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The Rationality of Balancing

Abstract: Every modern legal system is made up of two basic kinds of norms: rules and principles. These are applied by means of two different procedures: subsumption and balancing. While rules apply by means of subsumption, balancing is the means of applying principles. Balancing has therefore become an essential methodological criterion for adjudication, especially of constitutional rights.

However, balancing is at the heart of many theoretical and practical discussions. One of the most important questions is whether balancing is a rational procedure for applying norms. The aim of this paper is to consider whether this is the case. To achieve this aim, this paper reflects on why the rationality of balancing is in doubt, and to what extent balancing can be rational, and how this can be possible. The weight formula proposed by Robert Alexy is analysed as a model which, in spite of its limits, solves the philosophical and constitutional problems about the rationality of balancing to the greatest extent possible.

I. Introduction

In the global legal world, it is becoming increasingly recognized that every modern legal system is made up of two basic kinds of norms: rules and principles. These are applied by means of two different procedures: subsumption and balancing¹. While rules apply by means of subsumption, balancing is the means of applying principles. Balancing has therefore become an essential methodological criterion for adjudication, especially of constitutional rights.

The concept of balancing is at the heart of many theoretical and practical discussions. One of the most important questions is whether balancing is a rational procedure for applying norms or a mere rhetorical device, one that is useful for justifying any judicial decision whatever. This is a juridico-philosophical question. It has a major bearing on a second question, which is relevant from the point of view of constitutional law: the question of the legitimacy of the judge as balancer. More than one renowned author has stated that balancing is nothing more than an

¹ Robert Alexy, *A Theory of Constitutional Rights*, Translated by Julien Rivers, Oxford, 2002, 44 f.; Robert Alexy, *Zur Struktur der Rechtsprinzipien*, in: Bernd Schilcher et al. eds., *Regeln, Prinzipien und Elemente im System des Rechts*, Vienna, 2000, 31 f.; Ronald Dworkin, *Taking Rights Seriously*, London, 1977, 14 f.; Jan R. Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems*, Baden - Baden, 1990; Jan R. Sieckmann, *Modelle des Eigentumsschutzes: eine Untersuchung zur Eigentumsgarantie des Art. 14 GG*, Baden - Baden, 1998, 37 f.; Manuel Atienza and Juan Ruiz Manero, *Las piezas del derecho. Teoría de los enunciados jurídicos*, Barcelona, 1996; Carlos Bernal Pulido, *El principio de proporcionalidad y los derechos fundamentales*, Madrid, 2003, 569 f.

arbitrary and rash² Solomonic settlement, that the judge therefore does not have sufficient constitutional standing to apply principles from this standpoint, and that when he does so, he unduly restricts and even usurps other powers enshrined in the constitution³.

The aim of this paper is to consider whether balancing can be understood as a rational procedure for applying norms. To achieve this aim, it is necessary to reflect on why the rationality of balancing is in doubt (II), and to what extent balancing can be rational, and how this can be possible (III). Finally, the weight formula proposed by Alexy should be taken as a model which solves the philosophical and constitutional problems about the rationality of balancing to the greatest extent possible (IV).

II. Objections to the Rationality of Balancing

According to the critics, balancing is irrational for several reasons. The most prominent of these critics refer to the lack of precision, the incommensurability, and the lack of predictability of balancing.

1. The Lack of Precision of Balancing

The first objection claims that balancing is no more than a rhetorical formula or a technique for exercising power⁴ that lacks a clear concept and precise legal structure. The objection states that there are no objective legal criteria which could be binding on the judge for balancing and useful for controlling judicial decisions where balancing is brought into play⁵. From this point of view, balancing is a formal and empty⁶ structure, based only on the subjective, ideological and

² Jürgen Habermas, *Faktizität und Geltung*, Frankfurt, 1994, 316

³ Charles Fried, Two Concepts of Interests: Some Reflections on the Supreme Courts Balancing Test, *Harvard Law Review* 76, 1963, 759 f.; Peter Lerche, *Übermaß und Verfassungsrecht*, Cologne et al., 1961, 130

⁴ Walter Leisner, *Der Abwägungsstaat*, Berlin, 1997, 171

⁵ Rudolf Stammeler, *Theorie der Rechtswissenschaft*, Halle, 2nd edition, 1923, 447. In more recent times: Ernst W. Böckenförde, Grundrechte als Grundsatznormen, in: Böckenförde, *Staat, Verfassung, Demokratie*, Frankfurt, 1991, 184 f.; Ingeborg Maus, Die Trennung von Recht und Moral als Begrenzung des Rechts, *Rechtstheorie* 20, 1989, 197 f.; Kent Greenawalt, Objectivity in Legal Reasoning, in: Greenawalt, *Law and Objectivity*, Oxford and New York, 1992, 205

⁶ Fritz Ossenbühl, Abwägung im Verfassungsrecht, *Deutsche Verwaltungsblatt*, 1995, 905

empirical appraisals of the judge⁷. The scales for balancing are subjective appraisals by the judge⁸. Therefore, balancing cannot lead to a single correct answer.

2. Incommensurability in Balancing

The second objection states that balancing is irrational because it entails a comparison of two measures which, due to their radical differences, cannot be compared⁹. Incommensurability arises in balancing, for there is no organisation into a hierarchy or a common measure¹⁰ that makes it possible for the weight of the relevant principles to be determined. In the field of principles, there is no “unit of measure”¹¹, nor is there a “common currency for making possible a comparison” between principles¹².

