Afweging van grondrechten in een veellagig rechtssysteem. De toepassing van het proportionaliteitsbeginsel in strikte zin door het EHRM en het HvJ EU

Houdijker, F.M.J. den

Summary

Balancing of Fundamental Rights in a Multi-level Legal System. The Application of the Principle of Proportionality *Stricto Sensu* in the Case-law of the ECtHR and the CJEU (*Afweging van grondrechten in een veellagig rechtssysteem. De toepassing van het proportionaliteitsbeginsel in strikte zin door het EHRM en het HvJ EU*)

I Introduction, research question and research method

Balancing nowadays seems to be omnipresent, in particular in the continental European fundamental rights discourse. Often considered to be of German origin, balancing of fundamental rights and interests is more and more regarded as the preferable way of dealing with conflicts between these rights and interests, especially because it offers much room for 'honest' and particularised decision-making. Balancing has also permeated the case-law of the two supranational courts on which this study focuses: the European Court of Human Rights (ECtHR or Strasbourg Court) and the Court of Justice of the European Union (CJEU or Luxembourg Court).

The main research question of this study is whether the Courts' frequent references to the notion of balancing contribute to the intelligibility and transparency of their decisions in cases concerning conflicts of fundamental rights and/or interests. Both Courts have been criticised for a lack of clarity of their rulings, especially those rulings in which they rely on balancing. As this criticism is potentially harmful to the efforts or perhaps even the willingness of the Member States of the Council of Europe and the European Union to abide by the decisions of the accompanying Courts, it is of great importance to evaluate the critique on the Courts' use of balancing and – if necessary – to propose ways in which the rulings of the Courts can be improved.

In answering the aforementioned research question this book is divided into three parts. Part I delves deeper into the phenomenon of balancing from a legal-theoretical point of view. Chapter 2 explores the origins of the idea of balancing, as well as the current role of the idea in the case-law of the Strasbourg and Luxembourg Courts. Thus, Chapter 2 provides the background information on Strasbourg and Luxembourg balancing that is necessary to understand and evaluate the Courts' use of balancing in the reasoning of their judgments. Chapter 2 also contains a study of the American debate on balancing, which offers important comparative material and provides a good basis for understanding the theoretical aspects of balancing. In Chapters 3 and 4, the idea of balancing is dissected and discussed on the basis of legal theory with the objective of devising an 'ideal type' of balancing. This

ideal type provides a yardstick for the evaluation of balancing by the two European Courts whose case-law is studied in the second part of the book.

Part II of this study investigates the balancing practices of the ECtHR and the CJEU. The exact methodology of the case-law analyses is explained in Chapter 5. Chapters 6 and 8 contain an introduction to the context in which the Courts operate. Obtaining a sound understanding of the context in which the idea of balancing is used, enables one to discern the differences between pure balancing arguments and arguments associated with the context in which justice is delivered. Moreover, paying heed to the context in which the Courts operate leads to a more realistic analysis of their case-law and it allows for a sound evaluation of their rulings.

After an extensive description of the balancing opinions of the ECtHR and the CJEU in Chapters 7 and 9, the findings of the case-law analyses and those of the legal-theoretical research are brought together in the final chapter of this book: Chapter 10. Whilst the chapters in Part I and II are of a descriptive nature, Chapter 10 presents a normative evaluation of the balancing practices of the ECtHR and the CJEU. This normative evaluation is based on a synthesis of the legal-theoretical findings of Part I and the findings of the case-law analyses of Part II. The evaluation of the balancing decisions of the ECtHR and the CJEU is not based upon an appraisal of the substantive outcome of their decisions, but on an evaluation of the reasoning of their decisions. Put differently, it is the soundness, or intelligibility, of the Courts' reasoning that is assessed in Chapter 10. This is done by using the ideal type balancing act devised in Part I as a yardstick. The ideal type is not 'sacred', however, since it is conceivable that the results of the case-law analyses in themselves present a reason to amend or refine the ideal type. Indeed, this topic is also addressed in Chapter 10 of this study.

II Balancing and the complicated matter of balancing fundamental rights and interests in a multi-level legal system

In each study into balancing, a core question is what exactly is meant by 'balancing' and what it is that the idea of balancing requires a 'balancer' to do. Despite its popularity (or perhaps because of it), however, balancing is rarely defined; indeed, the idea is not easily captured in a definition. To give meaning to the idea, this study places it in the context of the continental European principle of proportionality. This principle consists of three separate tests to assess the reasonableness of measures that interfere with individual rights and/or interests: the tests of suitability, necessity and proportionality in the strict sense. Balancing is positioned in the test of proportionality in the strict sense. It is this test that obliges the judge to consider the adverse effects of a measure in relation to its positive effects or, in the language of balancing, to answer the question whether the positive effects of the measure outweigh the adverse effects.

As mentioned before, both the European Court of Human Rights and the European Court of Justice of the EU often use balancing language when dealing with conflicts between fundamental rights and interests. Real balancing would thereby require them to judge ('weigh') each of the conflicting interests on their own merits, followed by a reasoned choice for the most important ('most weighty') interest or group of interests. The question arises whether this is what the Courts actually do and, more importantly, if the technique of judicial decision-making they resort to under the denominator of balancing provides sufficient insight into the reasons and arguments for reaching a certain outcome.

