Law and Philosophy Library 150

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Autonomy and Law

Springer

Law and Philosophy Library

Volume 150

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ISSN 1572-4395 ISSN 2215-0315 (electronic)
Law and Philosophy Library
ISBN 978-3-031-96577-7 ISBN 978-3-031-96578-4 (eBook)
https://doi.org/10.1007/978-3-031-96578-4

This Springer imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Preface

This book explores the idea of autonomous reasoning, in particular regarding its application to law. Hence, it continues the analysis undertaken in my "The Logic of Autonomy". It also defends this approach to some objections and takes up some new issues regarding the implications of autonomous reasoning for legal theory.

I thank Laura Clérico, Federico de Fazio, Gabriel Encinas, Hyungjoon Jun, Grace Lee, Daniel Oliver-Lalana and Marvin Ruppert for helpful comments on drafts of this book, and Muhammad Ali Safdar, Rosaline Bates Anoma and Mongui Eyumeneh for the revision of the English language.

Erlangen, Germany — Jan-R. Sieckmann
April 2025

Competing Interests The author has no competing interests to declare that are relevant to the content of this manuscript.

Contents

Chapter 1
Introduction

How can normative claims be rationally justified if one cannot refer to a given moral world, and any norm established by social practice can be called into question? The only foundation of normative claims seems to be the judgements of the norm addressees themselves. But how can norm addressees be bound by norms that they themselves establish? This is the puzzle of autonomy as self-legislation. It also concerns the normative claim of law, which, moreover, pretends to be authoritative and, thus, seems to exclude individual autonomy. Hence, the problem regarding law is not only to justify its normative claim, but also to construct its authoritative claim on the basis of the idea of autonomy as self-legislation.

My suggestion to resolve these problems is the model of autonomous reasoning, which conceives autonomy as the balancing of normative arguments. Autonomy, balancing, and normative arguments are understood here in a special way. A crucial feature of autonomous reasoning is that conflicting arguments represent normative demands to recognise a particular norm as valid, and that these demands themselves are the reasons for normative judgements that result from their balancing. If, for example, in a conflict with personal honour, freedom of expression receives priority, this principle itself presents a reason for its priority. The priority is neither derived from a third criterion nor arbitrary. Conflicting normative arguments, hence, are not only objects of balancing, but, at the same time, reasons for balancing judgements.

The model of autonomous reasoning starts from some basic assumptions. Presuppositions of this model are:

1. Normative claims, implying that someone ought to do or accept something, need justification. It is a mistake to make normative claims without a reason that reasonable addressees must accept as a reason (principle of rationality).
2. Normative justification cannot refer to knowledge of a given normative reality but must result from rational construction (constructivist thesis).
3. Normative justification can only follow from the normative judgements made by the judging agents themselves (autonomy thesis).

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https://doi.org/10.1007/978-3-031-96578-4_1

The model of autonomous reasoning explains how normative justification is possible based on the idea of moral autonomy. Since autonomous agents are not determined in their normative judgements by given reality, they are free to form these judgements. On the other hand, as their judgements are justified by normative arguments, they must regard themselves to be bound by the norms established by their own judgements.

This approach has been systematically elaborated in my book "The Logic of Autonomy".[1] The following chapters explore crucial issues of the model of autonomous reasoning in more depth. They also consider alternative approaches and answer some critiques raised against it. Focusing on specific issues, the chapters present a collection of essays rather than a straightforward systematic analysis. They are meant to be self-contained and, presupposing the survey in Chap. 2, could be read separately.

The next chapter, "Autonomous Reasoning Revisited", resumes and continues the discussion of the notion of moral autonomy as self-legislation. The model of autonomous reasoning provides normative justification based on the assumption that autonomy consists in the balancing of competing normative arguments, which are all valid and applicable in the situation of conflict. It explores the main elements of this approach: the notion of normative arguments as demands presented by autonomous agents and balanced by other agents; the model of balancing as optimisation; and the idea of moral autonomy as the balancing of normative arguments, opposed to Kantian views of autonomy.

Chapter 3 is about "The Logical Structure of Principles". The distinction of normative arguments and normative judgements suggested here has been developed as a reconstruction of the thesis that rules and principles are logically distinct types of norms, presented in particular by Ronald Dworkin and Robert Alexy. Although the terminology of rules and principles is ambiguous and confusing, the debate on legal principles as a specific type of norms has been conducted in these terms. Regarding this debate, the distinction of normative arguments and normative judgements is the logical foundation for that of principles and rules. This distinction is explained and defended against some objections.

In Chap. 4, the model of "Balancing as Optimisation" is set out as opposed to conceptions of balancing as interpretation or as calculation. Its core is the definition of optimality in the context of the balancing of normative arguments, which follows a suggestion of Susan Hurley.[2] The understanding of what normative optimality means is crucial for any adequate theory of balancing. It also allows to develop the criteria that are relevant for the balancing of normative arguments. In this respect, the distinction between the justification by means of autonomous judgements and the reconstruction of the criteria used in these judgements is of particular importance. In connection with the approach of autonomous balancing, the model of balancing as optimisation presents an account of rational justification of

[1] Sieckmann (2012).

[2] Hurley (1989).

normative judgements that only requires autonomous judgement and, hence, can be managed by autonomous agents, and is not exposed to objections of objectivity or incommensurability.

Chapter 5 discusses "Alternatives to Balancing". Although balancing as optimisation seems to be the only rational approach to the justification of normative judgements through the balancing of conflicting normative arguments, many authors do not follow this approach. As alternative accounts, Alexy's "weight formula", the idea of satisficing, the suggestion of prioritisation and ranking instead of optimisation, the conception of specification, and of constructive interpretation as an alternative to the balancing of normative arguments, are discussed.

Chapter 6 is about "Epistemic Issues of Balancing". It addresses Alexy's idea that the reliability of premises regarding the factors of balancing (intensities of interference, abstract weights) forms a factor of balancing on its own. In contrast to this idea, the reliability of assumptions is conceived as relevant only regarding balancing judgements, not regarding the factors these judgements are grounded on. The strength and the force of balancing judgements are distinguished, and the problem is addressed how the reliability of balancing judgements affects a second-order balancing regarding diverging balancing judgements. Finally, normative strength, epistemic quality, and scope of acceptance are identified as relevant factors for the objective validity of normative statements, which is assessed according to the criterion of reasonable convergence.

In Chap. 7, "Dimensions of Law" are explored, starting with the insight that law has authoritative character. The normative claim of law included in legal judgements needs to be justified in a model of autonomous reasoning, but law also takes the form of legal systems of positive norms, and is applied and developed in legal practices. This leads to different views on law, conceived as a legal system, as a normative judgement, and as a legal practice. These conceptions can be characterised as analytical, normative, and empirical. However, all these conceptions are interrelated and depend on each other.

Chapter 8 discusses "Competences and Formal Principles". Normative competences, in the sense of the capacity to change or determine a normative situation according to one's will, are crucial elements of autonomous morality as well as of law. The structure of normative competences is, however, complex. The capacity to create norms is subject to normative requirements. This holds not only in morality, but also in a constitutional state. Therefore, the idea that a normative competence grants the capacity to establish a norm as definitively valid must be modified. Rather, a competence grants the power to create a normative argument for the definitive validity of a norm. This approach connects the notion of competence with that of formal principles, which include normative arguments to recognise the validity of norms for formal reasons and, hence, to recognise normative competences.

Chapter 9 explores the relation between "Balancing and Interpretation". Interpretation is regarded as a specific method of normative argumentation, presupposing the validity of a normative standard to be interpreted. Two types of interpretation are distinguished: the application of established priority rules, and the application of norms that are not considered as results of balancing judgements, but

assigned an existence independent from the balancing on which their justification rests. This interpretation must, however, be embedded in an overarching model of balancing. The connection is provided by the device of formal principles.

Chapter 10 is about "The Justification of Fundamental Rights". Although founded on human rights principles, fundamental rights are not mere moral rights, but legal rights. That is, they do not only demand legal recognition but actually ought to be applied in a legal system. Because of their special status, they are constitutional rights in a substantive sense. The question, then, is why certain rights ought to be accepted as constitutional rights. The justification of human rights is discussed, a system of fundamental rights is presented, and the emergence of fundamental rights is discussed, with a special focus on the criterion of reasonable convergence, on which objective validity is founded.

Chapter 11 highlights specific features of "Rights Balancing". Individual rights are sometimes regarded as opposed to balancing, being "trumps" (Dworkin) or "firewalls" (Habermas). Although the method of balancing seems to be inevitable as a means to resolve normative conflicts in a rational manner, the idea that rights are more than mere arguments to be balanced against competing arguments also seems plausible. Various ways to reconstruct the special character of rights in a balancing with competing demands are explored, first as a modification of balancing, then the notion of exclusionary rights as prohibitions of balancing that hold in principle, but might be overridden by sufficiently strong arguments.

Chapter 12 analyses the notion of "Normative Legal Pluralism", which challenges the model of legal systems with ultimate power within their jurisdiction. Instead, one sees a plurality of legal systems, each claiming its own authority while applying to the same legal cases. This development threatens the idea that law could resolve conflicts in a normatively justified way and not by mere political power. The issue, hence, is how the emergence of legal pluralism can be accommodated in a normative theory of law, normative in the sense that law constitutes a justified system of norms. The starting point is the perspective of someone applying law, facing the demands of competing normative systems.

Chapter 13 explores the relation between law and morality in the model of autonomous reasoning. Two distinctions are crucial for this analysis: between legal judgements and legal statements, and between definitive validity and validity in principle. Legal judgements result from autonomous reasoning in the frame of a legal system, in particular, considering the demands of formal principles. The judgement remains, however, subjective and can, because of the objective character of law, only claim that a particular norm ought to be recognised as law, but not state what the law is. In contrast, legal statements require an objective foundation, which consists in the reasonable convergence supporting a norm. The distinction between legal judgements and legal statements is combined with that of definitively valid norms and norms valid in principle. In both cases, judgements and statements regarding the legal validity of norms are possible. Legal validity is defined within this conceptual framework. The subsequent issue of the obligation to obey the law is addressed from the perspective of autonomous reasoning. Several types of justification of such an obligation are identified, which, however, may be disputed and

conflict with each other. On the other hand, they also might converge, and clear cases of an obligation to obey the law may result. Finally, the adequacy of a positivist conception regarding the identification of law is discussed, acknowledging that all norms that can correctly be stated to be legally valid can also be identified empirically. Hence, the problem with legal positivism is not the identification of objectively valid law, but the need to justify such statements.

Although in many respects, this book resumes and corroborates previous research, some issues are rather new or have not yet been analysed profoundly. In particular, the epistemic aspects of autonomous reasoning, the distinction between objective normative statements and subjective normative judgements, its application to law, the criterion of reasonable convergence, its relation to the emergence of legal norms or rights, and the relation between individual judgements and legal practice are addressed in these essays, but still need further investigation.

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Chapter 2
Autonomous Reasoning Revisited

2.1 Introduction: Features of Autonomous Reasoning

This essay explores the idea of moral autonomy as self-legislation[1] and presents the model of autonomous reasoning as an account of the rational justification of normative judgements. Autonomy is defined as the balancing of competing normative arguments,[2] all of which are valid and applicable in a situation of conflict.[3] Normative arguments are understood as demands presented and balanced by autonomous agents. Normative judgements resulting from the balancing of normative arguments propose certain norms as definitively valid; that is, as norms that ought to be accepted as the result of the balancing and, hence, ought to be applied and followed. They ascribe normative validity as an expression of autonomous choice, which is, on the one hand, free, but, on the other hand, must be presented as required by the prevailing argument.

In the model of autonomous reasoning, normative judgements are, on the one hand, free because they are not completely determined by given criteria. The autonomous agent could have judged differently. On the other hand, because of their logical structure, normative arguments demand that a particular norm be recognised as valid. Hence, whatever norm will be recognised as valid, it must be regarded as normatively required by the judging agent. Agents must present their judgements as required by the stronger argument, and hence as correct in a normative sense, or as normatively necessary. So the agent must regard himself as normatively bound. This is the essence of autonomy defined as the balancing of normative arguments.

[1] This idea has also been developed in previous writings, in particular Sieckmann (2004), pp. 66ff.; Sieckmann (2007a), pp. 149ff.; Sieckmann (2009), pp. 95ff.; Sieckmann (2012); Sieckmann (2018a), pp. 217ff.; Sieckmann (2022a), pp. 18ff., 80ff.

[2] See Sieckmann (2012), pp. 11, 13; Sieckmann (2022a), p. 22; also Sieckmann (1992), p. 296.

[3] A normative conflict exists if incompatible norms are claimed to be valid at the same time. Norms are incompatible if they cannot be fulfilled or complied with at the same time.

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https://doi.org/10.1007/978-3-031-96578-4_2

The aim of autonomous reasoning is to form normative judgements based on the balancing of normative arguments. The justification of normative judgements must refer to the judgements of the agents involved and hence result from the exercise of their moral autonomy.[4] The issue, then, is what is the structure of autonomous justification. The basic idea is that normative arguments include demands on other agents, which the agents have to consider in their reasoning and normative judgements. Normative arguments, hence, are neither statements of norms nor prescriptions to other agents, but present a distinctive form of normativity.[5] In general, normativity is understood here as the implication that a norm ought to be accepted, applied, and followed.[6] Regarding normative arguments, their validity rests on the normative competence of autonomous agents to present such arguments, thus bringing other agents under the obligation to consider these arguments in their reasoning, although not as conclusive, but as arguments to be balanced according to their own judgement.

For example, regarding the publication of offensive information, some arguments require that publication should be allowed, while other arguments demand that it should be prohibited. In a genuine problem of balancing, the conflict is not resolved by an established priority. Therefore, an autonomous judgement is required as to which norm ought to be accepted as the result of the balancing, that is, as definitively valid. This judgement does not follow from established premises, but if the agent regards freedom of expression as more important regarding the facts of the case, he must present this result as required by the stronger argument. If, in contrast, he regards arguments from personal honour as more important, he must present the prohibition of publication as required by the stronger argument. Although the determination of the strength of the arguments depends in the last instance on his own judgement, he must present this judgement as normatively required and, in this sense, correct.

Hence, crucial theses of the model of autonomous reasoning are:

(T1) Autonomy consists in the balancing of competing normative arguments.
(T2) Normative arguments include demands to recognise a particular norm as valid.
(T3) Autonomous agents have the normative competence to present normative arguments, and also normative judgements resulting from the balancing of normative arguments.
(T4) Autonomous agents must claim their normative judgements to be correct in the sense that they are required by the prevailing argument.

[4] On autonomy as self-legislation, and its difference to personal autonomy, see Sieckmann (2012), pp. 3f.

[5] See also Sieckmann (2012), pp. 11ff. One might even claim that this is the only form of normative validity. In contrast, descriptions or prescriptions as such are not normative but presuppose the validity of norms, either the validity of the norm described or a competence norm that authorizes to prescribe.

[6] See also Sieckmann (2012), pp. 12f., 52.

It is important to note that the notion of normative arguments used here is fundamentally different from the common account of arguments as sets of premises that imply certain conclusions.[7] In the common view, the premises of an argument have a propositional structure. As propositions, they can be expressed in the form "It is the case that …". Hence, normative propositions describe the existence of norms as some state of affairs. When used in an argument, they present normative assertions, which claim to state normative facts. Therefore, by stating normative propositions, one presupposes an ontology that regards norms as some sort of facts. In this line of reasoning, the issue of normative argumentation is to discern which normative statements are true and which normative facts exist.[8]

In contrast, autonomous reasoning does not presuppose the existence of norms as facts.[9] The point of normative argumentation is, in the first place, to *constitute* the validity of norms.[10] Norms are regarded as abstract, semantic entities, to which validity is ascribed.[11] The concept of norms does not include that norms are valid.[12] The ascription of validity is to be justified by means of normative argumentation, and the validity of norms must not be presupposed as a kind of fact. The aim of normative argumentation is not the description of a normative reality in statements of valid norms, but normative judgements of autonomous agents must first establish the validity of norms, before normative statements of definitively valid norms are possible. Hence, the normative competence of autonomous agents to introduce normative arguments and form normative judgements is crucial for normative justification.

Another difference to common accounts of normative reasoning concerns the logical structure of normative justification. The justificatory relation between normative arguments and normative judgements resulting from the balancing of normative arguments is conceived as normative, not as a logical inference.[13] Hence, balancing is a distinctive mode of reasoning, different from subsumption and deduction.[14] An autonomous agent accepts a norm as definitively valid because one ought to do so, according to the normative argument he considers to be stronger. Definitive

[7] See, for example, Detel (2007), p. 43; Salmon (1983), p. 10; Navarro and Rodriguez (2014), p. 3; Alexy (1989), p. 92; Buchwald (1990), pp. 86, 88; Sartor (2005), p. 670.

[8] Explicitly Alexy (2021), pp. 203f., rejecting the approach sustained here.

[9] Hence, normative arguments are reasons for balancing judgements, but not reasons in the sense of facts, in contrast to the conception of reasons as facts of Hage (1997), p. 12; Raz (1999), pp. 15ff.

[10] See also Sieckmann (2022b), pp. 143ff.

[11] Sieckmann (2020), p. 77; Sieckmann (2012), p. 25; Sieckmann (1990), pp. 25ff. This implies that the norms in a purely semantic sense cannot be used as such, but only by assigning some type of validity to them. The ought included in norms in a purely semantic sense hence can be defined as that what is common to different uses of norm sentences.

[12] In contrast, Reiser (2015), p. 191, regards an all-things-considered or final ought as the rock-bottom notion of ought. Normative conflicts occur between final oughts. Ought and reasons are distinguished (p. 196). However, it is not clear how reasons can be formulated without the notion of ought. If this ought is final, an argument about conflicting reasons will not be possible. For if the argument comes to a result, this shows that the ought included in the reasons was not final.

[13] See also Sieckmann (2013b), p. 196; Sieckmann (2012), pp. 110ff.

[14] This is a crucial thesis of the model of principles. See Sieckmann (1990), p. 18.

validity is not logically inferred from normative arguments.[15] This is obvious regarding deductive reasoning, as the conclusion (definitive validity) is stronger than the arguments. But it also holds for weaker notions of logical inference, such as non-monotonic or defeasible inferences.[16] Although they allow to construct normative conflict and inferences to defeasible results, they do not represent the crucial feature of normative arguments, that is, being reasons for a normative judgement just in the situation of conflict with competing arguments.[17]

Again, the divergence regarding the structure of justification follows from different notions of normative argumentation. A crucial assumption of the model of autonomous reasoning is that normative arguments are not only the objects of balancing, but, at the same time, reasons for a particular balancing judgement.[18] As far as I see, no alternative approach to normative argumentation accepts this assumption.[19] It is, however, the foundation of the model of autonomous reasoning.[20] This assumption is necessary if normative balancing is considered a distinct type of argumentation. If the result of the balancing were to be determined by other reasons, which are not involved in the balancing, balancing would not be a crucial part of the justification. The justification would follow from the other reasons. If, on the other hand, the competing arguments do not constitute reasons for the balancing result, but also no other reason for it existed, balancing judgements would be arbitrary, for they would not be based on reasons. So, the competing normative arguments themselves must present a justification for the suggested balancing judgement just in the situation of conflict.

The model of autonomous reasoning suggested here considers only a particular type of reasons, namely, normative arguments. It does not present a general theory of reasons or reasoning.[21] Normative arguments are founded on the competence of

[15] Therefore, the role of formal logic in autonomous reasoning is rather limited, see Sieckmann (2012), p. 44; Sieckmann (2020), pp. 100, 119, 125. The issue of a logic of normative argumentation is rather which moves are correct or required. This depends on the type of validity that is assigned to a norm. As different types of validity exist, also different types of logic will be required, so that a "fragmentation of deontic logic" results. Whether formal logic has something to offer for the analysis of these logical structures, remains an open question.

[16] On defeasible reasoning, for example, Ratschow (1998), pp. 141ff.; Wang (2004); Sartor (2018), pp. 315–364.

[17] Sieckmann (2003b), pp. 217f.; Sieckmann (2020), p. 99.

[18] Sieckmann (1990), p. 87; Sieckmann (1994a), p. 167; Sieckmann (1994b), pp. 243f.; Sieckmann (2003b), p. 213; Sieckmann (2012), p. 15; Sieckmann (2020), pp. 103f.

[19] See, however, Enderlein (1992), p. 272, who holds that principles imply their own priority in the case of conflict. This is implied in the structure of requirements for validity.

[20] On the other hand, a difference in the structure of justification can be noticed without distinguishing normative arguments and judgements. See, for example, Pavlakos (2014), pp. 90f., regarding the logical structure of the proportionality test. However, the crucial point of autonomous balancing is that the competing arguments themselves are, just in the situation of conflict, the reasons for the resulting normative judgement. Arguments with propositional structure do not have this property.

[21] In contrast to, for example, Raz (1999), p. 9, regarding reasons for action; Hage (1997), p. 11, who considers the notion of a reason the most fundamental one for a theory of reasoning, or

autonomous agents to advance demands and judgements, thus creating obligations of other autonomous agents to consider these arguments in their deliberation. This, again, is founded on an analysis of conditions of the justification of normative judgements.

It also differs from procedural or pragmatic accounts of argumentation that define the aim of argumentation as that of convincing other agents to accept a certain argument or position.[22] Whether other agents accept a particular proposal is a matter of their autonomous judgement, not an issue of the model of autonomous reasoning. The model of autonomous reasoning focuses on the structure of the argumentation of the autonomous agents and defines requirements they must observe in their reasoning, in order to bring other agents under the obligation to consider these arguments.

The structure of autonomous reasoning also limits the practical discourse. Admissible contributions must be related to the balancing of normative arguments. Advanced arguments must be legitimate, normative judgements be based on the balancing of such arguments, and justifications of such judgements refer to the relevant criteria of correct balancing. Hence, speakers are not allowed to introduce any assertion or express any attitudes, wishes, or needs.[23]

Another fundamental issue is the nature of normative justification. Usually, justification is regarded as a cognitive or epistemic enterprise. For example, Alexy claims that rationality is linked to truth and, hence, to arguments of propositional structure.[24] In a similar vein, Jansen has argued that normative argumentation is not about which rights one should accept but about which rights one has.[25] Also Dworkin has emphasized that legal argument is about existing rights.[26] In these views, normative argument is concerned with the question of which norms or rights exist.

However, the view that rational argument must, from the start, begin with claims to truth faces the problem of how such claims could be rationally justified. The idea that norms exist independently of any argument for them is unfounded, as well as the claim that one could discern such norms, presupposing that we have some sense to perceive normative facts. In addition, such views cannot assign justificatory force to the procedure of argumentation, for norms are conceived of as existing independently of any normative argument. Hence, according to these views, rights exist independently from argumentation.[27] This, however, seems to be an inadequate understanding of normative argumentation and its procedural character. It interprets argumentation as theoretical reasoning about norms and does not grasp the idea of

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Scanlon (2014), p. 2. On the other hand, a general theory of reasons that does not include normative arguments cannot be correct.

[22] For example, Eemeren et al. (2004), pp. 61, 134; Gordon (1995); Gordon (2010), p. 105. See also Hahn and Oaksford (2007), p. 47, on the pragma-dialectical approach of van Eemeren.

[23] In contrast to Alexy's discourse rules 2.2.b and c, Alexy (1989), p. 193.

[24] Alexy (2017), p. 29; Alexy (2021), pp. 203f.

[25] Jansen (1998), p. 97.

[26] Dworkin (1978), p. 87.

[27] See also Sieckmann (2022b), p. 152.

autonomy as self-legislation, that is, the constitution of normative validity by the arguments of the norm addressees themselves. In contrast, the balancing of normative arguments regards argumentation as a constructive enterprise, which does not presuppose, but aims at establishing the definitive validity of norms. This makes practical reasoning a type of reasoning on its own, not merely the application of theoretical reasoning to norms.

Hence, in the model of autonomous reasoning, the foundation of normative arguments and normative judgements rests on the normative competence of autonomous agents to present such arguments and judgements. The presented arguments and judgements are valid because autonomous agents present them. They do not need a substantive justification. Autonomous agents have the right to present arguments and judgements, thus constituting an obligation of other agents to take these arguments and judgements into account in their reasoning. Alas, the autonomy of the other agents includes the competence to decide on how they react to these normative demands. The demands, and also the normative judgements of autonomous agents, only constitute normative arguments as to which norm ought to be recognised as valid, and do not permit statements as to which norms are actually valid.

Although the model of autonomous reasoning developed here is rather peculiar, the notion of normative competence is recognised as important by some other authors. In particular, the account of "second-personal reasons" of Stephen Darwall emphasizes the competence to make demands and to respond to them as the foundation of morality. However, Darwall characterizes "second-personal reasons" as the *authority* to demand something from someone else. If this is not complied with, one has reason to complain.[28] These characterizations do not fit the relation of autonomous agents balancing normative arguments. In particular, Darwall does not distinguish normative arguments from action-guiding norms. Also, it does not seem adequate to characterize the symmetrical relation between autonomous agents as authoritative. Darwall himself speaks of "equal authority".[29] However, one cannot seriously speak of authority if the addressee is free to reject the advanced demand in his reasoning. In addition, the obligation to consider such demands does not follow from the demand itself but from an *a priori* principle of normative argumentation.

Another similarity can be found in the account of Ruth Chang and Victor Tadros, who uses the notion of "robust normative powers", by which one creates reasons in a well-formed choice situation regarding incommensurable options.[30] This corresponds to the account of autonomous balancing suggested here regarding the creation of normative reasons and the lack of a given measure for the balancing of competing arguments. However, the conceptual framework is different. In particular, the focus is on reasons as to what oneself should do, not on normative arguments

[28] Darwall (2006), p. 8.