3. The Lack of Predictability in Balancing

The final criticism maintains that balancing is irrational because its result cannot be predicted. Every result of balancing is individual. It depends on the circumstances of the case, not on general criteria. Judicial decisions that stem from balancing therefore conform to an *ad hoc* case law¹³, which tends to magnify the justice of the single case while sacrificing certainty, coherence and the generality of law.

⁷ Karl A. Betterman, Die allgemeine Gesetze als Schranken der Pressefreiheit, *Juristenzeitung*, 1964, 601 f.

⁸ Juan A. García Amado, ¿Ductilidad del derecho o exaltación del juez? Defensa de la ley frente a (otros) valores y principios, *Archivo de Filosofía del Derecho* XIII – XIV, 1996 – 1997, 71

⁹ Lothar Hirschberg, *Der Grundsatz der Verhältnismäßigkeit*, Göttingen, 1981, 72 f., 132 f. 153 f.; Nils Jansen, Die Struktur rationaler Abwägungen, in: Annette Brockmüller et al. eds., *Ethische und strukturelle Herausforderung des Rechts*, ARSP, Beiheft 66, 1997, 152 f.; Klaus Günther, *Der Sinn für Angemessenheit*, Frankfurt, 1988, 275 f.; Lawrence Tribe, Constitutional Calculus: Equal Justice or Economic Efficiency, *Harvard Law Review* 98, 1985, 595; Louis Henkin, Infallibility under Law: Constitutional Balancing, *Columbia Law Review* 78, 1978, 1048; Louis Frantz, Is the First Amendment Law? – A Reply to Professor Mendelssohn, *California Law Review* 51, 1963, 748.

¹⁰ See, on the concept of incommensurability: Joseph Raz, Incommensurability and agency, in: Raz, *Engaging Reason*, Oxford, 2001, 46.

¹¹ Jürgen Habermas, Anhang zu Faktizität und Geltung. Replik auf Beiträge zu einem Symposium der Cardozo Law School, in: Habermas, *Die Einbeziehung des Anderen. Studien zur politischen Theorie*, Frankfurt, 1996, 369

¹² Thomas Alexander Aleinikoff, Constitutional Law in the Age of Balancing, *Yale Law Journal* 96, 1987, 973

¹³ Herbert Bethge, *Zur Problematik von Grundrechtskollisionen*, Munich, 1977, 276; Hans Schneider, *Die Güterabwägung des Bundesverfassungsgericht bei Grundrechtskonflikten*, Baden–Baden, 1979, 23. The criticism about the *ad hoc* case law is as well-known as the objection about particularism. See: José J. Moreso, Conflitti tra principi costituzionali, *diritto e questioni pubbliche*, http://www.dirittoequestionipubbliche.org/D_O-2/testi?D-O-2_moreso-testo.htm, see on 20/11/2002; Bruno Celano, Defeasibility e bilanciamento. Sulla possibilità di revisione stabili, *Ragione Pratica* 18, 2002

There is a link between these three objections. The result of balancing cannot be predicted owing to its lack of precision, and the main reason for the lack of precision is the fact that there is no a common measure that makes it possible to determine the weight of the relevant principles.

III. Rationality or Hyper-rationality in Balancing

1. Limitations of the Rationality of Balancing

Some aspects of these criticisms should be rejected because they reflect hyper-rationality and therefore irrationality on the part of the critic. Someone is hyper-rational, if he or she is unable to recognize the limitations of rationality¹⁴. Critics are right when they affirm that balancing is formal and cannot exclude the subjective appraisals of the judge. But this does not mean that balancing is irrational and based only on these subjective appraisals. The syllogism is also formal. And this does not exclude subjective appraisals either. However, no one would state for this reason that the syllogism is irrational.

It is clear that balancing is no guarantee of objectivity. This is due, above all, to the fact that objectivity is an ideal that is unlikely to be achieved¹⁵ in any normative field¹⁶, and especially unlikely in such a controversial field as principles, which is so closely linked to ideologies. Objectivity could only be achieved in an ideal legal system, where the provisions established in the law completely determined the content of principles. In such a system, explicit individual regulations in the constitution and in statutory law would provide an objective justification for every judgment, for they would state exactly what is permitted, prohibited, and required in every conceivable situation¹⁷.

¹⁴ John Elster, *Solomonic Judgments. Studies in the Limitations of Rationality*, Cambridge, 1990, Chapter 1

¹⁵ For details of this sceptical view of objectivity in legal interpretation, see the criticism by Hans Kelsen of the “illusion of legal certainty” that is proclaimed in the first edition of the pure theory of law: *Introduction to the Problems of Legal Theory* (Translated by Bonnie Litschewski Paulson and Staley L. Paulson), Oxford, 1992, 83.

¹⁶ See, on the problems of objectivity in normative fields: Jan R. Sieckmann, *Grundrechtliche Abwägung als Rechtsanwendung – Das Problem der Begrenzung der Besteuerung*, *Der Staat* 41, 2002, 392 f.; M. Borowski, *La restricción de los derechos fundamentales*, *Revista Española de Derecho Constitucional* 59, 2000, 46

¹⁷ For the properties of such an ideal legal system, see Klaus Günther, *Critical Remarks on Robert Alexy's 'Special - Case Thesis'*, *Ratio Juris* 6, 1993, 151 f.