As is elaborated upon in Chapter 1 of this book, the Courts are confronted with two particular difficulties when aiming to provide their audience – ranging from the parties involved in a particular conflict to the public in general – with soundly reasoned decisions: the cases in this study all concern fundamental rights issues and the Courts have to deal with the multi-levelness of the legal system in which they develop their case-law. These two difficulties challenge the European Courts to reach high standards of judicial reasoning, whilst the success of meeting those standards is seriously hampered. Especially the factor of the multi-levelness of the legal system turns out to play an important role in the balancing case-law of both the Strasbourg and the Luxembourg Court.

III The German origins of balancing, the rise and current role of balancing in the Strasbourg and Luxembourg discourses and balancing in the US

To create a baseline for the study of the balancing opinions of the CJEU and the ECtHR, more clarity is needed on the exact meaning of the idea of balancing and its position in the general test of proportionality. The current Strasbourg and Luxembourg use of balancing can be better understood and hence better analysed and evaluated, if more is known about the origins of balancing in these two European systems and about its particular role in the 'average' Strasbourg and Luxembourg balancing opinion. Chapter 2 endeavours to enlighten the reader on both issues.

The German discourse on proportionality is clearly one of, if not the most advanced in Europe. Moreover, it has unmistakably influenced the distribution and development of the idea of proportionality in other European countries. Without prejudging if the German proportionality discourse is the sole and/or the most influential source of proportionality and balancing review by the Luxembourg and Strasbourg Courts, one cannot but choose the German proportionality discourse as a starting point for charting the development of the European proportionality discourse.

In the first part of Chapter 2 it is explained how the principle of proportionality, or *Verhältnismäßigkeit*, entered German law at the end of the nineteenth

century. It first emerged in the case-law of the Prussian *Oberverwaltungsgericht*, the main administrative court at the time, which used a proportionality test to assess the exercise of public order powers by the government. At the time, however, the test of proportionality only contained a test against the principle of necessity (*Erforderlichkeit* in German). It was only after the Second World War that the *Verhältnismäßigkeitsprinzip* began to develop into the more comprehensive principle with its three-part test that is currently used.

The *Lüth* and *Apotheken* judgments of the *Bundesverfassungsgericht* of 1958 were of great importance for the development of German proportionality thinking. Nevertheless, as is further elaborated upon in Chapter 2, the coming of age of proportionality is complex; in particular the influence of legal literature should not be underestimated. Besides, the development of the proportionality test into its current form was a gradual process, for which the pre-war period also was of great importance. In particular, a line of legal thought developed in the beginning of the twentieth century, the *Interessenjurisprudenz*, was very influential to the post-war development of the idea of proportionality. Chapter 2 paints a detailed picture of the rise of the proportionality principle, and with it of balancing, in German law and later in Europe more generally, and it provides for an explanation of its growing popularity. Chapter 2 also reveals the striking consistency of German legal doctrine on the principle of proportionality.

Chapter 2 subsequently focuses on the way in which the notion of proportionality has found its way into the case-law of the two European Courts. It is submitted that the Strasbourg and Luxembourg Court not only use a different balancing language than the German courts do, but even rely on a different conceptual interpretation of the idea of balancing. It is thus not correct to speak of a 'European' idea of balancing, as there are simply too many differences between the German, Luxembourg and Strasbourg balancing discourses. What is more, neither of the two European Courts has fully endorsed the German interpretation of the idea of balancing (especially the Luxembourg interpretation of balancing seems to be influenced by the French *contrôle de bilan*) and their own interpretation of the notion seems to be inspired by more than only the German doctrine, as is set out in the second part of Chapter II. It is interesting to note that neither of the two European Courts seems to have reached a final interpretation of balancing. The Luxembourg Court appears to be still agonising over the desirability of the application of the test of proportionality in the strict sense as such. The Strasbourg Court seems to have taken this hurdle fairly confidently, but it does not seem to be completely sure yet about the details of the balancing test it wishes to perform.

To analyse and evaluate the use of the highly different balancing discourses of the European Courts, it is desirable to rely on theoretical sources to create a relevant and objective yardstick. In view of the finding that the European

balancing discourses are *sui generis* discourses, it would be problematic to base the theoretical study on German sources only. When one is searching for an ideal type of balancing, however, one cannot but be interested in the American debate on balancing. The controversies and debates surrounding balancing in the United States offer highly interesting and relevant information on the possible meaning of the idea of balancing. For that reason, the third and final part of Chapter 2 explores the origins and current role of American balancing. This part discloses that, although American balancing and German balancing emerged in more or less the same period, the ideological backgrounds of balancing are very different for both systems. Nevertheless, it is argued that American balancing doctrine can serve as a source of inspiration in the quest for an ideal type balancing act.

IV Unravelling balancing, incommensurability and the balancing metaphor

To provide for a yardstick to evaluate the balancing acts of the ECtHR and the CJEU, the remainder of Part I studies judicial balancing from a legal-theoretical point of view. Since balancing is a complex notion, it is unravelled into three different stages or phases. Firstly, there is a phase of selection, where the rights and interests relevant to the balancing act are selected and non-relevant rights and interests are put aside. The second phase is the definition phase. In this phase a court has to decide on the level of abstraction of the relevant rights and interests, which can, after all, be defined in a highly concrete manner, but also in a very abstract way. In a case concerning freedom of expression, for example, it is possible to consider only the freedom of expression of one particular individual, but it is equally possible to look at the importance of freedom of expression for society as a whole. The third and final stage is that of the weight determination or weight allocation. The question here is how much weight each relevant right and interest puts into the scale, and especially how the weight of rights and interests can be determined.