[29] Darwall (2006), p. 24.

[30] Chang and Tadros (2020), pp. 275–300, 294. See also Chang (2023), pp. 173f., 186ff.

that create obligations for other agents, and no difference is made regarding normative arguments and normative judgements.

The following sections elaborate on crucial aspects of the model of autonomous reasoning, which are the distinction between normative arguments and normative judgements (Sect. 2.2), the procedure of balancing normative arguments (Sect. 2.3), and the explication of the character of moral autonomy (Sect. 2.4).

2.2 Normative Arguments and Normative Judgements

The difference between normative arguments and normative judgements is the point of the norm-theoretical "separation thesis":[31]

(T5) Normative arguments that figure as reasons in a balancing process and normative judgements stating definitive norms as the result of such a balancing have different logical structure.

2.2.1 "Non-propositionality Thesis" and "Reiteration Thesis"

Normative arguments do not yet state the result of the balancing with competing arguments. Hence, they must have a logical structure different from that of normative statements. Advancing a normative argument, for example, that one shall have the right to free speech, even if offensive, is not making a normative statement that the respective norm is valid. Obviously, a normative argument is not a statement that the respective norm N is definitively valid. But presenting a normative argument is also different from making a statement of validity as an argument. Alas, such a statement is implied in advancing a normative argument. However, it is a statement about a normative argument, not the argument itself. The use of an argument is different from a meta-statement in terms of the logical character of that respective argument.[32]

Even less so, normative arguments can be replaced by other types of normative statements, which do not demand strict compliance with a norm, thus enabling the construction of norm conflicts. For example, the claim to validity could be defined as a requirement of optimisation. Or the logic used might not be deductive, but non-monotonic, so that new information can invalidate an inference. In this way,

[31] This "separation thesis" is not identical with the separation of rules and principles, suggested, for example, by Dworkin (1978), pp. 22ff., or developed by Alexy (1985a), pp. 75f. (engl. transl. A Theory of Constitutional Rights, 2002, 47f.). Therefore it is not affected by objections presented against those approaches. For a discussion of the notion of principles in the framework of autonomous reasoning Sieckmann (2010a), pp. 59ff. On the discussion of principles in general see Sieckmann (2011), pp. 178f.

[32] See, in more detail, Sieckmann (2010a), pp. 53ff.

conflicting norms can be presented as simultaneously valid. However, the weakened normative statements do not present normative claims that could figure as reasons in a balancing. An optimisation requirement does not present an argument to choose one of the conflicting claims, but as a demand to choose an optimal solution, it is definitively valid. Non-monotonic logic makes arguments defeasible, but in case of a normative conflict, new information exists that invalidates the inferences based on the defeasible argument. Hence, there is no argument to be balanced.

Since normative arguments do not purport to present a norm as a normative fact and hence cannot be expressed directly in the form of normative statements, first, one must reject the idea that normative arguments have the logical form of normative propositions.[33] Hence, the "non-propositionality thesis" states:

(T6) Normative arguments do not have the structure of propositions.

Second, normative arguments claim that a certain norm ought to be definitively valid or ought to be accepted as definitively valid. Hence, they include requirements or demands of validity.[34]

For example, a problem of balancing occurs when the rights of the freedom of speech and of personal honour collide in the case of an offensive speech. The question, then, is whether the respective speech ought to be permitted or not. The argument of free speech demands that one ought to accept as definitively valid that a particular speech is permitted. On the other hand, the right of the offended person to respect his personal honour presents an argument that the offensive speech ought to be forbidden. The question is whether, given the circumstances of the case, the respective speech ought to be judged as permitted or as forbidden.

Hence, the arguments include normative requirements ("ought") regarding the deontic qualification (in the example, "permitted" or "forbidden") of the act in question. They demand to accept the validity of a particular norm. The remaining question is which character of validity do these requirements for validity have. They cannot have the character of normative facts, because this would be incompatible with recognising the validity of competing arguments. However, one must assign some sort of validity to them. The idea is to reiterate the requirements for validity (reiteration thesis):

(T7) Normative arguments include reiterated requirements for validity of a particular norm.

The structure of reiterated requirements for validity has the effect that a normative argument is immune against the sceptical strategy to put in doubt any proposal

[33] See also Sieckmann (1990), p. 84; Sieckmann (2009), p. 42; Sieckmann (2011), pp. 195ff. and below, Chap. 3.

[34] The notion "requirement" might be understood as a strict notion, which does not permit balancing. In this sense Lord and Maguire (2016), pp. 3f. This is not the way the notion is used here. Perhaps, the term "normative demand of validity" suits better. But also the term "demand" has connotations that do not fit the context of normative arguments.

by asking why one should accept it.[35] This constitutes a specific form of procedural validity. A valid normative argument cannot be brought down by questioning its foundation. The only rational way to proceed is to present counterarguments.[36] Hence,

(T8) Normative arguments have a form of procedural validity, which implies that they can only be rejected by means of argumentation.

The characteristics of normative arguments suggested here are not mere stipulations. Normative arguments follow from interest-based claims put forward by autonomous agents. These claims actually validate arguments with a reiterative structure. First, interest-based claims constitute normative arguments regarding the respective interest, that is, an argument that this interest ought to be realised. Second, given that a norm that demands the realisation of an interest itself is in the interest of the agent,[37] the first-order interest implies a second-order interest that a norm should be accepted that demands the realisation of the respective interest. This second-order interest generates a second-order normative argument that the respective norm ought to be recognised, and so on.[38] Thus, the thesis that normative arguments have the structure of reiterated requirements claims to be a correct description of the structure of normative argument. Hence,

(T9) Interest-based claims found the structure of reiterated requirements for validity.

It follows that the balancing of normative arguments includes two logically distinct types of normative speech acts: normative arguments referring to sets of requirements for validity, and normative judgements, ascribing definitive validity to the norm that presents the result of the balancing. These speech acts refer to two types of norms or normative entities: normative arguments as sets of requirements for validity, and definitively valid norms.[39]

One should note that this norm-theoretical distinction does not refer to first-order norms, but to normative structures that include several levels of norms. This is obvious for sets of requirements for validity. But also definitively valid norms include, besides the first-order norm to which validity is ascribed, a second-order norm

[35] On the refutation of the sceptical strategy of asking "why"-questions Sieckmann (1994c), pp. 212f.; Sieckmann (1994b), pp. 242f.; Sieckmann (2005), p. 205; Sieckmann (2009), p. 60f.; Sieckmann (2012), pp. 57f.; Sieckmann (2020), p. 183.

[36] In contrast, deductive justification is necessarily incoherent, for it uses premises that it does not justify. On this "trilemma of justification" Albert (1980), p. 13; Buchwald (1990), pp. 232ff. The incoherence of deductive justification remains even though one may claim that rational justification need not be a final justification ("Letztbegründung").

[37] This presupposes that norms are to some extent an effective means to realise interests. This assumption appears to be highly plausible. There might be exceptions, but if in general norms would not promote the protected interests, there were no reason to have norms.

[38] See Sieckmann (1994a), pp. 172f.; Sieckmann (1994b), p. 240; Sieckmann (1994c), pp. 211f.; Sieckmann (2005), p. 206; Sieckmann (2012), pp. 54f.

[39] Regarding definitive norms, this does not have an impact, for definitive norms demand to act accordingly, not to argue. However, the reiterative structure continues to exist after the balancing.

demanding that the first-order norm actually ought to be recognised as valid, applied and followed. Hence, normative arguments as well as definitively valid norms include not merely elementary norms but normative structures of several levels. Advancing a norm as a normative argument or a definitively valid norm refers to these structures.[40] Normative arguments and normative judgements ascribe the type of validity to a norm sentence that is characteristic of the respective type of speech act.[41] These uses can also be described in normative statements, which state that a particular norm is valid as a normative argument or definitively valid. However, the ascription of validity often will be implicit.[42]

2.2.2 Analytical Foundation

Although the account of normative arguments as reiterated requirements for validity presents a radically new approach in some respect, it is founded in the analytical philosophical tradition.

The semantic analysis uses the account of Frege, distinguishing semantic content, the qualification as a proposition (Gedanke), and the pragmatic qualification by the "Urteilsstrich".[43] Hence, the structure of a judgement is presented as |— A, where "A" denotes the content, "—" is the "proposition stroke" (Gedankenstrich), indicating that the term expresses a thought or proposition, that is, a content that can be qualified as true or false, and "|" is the "judgement stroke", indicating that a sentence is actually used, making a judgement that the respective sentence "— A" is true. This approach is applied to normative judgements, which assert definitive validity of a norm and display the structure "|— (VAL_{DEF}, N)".

Since the ascription of definitive validity implies propositional content, one can write simply "|VAL_{DEF} N" or, as definitive validity need not be stated explicitly but is implied in a direct normative judgement, "|N". This approach can be extended to normative speech acts that are not judgements, in particular, to normative arguments. Their character as reiterated requirements for validity can be expressed as "…O VAL_{DEF} N". This also adopts the insight of speech act theory that language does not merely consist in statements describing states of affairs. However,

[40] See Sieckmann (2005), p. 200; Sieckmann (2012), pp. 45ff.; Sieckmann (2020), pp. 108ff.; see also previous versions of the notion of normative arguments in Sieckmann (1994a), p. 170; Sieckmann (1994b), p. 241.

[41] Hain (1999), p. 121, denies the possibility of different types of validity, however, without argument. Against Hain see also Kallmeyer (2016), p. 247.

[42] Of particular interest among them are direct normative statements, which implicitly state norms as facts without ascribing validity explicitly.

[43] See also Sieckmann (2010a), p. 53. See also the reference to Frege (1918), p. 35, in Sieckmann (1990), p. 34.

statements are possible regarding the character of a normative argument, They can be represented in the form "$|\mathrm{VAL}_{\mathrm{ARG}}$ N".

Accordingly, different types of normative speech acts may be presented as follows:

1. Direct normative judgments or statements:

$$|\mathrm{N}$$

2. Statements of definitive validity of a |norm:

$$|\mathrm{VAL}_{\mathrm{DEF}}\ \mathrm{N}.$$

3. Normative arguments:

$$\ldots \mathrm{O}\,\mathrm{VAL}_{\mathrm{DEF}}\ \mathrm{N}.$$

4. Normative statements of the validity as an argument:

$$|\mathrm{VAL}_{\mathrm{ARG}}\ \mathrm{N}.$$

According to this notation, normative judgements or statements and normative arguments differ at a pragmatic level, that is, in their type of use, indicated by "|" and "…" respectively. This difference can be made explicit at a semantic level by the predicates of validity $\mathrm{VAL}_{\mathrm{DEF}}$ and $\mathrm{VAL}_{\mathrm{ARG}}$.[44]

2.3 Rational Balancing

Autonomous judgement is not determined by given criteria, but is claimed to be correct in the sense that the stronger argument requires it. This claim is founded on the competence of autonomous agents to present normative arguments, but from the point of view of the agent also needs a substantive justification. The agent cannot regard his judgement as completely arbitrary. In the first place, autonomous judgement must comply with demands of rational justification. These demands include consistency, coherence, and empirical correctness of the argument. In addition, a specific requirement of rational balancing is the demand to find an optimal solution. Hence, a crucial thesis is:

(T10) The balancing of normative arguments must strive for an optimal solution.

[44] See also Sieckmann (2012), p. 26; Sieckmann (2010a), p. 54.

It is important to note that striving for an optimal solution does not necessarily mean that an optimal solution must be found. For example, judicial review is often concerned with the question of whether there are sufficient reasons for interference with a fundamental right or whether the interference is disproportionate. This requires a comparison of the states of affairs obtained by the interference and without the interference with the right.[45] The comparison need not determine what an optimal solution would be regarding the competing demands. All that is needed is to determine whether the interference moves away from an optimal state of affairs, or not.

2.3.1 The Requirement of Optimality

The demand to choose a best option seems to be undeniable. It would be irrational to choose a worse solution if a better solution is available. Hence, one must choose a solution to which there is no better alternative and which, hence, is optimal.[46] This structure is embedded in our normative language. The demand to choose the best option follows from the meaning of the assessment of some options as "good", "better", and "best".[47] "Good" means that it is preferable to choose this option if possible. "Better" means that one should choose it in comparison with some other option. "Best" means that there is no better option. This implies that one should choose an option that is evaluated as best. This is an analytical truth, defining the structure of normative reasoning. If one wants to suggest to choose a worse or suboptimal solution, this requires a justification, which explains that all things considered, recognising the complexity of the issue, the suggested solution is optimal.

Although the demand of optimisation seems obvious, it is contested.[48] This issue will be addressed later.[49] However, it seems obvious that if one can tell that one solution is better than another, and no further argument is involved, it would be irrational not to choose the better solution or, regarding all available options, not to choose an optimal solution.

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[45] Sieckmann (2018a), p. 144; Sieckmann (1995a), p. 56, on comparative balancing.

[46] One might present this requirement as a form of "comparativism", see Chang (2016), p. 213. However, in contrast to Chang, choosing one of the best options in the frame of autonomous balancing does not make the choice objectively correct, but merely objectively correct within the normative assessments of the autonomous agent.

[47] This presupposes that the assessment as good, better, or best concerns the reasons to choose the respective option. There might be other aspects in which something can be qualified as good, better, or best. See Raz (2016), p. 155. Such examples, however, do not undermine the demand to choose the best option.

[48] See also Sieckmann (2012), p. 91; Sieckmann (2004), p. 73 n. 31.

[49] See below, Chap. 5.

2.3.2 *The Optimisation Model*

The analytical foundation of the demand for an optimal solution does not yet explain what optimality means. This explanation is provided by the "optimisation model",[50] which defines what is an optimal solution to a balancing problem. The optimisation model defines optimal solutions to a conflict of normative arguments regarding two types of criteria: the relative strength or importance of the argument (its abstract weight), compared to a competing argument, and the degree to which it is affected by diverse possible solutions to a balancing problem.[51] Each normative argument can be assessed in these dimensions.[52] Hence, the optimisation model defines two types of factors as relevant to a balancing judgement:

(T11) The balancing of normative arguments must consider the relative weight of the competing arguments and the degree to which their demands are fulfilled or not fulfilled by a particular balancing judgement.

The thesis that balancing of normative arguments follows the optimisation model does not assume that this is the only type of argumentation that might occur in normative discourse. There are, for example, also arguments referring to necessary presuppositions of normative discourse, that is, arguments that have *a priori*-character.[53] However, resolving a conflict of normative arguments requires a balancing according to the optimisation model.

To conclude, as a general demand of rationality, a conflict of normative arguments should be resolved by means of a balancing of the competing arguments that is aimed at an optimal solution for the respective conflict. Balancing as optimisation seems to be the only rational approach to the justification of definitive norms in the case of the balancing of conflicting normative arguments.

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[50] See Chap. 4; also Sieckmann (1995a), p. 49 n. 19; Sieckmann (2004), pp. 73ff.; Sieckmann (2009), pp. 69ff.; Sieckmann (2012), p. 90; Sieckmann (2022a), p. 47, following Hurley (1989), p. 70.

[51] One can define the abstractness of weight in various respects. See Chap. 4, Sect. 4.4.2. The definition here characterizes it as independent from the degree of fulfilment a particular solution achieves regarding this normative demand. This does not mean, however, that the abstract weight is independent from any circumstances of the pertinent case. The abstract weight of an individual right depends, for example, on the urgency of the underlying individual interest. This urgency may again depend on further circumstances of the case.

[52] A borderline case might be that a normative requirement can only be completely fulfilled or not fulfilled, but not be fulfilled to some degree. However, even in this case one can consider the dimension of fulfilment.

[53] Sieckmann (2012), p. 69.

2.4 Moral Autonomy

The structure resulting from the balancing of normative arguments displays the features of moral autonomy, that is, of making normative judgements that one regards as the result of a free decision but at the same time as obligatory. The balancing of normative arguments corresponds to this structure, for the result of the balancing is not determined by given criteria of priority; nevertheless, because of the logical structure of normative arguments as requirements for validity, one must regard it as obligatory to accept the resulting norm as valid.[54] Although from an external point of view, one must concede that one could have decided otherwise, as long as one holds a particular normative judgement, that is, from an internal point of view, one must claim that this judgement is required by the better argument and is, in this normative sense, correct. Hence, we can state the following thesis:

(T12) Normative judgements resulting from the balancing of normative arguments are at the same time free but also normatively required.

2.4.1 Autonomy as Self-legislation vs. Kantian Autonomy

The idea of moral autonomy is often associated with Kant, and indeed, Kant presented this idea in a formulation that looks similar to the account of autonomous reasoning presented here. However, in substance, Kant's approach is clearly different and even opposed to the idea of autonomous reasoning.[55] According to Kant, the dignity of mankind consists in being self-legislating and, at the same time, bound by the self-given norms.[56] However, Kant assumed the objective existence of the moral law, and self-legislation only refers to the option of accepting the moral law as directing one's actions, or not to accept it. The constitution of the validity of moral norms was not the issue of Kantian self-legislation.[57] In contrast, autonomous

[54] On this necessary claim to normative correctness Sieckmann (1994b), p. 243; Sieckmann (1997a), p. 21; Sieckmann (2004), pp. 70f.; Sieckmann (2009), pp. 30f.; Sieckmann (2012), p. 56.

[55] Hence, Keinert (2016), p. 77, misinterprets my approach when he regards it as a reconstruction of Kant's account of autonomy.

[56] Kant (1968), p. 440: "die Würde der Menschheit besteht eben in dieser Fähigkeit, allgemein gesetzgebend, obgleich mit dem Beding, eben dieser Gesetzgebung zugleich selbst unterworfen zu sein." (engl. translation M. J. Gregor, The Cambridge Edition of the Works of Immanuel Kant, Practical Philosophy, 1996, 89: "the dignity of humanity consists just in this capacity to give universal law, though with the condition of also being subject to this lawgiving.")

[57] See also Sieckmann (2007a), p. 152. Kant's notion of autonomy is a disputed issue. On the philosophical discussion see Khurana (2019), pp. 11ff. Kleingeld (2023), pp. 609–623, 610, suggests that in Kant's theory, the Moral Law (that is, the Categorical Imperative) should not be regarded as self-legislated, but as an *a priori*-principle of pure reason, in contrast to substantive moral laws, which are self-legislated. This corresponds to the approach suggested here. The remaining problem

reasoning is about the validity of norms. It is meant to constitute the validity of norms, and does not presuppose it.[58]

To be precise, autonomous reasoning refers to substantive norms. In other respects, there are analogies to Kant's approach. The model of autonomous reasoning states the validity of norms that must be presupposed as a condition of the possibility of normative justification, that is, of justifying statements of the validity of norms. In this respect, the methodological approach of the model of autonomous reasoning is Kantian. It aims to show the objective validity of some norms that must be recognised *a priori* as valid, independently of substantive normative arguments.

Hence, regarding the assumption of *a priori* valid norms, the model of autonomous reasoning is close to Kant's account of the Categorical Imperative, which requires the universalisability of maxims as the condition of validity of the respective norm. However, the set of norms justified as *a priori* valid in the model of autonomous reasoning is more complex than the Categorical Imperative. Regarding autonomous reasoning, criteria of universalisability apply in various respects:

- Normative arguments must be universalizable in the sense that it must be possible for each autonomous agent to accept them as a valid argument. This implies that claims that do not recognise the autonomy of other agents cannot be valid as a normative argument.
- Normative judgements must be universalizable in the sense that it must be possible for each autonomous agent to accept the stated norm as definitively valid. This implies not only compatibility with the autonomy of all other agents, but also the demand to consider the arguments and judgements of other agents in developing one's own normative judgement. Normative judgements must, therefore, also comply with demands of intersubjective reflection, which can be understood as universalisability in a procedural or discursive sense.
- Statements of the objective validity and, hence, bindingness of norms must be justified in a way that each autonomous agent must accept the stated norm as valid. This includes a criterion of universal validity that goes further than mere universalisability in the sense that it is possible to accept a norm as valid. It demands that accepting the norm as valid is rationally necessary.

Consequently, autonomous reasoning applies demands of universalisability in various respects and, therefore, could be regarded as a Kantian approach to moral reasoning. However, it is not Kantian regarding the notion of autonomy and the structure of normative reasoning.

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is how self-legislated laws could be regarded as binding by the self-legislating agents. The model of autonomous reasoning offers an answer to this question.

[58] An attempt to interpret Kantian self-legislation suggests that autonomous agents engage in a collective enterprise and act as "co-legislators". See Bagnoli (2017), p. 113. However, the problem remains that either the validity of norms depends on individual judgement, and it remains open how an individual can conceive self-chosen norms as binding, or individuals are subjected to the judgements of other agents, and hence are not self-legislating.

2.4.2 *Autonomy as a Normative Competence*

An important element of the model of autonomous reasoning is the recognition of a normative competence or power of autonomous agents to form normative arguments and judgements.[59] Their validity is founded on the act of autonomous agents to present normative arguments and judgements, not on some independent source of validity. Since no independent, objective criteria of validity are available, autonomous agents have, within the limits of rational argumentation, a choice as to which normative arguments or judgements they put forward.

This type of freedom in exercising a normative competence expresses the idea of autonomy. Again, it is quite distinct from Kant's idea of a free will, which is concerned with the problem of how a free will is conceivable, while the empirical world, to which also human beings belong, is determined by causal laws.[60] The question of how a free will is possible in the empirical world is of no relevance to the model of autonomous reasoning.[61]

Freedom in autonomous reasoning refers to the power of the autonomous agent to make choices regarding normative arguments and normative judgements. These choices change the normative situation. They constitute normative validity, although merely in the sense of normative arguments that other agents have to consider in their reasoning. Hence, autonomous reasoning includes not only a liberty to make choices but also a normative competence to establish the validity of normative arguments.[62]

In practical philosophy, little attention is paid to the notion of normative competence as an element of normative justification.[63] This aligns with the propositional model of normative argumentation, where arguments are about which norms exist.

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[59] See also Sieckmann (2012), pp. 71f., 144.

[60] See Kant (1968), pp. 400, 410, 412, 452, 454.

[61] One should note, however, that empirical regularities, although they cannot directly determine normative judgements, might be relevant regarding the objectivity of normative judgements. If normative judgements were causally determined so that all agents come to the same result, one would assume that this result is objectively correct. If a certain result is supported by statistical regularities, one could interpret this as reasonable convergence, so that it is objectively justified to claim this result to be binding in the sense that it may be applied and enforced. On reasonable convergence and its implications see also Sieckmann, The Problem of Normative Objectivity, in: Villa Rosas and Fabre-Zamora (2022), pp. 215–231, sect. 5.

[62] See also the critique of Kant's account of autonomy and some reconstructions of it in Darwall (2006), p. 214. Darwall argues that moral obligation cannot be explained from a first-personal standpoint but requires a second-personal framework. Although Darwall interprets this second-personal framework as an authority of agents in relation to other agents, and the terminology of authority does not seem to be adequate, the crucial point is that justification requires normative competences.

[63] See, however, Darwall (2006); Chang and Tadros (2020), pp. 275–300. Also Rawls' formulation of persons as a self-originating source of valid claims (Rawls 1980, pp. 544, 546) might be understood as recognising a normative competence to create moral reasons. However, it seems that Rawls merely meant that persons have rights on their own.

In contrast, in legal theory, the idea that agents can determine the validity of norms by their own judgements is regarded as a feature of law, but not of morality.[64] In contrast, the notion of normative competence is crucial for the model of autonomous reasoning.

2.5 Conclusion

The model of autonomous reasoning is a specific account of normative argumentation, which conceives autonomy as a structure of balancing normative arguments, and grounds the validity of substantive norms on the normative competence of autonomous agents to introduce normative arguments and judgements. It adopts a distinctive account of normative arguments as requirements for validity, logically distinct from normative judgements or statements, and neither descriptive nor prescriptive but a unique type of normative expression. The reiteration of requirements for validity is in accordance with the structure of interest-based arguments. Hence, the account of normative arguments as reiterated requirements for validity claims to present a correct analysis of normative reality.

The justification of normative judgements is not inferential but founded on the claim that a judgement ought to be accepted for the stronger argument, stronger according to the judging agent. Normative judgements must comply with formal requirements of rationality, in particular, they must strive for an optimal solution to balancing problems. However, no given criterion determines the result of the balancing. This makes normative balancing a specific form of reasoning, distinct from subsumption and deduction. Nevertheless, it presents a coherent account of normative justification.

Because of the structure of the underlying normative arguments, normative judgements are connected with a claim to normative correctness, not to truth. At the same time, they are free in the sense that they are not determined by given criteria. Hence, the judgements based on the balancing of normative arguments are autonomous.

Autonomy, conceived as the balancing of normative arguments, is alien to Kantian autonomy. If, however, one conceives the moral law as the obligation to engage in autonomous reasoning, morality and autonomy are necessarily connected, and the Categorical Imperative can be translated into diverse demands of universalisability, which apply to different levels of autonomous reasoning.

[64] See, for example, Kelsen (1960), pp. 198ff., on the dynamic dimension of law.

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Chapter 3
The Logical Structure of Principles

3.1 Introduction

The distinction between normative arguments and normative judgements or statements has been developed as a reconstruction of Dworkin's thesis that rules and principles are logically distinct types of norms.[1] His approach that principles are reasons to be balanced against competing principles, whilst rules are applied in an all-or-nothing fashion, links a normtheoretical feature to a specific method of application. However, whether such a distinction is tenable is a matter of dispute.[2] The most prominent attempt to present a structural distinction of rules and principles is Alexy's account of principles as requirements of optimisation,[3] in contrast to rules as definitive norms[4] or as norms with a special *prima facie* character.[5] However, Alexy's approach is contested,[6] and indeed it does not explain how principles can figure as reasons for balancing judgements.[7] The prevailing opinion seems to be that there is no structural difference between rules and principles, but, if at all, only a gradual one.[8]

[1] Dworkin (1978), pp. 24f.

