrast to a comprehensive scope of discussion of all relevant norms in

[65] The *PSPP* case (BVerfG, 2 BvR 859/15 *et al*) concerned the European Central Bank's programme on the purchase of bonds operating since 2015. The key point of contention was whether the *PSPP* remained within the scope of monetary policy (as part of the competences of the ECB) or whether its exercise encroached upon economic policy (as part of the competences of the Member States). On this question, the proportionality assessment provided by the CJEU was scrutinized by the GFCC. Three general points stand out in the judgment of the German Federal Constitutional Court. First, it was the first deployment of *ultra vires* control (earlier pronouncements were *obiter dicta*). Second, it held that the proportionality assessment deployed by the ECJ (based on the ECB's arguments) was insufficient (being, among other considerations, too deferential to the expertise of the ECB). In this sense, one could read the *PSPP* judgment (independently of its merits) as addressing the matter of levels of scrutiny in proportionality review, demanding in this case a higher one for the margin of discretion of the ECB. Third, this limited review of proportionality was considered to entail an omission and to allow for acts beyond the scope of competences. On this judgment, see (Mayer, 2020), providing a useful overview of its early reception.

[66] (See Kumm, 2009, p. 274): "The principle of legality, in its thinnest interpretation, establishes that wherever public authority is exercised, it should respect the law. If there is a law that governs an activity, public authorities are under an obligation to abide by it." *Cf.* its interpretation in (Roth-Isigkeit, 2018, p. 205): "This move turns the argument of legitimacy through legality upside down. Authority is legitimate insofar as it does not contravene the law, instead of having to be positively legitimated".

constitutional courts.[67] In any case, a limited proportionality assessment (where taken in this context), remains contingent upon a great variety of factors which cannot count as a *tout court* argument against proportionality in such constellations. On the contrary, it provides us with reasons for a further study of the different standards of review employed in this context vis-à-vis (or among) special regimes. A closer look into the interlegal deployment of balancing would be promising, e.g., to pre-empt grounds for the non-recognition or non-enforcement of "foreign" rulings, giving a greater clarity to the different norms considered and grounds for taking interinstitutional relations into account.

4.2. The comparability of values across legal orders and legalities

As previously recalled, a doubt runs on whether balancing is possible in horizontal constellations, provided that each jurisdictional "hub" in such constellations may reach discrepant results in balancing, being biased towards their own rationales.[68] This objection thus combines a concern with institutional legitimacy (pointing towards the different rationales of each special regime or legal order), with a concern with objective justification (pointing that there are no grounds for a rational comparison and decision among the different values involved).

[67] For instance, (De Brabandere & da Cruz, 2020, p. 474) hold that arbitral tribunals "have engaged with proportionality in a more casuistic way", noting that arbitral awards remain less uniform especially in the level of scrutiny in proportionality assessments, especially in the necessity stage, looking at the presence of less restrictive means. (However, something similar could hold regarding levels of scrutiny in some national courts.) They compare for instance the high degree of deference recognized in the award *Glamis Gold v United States of America* in the International Centre for the Settlement of Disputes from 2009, with a stricter scrutiny in the partial award from November 2000 in *S.D. Myers Inc v. Government of Canada*. Similarly, although focusing in domestic case law, Pirker (2016) compared balancing arguments regarding freedom of trade and the protection of foreign investments on the one hand and "public policy" on the other hand. This, framed under Article V(2)b of the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which provides for the denial of recognition and enforcement of the rulings of arbitral tribunals, in case that this would be "contrary to the public policy" of the country where "recognition and enforcement is sought". In this regard, (Pirker, 2016, pp. 311–313) refers to a case from the Court of Appeal of Paris, *SA Thales Air Défense v. Euromissile*, from November 18, 2004, which upheld awards "that did not manifestly disregard EU public policy" (Pirker, 2016, 312), as well as drawing an analogy to the judgment of the CJEU in Case C-38/98 *Régie nationale des usines Renault* EU:C:2000:225 at ¶30 for characterizing the threshold for public policy concerns upon the infringement of fundamental principles or rights. However, special attention is paid to the the judgment 4A_558/2011 of March 27, 2012 from the Federal Tribunal of Switzerland, on the annulment of an arbitral award (by the Court of Arbitration for Sport) related to sanctioning rules from FIFA as it was found to contain "an obvious and grave violation of privacy" making it therefore "contrary to public policy" (¶4.3.5), due to its foreseen "ban from all professional activities in connection with football until a claim in excess of €11 million with interest at 5% from the middle of 2007" (¶4.3.4), which was judged disproportionate.

