Values and Factors

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Rights and social goals as values/principles

Both individual valuable interests (to freedom, health, work, property, etc.) and social goals (public health, economic development, environmental protection) may viewed:

- not only and always as rigid constraints, but also as
- scalable goals to be taken into account and balanced in legal decisions

This happens not only when no rules are there, but also when there is a conflict between rules, or between rules and principles

Basic notion

Definition (Differential impact over a value)

The differential impact over value v of making choice a rather than b in case c, denoted as $\Delta_c^{a[b]}(v)$ is the difference in the overall benefit or utility resulting from the fact that making choice a in case c realises v to a different extent than making choice b would.

Example

- The choice to allow the construction of the new factory (a) in comparison to the choice of not allowing it (b), delivers differential benefits relatively to different values in case c: $\Delta_c^{a[b]}(production)$, $\Delta_c^{a[b]}(employment)$, $\Delta_c^{a[b]}(environment)$.
- Such benefits can have different importance, and different polarities. E.g.: $\Delta_c^{a[b]}(production)$ and $\Delta_c^{a[b]}(employment)$ may be positive, and $\Delta_c^{a[b]}(environment)$ may be negative.
- Overall, decision a provides the aggregated differential benefit $\Delta_c^{a[b]}\{production, employment, environment\}$, resulting from the sum of the three separate values: $\Delta_c^{a[b]}(production) + \Delta_c^{a[b]}(employment) + \Delta_c^{a[b]}(environment)$. It may be positive or negative.

Priority relatively to values

- let us write $a_c \succ_{\{v\}} b_c$ iff $\Delta_c^{a[b]}(production) > 0$

Proportionality

Many court adopt the proportionality approach. A legal measure which negatively affects an individual right is proportionate in case c when

- it contributes to a legitimate goal (suitability). There is one legitimate goal g such that $\alpha_c \succ_{\{g\}} Nul_c$
- there is no other way to contribute to the same extent to that goal, which affects to a lesser extent the individual rights or social value at stake (necessity). There is no alternative choice β_c such that $\beta_c \succeq_{\{g\}} \alpha_c$ and $\beta_c \succ_{\{v\}} \alpha_c$
- The contribution to the legitimate goal no less important that the diminution of the right or value (proportionality in strict sense): $\beta_c \succ_{\{g,v\}} \alpha_c$

Aspects to be taken into account in value-assessment

- different values, individual and social may be at stake(e.g., security, economic initiative, privacy, environmental protections)
- they can be realised up to different extents, delivering different benefits
- the change in the extent to which a values is realised determines a change in the extent to which the benefit resulting from the realisation of that value is realised. E.g. by reducing pollution, we increase the benefit resulting from less pollution.
- different values have different weights, i.e., the benefit that they provide may be more or less important

How to take a decision in cases in which different values are at stake

Let decisions α_c and β_c have different impacts on economic development, employment, and environmental protection; or on privacy and security

- The easy case. Pareto superiority: α_c is better (provides a larger benefit) than β_c, there at least one value v such that $\alpha_c \succ_{\{v\}} \beta_c$ and no value u such that $\beta_c \succ_{\{u\}} \alpha_c$ (e.g., a new factory (in place of the old one) will promote both development and environment)
- The difficult case α_c is better then β_c relatively to some value and it is worse relatively to some others (e.g., a new factory will promote development, but demote environment)

E.g. Interpretive choice α_c is better relatively to economic development, but β_c is better relatively to environmental protection

A famous German case (the Lebach Urteil

Has the person the right that his name is not made in a documentary concerning a crime that he did 20 year ago?

- using the name would contributo to freedom of expression and information
- not using would contribute to privacy

How shall we address the case: by comparing advantage that using the name would deliver relatively to freedom of expression and access to information, with the disadvantage that it delivers relatively to privacy. The case is discussed by Prof. Alexy

A recent case at the Court of Justice (Google-Spain)

Has a person who went bankrupt 20 years ago the right that Google does not provide the possibility to find this information (searching with the person's name)? The EU data protection directive allows for a data processing meant so satisfy a legitimate interest if it is not outweighed by the interest of the data subject.