[2] See in recent years Ratti (2023), pp. 48–56; Riechelmann (2021), pp. 102ff.; Riechelmann (2011), pp. 207–217; Poscher (2020), pp. 134–149; Azevedo Palu (2019), pp. 115ff.; de Fazio (2019), pp. 305–327; Lopes (2017), pp. 471–490; Sieckmann (2020), pp. 186ff.; Sieckmann (2011), pp. 178–197.

[3] Alexy (1985a), pp. 75f.; Alexy (2002a), pp. 47f.; Alexy (2000a), pp. 294ff.; Alexy (2023), pp. 153–159.

[4] Alexy (2009), p. 9; Alexy (2021), p. 21.

[5] Alexy (1985a), pp. 87–89; Alexy (2002a), pp. 57–59.

[6] See Ratti (2023), pp. 48–56; Poscher (2020), pp. 134–149.

[7] See Sieckmann (1990), pp. 62ff.; Sieckmann (2022), pp. 35ff.

[8] Martínez Zorilla (2007), p. 84; Navarro and Rodriguez (2014), p. 194 n. 75: existence of two distinct modes of application does not imply the existence of two logically distinct types of norms.

J.-R. Sieckmann, *Autonomy and Law*, Law and Philosophy Library 150,
https://doi.org/10.1007/978-3-031-96578-4_3

The general problem with the denial of a structural difference between rules and principles is that it defends a negative thesis. In order to prove this thesis, one had to show that no account of rules and principles can provide such a distinction. However, opponents of "principles theory" do not show that a structural distinction of rules and principles cannot be made. They only refer to specific interpretations or accounts of the notions of rules and of principles,[9] in particular those of Dworkin[10] or Alexy.[11] Hence, they fail to show that a structural distinction between rules and principles does not exist.

I will defend a strict separation of rules and principles based on the distinction of normative judgements and normative arguments. Principles are conceived as normative arguments, figuring as reasons for balancing judgements.[12] In contrast, rules are defined as norms that result from the balancing of principles. Hence, the normative claim of rules is that they are to be applied and followed in the way they demand, and no further balancing is required.[13] This distinction implies that normative arguments have a specific logical structure, which allows to use them as reasons for balancing judgements. A crucial feature of such reasons is that, in contrast to normative statements, they do not present normative propositions. Their normative claim results from reiterated requirements for validity,[14] whilst the results of the balancing of normative arguments are presented by normative propositions stating the definitive validity of norms.

One should note that, in contrast to the interpretation applied here, the term "principles" can be used in various ways.[15] In particular, principles can be

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Regarding the general character of principles Raz (1972), pp. 823–854, 838; García Figueroa (1998), p. 198; Verheij et al. (1998), pp. 3–26; Marmor (2001), p. 86; Ratti (2023), pp. 48–56, 48.

[9] See, for example, Ávila (2006), pp. 29–55, who describes features of rules and principles, and offers a conceptual distinction as a consequence of this description, 69; Zucca (2008), pp. 11f., who assumes that rules can have exceptions; Brożek (2007a), p. 34, who assumes that principles can produce exceptions to rules.

[10] Alexander and Kress (1995), pp. 279ff., regarding Dworkin.

[11] Cf. Ratti (2023), pp. 48–56; Poscher (2020), pp. 134ff.; Šušnjar (2010), pp. 275ff.; Brożek (2007a), pp. 123ff., regarding Alexy.

[12] On the notion of principles Sieckmann (1990), pp. 74f., 87; Sieckmann (2009), pp. 21ff.; Sieckmann (2018a), pp. 111ff.; Sieckmann (2020), pp. 186ff.; Sieckmann (2022), pp. 40ff.

[13] On the other hand, the statement of a rule as the result of a balancing does not exclude to enter again into a balancing. A rule might merely state the result of an argumentation at a particular moment. Several ways to protect balancing results are possible. First, a rule might be protected by a demand not to be subject to balancing. Hence, the rule presents a protected, peremptory, or exclusionary reason. In case of protected rules, the protection can be more or less strong. It might suffice that a new argument occurs, or that a new argument of a particular strength occurs, or one might consider the protection as absolute. However, an absolute protection that excludes any deliberation about an established rules will not find a rational justification, for the possibility of critical revision of formerly established rules is a demand of rationality.

[14] See Sieckmann (2005), pp. 197–210; Sieckmann (2009), pp. 51ff.; Sieckmann (2012), pp. 45ff.; Sieckmann (2018a), pp. 113ff.; Sieckmann (2020), pp. 108ff.

[15] See the listing of different uses in Atienza and Ruiz Manero (1998), pp. 3ff; Carrió (1971), pp. 12ff.; Rodriguez (2002), p. 337; Reimer (2001). An interpretation close to Dworkin's approach

understood as fundamental norms that are strictly valid.[16] There is no need to reject this alternative understanding. Indeed, both notions can be combined to understand principles as starting points of argumentation.[17] However, in this essay, principles are conceived as normative arguments. In order to count as *legal* principles, an obligation of law-applying organs to apply a normative argument must be justified.

3.2 Principles as Normative Arguments

A crucial feature of principles as normative arguments is that they are not only objects of balancing but, at the same time, the reasons for judgements resulting from their balancing with competing principles.[18] Thus, they include requirements for validity, demanding that a certain norm shall be accepted as definitively valid. However, as arguments to be balanced with competing principles, they do not entail a strict demand, but an ideal "ought".[19] In contrast to a real "ought", an ideal "ought" is a normative demand that ought to be accepted as valid, but, in fact, is not actually valid. The ideal character implies that the content of an ideal "ought" is not qualified by a clause "to a degree as high as possible" or by any other clause, for such a relativisation would eliminate a conflict with other arguments and make the relativised demand strictly valid. This implies a specific logical structure of principles.[20]

One should also note that not any legally valid normative argument might be called "principle". Usually, principles are regarded as norms with some degree of generality, or some importance. Hence, the class of principles is narrower than that of normative arguments. This does not affect, however, the existence of a structural difference between principles as normative arguments and rules as definitively valid norms. It only implies that this distinction is not complete.[21]

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is suggested by Rescher (2010), pp. 1, 71 (rules as conditional guides of conduct and principles as general norms capable of conflict).

[16] See also on "soft" and "hard" interpretation of principles Zhao (2009), pp. 75ff.; Perry (1997), pp. 787–820; Pattaro (1988), pp. 119–121.

[17] See also Sieckmann (2010a), pp. 59f.

[18] Sieckmann (1990), p. 87; Sieckmann (1994a), p. 167; Sieckmann (1994b), pp. 243f.; Sieckmann (2012), p. 15; Sieckmann (2020), pp. 103f.

[19] On the notion of an "ideal ought" Alexy (1980), pp. 80f.; Sieckmann (1990), pp. 76ff.

[20] Sieckmann (1994a), p. 170; Sieckmann (1994b), p. 241; Sieckmann (2005), p. 200; Sieckmann (2012), pp. 45ff.; Sieckmann (2020), pp. 108ff.

[21] Hence, it is not correct to say that each norm is either a rule or a principle, against Alexy (2003), p. 295. See also Sieckmann (1990), p. 74.

3.2.1 Logical Features of Normative Arguments

As normative arguments, principles cannot be directly presented in normative statements. Hence, they do not have the structure of propositions (non-propositionality thesis).[22] On the other hand, one can state their validity as a principle. Such meta-level statements, however, are distinct from the direct use of norm sentences as normative arguments.

Since normative arguments cannot be directly presented in the form of statements, the question remains: what is their logical form? They cannot be descriptions of existing norms, nor can they be understood as prescriptive sentences. Prescriptions are not a type of speech act that is suitable for normative argumentation. Since normative argumentation is an instance of autonomous reasoning and autonomous agents are not in a position to prescribe something to other autonomous agents,[23] normative arguments cannot be understood as prescriptive sentences.

The logical form of normative arguments is displayed in the way they are used in a balancing. For example, regarding the conflict of free speech and personal honour, the argument of free speech demands that one ought to recognise a norm that a particular speech be permitted. The argument of personal honour demands that offensive speech be forbidden. We see a two-level structure. On the one hand, we find a demand regarding the validity of a permission; on the other hand, we find a demand that a prohibition be valid. The demand can be expressed by the modality "ought". Hence, we have a structure O VAL N, where "O" represents the deontic modality "ought", and VAL predicates the validity of a norm N.

In order to present the procedural structure of argumentation, one can present the second-order requirement as a demand to accept a particular norm as definitively valid: O ACC (VAL_{DEF} N). In a short hand form, one can say that they demand the definitive validity of the respective norm: O VAL_{DEF} N. Hence, they are requirements for validity.

The meta-level structure of normative arguments does not yet sufficiently describe their logical character. The question remains: what is the type of validity of the second-order requirement? It must have some type of validity in order to qualify as a normative argument, but it cannot have validity as a kind of normative fact, expressed in a normative statement. The suggestion to overcome this problem is to reiterate the requirements for validity. A normative argument, hence, has a structure in which each requirement of validity of a certain order is supported by a requirement of validity of higher order, demanding to recognise the definitive validity of the lower requirement of validity. This is represented as: …O VAL_{DEF} N. The reiteration is indicated by "…", characterizing the type of use that is made from normative sentences. The use as a normative argument implies the claim that one can support each requirement of validity regarding a norm N by a requirement of validity of higher order. Hence, one can define normative arguments as:

[22] See Sieckmann (2011), pp. 195ff.; see also Sieckmann (2020), p. 104; Sieckmann (1990), p. 86.
[23] See Sieckmann (2012), pp. 11ff., 18; Sieckmann (2022), p. 22.

DF_{NA}: A normative argument for the definitive validity of a norm N_i consists of a requirement of validity O VAL N_i, backed by an infinite set of requirements for validity of higher orders referring ultimately to the norm N_i.

3.2.2 Adequacy of the Analysis

Several arguments count in favour of the account of normative arguments as reiterated requirements for validity.[24] First, the reiteration of requirements for validity constitutes a specific type of validity, which may be called procedural validity. It is not possible to discard the normative claim presented with the argument without a counterargument. Second, the structure of reiterated requirements for validity indeed reflects the structure of interest-based arguments. Hence, it is a correct description of normative reality. Third, the structure of requirements for validity necessitates a claim to correctness for balancing judgements. Although these judgements cannot be derived from accepted premises but display a subjective judgement, they must be presented as normatively required. Finally, this allows an adequate reconstruction of the idea of moral autonomy, which consists in establishing the validity of norms by normative judgements that are, on the one hand free, because not derived from given premises, and on the other hand, regarded as normatively bound, because whatever judgement one makes, one must claim that this judgement is required by the stronger normative argument.

3.2.2.1 Procedural Validity

The foundation of procedural validity follows because reiterated requirements for validity provide a basis for encountering the sceptical strategy to attack any argument with a question of why one should accept that argument. If someone suggests that given C, one has the right to free speech, a sceptic will ask why. If the proponent gives an argument, the sceptic will again respond with a "why"-question, and so on. This leads to the well-known "Münchhausen"-trilemma,[25] that any argument will end in a circle, an infinite regress, or a break-off of argumentation. There are various suggestions to cope with this problem of deductive justification. The account of normative arguments as reiterated requirements for validity may serve as a defence against the sceptical strategy of asking "why"-questions, for it creates the possibility to adduce an unlimited number of arguments. Hence, any "why"-question can be answered with a new argument. The proponent will never be in a position where he could give no further argument.

[24] See also Sieckmann (2012), pp. 48ff.; Sieckmann (2009), pp. 53ff.

[25] Albert (1980), pp. 13f. See also Sieckmann (2009), p. 60; Sieckmann (2012), p. 57.

One might object that the reiteration of requirements for validity only leads to an infinite regress. This is true, but the question is whose problem is this. It is crucial to understand that the argumentative function of normative arguments is distinct from that of normative statements. Normative statements claim to state what is definitively valid. Thus, they claim to state the result of an argumentation, and to finish or exclude an argumentation. Contrarily, normative arguments are meant to open or continue an argumentation. They do not exclude counterarguments. Someone who offers a normative argument is ready to consider other arguments.

This difference is important because the sceptical strategy of "why"-questions leads to different effects with regard to normative arguments than for normative statements. If one makes a normative statement, thus claiming to end an argumentation, one must be able to support this claim in a finite number of steps. Else, one loses the argumentation. If, on the contrary, one opens an argumentation with a normative argument, the sceptical strategy will never bring the proponent into the difficulty of giving a new argument. A first-order requirement of validity of N is different from a second-order requirement, and so on. Each of them is supported by the possibility of reiteration. Hence, the proponent can always present a new argument.

Obviously, this does not make much sense, but this is not a problem for the proponent. It is the sceptic who blocks further argumentation by provoking a senseless reiteration. This is irrational, given the interest in rational argumentation, which also the sceptic purports to have. Hence, one cannot rationally ask "why"-questions demanding further arguments when the proponent can show that he is able to present a normative argument supported by reiterated requirements for validity.[26] If one does not accept the normative argument put forward, the only rational way to proceed is to offer counter-arguments and a weighing and balancing of colliding arguments. Therefore, the structure of reiterated requirements for validity makes normative arguments reasons within a procedure of weighing and balancing.

This argument is meant to make plausible the suggestion that normative arguments should be analysed as a structure of reiterated requirements for validity. One can add that the reiteration of requirements for validity offers a natural interpretation of the concept of an ideal "ought".[27] This is distinct from an understanding of normative ideals characterised by the demand for an ever higher degree of fulfilment, which, however, cannot be fulfilled completely. In contrast, an ideal "ought" is set against a real "ought". Accordingly, it is an "ought" that is not actually valid. If it is not actually valid but nevertheless must have some kind of validity, it is natural to assume that an ideal "ought" is one that should be actually valid. Thus, a requirement of validity is part of an ideal "ought". The next question is which kind of validity the second-order "ought" has. Again it cannot be an actually valid, real "ought", but must have validity in the sense that it ought to be valid, and so on.

[26] Sieckmann (1994b), pp. 242f.; Sieckmann (2009), pp. 54f.; Sieckmann (2012), pp. 57f.; Sieckmann (2018a), pp. 115ff.; Sieckmann (2020), pp. 110f.

[27] See also Sieckmann (2012), p. 51.

Consequently, an ideal "ought" consists of an infinite or unlimited reiteration of requirements for validity.

3.2.2.2 Normative Reality

Furthermore, the characterization of normative arguments by a reiteration of requirements for validity is supported by the fact that arguments based on interests do indeed have such a structure.[28] If one accepts that interests imply a demand that they should be respected, one will also have to assume that there is an interest in the validity of the norm that demands respect for those interests, and an interest in the validity of the higher-order norm, and so on. Hence, the structure of reiterated requirements for validity is not mere stipulation but has real applications.

The substantive justification of normative arguments follows from the interest-based claims of autonomous agents. The possibility to reiterate interest-based demands results from two premises:

1. An interest of an autonomous agent justifies a demand that this interest be realised and, consequently, a corresponding normative argument for the definitive validity of the respective norm.
2. Together with a first-order interest, there is an interest of higher order in the definitive validity of the requirement of validity of a norm protecting the first-order interest.

The first premise, that autonomous agents may present interest-based claims that ought to be recognised as arguments, can be justified by means of the conception of autonomous reasoning. Since the validity of a norm can only be established by striving for the consent of autonomous agents, and these agents, if reasonable, will not consent to an argument that treats their interests as irrelevant, the validity of a norm can only be established if it is recognised that the interests expressed by autonomous agents ought to be realised. Accordingly, autonomous agents must have the normative power or competence[29] to introduce interest-based claims as normative arguments.

The second premise, which connects a first-order interest with a higher-order interest in the validity of a norm protecting the first-order interest, follows as a requirement of rationality. The norm protecting the first-order interest serves to promote the realisation of this interest. This holds in case of a conflict of interests and if the normative protection serves to promote the realisation of the respective interest. This positive effect is proven by the fact that argument about norms actually

[28] See Sieckmann (1994a), pp. 172f.; Sieckmann (1994b), p. 240; Sieckmann (2005), p. 206; Sieckmann (2012), pp. 54f.

[29] Normative power in the sense of Hohfeld as the capability to change the normative situation. See Hohfeld (1923), pp. 23–64.

takes place. If norms were irrelevant to realising interests, such disputes did not make sense. Therefore, at least in general[30] the second premise holds.

Based on these premises, one can develop the reiterative structure of normative arguments. The higher-order interest in normative protection justifies the normative demand for such protection. This protection, again, is in the interest of autonomous agents, as long as the argumentation continues. Thus, one can develop an unlimited set of reiterated requirements for validity.

3.2.2.3 Claim to Normative Correctness

The claim to the correctness of an autonomous judgement includes that this judgement, although free and not pre-determined by established norms, is required by the stronger of the competing normative arguments and, hence, should be accepted.[31] This claim includes, in accordance with the requirements of normative justification, formal and normative elements. An agent making a normative judgement must, firstly, claim that the judgement complies with the formal requirements of a correct balancing and, secondly, that it is required by the stronger of the competing normative arguments and, therefore, is the judgement that one ought to make or accept.

Normative judgements include a claim that the result of the balancing be accepted as definitively valid. Complying with this demand then leads to a normative statement that the respective norm is definitively valid.

For example, the result of a balancing might be expressed as:

(1) In situation C, the principle of liberty of expression deserves priority with respect to the question of whether offensive speech is allowed, with, for example, C: the speech is not negligently based on false assumptions.

This can be expressed in the form of a normative requirement:

(1′) In situation C, the offensive expression should be permitted.

On the other hand, one might make a normative statement:

(2) In situation C, the offensive expression is permitted.

Within the structure of balancing normative arguments, the normative statement, that is, (2), of what is actually permitted, prohibited, or required, is not included in the normative requirement, that is, (1) or (1′), but complies with the normative requirement included in a balancing judgement. The step from the normative requirement to a normative statement requires a procedural act of determining

[30] There may be exceptional cases in which interests are not furthered by the existence of norms demanding respect for them. For example, one might have an interest not to have normative support for the realisation of a particular interest. Then, the particular interest does not support a normative argument, and there is no point in having a normative argumentation.

[31] See also Sieckmann (1994b), p. 243; Sieckmann (2009), p. 108; Sieckmann (2020), p. 118.

which norm is definitively valid.[32] The claim to (substantive) correctness of balancing judgements then consists in the claim that the stated norm ought to be accepted as definitively valid.

The necessity of such a claim follows from the structure of normative arguments as reiterated requirements for validity. If a normative argument is preferred to a conflicting one because of its greater relative weight in a given situation C, the resulting priority relation and the corresponding conditional norm, that R holds in case C, are required by the prevailing argument. This argument demands that the stated norm ought to be valid. Thus, a normative judgement includes a requirement that the respective priority ought to be accepted.[33]

Indeed, the prevailing argument requires an even wider-ranging norm that covers the complete norm-content of the normative argument. However, the norm established by the balancing is limited to the range of application in which the argument receives priority, represented by the condition C. Since it is included in the wider-ranging norm, it is also required by the prevailing argument.

Summing up, a normative judgement based on the balancing of normative arguments carries a claim not only to formal correctness in the sense of compliance with the standards of rational decision-making, but also a claim to normative correctness in the sense that it is required by the prevailing normative arguments. Autonomous agents cannot avoid making such claims in their normative judgements.

3.2.2.4 Understanding Moral Autonomy

The core of autonomous reasoning consists in the balancing of normative arguments based on the interests of autonomous agents.[34] Normative arguments require a particular result of this balancing, a result that is a normative judgement stating that a certain norm is definitively valid and is, therefore, actually to be applied and followed. We can state four characteristics of autonomous reasoning:

1. The result of the balancing cannot be inferred from given norms, but must be established by autonomous judgement.
2. Normative arguments are the result of claims that autonomous agents make based on their interests.
3. Normative arguments include requirements for validity; that is, they demand that a particular norm be accepted as definitively valid.

[32] Definitive validity means that a norm is the result of a balancing of all relevant arguments and information. That is, it marks the transition from argumentation to the statement of an immediately action-guiding norm. More exactly, the result of the balancing includes two elements. First, a normative judgement that a particular norm *shall be* definitively valid and, second, a normative statement that the norm *is* definitively valid.

[33] See also Enderlein (1992), p. 272.

[34] See Sieckmann (2012), pp. 11, 13; Sieckmann (2022), p. 22; also Sieckmann (1992), p. 296; Sieckmann (2004), p. 66; Sieckmann (2007a), pp. 159f.

4. The structure of requirements for validity implies that normative judgements (as the result of the balancing of normative arguments) include a claim to the normative necessity of the established result.

Since the normative arguments and the balancing results are not inferred from given premises, but established by the judging agents themselves, autonomous reasoning presents a type of self-legislation. The agents have to make a choice regarding the norm they consider to be valid.

On the other hand, autonomous agents must claim the *normative necessity* of their balancing judgements. Whichever norm an agent states to be definitively valid as the result of a balancing of competing normative arguments, he must claim that the validity of this norm is required by the stronger argument.

This claim to normative necessity is crucial to the structure of autonomy. In the free speech-example, the possible result of the balancing—stating that some offensive speech shall definitively be permitted if it forms part of a discussion of public affairs—will be covered by the argument for free speech, claiming that speech shall definitively be permitted. The argument for free speech requires also, then, the validity of the resulting conditional norm. The norm is accepted as valid because it *shall be* valid.

Hence, the agent will regard his judgement as free because it is not inferred from given norms. He could have decided differently. But as long as he holds his actual normative view, he must regard his decision as normatively bound and the resulting norm as valid in the sense that it shall be accepted, applied, and followed. Consequently, judgements based on the balancing of normative arguments are free but claim at the same time to express what is normatively required. Thus, they show how one can understand oneself as self-legislating, that is, as establishing a valid norm by one's own choice.

3.3 Objections

Against the thesis that normative arguments include reiterated requirements for validity, distinct from normative statements, some critiques have been presented. On the other hand, it has been defended by Christoph Kallmeyer,[35] who argued that it presents the most plausible account of an ideal "ought", compared to those of Robert Alexy and Peng-Hsiang Wang. With some minor modifications, he regards it as an adequate account of an ideal "ought".

In particular, Kallmeyer claims that the content of an ideal "ought" must be related to a value.[36] In contrast, the notion of normative arguments does not refer to the content of arguments, but only to their structure, and regards their relation to some value as a matter of validity. This formal conception seems to be more

[35] Kallmeyer (2016), pp. 54ff., 242ff.

[36] Kallmeyer (2016), p. 259.

adequate for a norm-theoretical approach. Kallmeyer also assumes a conceptual relation between the ideal "ought" and optimisation requirements.[37] In contrast, the notion of normative arguments is not linked to a specific form of application. Optimisation is required because and insofar as it is the most rational form to proceed. Against Kallmeyer, distinguishing the logical structure of normative arguments and the rational requirements applied to them is not an immunisation, but an advantage regarding the discussion of which form balancing should take.[38]

3.3.1 Clarifications

Regarding the critiques, some already fail to present a correct description of the object of their critique. For example, the thesis that normative arguments do not have a propositional structure and, therefore, the usual understanding of deontic logic does not apply to them is ignored, and objections are based on standard deontic logic or possible worlds-semantics.[39] Also, the point of constructing normative arguments in contrast to normative statements is misunderstood. Thomas Zoglauer has objected that the conception of reiterated requirements for validity does not constitute a normative conflict in the sense of a contradiction.[40] However, this is just the point of normative arguments, which are meant to construct collisions of norms that do not amount to a contradiction.

Alexy claims that the reiteration of requirements for validity does not explain the argumentative force of principles as normative arguments.[41] He describes the relation between normative sentences expressing norms in a purely semantic sense Op and normative statements VAL Op as an oscillation between two inadequate alternatives: as a pure norm in a semantic sense, Op says too little to be an argument, but as a normative statement VAL Op, it contains too much, as it excludes balancing. The reiteration, Alexy argues, does not constitute an argument.[42]

However, the reconstruction of the reiteration as an oscillation between norms in a semantic sense and normative statements misses the point of the reiteration as an infinite structure. Alexy replaces an infinite logical structure with an oscillation between two finite structures. As a finite structure need not have all the properties of an infinite structure, his argument is inconclusive. Also, Alexy ignores the argument for the argumentative function of a set of reiterated requirements for validity.[43]

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[37] Kallmeyer (2016), p. 175.

[38] On diverse suggestions regarding balancing see, in particular, Spohn (2022b), pp. 387ff.

[39] See Mauer (2015), pp. 413–460, 451.

[40] Zoglauer (1998), p. 148.

[41] Alexy (2000b), pp. 39ff.; Alexy (2000a), pp. 294ff.

[42] Alexy (2000a), p. 43. Followed by Azevedo Palu (2019), pp. 115ff.; Badenhop (2010), p. 335; Reßing (2009), p. 42.

[43] See above, Sect. 3.2.2.1, on procedural validity.