Chapter 3 studies each stage in depth in order to reveal the difficulties a court is likely to encounter when using the idea of balancing as a means of judicial decision-making, or rather as a means of structuring the reasoning of a balancing decision. To achieve a theoretically sound result, balancing requires a long and difficult journey. In each of the three phases the court can easily get lost, and there are many questions related to balancing that the idea itself does not provide an answer to. At the end of the journey, the seemingly attractive and persuasive methapor of balancing will have lost much of its charm. In short, the journey can be described in the following terms: The selection of relevant rights and interests from a 'Universe of Interests' is up to the court. The same applies to the definition of the relevant rights and interests. Since the choices made in these two phases of balancing (can) strongly influence the remainder of the balancing process, the judge should be conscious of his choices and their consequences, to say the least. When it

comes to assigning weight to the selected rights and interests, the complexity and impracticability of the idea of balancing are evident. The problem here seems to be of a fundamental nature. If one acknowledges the thesis of incommensurability of rights and interests, the question even arises whether the actual valuation of rights and interests, be it on the basis of an intrinsic or relative weight determination, is at all possible.

Chapter 3 provides for an in-depth analysis of the aforementioned thesis of incommensurability. This is a complex thesis related to the question of whether weighing and/or comparing fundamental rights and interests is possible. The classical incommensurability problem is the lack of a common scale by which the importance or weight of interests can be determined. The accompanying question is whether in the search of a balance between conflicting rights and interests, it is possible to find a common scale to define the relative weight of the conflicting rights and interests, i.e. their weight in relation to each other. A related idea to which incommensurability is often linked in legal discourse, is that of incomparability. There the question is how different rights and interests can be compared and thus how the comparative strength of conflicting rights and interests can be determined with the ultimate goal of deciding which right or interest or which group of rights and interests should prevail. If the thesis of incomparability is adhered to, the presence or absence of a common scale is not the pivotal question anymore – it is replaced by the question how rights and interests of a different nature can be compared.

Given its relevance for judicial balancing, this study focuses on the incomparability of rights and interests. The classical thesis of incommensurability is explored and explained, but it is not used as a means to evaluate the European Courts' case-law, since it relates to something that will always linger on a moral level. A belief or non-belief in incommensurability is to such a large extent inextricably linked with one's choices on a moral level, i.e. one's belief in value monism or value pluralism, that the very notion of incommensurability can hardly help to assess the case-law in an objective manner. Hence, no attempts are made to solve the incommensurability question. Nevertheless, the legal-theoretical discourse on incommensurability and incomparability does raise the question as to how courts can best account for the claim that, due to the incommensurability theses, it is difficult, if not impossible, to provide rational and intelligible arguments for choices between conflicting rights and interests.

Finally, it is argued in Chapter 3 that the metaphor of balancing would be taken too literally if one would limit the thesis of incommensurability to the impossibility of finding a common (material or immaterial) scale to define legal magnitudes. It is important to realise that talking about establishing the 'weight' of interests and the 'balancing' of interests implies metaphorical language. Although we – as human beings – probably will not be able to live without metaphorical language, we should refrain ourselves from taking the metaphor of the scales of justice literally. The metaphor touches upon a deep

understanding of the law as a distribution mechanism and what the application of the law is about. It implies that we look at the process of solving a legal dispute as a process of using a mutual and contextual comparison of the relevant rights and interests, in which process the importance that is attached to each relevant right and interest plays a decisive role. It is argued in this book, however, that balancing is only about knowing the weight of a right or interest in a *figurative* sense. A judicial balancing opinion should make clear why one or more rights or interests take priority over conflicting rights or interests, without there being a need to present a substantive or non-substantive weighing device. Even then it is difficult to describe how, in a figurative sense, a comparison can be made between things like the right to freedom of expression and the interest in the maintenance of public order, or the right to the protection of one person's privacy rights and the other person's right to freedom of expression (and perhaps a third person's right to be informed). It is submitted in Chapter 3 that this is the real challenge for the Courts, but not one that is too daunting to be taken up.

The previous does not mean that the metaphor of balancing should be abandoned. In view of our familiarity with the concept and in view of the concept's structuring capacities, the metaphor still offers a good starting point for a legal-theoretical dissection of balancing and thus it is used as such in this study.

V Rationalising balancing and the 'ideal type' balancing act

If the aim of this research project is to find an answer to the question as to whether and to what extent the European Courts' practices are to be criticised and improved, it is essential to provide for a normative point of departure that can serve as an evaluative yardstick. To provide for that normative starting point, Chapter 4 proposes an ideal type of balancing, based on the findings of Chapter 3. The ideal type of balancing should indicate how a judge should jump every hurdle it finds on its balancing journey. An important *caveat* is that the study does not aim to create a general theory on balancing. Instead, it is tried to make use of the procedural and structuring capacities of the idea of balancing itself to create a tool that courts can use in the complex process of balancing conflicting rights and interests. Thus, the ideal type of balancing developed in Chapter 4 mainly aims to show where courts could look for answers to the fundamental questions evoked by the application of the idea of balancing. Following the questions and answers of the ideal type of balancing could provide for a transparent and understandable application of the idea of balancing in a particular case.

