THE ROLE OF THE JUDGE IN LABOUR AND EMPLOYMENT RELATIONS: SHOULD THEORY SAVE THE PROPORTIONALITY TEST?

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1. Introduction

"Can judges play a constructive role in resolving labour conflict?" is a question raised by John Wood in the Anglo-American Law Review in 1985. Wood argued "that traditional industrial relations commentators tend to be suspicious of the legal aspects of industrial relations".[1] This 'suspicion' may have to do with the degree of autonomy or discretion attributed to the parties in industrial relations. It may also have to do with how the role of the legislator is estimated. It may be seen to be primarily for the legislator to intervene in industrial and employment relations in order to arrange, or rebalance, the power relations between the parties.

While Wood's question is a trigger for this paper, the main driver is reality. The world of work is evolving and it would seem that it increases the role of – and pressure on – courts and judicial law-making. Labour legislation does not easily follow the pace of societal evolution and is not always capable of regulating employment relations in detail, let alone that this would be opportune. Labour law problems may also appear to become more complicated. 'Rights conflicts' in labour and employment relations increasingly involve hard cases and dilemmas. They involve fundamental conflicts in the legal system, or progressively transcend the bi-polar opposition between employer and employee as, in fact, many conflicts of rights are conflicts between (rights of) workers or concern a broader impact on labour law or social welfare systems.

It would seem that these developments have the consequence of making the task of the labour judge more complicated. Judges have to find new legal tools and ways to engage in acceptable and legitimate decision-making in legal disputes in industrial and employment relations with growing complexity. Dealing with hard issues in labour law cases, the proportionality principle seems to be on the rise. However, while judges need to engage in balancing, there remain questions about the functioning of the proportionality principle as the outcome of some major labour law disputes becomes more difficult to predict. As this may make judicial decisions more controversial, the question is whether this proportionality principle is (to be) applied with underlying value frameworks, or a theory.

[1] J. Wood, "Can judges play a constructive role in resolving labour conflict?", *Anglo-Am. L. Rev.* 1985, 360.

This paper is concerned with the role of the law in producing substantial outcomes, with a focus on the role of the judge. The main purpose of this paper, written for the discussion at the 2013 Barcelona meeting of the Labour Law Research Network, is to be explorative and to discuss the way how the proportionality principle is operated in labour cases and whether. It will be questioned how it is related with the role of the judge. This will be done on the basis of two exemplative cases of the European Court of Justice in the area of industrial action and age discrimination, the cases *Viking*[2] and *Palacios de la Villa*[3]. These cases, in two key labour law areas in both collective as well as individual labour law, can be seen as 'hard cases' and good examples of the manner in which the proportionality principle can work.

2. Evolution of labour law disputes

The role of the proportionality principle and, connected to this, the role of the judge in labour law, - or at least a discussion of it – may become more important due to evolutions in labour law disputes. It can be argued that, at least, two evolutions are relevant.

A first evolution is that, increasingly, labour law disputes involve fundamental conflicts in the legal system. There is an increasing awareness that conflicting rights concern conflicts at the fundamental level of rights and principles. This is, at least partly, due to what can be called the 'constitutionalisation' of the legal discourse in labour law and the advanced application of fundamental rights in the employment context.

A number of examples may illustrate that this is not only due to certain developments of substantial law, but also because of the manner in which case law (or the role of courts) has developed.

A first example, in the European context, is the recognition of classical, individual, civil human rights, under the European Convention of Human Rights (ECHR) and the ever bigger role these have played in labour law over the past few decades. A major doctrinal (and judicial) development, in this respect, is the horizontal applicability – or third applicability – of fundamental rights. It has enabled the development of employee rights, like privacy or free expression in the workplace, which are introduced and examined through the lens of human rights protection mechanisms (as described in article 8 ECHR).

A second illustration is related with the European Court of Justice, which developed case law through a doctrine of direct effect of European Treaty articles, allowing rights of

[2] ECJ, 11 December 2007, C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*.
[3] ECJ 16 October 2007, C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA.*

free movement of workers *and* businesses to apply in the relationship between employers and employees (or employers and unions).

A third example concerns the rise of the equality principle (either through the work of European Courts, constitutional courts or of legislators). Equality law has severely affected the labour law discourse.

We may have come to a point where we might realise that this movement of 'constitutionalisation' of the workplace may have limits and puts into perspective the underdevelopment, in our European legal systems, of also recognizing the employer's rights as fundamental rights.