Some critiques refer to earlier and obsolete notations of requirements for validity. Indeed, the presentation of reiterated requirements for validity as "OOp" contains an equivocation in the sense of "ought" at the first level and the second level operator.[44] However, an equivocation does not occur when the character of validity is made explicit by a predicate VAL.[45] In addition, the notation in a single term, "…OVAL N", has been replaced by the conception of a set of reiterated requirements for validity.[46]

3.3.2 Conceptual Problems

In a logical respect, the reiteration of modalities in normative arguments is regarded as a problem. However, the reiteration of requirements for validity is not an iteration of deontic modalities,[47] for the second-order "ought" does not directly refer to another deontic modality, but to a demand of validity of a particular norm.[48] Problems of iterated deontic modalities, therefore, do not apply to the reiteration of requirements for validity.[49]

Further objections are that norms must refer to actions, not to the validity of norms,[50] that the reiteration can be eliminated and, therefore, has no effect,[51] that one cannot state the validity of a principle,[52] or that one cannot state when a collision among normative arguments exists,[53] due to the lack of a formal semantics.[54]

However, the view that norms must refer to actions is too restrictive.[55] Anyway, requirements for validity have also been interpreted as requirements to accept the validity of a norm,[56] and this interpretation complies even with the restrictive understanding of norms as referring to actions.

Regarding the issue of redundancy, the possibility of elimination applies only to statements of definitive validity $\mathrm{VAL}_{\mathrm{DEF}}\mathrm{OVAL}_{\mathrm{DEF}}$ N. One might interpret "$\mathrm{VAL}_{\mathrm{DEF}}$O" as indicating a type of normative necessity, expressed by a modal operator **N**, and

[44] Jansen (1998), p. 98 n. 92.

[45] Cf. also Sieckmann (1997b), pp. 352ff.; Sieckmann (1994b), pp. 239f.

[46] See Sieckmann (2005), p. 200. This is ignored by Wang (2010), p. 36.

[47] Therefore, the presentation in Sieckmann (1994a) was not adequate.

[48] Against Wang (2010), pp. 41ff.; Mauer (2015), p. 448. Although both authors see the difference in the notation of reiterated modalities and reiterated requirements for validity, they ignore this difference.

[49] See also Kallmeyer (2016), p. 245.

[50] Mauer (2015), p. 445.

[51] Wang (2010), p. 43.

[52] Portocarrero Quispe (2013), pp. 200–235, 213.

[53] Zoglauer (1998); Wang (2010), pp. 36f.

[54] Wang (2010), pp. 35ff.

[55] See also Kallmeyer (2016), p. 247; Jansen (1998), p. 46 fn 37.

[56] Sieckmann (2005), p. 199.

apply a system of modal logic where **NN**p is equivalent to **N**p.[57] Then, one could eliminate the reiteration of "$VAL_{DEF}O$". However, this is not a problem; it displays that at the level of definitively valid norms, the reiteration has no argumentative function, although the reiterative structure still exists. By contrast, the elimination of reiterated requirements for validity "$OVAL_{DEF}OVAL_{DEF}$" in normative arguments is not possible. First, they do not have a propositional structure, so the argument for elimination does not apply. In addition, regarding normative arguments, the reiteration has an argumentative function, as it constitutes a specific form of procedural validity.

Regarding the objection that one could not state the validity of principles,[58] this objection fails because, although one cannot infer definitive validity, the validity as a principle can be stated when the reiteration of requirements for validity can be justified.[59]

Regarding the collision of normative arguments, Zoglauer objects that a contradiction of norms would only exist if there is no possible world in which both norms could be valid at the same time.[60] Regarding the example of the requirement of the permission of a certain speech (OVAL P VZh) and the requirement of the prohibition of this speech (OVAL F VZh), it is claimed that both the permission and the prohibition could be valid at the same time in our (deontically not perfect) world. However, this objection overlooks that the issue of normative argumentation is the rational justification of norms. The question, hence, is whether one can rationally state both, the permission of a certain action and the prohibition of this action, where validity means definitive validity. However, one cannot rationally accept the definitive validity of both of these norms. The incompatibility of definitive validity of these first-order norms results in a conflict between the respective requirements of definitive validity. A conflict exists because the competing requirements of these arguments cannot be fulfilled at the same time. Incompatible norms cannot be definitively valid at the same time. This follows from the definition of definitive validity, which implies that a definitively valid norm must be applied and followed. If it is impossible to apply and follow both norms at the same time, then these norms cannot be both definitively valid.

The most profound critique is offered by Peng-Hsiang Wang. He objects that no formal semantics is offered and, therefore, notions of satisfiability of norms, logical validity, logical consequence, or logical contradiction are not precisely defined.[61] Wang asks why normative statements of the definitive validity of Op and of O¬p cannot both be true.[62] That (mandatory) norms with mutually contradictory norm contents cannot both be definitively valid is, according to Wang, merely a normative

[57] See Sieckmann (2020), pp. 104ff.

[58] Portocarrero Quispe (2013), p. 213.

[59] See also Kallmeyer (2016), pp. 253f.

[60] Zoglauer (1998), p. 149.

[61] Wang (2010), pp. 35ff.

[62] Wang (2010), p. 37.

requirement. However, the definitive validity of a norm implies a definitive obligation to apply and follow it. If norm contents are inconsistent, then it is not possible to apply and follow both obligations. In a rational theory of definitively valid norms, one cannot assume the definitive validity of a norm that is impossible to comply with. Indeed, there is a presupposition of rationality in this argument. One might suppose that this is not a logical inconsistency. But in normative argumentation, formal logic makes little sense without some assumptions about rationality.

Wang, however, follows a different approach. He points out that from a logical point of view the validity of norms might be defined at a meta-level or, as in my theory, included in the object language of a logic, so that validity is predicated of norms. Wang follows the meta-level approach.[63] Against this, however, one should note that for an adequate reconstruction of the balancing of normative arguments, and of the difference between rules and principles, different types of validity must be distinguished. This is not possible in the scheme of formal logic Wang follows.

Wang rightly notices that I try to explicate the difference between ideal and real "ought". He is mistaken, however, in his assumption that this is meant as a reconstruction of Alexy's distinction between ideal and real "ought".[64] In contrast, it is necessary to understand balancing as argument about which norm ought to be recognised as definitively valid. Wang characterizes this approach as "odd", but without it, one will not understand normative balancing.

Wang correctly explains that the reconstruction of normative arguments as reasons for balancing judgements leads to the reiteration thesis. Against it, Wang asks why one should not simply say that the ideal situation that a set of principles demands to realise is the obligation that all obligations arising from the colliding principles are fulfilled.[65] However, Wang confuses the notion of an ideal "ought" with the idea that the fulfilment of norms is, in some sense, ideal. Although it is possible to say that a norm Op "envisages an ideal situation in which p is the case",[66] this does not explain the structure of normative balancing. Anyway, the idea that incompatible norm contents are all fulfilled cannot be regarded as an ideal situation, but is logically impossible and hence does not make sense.

Regarding the critique that I would suggest the logical validity of some formula without foundation in a formal semantics,[67] it is not clear why Wang assumes that I would claim logical validity of the presented formula in the sense of formal logic. Wang himself has the impression that I am content with an intuitive interpretation and that their translation is plausible in the context of my theory of normative system and normative argumentation, and gives some references.[68] Leaving aside the

[63] Wang (2010), p. 32.
[64] Wang (2010), p. 33.
[65] Wang (2010), p. 34.
[66] Wang (2010), p. 35.
[67] Wang (2010), p. 36.
[68] Wang (2010), p. 36.

outdated notation Wang refers to, implications as O VAL N → VAL N or OVAL N → OVAL OVAL N describe structures that must be accepted regarding the norms considered as valid in the balancing of normative arguments. These are not theorems in a logical system, but theses about correct normative argumentation.

Wang argues that, if the incompatibility of norm contents leads to an inconsistency regarding normative statements, then the same must hold for normative arguments with incompatible norm contents.[69] He draws on his understanding of ideal situations. However, the construction of an inconsistency between normative statements relies on the notion of definitive validity. Without this, there is no foundation for Wang's assumption of an inconsistency.

Anyway, and against Wang's critique, one can understand the logical structure of normative argumentation without a formal semantics.[70] In addition, one might develop a formal semantics based, not on truth-values, but on the value of being "reiteration-conserving", which is the criterion of validity of normative arguments.[71] However, this is of little interest since, regarding normative arguments, hardly any logical inferences are admissible.[72] In any case, it is better to have an adequate informal theory of normative argumentation than an inadequate formal theory. This is also displayed by Wang's account of an ideal "ought", which sticks to established deontic logic but fails to address the issue of the balancing of normative arguments.

3.3.3 The Nature of Normative Justification

A fundamental objection concerns the nature of normative justification, which is understood as an argumentation about truth.[73] However, the view that rational argument must, from the start, begin with claims of what is true faces the problem of how such claims could be rationally justified. The idea that norms exist independently of any argument for them seems to be unfounded, as well as the claim that one could discern such norms, presupposing that we have some sense to perceive normative facts.

By contrast, the balancing of normative arguments regards argumentation as a constructive enterprise, which does not presuppose the existence of substantive definitive norms but aims at establishing the definitive validity of norms. This makes practical reasoning a type of reasoning on its own, not merely the application of theoretical reasoning to norms. It claims to present an adequate interpretation of the idea of autonomy and assigns the procedures of normative argumentation an essential role in the justification of norms.

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[69] Wang (2010), p. 37.

[70] See also Kallmeyer (2016), p. 250.

[71] Sieckmann (2020), p. 86.

[72] Sieckmann (2012), p. 39; Sieckmann (2020), pp. 87f.

[73] See above, Chap. 2, Sect. 2.1, in particular against Alexy (2017), pp. 17–30, 29; Alexy (2021), p. 204.

3.4 Conclusion

Summing up, no convincing objection has been offered against the account of normative arguments as reiterated requirements for validity, and the distinction of normative arguments and normative judgements or statements. This does not prove its correctness. However, although it presents, in some respect, a radically new approach, it is founded on an analysis of the structure of normative language.

The idea that normative arguments are not merely objects of balancing, but reasons for balancing judgements implies that normative arguments are reasons that require their own priority in the balancing with competing reasons. Although this self-referential character might raise suspicion, it is the key to resolving the paradox of moral autonomy: how can autonomous agents be free in determining which norms are valid and, at the same time, be bound by the self-chosen norms? The structure of normative arguments, as reiterated requirements for validity, presents an account that can explain the structure of moral autonomy. Normative judgements resulting from the balancing of normative arguments are, on the one hand, free, for they are not determined by given criteria, and, on the other hand, must be regarded by the one making this judgement as required by the stronger argument and hence as morally bound.

Practical reasoning, thus, is not merely an epistemic enterprise but normative argumentation has a constitutive role in establishing the validity of norms. It is distinct from theoretical reasoning, which is focused on truth and the inference of conclusions from premises. Practical reasoning, hence, is not merely theoretical reasoning about normative issues but has its own domain.

The conception of normative arguments as reiterated requirements for validity also suggests a solution to the trilemma of justification, holding that any deductive justification must end in circularity, infinite regress, or dogmatism (that is, asserting without giving reasons). The reiterative structure of normative arguments permits a form of procedural justification, distinct from logical inference and reference to facts, which is immune to the sceptical strategy of repeated "why"-questions and makes it necessary to present counterarguments if an opponent does not want to lose the argument.

The reiterative structure of normative arguments offers a peculiar ontological view of the normative "world". Norms do not simply exist but, as reiterated requirements for validity, form an interrelated structure that enables one to make normative claims without implying the assertion of existing norms. Moreover, this structure corresponds to that of interest-based arguments and, since normative arguments are based on individual interests, the notion of normative arguments can claim to present a correct description of normative reality.

The notion of normative arguments as reiterated requirements for validity also allows to understand the specific logical structure of principles as norms that figure as reasons for balancing judgements. Legal principles are normative arguments insofar as they are recognised as legally valid. Although this is not the only way the

term “principle” might be used, it certainly presents a way to understand the logical distinction between principles and rules in the sense of definitively valid norms.

Hence, principles and rules can be distinguished as logically distinct classes of norms. According to this distinction, principles have the character of normative arguments with distinctive logical features; rules are definitively valid norms expressed in normative judgements and statements. This is not simply a structural difference, but embedded in the model of autonomous reasoning and, hence, a crucial element of a plausible theory of normative justification.

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Chapter 4
Balancing as Optimisation

4.1 The Structure of Balancing

Reasoning with conflicting normative demands takes the form of balancing. Balancing consists in determining a priority amongst conflicting arguments according to their weight.[1] In law, such arguments are usually called "principles" in the sense of norms that can conflict with each other and figure as reasons for a particular result of the balancing of the competing principles.[2]

This core idea of balancing has, however, diverse interpretations. In particular, the conception of autonomous balancing contrasts with that of balancing as interpretation and that of balancing as calculation.[3]

Balancing as interpretation suggests that balancing takes place in the application of abstract criteria that guide a decision. For example, a highly abstract criterion of legal balancing would be to choose the best account of law, or the "soundest theory of law".[4] Regarding particular legal problems, one might look for an optimal, reasonable, or adequate solution. One can represent such arguments in a deductive scheme, presenting the basic premise as a conditional:

If x is the best interpretation of the law, then one ought to choose x.

The question then is which interpretation of the law is best. If we regard an interpretation I_1 as the best, one has to conclude that one ought to choose I_1. Balancing thus takes place within a deductive frame of interpretation.

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[1] See Sieckmann, Rational Law-Making, Proportionality, and Balancing, in: Meßerschmidt/Oliver-Lalana (eds.), Rational Lawmaking under Review. Springer, Cham, 2016, 350.

[2] As to this idea of the "theory of principles", see Dworkin (1978), pp. 24ff.; Alexy (1985a, 2002a); Sieckmann (1990, 2009, 2012).

[3] See also Sieckmann (2004); Sieckmann (2012), pp. 85 ff.; Sieckmann (2013a), p. 191 ("rule-based" vs. "autonomous" balancing).

[4] Dworkin (1978), pp. 105ff.

J.-R. Sieckmann, *Autonomy and Law*, Law and Philosophy Library 150,
https://doi.org/10.1007/978-3-031-96578-4_4

Also, one might represent balancing as a mathematical calculation based on certain criteria that determine a preference relation between conflicting goods.[5] In this sense, formal or axiomatic theories of rational decision-making present an analysis of balancing as a calculation. The correct result of balancing, if there is one, follows from given axioms, premises, and rules of calculation, applied to certain data.

These approaches need criteria that determine the correct, best, or optimal solution. Regarding a genuine problem of balancing, however, there are no predetermined criteria that allow one to determine the relative weight of the colliding arguments in an objective manner. Instead, the relative weight must be determined by the balancing itself. Hence, autonomous balancing is different from those conceptions of balancing as interpretation or calculation. It does not presuppose premises that substantially determine the balancing of normative arguments, but consists in its core in *establishing* a priority relation between the conflicting arguments.[6]

According to this conception, the structure of balancing includes three elements: firstly, the arguments to be balanced against each other; secondly, the procedure of balancing aimed at establishing a priority between the conflicting arguments; and, thirdly, the definitive norm that results from the balancing decision.[7]

For example, if someone says about another person that she is a liar, this will, in general, count as an insult and hence be legally forbidden. However, one might argue about this issue. On the one hand, there is the right to personal honour, which demands protection against insults. On the other hand, there is the right to free speech, which demands that everyone should be allowed to say what he thinks. Both rights cannot co-exist unrestrictedly. Hence, we have a conflict of rights. Both rights apply to the case but cannot dictate the solution. They hold only in principle, requiring a particular solution, but to be weighed and balanced against other arguments. In order to determine a definitive solution, a priority must be established between the competing arguments.

4.1.1 The Conflict of Normative Arguments

Autonomous balancing includes at least two competing arguments.[8] In the example above, these are:

P_1: Everyone ought to have the right to free speech.
P_2: Everyone ought to have the right to personal honour.

[5] See, for example, Hurley (1989), p. 225; Broome (1991), p. 11.

[6] Hence, the assignment of weight makes sense only regarding conflicting arguments. See also Scanlon (2014), pp. 111f.

[7] Sieckmann (2012), p. 87; Sieckmann (2013a), p. 192.

[8] See also Sieckmann (2012), pp. 88–89; Sieckmann (2013a), pp. 193–194; Sieckmann (2018b), pp. 12–13.

The principle P_1 implies a requirement of a particular normative consequent, namely that the speech be permitted (R). The principle P_2 implies a requirement of the opposed consequent (¬R). The normative situation comprises a number of facts of the case F_1, …, Fn. A subset of these facts forms the condition (C), according to which one principle receives priority over the other with respect to the normative issue of whether a particular speech ought to be permitted or forbidden.

4.1.2 Priority Between Normative Arguments

The priority relation between the conflicting normative arguments depends on the facts of the case and the relative weights of the competing arguments. Thus, the balancing requires not only conflicting arguments but also supplementary arguments concerning the relative weight and degree of fulfilment or non-fulfilment of the requirements included in the conflicting arguments. The determination of the priority is, of course, a matter of evaluation. What is of interest here is only the structure of this type of argumentation.

The priority relation can be defined in various ways, as a priority among principles or between possible results. One may state a priority among the conflicting principles with regard to a certain result, that is, a certain legal consequence, and certain conditions.[9] One can represent this as:

$$\mathrm{PRIOR}\left(\mathrm{P}_1 / \mathrm{P}_2\right)\mathrm{C},\mathrm{R}.$$

For example, the principle of free speech receives priority over the principle of personal honour with regard to the permission of this speech under the condition that the speech is not false.

One may also state a priority with regard to the legal consequences; that is, the possible solutions of the balancing. Such a priority depends on certain conditions C and on the conflicting principles or normative arguments. Thus, the notation will be:

$$\mathrm{PRIOR}\left(\mathrm{R} / \neg\mathrm{R}\right)\mathrm{C},\mathrm{P}_1,\mathrm{P}_2.$$

For example, if the statement is not false, the permission of speech receives priority over its prohibition.

The second notation makes clear that the conflicting principles figure as reasons for a particular result of the balancing, whereas the first notation represents principles as the objects of the balancing. Both notations are possible. However, the second conforms better to the idea of normative arguments as reasons for the particular results of a balancing.

[9] See also Sieckmann (2012), p. 89. Similarly Alexy (1985a), p. 83; Alexy (2002a), p. 54. However, his "law of competing principles" *(Kollisionsgesetz)* does not include a reference to the respective result of the balancing.

A priority statement is always a positive statement. The negation of a priority means this priority does not exist. This may be the case because the opposite priority exists, or because no priority is determined between the arguments in conflict. In this sense, a priority of R against ¬R implies the negation of a priority of ¬R against R.

$$\mathrm{PRIOR}\left(\mathrm{R}/\neg\mathrm{R}\right)\mathrm{C},\mathrm{P}_1,\mathrm{P}_2 \Rightarrow \neg\mathrm{PRIOR}\left(\neg\mathrm{R}/\mathrm{R}\right)\mathrm{C},\mathrm{P}_1,\mathrm{P}_2.$$

The reverse does not hold. It is possible that no priority judgement regarding R and ¬R is made.

$$\mathrm{PRIOR}\left(\mathrm{R}/\neg\mathrm{R}\right)\mathrm{C},\mathrm{P}_1,\mathrm{P}_2 \;\&\; \neg\mathrm{PRIOR}\left(\neg\mathrm{R}/\mathrm{R}\right)\mathrm{C},\mathrm{P}_1,\mathrm{P}_2.$$

In this case, the priority relation between the respective alternatives remains undetermined. One might then say that the alternatives are "on a par".[10]

The priority among the competing arguments determines which rule commands the case in question. This rule may support the consequence R under a certain condition C:

$$\mathrm{R}/\mathrm{C}$$

Or it may support the opposite consequence Non-R under some condition C′:

$$\neg\mathrm{R}/\mathrm{C}'.$$

The important point is that the validity of this rule is established only as the result of the procedure of balancing and is not derived from pre-determined criteria. Since it is based on the reasoning of an autonomous agent (X), the type of validity of the result of the balancing is, if, for example, R is chosen:

$$\mathrm{VAL}_{\mathrm{DEF,X}}\left(\mathrm{R}/\mathrm{C}\right).$$

Hence, the result of the balancing is a normative judgement of the agent doing the balancing. Since it is, in the first place, merely an individual, subjective judgement,[11] but nevertheless claims to state a norm valid also for other agents, the question arises whether, and in which sense, such a judgement can be claimed to be rationally justified.

[10] See Chang (1997), p. 4.

[11] See also Sieckmann (2012), p. 89.

4.1.3 Criteria of Balancing

The crucial point of balancing is how to justify the determination of a certain priority. This is the issue of the criteria of balancing. The basic principle of balancing states that, regarding two requirements in conflict, the one deserves priority in the case in question whose fulfilment is more important in the circumstances of this case, or, as one might also say, the one that has the greater weight in the concrete case.[12] The importance of a principle in the concrete case depends again on two factors: the degree of fulfilment of a certain requirement by some solution, and its abstract weight. That is, the greater the degree to which a certain solution fosters or hinders the realisation of a certain requirement, the greater is *ceteris paribus* the concrete weight of this requirement. And the greater its abstract weight, the greater is *ceteris paribus* its concrete weight.

This structure of the criteria of weighing and balancing is similar to that of calculating and comparing the weights of items by the specific weight of the respective substance and the amount of it, or the price of goods by their respective price per unit and the number of units. That is, it is a fairly common method. However, calculating and comparing weights presupposes a scale according to which the weights are determined. Such a scale does not exist for normative balancing, and indeed, it would be incompatible with the conception of autonomous balancing. Autonomous judgements determine priorities between competing arguments, but are not derived from given criteria. Criteria of balancing only serve for a reconstruction of autonomous judgements, in order to corroborate their rationality.[13] Regarding autonomous balancing, the concrete weight assigned to competing arguments expresses a priority relation, not its foundation.

A fundamental problem of rational balancing in a normative context is, hence, to explain what the concrete weight of arguments means that could determine the priority between competing arguments. This explication must refer to the requirement to choose an optimal solution, which guides rational balancing.

4.2 The "Optimisation Model"

The optimisation model explicates the idea that in the case of a conflict of arguments one ought to choose one of the best among the available options.[14] It considers two aspects of conflicting normative arguments: the relative strength or importance of the argument (its abstract weight) compared to a competing argument,

[12] See Sieckmann (2010b), pp. 103–119. One may also speak of the "value of fulfilment" that is assigned to a particular solution of the balancing problem, see Sieckmann (1995a), p. 50.

[13] See below, Sect. 4.3. Hence, in first place, arguments are assessed as weightier or less weighty. The assignment of weight is possible only as a reconstruction of comparative assessements of weight. See also Lord and Maguire (2016), p. 8.

[14] See also Sieckmann (2012), pp. 90–92; Sieckmann (2018b), p. 15; Sieckmann (2019), p. 135; Sieckmann (2018a), pp. 141ff.

and the degree to which it is affected by diverse possible solutions to a balancing problem. However, the notion as well as the criteria of optimisation are a matter of dispute. In addition, even if a particular result is determined by means of balancing, a problem remains as to whether this result can claim to be objectively valid, so that every reasonable agent must accept it. It is important to distinguish the questions of, on the one hand, whether balancing as optimisation presents a coherent account of normative justification, which an individual agent can apply, and, on the other hand, whether it yields objectively valid results.

Here, I will only discuss the notion of optimisation and the problem of coherence. The first issue, hence, is to understand the notion of optimisation in a normative context. Balancing includes an autonomous judgement, which cannot be derived from given criteria and hence is not completely determined in its result, but includes a subjective, personal judgement. However, these judgements must comply with requirements of correct balancing, which can be presented as requirements of coherence.[15]

The question, hence, is whether balancing as optimisation presents a coherent account of normative justification. In the first place, one must understand what optimisation means. The "model of optimisation"[16] offers an explication of what counts as an optimal solution of a balancing problem. The problem is how to justify a priority among competing normative arguments, like principles, rights, interest-based claims, or other types of normative requirements.

The first issue is that there are limits to what is, in fact, possible. In case of a conflict of normative demands, the conflicting demands cannot all be fulfilled completely. On the other hand, possible solutions are evaluated as better, worse, or equally good. Optimal solutions, then, are those that are evaluated as best among those that are, in fact, possible.

More precisely, preferences between normative arguments are determined by reference to the relative importance of the conflicting arguments in the concrete case. One asks, first, which solutions are possible, that is, to what extent one of the claims must be sacrificed in order to fulfil the other; second, which ratio of fulfilment of one of the conflicting claims is required to justify the respective non-fulfilment of the other; and, third, whether the actual gains and losses that result from a certain solution are higher, lower or equal to what is required.

The central elements of this model of optimisation are the criterion of Pareto-optimality, applied to conflicts of normative arguments, and the relative weight of the conflicting principles, as illustrated by the instrument of indifference curves.

The criterion of Pareto-optimality determines which solutions are best in factual respect.[17] In its original version, it classifies optimal solutions as those to which

[15] See also Sieckmann (2012), pp. 89, 93ff.

[16] Hurley (1989), p. 70; Barry (1990), p. xxxviii; Steiner (1994), p. 164; Sieckmann (1995a), p. 50 n 19; Sieckmann (2004), p. 73; Sieckmann (2009), p. 71; Jansen (1997), pp. 27ff.; Jansen (1998), pp. 112f.; Rivers (2007), pp. 189–206, 176; Šušnjar (2010).

[17] On Pareto-optimality in the context of legal balancing Schlink (1976), pp. 171ff.; Alexy (1985b), p. 27.