Of course it will remain to be seen whether courts pay attention to balancing problems in the first place, including the various stages of balancing that each give rise to their own questions. When analysing the case-law of the European Courts in Part II of this book, the legal-theoretical ideal type of balancing should not be treated as written in stone. If the European Courts

purport to other, yet insightful ways of dealing with balancing questions, these ways should be respected.

A summary of the ideal type of balancing can only be incomplete. Nevertheless, it should be remarked here that, firstly, it is important that each balancing act accounts for the three phases distinguished in Chapter 3. With regard to the selection phase, courts are urged to bear in mind that conflicts between fundamental rights and interests are not always bipolar, but can be multipolar, i.e. involving more than just two opposing rights or interests. Simultaneously they should pay heed to the problematic of a 'Universe of Interests'. It is admitted that especially an international court should be wary to explore this universe to its fullest extent, now that national courts and other authorities will already have identified the relevant rights and interests. The international courts will mainly have to check if the national authorities really have done so. If not, it is necessary for the courts themselves to start an expedition into the universe of possibly relevant interests. If the national authorities have made a selection of relevant rights and interests, the main question is how marginally or how strictly the international court should review this selection. This may be considered a difficult matter, but it is one courts are used to dealing with. Alternatively, it can be argued that there is not always a reason for courts to review the selection of interests. This may be true in particular in the situation where the parties to the case agree about the selection of relevant rights and interests.

The next phase in the balancing process is the definition of the relevant rights and interests. As a rule, the rights and interests to be taken into consideration should be defined on the same level of abstraction. Legal literature adds to this a preference for a specific case-oriented approach and thus a concrete level of abstraction. If these two premises (same level and concrete level of abstraction) are respected, it is arguably easier to solve a conflict of rights and interests. This 'concretising' approach is also important from a perspective of judicial tactics, which is especially relevant in a multi-level context. If the interests are formulated on the level of the individual case, the decision will less easily serve as a precedent beyond its own possibilities. Besides, a concrete level of abstraction is considered a remedy against statements that are of a too general nature and which are difficult to substantiate due to a lack of time and resources.

This study demonstrates, however, that the choices made in this phase are not free of underlying considerations. Here, Sunstein's theory on judicial minimalism plays an important role. Follwing his argument, it is argued in Chapter 4 that the own 'mission statement' of the balancing court inevitably influences the choice of a certain level of abstraction. A court that does not regard itself as leading on a certain subject-matter (e.g. fundamental rights protection) may show a tendency towards minimalist rulings and hence a very case-specific (narrow) approach to the conflict at hand. Alternatively, a desire for so-called shallowness may lead a court to opt for general and abstract considerations that can be agreed upon by the majority of people

but that lack a thorough argumentative foundation. Both approaches are tenable in itself, but what is important to bear in mind from the point of view of delivering a lucid balancing act, is that the court in question must account for the choices it makes in the definition phase.

The third and final phase of the balancing process is the allocation of weight. As explained above, this is a complex issue because of the thesis of incommensurability. The analysis in Chapters 3 and 4 demonstrate that complete denial of the existence of incommensurability is impossible, even for those who do not believe in the thesis. This means that in conflicts between fundamental rights and interests one can never deny the incommensurability of the rights and interests. As a solution to this, one may perhaps want to join the supporters of constitutive incommensurability, who value incommensurability as a positive thing. From an argumentative point of view, however, that is of little help, since the acceptance of a balancing act then depends on the extent of the audience's beliefs in constitutive incommensurability. Besides, one could wonder if one's own belief in constitutive incommensurability actually helps to solve a legal dispute.

More promising as a solution to the problems of incommensurability and incomparability are the efforts made in legal-theoretical literature to eliminate the element of relative weighing from the idea of balancing. Chapter 4 discusses the methods of Alexy and Nieuwenhuis as main examples of this strategy. Moreover, it is argued that, apart from eliminating the weight element, there remain three general choices courts can make when confronted with incommensurability problems.

First, a court may decide that making a choice between incommensurable options (or between incommensurable rights and interests) is beyond its powers and should be left to politicians (the legislature); it may then entirely avoid the issue of balancing. Second, the court may refer to the organic nature of law. The system of law will always grow over the years as a result of the continual changes in legal rules and societal developments. The growth and development of the system will be paralleled by a growth and development of knowledge and understanding of its functioning. This knowledge and understanding can be exploited to a maximum. In fact, difficult choices between incommensurable rights and interests can be made by making a comparison between the case at hand and more or less similar cases that have been decided in the past. The central question for the courts then is whether a tested solution does not only help to solve the case presented, but also fits into the existing sytem of law. Thus, actual allocation of weight to individual interests and rights can be avoided by using this strategy. Third, a solution to the thesis of incommensurability can be found in managing of one's expectations in relation of the function of the law as such. Especially in the field of fundamental rights and interests, there are no ready-made solutions. This is something that courts will have to be aware of and also something that they can communicate to their audience.

Chapter 4 concludes with a notice on the mainly structural function of balancing that is advocated in this study. It is acknowledged that there is a risk of resorting into an overly procedural approach towards the idea of balancing. Procedures can live lives of their own and they can be strategically deployed to avoid difficult substantive questions. It is therefore argued that some limits should be set to a purely procedural approach of the balancing metaphor. In this context, some insight is given into the suggestions of Levinson and De Schutter & Tulkens to solve the problems of framing and 'perspectivism'. Their writings teach us that it is always useful for courts to provide a glimpse of the contents of a conflict and that it may be necessary to address substantive issues, even if one chooses a primarily procedural approach to solving conflicts by means of balancing.