A second evolution may be due to the fact that many legal disputes in the employment context transcend the classical (bi-polar) opposition between employer and employee. Many conflicts of rights are conflicts between (rights of) workers. There is a rise of individual rights conflicts (e.g. discrimination claims, unfair dismissal claims,…). But these conflicts very often hide a worker-worker opposition besides, or instead of, worker-employer opposition. Discrimination law seems to be addressed to the employer, but many cases deal with the distribution of rights between workers. European disability discrimination law requires employers to make reasonable accommodation, but it may happen that the accommodation to be made in the work organization is actually an accommodation to be made by the colleagues of the disabled worker. Furthermore, leading case law or legislation in the area of non-discrimination law has not only a meaning in the individual employment relationship, but has a strong impact on the labour market and society as a whole, certainly in fields such as positive discrimination or age discrimination.

Dismissal law or corporate restructuring law is another area where not only two opposing individual rights are at stake. Dismissal law can be concerned with an insider-outsider discussion and the relationship, and solidarity, between well-protected 'insiders' versus 'outsiders' with precarious jobs and low pay. Crucial in such debate would seem to be that the notion of fairness and how workers perceive fairness in the workplace becomes more important.

These combined complexities of rights conflicts become a subject of case law and judgment.

3. On legal reasoning

The suspicion from industrial relations commentators, to which Wood referred,[4] might be shared by legal commentators. This may have to do with the fact that judges use (or

[4] J. Wood, "Can judges play a constructive role in resolving labour conflict?", *Anglo-Am. L. Rev.* 1985, 360.

assume) discretion and reasoning. This might feel uneasy from the perspective of industrial relations, or perhaps workplace conflict theory. Legal reasoning, however, is strongly influenced by arguments and less by other factors, like the exercise of power or agreement after negotiation.

Law, not only as a field of study but also in the world of practice, is about arguments. Whereas law is an argumentative discipline, lawyers use argumentative techniques to demonstrate their point. The law does not speak for itself. It needs interpretation before application. Opposite views about what the law is or should be, is very common. The exchange of arguments may concern details, but also fundamental issues.

If it is true that balancing and arranging arguments is a core business of (labour) law, it would seem that the more complicated and 'harder' the case becomes, the more controversial the outcome of the balancing might be.

The proportionality principle seems to play an interesting role in this. For example, the European Court of Justice, using balancing techniques, makes widely use of the proportionality principle. It seems that it is through this proportionality principle that hard cases are being decided. The principle of legitimacy would mostly seem to be of relatively weak concern.

4. On proportionality

As a principle, proportionality has a long history and it is nowadays widely used in many legal systems. Within this historical perspective some have addressed it as a "worldwide principle of law".[5] Perhaps, this is a sign of its success, or rather of its flexibility.

The proportionality principle incorporates different tests or 'checks' and can be used in various ways. Seen from the perspective of this contribution, three main workings of the proportionality principle can be conceived. First, it can be seen as a method to assess the limitation of a fundamental right (the limitation must not only be legitimate, but also be proportional). Second, it can be seen as a method to determine the extent to which actors (states, employers…) are allowed to use a margin of discretion, in a context where responsibilities over the respect of rights are shared, or where a degree of autonomy is exercised in a way that it affects rights of others. A third possible use may refer to a method to assess the purpose and justified use of a fundamental right (e.g. is a right properly used and exercised in a proportionate way - in light of a concept of abuse of rights).

Three typical features of the proportionality test are applied by the European Court of Justice. According to Höss, these elements boil down to a suitability test, a necessity test

[5] E. Engle, "The history of the general principle of proportionality: an overview", 10 *Dartmouth L.J.* 1 2012, 3.

and a proportionality test in the strict sense, under which "the Court has to establish whether, even in the absence of less restrictive means, the measure does not have any excessive or disproportionate effect on the applicants' interests".[6] The latter part of the test seems to be the most challenging and controversial. This latter part of the proportionality analysis, would actually require an appreciation of the effects, or negative impact, of a measure and weigh this out against the advantages of maintaining the respect for the right which is limited, or for the principle which is being deviated from. In other words, it may imply a cost-benefit analysis. The question is whether this should still be seen as a proportionality test, or rather as a main 'balance'-test.