- Allowing the search would contributo to freedom of expression and information, and economic initiative
- not allowing it would contribute to privacy

A set of cases

For simplicity's sake, I shall provide a set of made-up cases. These cases correspond however to issues that many data protection officers have to address in their daily work. They concern the on-line distribution, in a Facebook page, of the photo of a university student, without the student's consent. Each case provides a different factual constellation, but all such cases share the following features:

The value framework

- The cases allows for two possible decisions:
  - **P**d (The distribution d of the photo is permitted)
  - **F**d (The distribution d of the photo is forbidden)
- Such decisions may affect three values:
  - *Privacy* (*Priv*),
  - *Freedom of expression* (*FrEx*),
  - *Access to information* (*AccInf*)

Description of the cases I

Let us now describe each case, providing its decision and a description of the relevant circumstances

c_1: **The photo of a student.** The first case, let us call it c_1, concerns the distribution of the student's photo. The photo, in which the student is clearly identifiable, was taken while she was walking on the street, and was published without her consent. Decision is $\mathbf{F}d$

c_2: **The photo of a student at a graduation ceremony.** Case c_2, corresponds to c_1, except for the fact that the photo was taken at the graduation ceremony, which is a public event. Decision is $\mathbf{P}d$

c_3: **The photo of student of student at a graduation ceremony, which focuses on the student.** This case corresponds to c_2, except for the fact that a large image of the student is at the centre of the photo. Decision is $\mathbf{F}d$

Description of the cases II

- c_4: **The photo of a student at a graduation ceremony, which focuses on the student, while she is a speaker.** This case corresponds to c_3, except that the student is portrayed while making a speech. Decision is $\mathbf{P}d$
- c_5: **The photo of a student at a graduation ceremony, which focuses on the student, while she is a speaker and has an embarrassing expression.**. This case corresponds to C_5, expect that the student is portrayed while she was sneezing in a very awkward way. Decision is $\mathbf{F}d$
- c_6: **The photo of a student at a graduation ceremony, which focuses on the student, while she is both speaker and a chair.** In this case the student, besides being a speaker, as in c_4 and c_5, also is chair of the panel in which she is speaking. Differently from c_5 she has no embarrassing facial expression. Decision is $\mathbf{F}d$

Value impacts

- The differential impact on the value of privacy, of having $\mathbf{F}d$ rather than $\mathbf{P}d$ in case c_1. is the social and individual benefit provided by the increase in privacy obtained by prohibiting the publication of the photo, rather than permitting it. We can denote it by $\Delta_c^{\mathbf{F}d[\mathbf{P}d]}(Priv)$
- Similarly $\Delta_c^{\mathbf{F}d[Priv]}(FrEx, AccInf)$ denotes the the extent to which in c_1 the diminished realisation of freedom of expression and information resulting from $\mathbf{F}d$ would be detrimental.

Value-preferred decision

Let us extract from the set V of all values at stake two mutually exclusive sets, the set of the values that would be promoted by a relatively b, denoted by $V^{a[b]}$ and the set of the values that would be promoted by b, relatively to a, denoted as $V^{b[a]}$. In case c, decision a is value-preferred to b, if the advantage that a provides over values that a differentially promotes should be higher that advantage that b would provide relatively to the values it differentially promotes.

$$a \succ_c b \text{ iff } \Delta_c^{a[b]}(V^{a[b]}) > \Delta_c^{b[a]}(V^{b[a]})$$

Example

Case	Decision	Value Preference
c_1	$\mathbf{F}d$	$\Delta^{\mathbf{F}d}_{c_1}\{Priv\} > \Delta^{\mathbf{P}d}_{c_1}\{FrEx, AccInf\}$
c_2	$\mathbf{P}d$	$\Delta^{\mathbf{F}d}_{c_2}\{Priv\} < \Delta^{\mathbf{P}d}_{c_2}\{FrEx, AccInf\}$
c_3	$\mathbf{F}d$	$\Delta^{\mathbf{F}d}_{c_3}\{Priv\} > \Delta^{\mathbf{P}d}_{c_3}\{FrEx, AccInf\}$
c_4	$\mathbf{P}d$	$\Delta^{\mathbf{F}d}_{c_4}\{Priv\} < \Delta^{\mathbf{P}d}_{c_4}\{FrEx, AccInf\}$
c_5	$\mathbf{F}d$	$\Delta^{\mathbf{F}d}_{c_5}\{Priv\} > \Delta^{\mathbf{P}d}_{c_5}\{FrEx, AccInf\}$
c_6	$\mathbf{F}d$	$\Delta^{\mathbf{F}d}_{c_6}\{Priv\} > \Delta^{\mathbf{P}d}_{c_6}\{FrEx, AccInf\}$