Such a legal system would nevertheless appear to be neither feasible nor convenient. It would not be feasible because legal provisions that establish principles are always undetermined. Normative lack of precision is a property that is inherent in the language of these provisions. Moreover, these provisions are drawn up and issued in situations in which time is at a premium and limitations exist on information. In practice, no power has either the time or the necessary information to foresee and regulate all the conflicts that could, hypothetically, arise in the field of principles. And, looking at it from the rule of law and democratic organization of society viewpoint, nor would this imaginary system be desirable. In a society that had such a specific and totally certain catalogue of constitutional and statutory principles, its prospects of political deliberation would be notably reduced. Parliament's sphere of action would be reduced to a minimum, the legislature would be transformed into an authority that is responsible merely for executing constitutional regulations, and its import as forum for democratic deliberation would be lost. Constitutional provisions governing constitutional principles would furthermore predetermine the content not only of legislation but also of administrative acts and judicial decisions. As a side effect, law would be anchored in the past, shorn of any ability to adapt to the new needs of society.

As a result, it is impossible to imagine an objective procedure for applying principles. Lack of precision opens the door to the subjective appraisals of the judge, and these will necessarily appear in balancing or in any alternative procedure. The same could be said about subsumption. For this reason, it is not correct to substitute "unsafe" balancing for "safe" subsumption. Anyone who claims that subjective appraisals by the judge should be excluded from balancing is therefore being hyper-rational. It is clear that the task of determining the normative content of principles allows the judge room for discretion. Normative and empirical appraisals are undertaken within the scope of this discretion, in order to overcome controversies relating to how much freedom each individual has, the restrictions that should be imposed on the principle of majority, or the extent to which the state can intervene in economic activities in order to guarantee the redistribution of wealth and ensure that each human being enjoys at least minimal living standards. We cannot expect that there be a single correct answer to controversies of this magnitude and complexity.

2. The Claim to the Rationality of Balancing

This sceptical position with respect to objectivity in the adjudication of principles does not, however, imply that we are left with irrationality. The fact that objectivity is utopian by nature does not mean that its value as an ideal, which should be pursued to the greatest extent possible, is lost. Balancing is a common practical procedure in legal reasoning, and its results are generally considered acceptable in everyday life and in legal practice. It therefore makes sense to enquire how one can obtain the greatest possible degree of rationality when applying principles by means of balancing. To answer this question, it is necessary to explain what rationality means and what rationality requirements should be observed in balancing.

a. The Concept of Rationality

The concept of rationality is ambiguous. At the most abstract level, rationality alludes to two dimensions: theoretical and practical¹⁸. Theoretical rationality states the conditions that a theory or a concept should fulfil in order to be considered rational. Theoretical rationality requires that theories and concepts have a precise structure, and that they are clear and free of all contradiction¹⁹. Meanwhile, practical rationality states the conditions that a human act is to meet in order to be rational. This is an evaluative sense of rationality²⁰ that is especially relevant in law when judicial acts relating to the application of norms are taken into account. One mission of legal theory, and especially of theories of legal reasoning, has been to state the conditions that an act relating to the application of norms should fulfil in order to be considered rational. It should be recognised that there is no consensus on the rationality conditions for an act relating to the application of norms from the point of view of the theories of legal reasoning²¹. It is nevertheless generally accepted that for being rational, such an act should be correctly justifiable in the law²².

¹⁸ See, on the difference between practical and theoretical rationality: John R. Searle, *Razones para actuar. Una teoría del libre albedrío*, Barcelona, 2000, 109 f. Similarly: Jürgen Habermas, Rationalität der Verständigung. Sprechakttheoretische Erläuterungen zum Begriff der kommunikativen Rationalität, in: Habermas, *Wahrheit und Rechtfertigung. Philosophische Aufsätze*, Frankfurt, 1999, 107 f.

¹⁹ Ota Weinberger, *Alternative Handlungstheorie*, Vienna, Cologne and Weimar, 1996, 67 f.

²⁰ Kurt Baier, *The Rational and the Moral Order*, Chicago and La Salle, 1995, 35 f.

²¹ See, on the discussion about the concept of rationality from the point of view of the theories of legal argumentation: Ernst Tugendhat, Zur Entwicklung von moralischen Begründungsstrukturen im modernen Recht, *ARSP*, Beiheft 14, 1980, 1 f.; Ulfrid Neumann, *Juristische Argumentationslehre*, Darmstadt, 1986, 94 f.

²² Jerzy Wróblewski, *The Judicial Application of Law*, Dordrecht, 1992, 209

This is the case when its justification can be stated in conceptually clear and consistent terms²³, and where the requirement of complete and saturated premises²⁴, logic²⁵, the burdens of argumentation and normative consistency²⁶ and coherence²⁷ are all respected.

b. Requirements of Rationality in Balancing

Both senses of rationality are relevant in the criticism of balancing. The objection respecting lack of precision accuses balancing of not being clear and not having a precise structure. Anyone seeking to overcome this objection should put forward a balancing model in which the concept and structure come across as clear and precise. On the other hand, practical rationality is relevant from the viewpoint of the three criticisms: lack of precision, incommensurability and lack of predictability maintain that the act of balancing is irrational from the practical point of view. Anyone seeking to overcome this objection has to present a balancing model in which the structure comes across as determined, as having a common measure for comparing principles, and as providing a predictable result that can be correctly justified in the law.