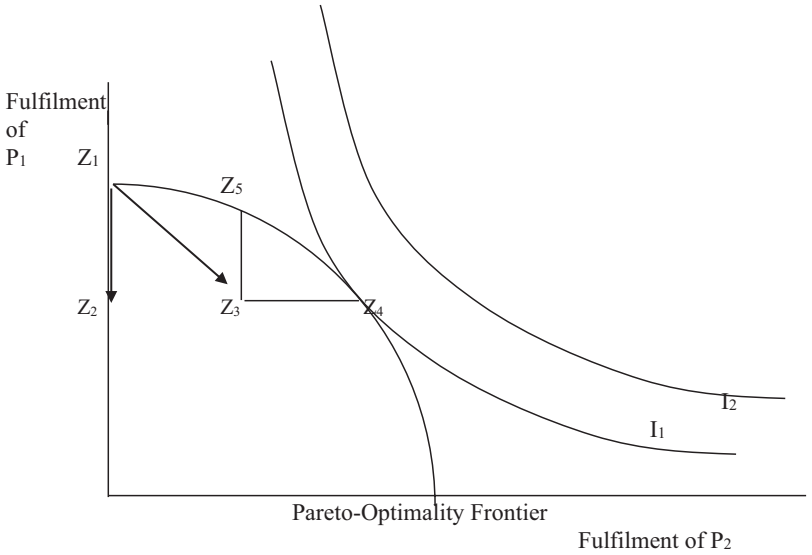

Fig. 4.1 Structure of a balancing problem

there is no alternative by which one of the parties could be better off without ensuing any disadvantage for someone else. In order to apply this criterion to problems of balancing, one must focus not on a comparison of the positions of individual parties but on the degrees of fulfilment of the conflicting requirements.

Indifference curves show the cases in which the respective gains and losses regarding the fulfilment of the conflicting requirements are considered as equally good. Figure 4.1 illustrates the structure of a balancing problem.[18]

Using the elements of this scheme, it is possible to define what counts as an optimal solution to a problem of balancing.[19]

When a conflict of two principles, P_1 and P_2, occurs, the possible degree of fulfilment of one principle is greater the less the other principle is fulfilled. For example, the greater the degree of liberty of speech granted, the less the degree of personal honour protected. The solutions that are, in fact, possible can be represented by a curve that connects the points combining a certain fulfilment of P_1 with the highest possible fulfilment of P_2 that is compatible with the respective fulfilment of P_1 (the Pareto-optimality frontier).

In addition, combinations of a certain fulfilment of P_1 and of P_2 can be evaluated. Obviously, the complete fulfilment of P_1 and P_2 would be best, and complete non-fulfilment of both P_1 and P_2 worst. Combinations between these extremes can be

[18] See also Hurley (1989), p. 70; Steiner (1994), p. 164; Jansen (1998), pp. 112f.; Sieckmann (2004), pp. 73ff.; Sieckmann (2009), pp. 69ff.; Sieckmann (2012), p. 90; Sieckmann (2016), p. 353; Sieckmann (2018b), p. 14; Sieckmann (2019), p. 135; Sieckmann (2021), p. 126.

[19] See also Sieckmann (2012), pp. 90–91; Sieckmann (2018b), p. 15.

ordered in classes of combinations to which the person judging is indifferent, that is, which are evaluated as equally good. This evaluation results from weighing-up a certain loss in fulfilment of P_1, resulting from a particular solution, and a certain gain in fulfilment of P_2, resulting from this solution. For example, a solution of permitting offensive speech in the context of public debate will cause a certain loss of protection of personal honour and a certain gain in free speech, compared to prohibiting this type of speech. The points representing combinations that are evaluated as equally good can be connected by indifference curves. The higher an indifference curve in this bundle is placed, the better the combinations represented by this curve. The relative weight attributed to a principle can be read off the gradient of the relevant indifference curve, more precisely, the absolute value of the gradient. A steep gradient shows a low relative weight of P_1 in relation to P_2; that is, a great loss in the fulfilment of P_1 is compensated already by a relatively small gain in the fulfilment of P_2. A flat gradient shows a high relative weight of P_1 against P_2; that is, a certain loss with regard to P_1 requires a relatively great gain in fulfilment of P_2. P_1 and P_2 are of equal relative weight if a certain loss in the fulfilment of one of them is compensated by an equal degree in the fulfilment of the other.

There will be a bundle of indifference curves that do not touch or intersect but lie on top of each other. Some of these indifference curves will, at some point or at some set of points, intersect with or touch the curve of factually possible combinations. The indifference curve that does not intersect but only touches the curve of possible combinations is the best available indifference curve. The points situated on both curves are the optimal solutions to the balancing problem. The preference among the conflicting principles follows from this criterion.

According to the model of optimisation, the balancing depends on the relative weight of the competing principles in the concrete case, that is, its concrete relative weight or importance. The importance of a principle in a concrete case depends, again, on the degree of fulfilment of this principle that is at stake in the particular balancing, and the relative weight attributed to it. On this basis, one can characterize optimal solutions of balancing as follows:

$DF1_{OPT}$: A solution to a balancing problem is optimal if, with respect to the conflicting principles P_1 and P_2, the relation between the degree of fulfilment of P_1 to the loss of fulfilment of P_2 equals their relative weight.

The relative weight of the conflicting principles is defined as the relation between a certain degree of fulfilment of P_1 and the degree of fulfilment of P_2 that is required to justify the corresponding loss of the former. Accordingly, a solution is optimal if, in the concrete case, the respective fulfilment of the principles in conflict is of equal importance. Hence, optimal solutions are those in which the conflicting principles are in equilibrium.

By applying the notion of concrete relative weight, the condition of optimality of balancing solutions can be defined as the equilibrium of the concrete relative weights of the principles in conflict.

$DF2_{OPT}$: A solution to a balancing problem is optimal if the principles in conflict have equal concrete relative weight with regard to this solution.

A third way of defining a criterion for optimality is based on the notion of the value of fulfilment that is attributed to a particular solution to the balancing problem. The value of fulfilment of a single principle with regard to a particular balancing solution equals its concrete relative weight. The value of fulfilment of a balancing solution results from aggregating the values of fulfilment of the principles involved. An optimal solution fulfils the following condition:
$DF3_{OPT}$: A solution to a balancing problem is optimal if its value of fulfilment is at least as great as that of any other solution, that is, if it is maximal.

One should note that the point of this analysis is to *define* criteria of optimality. Quite another issue is how to apply such criteria, and how to justify judgements regarding relative weights and values of fulfilment.

4.3 Reconstruction vs. Justification

The balancing outlined above makes the concrete weight of principles depend on two factors: the degree of fulfilment or non-fulfilment of the competing principles and, the relative weight or importance of these principles in the abstract, disregarding the degree of fulfilment in the concrete case.[20] One might suppose that these factors determine the concrete weight, thus justifying a particular balancing judgement. This presupposes that one can determine degrees of fulfilment and abstract weights independently from concrete weight, a view that encounters some problems.

Regarding autonomous balancing, it is misleading to speak of degree of interference and abstract relative weight as factors of balancing. Autonomous judgement directly determines the priority between conflicting arguments. The resulting normative judgement can give priority to one of them or state that neither of them receives priority in the particular case, regarding the circumstances of the particular case and the relative importance assigned to the competing requirements.[21] The priority relation can be expressed in terms of the concrete relative weight of the arguments. The argument that receives priority is assigned greater concrete weight. If none of the conflicting argument receives priority, their concrete weight in this balancing is regarded as equal.

On the other hand, when we ask for rational standards to control autonomous judgement, we look for degrees of interference and abstract relative weight of

[20] See also Sieckmann (2012), pp. 95–96, where, however, the relative weight is defined without regard to the actually realised degree of fulfilment and the abstract weight is defined as the non-relational relative weight (97).

[21] Therefore, the discussion on incommensurability and incomparability (see in particular Chang 1997, pp. 1ff.; Afonso da Silva 2011, pp. 273ff.) does not affect autonomous reasoning. Autonomous reasoning does not use a single scale to measure alternatives, Hence, commensurability in the sense that such a scale exists is not an issue. Also it does not presuppose comparability in the sense that a positive value relation holds between the alternatives in conflict (see Chang 1997, p. 4), for the reasoning itself establishes the value relation.

principles that determine the concrete weight of normative arguments and can explain the balancing judgement as based on reasons. Hence, we need assessments of degrees of interference and of relative weight not for balancing, but for making balancing more rational.[22]

Therefore, we must not try to understand balancing as a form of justification based on some formula and factors of balancing. Instead, balancing consists in autonomous judgements, expressing the concrete weight assigned to the competing arguments. Assessments of balancing factors, hence, do not claim to be objectively correct, but merely to be a coherent reconstruction of autonomous balancing judgements. The more balancing judgements are included in the analysis, the more complex the task of making coherent assessments of the factors of balancing will be, and the more rationality will be gained for the balancing.

The best way to achieve coherence is to present the balancing in mathematical form. Since the representation must not be objectively valid, any form will do that is compatible with the model of optimisation set out above. It is not even necessary to use mathematical functions that directly represent the elements of this model, displayed by the Pareto-optimality frontier and the indifference curves. All that is required is that the mathematical function is compatible with the model of optimisation.

One should, therefore, start with the simplest mathematical function to represent the balancing. This seems to be the definition of the concrete weight (WC) of a principle (P_i) as the product of degree of fulfilment (DF) and the abstract weight (WA) of the respective principle. The definition of the concrete weight of a principle hence is:

$$WC(P_i) = DF(P_i) \times WA(P_i)$$

A mathematical function does not refer to the notions of the degree of fulfilment and relative weight, but to numerical values assigned to them. The values of concrete weight, abstract weight, and degree of fulfilment can be represented by symbols as follows:

df for the degree of fulfilment of a principle $DF(P_i)$;
wa for the abstract relative weight of a principle $WA(P_i)$;
wc for the concrete weight of a principle $WC(P_i)$.

The relation between these values can be represented mathematically as

$$wc = df \cdot wa$$

However, for the sake of simplicity, I ignore this aspect.

The concrete weight of a principle corresponds to the value of fulfilment (VF) of a certain solution regarding this principle:

[22] See also Sieckmann (1995a), p. 49.

$$\mathrm{WC}\left(\mathrm{P_i}\right) = \mathrm{VF}\left(\mathrm{P_i}\right)$$

A solution (S) is optimal (OPT) if the sum of the values of fulfilment of the competing principles is greatest (MAX). In the case of two principles:

$$\mathrm{OPT}\left(\mathrm{S}\right) = MAX\left(\left[\mathrm{VF}\left(\mathrm{P_i}\right) + \mathrm{VF}\left(\mathrm{P_j}\right)\right], \mathrm{S}\right)$$

The priority (PRIOR) of a principle P_i depends on that its value of fulfilment (or concrete weight) is greater than that of the competing principle Pj:

$$\mathrm{PRIOR}\left(\mathrm{P_i}, \mathrm{P_j}\right) <=> \mathrm{WC}\left(\mathrm{P_i}\right) > \mathrm{WC}\left(\mathrm{P_j}\right)$$

4.4 Criteria of Optimisation

The issue remains of how to determine the factors that enter into the reconstruction of a balancing judgement.[23]

4.4.1 Degree of Fulfilment

A principle protects a certain good, which can be affected to more or less degree. In some cases, the loss is countable; for example, one might lose one or more fingers. In other cases, at least an ordering is possible regarding the degree of interference, and certain values can be assigned to the respective interference. For example, the publication of photos of people may be more or less restricted. It might be prohibited without consent, or permitted in case that there is a legitimate interest, which again may be defined more or less restrictively. In any case, it seems that, by contrast to the relative weight of competing principles, the criterion of the degree of interference refers to something real, not to something that is determined by the balancing itself.

One should note that the degree of interference corresponds to the severity or intensity of the interference, but is not identical with it. For example, losing a thumb is worse than losing some other finger, losing the index finger is worse than losing some other finger except the thumb, and losing a little finger is less bad than losing some other finger. So we can distinguish how important a particular finger is. The importance of a finger determines the relative weight that the right to physical integrity has regarding this finger, that is, its concrete relative weight. The importance of

[23] As to the criteria of optimisation see also Sieckmann (2012), pp. 93ff.; Sieckmann (2018b), pp. 15ff.

a good and the concrete relative weight of the principle protecting this good then correspond to the intensity of interference by losing this good.

Now, it seems that, at least for an autonomous balancing, we do not need to fix a degree of interference. An autonomous agent can directly determine the intensity of interference and relative weight of a principle in the concrete case by asking what is required to compensate for this loss. Autonomous judgement directly determines the concrete relative weight of principles, regarding the circumstances of the particular case. However, when we ask for rational standards to control autonomous judgement, we look for degrees of interference and abstract relative weight of principles that might explain the balancing as a rational judgement. Connecting intensities of interference with degrees of interference creates a form of supervenience:[24] different normative judgements correspond to differences in the real world. A correspondence between intensities and degrees of interference creates a form of coherence. This may be used for a rational control of balancing judgements.

Degrees of interference must correspond to the balancing judgements, and must be internally coherent. As long as one considers isolated balancing judgements, this requirement can easily be fulfilled. However, the more balancing judgements are taken into account, the more demanding the task will be to develop a coherent scale of degrees of interference.

4.4.2 Abstract Relative Weight

Autonomous balancing assigns concrete relative weight to competing principles, regarding the circumstances of a particular case.[25] The concrete relative weight depends on what is lost regarding a protected good, and the importance of the principle protecting this good. In order to rationally reconstruct autonomous balancing judgements, we have to make explicit the underlying assumptions regarding the degree of interference as well as of the abstract relative weight assigned to the competing principles.

One should note that the notion of abstract weight is ambiguous. First, it is abstract because it does not reflect the degree of fulfilment or interference. In contrast to the concrete weight, it is assigned to the argument as such, without regard to the degree of fulfilment or interference following from particular results of the balancing. This is not to say that the abstract weight is independent of any factual circumstances. In general, it reflects the interests backing the respective argument, and their respective importance or urgency. But this relation is distinct from the degree of fulfilment achieved by some balancing solution.

[24] Supervenience in a broad sense according to Rotolo (2017), pp. 3f.

[25] Concrete or particular case must not be understood as a single or individual case. Any description of a case must include general features and hence define a certain type of individual cases. Consequently, balancing is aimed at establishing general rules of priority.

Another kind of abstractness results if the weight of an argument is not determined in the balancing itself, but assessed according to previous judgements. In this sense, the assessment is separate from a concrete procedure of balancing, and weight is assessed not merely as a reconstruction of a balancing, but as a criterion that can be used to justify balancing judgements in subsequent procedures.

Furthermore, one can abstract from the relation to a competing argument and assign abstract weight to arguments in isolation (that is, assign a non-relational relative weight to individual arguments).[26] The relative weight of competing requirements expresses a normative substitution rate. It determines which degree of realisation of one requirement is necessary in order to justify a certain degree of detraction from the other requirement. This, however, only explicates the weighting one makes in particular instances of balancing. But we can abstract from the particular, concrete instance of balancing. This is possible by ordering the weightings in a set of concrete cases. Then, we might find that, given the same degree of fulfilment or interference, some requirements are never superseded by others. A second group might never be superseded except by those of the first group. A third group will not be superseded except by those of the first and the second group, and so on. Finally, some requirements will never win against others in case that their respective degrees of fulfilment or interference are the same. Of course, we may not be able to classify certain requirements according to this ordering, and there may be situations in which we cannot determine the abstract weight of a certain requirement. But in principle it is possible to arrange the requirements this way and, hence, to determine their abstract weight.

This way, it is possible to assign weight to a single principle, not in relation to a competing principle.[27] The relative weight represented by indifference curves is the relative weight of P_1 to P_2 in the particular case, $WR(P_i,P_j)$, expressing a relation between these principles. The abstract relative weight of a single principle is represented by a predicate (or one-place-relation) $WR(P_i)$. One can call the former a relational weight, and the latter a non-relational weight. Nevertheless, the latter is also a relative weight, for it reflects the strength of a principle in collision with other principles. The colliding principles are not specified, however. Accordingly, the abstract relative weight reflects the strength of principle against all other principles with which it might conflict.

Just as the degree of interference, the abstract relative weight is not an operative criterion in autonomous balancing. Rather, it results from a reconstruction of autonomous balancing judgements.

According to the model sketched above, the abstract relative weight is defined as a relation: a principle might have equal, higher, or lower weight than a competing principle. The relative weight is assigned to the principles in conflict, not to a single principle. Thus, one cannot say, for example, that the principle of protecting human

[26] Sieckmann (2012), pp. 97f.; Sieckmann (2018a), p. 158.

[27] Sieckmann (1995a), p. 59.

life has great weight. If human life stands on both sides, the principle of protecting human life on both sides would have equal abstract weight.

As to the relative weight represented by indifference curves, the relative weight of one principle to the other is the reciprocal of that of the principles in reverse order. That is, if

$w_{1/2}$ = the relative weight of the conflicting principle P_1 in relation to P_2 ($WR(P_1,P_2)$),
$w_{2/1}$ = the relative weight of the conflicting principle P_2 in relation to P_1 ($WR(P_2,P_1)$),

the following equation holds:

$$w_{1/2} = \frac{1}{w_{2/1}}.$$

By contrast, the non-relational relative weight is assigned to each principle separately, represented by $WR(P_1)$ and $WR(P_2)$.[28] If one attributes these weights in accordance with the model of optimisation sketched above, their ratio must equal the relational relative weight of the respective pair of principles. That is, if

w_1 = the non-relational relative weight of the conflicting principle P_1 ($WR(P_1)$),
w_2 = the non-relational relative weight of the conflicting principle P_2 ($WR(P_2)$),

the following equation holds:

$$\frac{w_1}{w_2} = w_{1/2}.$$

The task of a rational reconstruction of balancing judgements, hence, is to determine the factors for abstract weight (relational or non-relational), degrees of fulfilment, and concrete relative weight so that a coherent set of priority rules results.

4.4.3 Rules of Balancing

Based on the definitions above, one can state certain rules of balancing, which all present the idea of optimisation but use different terminology:

(R1) The balancing of normative arguments must consider the relative weight of the competing arguments and the degree to which their demands are fulfilled or not fulfilled by a particular balancing judgement.

(R2) One should give priority to the principle that has the greater concrete weight in the circumstances of the particular case.

(R3) One should give priority to the solution that achieves the greater value of fulfilment in the circumstances of the particular case.

[28] See also Sieckmann (2010b), p. 111.

(R4) One should choose a solution to a balancing problem that achieves the greatest value of fulfilment.

These rules interpret the requirement of optimisation stated above. One should remind, however, that the issue is only to define what an optimal solution is, not to determine a solution as the objectively correct one. The model of optimisation shows which assumptions one must introduce in order to carry out a balancing of conflicting arguments.

4.5 Conclusion

The model of optimisation proposed here is crucial for a suitable approach to balancing as a distinct mode of practical reasoning. Balancing aims at optimisation, and without a clear understanding of what optimisation means, an adequate theory of balancing will not be possible.

Numerous issues require further research. We must keep in mind that balancing, in the first place, consists in a subjective, autonomous judgement. Therefore, at the stage of autonomous balancing, we do not look for objectively valid solutions. However, autonomous judgements must comply with the demands of rationality. Although the judgement determines a priority relation and is not derived from given criteria, a reconstruction as a judgement based on reasons is required. This reconstruction is presented by a coherent assessment of degrees of interference and relative weights that can justify the respective autonomous judgements. We can assume that this is not impossible, although no comprehensive account of autonomous balancing has yet been developed. So, the development of the theory of balancing is still in its beginning stages.

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Chapter 5
Alternative Approaches to Balancing

Balancing as optimisation seems to be the most rational approach regarding conflicting normative arguments. However, it is not generally accepted, and various other accounts of balancing have been suggested.[1] Alternative accounts of balancing are, in particular, Alexy's "weight formula", the idea of satisficing, a theory of prioritisation by ranking instead of optimisation, and a method of specification instead of proportionalism. In addition, the approach of constructive interpretation may be regarded as an alternative account of balancing.

In systematic respect, both Alexy's approach and the satisficing model interpret balancing as a process of weighing. However, Alexy offers a different interpretation of optimisation, whilst satisficing approaches reject optimisation as the aim of balancing. On the other hand, prioritisation, specification, and constructive interpretation offer alternatives to the method of weighing. Rather than establishing priorities through balancing, these approaches presuppose the application of a pre-existing

[1] For a discussion of alternative accounts of or to balancing see also Petersen (2013), pp. 1387ff. The discussion here is confined to accounts of balancing. These are "conflictivist" in the sense that they assume the existence of conflicts between the arguments to be balanced, for example, rights or principles. "Non-conflictivist" accounts will be left aside here. But of course such views exist. For example, Pérez Bermejo (2012), p. 298, characterises weight-theories as assuming that *prima facie* obligations coming from conflicting principles actually are demanding and remain valid even after the conflict has been resolved and a principle has been overridden. Pérez Bermejo assumes that at least regarding law, rights must be accepted as legally compulsory and binding and cannot be finally unprotected or unsatisfied. He claims to replace a "metaphysical interpretation" of a *prima facie* clause by an "epistemic interpretation", following coherence theories (referring to Brink 1994, p. 219; reprinted in 1996, p. 104); one should note, however, that Brink supports the "metaphysical interpretation"). He also claims that the conflictivist view "does not satisfy the legal domain". In contrast to this view, however, the reality of many constitutional systems seems to correspond to the conflictivist account. Finally the issue is whether one can present epistemic criteria for the resolution of normative conflicts. Insofar as this is not possible, one has to acknowledge the existence of genuine conflicts in constitutional law.

J.-R. Sieckmann, *Autonomy and Law*, Law and Philosophy Library 150,
https://doi.org/10.1007/978-3-031-96578-4_5

priority relation, either as a concrete order,[2] or as abstract criteria to be specified, or holistically, as a coherent order to be found in the whole of the legal system.

5.1 Alexy's "Weight Formula"

Alexy's account of balancing differs from the conception of balancing as optimisation mainly in two respects: the understanding of optimisation, and the construction of balancing as a distinctive type of norm application. Although stressing that principles are optimisation requirements,[3] Alexy does not use the criterion of optimality that grounds the "model of optimisation", and does not offer an explicit definition of what optimisation means. Instead, Alexy suggests his "weight formula",[4] but although this approach can be reconstructed to some extent in the optimisation model,[5] some differences remain. An even more fundamental difference concerns the "weight formula" itself. Besides a number of conceptual problems, the "weight formula" undermines the distinction of balancing from subsumption and deduction. Indeed, it makes balancing a specific form of subsumption and deduction. In the end, it does not present a plausible account of balancing as a basic form of normative argumentation.[6]

5.1.1 Alexy's Account of Balancing

Alexy's conception of balancing includes three elements,[7]

1. The "law of competing principles":

The circumstances under which one principle takes precedence over another constitute the conditions of a rule which has the same consequences as the principle taking precedence.[8]

2. The "law of balancing":

The greater the degree of non-satisfaction of … one principle, the greater must be the importance of satisfying the other principle.[9]

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[2] One might object against this systematisation that also Alexy's "weight formula" might be interpreted as presupposing concrete priority relations. However, Alexy uses weight to determine priorities, whilst other approaches suggest to avoid the notion of weight.

[3] Alexy (2000), pp. 294–304.

[4] Alexy (2002a), pp. 408f.; Alexy (2003a), pp. 444ff.; Alexy (2003b), p. 783.

[5] See Sieckmann (2010b), pp. 103–119.

[6] On the "weight formula" see also Brożek (2007b), pp. 319–330.

[7] Alexy (2002a), p. 408.

[8] Alexy (2002a), p. 54.

[9] Alexy (2002a), p. 102.

3. The weight formula:[10]

$$W_{i,j} = \frac{I_i \bullet W_i \bullet R_i}{I_j \bullet W_j \bullet R_j}$$

In this formula, $W_{i,j}$ represents the concrete weight of the principle P_i relative to the colliding principle P_j. The "weight formula" defines this relative concrete weight as the quotient of the products of three factors related to the principles standing on each side of the balancing:

I_i stands for the intensity of interference with P_i. I_j represents the importance of satisfying the colliding principle P_j, which, according to Alexy, can also be understood as the intensity of interference with P_j through non-interference with P_i.

W_i and W_j stand for the abstract weights of the colliding principles P_i and P_j.

R_i and R_j refer to the reliability of the empirical and normative[11] assumptions concerning, on the one hand, the question of how intensive the interference with P_i is, and how intensive the interference with P_j would be if the interference with P_i were omitted and, on the other hand, the classification of the abstract weights, that is, W_i and W_j.

In order to represent the factors of the "weight formula" by numbers, Alexy proposes a discrete, that is, a non-continuous triadic scale, in which geometric sequences are implemented.[12] This scale assigns the values "light", "moderate", and "serious" to the intensity of interference and to the abstract weights.[13] The values for the intensity of interference and for abstract weight are expressed by the numbers 2^0, 2^1, and 2^2, that is, by 1, 2, and 4. With regard to the epistemic factors R_i and R_j, the values are "reliable" or "certain" (r), "plausible" (p), and "not evidently false" (e), to which the numbers 2^0, 2^{-1}, and 2^{-2}, that is, 1, $\frac{1}{2}$, and $\frac{1}{4}$, are assigned.

Alexy's account of balancing is comprised of the "weight formula", for this formula defines the relation between the factors of balancing more precisely than the law of balancing, and also provides a criterion for the priority between competing principles, which is the issue of the "law of competing principles". My discussion, therefore, will focus on the "weight formula".

[10] Alexy (2014), p. 513. See also Alexy (2003a), pp. 444, 446; Alexy (2003b), p. 789; Alexy (2002a), p. 408.

[11] In earlier publications, R referred only to empirical assumptions, but this was extended to normative assumptions, Alexy (2014), p. 514.

[12] Alexy (2002a), pp. 409–410, 419.

[13] In terminological respect it seems, however, that this scale is not adequate for the abstract weight, which could better be expressed by the levels "low", "medium", and "high". See also Alexy (2003b), p. 783.

5.1.2 Critique

The "weight formula" faces three main problems:[14] first, whether it is compatible with the view that balancing presents a basic form of norm application, which is opposed and distinct to that of subsumption; second, whether it adequately represents the structure of balancing, and third, whether the geometric scale is adequate for presenting the factors of balancing.

