Values and Factors

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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
The differential impact over value $\nu$ of making choice $a$ rather than $b$ in case $c$, denoted as $\Delta_c^{a[b]}(\nu)$, is the difference in the overall benefit or utility resulting from the fact that making choice $a$ in case $c$ realises $\nu$ to a different extent than making choice $b$ would.
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 $a_c \succeq_{\{v\}} b_c$ iff $\Delta^a_{\{b\}}(production) > 0$
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 \( \alpha_c \succeq \{g\} \text{Null}_c \)

- 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 \( \beta_c \) such that \( \beta_c \succeq \{g\} \alpha_c \) and \( \beta_c \succeq \{v\} \alpha_c \)

- The contribution to the legitimate goal no less important that the diminution of the right or value (proportionality in strict sense): \( \beta_c \succeq \{g,v\} \alpha_c \)
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 value 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 $\alpha_c$ and $\beta_c$ have different impacts on economic development, employment, and environmental protection; or on privacy and security

- The easy case. Pareto superiority: $\alpha_c$ is better (provides a larger benefit) than $\beta_c$, there at least one value $v$ such that $\alpha_c \trianglerighteq \{v\} \beta_c$ and no value $u$ such that $\beta_c \trianglerighteq \{u\} \alpha_c$ (e.g., a new factory (in place of the old one) will promote both development and environment)

- The difficult case $\alpha_c$ is better then $\beta_c$ 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 $\alpha_c$ is better relatively to economic development, but $\beta_c$ is better relatively to environmental protection
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 contribute 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 cases allows for two possible decisions:

- \( Pd \) (The distribution \( d \) of the photo is permitted)
- \( Fd \) (The distribution \( d \) of the photo is forbidden)

Such decisions may affect three values:

- Privacy (\( Priv \)),
- Freedom of expression (\( FrEx \)),
- Access to information (\( AcclInf \))
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 $Fd$.

$c_2$: 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 $Pd$.

$c_3$: 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 $Fd$. 
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 \(P_d\).

\(C_5\): 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 \(C_5\), except that the student is portrayed while she was sneezing in a very awkward way. Decision is \(F_d\).

\(C_6\): 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 \(F_d\).
The differential impact on the value of privacy, of having $Fd$ rather than $Pd$ 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 $\Delta^{Fd[Pd]}_c(Priv)$.

Similarly $\Delta^{Fd[Priv]}_c(FrEx, AccInf)$ denotes the the extent to which in $c_1$ the diminished realisation of freedom of expression and information resulting from $Fd$ would be detrimental.
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 to $b$, 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.

$$a \succ_c b \iff \Delta^a_c(V^a) > \Delta^b_c(V^b)$$
<table>
<thead>
<tr>
<th>Case</th>
<th>Decision</th>
<th>Value Preference</th>
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<tbody>
<tr>
<td>( c_1 )</td>
<td>( F_d )</td>
<td>( \Delta_{c_1}^{F_d} { \text{Priv} } &gt; \Delta_{c_1}^{P_d} { \text{FrEx, AcclInf} } )</td>
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<tr>
<td>( c_2 )</td>
<td>( P_d )</td>
<td>( \Delta_{c_2}^{F_d} { \text{Priv} } &lt; \Delta_{c_2}^{P_d} { \text{FrEx, AcclInf} } )</td>
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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 $c_a$. 
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

\[ PhId^F_d : \text{The photo identifies the data subject} \]
\[ PhPub^P_d : \text{The photo concerns a public event} \]
\[ PhFoc^F_d : \text{The photo focuses on the data subject} \]
\[ PhSpe^P_d : \text{The photo portrays a speaker} \]
\[ PhEmb^F_d : \text{The photo portrays an embarrassing expression of the data subject} \]
\[ PhCha^P_d : \text{The photo portrays the chair} \]
If we assume that all differences in the achievement of values by the same decision in different cases may be explainable through factors, then the extent to which a decision $a$ differentially realises values $V^{a[b]}$ must be equal to the extent to which the factors supporting $a$ in $c$, denoted as $F^{a}_c$, enable the decision to have that effect.

$$\Delta^{a[b]}_c (V^{a[b]}) = \Delta^{a[b]}_{F^{a}_c} (V^{a[b]})$$
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

$$\text{Factor and value-consistency}$$

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

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 $b$
### Ratio decidendi

<table>
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<th>Condition</th>
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<tbody>
<tr>
<td>$c_1$</td>
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<tr>
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<td>$\Phi_l d^F \land \Phi_{Pub}^P \Rightarrow P_d$</td>
</tr>
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<td>$\Phi_l d^F \land \Phi_{Pub}^P \land \Phi_{Foc}^F \Rightarrow F_d$</td>
</tr>
<tr>
<td>$c_4$</td>
<td>$\Phi_l d^F \land \Phi_{Pub}^P \land \Phi_{Foc}^F \land \Phi_{Spe}^P \Rightarrow P_d$</td>
</tr>
<tr>
<td>$c_5$</td>
<td>$\Phi_l d^F \land \Phi_{Pub}^P \land \Phi_{Foc}^F \land \Phi_{Spe}^P \land \Phi_{Emb}^F \Rightarrow F_d$</td>
</tr>
<tr>
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<td>$\Phi_l d^F \land \Phi_{Pub}^P \land \Phi_{Foc}^F \land \Phi_{Spe}^P \land \Phi_{Cha}^P \Rightarrow F_d$</td>
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