As a result of these premises, it should be asked whether there is a balancing model that can meet these theoretical and practical rationality requirements. The thesis that Alexy's weight formula offers such a model will be defended here.

V. A Rational Model for Balancing

²³ Robert Alexy, *Theorie der juristischen Argumentation*, Frankfurt, 1978, 234 f

²⁴ Alexy (note 23), 301

²⁵ Manuel Atienza, Para una razonable definición de razonable, *Doxa* 4, 1987, 193

²⁶ A justification is normatively consistent when the same result is arrived at when the same facts occur and all different treatment is justified. See Alexy (note 23), 234; Alexander Peczenik, *Grundlagen der juristischen Argumentation*, Vienna and New York, 1983, 189; Neil MacCormick, Coherence in legal justification, in: Werner Krawietz et al., eds., *Theorie der Normen. Festgabe für Ota Weinberger zum 65. Geburtstag*, Berlin, 1984, 43 f.

²⁷ The more a justification is founded on principles, rules, decisions, the general concepts of the legal system, and normative and empirical premises relevant to this system, the more coherent it is. See Robert Alexy, *Juristische Begründung, System und Kohärenz*, in: Okko Behrends et al., eds., *Rechtsdogmatik und Praktische Vernunft. Symposium zum 80. Geburtstag von Franz Wieacker*, Göttingen, 1990, 97 f.; Robert Alexy and Alexander Peczenik, The Concept of Coherence and Its Significance for Discursive Rationality, *Ratio Juris* 1, 1990, 115 f.; B. Baum Lavenbook, The Role of Coherence in Legal Reasoning, *Law and Philosophy* 3, 1984, 355 f.

In *A Theory of Constitutional Rights*²⁸ and other writings, Alexy puts forward a well-developed conception of the structure of balancing. In the final version, three elements form the structure of balancing: the rule of balancing, the weight formula, and the burden of argumentation. The second element - the weight formula - shall be concentrated on here (2), but first it is necessary to clarify the concept and the general structure of balancing in the model proposed by Alexy (1).

1. The Concept and the Structure of Balancing

a. The Concept of Balancing

According to Alexy, principles are optimisation requirements. Principles are norms that do not establish exactly what ought to be done, but require “that something be realised to the greatest extent possible, given the legal and factual possibilities”.²⁹ The scope of what is legally possible is determined by opposing principles and rules; factual statements about the case determine the scope of the factually possible.

In order to establish the “greatest extent possible” to which a principle should be carried out, it is necessary to contrast it with opposing principles or with principles that support opposing rules. In this case, all of them are competing principles; they support *prima facie* two incompatible norms (for instance, N₁ forbids \emptyset and N₂ commands \emptyset), which can be proposed as solutions for the case.

Balancing provides the means to resolve this incompatibility between *prima facie* norms. Balancing does not guarantee a systematic articulation of all the legal principles that, taking into account their hierarchy, resolve ahead of time all possible conflicts between them and all possible incompatibilities between all the *prima facie* norms they support. This hypothetical means of resolving the opposition between principles³⁰ is to be rejected for presupposing something that is impossible to conceive in the legal order of a pluralistic society: a complete hierarchy of

²⁸ Alexy (note 1), *Constitutional Rights*, 48 f.

²⁹ Alexy (note 1), *Constitutional Rights*, 47

³⁰ Supporting this hypothetical solution: Josef Isensee, *Das Grundrecht als Abwehrrecht und als staatliche Schutzpflicht*, in: Isensee and Paul Kirchhof eds., *Handbuch des Staatsrechts*, Heidelberg, 1992, vol. 5, 236; Friedrich Müller, *Juristische Methodik*, Berlin, 1989, 60

principles reflecting a complete hierarchy of values. Balancing involves neither the validity of a lexical order of constitutional rights nor that of a lexical order of justice principles. Such a model was proposed by Rawls when he stated the absolute priority rule for his first principle of justice over the second, and therefore that “liberty can be restricted only for sake of liberty”³¹. The idea of a lexical order should be also discarded, for it presupposes the possibility of separating, absolutely, liberties from social rights (especially the right to a minimal living standard) and collective goods that are related to the second principle of justice. The guarantee of a minimal living standard is a condition that liberties not remain merely rhetorical³². Balancing, on the other hand, is merely a structure by means of which not an absolute but rather “a conditional relation of precedence between the principles in the light of the circumstances of the case”³³ is to be established in order to reach the legal decision.

b. The Structure of Balancing

If we agree with Alexy, in order to establish the conditional relation of precedence between competing principles, it is necessary to consider three elements, which form the structure of balancing: the rule of balancing, the weight formula and the burden of argumentation.

1.) The Rule of Balancing

According to the rule of balancing,

“The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other”³⁴.