Interestingly, Hickman[7] has identified this issue in trying to structure the proportionality test. His proposed solution is to distinguish relative and overall proportionality. "Relative proportionality" would refer to a discussion about alternative means, and would require to consider the value of choosing one measure *in preference to* another. "Overall proportionality" would thus concern a cost-benefit analysis: "In very broad terms, what the court is doing when it evaluates overall proportionality is weighing the costs and benefits of the measure."[8] The author recognises that the latter test can also be seen as a 'fair balance test'. Such test seems to be able to make a broad assessment of a complex of different rights at stake. It is perhaps not surprising that the 'fair balance test' has been adopted by the European Court of Human Rights, when it comes to reconciling or weighing various rights and interests.[9]

If it is broken down, when applying the proportionality principle, the European Court of Justice would seem to make a combined use of these elements through the following questions:

- Does the challenged practice deviate from a general rule?
- Does it fit in the range of legitimate deviations?
- Is that deviation "appropriate and necessary"?
    - Is it capable of reaching the legitimate aim or goal?
    - Are there alternatives to reach the legitimate aim or goal with a similar effect?
    - A cost-benefit analysis: are the benefits outweighing the disadvantages?
    - A saving clause: can extreme negative consequences be avoided?

Let us turn to the industrial action case law and the age discrimination case law to bring the discussion to the level of examples.

[6] N. Höss, "The Principle of Proportionality in *Viking* and *Laval*: An Appropriate Standard of Judicial Review?", *European Labour Law Journal*, Vol. 1 (2010), No. 2, 241-242.
[7] T. Hickman, "The substance and structure of proportionality", *Public Law*, 2008, 711-712.
[8] Idem, 712.
[9] A. Mowbray, "A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights", *Human Rights Law Review* 10:2, 2010, 289-317.

5. The European case law on industrial action

European industrial relations law were shaken up by the judgements of the European Court of Justice in *Viking*[10] and *Laval,*[11] two cases concerning the right to collective action. The judgments triggered an enormous debate. In many labour law comments, the aforementioned question of John Wood ("Can judges play a constructive role in resolving labour conflict?") is most regularly answered in the negative. Judges are often seen as having no (or almost no) role in industrial action cases, defined as – primarily – collective interest conflicts.

The commotion caused by the European Court of Justice is due to the fact that the fundamental right to strike was balanced against the freedom to provide services and the freedom of establishment, two internal market freedoms enshrined in the European Treaty. The Court mainly used the proportionality principle to tilt the balance in favour of the internal market freedoms.

Of the two cases, the *Viking* case is the most interesting for the proportionality discussion. The facts in the *Viking* case are well-known. It concerns a large ferry operator, Viking, incorporated under Finnish law. It operated seven vessels, including the *Rosella* which, under the Finnish flag, did the route between Tallinn (Estonia) and Helsinki (Finland). However, the *Rosella* was running at a loss as a result of direct competition from Estonian vessels operating on the same route with lower wage costs. As an alternative to selling the vessel, Viking sought to 'reflag' its ship by registering it in Estonia. But the Finnish union gave notice of a strike requiring Viking to give up its plans to reflag the ship.

The Court's steps of reasoning can be analysed as follows. The starting point for the analysis is clear. Once the legal framework was made clear, the Court considered that there was a limitation of the free establishment of the Ferry company, *Viking*. It thus needed to examine a deviation from the principle of free establishment in the European Union as it found that the collective action made the company's freedom "less attractive, even pointless". (§72) The Court then found a legitimate aim for limiting the free movement principle. Legitimacy was found in the Court's view that "the right to take collective action for the protection of workers interests is legitimate interest" (§77) and the Court stressed that the European Union is not only characterised by an internal market but also by "a policy in the social sphere" (§78).

The Court then applied the proportionality test. It assessed whether the strike action was proportional, i.e. "appropriate and necessary".

[10] ECJ, 11 December 2007, C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*.
[11] ECJ 18 December 2007, Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others.*

- The strike action was found to be appropriate: collective action is "one of the main ways in which trade unions protect the interests of their members". (§86)
- Whether there were better alternatives in the Court's view remains less clear as it left this matter open: the Court stated that "it is for the national court to examine" whether the trade union "did not have other means at its disposal which were less restrictive". (§87)

The Court would then seem to come to a kind of cost-benefit assessment, although it may be rather covert. The Court referred to the fact that the trade union policy resulted in ship owners being prevented from registering their vessels in another European state (§88), while this was "irrespective of whether or not that owner's exercise of its right … is liable to have a harmful effect on …conditions of employment …".(§89) In other words, reading this in a broad way, the collective action went too far seen the relationship between the purposes of the collective action and the limitation of the freedom of the company.