When are value based decisions consistent with the values at stake

- Internal consistency: In every cases, the advantage that the case's decision a provides over values $V^{a[b]}$ that a differentially promotes is higher that advantage that alternative b provides relatively to the values $V^{b[a]}$ it differentially promotes.
- External consistency:If two cases c_a and c_b have opposed outcomes, a and b, then either decision a in c_a differentially promotes $V^{a[b]}$ more then it would in c_b or c_b differentially promotes $V^{b[a]}$ more then it would in c_a.

From value to factors

We can characterise factors in a way that clarifies their connection to values. Let F_c denote all features of a case c, a set of atoms.
By a factor for decision a rather than b, in a case c, we mean a feature f such that the presence of f in c increases the differential extent to which a enhances $V^{a[b]}$, in comparison to what would happen if f were missing.

Definition (Factor)

Feature f is a factor for a rather than b written $f^{a[b]}$ iff for every pair of cases c and c' such that $f \in F_c$ and $F_{c'} = L_c/\{f\}$, the following holds:

$$\Delta_c^{a[b]}(V^{a[b]}) > \Delta_{c'}^{a[b]}(V^{a[b]})$$

Factors

$PhId^{\mathbf{F}d}$: The photo identifies the data subject

$PhPub^{\mathbf{P}d}$: The photo concerns a public event

$PhFoc^{\mathbf{F}d}$: The photo focuses on the data subject

$PhSpe^{\mathbf{P}d}$: The photo portrays a speaker

$PhEmb^{\mathbf{F}d}$: The photo portrays an embarrassing expression of the data sub

$PhCha^{\mathbf{P}d}$: The photo portrays the chair

If we assume that all differences in the achievement of values by the same decision in different cases my be explainable through factors, then the extent to which a decision a differentially realises values $V^{a[b]}$ must he equal to the extent to which the factors supporting a in c, denoted as F_c^a, enable the decision to have that effect.

$$\Delta_c^{a[b]}(V^{a[b]}) = \Delta_{F_c^a}^{a[b]}(V^{a[b]})$$

Factor and value-consistency

The very definition of a factor entails that having more factors that enable decision to promote certain values enable that decision to promote those values to a larger extents

$$F_c^{a[b]}(V^{a[b]}) \supset F_{c'}^{a[b]}(V^{a[b]}) \leftrightarrow \Delta_c^{a[b]}(V^{a[b]}) > \Delta_{c'}^{a[b]}(V^{a[b]})$$

But then two cases c_a and c_b having opposite outcomes a and b are value-consistent only if either c_a has more factors for a or c_b has more factors for b

Back to our cases

C.		Ratio decidendi
c_1		$PhId^{\mathbf{F}d} \Rightarrow \mathbf{F}d$
c_2		$PhId^{\mathbf{F}d} \wedge PhPub^{\mathbf{P}d} \Rightarrow \mathbf{P}d$
c_3		$PhId^{\mathbf{F}d} \wedge PhPub^{\mathbf{P}d} \wedge PhFoc^{\mathbf{F}d} \Rightarrow \mathbf{F}d$
c_4		$PhId^{\mathbf{F}d} \wedge PhPub^{\mathbf{P}d} \wedge PhFoc^{\mathbf{F}d} \wedge PhSpe^{\mathbf{P}d} \Rightarrow \mathbf{P}d$
c_5		$PhId^{\mathbf{F}d} \wedge PhPub^{\mathbf{P}d} \wedge PhFoc^{\mathbf{F}d} \wedge PhSpe^{\mathbf{P}d} \wedge PhEmb^{\mathbf{F}d} \Rightarrow \mathbf{F}d$
c_6		$PhId^{\mathbf{F}d} \wedge PhPub^{\mathbf{P}d} \wedge PhFoc^{\mathbf{F}d} \wedge PhSpe^{\mathbf{P}d} \wedge PhCha^{\mathbf{P}d} \Rightarrow \mathbf{F}d$