5.1.2.1 The Specific Character of Balancing

Alexy presents the "weight formula" as an inferential scheme, analogous to that of deduction.[15] He seems to believe that because it uses an arithmetic function, it is opposed to deduction. This, however, is a mistake.[16] The mathematical relations defined by the weight formula can be represented in a deductive scheme, although this would be rather complex. In addition, Alexy himself claims that the "weight formula" reconstructs legal balancing, but that this balancing will be represented in ordinary language, and numbers merely illustrate the triadic model.[17] Then, however, the legal arguments that correspond to the "weight formula" will be deductive. Accordingly, the "weight formula" presents a conception of balancing that cannot be opposed to subsumption and deduction. Rather, it presents a complex case of subsumption and not a distinct form of norm application.[18]

As a consequence of the character of the "weight formula" as an inferential scheme, balancing cannot be regarded as a basic form of norm application on its own if the "weight formula" should indeed adequately represent the structure of balancing.[19] Accordingly, there would be no need for an ideal "ought" that goes beyond the real "ought" of definitive norms, and the theory of principles loses its ground.

5.1.2.2 Inappropriate Elements

Compared with the optimisation model of balancing, which regards the degrees of interference and the abstract weights of the colliding principles as the relevant factors of balancing,[20] the "weight formula" is unclear regarding the factor of the

[14] For further objections see Sieckmann (2010b), pp. 113f.; Sieckmann (2018a), pp. 173–175.

[15] Alexy (2003a), p. 448; Alexy (2009), p. 16.

[16] For a critique see also Brożek (2007a), p. 110.

[17] Alexy (2002a), p. 409; Alexy (2003b), p. 783; Alexy (2021), p. 228.

[18] See also Sieckmann (2013a), p. 191.

[19] See also, from a different perspective, Zucca (2008), pp. 12, 23, who claims that Alexy assumes an harmonious order of values.

[20] See Sieckmann (1995a), p. 51.

intensity of interference, and introduces two new elements: the quotient of the concrete importance of the individual principles in conflict, and the factor *R* of the reliability of the underlying premises of the balancing.

Whilst in the "model of optimisation", degree of interference and abstract weight are clearly distinct, Alexy links the factor of the "intensity of interference" also to the importance of principles, as it is said to represent the importance of satisfying the colliding principles. Hence, intensity of interference includes an assessment of weight. This follows the terminology of the "law of balancing", pretending a continuity between this law and the "weight formula". However, in the "weight formula" the abstract weight is introduced as an independent factor, and this is not compatible with an account where the intensity of interference also reflects the importance of the fulfilment of a principle.

Regarding the quotient that forms the core of the "weight formula", this mathematical device is redundant for first-order balancing. All that matters is which of the conflicting principles is of greater importance in the concrete case. A mere comparison is sufficient to determine the priority.[21] The mathematical relation between these concrete relative weights of the principles may be relevant if a dispute among diverse balancing judgements occurs. Regarding a single balancing judgement, the quotient is of no use.

As to the reliability factor *R*, the inclusion of this factor has no foundation in the model of optimisation and, in addition, mixes up first order-balancing with a second order-balancing of which balancing judgement one should follow. In this second order-balancing, the reliability or certainty of a particular balancing judgement matters. In a first-order balancing, consideration of these epistemic issues does not correspond to demands of rationality and may even lead to wrong results.[22]

In general, rational agents must act on premises that they believe to be correct. If, for example, as to one's best judgement, one concludes that there is a high risk of damage to a certain good, one must use this premise in order to strike a balance. Even if this judgement should be based on assumptions of low reliability, it is what the agent actually believes. It would be inconsistent and hence irrational not to act on the premise that the agent actually believes, in the example, that there is a high risk of damages.

In contrast, the "weight formula", by including a factor for the certainty or reliability of premises, confuses ontological and epistemological issues. In this respect, it is important to note that Alexy does not regard uncertainty as the probability of interference with or fulfilment of a principle, which may well be relevant for determining the degree of interference or fulfilment.[23] In contrast, uncertainty or certainty of the premises of the balancing judgement are understood as epistemic qualifications of those premises. This leads to the absurd result that a confirmation

[21] See Sieckmann (2010b), p. 113; Sieckmann (2013b), p. 284.

[22] See Sieckmann (2010b), p. 114; Sieckmann (2013b), p. 285.

[23] Alexy (2007), pp. 345f.

that an argument is weak, for example, due to a low degree of interference, makes the argument stronger. But what, in fact, is confirmed is that the argument is weak.

The confirmation of a previously uncertain premise of the balancing might even change the result of the balancing, instead of confirming it.

For example, someone might come to conclude that a principle P_1 deserves priority against P_2 based on the assumptions that both principles are of high importance, the interference with P_1 is mediate, that of P_2 is low, and in both cases, the certainty of the premises is mediate. Now, let us assume that the premise that P_2 is affected only to a low degree is corroborated by new evidence. According to the "weight formula", this would increase the relative weight of P_2 in the balancing, so that a stalemate results. However, the corroboration of the underlying premises should lead to confirm the result of the balancing, not to change it.

Moreover, if epistemic factors are regarded as relevant to the balancing, one might well ask what is the reliability of these epistemic assessments. They might be qualified as certain, plausible, or implausible. Then, however, an infinite regress is imminent, for the epistemic reliability of these higher-order assessments might again be assessed. Since certainty is rarely achieved, the assessment as "plausible" might itself be regarded as "plausible", which leads to a continuing decrease in the relative weight assigned to the respective principle.

However, this objection is not as strong as it might appear at first sight. Even though the regress might lead to diminishing values of reliability, one can still determine a relation of the reliabilities of the competing assumptions. The impact of this objection rather is that one must judge the reliability not of single premises, but regarding the whole set of premises an argument uses. This supports the view that first-order balancing is limited to the factors of abstract weight and degrees of fulfilment, which determine the concrete weight of an argument. The epistemic issue, then, is how reliable the determination of the concrete weight is.

Hence, a rational agent must act on his best judgement, though the underlying assumptions might be uncertain. Only if diverse balancing judgements compete, reliability becomes an issue. If, for example, one agent claims that there is a high risk, but acknowledges that this assumption is based on premises or methods of low reliability, and another agent claims that there is no high risk, based on premises or methods of high reliability, one might conclude that one should follow the judgement of the second agent in his balancing.[24]

5.1.2.3 The Geometric Scale

As to the geometric scale (2^0, 2^1, 2^2), a disadvantage of this account is that non-interference with a principle cannot be expressed, for the geometric scale does not include the value "0". Thus, it cannot represent a complete model of normative

[24] See also Sieckmann (2014), p. 280; Sieckmann (2013b), p. 285.

reasoning, but merely a reconstruction of cases where conflicts occur. It does not include clear cases where only one decision is rationally possible.

In this respect, Alexy's approach differs from the model of optimisation. The notion of optimality connects Pareto-optimality and indifference curves and integrates all elements of the proportionality test.[25] In contrast, in Alexy's model, the criterion of suitability cannot be represented, for in the case of an unsuitable interference, the degree of interference with the respective principle by not implementing the measure would be zero. However, Alexy's geometric scale does not include the value zero. Also, the criterion of necessity cannot be represented, for it requires a comparison of degrees of fulfilment, and if this should be represented using the "weight formula", the difference in the fulfilment of the objective of the interference regarding the applied measure and the less severe measure would be zero. Again, this cannot be represented by the geometric scale.

The "weight formula" is, hence, incapable of representing the complete test of proportionality. It might only apply to the balancing in a narrow sense, but cannot represent requirements of suitability and necessity. These criteria express, however, the requirement of Pareto-optimality and hence are crucial elements of a theory of rational balancing. The model of optimisation can integrate these criteria as a requirement for correct balancing. By contrast, Alexy's theory of balancing is at least incoherent, because one must consider "weight formula" and Pareto-optimality as distinct theories.

One might object that the geometric scale is not the "weight formula", but only a particular interpretation of it. However, without the geometric scale, the simplicity of the results that the "weight formula" yields is lost, and one cannot argue anymore[26] that one cannot discern degrees of interference or relative weight on an infinitesimal scale, but one is able to apply a gross scale like "high, medium, low". The "weight formula" then becomes just an overcomplicated mathematical device for making priority judgements.

In addition, the relative weight of principles has found a plausible definition in the model of optimisation. There is no need to introduce a different notion of relative weight, which, moreover, is superfluous for a first-order balancing. In the end, it is clear that the "weight formula" cannot represent the notion of optimisation.

5.2 Optimising or Satisficing?

An alternative approach to balancing suggests that not "optimising" but "satisficing" should be the aim of balancing.[27] In particular, Giovanni Sartor argues for a "sufficientist understanding of reasonableness in legal decision-making".[28] Required

[25] See Sieckmann (2018b), p. 18.

[26] See Alexy (2003a), pp. 443f.

[27] See, for example, Simon (1983), Slote (1989) and Sartor (2009).

[28] Sartor (2009), p. 1.

is not an optimal solution, but one that is sufficiently good. He argues with the role reasonableness and rationality play in cognition. A crucial element of this analysis is that of bounded rationality. Optimisation is said to often be out of reach of a bounded decision-maker.[29] What is required is that the decision-makers appropriately use their cognitive powers.[30]

However, the idea that one should not strive for an optimal solution but be content with a satisfactory solution is not adequate for the perspective of the decision-maker, that is, the one forming a balancing judgement. The criterion cannot be to look for a sub-optimal solution if an optimal solution is available. If "sufficiently good" is understood as that one is not able to qualify an alternative as better, then the "sufficiently good" solution is optimal. If, in contrast, one can tell that one solution is better than another, and no further argument is involved, it would be irrational not to choose the better solution or, regarding all available options, not to choose an optimal solution.

On the other hand, practical problems often are rather complex. In particular, costs of decision-making might be relevant, which constitute reasons for second-order balancing, referring to the process of balancing. In such cases, there are reasons not to look for an optimal solutions of the first-order balancing. However, regarding the complex problem, considering all relevant aspects, one cannot seriously deny that one should choose an optimal solution.

The defence of the optimisation model, hence, is that not choosing an optimal solution requires some reason, and if there is such a reason against optimisation then a second-order question arises of whether one should optimise or rather follow the reason against optimisation. So, in the end, one always has to look for an optimal solution.[31]

Šušnjar regards this as "a very curious attempt" to justify the choice of the maximisation (or optimisation) ideal.[32] However, he confuses two questions. One is the defence of the optimisation model against the satisficing-approach. In this respect, the distinction between first-order and second-order problems of balancing seems rather clear and understandable. If there is a reason not to optimise at the first-level, then this reason forms part of a second-order balancing that again aims at an optimal solution. Šušnjar objects that the incorporation of the critique into the balancing changes the character of the critique, because it regards it as a principle. Thus, something is lost by considering norms as principles and, in addition, some norms do not allow for a balancing.[33] However, the claims that something is lost, and that some norms do not allow for balancing, require justification. Starting with the assumption that some norm is strictly valid, including it in a balancing means a loss, but if this assumption is not justified, the loss is irrelevant in normative respect.

[29] Sartor (2009), p. 18.

[30] Sartor (2009), p. 34.

[31] See also Sieckmann (2004), p. 73 n. 31.

[32] Šušnjar (2010), p. 203 n. 1354.

[33] Šušnjar (2010), p. 287.

Hence, the objection must show that the loss of strict validity is relevant in normative respect, or that the claim of absolute validity of a norm is sound. This justification must proceed without considering valid counterarguments, for this again would imply balancing. Such a justification is not to be seen. A mere stipulation of strict or absolute validity does not suffice.

The other issue is the justification of the optimisation demand as such. In this respect, one should note that, in contrast to economic models of maximisation, the optimisation model is applied to conflicts of normative arguments, which, by definition, have normative content and therefore, in principle, ought to be fulfilled. If complete fulfilment is not possible they ought to be fulfilled to at least an extent as great as possible.[34] They also imply an evaluation regarding their fulfilment in the sense that it is good to fulfil them, a higher degree of fulfilment is better than a lower degree of fulfilment, and degrees of fulfilment to the highest degree possible are best, regarding the respective requirement. This follows from the meaning of the terms "good", "better", and "best", hence is an analytical truth and does not need further justification.[35]

5.3 Balancing as Ranking

One might insist that the argument for optimisation only refers to balancing in an unspecific sense of determining a priority between competing demands, whilst optimisation means that such a priority is determined according to factors of relative weight and degrees of fulfilment.[36] It is indeed a crucial thesis of the model of optimisation that the result of the balancing depends on an evaluation regarding two types of factors: the degree to which an argument is satisfied or not satisfied by a proposed solution, and the importance of the argument as such, abstracting from the degree of satisfaction. In addition, it assumes that both factors are related in a way that the greater the degree of satisfaction or no-satisfaction (the abstract weight being the same), and the greater the abstract weight (the degree of satisfaction or no-satisfaction being the same), the greater is the concrete weight or importance of the argument. This thesis is substantive; it does not follow merely from the notion

[34] This seems to be undeniable in general, although in exceptional cases only complete fulfilment might be demanded and incomplete fulfilment worthless, as, for example, regarding the demand to build a bridge. Still it is an open question whether such exceptions exist in the case of normative arguments and not only for norms that are the result of an argumentation.

[35] Regarding Šušnjar's discussion of the satisficing approach (Šušnjar 2010, pp. 229ff.) one might ask whether he claims that it is better as the optimising approach for the analysis of balancing problems. If Šušnjar claimed that it is better, this would conform to the optimising approach. If, in contrast, he wished to oppose the optimising approach, he had to deny that the satisficing-approach is better than the optimising approach. Then, however, there would be no conceivable reason why one should follow the satisficing approach.

[36] On balancing in a wide sense and a narrow sense Sieckmann (2018a), p. 130.

of determining a priority between competing normative demands. Hence, other models of balancing might be feasible.

In particular, Wolfgang Spohn suggests that balancing need not be based on weighing.[37] This is certainly true regarding an unspecific use of the term balancing. On the other hand, regarding balancing as determination of a priority between competing arguments that figure as reasons for a particular balancing result, it is not clear that there is an alternative to the model of optimisation followed here. One might avoid the terminology of weighing. Indeed, the model of optimisation does not need this terminology. Its core is a comparison of a demanded substitution rate with the achievable substitution rate regarding the fulfilment of the competing demands. One can explain the notion of weighing by this model, but the model can be presented without the terminology of weighing. The question remains whether an alternative to the model of optimisation is available.

Spohn suggests a model of prioritisation based on ranking theory.[38] Prioritisation defines which solution is regarded as better.[39] It presents a form of balancing and might be regarded as optimisation in a general, unspecific sense. Its foundation is, however, not some form of weighing, but ranking functions.[40] Instead of weights, the alternatives are assigned ranks. The alternatives are defined by descriptive and normative premises and presented in the form of a belief revision theory. It shows how judgements change relative to changes in the relevant premises. It is founded in an "anchoring order", which defines the prioritisations between norms (potentially) for all cases of conflict.[41]

However, Spohn's model does not display how to construct preferences and the resulting norms. The foundation of preferences is not an issue of ranking theory but presupposed by it. Regarding empirical assumptions, Spohn refers to "plausibility" as the foundation of an anchoring order.[42] Regarding normative preferences, one might see this foundation in the concrete weights that are assigned to the competing arguments. However, from the point of view of ranking theory, determining concrete weights is a pre-theoretical issue. It does not present an alternative to autonomous balancing.[43]

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[37] Spohn (2022b), p. 400.

[38] Spohn (2022b), pp. 387ff. The opposition to weighing is not as clear in Spohn (2020), pp. 1413, 1420. Spohn also explains that various models of decision-making exist, Spohn (2022a), p. 33.

[39] Spohn (2022b), p. 388.

[40] Spohn (2022c), pp. 5ff.; Spohn (2022b), p. 394; Spohn (2020), pp. 1397ff. On this theory in general see Spohn (2012), pp. 65ff.

[41] Spohn (2022b), p. 398.

[42] Spohn (2022b), p. 392.

[43] Spohn responds to my assessment of defeasible reasoning that, although it is correct that defeasible reasoning is not relevant for the justification of preference relations, my book "Logik juristischer Argumentation" also does not say how to justify prioritisations, Spohn (2022c), p. 399. However, this response overlooks that the model of autonomous reasoning does provide an account of how prioritisations are introduced: they are established by autonomous agents. In contrast, defeasible reasoning and any other propositional account of normative justification presuppose criteria for preference judgements.

5.4 Balancing as Specification

Balancing as optimisation implies that competing normative demands are recognised as simultaneously valid in the situation of conflict, but nevertheless might suffer restrictions as a result of a balancing. Regarding the balancing of rights, these rights are not considered as strictly valid. An alternative approach claims to maintain the strict validity of rights, and the balancing only affects the scope of the rights. José Juan Moreso suggests that in a conflict of rights with moral considerations, the tension can be resolved by reducing either the scope of the right or its stringency.[44] The specificationist account consists in reducing the scope of conflicting principles, while preserving their stringency.[45]

One might ask whether specificationism is a kind of balancing. Balancing presupposes the existence conflicts, whereas the reduction of the scope of rights or principles eliminates conflicts. One might understand specificationism as a non-conflictivist approach to constitutional interpretation. However, Moreso presents specificationism as a kind of balancing. He conceives balancing as one of the steps prior to the final subsumption. This approach is claimed to be in accordance with balancing.[46]

Balancing is presented as part of an operation that allows to proceed from principles as norms with open application conditions to rules with closed application conditions.[47] This operation is described in five stages: the identification of the normative problem by selecting the set of actions that constitute the universe of discourse; the identification of the rules and principles that are *prima facie* applicable; the consideration of paradigmatic cases regarding the selected universe of discourse; the identification of the relevant properties that will lead to normative solutions, and the formulation of rules that cover all cases of the universe of discourse.[48]

However, this approach encounters some objections. In the first place, the alternative of reducing stringency or scope of rights is mistaken. The balancing of normative arguments includes both aspects. The principles presented by normative arguments are not strictly valid, but not restricted in their scope, as defined by the underlying interests or other kinds of justification. The rules resulting from balancing are definitively valid, but restricted in their scope. They reach only as far as the supporting arguments receive priority. Hence, the balancing of normative arguments includes both aspects. Separating them destroys the justificatory relation between the normative arguments and the results of the balancing.

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[44] Moreso (2012), pp. 31–45, 35, citing Shafer-Landau (1995), p. 225. On Moreso and other specificationist accounts see Clérico (2012), pp. 113–145; de Fazio (2014), pp. 197–226.

[45] Moreso (2012), p. 39.

[46] Moreso (2012), pp. 39, 44.

[47] Moreso (2012), p. 39.

[48] Moreso (2012), p. 40.

Hence, specificationism faces the problem of how to justify the specified rules. Moreso's account includes the distinction of principles and rules, however, principles defined as norms with open application conditions do not present arguments for a particular result just in the situation of conflict with competing arguments. There is no justificatory relation between openness and closure of the conditions of application that follows from the principles themselves.

In Moreso's account, the justificatory relation consists in the reconstruction of paradigmatic cases. This reconstruction should cover all cases of the universe of discourse. However, although one can construct all possible cases regarding the actions under considerations, there is no way from the solution of paradigmatic cases to that of non-paradigmatic cases. Paradigmatic cases have clear solutions, but non-paradigmatic cases are a matter of dispute. There will be paradigmatic cases for both sides of the argumentation, but there will be cases inbetween that a reconstruction of paradigmatic cases cannot resolve, because this reconstruction will provide arguments for both sides.

5.5 Balancing and Interpretation

Another approach that might present an alternative to balancing as optimisation is that of constructive interpretation. However, it is not clear whether interpretation presents an alternative methodology of balancing. Interpretation can be conceived as assigning meaning to given standards. In this sense, interpretation presupposes the existence of normative standards that do not conflict with other arguments, so that the issue is not the validity, but only the meaning of these standards and their applicability to the facts of a case.[49] In contrast, balancing requires that conflicting normative arguments are all valid in the situation of conflict.

On the other hand, constructive interpretation does not presuppose that the standard to be interpreted already exists, but assumes that interpretation itself defines which norms are regarded as valid law. The interpretation must start from legal materials, which involve conflicts. The conflicts are resolved by means of interpretation. In this sense, constructive interpretation can be regarded as a type of balancing, which, however, is different from that of optimisation.

An account of constructive interpretation has been suggested in particular by Ronald Dworkin.[50] Constructive interpretation is characterised by imposing a

[49] See, for example, Pérez Bermejo (2012), p. 298, who assumes that at least regarding law, rights must be accepted as legally compulsory and binding and cannot be finally unprotected or unsatisfied.

[50] Dworkin (1986), pp. 52ff.; Dworkin (2011), pp. 131, 149ff. Dworkin presents his theory as a "value account of interpretation". Although Dworkin has inspired the development of the theory of principles, he later rejected moral pluralism, and the existence of conflicting moral values, Dworkin (2006b), 105ff., p. 116, and also balancing oriented to the question of "where our own interest lies on the balance", Dworkin (2006a), p. 27. However, the problem remains how to proceed from at

purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to belong.[51] Legal interpretation is understood as an enterprise that considers law as if it would be the result of a rational decision,[52] and as if it would conform to a set of coherent principles.[53] Thus, Dworkin does not refer to particular positive norms, but to a legal practice as a whole. He characterizes interpretation as "pervasively holistic".[54] The question remains how one can determine the set of coherent principles that should be chosen as an interpretation of the law.

Dworkin's coherence test includes a dimension of fit and a dimension of value and aims at developing the soundest theory of law. But it is already unclear what these elements (fit with the legal practice, value regarding political morality, soundest theory of law) exactly mean. Even less clear is their relation. Dworkin demands a minimum of fit in order that something count as an interpretation of the law. It is plausible that there must be some relation of an interpretation to the legal practice or legal system to count as a legal interpretation, and hence some limit where a proposal does not count as a legal interpretation. But there is no criterion where this limit is. Also, the question remains why only a minimum is required and not the most accurate interpretation of the legal practice in empirical respect.

The dimension of value is burdened with all problems of political morality, beginning with the need to justify value judgements. And, of course, a coherentist theory opposed to weighing conflicting arguments must assure that moral values are ordered in a harmonious way, which is quite implausible regarding the plurality of values and the conflicts between interests underlying these values.

Another issue is the relation between fit and value. It is quite implausible that there is a minimal degree of fit that, in any context, suffices to qualify an interpretation as a legal interpretation, and makes irrelevant the institutional support that an interpretive suggestion has. If, for example, there is, on the one hand, an interpretation that has minimal fit and, on the other hand, a competing interpretation that explains perfectly the actual legal practice, the decision had nevertheless to be taken in the dimension of value alone. This is a rather rare view of legal interpretation.[55]

Dworkin offers a coherence approach to legal interpretation. Leaving aside problems of Dworkin's particular conception of legal interpretation, a coherence theory must present an account that assesses all possible criteria of coherence and bring

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least apparent conflicts of arguments to definitive normative statements. Dworkin tries to resolve the problem by eliminating the conflict of arguments. If this approach should work, then it should also offer an account to justify definitive normative statements. Hence, it displays the structure of balancing.

[51] Dworkin (1986), p. 52. See also Becker (1992), pp. 7–31, 26.

[52] See Dworkin (1986), pp. 58f.

[53] See the description of Becker (1992), p. 27.

[54] Dworkin (2011), p. 154. Holism in legal interpretation is also emphasized by Sourlas (2011), p. 184.

[55] In addition, coherence tests may include other criteria beside those suggested by Dworkin. See Pérez Bermejo (2012), p. 305; Hurley (1989), pp. 225ff.

them into a coherent scheme that resolves all conflicts. However, no such theory currently exists, nor is there a plausible framework for developing it. A coherentist approach might claim that this is only due to our limited knowledge, and that the legal order exists in a way the soundest theory of law would describe. This, however, means to stipulate the existence of something without an argument that justifies this belief, an assumption that is irrational.

In fact, there is a general argument suggesting that interpretation requires the balancing of normative arguments. Legal systems or legal practices include normative material that does not form a coherent system. This follows because the law is concerned with conflicts between human interests.[56] Some legal norms will protect individuals' interests. Hence, there will be conflicts between legally valid norms. These conflicts must be resolved in order to construe definitively valid norms, which can be used as a foundation of legal judgements. The construction of definitively valid norms starting from conflicting material requires normative arguments that are valid and serve as reasons for a particular solution just in the situation of conflicts.

Hence, the balancing of normative arguments is necessary. In law, such arguments take the form of legal principles. Therefore, it is necessary to construe definitively valid norms by means of balancing legal principles. No alternative of normative justification seems to be available that could replace the balancing of normative arguments. In particular, the mere stipulation of a coherent system of norms does not present a rational justification of statements of the definitive validity of norms.

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[56] On this view Sieckmann (2018a), pp. 1, 5.

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Chapter 6
Epistemic Issues of Balancing

6.1 Probability and Certainty in the Structure of Balancing

The balancing of normative arguments aims at determining a priority between the conflicting arguments according to their weight in the particular case. The weight of normative arguments in the particular case depends, on the one hand, on the abstract relative weight of the arguments and, on the other, on the degree of fulfilment or non-fulfilment (interference) of the competing demands that follows from the suggested priority relation. This structure is defined by the model of balancing as optimisation.[1] However, a contested issue is which role epistemic assessments have to play in this balancing.

It is clear that epistemic issues are relevant to the balancing of normative arguments as far as degrees of fulfilment or interference depend on empirical assumptions, such as the level of risk for a particular good, the chance to achieve something, or, more generally, the probability of the consequences of some decision.