6. The European age discrimination law

Age discrimination law has developed in the Europe Union since the year 2000. In light of extended competences at the European Union Treaty level, the EU adopted Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation,[12] including provisions on age discrimination. Over the past decade, the European Court of Justice delivered a series of judgments in the area of age discrimination. However, there seems to be something special about age discrimination.

In age discrimination cases, the European Court of Justice, using the principle of proportionality as its main legal tool, seems to engage in a difficult exercise of balancing, acting between an emphasis on the individual rights dimension of equal treatment and a more collectively driven and labour market and policy oriented reasoning. This approach makes the outcome of age discrimination cases often difficult to predict. It still leaves questions about the content and meaning of the concept of age discrimination in the European Union.

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[12] *OJ* 2 December 2000, no. L 303.

In the case of *Palacios de la Villa*, a worker was employed by *Cortefiel Servicios* in the function of organisational manager. When reaching the age of 65, his employer notified him of the automatic termination of his contract of employment on the ground that he had reached the compulsory retirement age provided for in the applicable collective agreement and in furtherance of the Spanish legislation authorising this measure. Of relevance is the fact that, at the date on which his contract of employment with Cortefiel was terminated, Mr. Palacios de la Villa had completed the periods of employment necessary to draw a retirement pension under the social security scheme amounting to 100% of his contribution. Mr. Palacios de la Villa, however, claimed that the employment termination was in breach of his fundamental rights and, more particularly, his right not to be discriminated against on the ground of age, since the measure was based solely on the fact that he had reached the age of 65.

The Court had to examine the case from the general principle of equal treatment and had to look for possible deviation from the principle.

In light of article 6 of Directive 2000/78 the Court found a legitimate aim to deviate from the equal treatment principle. The Court held that:

- "encouragement of recruitment undoubtedly constitutes a legitimate aim of social policy and that assessment must evidently apply to instruments of national employment policy designed to improve opportunities for entering the labour market for certain categories of workers."[13]

There was thus, in the view of the Court, an objective and reasonable justification for the compulsory retirement age.

The Court then applied the proportionality principle. It assessed whether the measure was proportional, i.e. "appropriate and necessary".

- The measure was considered to be appropriate: "Thus, placed in its context, the single transitional provision was aimed at regulating the national labour market, in particular, for the purposes of checking unemployment." (§62)

- There were no better alternatives: "social partners at national level enjoy broad discretion in their choice, not only to pursue a particular aim (…) but also in the definition of measures capable of achieving it" (p.68)

The Court made then a kind of cost-benefit analysis. It concluded that the measure "does not appear unreasonable" (§72) and "furthermore, the measure cannot be regarded as unduly prejudicing the legitimate claims of workers subject to compulsory retirement". (§73)

[13] ECJ 16 October 2007, C-411/05, *Félix Palacios de la Villa v Cortefiel Servicios SA*, para 65.

In this latter step, the Court weighs the rights and interests of the individual worker against the compulsory retirement system: "because they have reached the age-limit provided for; the relevant legislation is not based only on a specific age, but also takes account of the fact that the persons concerned are entitled to financial compensation by way of a retirement pension at the end of their working life, such as that provided for by the national legislation at issue in the main proceedings, the level of which cannot be regarded as unreasonable." (§73)

The Court did not find a violation of the prohibition of discrimination based on age as laid down in Directive 2000/78.

7. Discussing the cases and proportionality

So far, the case of *Viking* – with its 'twin case' *Laval* – has been much broader discussed than the *Palacios* case. Nevertheless, the cases have the proportionality test in common. What can also be said about the two cases is that in both cases not so much the issue of legitimacy, but the proportionality test is decisive for their outcome. Let us try to gain more insight into the proportionality principle, discussing closer its role in the cases.

1. Although in the two cases, the 'workings' of the proportionality principle, which we indicated above, may be similar, the effect is more distinct. In fact, although both in *Viking* and *Palacios* the proportionality test was applied as method to assess the limitation of a 'fundamental' right or principle (in *Viking*: free establishment – in *Palacios*: non-discrimination), the *Viking* case has been experienced as a case where proportionality is operated as a manner to assess the purpose and justified use of a the fundamental right to strike (namely, is this right properly used and exercised in a proportionate way, for example given the fact that the strike action was "irrespective of … a harmful effect on … conditions of employment …").(§89) This creates a lot of uneasiness in strike law.[14]

2. In the two cases, although more pronounced in *Palacios*, the Court applies a proportionality test while it is actually making a cost-benefit analysis. One may question whether this should be so central in a proportionality test, or whether it concerns another test. This is a point where the line between proportionality and reasonableness becomes rather thin. In the case of *Palacios*, the Court examines whether the measure is "not unreasonable" under the proportionality test. (§72) It would therefore seem to use a reasonableness standard which may be distinct from a means-end test. In the same

[14] C. Barnard, *E.L. Rev.* 2012, 37(2), 117-135

line it has been argued that "the court is referring to the proportionality principle when it in fact is using the reasonableness test".[15]

3. It is clear from the cases that, at least potentially, the proportionality allows for a broad kind of balancing, but also a difficult one, when using a cost-benefit approach.