Consistent with this rule, the structure of balancing can be broken down into three different stages, which Alexy clearly identifies: “The first stage involves establishing the degree

³¹ John Rawls, The Basic Liberties and Their Priority, in: Rawls, *The Tanner Lectures on Human Values*, Salt Lake City, 1983

³² See Robert Alexy, John Rawls’ Theorie der Grundfreiheiten, in: W. Hinsch et al., eds., *Zur Idee des politischen Liberalismus*, Frankfurt, 1997, 282 f.

³³ Alexy (note 1), *Constitutional Rights*, 52 f.

³⁴ Alexy (note 1), *Constitutional Rights*, 102

of non-satisfaction of, or detriment to, the first principle. This is followed by a second stage in which the importance of satisfying the competing principle is established. Finally, the third stage establishes whether the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first”³⁵.

It is important to note that the first and second stages of balancing are analogous. Both operations consist of establishing the importance of the principles at stake, so we will refer to both as such.³⁶ Indeed, in both cases Alexy claims that commensurability can be established by reference to a triadic scale: “light”, “moderate” and “serious”.

The importance of the principles at stake is not the only relevant variable. A second one is the “abstract weight” of the principles.³⁷ Different abstract weights might derive from the different legal hierarchies of the legal sources in which principles are established or from which they stem. In addition to this, the abstract weight of one principle might be established by reference to positive social values. Thus, for instance, it could be claimed that the principle of protection of life has a greater abstract weight than that of liberty, if only because to be able to exercise one’s liberty, it is pretty obvious that one must be alive. Similarly, the constitutional courts of many countries have assigned a greater abstract weight to free speech owing to its connection with democracy, or to privacy owing to its connection with human dignity, when these principles are at stake.

A third variable *R* should be added, which refers to the reliability of the empirical assumptions concerning what the measure in question means for the non-realization of the first principle and the realization of the second in the circumstances of the case. *R* is based on the recognition that the empirical assumptions relating to the importance of the competing principles can have a different degree of reliability, something which should affect the relative weight of each principle in the balancing exercise.

³⁵ Alexy (note 1), *Constitutional Rights*, 401

³⁶ Following Alexy’s notation, we will symbolise the degree of variation or non- satisfaction of the first principle in the case as *IpiC*, and the importance in the satisfaction of the second principle in the case as *SPjC*. See Alexy (note 1), *Constitutional Rights*, 406.

³⁷ Following Alexy’s notation, we will symbolise the abstract weight of the first principle as *WpiA*, and the abstract weight of the second principle as *WPjA*. See loc. cit.

Now the question is: how should the importance of principles, their abstract weight, and the reliability of the empirical assumptions concerning the importance of the principles be assessed in order to come to a concrete balancing outcome? According to Alexy, the answer is provided by the weight formula.

2.) The Weight Formula

This formula has the following structure³⁸:

$$WP_{i,j}C = \frac{IPiC \cdot WPiA \cdot RPiC}{SPjC \cdot WPjA \cdot RPjC}$$

This formula states that the concrete weight in a given case of principle *Pi* in relation to principle *Pj* results from the quotient between, on the one hand, the product of the importance of principle *Pi*, the abstract weight of this, and the reliability of the empirical assumptions regarding that importance and, on the other hand, the product of the importance of principle *Pj*, the abstract weight of this, and the reliability of the empirical assumptions relating to that importance. Alexy says that it is possible to give a numerical value to the variables of the importance and abstract weight of the principles with the help of the triadic scale: light 2⁰ that is 1; moderate 2¹ that is 2; and serious 2², that is 4. In contrast, the reliability of the factual premises must be given a quantitative expression in the following way: reliable, 2⁰, that is, 1; maintainable or plausible 2⁻¹, that is 1/2; and not evidently false, 2⁻², that is, 1/4.³⁹

By applying this numerical value to the weight formula, it is possible to determine the “concrete weight”⁴⁰ of principle *Pi* in relation to principle *Pj*, in the case at hand. If the concrete weight of principle *Pi* in relation to principle *Pj* is greater than the concrete weight of principle *Pj*

³⁸ Alexy (note 1), *Constitutional Rights*, 408. See also Robert Alexy, *Die Gewichtsformel*, in Joachim Jickeli et al. eds., *Gedächtnisschrift für Jürgen Sonnenschein*, Berlin, 2003, 771 f.

³⁹ See Alexy (note 38), *Gewichtsformel*, 789 f.

⁴⁰ Robert Alexy, *On Balancing and Subsumption. A Structural Comparison*, *Ratio Juris* 16, 2003, 433 f.

in relation to principle P_i , the case should be decided according to principle P_i . On the other hand, if the concrete weight of principle P_j in relation to principle P_i is greater than the concrete weight of principle P_i in relation to principle P_j , the case should be decided according to principle P_j . If P_i supports the norm $N1$ that forbids \emptyset and if P_j supports the norm $N2$ that commands \emptyset , \emptyset should be forbidden in the first case and commanded in the second case.

3.) The Burden of Argumentation

The third element in the structure of balancing is the burden of argumentation. This burden operates when the application of the weight formula results in a stalemate, that is, when the weight of the principles is identical (or to express it formally, $WP_{i,jC} = WP_{j,iC}$). Alexy seems to defend two different ways of breaking the stalemate, one in the final chapter of *A Theory of Constitutional Rights*, and another in the *Postscript* to the English language edition of this book, written fifteen years after the initial publication. This double solution is problematic to the extent that it could lead to rather different results, as we will see.