For example, the justification of restrictions on personal freedom in order to manage an infectious disease depends on how infectious the disease is, and how dangerous it is an infection. In case of a potentially lethal disease, the interference, in case that no measures are taken to contain the disease, is not simply the loss of life, but the probability that someone dies because of an infection with this disease.

The relevance of probabilities for determining the degree of fulfilment of or interference with a normative demand is beyond doubt.[2] A contested issue is, however, whether the reliability or certainty of the premises used to justify a priority judgement are factors in determining the priority judgement. Robert Alexy has indeed suggested this with his "weight formula". However, against Alexy, the reliability of premises is relevant, not for first-order balancing, but only at a

[1] See above, Chap. 4; also Sieckmann (2012), p. 90ff.

[2] See also Sieckmann (2010b), p. 114, where certainty is understood as probability and included in the determination of degrees of fulfilment or interference.

J.-R. Sieckmann, *Autonomy and Law*, Law and Philosophy Library 150,
https://doi.org/10.1007/978-3-031-96578-4_6

meta-level or second-order balancing regarding diverse competing balancing judgements.[3]

Besides this particular dispute, the general issue is whether, and in which respect, the balancing of normative arguments is an epistemic enterprise. The model of autonomous reasoning assumes that balancing is not aimed at cognition, but at a *decision* based on normative arguments. It includes a non-cognitive element, but is bound by standards of rationality. Hence, it may be called a form of "non-cognitive rationalism".[4] The remaining issue is which cognitive aspects are pertinent in autonomous reasoning, as set out in the "model of optimisation".

6.2 Epistemic Issues in the "Optimisation Model"

The optimisation model explicates the idea that in the case of a conflict of arguments, one ought to choose the best of the available options.[5] The conflicting demands cannot all be fulfilled completely. However, possible solutions are evaluated as better, worse, or equally good. Optimal solutions, then, are those that are evaluated as best among those that are, in fact, possible. This evaluation is autonomous; that is, it is not a matter of knowing the correct answer, but a determination by the judging agent himself. The evaluation will be based on premises regarding the factors of balancing, but the evaluation as such is not a statement that claims to be true. On the other hand, the practical aim of normative argumentation is to determine which norm ought to be accepted as definitively valid by all reasonable agents; that is, which norm is objectively valid and actually ought to be recognised as definitively valid. Such a statement of objective validity claims to state a normative fact and hence claims to be true. The ultimate problem is how to justify such a statement of objective validity.[6] However, the first issue is an analysis of diverse levels of balancing, and the role epistemic issues have to play there.

6.2.1 Balancing Judgements and Balancing Positions

Normative argumentation includes a complex structure of balancing procedures. In a first order-balancing, the issue is to establish a priority between competing normative arguments. This requires an individual, autonomous normative judgement. However, in order to claim definitive validity for the resulting norm, balancing judgements of other agents have to be taken into account, and an intersubjective

[3] See above, Sect. 4.1.

[4] Sieckmann (2012), p. 224.

[5] See above, Chap. 2, Sect. 2.4.1.

[6] On this problem see also Sieckmann (2012), p. 106ff.

reflection of competing balancing judgements is required. This leads to the distinction of balancing judgements and balancing positions. Balancing judgements are normative propositions that state priority relations and the resulting norms. Balancing positions are relations between agents and the balancing judgements they propose. These relations consist in the justification of balancing judgements by some agents.

A crucial point of the subsequent analysis is that the epistemic quality of a judgement is relevant, not for the first order-balancing judgements, but for the assessment of balancing positions. Since balancing positions include a justificatory relation, the quality of this justification is a feature of these positions. Balancing positions, hence, can be assessed according to their epistemic quality.

More generally, one may ask in which respect balancing positions can be assessed. The first issue is the strength of the respective balancing judgement according to the evaluation of the judging agent. A second issue is the epistemic quality regarding standards of rational argumentation. A third issue is that balancing positions can be shared by several agents. Hence, the support for a balancing judgement is stronger the more agents hold the respective balancing position. All of these three assessments are relevant when it comes to assessing the objective validity of balancing judgements.

6.2.2 The Strength of Balancing Judgements

Regarding balancing judgements, only two types of factors are relevant: the degree of fulfilment DF and the abstract relative weight WA of a principle. Together, both determine the concrete weight WC of a principle. The concrete weight, then, may be defined as a product of abstract weight and degree of fulfilment.[7] This relation between these values can be represented as

$$\mathrm{WC}(\mathrm{P}) = \mathrm{WA}(\mathrm{P}) \mathrm{x}\, \mathrm{DF}(\mathrm{P}).$$

The concrete weight of a normative argument is hence defined as the product of the value of the abstract weight and the degree of fulfilment assigned to it in a balancing. The argument with the greater concrete weight receives priority against the other argument.

Balancing judgements can be assessed according to their strength. The strength of a balancing judgement, and of the priority established by it, follows from the difference between the concrete weights of the competing principles or arguments. This difference may be more or less great, so that the judgement will appear to be more or less clear. The stronger a judgement is in evaluative respect, the clearer it is.

[7] See above, Chap. 4, Sect. 4.3.

However, the strength of a balancing judgement is determined by the judging agent himself, not as an objective measure.

The strength S of a balancing judgement hence follows from the difference of the concrete weight of the prioritized argument to the concrete weight of the repressed argument. Its amount can be represented by S. The strength S of a judgement JDG giving priority to P1 over P2 can then be represented as the difference of the concrete weights assigned to P1 and P2, respectively:

$$S(JDG) = WC(P1) - WC(P2)$$

Hence, balancing judgements differ not only regarding the priority assigned, but also regarding the strength assigned to this priority by the respective agent. Different agents, hence, may propose opposed priority judgements, but also the same priority judgement but with different strengths. Regarding a priority of P1 over P2, judgements might support or reject it, and this with different strengths.

Epistemic factors do not appear in these relations. In autonomous reasoning, agents will determine a priority by their own judgement and not as a cognition of balancing factors. They must comply with requirements of formal rationality (consistency, coherence, empirical correctness), but they do not purport to recognise a given priority relation or pre-determined balancing factors. The epistemic assessment of balancing factors can only be developed as a reconstruction of balancing judgements.[8] Such a reconstruction will not be more precise than necessary in order to justify the balancing judgement. Hence, it will not be completely determinate. A range of assessments will be possible. This range will become smaller the more balancing judgements are available for a rational reconstruction regarding the balancing factors. Within such a web of balancing judgements, one can argue about the correct assessment of the balancing factors.[9] However, the web depends on autonomous balancing judgements, and the rational reconstruction of balancing factors cannot determine these judgements.

[8] Alexy has noticed that only gross assessments of the balancing factors will be possible, Alexy (2003), p. 443f. Therefore, he begins with a three-valued scale, which, however, might be refined. In contrast to Alexy, the reconstruction of balancing factors does not assess these factors directly, but makes explicit the presupposed assessments. In addition, the indeterminacy is not represented by a discrete scale, but leads to assessments of a range of values. For example, the degree of fulfilment achieved by a particular solution might be assessed as 3 to 5 on a scale from 0 to 10. As a consequence, a range of balancing judgements will be compatible with the existing balancing judgements.

[9] Klatt and Meister (2012), p. 109, use the term "classification balancing" regarding the assessment of balancing factors. However, this is a type of balancing in a general sense of deliberation, not of optimisation. The issue is which assessment is adequate or appropriate, in relation to other, actual or hypothetical cases of balancing.

6.2.3 The Force of Balancing Positions

Although epistemic assumptions about balancing factors do not affect a first-order balancing judgement, the reliability R of such assessments may become relevant if a choice has to be made between diverse balancing judgements. The issue, then, is not to form a first-order balancing judgement, but to assess competing judgements.

The assessment of competing judgements may be necessary where different agents suggest diverging balancing results.[10] However, competing balancing judgements might also occur from the perspective of only one agent.

For example, regarding the issue of abortion, a balancing is required between the protection of the life of the unborn and the personal freedom of the mother. If one regards the unborn life as full human life, this argument will be particularly strong. However, the assumption that all human life deserves the same protection requires a justification, and this might be rather weak. The view that the protection of human life should be graded according to the state of its development seems to be better justified and, hence, more reliable. If one follows this view, the loss in value because of an abortion is not so great, and personal freedom may gain priority under certain conditions. Hence, one has to balance between a view that assumes a great value, but with weak justification, and a view that claims to realise less value, but is more reliable regarding its justification.

The assessment of balancing judgements may consider the substantive strength, but also the epistemic quality of these judgements. In order to do this, it is necessary to distinguish between balancing judgements and balancing positions. Balancing judgements are presented by particular agents proposing some priority relation. These judgements present priority relations:

$$\mathrm{JDG} = \mathrm{PRIOR}\left(\mathrm{P1} / \mathrm{P2}\right)$$

The judgement of a particular agent will be presented as JDG(A). Reference to agent A here only serves to identify the judgement.

In contrast, a balancing position is a relation in which an agent presents a particular balancing judgement. A balancing position, hence, is represented as a two-place relation:

$$\mathrm{POS}\left(\mathrm{JDG},\mathrm{A}\right)$$

Balancing positions can be more or less strong, not only because of the strength of the respective balancing judgement, but also because of the quality of the justification of the balancing judgement. In order to make this difference clearer, I will use the term "force" for balancing positions. The force F of a particular position POS, defined by a particular balancing judgement JDG of a particular agent A, depends, on the one hand, on the strength assigned to the balancing judgement JDG by the

[10] See Sieckmann (2014), p. 280.

respective agent and, on the other hand, the quality of the justification of this judgement, which, again, depends on the reliability of the premises it uses. Since different agents may present different justifications, the reliability must be assigned to the judgement of a particular agent.

One might try to give a more precise presentation of this relation in mathematical terms. The relation defining the force of a balancing position might be described as a product of strength and reliability:

$$F(JDG,A) = S(JDG(A)) \times R(JDG(A))$$

The idea behind this is that by proposing a particular balancing judgement, an agent claims that one will realise a value of some magnitude if one follows this judgement. This claim may, however, be more or less well justified. Hence, whether the prospective value is actually realised, is uncertain, and the expected value to be realised depends on the magnitude of the claimed value and the reliability of the underlying justification.

However, this suggestion is not beyond doubt. It gives equal relevance to the rational justification of judgements and to the normative assessment of possible solutions. Hence, it assumes equal standing of morality and rationality. Against this assumption, one might argue that morality and rationality are not of symmetric relevance for practical argumentation. The rational justification of a judgement might be so strong that it comes close to establishing truth, and if a judgement should be regarded as true, the strength of the moral claims involved does not matter.

For example, someone might claim that animals have the same moral standing as human beings and hence must not be killed, even if this would be necessary to save human lives. However, without rational justification, the strength that someone assigns to this position cannot compensate for the deficit in rationality.

Hence, the relation between strength and reliability must be asymmetrical. The strength of normative views is relevant only if rational doubts remain. An open issue remains: how to define this relation. This leads to the question of what should be the point of this definition. It seems that as long as only one agent is involved, the relation between morality and rationality can be left up to the agent himself.

6.2.4 The Support for Competing Balancing Positions

In a dispute among diverse agents, different balancing judgements and corresponding positions will be defended. The issue then is how to decide in view of the dispute among diverse balancing positions. The question is which norm ought to be accepted as valid regarding the competing balancing judgements. One might describe this issue also as which norm should actually or in fact be regarded as valid. At this level, normative argumentation requires statements of definitive validity that are analogous to statements of truth and, hence, represent some kind of knowledge.

Regarding statements of definitive normative validity, the normative strength and the level of rationality of the competing views are relevant. In addition, as the issue of definitive normative validity only occurs when diverse balancing positions compete, another aspect of establishing definitive validity might be the degree of support that a particular balancing judgement receives.

Several agents can share a balancing position. That is, they support the same balancing judgement. Hence, one can regard as a balancing position not only the relation that some agent proposes a particular balancing judgement, but the relation between some balancing judgement[11] and the set of agents who propose it. For simplicity reasons, I will write "POS" without reference to a particular judgement of a particular agent.

The issue then is how to determine the force of balancing positions POS. As a particular force can be assigned to each particular position of some agent A, that is, POS(JDG,A), it seems plausible to determine the solution by the aggregation of force that is assigned to a particular solution by the involved agents. Some agents will suggest a particular solution (priority), others a contrary solution. The priority is determined according to the magnitude of force assigned to a particular solution and its opposition:

$$\mathrm{PRIOR}\left(\mathrm{POS}/\neg\mathrm{POS}\right) <=> \mathrm{F}\left(\mathrm{POS}\right) > \mathrm{F}\left(\neg\mathrm{POS}\right)$$

Hence, the views of the agents supporting a particular solution have to be aggregated, the contrary views as well, and the decision has to be made according to which solution achieves greater force in total. A simple way to aggregate the force of particular balancing positions is to sum up the forces of the particular positions. Hence, the overall force of a balancing position would be:

$$\mathrm{F}\left(\mathrm{POS}\right) = \Sigma\,\mathrm{F}\left(\mathrm{POS}\left(\mathrm{JDG},\mathrm{A}_{\mathrm{i}}\right)\right)$$

However, this suggestion encounters some problems. It assumes that the force of balancing positions of several agents is simply added to determine the force of the position as such. This presupposes that the number of agents who support a particular judgement counts without restrictions. This might hold in certain contexts, for example, democratic decisions. On the other hand, there are contexts in which the number of agents does not count.

- Regarding truth, the number of agents holding a view does not matter. If rational justification comes close to truth, the number of agents should be irrelevant.
- Regarding fundamental rights, the protection of these rights does not depend on the number of agents who support or oppose it.[12]

[11] That is, a balancing judgement of someone, without specifying the respective agent.

[12] See also Sieckmann (2021), pp. 113–134.

Hence, again it is an open issue how to define the relation of rational justification, normative evaluation, and the number of agents who support a particular balancing position.

6.3 The Relation Between Rationality, Morality, and Support

The balancing between competing balancing judgements is a second-order balancing, about which norm one should accept as definitively valid regarding competing balancing judgements.[13] Whilst first-order balancing judgements are autonomous and hence subjective statements, the second-order balancing addresses the issue of objective validity, that is, the determination of which norm ought to be accepted by all reasonable agents. However, as a balancing judgement, it remains an autonomous and hence subjective statement. Hence, diverse agents can also hold differing views in the second-order balancing. Nevertheless, there is a difference. First-order balancing cannot claim to be an objectively binding judgement, for one must respect the same autonomy of other agents and hence cannot claim a subjective judgement to be binding on other agents. In contrast, the second-order balancing claims to present an objectively binding result, although this claim remains merely subjectively valid.

6.3.1 Criteria of Objective Validity

As a second-order balancing claims to present an objectively valid solution, it must comply with the demands of objective bindingness. This requires intersubjective reflection by all agents involved regarding all of the competing views.[14] One cannot simply state one's own view regarding the conflict between diverse balancing judgements, but must present a view that one can claim to be acceptable for all agents involved.

The issue, then, is which criteria this intersubjective balancing should follow. The analysis above suggests three types of criteria: normative evaluation, rational justification, and quantitative support among the agents involved.

Normative evaluation represents the autonomous element in balancing. Each agent has to form a view regarding the concrete weight of the competing arguments in order to define a priority relation between them. The criteria for the normative evaluation are provided by the theory of balancing.

Rational justification presents the element of epistemic objectivity. It applies criteria of formal rationality to balancing arguments, but also requirements of rational practical discourse. Balancing must be consistent, coherent, and correct in its

[13] See also Sieckmann (2007a), p. 149ff.; id. (2012), p. 117f.

[14] See also Sieckmann (2012), p. 82.

empirical premises. In addition, intersubjective reflection requires procedures of argumentation aimed at the solution of practical problems. Hence, the criteria of rational justification are the issue of discourse theory and, finally, epistemology regarding the question of whether normative solutions can be claimed to be objectively valid.

The quantity of support introduces an empirical or social element in the justification of norms. This, again, points to the theory of rational discourse. Since normative argumentation must strive for consensus among the involved agents, the greater the group of supporters, the closer a solution comes to the end of consensus.

In addition, if rational argumentation generates more support for one solution than for another, the minority cannot claim that its preferred solution ought to be binding for all. In contrast, if a commonly binding norm is necessary, the solution that finds more support founded on rational argumentation, can be claimed to be also binding for its opponents. This applies the criterion of reasonable convergence.[15]

In an institutional setting, the issue of empirical acceptance is an element of a theory of democracy. Democratic decisions are justified by majorities, which might be simple or qualified majorities. In particular, regarding the status of fundamental rights in a democratic system, the issue is whether majority decisions that interfere with fundamental rights are legitimate. In this respect, moral evaluation, the assessment of rationality, and the degree of empirical acceptance compete.

6.3.2 Distinct, but Related

Hence, the relation of morality, rationality, and empirical acceptance is to be explained in a complex theory, which connects the theories of balancing, discourse, and democracy. It is important to note that each of these approaches has its own standards of correctness. What is regarded as morally correct need not have the best rational justification, and need not have the strongest degree of acceptance. What is regarded as most rational need not be morally convincing or generally accepted. And what is in general accepted need not be morally convincing or the most rational position. As these standards are distinct, they may and will collide. Hence, a problem of balancing results, and one cannot expect simple criteria that define the relation between morality, rationality, and empirical acceptance.

On the other hand, although one must distinguish three notions of correctness, these are not completely independent from each other. One can identify relations in at least two respects.

First, correctness in one dimension might require some compliance with the standards of the other dimensions. A moral view that is completely irrational cannot

[15] Sieckmann (2007a), p. 165; id. (2012), p. 122f. It is important to note that reasonable convergence justifies only the rational necessity to accept application and enforcement of a norm, not the necessity to accept it as correct in substance.

count as morally correct. In addition, standards of rationality cannot hold without being shared by reasonable agents. Although their validity does not depend on acceptance, a standard that is not accepted by anyone else cannot count as rational. Furthermore, empirical support cannot make a normative view correct if this view does not comply to some extent with standards of rationality.

Second, the three notions of correctness are integrated by the notion of an ideal practical discourse. According to the theory of ideal discourse, a normative statement qualifies as correct and may even be considered as true if it is supported by the consensus resulting from a discourse that complies with all requirements of rationality. Hence, according to the theory of ideal discourse, a statement is regarded as correct only if it is correct in all the three dimensions of normative correctness, rationality, and empirical support.

However, the ideal discourse is a regulative idea that does not exist in reality. Hence, in real discourse, the competition of diverse notions of correctness will persist. Nevertheless, the existence of the ideal of consensus in a rational discourse affects the model of autonomous reasoning. A conflict between diverse notions of correctness must not immediately be decided by means of balancing, but one must strive for a solution that approaches the ideal of correctness in a rational discourse. Only if it is necessary to have a binding judgement, a decision has to be made on which solution ought to be considered as valid according to the competing notions of correctness.

6.3.3 Balancing Regarding Correctness

Although one cannot expect to find simple criteria that define the relation between morality, rationality, and empirical acceptance, one can expect that there are at least some clear cases. First, it might be the case that all criteria point in the same direction.

For example, fundamental rights are important and rationally justified, but might also have empirical support in a democratic society.

In addition, a criterion might clearly dominate the other ones. In this sense, an undeniable rational justification might dominate morality and acceptance.

For example, unnecessary restrictions on fundamental rights violate demands of rationality and are not justifiable, regardless of the support they might have. Religious views might be very strong; nevertheless, lacking rational justification, they cannot justify restrictions on fundamental rights, no matter what empirical support they have.

Or, morality might dominate acceptance, alone or together with the criterion of rational justification.

For example, a religious practice, although lacking rational justification, might be assigned great importance, so that a restriction is not justified, no matter the empirical support for a restriction.

On the other hand, in many cases, there will be no clear result regarding a competition of morality, rationality, and support. In these cases, it will be difficult to identify an objectively valid solution to a balancing problem. However, this does not mean that it is impossible to find a correct answer in some cases. The dimensions of morality, rationality, and support can be assessed by more specific criteria.[16] The degree of support is presented by the range of consensus among reasonable people or among reasonable norm addressees. The dimension of rationality is presented by the degree of rationality displayed in the autonomous judgements of the people involved, including the intersubjective reflection of diverse normative conceptions. The dimension of morality is presented by the concrete weight that is attached to balancing judgements.

For example, a norm that one must not smoke in public places might be accepted as binding by more or less people, thus being more or less consented. The agreement or disagreement of some people to such a norm may suffer from a lack of information or false information about the health risks of smoking, thus not being fully rational, or addicted smokers might not be in a position for a rational deliberation of these risks, thus not acting fully autonomously. Also, some people might carefully take into account the views of other people in forming their own judgement; other people might not reflect on diverging opinions, or might engage in intersubjective reflection only to a low degree. In addition, the claims presented by diverse agents might be more or less strong, depending on the weight that is assigned to the competing interests and the resulting arguments and judgements.

One might refer to the strength of rational acceptance as a combination of the dimensions of rationality and of support.[17] However, one must not neglect the relation of rationality and support to the aspect of morality. The degree of rationality and of support cannot be assessed in isolation, but their impact will depend also on the moral importance that is assigned to a particular view.

6.4 Conclusion: Objective Validity of the Claim to Bindingness

In the end, one can define the objective validity of normative judgements by the strength of rational acceptance, but one cannot exclude that an autonomous normative judgement diverges from that which has the strongest rational acceptance, without being irrational. This gap between rational justification and autonomous morality remains. However, the existence of reasonable diverging views is not necessary, and they can be handled by means of rational discourse, thus diminishing the divergence. In this sense, an approximation to objectivity is possible.[18]

[16] See also Sieckmann (2003a), pp. 105–122.

[17] See Sieckmann (2003a), p. 119.

[18] On this idea Sieckmann (2003a), p. 107ff.; id. (1997a), p. 35f.

Nevertheless, a gap between individual autonomy and rational justification remains. It can only be closed if it is necessary to have a commonly binding norm, and a rational argumentation results in a reasonable convergence regarding the norm that ought to be accepted as valid. In this case, opponents must accept the claim to bindingness regarding the norm supported by reasonable convergence. Hence, this claim to bindingness is objectively justified.

On the other hand, the claim to the bindingness of a norm is distinct from the claim to its substantive correctness. The legitimacy to hold a contrary normative view regarding the substantive issue remains untouched, as far as the contrary view is rationally justified as an autonomous judgement.

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Chapter 7
Dimensions of Law

7.1 Introduction

Law as a normative systems requires justification through autonomous reasoning. There seems to be no other way to ground the normative claim of law. Normative validity implies that a norm ought to be recognised, applied, and followed by its addressees. Legal norms, claiming normative validity, hence imply an obligation at least of the law-applying organs to recognise, apply and follow these norms. This obligation can hold only if there is a justification for it, and this justification must be founded on autonomous morality. That is, one must show that every autonomous agent must accept as correct the claim that the respective norm is valid.[1]

The normative validity of law hence depends on autonomous morality. However, law is not identical with morality. It is defined also by its authoritative character.[2] The interplay of authoritative character and autonomous justification manifests in three dimensions of law: law as a system of positive norms, as a normative system, and as a practice.

Legal norms are valid, not necessarily because of their content, but because a legislative authority has enacted them. The competences to enact legal norms are "sources" of law in the sense that by exercising these competences, legal organs create legal norms. The norms establishing these competences hence include criteria for the identification of law. The norms constituted by the exercise of these competences form a legal system; that is, a set of norms united by their relations to the

[1] This is a moral justification in a weak sense of defensibility of a normative claim. A strong moral justification had to show that each autonomous agent must accept the validity of the respective norm; that is, recognition of the norm is normatively necessary. However, legal validity only requires a justification for the application and enforcement of law, and for this it suffices to justify the claim to validity of legal norms.

[2] Sieckmann (2009), p. 135; id. (2012), p. 167.

J.-R. Sieckmann, *Autonomy and Law*, Law and Philosophy Library 150,
https://doi.org/10.1007/978-3-031-96578-4_7

competence norms that provide the criteria for the identification of law.[3] The enacted norms form the core of a legal system, which is complemented by norms justified on the basis of the enacted norms.

The conception of law as a legal system explains an important aspect of law. However, it is incomplete. As a normative system, law exists only if its normative claim can be justified. Hence, a moral justification of legal competences is required, and this will provide limits for legal competences. In the frame of autonomous morality, the exercise of legal competences must be bound by moral principles, although modified by specific legal principles. However, as law-applying organs are also moral agents, moral principles apply to them without legal enactment. Legal systems can only exclude moral principles but do not exist independently from them.[4] Hence, legal decisions must be bound by principles founded on morality as well as on specific legal determinations. And since principles tend to collide, the justification of legal decisions requires a balancing of principles. These qualify as legal principles, for law-applying organs have to apply them.

Regarding law as a system of principles, a crucial question is whether some principles must necessarily be recognised as legally valid.[5] Such legally necessary principles are, in the first place, human rights principles. Human rights principles must necessarily be recognised in an autonomous morality, some as *a priori* conditions of the possibility to achieve any normative justification, others *a posteriori* because of claims of autonomous agents to protect their fundamental interests.[6] There may be other principles that have necessarily to be recognised as legally valid. Autonomous morality requires, however, in the first place, to recognise human rights principles.

A third dimension of law, besides being an authoritative system based on moral principles, is that of being a legal practice. Law as a normative system not only consists of norms and balancing procedures but also includes a complex practice of interrelated law-creating and law-applying procedures. In this respect, the legal practice is, on the one hand, a social or institutional fact. This fact affects, on the other hand, the normative validity of legal norms. Law can be justified not only for purely moral reasons or authoritative competences, but also for reasons referring to aspects of the established legal practice. For example, there are good reasons to follow an established legal practice. Departing from it requires a sufficient justification.