Thus, the main message to every court applying balancing techniques is that it is always essential to reflect on where one substantively wants to go. The freedom of the idea of balancing makes it ideally suited to the process of structuring thoughts in the assessment of the idea (and thus also for allowing others to follow these thought processes and to reconstruct them towards the outcome). However, recognising and utilising the procedural or structuring force of the idea of balancing alone is not sufficient to achieve an ideal balance act. To arrive at an ideal type of a balancing act it is just as important to have an understanding of – and preferably a vision concerning – the substantive ideals of the system in which the idea of balancing is applied.

VI Balancing in the case-law of the ECtHR and the CJEU

Based on the ideal type of balancing developed in Part I of the study, Part II is devoted to the application of the idea of balancing by the two European Courts: the ECtHR and the CJEU. Chapter 7 presents a detailed analysis of the ECtHR's case-law, divided over three thematic sections. One section deals with the expulsion cases decided under Article 8 ECHR, the second one focuses on 'other' Article 8 ECHR cases and the third section concentrates on freedom of expression cases decided under Article 10 ECHR.

First of all, the analysis of expulsion cases discloses that any difficulties the Strasbourg Court encounters in the selection and definition of interests are not made explicit. On the other hand, the ECtHR does rely on several methods which were discussed in the theoretical part as ways to address problems of weight allocation. Interestingly the Court does not expressly state that they are a means to deal with weight allocation problems. The methods are simply used, without further explanation. Most often the Court uses the 'topoi' method. The method allows for the determination of the weight of rights and interests on the basis of a list of viewpoints (topoi) that are considered relevant by the Court. When having to answer the question of the fairness of a decision to expel a settled migrant, for example, the Court will take into account the duration of the migrant's stay in the host country, his emotional and cultural ties to the host country, his ties with the country of origin et cetera.

The most striking finding of the analysis of the 'other' Article 8 ECHR cases is that one cannot really speak of 'the' application of the idea of balancing by the ECtHR. When deciding if an infringement is "necessary in a democratic society", as the second paragraph of Article 8 ECHR states, the ECtHR appears to use many different legal argumentative tools. Moreover, the Court is often seen using more than one possible interpretation of the balancing idea in one and the same case. It must be added, however, that when the Court uses more than one interpretation, each one is usually one partly used, so that in fact the Court creates a new approach to balancing altogether. From the perspective of intelligibility and transparency the success of this approach varies.

Another finding of the analysis of the 'other' Article 8 ECHR cases is that the particularised, case-based approach for which the Court is famous does not preclude it from relying on generalising forms of dispute settlement. This is manifest primarily in the choice for a procedural review of applications. Furthermore, problems of weight allocation are never made explicit, making it almost impossible to say if the Court encounters these problems and if it is aware of them, and if the Court has concerns about the incommensurability thesis.

Just as in the 'expulsion case-law', the selection and definition phases are given little attention in the 'other' Article 8 ECHR case-law. It is concluded in Chapter 7 that the omission to pay attention to the selection phase gives rise to some unclear balancing decisions. The neglect of the definition phase seems to be overcome by the use of the 'Nieuwenhuis method'. This method, which has been further analysed in Chapter 4, allows for a combination between a general and a concrete definition of interests by requiring that a court both gives its opinion on the general issues underlying a conflict of interests, as well as on the concrete issues at stake. As this approach forces courts to combine a general and a concrete view this serves as a buffer to approaching the conflict unevenly. In addition, the Court tends to concentrate on the concrete facts of the case, starting from an individual justice perspective. This, too, prevents it from an uneven approach to conflicts of rights.

Finally, the doctrine of the margin of appreciation is very prominent in the Court's case-law on Article 8 ECHR. Nevertheless, the case-law analysis demonstrates that the interrelationship of the doctrine with the idea of balancing is hard to define. It is clear though, that the Court never leaves a margin of appreciation that is so wide as to allow for a non-balancing approach on the national level: the Court always requires that a measure or decision is proportionate to the aims pursued. This evidences the weight the ECtHR attaches to balancing as such. The complicated interplay between the doctrine of the margin of appreciation and the idea of balancing is further discussed in a separate section in Chapter 7.

The balancing approach used by the Strasbourg Court in relation to Article 8 cases appears to be particularly versatile. There is a great variety in the Court's interpretation of the idea of balancing; dispute settlement by the

ECtHR by means of balancing may even consist of a combination of several interpretations of the same idea. As a general rule the same is true for the Article 10 ECHR case-law.

In more recent case-law on Article 10 ECHR, there is a widespread use of the topoi method. Whilst this method is often considered problematic in legal literature – as it is unclear where the topoi come from and how they interrelate – the Court utilises the flexibility of the topical approach to its fullest extent. It does so by incorporating different possible interpretations of the idea of balancing into the topoi method. The Court can resort to a procedural approach, for example, or it may use the viewpoints to implement the 'Alexy method'. This method, which is discussed in more detail in Chapter 4, questions whether the interference with a certain right or interest can be justified by reference to the importance of the protection of another, conflicting right or interest. In its Article 10 ECHR case-law, the Court frequently uses viewpoints to determine the severity of the interference with the one right and/or the importance of the protection of the conflicting right or interest. Moreover, the Court also often uses the Alexy method in combination with the Nieuwenhuis method, which was shortly mentioned above. It turns out, however, that the combination of the two interpretations of the idea of balancing leads to an incomplete use of both of them.