For example, in *Palacios* the approval by the Court of the compulsory retirement system could be seen in relation to the (read: decent) retirement benefits of the worker. That would imply an approach of balancing the rights of younger workers related to work with those of older people related to social security benefits. It would anyway nuance the judgment, as only a system of compulsory retirement would be approved for workers who are able to obtain a decent income and standard of living after retirement.[16] However, it would seem that this is not the Court's approach, or at least, not completely. Indeed, in the case of *Rosenbladt,*[17] a compulsory retirement system was upheld by the Court, even in a situation where the worker, Mrs. Rosenbladt, received only a statutory old-age pension of 228.26 Euro net per month. The Court seems to be aware of the difficult balance which is to be made and points out that "account must be taken both of the hardship it may cause to the persons concerned and of the benefits derived from it by society in general and the individuals who make up society".[18]

The *Viking* case raises the question of how the proportionality test would need to work when dealing with two opposing rights or principles of equal value or of similar rank in the hierarchy. As is well known, the case law of the Court in Viking and Laval influenced the discussion concerning the balance between social rights and market freedoms, the point being that social rights are not of less importance than market freedoms.

This problem came through in the case of *Commission v Germany,*[19] which was brought before the Court by the European Commission on the grounds that Germany had failed to fulfil its obligations under the relevant European public procurement legislation. Local authorities had awarded service contracts in respect of occupational pensions, without a call for tender at European Union level. The German government argued that services related to pension insurance contracts fall within the employment relationships and the application of public procurement law would be contrary to the autonomy of management and labour protected under German law. The Court referred to *Viking* and *Laval* and reiterated to the reasoning that the exercise of the fundamental right to bargain collectively must therefore be reconciled with the requirements stemming from

[15] T.I. Harbo, "The Function of the Proportionality Principle in EU Law", *European Law Journal*, Vol. 16, No. 2, March 2010, 185.
[16] This point is elaborated in: M. Schlachter, "Mandatory Retirement and Age Discrimination under EU Law", *Int J Comp LLIR* 2011, vol. 27, no. 3, 290.
[17] ECJ 12 October 2010, C-45/09, *Rosenbladt v Oellerking Gebäudereinigungsges*.
[18] C-45/09, *Rosenbladt,* para. 73.
[19] ECJ 15 July 2010, C-271/08, *European Commission v Federal Republic of Germany*.

the freedoms protected by the Treaty and be in accordance with the principle of proportionality.[20]
In her opinion before this case, Advocate-General Trstenjak nevertheless paid attention the issue of balancing rights or principles that are of a similar hierarchy. The Advocate-General concludes that "the approach adopted in *Viking Line* and *Laval un Partneri*, according to which Community fundamental social rights as such may not justify – having due regard to the principle of proportionality – a restriction on a fundamental freedom but that a written or unwritten ground of justification incorporated within that fundamental right must, in addition, always be found, sits uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms."[21] "Such an analytical approach suggests, in fact, the existence of a hierarchical relationship between fundamental freedoms and fundamental rights in which fundamental rights are subordinated to fundamental freedoms".[22] The Advocate-General then concludes that "there is no such hierarchical relationship between fundamental freedoms and fundamental rights".[23] From this, she derives the following consequence: "A fair balance between fundamental rights and fundamental freedoms is ensured in the case of a conflict only when the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom."[24]

It is striking that the Advocate-General used the notion of "a fair balance" when explaining how the proportionality principle should work in this case. The question is how such fair balance can be found.

4. This brings the discussion to our last point. Balancing is an exercise that may not only leave a large degree of discretion, but also uncertainty. The question then would be, what is the (normative) framework from which the balance would be tilt in favour of one of the involved rights or interests? What makes the balance 'fair'? It triggers the question whether judicial balancing resulting from the proportionality test, should be supported by some form of theory. At this point, the role of the judge comes to the fore again.

