

FOREWORD

It would appear that balancing is an indispensable instrument of legal reasoning, in particular, with respect to the interpretation and application of basic rights in contemporary constitutional law, but also in many other fields of law. However, the objectivity, rationality, and legitimacy of this method are contested. It is criticised as irrational and arbitrary, a threat to legal certainty, and an illegitimate interference of courts with the powers of political organs, such as parliaments and other legislative bodies. Although in past years ever more sophisticated approaches of balancing have been developed in order to cope with these problems, many issues remain open and contested. The Special Workshop “Legal Reasoning: The Methods of Balancing”, a part of the 24th IVR World Congress from 15–20 September 2009 in Beijing, was dedicated to these issues. The workshop provided a forum for the discussion and clarification of the structure of balancing, its epistemology, and its legitimacy.

As for the structure of balancing, the role of normative conflicts in rational argumentation raises many questions: What is the justificatory relation between the arguments to be balanced and the result of the balancing? Is there a logical relation at all, and what species of logic is required to reconstruct it, for example, some form of non-monotonic logic or defeasible reasoning? What are the formal characteristics of the arguments to be balanced against each other? How does the logical structure of these arguments affect the structure of balancing? And what is the structure of normative conflicts that lead to balancing? The contributions of Cesar Serbena, Peng-Hsiang Wang, and David Duarte address some of these issues. Serbena argues for the use of paraconsistent logic in analysing normative conflicts. Wang discusses the notion of the “ideal ‘ought’” and tries to reconstruct it by means of a deontic logic based on a possible world semantics. Duarte presents a formal account of conditions in which balancing has to take place.

As for the epistemology of balancing, the crucial problem of balancing is whether it provides a rational justification of normative judgements. Does it provide knowledge about the law, or can one at least claim some other form of objectivity for judgements based on balancing? Diverse conceptions of balancing offer different answers to these questions, for example, conceptions applying economic methods, Alexy’s “weight formula”, or the conception of balancing as autonomous judgment. In any case, a central issue is whether, and to what extent, an objective determination of the factors of balancing, in particular, of the relative weights of the arguments to be balanced, is possible. The contributions of Bernardo Bolaños, Ekkehard Hofmann, Jean-Baptiste Pointel, Ricardo Guibourg, and myself are concerned with problems of the criteria for balancing and the availability of a rational justification for balancing judgements. Bolaños suggests an understanding of balancing as a kind of deontic probabilistic reasoning, which might help to give a more precise account of Alexy’s “weight formula”. Hofmann points out the need for applying numerical methods in legal reasoning. Pointel suggests an analysis of principles by means of vectors, and uses the device of the “Edgeworth-box” for explaining the criteria for balancing judge-

ments. My own paper presents an account of balancing as optimization by contrast with Alexy's "weight formula", which is criticized as unsatisfactory in several respects. Guibourg rejects this formula straightforwardly and claims that it cannot contribute much, if anything at all, to the rationality of balancing.

Central issues of the legitimacy of balancing are, on the one hand, whether it should take place at all and, on the other, and perhaps in practical respects even more important, who should have the competence to make binding judgments based on balancing. In particular, the issue is whether the courts or other legal or political organs should have this competence. Since in cases of conflict the normative situation seems not to be determined by previously established law, one might well doubt that such decisions should be regarded as applications of the law. In this respect, the rationality of balancing appears to be crucial. Can the principle of proportionality, which is the legal principle governing balancing, provide a solution to this problem? And might there be an alternative to balancing? These are the issues of the contributions of Marijan Pavčnik and Friedrich Lachmayer, Hannele Isola-Miettinen, and Lin Cai. Pavčnik and Lachmayer present the elements of the principle of proportionality. Isola-Miettinen demonstrates that the jurisprudence of the European Court of Justice depends in crucial respects on balancing, and invites attention to the problem of competence in balancing. Cai criticizes the approach of balancing and suggests that one look for an alternative.

In sum, the contributions cover a number of the pertinent issues in the theory of balancing. I should like to thank the contributors for their participation in the workshop, for delivering original and stimulating papers, and for taking responsibility, too, for arriving at a proper English in their contributions, the IVR and the organizers of the IVR-World Congress for offering an opportunity to hold the Special Workshop on balancing at this congress, and the Steiner-Verlag for its readiness to publish the contributions of the workshop in an ARSP-Beiheft.

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