[68] See (Michaels & Paulwelyn, 2011). Relatedly, (Kuo, 2018) invokes in this context Robert Cover's concept of *nomos*. Here, it must be left open whether among the participants in the regulations of Global Administrative Law there is a comparable "thickness" of shared narratives and expectations to the ones which interested Cover in the pluralism of religious communities within the state. Perhaps more plausible than *nomos* communities on this point is the idea of involving different "publics", e.g., as used in some passages in (Crow, 2019).

This objection should be tempered with an eye to the following considerations. First, regarding the concern with institutional legitimacy, one must not overlook that treaties in each regime may provide directives for taking into consideration other, "external" relevant legal norms. This may occur either explicitly through opening clauses, or implicitly through general (interpretive) clauses.[69] Even in the absence of such clauses, it is necessary to insist that an intertwinement of legalities does not occur in a legal vacuum. General international law may well be of help in the interpretation of the different treaties, and along these lines, human rights and *jus cogens* norms are transversal concerns across regimes. In this context, while it is the case that there is no "comprehensive" *catalogue of values*, this remains far from entailing that there are *no* common values in international law and other legal orders.[70]

Second, regarding the concern with objective justification, we cannot but recall certain elements from discussions on the *incommensurability* or *incomparability* of values (or the objects of balancing, be they principles, reasons, etc.) which are also a familiar point of contention regarding the rationality of proportionality balancing.[71] I will recall some points which call in this context for a greater attention to *parity* (among compared objects) and its conditions, instead of a more general disavowal of evaluation and balancing.

That there are no grounds for a rational comparison among the different values involved is something which may follow from two contrary stances on practical reasoning. On the one hand, it may be a consequence of a more general metaethical stance which denies the possibility of objectivity in values, in evaluation, or in practical reasoning (as a whole). A discussion of this more general stance cannot be further pursued here. On the other hand, while

[69] One may recall the exceptions provided in Article XX GATT (its "necessary to" clauses). See (Bücheler, 2015, pp. 70–74); (Tancredi, 2019, pp. 170; 176 and ff). See also the discussion of Article V (2) (b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in (Pirker, 2016).

[70] (Vranes, 2009, pp. 21–22) distinguishes three interrelated elements in the context of similar objections to the use of proportionality in international law: (1) that there is no comprehensive catalogue or order of values in international law, (2) that "no hierarchy of values exists in international law", and (3) that balancing in international law (or in general) is not objective.

[71] Especially earlier contributions articulated the point in terms of *incommensurability*. The idea is that comparing (in balancing) different rights or interests resembles comparing "whether a particular line is longer than a particular rock is heavy". This formulation derives from Judge Scalia's dictum in the US case "Bendix Autolite Corporation v. Midwesco Enterprises, 486 U.S. 888 (1988)", at paragraph 897 (in its original context, the quote concerned a disavowal of balancing "the governmental interests of a state against the needs of interstate commerce", allowing by contrast "'balancing' judgments in determining how far the needs of the State can intrude upon the liberties of the individual" as "of the essence of the courts' function as the nonpolitical branch"). At least etymologically, incommensurability suggests that there is no common measure among two items (values). However, against this stance, the more concise reply is that even if values (or other items) have no common measure or are otherwise "incommunicable" among each other by their own lights, this does not entail that they cannot be compared. In the words of (Petersen, 2020, p. 165): "human beings have to make choices between incommensurable values all the time".

the possibility of objectivity in evaluation or practical reasoning may be admitted in principle, certain scenarios (perhaps a significant amount of them) leave us without grounds for a choice which is rational or satisfactory. This second stance present us with nuances which may be made explicit upon Ruth Chang's "comparativism" as a backdrop.[72]