It has become obvious that behind a case like *Viking*, there is a socio-political discussion about the role of labour law in the European Union context, the position of the European social model and, ultimately, the European integration project. The question is whether the Court would be in a position to describe a clearer position in this

[20] C-271/08, *Commission v Germany*, para. 44.
[21] C-271/08, *Commission v Germany*, opinion of Advocate-General Trstenjak, delivered on 14 April 2010, para. 183.
[22] Opinion, para. 184.
[23] Opinion, para. 186.
[24] Opinion, para. 190.

normative framework. Similarly, in a case like *Palacios*, the question is whether the Court could not strongly and explicitly adhere to a policy framework connected with active ageing. As is well known, the European Union declared the year 2012 as the "European Year for Active Ageing and Solidarity between Generations".[25] In such normative context, the Court might come to a different conclusion with regard to compulsory retirement systems.

8. The future of proportionality

So, can judges play a constructive role in resolving labour conflict?

In a context of evolving labour law disputes and a growing number of fundamental questions and hard cases in labour law, the role of judge is likely to become more important. But it may also become more challenging and more controversial.

The use of the proportionality principle seems to suit this role of the judge. But it is equally characterized by a degree uncertainty and, perhaps, controversy. As the proportionality test is applied in various kinds of complex rights conflicts, like rights conflicts that represent fundamental conflicts in the legal system, or individual versus collective rights conflicts, or workers versus other workers' rights conflicts, it might be the best possible test available. However, the distinction between a proportionality test, a cost-benefit test, a reasonableness-test or a fair balance test may become less clear.

Looking further into the proportionality test, applied broader with a fair balance concept, and reflected in the role of the judge, it seems that there different possible views.

One way of looking at it might fit in the view of Posner, who concludes that "decisions which shape the law are rarely the product of an analytical process that can be evaluated in terms of truth and falsity, or right and wrong. They are personal in a broad sense that precludes objective assessment".[26] So, we may draw from this that rationality should not be overestimated, but reasonable decision-making – without direct concern for the 'system' – should prevail. Nevertheless, Posner's conclusion may exactly make the importance of the proportionality test more apparent, as it is at least a formal way to structure in a transparent way arguments in a decision-making process. The test of proportionality may happen to be a useful technique to facilitate and arrange arguments, even in hard cases. On the other hand, controversy would be unavoidable.

Another way of thinking is that the outcome of hard cases with a complex nature would be better understood or even more accepted when some form of normative framework,

[25] Decision No 940/2011/EU, 14 September 2011 on the European Year for Active Ageing and Solidarity between Generations (2012) , *OJ* 23.09.2011, no. L 246/5.
[26] R.A. Posner, "The role of the judge in the Twenty-First Century", *Boston Univ. Law Review*, Vol. 86, 1068.

or theory, is not only present but also made more explicit in the judicial decision-making process itself. This is after all something that is also, increasingly, required in academic legal work which concentrates on legal problems with a complex character. A normative framework could be a method to underpin the operation of the principle of proportionality. On the other side, critics may say that in such a framework, judicial decision-making is also reduced to irrational approaches, or to put it more nuanced, proportionality would then be reduced to the level of goals and policies and values.[27] Another question would be to what framework the judge would refer. Is it the own internal framework of the legal system, then concerns of consistency with past cases might prevail. The *Viking* case could be seen as an example of this. But the framework may also concern an 'outside' view, theories that may not involve strict legal reasoning, but socio-political or economic thinking. The *Palacios* case may be seen as an example of this, where the Court refers to the labour market which could be stimulated by compulsory retirement.

Maybe there is a third way, perhaps a combined one, of reasonable decision making, where normative frameworks would not necessarily be decisive, but only give useful perspectives and points of reference. It would seem that hard labour law cases, like *Viking* and *Palacios*, deal with dilemmas, meaning that opposing rights or interests are concerned from which it would seem that is almost impossible to make a rational choice. But both the formal technique of proportionality as well as the involvement of normative frameworks may still contribute to a fair outcome. Perhaps the view should be that "the fact that a decision concerning the most basic constitutional rights may turn out to be a dilemma or a tragic choice does not imply that comparison and balancing have failed".[28] In short, in the absence of one single scale balancing should not be predicted to fail.

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[27] J. Habermas, *Between Facts and Norms*, Cambridge, Cambridge University Press,1996, 256-261; This point with this reference to Habermas has been brought up in: C. Barnard, "A proportionate response to proportionality in the field of collective action", *E.L. Rev.* 2012, 37(2), 126.

[28] V.A. Da Silva, "Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision, *Oxford Journal of Legal Studies*, 2011, Vol. 31, 276.