5 Balancing—A Legal Perspective

The object of the previous chapter was a discussion of the necessary premisses of balancing in general and Principle Theory in particular, where Principle Theory served as an example for value theories in general. As a matter of fact, that chapter already presented some criticism against Principle Theory. That criticism was of an internal nature—internal because the basic normative assumptions of Principle Theory have not been questioned from a prescriptive stance, namely the optimization ideal. Also the implications for the separation of powers, the enforcement of fundamental rights, and legal reasoning and dogmatics were not considered. The previous chapter merely showed which cognitive and methodical problems must be faced if Principle Theory should be applied. Now, Principle Theory will be discussed externally. The external criticism can be grouped into three categories: (a) methodical consequences, (b) the implications for the separation of powers, and (c) the enforcement and nature fundamental rights.\footnote{A similar classification is made by Habermas, supra note 39, p. 293.}

This critique will serve as the last pillar of an alternative vision of adjudicative choice, which will be elaborated and tested in the next chapter. Discussing Principle Theory further is important for three reasons:

First, the standards that a theory of balancing should meet are nowhere described abstractly; they must be distilled from the current discussion. Principle Theory is undoubtedly one of the most clearly formulated and most heatedly debated conceptions of balancing. Therefore, standards to judge a theory of balancing can be most easily derived from a discussion of Principle Theory. Besides, understanding why Principle Theory is able or unable to meet the standards thus extracted allows the theory developed in this study to avoid the problems of Principle Theory.

Second, despite some apparent fundamental differences between Principle Theory and the position purported in this study, similarities do exist. At least two resemblances can be discerned: (a) Based on the case-law of the courts discussed so far, the balancing conception of this study can operate with positive obligations. Judicial enforcement of positive obligations is viewed by some as a major threat to liberty\footnote{Böckenförde, supra note 182, p. 188; Ladeur, supra note 168, pp. 36–7; cf. Maus, supra note 97, pp. 847–8; Fischer-Lescano, supra note 168, p. 169.} and is one of the major objections against Principle Theory. (b) An ubiquitous assumption of this study and Principle Theory is that it is principally the competence of courts to apply fundamental rights and thus to contribute to the solution of social disputes; however, it must be observed...
that the judiciary does not become a super-legislature.\textsuperscript{1516} This assumption is profoundly challenged by post-modern scholars, who argue that the problem is not whether a court or a legislature should decide an issue but whether evaluations and knowledge persistent in social sub-systems should be derogated by official decisions (be they judicial or legislative).\textsuperscript{1517}

Three, due to distinction between is and ought, objections based on empirical findings, e.g. descriptive or explanatory arguments that were presented up to now, must be distinguished from normative ones. Saying that courts seem (un)able to apply a certain balancing conception is different from saying that they should (not) apply it, irrespective of their ability.

## 5.1 Methodical Objections

Principle Theory rests on the distinction between principles and rules and on a particular definition of ‘principle’: Principles correspond to values and can be fulfilled gradually, i.e. they do not make definite prescriptions, while rules can only be either fulfilled or not and thus have definite content.\textsuperscript{1518} This understanding of principles and rules entails certain methodical consequences, which will be discussed in this section.

The methodical objections can be broken up into the following categories: It could be argued that Principle Theory

1. introduces a way of thinking that is incompatible with legal reasoning as such.\textsuperscript{1519}
2. requires cardinal scaling but that constitutions do not provide yardsticks to generate such scales.\textsuperscript{1520} Coupled with the first prong of the critique, this one means that Principle Theory introduces arbitrary and subjective value judgements into legal reasoning because it dissolves structures of legal reasoning that provide objectivity and introduces a form of reasoning that cannot be objective.\textsuperscript{1521}
3. erodes dogmatic structures.\textsuperscript{1522}

Proponents of Principle Theory reject all claims. First, balancing is a necessary addition to the deductive model of legal reasoning (i.e. subsumption) and cannot be avoided at least in hard cases.\textsuperscript{1523} As such, balancing is part of the practice

\begin{itemize}
\item \textsuperscript{1516} See pages 6–7; 83; Section 2.2.3; Section 2.3.3; and Section 2.4.3.
\item \textsuperscript{1517} Ladeur, supra note 168, pp. 32–3, 41; Fischer-Lescano, supra note 168, pp. 174–5.
\item \textsuperscript{1518} Alexy, supra note 7, pp. 75–7 [47–8].
\item \textsuperscript{1519} Habermas, supra note 39, pp. 311–7 [255–61].
\item \textsuperscript{1520} Schlink, supra note 549, p. 153; Habermas, supra note 39, pp. 315–6 [259]; Scherzberg, in: VDStRL, supra note 1343, 173; Hillgruber, in: VDStRL, supra note 1343, 175; Engel, in: VDStRL, supra note 1343, 190–1; Tribe, supra note 1092, pp. 598, 606; Aleinikoff, supra note 489, p. 973.
\item \textsuperscript{1521} Habermas, supra note 39, pp. 316–7 [260]; Schlink, supra note 549, p. 462.
\item \textsuperscript{1522} Poscher, supra note 548, pp. 74–5, 81.
\item \textsuperscript{1523} Alexy, supra note 77, pp. 435–6; Alexy, supra note 7, pp. 111 [75]; Stück, supra note 77, p. 405; Pulido, supra note 532, p. 195.
\end{itemize}