In Chapter 7 it is suggested that the Court's preference for the topoi method can be traced back partly to the opportunity this method offers to take the particular circumstances of the case into account. Indeed, more generally, it is concluded that the Court's preference for particularised decision-making provides an important explanation for the difficulties in labelling the Court's balancing approach in individual cases. It is also explained, however, that despite the Court's preference for deciding upon the individual case, a certain amount of 'generalisation' is discernible.

At the end of the analysis of the case-law of the ECtHR, it can only be concluded that the Court's application of the balancing idea is diverse and idiosyncratic and that it is not easy to bridge the gap between Strasbourg practice and balancing theory.

Chapter 9 of the book is devoted to presenting the results of the analysis of the case-law of the CJEU. It appears that many Luxembourg judgments are difficult to classify in terms of the ideal type of balancing. Firstly, very few cases actually show an express application of the idea of balancing by the Court. Secondly, and perhaps surprinsingly, almost every case does show an interesting aspect of balancing, but it is often difficult to grasp such aspects in terms of the balancing theory outlined in Part I. The nature of European Union law, as well as the decision-making methodology of the CJEU, seem to play an important role in the CJEU's (yet again) idiosyncratic balancing discourse.

The CJEU cases are discussed in three separate sections. The cases concerning the right to property are analysed first. A second section is devoted to the cases concerning the EU principle of proportionality. The EU principle

of proportionality is normally used to determine the proportionality of sanctions imposed for breaches of EU law and it therefore may seem atypical to incorporate these cases in this study. Doing so is justified, however, since in the cases that are studied the EU principle of proportionality entered the stage together with the right to property. Finally, the results of the analysis of other cases on fundamental rights are discussed in a third section.

Proportionality assessment clearly plays a role in the studied cases, but in all three clusters of studied cases, express references to the idea of balancing are almost always lacking. The CJEU comes closest to the application of the idea of balancing when using the Alexy method. Even then, however, its application of the method is often incomplete, because the Court mostly only discusses the interest in protecting or implementing a Community interest, without paying express attention to the seriousness of the infringement of the fundamental right that suffers from the Community interest.

European Union law seems to hold a preferred position in the case-law of the CJEU. The primary position of Community interests is visible in all three clusters of cases. In the largest group of cases (the 'general' group of fundamental rights cases discussed in the third section) something special is happening. There, the fundamental rights aspect of a conflict is often incorporated into the question of the interpretation of the applicable European Union legislation or, alternatively, it is incorporated into the question whether or not a restriction of one of the four fundamental freedoms can be justified. The Alexy method plays an interesting role in this respect. The case-law analysis show that the method is mostly used when the seriousness of an infringement of one of the free movement provisions has to be determined. Usually there is no application of the other 'half' of the method, i.e. the determination of the importance of safeguarding the right or interest that is served by limiting a fundamental freedom. On the other hand, whenever there is an infringement of a fundamental right or interest, the determination of the severity of this infringement is put aside and the Alexy method is used only to determine the importance of the Community interest that is served with infringing a fundamental right. In this sense, the application of the Alexy method underlines the primary position of European Union law in the Luxembourg balancing acts. Not surprisingly, it is concluded in Chapter 9 that this approach strongly influences the selection and definition of rights and interests.

Rather than adopting a balancing approach, the Luxembourg Court seems to prefer an instrumental approach, i.e. an approach in which the appropriateness and necessity of measures hold a central position. This instrumental or 'means-end' oriented review is combined with a preference for deciding cases on a general and abstract level. This preference for abstractness over particularised decision-making can be explained from the overriding importance of European Union Law for the Court's work. EU interests and values gain importance when expressed in more general terms, whereas attention for the individual rights and interests that are possibly

breached by effectuating European Union law might prove to be too much of a distraction from the overall EU project. But regardless of the reasons for the Court to endorse an instrumental and abstract approach to fundamental rights conflicts, it is clear that as a result questions pertaining to weight allocation are absent in the Court's case-law.

A special feature of the Luxembourg case-law, in which another possible explanation can be found for the Court's preference for abstract decision-making, is the procedure for preliminary references. This procedure is further elaborated upon in a separate section in Chapter 9 to find out if the nature of this procedure could explain the application (or rather non-application) of balancing in the CJEU's fundamental rights cases. It is concluded, however, that the preliminary references procedure as such cannot be regarded as an important explanation of the CJEU's balancing practices. Within the body of cases brought to the Court via the preliminary reference procedure, the Court can be seen to make different choices as to the level of abstraction. Although the analysis of preliminary rulings shows that the procedure can sometimes explain choices with regard to the application of the idea of balancing, there are many rulings containing judicial choices that cannot be easily related to a preliminary reference procedure. The differences in approach disclosed by the preliminary rulings serve as yet another illustration of the finding that it is very difficult to speak of well-developed Luxembourg balancing practices. Clearly, the ideal type of balancing as devised in Part I of this book seems not to have convincingly presented itself to the CJEU.