In *A Theory of Constitutional Rights*, Alexy argues for a burden of argumentation supporting legal liberty and legal equality which means the same as the statement “in dubio pro libertate”⁴¹. According to this, no principle contrary to legal liberty or legal equality is able to prevail, unless “stronger reasons”⁴² are put forward in their favour. In other words, a stalemate would favour legal liberty and legal equality. However, in the *Postscript* to *A Theory of Constitutional Rights*, Alexy defends a different burden of argumentation. In the event of a stalemate, he says, the act of Parliament appears to be “not disproportionate”, and should therefore be declared to be in accordance with the Constitution. In other words, stalemates work not in favour of legal liberty and legal equality, but in favour of democracy⁴³. From the democratic point of view, this second burden of argumentation is more appropriate than the first.

2. The Role and Structure of the Weight Formula

⁴¹ Alexy (note 1), *Constitutional Rights*, 384 f.

⁴² Alexy (note 1), *Constitutional Rights*, 385

⁴³ Alexy (note 1), *Constitutional Rights*, 410 f.

a. The Role of the Weight Formula

According to Alexy, the weight formula is a procedure for determining the concrete weight of principle P_i in relation to principle P_j , in the light of the circumstances of a case. The weight formula is thus proposed as a developed complement to the rule of balancing, which Alexy states on the basis of a classical formulation of the third limb of the proportionality principle, or proportionality in the narrow sense, in German constitutional law⁴⁴.

However, it seems to me that the weight formula, as described by Alexy, calls for a new law of balancing. The aim of the weight formula is to establish “a conditional relation of precedence between the principles in the light of the circumstances of the case”. The key observation is that the relation of precedence is not determined by means of merely comparing the importance of the principles in the case at hand (“the degree of non-satisfaction of, or detriment to, one principle” and “the importance of satisfying the other”), but by means of a wider operation which includes reference to their abstract weight and to the reliability of the empirical assumptions relating to the importance of the principles. That is, the weight formula is a reformulation of the basic insight behind the original law of balancing which is more sophisticated in analytical terms in that it renders explicit the need to consider two more variables, namely, abstract weight and reliability of the empirical assumptions.

The new formulation of the law of balancing should run:

The greater the concrete weight of principle P_i in relation to principle P_j in the light of the circumstances of the case, the greater the concrete weight of principle P_j in relation to principle P_i in the light of the circumstances of the case.

This reformulated law of balancing could also be expressed as:

$$WP_{i,j}C \leq WP_{j,i}C$$

⁴⁴ See, for example, Decision of the German Constitutional Court in: BVerfGE 30, 296 (316). See also, Laura Clerico, *Die Struktur der Verhältnismäßigkeit*, Baden – Baden, 2001, Chapter 3.

Or, more explicitly,

$$\frac{IPiC \cdot WPiA \cdot RPiC}{SPjC \cdot WPjA \cdot RPjC} \leq \frac{SPjC \cdot WPjA \cdot RPjC}{IPiC \cdot WPiA \cdot RPiC}$$

This could be rendered clearer with the help of a concrete example. Imagine that the life of a child is dependent on a blood transfusion, which her parents refuse in the name of their religious beliefs. This implies a conflict between the right to life and the right to religious freedom. Is it constitutionally sound to mandate the transfusion contrary to the will of the parents? A constitutional court could consider that the degree of non-satisfaction or detriment of principle *Pi* (freedom of religion) is serious (4), as is the importance of satisfying principle *Pj* (protection of the life of the child) (4). The Court could further consider that the abstract weight of freedom of religion *Pi* is moderate (2) and that the right of life is high (4); finally, that the empirical assumptions concerning the importance of both principles are reliable (1). In this case, the application of the law of balancing leads to the following conclusion:

$$\frac{4 \cdot 2 \cdot 1}{4 \cdot 4 \cdot 1} \leq \frac{4 \cdot 4 \cdot 1}{4 \cdot 2 \cdot 1}$$

That is to say:

$$\frac{8}{16} \leq \frac{16}{8}$$

$$\frac{1}{2} < 2$$

In this example, the measure meets the requirements of the rule of balancing, because by applying it, $WP_{i,jC} \leq WP_{j,iC}$, and protecting the child's life should thus be considered to be in line with the constitution.

b. The Structure of the Weight Formula

The structure of the weight formula poses many interesting problems. Paramount among them is whether there are objective criteria to determine the value of the relevant variables that form the weight formula. Whether or not this is the case is what I shall explore in this section, namely, by considering each of the variables in detail.

1.) The Degree of Importance of the Competing Principles

It is certain that sometimes rational judgments about degrees of intensity and importance of competing principles are possible. Or, what is the same, there are easy cases concerning the degree of importance of principles. For example, if a satirical magazine calls a handicapped officer a “cripple”, this clearly constitutes a serious offence against his honour (4), while at the same time contributes very slightly to the protection of freedom of speech (1). However, there are also hard cases in which the premises, both factual and normative, that should be considered in determining the importance of a principle, are uncertain. This is typically the case when religious freedom is at stake. It can be doubted whether the degree of interference of a given measure with religious freedom can be determined in abstract terms, without taking into account subjective views on religious experience. Thus, the perceived degree of interference with religious freedom of a forced blood transfusion is clearly dependent on how the individual lives his religious faith. It might be fully negligible for most believers, and very serious for a member of Jehovah’s Witnesses. An assessment of the importance of the principle can only be made after taking a concrete stand that cannot be determined by the weight formula itself. Thus, reference to the weight formula implies a grant of discretion to the judge and to his critical moral views, as well as to his political ideology. However, even in such cases the weight formula has a role to play, for it makes clear where there is room for discretion at the heart of the balancing process.