Here, the concern ceases to be with the more theoretical question of whether two items are comparable. Ultimately, almost any two items can enter comparison under an open-ended "covering value" or consideration (for example, "social importance" could qualify as such a covering value or consideration in a relevant way for proportionality balancing). The interest shifts towards the more practical questions of how comparisons are suitable or how they may contribute to the justification of a decision. "Incommensurable" or "incomparable" values call attention to a particular result of comparison: *parity*. Usually, we think of the relation between two compared items (values, principles) as either "greater than", "lesser than", or "equal to" the other. To these, Chang has added a further possibility: being "on a par to" each other. The distinctive feature of "parity" (or being "on a par") is that it behaves differently to being equal. If two items are equal, then a small improvement (or impairment) to one or the other must break the equality and make one "greater" and the other "lesser". Parity remains even under a series of small improvements, although not indefinitely. Eventually, under a sufficient chain of small improvements (or impairments), parity will cede, and one item will strike us as greater and the other as lesser. For instance, while two great master artists (Mozart and Michelangelo)[73] arguably are *on a par* on, say, their creativity, they are not equal nor incomparable. Small improvements or impairments to either would still qualify them as great masters (on their creativity); these are items of comparison which would remain in proximity of each other. However, at some point, these improvements or impairments would break the scope of parity: roughly, a heavily impaired Mozart would no longer be equal to a non-impaired Michelangelo. This would reveal that there is indeed a comparative reasoning at work (i.e., that even though on a par, their comparison is presupposed). Something similar could hold between values or principles in "stalemate" cases in balancing, where there is no clear principle outweighing the other: small improvements or impairments to either would likely not affect equality, but a chain of them would make one be greater or lesser than the other.

[72] See (Chang, 2016). See also a concise overview of the debate between versions of incommensurability and incomparability of values in (Chang, 2015). For two counterposed takes on the consequences of Chang's arguments on *parity* regarding proportionality assessments, see (Da Silva, 2011) and (Caviedes, 2017).
[73] For this example, see (Chang, 2002, p. 673 and *ff*).

The point is that there might be a sense of parity behind the misgivings on the possibility of a rational choice between different values, protected by different legal regimes or legal orders. This parity may obtain from two different scenarios:

- In the first, the involved values (in the abstract or in a concrete collision) would be on a par to each other if they were part of one same legal order. In such a scenario, the presence of jurisdictional constraints or bias (toward the "internal" norms) may either retain this parity or "tip the scale" for one of the values.

- In the second, the involved values are only on a par in virtue of certain jurisdictional constraints or bias.

In this way, a formal jurisdictional "bound" or "setting" is revealed as an important but non-exclusionary reason. It enters as a consideration in our practical reasoning, along with the different "substantive" values (or principles) involved. This may have the effect of denying that there is a choice between either balancing on the one hand, or the application of conflict of laws techniques for *framing* under a specific regime on the other hand. Instead, the matter would call for integration. In this sense, an additional set of potential *covering values* that may enable comparison or break parity could be found under interlegality's epistemic shift of attention into avoiding injustice in the circumstances of a case at hand. Revealing how different norms are materially interconnected, we might speak of the composite legal nature of such a case itself as *tertium comparationis* against the objection from the different rationales of each special regime and the incomparability of values. From the perspective of the subjects of diverse legalities in a case, or the hypothetical enforcing state which must comply with a diversity of international legal obligations, different regimes cannot be self-enclosed, and obligations cannot be incomparable. If a case involves norms from e.g., trade and environmental special regimes of international law, the epistemic point of vantage of the case compels to take both into consideration, even as a condition for ascertaining whether good reasons are in place for focusing upon the protection of certain set of norms.

This way, it is necessary to assess what the "structural bias" of each specific legal order or regime entails.[74] We find a range: from a "tunnel vision" approach that disregards the interlegal dimension of conflicting norms under formal techniques of closure on the one

[74] (Kleinlein, 2012, p. 258).

extreme, towards a complete opening into an "unrestrained space of reasons" of purely substantive value-based balancing on the other extreme.[75]

Interlegal balancing can strike a middle ground by integrating both the substantive and the formal-jurisdictional dimensions of conflicts involving norms sourced in different legal orders. Beyond the more clear and explicit directives to take all relevant norms into consideration, this requirement of interlegality can be made good if a jurisdictional counterweight is incorporated in balancing. To be sure, the question is open on how to incorporate (and give weight to) such different values in interlegal balancing: not only the diversity of substantive values across different legal orders, also the formal values involved in the authoritative and institutional dimension of law. The next subsection is meant as a preliminary stocktaking of one of the most complete contributions in this regard.