VII The normative evaluation of balancing in the case-law of the Strasbourg and Luxembourg Court and some recommendations to both Courts

The great gap between the theoretical blueprint of balancing as devised in Part I of this book and the balancing practices of the ECtHR and the CJEU as discovered in Part II cannot be denied. At the same time, the existence of the gap does not preclude the evaluation of the Strasbourg and Luxembourg balancing practices on the basis of the theoretical blueprint. As discussed in the beginning of Chapter 10, it is a finding on its own that both the ECtHR and the CJEU do not need the structuring potential of the idea of balancing as elucidated in this book. Meanwhile, the 'ideal type' of the balancing idea as described in Chapter 4 remains a valid tool for evaluation. In case the balancing practices of the Courts show something which merits adaption, the ideal type can be adjusted to that.

The results of the evaluation of the case-law of the ECtHR and the CJEU respectively are presented in separate sections in Chapter 10 to highlight the differences in their approaches to balancing, which seem, at least in part, to be generated by the differences in the context in which each Court operates.

The analysis of the Strasbourg Court's case-law has shown firstly that the selection phase often finds indirect expression in the Court's use of the topoi method. Although the use of this method is acceptable from a legal-theoretical perspective, it could be considered problematic that the Court consistently fails to answer the question 'why these topoi?'. Nevertheless, the analysis also demonstrated that the Court often finds the basis for these topoi in its previous case-law. Creating a list of topoi thus serves to bring different strands of case-law together, thus providing more clarity as to the factors the Court considers relevant in balancing. Seen from the perspective of this study's interest in the intelligibility of the Court's reasoning, this particular use of the topoi method can be valued as something positive. It is argued in Chapter 10, however, that the Court may give itself too much leeway by using topoi in its balancing review that are in fact its own creation. Secondly, with regard to the cases in which the Court does not use the topoi method, the Court's approach to the selection phase is sometimes too minimal. Especially with regard to the interests that are invoked by the Contracting Parties, the Court could be more strict in answering the question whether these interests are always as relevant for the balancing exercise as the Contracting Parties contend. Finally, it is argued that the results of the case-law analysis raise the question whether the Court is sufficiently aware of the possible negative consequences of its habit of conceiving conflicts generally to be of a dichotomous nature. Although the Court sometimes mentions contextual arguments, it usually turns a blind eye to these arguments, even if they can be relevant to the balancing process.

The main conclusions of the normative evaluation of the ECtHR's approach to the definition phase is that a different distinction between abstractness and concreteness is relevant for the Court than the one elaborated upon in Part I of this study. The Court is not so much interested in the level of abstraction of each of the relevant rights and interests, but rather in the abstraction level of the conflict as a whole or, in other words, of the central legal question that the Court is asked to answer. The case-law analysis disclosed that the Court prefers answering a very concrete question over answering a general one. Interestingly, this preference does not lead to a concrete definition of each of the rights and interests as it does not prevent the Court from taking into account considerations of a more general level. Besides, the Court easily phrases general conclusions on the basis of its concrete approach of conflicts. The topoi method plays an important role in this respect as it allows a topoi discovered in one case to reappear in future cases, thereby creating 'generalness' out of particularities.

In relation to the third element of the ideal type – the allocation of weight and the actual balancing of interests – it is concluded in Chapter 10 that the Court has adopted a highly particular approach to balancing that is far removed from the approaches described in legal theory. The Court has developed many strategies to avoid actual balancing. When using the topoi method, for example, it often simply mentions the different topoi without paying attention to their interrelationship or their respective weight. More-

over, it is elucidated that the Court often invokes notions of procedural fairness to keep its distance from difficult, 'weighty' questions. And finally, the Court often does not apply a real balancing approach, as well as an 'unfolding narrative' aproach. In this approach the Court moves from an exposition of the facts of a case and a discussion of the judicial decision at the national level to the arguments put forward to the Court. Then – as an unfolding narrative – the decision of the case follows seemingly logically from the exposé of all the factors and arguments that are deemed relevant by the Court. To conclude, the Court resorts to balancing only rarely. If it does so, the Alexy method (discussed in Chapter 3) plays an important role, but it is concluded that the Court's use of the method can be improved.

After a normative evaluation of the role of the margin of appreciation in the Court's balancing decisions, suggestions are made to the Court not only how to improve its use of the Alexy method, but how to improve its use of the idea of balancing in general to enhance the intelligibility and transparency of its decisions. With regard to the selection phase the Court is, amongst other things, urged to be less heedless to the multipolar character of conflicts. With regard to the definition phase it is noted that as a result of the previously mentioned approach of the unfolding narrative, this phase has lost importance in the Strasbourg case-law. When resorting to the unfolding narrative approach, however, the Court is advised to beware of making references to the balancing metaphor when no actual balancing is taking place. One of the suggestions with regard to the phase of weight allocation concerns the Court's use of the topoi method and invites the Court to answer the question of how the topoi it uses, interrelate. Finally, the Court is urged to be more clear about its reasons for resorting to notions of procedural fairness. Although the use of these notions as such is not valued negatively, they are a stranger in the midst of the Court's frequent references to the balancing metaphor and from that perspective they merit the Court's explanation.

Suggestions of how to improve its reasoning on the application of the idea of balancing are also made to the CJEU. The normative evaluation of this Court's balancing case-law reveals various areas where such improvement is possible and desirable. As regards the selection of interests, firstly, the analysis has shown that, if the Court mentions the relevant interests at all, it usually only pays attention to the EU-interests that are at stake; the fundamental rights infringed upon are hardly ever specified. Moreover, just like the Strasbourg Court, the Luxembourg Court has a tendency to reduce multipolar conflicts to bipolar conflicts, often by incorporating a fundamental rights issue into an EU issue. In Chapter 10 it is questioned if the CJEU will be able to continue this approach much longer in view of the growing importance of fundamental rights for the Court's case-law.