Likewise, the judge can exercise discretion when it is not clear whether the case is an easy or a hard case with respect to the first variable in the weight formula, namely, the importance of principles. It can happen that even if the case seems to be an easy one, after considering additional arguments, it appears difficult. This can be shown with the help of a concrete case, the Tobacco Judgment of the German Constitutional Court, which Alexy refers to as an example of a clear case.⁴⁵ This judgment concerned the statutory duty imposed upon tobacco producers to make consumers aware of the health risks associated with smoking in the labels on cigarette packs, and, more precisely, whether or not this was constitutionally sound. Alexy says that this duty is a “relatively minor interference with the freedom of profession”⁴⁶, especially when compared to potential alternative measures, such as the prohibition of the sale of tobacco, or the imposition of harsh restrictions on its sale. Moreover, it is clear that the measure fosters the protection of health. Therefore, Alexy concludes that “The Federal Constitutional Court was not exaggerating when it stated in its decision on health warnings, that ‘according to the current state of medical knowledge, it is certain’, that smoking causes cancer and cardio-vascular disease”⁴⁷. The minor interference with the freedom of profession is balanced against the protection of health. However, different assessments of the relevant variables are not impossible. From a factual point of view, it could be said that it is not certain that the duty to advertise the health risks stemming from tobacco in tobacco labels actually contributes to the promotion of consumers’ health. It could be the case that such a measure is inefficient, perhaps because consumers are already aware of what the labels tell them; or because tobacco addiction persists even if consumers are informed of its consequences, for it is traceable back to weakness of will and not to lack of information; or perhaps because providing information in the labels would render smoking more desirable. Viewed from this angle, the degree of health protection is not necessarily high. One can discuss this further and, for this reason, the case becomes difficult at this point.

What, at any rate, is clear is that the range of the importance of the relevant principles depends on factual and normative premises. At this point the weight formula can be

⁴⁵ Alexy (note 1), *Constitutional Rights*, 402

⁴⁶ *Loc. cit.*

⁴⁷ *Loc. cit.*

complemented. A first kind of normative premise concerns the “meaning”⁴⁸ (*M*) of the relevant positions of the principles, from the 'concept of person' viewpoint that the legal and political system must presuppose⁴⁹. In a liberal society *a la* Rawls, liberty rights closely connected to the moral capacities of the person should be given more weight. They have greater meaning and, therefore, if an act of public power interferes with them, this results in a serious violation of the principle that underlying them. In a Rawlsian Society, the more connected with the moral capacities of the person a position of a principle is, the more importance should be attributed to a principle.⁵⁰

A second kind of normative premise is the importance of the legal position (*LP*) in a case, regarded from the point of view of the content of the relevant principles. For instance, an act of censorship of the government against the opposition party at election time is a more serious detriment of freedom of speech than the strict regulation of a journal that publishes details about the sex lives of actors in Hollywood. It could be also said that a restriction of access to the basic education for many children is a more serious detriment to the right of education than a strict regulation of the LLM or PhD would be.

As for the empirical premises, they concern what the measure in question means for the importance of the relevant principles. From this point of view, the importance of principles depends on the efficiency (*E*), speed (*Sp*), probability (*P*), reach (*Re*) and duration (*D*) of the controversial act in failing to satisfy and in satisfying the principles at stake. The more efficient, fast, probable, powerful and long the act under review is in failing to satisfy or in satisfying the relevant principles, the greater the importance of these principles.

Regarding these normative and empirical premises, it could be said that the variables *IPiC* and *SPjC* in the weight formula might be formulated in a more explicit and extended way as follows:

⁴⁸ See, on the concept of meaning: John Rawls, *Political Liberalism*, New York, 1993.

⁴⁹ Carlos Bernal Pulido (note 1), 760

⁵⁰ An analogous observation could be made when considering the concept of person from a different standpoint, more precisely, as a citizen, whose dignity requires the protection of social rights.

$$IPiC = (MPiC \cdot LPPiC) \cdot (EPiC \cdot SPPiC \cdot PPiC \cdot RePiC \cdot DPiC)^{51}$$

$$SPjC = (MPjC \cdot LPPjC) \cdot (EPjC \cdot SPPjC \cdot PPjC \cdot RePjC \cdot DPjC)^{52}$$