4.3. Criteria for weighting colliding norms sourced in different legal orders

A foremost contribution on the challenging question of how to incorporate, assess (weight), and balance considerations from different legal orders is the one provided by Matthias Klatt.[76] Klatt has presented a comprehensive model which has the virtue of accounting for substantive and formal considerations through legal reasoning. In this regard, under the banner of "weighting rules", he has usefully systematized an important share of the criteria which determine the importance of the jurisdictional issues involved. These include democratic legitimacy, the importance of the substantive principles involved, the quality of the reviewed decision, and considerations from subsidiarity.[77] Given that this is one of the more sophisticated and complete models available, I will now present a brief exposition of the core elements in Klatt's contribution on balancing competences before turning towards some points where distance may be taken, especially to account for the different possible applications of balancing in both multilevel and horizontal constellations of interlegality.

[75] The "tunnel vision" was briefly cited *above* (§1). See (Shany, 2019). Stepping into an "unrestrained space of reasons" is the formulation in (Habermas, 1999, p. 447), regarding his concerns that increased judicial activity may erode the division of powers. Its use here is more general, evoking a "disregard" of jurisdictional constraints.
[76] (Klatt, 2014, 2015a). The following remarks will address Klatt's article for the sake of conciseness.
[77] See (Klatt, 2015a, pp. 214–217). Compare the list of factors for weighting, or assigning an importance to satisfy or not certain competences, in (Klatt, 2015b, pp. 367-373), addressing the institutions of constitutional states and discussing: the quality of the primary decision, the epistemic reliability of the argumentative premises used for a decision, democratic legitimacy, the significance of the substantive principles at stake, and the specific function in a system's division of labor between the judiciary and parliament.

Matthias Klatt focuses on conflicts of competences, characterized as case-based antinomies, or instances which involve "colliding abilities to make substantial decisions"[78] and which are to be resolved according to legal procedures and reasonings.[79] Indeed, one of Klatt's main moves in this regard is to further distinguish legal solutions into "strict" and "flexible" ones. While strict legal solutions are decided *ex ante* (through the absolute precedence of one of the legal orders or their norms and competences), flexible legal solutions "will always be relative to the legal and factual circumstances of the case at hand",[80] through balancing.

This way, the other main move of Klatt is to recast competences as "formal principles" instead of rules. In balancing competences (formal principles), the first two argumentative steps are: (1) to establish "the degree of non-satisfaction to a first competence" and (2) "the importance of satisfying the competing competence", while the third and last step is to assess (3) whether the "non-satisfaction of a competence" is indeed justified by the importance of the satisfied one (Klatt, 2015a, p. 213).

These three steps promise a general analytical model or structure with which to reconstruct paradigmatic cases of conflicting competences in overlapping legal orders with a degree of precision. It is worth mentioning that, in his article, Klatt focuses on the structural conflict between national constitutional courts and the ECJ regarding the protection of fundamental rights.[81] Furthermore, except for the "Reverse Solange" proposal (Bogdandy et al., 2012), the chosen cases of application concern balancing as undertaken in national courts: *Solange I* and *II*,[82] *Banana Market*,[83] and *Data Retention.*[84]

This way, Klatt's model mainly reconstructs national constitutional courts' decisions in the context of defeating (or not satisfying) the competence of the ECJ. Beyond this state-law setting, this model may well be transposed into the legal reasoning of non-state courts and actors. This is so, as Klatt enunciates but leaves open the criteria for "weighting" or assessing the respective importance of satisfying or not the competences involved (including democratic legitimacy, the importance of the substantive principles involved, the quality of the reviewed