With regard to the definition phase, the case-law analysis disclosed a clear preference of the CJEU for decision-making on an abstract level, which seems to derive mainly from the fact that the CJEU greatly values the European integration process. It appears that this process is most strongly pro-

tected when conflicts are treated and decided upon on a general and abstract level. This does not lead to unbalanced decision-making in the sense that the Court interprets part of the relevant rights and interests on a concrete level and part of them on an abstract level. Rather, the case-law shows that the Court approaches the whole conflict in a general and abstract matter. It is argued, however, that the pivotal role of integration-related interests leads to the downplaying of the fundamental rights-side of conflicts, sometimes even to the point of evaporation. Although this may be understandable from the particular context in which the Court operates, this raises the question to what extent the CJEU actually applies a balancing approach. In many cases, it seems that balancing language is merely invoked for reasons of persuasion.

The instrumental approach of the Court is also clearly visible in the phase of the weight allocation, where the Court often uses the Alexy method as a method of weight allocation. It is noted, however, that the CJEU's use of the method is often incomplete in the sense that it usually, once again, focuses on the EU side of the conflict. Given the finding that the Court's attention to the EU side of conflicts is predominant in all stages of the balancing process, Chapter 10 contains a separate section on the role of the ideal of the internal market in the balancing case-law of the Luxembourg Court. There, a nuance is presented to the importance of the ideal of the internal market over fundamental rights issues by explaining the role of the conclusions of the Advocates-General for the Court's case-law in general and its case-law on fundamental rights in particular. The conclusions traditionally play an important role in the EU fundamental rights discourse and also in more recent times they confirm Luxembourg's attention for fundamental rights issues. Still, even when fundamental rights issues are incorporated into the decision-making process on their own account, actual balancing only very rarely takes place.

It is concluded that the CJEU's application of the idea of balancing is unique, and that it is fairly remote from the theoretical interpretation of the idea of balancing in Part I of this study. Compared to the ECtHR's balancing case-law, the CJEU's case-law is clearly less 'balancing-oriented'. The limited importance of balancing in the case-law of the Luxembourg Court is reflected in the way the Court deals with the multi-levelness of the system in which it operates; evident example of this proposition are the decisions in which the CJEU leaves the application of the idea of balancing to the national court. The limited role of balancing is reflected in the Court's bearing to the multi-levelness of the European legal system in a more intricate way as well. The Court's 'attitude' towards a conflict is of importance here. It is explained that when confronted with fundamental rights issues the CJEU usually adopts a more subsidiary approach, whereas when confronted with EU issues the Court assumes a more supranational approach. It turns out this supranational approach often prevails and with it the Court's prefence for EU-interests. As explained earlier, this in its turn often leads to the exit of balancing.

Given the limited importance of balancing as such, only general suggestions can be made with regard to the question as to how the Court could improve its application of the idea of balancing in order to enhance the intelligibility and transparency of its balancing decisions. In reaction to the finding that balancing generally plays a very limited role in the Luxembourg Court's case-law, it is argued that the CJEU should reconsider its references to the metaphor on a more fundamental level. If these references are meant to announce actual balancing this could be reflected and elaborated upon more clearly in the Court's reasoning in its balancing decisions. Besides, even if the Court chooses to adhere to an approach in which it takes the safeguarding of EU-interests as its principal task and thus leaves balancing of these interests and fundamental rights to the national level, for example, it is advisable the Court pays more attention to the selection and 'articulation' of fundamental rights and interests and lets these rights and interests fill a more evenly part in the decision-making process. With regard to the phase of weight allocation the CJEU's case-law as yet does not reveal a clear choice for one or more options described in Part I of this study. The Luxembourg Court's cautious steps towards the use of the topoi method could be further developed. When referring to the ECtHR's case-law and thus incorporating the ECtHR's use of the topoi method, the CJEU should not avoid its own responsibilities in informing its public on how the various topoi interrelate.

In the final section of Chapter 10 a final word is devoted to the finding that there is a clear divide between balancing theory as elaborated upon in Part I and the balancing practices of both Courts as described in Part II. It is argued that this divide can at least partly be attributed to the fact that legal theory sometimes tends to lose sight of the metaphorical nature of the idea of balancing, as well as to overestimate the possibilities of judges and courts when administering justice. In line with this observation it is noted that the evaluation of both the ECtHR's and the CJEU's balancing practices in Part III is not downright negative. The idiosyncratic ways in which the Courts apply the balancing idea does not per se lead to unintelligible or obscurely reasoned balancing decisions. Indeed, the uniqueness of both balancing approaches, as well as the many deviations from the legal-theoretical ideal type of balancing, seem to be largely the result of the particularities of the context in which each approach is developed.

Nevertheless, in the current application of the idea by both European Courts there is a risk that the potential of the idea as well as its limitations are disregarded and this could turn references to the idea of balancing into meaningless words. That would be a shame considering the potential of the idea. It would also be undesirable on a terrain as controversial – and in more recent times as highly debated – as the terrain of European fundamental rights protection. Taking into account both the ideal type of balancing and the context-specific factors, it therefore remains important that the European Courts set out to improve their use of the balancing metaphor.