2.) The Abstract Weight of the Competing Principles

Further room for judicial discretion derives from the measurement of the abstract weight of the principles. Abstract weight is a very singular variable, one which always leads back to moral and ideological considerations and which necessarily implies that the judge has to adopt a position about the substantial theory of the constitution. Naturally, the abstract weight variable loses its importance when the competing principles are of the same nature. However, even where this is not the case, there might be nevertheless easy cases. It could be assumed, for example, that the protection of life, or constitutional rights based closely related to the principles of human dignity and democracy should be given a higher abstract weight than others⁵³. However, judges have a considerable discretion when determining the abstract weight of principles. At this point, rationality has a limit. Quite obviously, there is no complete pre-established graduation of abstract weights that can be formulated in terms of the triadic scale. The protection of life might be said to deserve the highest value (4), but one could discuss whether such a value should not also be granted to the rights closely connected to human dignity and democratic decision-making. Furthermore, should the value be the same for all rights connected to human dignity and democratic decision-making, or should it vary depending on the closeness of the connection? What about other principles, like legal equality or the right to factual, and not merely legal, equality? It might be said at this point that the measurement of the abstract weight of principles according to the triadic scale clearly depends on the search for the best substantial theory of the constitution that the judge is to undertake. If this theory is an individualistic one, the judge will give the highest abstract weight to liberty. If the theory is a communitarian one, the judge might give the greatest weight to the common good. The judge should solve the case according to the

⁵¹ The aim of the parenthesis is to make explicit the concepts that serve as the variables of the *IPiC*. However, they do not play any mathematical role.

⁵² The aim of the parenthesis is to make explicit the concepts that serve as the variables of the *SPjC*. However, they do not play any mathematical role.

⁵³ Carlos Bernal Pulido (note 1), 760, 770, 772

best substantial theory of the constitution, but sometimes it is not easy to know what this comes to. Thus, the right answer is that there is no right answer.

3.) The Reliability of the Premises

Some limits on rationality are also observable in what concerns the determination of the reliability of the empirical assumptions relating to the importance of principles. Importance can be said to depend on its efficiency, speed, probability, reach and duration. The limits of rationality are related to several factors. First, it is difficult to determine the reliability of the empirical assumptions from all these perspectives. The empirical knowledge of the judge is limited. Sometimes he does not know the right value of each of the variables. Second, the combination of these variables is a highly complex affair. What should be the reliability of an empirical assumption whose slight efficiency is plausible ($\frac{1}{2}$), whose high speed is not evidently false ($\frac{1}{4}$), whose high probability is reliable (1), whose great reach is plausible ($\frac{1}{2}$) and whose long duration is reliable (1)? And, correlatively, will this reliability be greater if the same variables have the same values but in a different order?

This is what explains that Alexy, at the end of the day, limits himself to considering the reliability of the empirical assumptions as such. However, there could be also an epistemological problem concerning the reliability of the normative premises that determine the importance and abstract weight of a principle. This opens up the “normative epistemic discretion”⁵⁴ of the Parliament and other public decision-making powers. Clarification is required as to whether the relevant normative premises are reliable, plausible, or not evidently false. If we distinguish the reliability of the empirical premises (*REIPiC* and *RESPjC*) from the reliability of the normative premises concerning the importance of principles in the case at hand (*RNIPiC* and *RNSPjC*) and their abstract weight (*RNWPiA* and *RNWPjA*), we have an extended definition of reliability as follows:

$$RPiC = REIPiC \cdot RNIPiC \cdot RNWPiA$$

⁵⁴ Robert Alexy (note 1), *Constitutional Rights*, 420

$$RPjC = RESPjC \cdot RNSPjC \cdot RNWPjA$$

V. Conclusion

All the previous considerations lead to the following extended weight formula model.⁵⁵

$$W_{Pi,j}C = \frac{(MPiC \cdot LPPiC) \cdot (EPiC \cdot SPPiC \cdot PPiC \cdot RePiC \cdot DPiC) \cdot WPiA \cdot (REIPiC \cdot (RNIPiC \cdot RNWPiA))}{(MPjC \cdot LPPjC) \cdot (EPjC \cdot SPPjC \cdot PPjC \cdot RePjC \cdot DPjC) \cdot WPjA \cdot (RESPjC \cdot (RNSPjC \cdot RNWPjA))}$$

This formula seeks to reflect the main normative and empirical variables that are relevant for balancing. It is accordingly a very complex model, one that gives rise to the objection that application would seem not to be obviously straight forward. However, it should be said that the model is complex because the application of principles is a highly complex procedure. Moreover, the weight formula is not an algorithmic procedure that can guarantee the only correct answer in all cases. Quite the contrary, for it has diverse rationality limits that give the judge room to exercise discretion. His ideology and appraisals play an important role here. Nevertheless, this fact does not reduce the rationality and usefulness of the formula. The weight formula is a clear procedure even when its limits are borne in mind. It offers for balancing, a clear concept and a precise legal structure, that are free of all contradiction. In this structure, the triadic scale is the common measure for determining the weight of the relevant principles. The weigh formula is also a determinate structure that clarifies the different, relevant balancing variables. It therefore enables the result of balancing to be correctly justified in the law. Through this formula, justification can be stated in conceptually clear and consistent terms, with complete and saturated premises, and with logic and the burdens of argumentation respected. The weight formula gives expression to every element that the judge ought to take into account and every decision that should be justified. In legal practice, these judicial decisions make up a network of precedents that allow principles to be applied in a consistent and coherent manner, with the result that balancing is predictable. Finally, the weight formula is a very good example of how practical

⁵⁵ The aim of the parenthesis is to make explicit the concepts that serve as the variables of the weight formula. However, they do not play any mathematical role.

problems in constitutional law can be solved with the help of juridico-philosophical considerations.

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