[78] (Klatt 2015, p. 199).
[79] Upon a taxonomy of conflicts of competences, Klatt delimits his interests into conflicts of competences whose nature is legal (as opposed to political), logical (or with a deontic antinomy, as opposed to a functional sense of conflict), formal (as opposed to consisting of contradicting substantial decisions), actual (as opposed to potential), and concrete (as opposed to abstract). (Klatt 2015, pp. 199-200).
[80] (Klatt 2015, p. 208).
[81] (Klatt 2015, p. 218).
[82] (BVerfGE 37, 271 [1974]; BVerfGE 73, 339 [1986]).
[83] (BVerfGE 102, 147).
[84] (BVerfGE 125, 60).

decision, and subsidiarity). On the one hand, especially in "horizontal" contexts (among different special regimes, legalities, or regulations), how democratic legitimacy or subsidiarity enter the equation is more open-ended. On the other hand, the quality of the decision (incorporating the consideration of special expertise in the matter at hand) will certainly be salient. Likewise, the importance of substantive principles involved might well be the more important and transversal concern, lending itself for transposal across the different contexts of interlegality.

One could argue that the importance of the involved substantive principles relativizes Klatt's original aim of looking primarily at counterposed claims to competence. It is plausible that, conversely, jurisdictional concerns should be incorporated (as weighting factors) into the assessment of the substantive principles and claims involved. While, ultimately, this matter may turn out to reflect but differences in exposition in alternative conceptualizations of one same set of concerns during (inter-)legal reasoning, there is also a sense in which a rapprochement with interlegality in its broad variety may benefit from shifting our point of departure, from counterposed claims of competence and into the substantive principles involved: not every context involves a presumption of primacy which may then be either satisfied or not. On the contrary, very often there are multiple legal orders which can become involved (perhaps unforeseeable *ex ante* a conflict), including their own jurisdictional claims. As a result, it seems that the aims of interlegality in avoiding injustice can be advanced if jurisdictional concerns are seen through the lens of incorporating all substantive reasons.

There is a more fundamental set of questions underlying some details of this model. As alluded, Klatt bases his contribution upon recasting competences as "formal principles". The reason for this is Klatt's adherence to the strict dichotomy of rules and principles as well as its role in grounding the use of either subsumption or balancing: "Competences can only be submitted to a balancing procedure if they are reconstructed as principles" (Klatt, 2015, p. 211). With an eye to the considerations on balancing previously recalled (*above*, §2), this controversial move is not necessary. Klatt's model could well be understood as an explanation (the *external justification*) of the defeasibility of primacy or jurisdictional claims (generically) – thereby dispensing with the need to redefine competences as formal principles.

This is relevant in the light of two related matters. One regards the complex nature of competences which, as already mentioned (*above*, §4.1), resembles in its personal and procedural conditions the stricter character of rules while also resisting in its substantive scope

a straightforward classification into the strict binary distinction of either rules or principles. The other regards the many open controversies which remain around formal principles: not only on their "weighting" or the criteria for assigning their importance, but also upon their concept (or nature), their object (including the "input" of settled cases which they reconstruct), and their structure or models for balancing.[85]

This is not the place to provide an overview of the development and challenges of theories on formal principles. It may only be remarked that, with special intensity in the last decade, the concept of formal principles has become a site of controversy in theories of balancing and legal principles. The stakes in the debate are remarkably high. Formal principles could account not only for the authoritative dimension of law in legislation and precedents,[86] but also in the degree of "deference" owed between the different organs inside the state, just as much as between the different sites of authority within and beyond the state in multilevel settings (or even as a general theory of competences).[87] As a result, formal principles seem to be more heterogeneous than substantive principles. Are formal principles as abstract as "democratic decision-making", or as concrete as particular power-conferring norms? How may one identify the different principles involved? Without a clear criterion or a share of settled cases from which to depart, it becomes difficult to assess the plausibility of reconstructions in terms of formal principles.

