6 A Rule Based Model of Balancing

The purpose of this chapter is to present the balancing conception of this study cohesively. So far, it was occupied with describing and rationalizing the way courts balance and with refuting a certain conception of balancing—Principle Theory. An alternative balancing conception was proposed in Section 4.3. It suggests that balancing, including proportionality in the narrow sense, should be broken down to smaller steps, which are discussed sequentially (lexicographically). Instead of searching for an optimal result, decision makers (i.e., judges) should only look for adequate results. This was called ‘satisficing’. The virtue of this approach is that it does not require cardinal scaling of weights and that it is more transparent. However, it was a proposal from the point of view of decision theory (not legal reasoning), although an attempt was made to rationalize the proportionality principle as a satisficing algorithm. Moreover, the proposal was not justified normatively: Neither the fundamental concept (satisficing) nor the focus on methods as such was justified. Besides, the proposal was incomplete from a legal point of view because some details (Which aims are actually legitimate? Should competing rights be acknowledged?) were omitted. Finally, possible objections against this approach were neither presented nor, let alone, refuted.

6.1 The Pivotal Role of Methodical Considerations

First of all, the starting point needs some justification. Principle Theory is founded on a certain understanding of fundamental rights: They are optimization commands. Hence, the correct way of balancing is optimization. German functionalists, in contrast, believe that methods of interpretation are no help in solving difficult constitutional problems. Therefore, balancing depends on the competence of the institutions in question: Those bodies that are able to decide certain issues also ought to decide them. The starting point of this study is a methodical one, i.e., balancing is approached from a methodical perspective by asking how much rationality is possible in complex decision-making processes and how complexity can be reduced. Of course, any approach to balancing has to take all these aspects into account, namely the nature of fundamental rights and their effective protection, separation of powers considerations, and

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1814 Alexy, supra note 7, pp. 75 [47].
1815 Rinken, in: Azzola, supra note 978, vor Art. 93, para. 95.
methodical concerns. Moreover, all requirements must be based on the text of the constitutional instrument. For the method of the ECJ, the relevant provision is art. 220 TEC. According to this provision, the Court has to enforce the law—not some form of political morality, which requires the separation of goal reasons from rightness reasons.\footnote{1816} However, any discussion of balancing should begin with methodical considerations, for two reasons: (a) Many objections against Principle Theory rest on the assumption that the Weight Formula cannot operate in an objective way, because it is methodically too demanding.\footnote{1817} (b) Concerns regarding the right balance between powers of government are partly based on methodical uncertainty (the constitutional court defines the margin of normative epistemic discretion).\footnote{1818} For example, some German functionalists claim that the abilities of the powers involved should determine the application of norms (including balancing), because methods of interpretation are not objective.\footnote{1819}

An ideal theory of balancing should also abstract from the contents of the principles and rules that enter the process. \textit{How} one balances is one thing; whether obscure public interests, pure policies, rights backed policies or competing fundamental rights should be considered is another. Which rights and interests should be balanced depends on a particular understanding of fundamental rights. Separating these aspects is so important, because balancing conceptions may have certain undesirable and unnecessary connotations. For example, the minimal position conception (also known as \textit{Eingriffs- und Schrankendenken}) is usually thought to exclude the consideration of conflicting rights, positive obligations, and \textit{Drittwirkung}.\footnote{1820} Yet this association is in no way necessitated, because conflicting rights could be considered without changing the balancing process as such.\footnote{1821} Likewise, the Weight Formula could be changed such that public interests had to be considered: \[ W_{\text{public interest}, j} = W_{\text{public interest}} \cdot I_{\text{public interest}} / (W_j \cdot I_j) \]