In any case, given that no discussion of formal principles and their open questions can be attempted here, my remarks are only meant to point that Klatt's model could also be recast so as to avoid its more controversial premises (on the nature of legal competences as formal

[85] May formal principles be balanced in combination with substantive ones? May only formal principles be balanced against each other? Or are formal principles only indirectly involved, in cases of uncertainty or stalemate and favoring the authority of certain institutions? Such are the questions which the different models address. For overviews see (Alexy, 2014) who discusses three main models, and (Borowski, 2015) who also discusses a model which incorporates considerations on formal principles within the "abstract weight" or importance of substantive principles. More detachedly, the possibility remains open for the combination of different such models depending on the given institutional context. One could also add further possibilities, such as broadly incorporating the reasons around "formal principles" as part of contextual considerations which may affect the standard of review employed (instead of the output of balancing directly), along the lines of the proposal in (Pirker, 2016, p. 299): "Formal principles influence the substance and outcome of a balancing test. Instead, courts and tribunals ought to strive for the use of an appropriate balancing test first, and only afterwards apply this test to the case in question, balancing only the substantive values at issue. Therefore, instead of factoring contextual elements into the main balancing test, these elements should be examined independently; the result of weighing them ought to serve international courts and tribunals to devise their balancing test at the outset before using the test they have found."

[86] An inspiration for Alexian principles theory stems from (Dworkin, 1967, p. 39) who spoke of "conservative principles" conferring an authoritative weight to legislated rules and precedents, constraining their defeasibility.

[87] On the development of formal principles theory as a response to the "democratic objection" to proportionality in judicial review, see (Borowski, 2015) and (Portocarrero Quispe, 2016); *cf.* a possible parallel with earlier U.S.-American debates on balancing in (Duncan Kennedy, 2011, pp. 208–209). On the application of formal principles to law beyond the state, see especially (Klatt, 2015a; Kleinlein, 2012).

principles) while maintaining its many valuable contributions: systematizing an open list of criteria to assess ("weight") and incorporate jurisdictional and substantive concerns, and more generally recognizing that the authoritative dimension of law *is a value*, as the principle of legality is too. This avoids the extremes of a "tunnel vision" of each legal order, and of an "unrestrained space of reasons" for the judiciary.

In its turn, the open questions invite further research into categorizations for assessing and incorporating "extrinsic" norms and claims, as well as studies on the different standards of review which may be used regarding interlegal balancing (especially in horizontal constellations).

5. Summary and concluding remarks

The starting point of this paper has been the relevance of balancing and proportionality for cases of interlegality, that is the relevance of interlegal balancing as a technique to take into due consideration all the relevant norms which apply to a case at hand.

Given the variety of understandings of balancing and proportionality, it was first necessary to lay down a working conceptualization of balancing capable of giving account both of its general meaning and of its specific and structured forms, such as proportionality.

Two different uses of interlegal balancing, concerning different types of constellations, have been then identified. Multilevel settings may employ balancing as part of the review of decisions or as part of the considerations to defeat the presumption of hierarchy in the relevant legal orders. Horizontal constellations include a greater variety of contexts (among regimes of international law, among regulations of Global Administrative Law, and among the legal orders of states) and this also accounts for why balancing finds a variety of different uses and comparable standards of review.

In a last section, three main challenges faced by the notion of interlegal balancing have been noted. While some of these are continuous with more familiar discussions on balancing (in the state), attention has been paid to the dimensions which are distinctive of interlegal constellations. Regarding competences, it has been noted how in multilevel settings balancing is delimited to the material scope of competences in their exercise – but matters stand differently considering the jurisdiction of legal orders and other legalities. Regarding the comparability of values, it has been pointed out that the matter lies less on the questions of *incommensurability*

of values (or an outright disavowal of a "catalogue of values" beyond the state) than on questions of *parity* and structural bias. This latter point has been briefly matched with a stocktaking of Klatt's contributions as one of the foremost models pointing towards the incorporation of formal values (of jurisdiction) and substantive values (human rights and other fundamental principles) in legal reasoning.

Insofar as we inhabit a world marked by interlegality – the "phenomenological counterpart" of the intertwinement of legal orders, it is necessary to look at the possible space of reasons which this condition creates. Here, I have attempted to relate the matter regarding balancing in the more general sense of practical reasoning as well as in its instantiations in legal reasoning. A great many questions remain pending for further comment: interlegal balancing plausibly argues to go past a strict confinement of validity and interpretation of relevant norms to only those sourced in one same legal order – but it is also able to reconstruct validity as a consideration to be taken duly into account; interlegal balancing takes cases as an epistemic point of vantage – but it also has the potential of creating precedents and further development of law in more general terms; interlegal balancing cuts across divisions such as those of public and private law – but it is also subject to contextual-institutional applications and standards of review which deserve to be studied.

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