Also, as far as the practice is upheld, the practical issue within an established practice is not what the correct moral answer is but what is morally correct within the established practice. Then, how does the frame of a legal practice affect the balancing of principles? It is not plausible that in each legal case, one has to do a fresh balancing of principles, but previously established results might determine new judgements. Hence, the issue of the application of law will be to determine the

[3] Similarly, legal practices can establish law by a set of actions.

[4] Sieckmann (1990), p. 220; id. (2009), pp. 130, 225; id. (2012), p. 180.

[5] Sieckmann (2018a), p. 245; id. (2022a), p. 74.

[6] Sieckmann (2022a), p. 25f.

content of the legal practice; that is, the interpretation of the legal practice. In interpreting a legal practice some substantive norms are presupposed as definitively legally valid. Hence, legal interpretation might - and indeed does - proceed by applying these norms instead of going back to a fresh balancing of principles.

Hence, a theory of law as a normative system will include, as dimensions of law, the conception of law as a legal system, grounded on legal competences that establish the authoritative character of law, a theory of the normativity of law, implied in judgements based on the balancing of principles and human rights principles as necessary content of law, and a theory of legal interpretation regarding the legal practice constituted by balancing judgements. The first dimension may be called, according to their main focus, the analytic, the second the normative, and the third the empirical dimension of law. However, these dimensions are interrelated and not independent from each other.[7]

7.2 Law as a System

Law as a system is defined as a set of norms identified by certain criteria of legal validity.[8] Legal norms are constituted by norm-creating acts grounded on legal competences and competence norms. The structure of such competence norms may be described as:

If the competence to create a norm is correctly exercised regarding norm N, then N is legally valid.

$$\mathrm{EXE-COMP(N)->VAL_{LEG}\,(N)}$$

At the level of the legal system, the identification of law is primarily a matter of description and logical inference. One must identify the competence of some legal organ to create a legal norm according to a competence norm, then state that the conditions of a correct exercise of the respective competence are met, and infer the legal validity of the enacted norm.

One should note, however, that legal norms are considered as normatively valid; that is, that at least in principle, the addressees of a legal norm ought to accept it as

[7] A way to present this relations is the ACE-Theory of Law, see Sieckmann (2009), p. 149; id. (2012), p. 205. The ACE-Theory focuses on the perspective of the law-applying organ (the A-level), which is primarily, but not exclusively determined by the criteria of legal validity of legal systems (the C-level), which again are determined by legal practices that are empirically identified (the E-level). However, the relations between different dimensions of law can be described in various ways. One might consider a CEA-Theory of Law, focusing on the C-level, which is determined by the legal practice (the E-level), which includes applications of law in individual legal judgments (the A-level). Also possible would be an ECA-Theory, starting with the empirical legal practices, which define criteria of legal validity, which direct the application of law. Several combinations are possible, as well as different definitions of the relations between the different dimensions.

[8] Sieckmann (2009), p. 126.

valid and apply or follow it. Hence, law as a legal system has a normative dimension. This implies that the consequence of the correct exercise of a legal competence to create a norm is not merely the legal validity of this norm in the sense of membership in a legal system, but also the demand that this norm ought to be applied and followed. Hence, we must also accept a normative statement:

If the competence to create a norm is correctly exercised regarding norm N, then N ought to be applied and followed by its addressees.

$$\mathrm{EXE-COMP}(\mathrm{N}) -> \mathrm{O\,APP}(\mathrm{N})$$

Such a statement presents a norm and hence requires a normative justification. A normative justification must support the conclusion that one ought to accept the respective norm. Hence, we need a conclusion of the form:

One ought to accept that, if the competence to create a norm is correctly exercised regarding norm N, then N ought to be applied and followed by its addressees.

$$\mathrm{O\,ACC}\left(\mathrm{EXE-COMP}(\mathrm{N}) -> \mathrm{O\,APP}(\mathrm{N})\right)$$

In short, this expresses the demand to recognise and respect the respective legal competence. Respecting a legal competence implies that one regards the established norms as binding.

Whatever the justification of this requirement might be, it will have the structure of a general requirement to accept the respective competence as valid. Such requirements are referred to as formal principles.[9] In this sense, formal principles imply that the norm established by means of some competence ought to be followed and, accordingly, that the respective legal competence ought to be recognised.[10] That is to say, the normative claim connected with legal competences is contained in formal principles.

Since the authoritative character of law follows from the existence of competences to create legal norms, formal principles constitute authoritative structures in law. Hence, formal principles are an essential element of the analytic dimension of law. They present a necessary element of legal systems, which distinguishes law from morality and complements the hierarchical structure of legal systems (the "Stufenbau der Rechtsordnung") that results from the derivation of legal norms from criteria of legal validity.

There has been some discussion about the notion of formal principles. Additionally, one might explore their relationship to alternative theories of authority, in particular to Raz's account of exclusionary reasons.

[9] Sieckmann (2018a), p. 196.

[10] See also Sieckmann (2009), p. 137.

7.2.1 The Notion of Formal Principles

The notion of formal principles is complex. The formal character might be understood merely negatively, as not referring to the content of norms, thus opposing formal to substantive or material principles. On the other hand, positive characterisations are possible. Formal principles might be understood as referring to procedural or institutional issues, for example, the jurisdiction to decide on certain issues. Or the formal character might be seen in a relation to issues of validity, in difference to issues of the content of norms.

Regarding validity, formal principles in a wider sense ascribe validity to norms or normative decisions independently of their substantive correctness, for example, demanding to follow norms established in a particular legal practice. In a more specific sense, they present arguments to recognise a normative competence to establish norms as valid. As to the type of validity, formal principles might demand recognition of the validity of norms merely as normative arguments. A stronger version of formal principles not only assigns competences to constitute arguments, but also to demand definitive validity of the respective norm. Such a claim, in principle, excludes the balancing with competing arguments, hence has exclusionary character and can be called "authoritative". Finally, formal principles might refer to the distribution of normative competences, so that recognition of the competence of one organ excludes that some other organ has such a competence, too.

Hence, regarding the validity of norms, several types of formal principles must be distinguished:

DF_{FP}: Formal principles can
- simply present arguments to accept a norm as valid independently of its substantive correctness (simple formal principles);
- establish legal authority by offering an argument that decisions of the alleged authority ought to be regarded as binding, excluding a balancing with further arguments (exclusionary formal principles);
- determine which of the competing authorities should have the competence to decide on certain issues (competence-distributing principles).

One should note that simple formal principles collapse with exclusionary formal principles as far as they are recognised as definitively valid. If a formal principle is recognised as definitively valid, all counterarguments are superseded, and the prevailing formal principle decides the case. Hence, the decision backed by the formal principle must be followed. The same result follows if an exclusionary formal principle is recognised as definitively valid. Nevertheless, the notion of exclusionary formal principles is important to understand the character of authority.[11]

[11] See also Sieckmann (2009), p. 136.

7.2.2 *Authoritative Character of Law*

Formal principles can explain the authoritative character of law, as they demand to recognise norms as valid independently of their substantive correctness. Authority is an essential feature of law.[12] Law is a normative order meant to be binding on its addressees, and this requires that legal norms be authoritatively established, applied, and enforced, independently of their moral correctness. Following Raz, legal authority has an exclusionary character.[13] Legal norms claim to be binding, thus excluding that their addressees act upon their own normative judgements.

However, because of their character as principles, the authoritative character grounded on formal principles is subject to a balancing with competing principles. In this respect, authority based on formal principles is distinct from notions of strict authority. The need to balance formal principles might be regarded as incompatible with the authoritative character of law, if understood as excluding the balancing of the normative claim of law with other arguments.[14] In this sense, Raz has offered an account of authority, based on the idea of pre-emptive or exclusionary reasons,[15] where authoritative bindingness results from the exclusion of substantive arguments referring to the merits of the case. On the other side, some efforts have been made to show that authority must not hold strictly.[16] Formal principles allow to construct a more or less strong authoritative character of norms or decisions without problems. Also the idea that authoritative decisions exclude deciding on one's own substantive judgement can be reconstructed.

Two types of demands must be distinguished: a formal principle might merely demand recognition of a normative competence, or it might attribute a normative competence exclusively to some organ. In the first case, several organs might have the competence to decide on a certain issue. Hence, several competences might compete. In the second case, competing competences of other organs to decide on the issue in question are in principle excluded.

Hence, one can distinguish between weak and strong authority. A weak authority implies that a normative decision ought to be considered as an argument in a balancing with competing arguments. For example, precedents of different courts may be relevant to a legal system. They all might have some normative force, according to the status of the court who made them. A final decision will have to be made, taking into consideration all relevant precedents. Another example is the relation of different courts in multipolar systems, which might be characterised as a relation of cooperation. All courts have to consider decisions or judgments of other courts in the multipolar system. In the end, each court will have to make its own final decision,

[12] Raz (1979), p. 30; id. (1986), p. 70ff; id. (1994), p. 210ff.

[13] Raz (1979), p. 30; id. (1986), p. 59; id. (1999), pp. 143, 171.

[14] See also Gur (2018), p. 130, rejecting this view.

[15] Raz (1979), p. 16 ff; id. (1999), pp. 100 f, 191 ff.

[16] On this discussion see Roughan (2014), p. 75ff.

or there might be one court that has the competence to make a final decision, taking into account all relevant decisions or judgments of other courts.

A strong authority implies that consideration of competing decisions or judgments is excluded. There is only one organ whose decisions or judgments count. Whatever decisions or judgments of other organs exist, they have no legal relevance for the decision of the organ that has strong, exclusive authority. This is the normal case in a legal system that is hierarchically organised. In such a system, a constitutional court has no obligation to consider the decisions or judgments of other legal organs in its judgment. The parliamentary legislator has no legal obligation to take into account the views of other organs. In fact, it might do so, and this might even be a requirement of rational argumentation, but there is no legal obligation to do so.

Moreover, strong authority might take two forms: competing competences can be excluded right from the beginning, or the exclusion of competing arguments might follow only after an authoritative decision has been made. The second case is that of a competence to make a final decision in a system of competing competences, referred to above. In fact, three models exist: competing competences without exclusive authority, competing competences with an authority to make a final decision, and exclusive authority in a strict sense, not admitting competing competences at all.

Exclusionary formal principles can assign strong authority in the strict or in the moderate sense. If they prevail and determine what is definitively valid, they exclude consideration of competing decisions or judgments. However, being principles, a balancing regarding the demanded exclusion of other arguments remains possible. In addition, formal principles for recognising an authoritative competence need a substantive justification. Authoritative competences are not an intrinsic value, but must be supported by further arguments. Authority based on formal principles, hence, cannot be absolute. It needs a justification that again requires balancing, although the result of this balancing might, in most cases, be in favour of the authority of law.

We can conclude then that formal principles, understood in a narrow sense, demand recognition of the normative competence of some legal organ to establish legally valid norms. This explains the authoritative character of law, which, however, may take different forms. In any case, formal principles can be balanced with competing arguments. This explains that the authority of law cannot be absolute, but might be overridden by principles of political morality. Hence, legal authority is a matter of balancing.

7.3 The Normativity of Law

The normativity of law is included in the characteristic that the legal validity of a norm implies a demand that this norm ought to be applied and followed.[17] However, law can claim normative validity only if such claims are not only raised, but also justified.[18] Therefore, law must comply with specific normative requirements. These requirements must be met in order to justify that one actually ought to apply or follow the law. Hence, the issue is what is required to justify legal judgements. This issue must be dealt with from the perspective of someone forming legal judgements, that is, from the perspective of a participant in the legal system. Hence, the normative dimension of law must be analysed from the participant's perspective.

The participant's perspective gains importance in case that conflicts occur within a legal system or between competing normative systems. From this perspective, in the first place the authority of law must be recognised as an argument. If there are no counterarguments and, hence, positive law provides a unique answer, the participant's perspective will not differ from the perspective of an observer. In contrast, the participant's perspective becomes relevant where legal claims encounter conflicts. Positive law might have internal conflicts, or it might conflict with normative requirements of political morality, or of alien legal systems.

In case of conflicts, respect for the authority of law cannot be demanded unconditionally. The participants of a legal system must balance the authoritative claim of their system with competing normative demands. As a consequence, a crucial thesis regarding law from the participant's perspective is that

(T13) in principle, a demand of correct balancing of legitimate normative claims must be recognised by the participants of a legal system.

One should note, however, that the balancing of legal principles by a participant does not yet justify a statement that the norm proposed as the result of the balancing is actually legally valid. An individual participant can only claim that a particular norm ought to be accepted as definitively valid, but an individual normative judgement cannot determine the legal situation. An individual judgement cannot claim to be superior to the judgements of other agents. Therefore, a statement of legal validity requires more than an individual normative judgement. There must be some kind of objective validity. This objectivity might result form a justification that it is rationally necessary to recognise a certain norm as valid, or from some competence, for example, of a court, to state one's own normative view as legally valid, or from support by a legal practice.

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[17] On this notion of normativity see Sieckmann (2012), pp. 12f., 52. "Normativity" is an ambiguous term with many interpretations. See, for example, Bix (2021), p. 585ff. I am interested only in the notion of normative validity, defined by the implication that one ought to accept, apply and follow a norm.

[18] Therefore, normativity of law cannot be claimed only for an individual himself, against Bix (2018), pp. 25–42. Against Bix see also Halpin (2019), p. 40.

7.3.1 Balancing and Proportionality

A fundamental demand of rationality, which must be recognised in each legal system, is the demand of correct balancing. Statements of law cannot be justified if they contradict the requirement of a correct balancing. Law as a normative system, hence, necessarily includes the requirement that conflicts between legal demands must be judged according to standards of correct balancing.

A demand of correct balancing is formulated, for example, in the principle of proportionality. The test of proportionality applies to conflicts of principles, which may protect rights or other types of goods.[19] It requires for the justification of an infringement of a principle that the measure pursues a legitimate objective and complies with

- the demand of adequacy or suitability, that is, the interference must be apt to promote the objective of the interference,
- the demand of necessity, that is, no alternative is available that is less detrimental to the affected principle and at least equally effective as to the fulfilment of the objective of the interference,
- the demand of proportionality in a strict sense; that is, a demand of balancing, guided by the requirement that the intensity of an interference must keep a reasonable relation with the importance of the reasons for the interference in the concrete case.

Whether the demand of proportionality in a strict sense is met depends, accordingly, on the degree of interference or, respectively, fulfilment of the competing principles, and on their abstract weight, that is, their relative weight without regard to the degree of interference or fulfilment of the respective principle. Both factors, the degree of interference and the abstract weight of a principle, determine its weight or importance in the concrete or particular case. The principle with greater importance in the concrete case deserves priority over the competing principle.

The test of proportionality can be understood as a demand of correct balancing. The sub-principles of suitability and necessity are required for a correct balancing. The third sub-principle is the demand of balancing itself. Thus, the principle of proportionality is included in the simple demand of correct balancing.[20]

[19] On the principle of proportionality, Schlink (1976); Hirschberg (1981); Alexy (1985a); id. (2002a); Clérico (2001).

[20] Sieckmann (2018b), p. 3ff. See also Schlink (1976), p. 171ff. and Alexy (1985a), p. 100f.; id. (2002a), p. 66ff.

7.3.2 Human Rights and Proportionality

Balancing presupposes a conflict of normative demands. Hence, another issue is what are the normative demands that could conflict with the authoritative claim of law. These must be claims that are not again grounded on positive enactment but must necessarily be recognised as legally relevant principles.

In the first place, principles that must necessarily be recognised within legal systems are human rights principles. The idea of human rights principles is that they must be recognised in each legal system, as a condition for that legal norms can be regarded as valid in a normative sense. Hence, a further thesis is that,

(T14) normative validity of law implies the recognition of certain human rights principles.

Which principles must be recognised as human rights principles is an issue on its own. However, one may well assume that some human rights principles must be legally recognised if the normative claim of law should be justified.

The interpretation of human rights as principles that need to be balanced against competing arguments according to the standard of proportionality is regarded here as the minimal guarantee of human rights, which is supplemented by exclusionary human rights principles.

Whilst protection by balancing simple human rights principles is a universally valid demand, a stronger form of protection is achieved by exclusionary human rights principles. As exclusionary principles, they prohibit the balancing of the protected rights. This prohibition holds, however, only in principle, and can be overridden by sufficiently strong arguments. Compared with the demand of a comprehensive balancing that includes all relevant arguments and weighs them correctly, the conception of exclusionary principles requires a specific justification. This justification can be based on the idea that individuals have fundamental interests, which, in principle, should not be subject to interference by public authorities. Hence, exclusionary human rights principles follow from a specific individualistic conception of human rights.[21]

There is a problem applying the optimisation model to the balancing of rights that have exclusionary character and, hence, in principle, exclude balancing. Conflicts of such rights require a second-order balancing as to whether a first-order balancing regarding the protected interest can take place. The question, then, is whether the second-order balancing follows the optimisation model. It does not consist in a simple balancing of all relevant arguments. Rather, its focus is whether the individual interest outweighs the need for a commonly binding norm, or whether the claim to bindingness of law is acceptable from the perspective of the affected individual, applying demands of universalisability and role-exchange.[22]

[21] See also Sieckmann (2022b), p. 170ff. However, non-individualistic justifications are possible (172).

[22] See also Sieckmann (1995b), pp. 171f., 180.

Still, one might consider this as an application of the optimisation model, although in the abstract sense that one has to look for an optimal solution regarding the conflict of arguments.[23] Within this abstract model of optimisation diverse types of balancing are possible. The simple balancing of all relevant normative arguments according to their strength or importance is only one account of balancing.[24]

One can expect that autonomous agents will demand this stronger protection for at least some of their rights. Hence, two forms of human rights protection exist:

(T15) The minimal form of human rights protection consists in the application of the principle of proportionality to human rights. It ought to be combined with a model of exclusionary human rights, which in principle exclude balancing and hence require stronger forms of protection than that by balancing all relevant arguments.

In contrast to the view that proportionality test and exclusionary rights present two complementary forms of human rights protection, the test of proportionality is contested as undermining the idea of rights as "trumps" or strict barriers ("firewalls") against state interference.[25] As a consequence, the principle of proportionality as a guideline for the balancing of rights is a matter of dispute.

An objection against the proportionality test is that this test, understood as optimisation, refers to the balancing of interests, which, however, is distinct from that of reasons or rights.[26] Against this view, one can doubt that there can be reasons or rights to be balanced against competing arguments that are not in some way justified by reference to individual interests. And even assuming that this is possible, this does not yet constitute an objection against the optimisation model. It is true that autonomous reasoning starts with normative arguments, which autonomous agents present based on their interests. But the model of optimisation can work with other types of normative arguments. It only presupposes that arguments are directed to the issue of the conflict; that is, acceptance of the validity of some norm as the result of the balancing, and requires an evaluation of the relative strength or importance of the competing arguments. Hence, the optimisation model applies to any object that can be evaluated in this way. An objection against the optimisation model would only result if this type of evaluation were excluded. This leads to the notion of exclusionary rights, as explained above. The balancing of exclusionary rights applies, however, besides the test of proportionality and complements the protection of human rights, but does not replace the protection according to the principle of proportionality.

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[23] Hence, it is not a simple balancing or an optimisation regarding all relevant interests, Sieckmann (1995b), p. 171.

[24] See also Sieckmann (2013c), p. 292f.

[25] See also Zucca (2008), p. 94, who assumes that constitutional essentials have a hard core, which, however, needs refinement from time to time. An open question remains how to determine this "hard core" and the criteria for its refinement.

[26] See, for example, Möller (2012), p. 715f, who suggests that balancing of interests is distinct from balancing as all-things-considered moral reasoning.

Critiques of proportionality[27] have not addressed the account of the protection of human rights presented here, which is based on the idea of autonomous reasoning. An example is the critique of Urbina, who intends to present a general critique of proportionality as applied in human rights adjudication.[28] Urbina distinguishes two models: the maximisation account of proportionality and proportionality as unconstrained moral reasoning. The maximisation account is characterised as "aimed at maximising some property or properties".[29] In contrast, proportionality as unconstrained moral reasoning is not limited to a particular method, but merely requires that state interference with rights is justified by reasons, whatever these might be.[30]

Urbina describes the "maximisation account" as demanding to maximize principle realisation.[31] This description applies also to the model of optimisation followed here.[32] However, the demand that if, according to some valid principle, a state of affairs ought to be realised, it ought to be realised to the maximal degree that is possible seems to be a fundamental requirement of normative rationality. One cannot seriously claim that if something is obligatory, it is an open question of whether it should be realised to a higher or lesser degree. Also, one cannot claim that a valid norm must always be fulfilled completely, and if this is not possible, the norm is not relevant at all. Hence, Urbina's objection affects the optimisation model, but it seems to be unfounded. On the other hand, the further objection of incommensurability[33] is not relevant to autonomous reasoning. Autonomous balancing establishes priority relations[34] and does not derive them from some form of measurement and calculation. Hence, it does not presuppose scales or standards for measurement of weight and degrees of satisfaction.[35] Therefore, Urbina's critique does not present a

[27] See Urbina (2017); Šušnjar (2010); Webber (2010), pp. 179–202; id. (2009); Tsakyrakis (2009), pp. 468–493; Réaume (2009); Möller (2007), p. 454; Çali (2007), p. 251ff.; Greer (2004), pp. 412–434.

[28] Urbina (2017), p. 3.

[29] Urbina (2017), p. 19.

[30] Urbina (2017), p. 126.

[31] Urbina (2017), p. 27.

[32] One should note, however, that the optimisation model does not necessarily operate with requirements that have to be realised to a maximal degree. The formulation of the arguments to be balanced might be imprecise. For example, individual liberty might be demanded in a normative argument, without claiming that it ought to be realised to a maximal degree. All that is required fot the balancing is that regarding the the range of options that are relevant to the balancing one ought to aim at a higher degree of realisation.

[33] Urbina (2017), p. 39ff. For the critique of incommensurability see also Petersen (2013), p. 1387. In contrast to the approach followed here, Petersen accepts the requirement of commensurability (1392f.), but argues that suggested alternatives to balancing are not clearly better. Instead of focusing on the issue of rationality, he suggests to discuss the role of courts in the political system (1407f.). One can agree on this point. However, one cannot avoid the issue of the structure of balancing.

[34] See also Jansen (1998), p. 124.

[35] In contrast, the critique of incommensurability assumes that balancing presupposes a scale according to which weights are assigned. See, for example, Endicott (2014), p. 315, who, however, acknowledges that it might be justified that such cases are decided by an independent institution

relevant objection to the model of balancing suggested here. It does not affect the thesis that applying the principle of proportionality to conflicts of rights is a requirement of rationality, which follows from the structure of autonomous reasoning and ought to be respected by all legal systems and, hence, is a universally valid requirement.[36]

In addition, Urbina's argument against proportionality seems to be incomplete. Proportionality requires balancing. Balancing must always aim at finding a best solution. However, the objects of the balancing might have diverse characters, and the criteria of what counts as best might vary.

- The arguments to be balanced might be requirements that ought to be maximised,[37] or some other type of argument.
- Among maximising accounts, the aim can be optimising according to the weight of the relevant arguments (optimisation model), or the aim might be defined in some other way (for example, though implausible, mere satisficing).
- Optimising can be unconstrained or constrained.
- The constraints might result from exclusionary principles, which can exclude balancing as such, that is, exclude all competing arguments, or limit the balancing to some kind of competing arguments, for example, to arguments of constitutional rank, of specific importance, or those not based on external preferences (Dworkin). In addition, constraints might refer to the weighting of the competing arguments, for example, giving equal abstract weight to individual and collective interests.
- In contrast to maximising accounts of arguments, balancing might use other types of criteria to assess normative arguments, instead of normative requirements that ought to be fulfilled to a degree as high as possible. For example, it might refer to the consent of the affected individuals. One might give priority to an argument if this would find consent in a rational discourse, or one might exclude priorities that could not find reasonable consent from all individuals

(326). The possibility to choose between incommensurable values is also acknowledged by Urbina (2017), p. 65.

[36] One should note that respecting the principle of proportionality as a demand of rational argumentation does not exclude the possibility that constitutional law regulates the scope of application of this principle. Such a regulation might restrict the use of the proportionality test by courts. However, such a restriction needs a rational justification. See also Stone Sweet and Mathews (2019); Pou-Giménez et al. (2022).

[37] A further distinction is whether a requirement has a content that is limited, that is, can be completely fulfilled, or has no limits, that is, has ideal or aspirational character. For example, physical integrity can be realised completely, whilst well-being does not seem to have a limit. This distinction is, however, of no relevance at least for the optimisation model, for optimisation does not determine the degree of fulfilment in relation to complete fulfilment of a requirement but will compare possible results of the balancing. Therefore, the aspirational character of a requirement does not matter.

involved.[38] Other arguments not referring to the maximal realisation of a right might be pertinent.

As any rational argument is admissible, one can call this "unconstrained moral reasoning" (a term used by Urbina). However, this does not imply that there are no legal constraints on the argumentation. What is required is, according to the theory defended here, merely that all legal constraints are finally justified by rational argumentation.[39] By denying this, Urbina is committed to the view that one should accept constraints on legal argumentation that are not rationally justified. This position is, however, plainly irrational.[40]

7.4 Legal Practice

The interrelated individual normative judgements of autonomous agents in a legal system make up a legal practice. A legal practice is, in the first place, an empirical phenomenon. It is possible, to some extent, to identify what the judgements and activities are that constitute a practice. Although identifying a practice presupposes assumptions about intentions, goals, values, or, in most general terms, the point of the particular activities that are considered elements of the respective practice, and this will include evaluations, at its core the identification of a practice is a descriptive operation. It is not a statement of what ought to be but a statement that there is some kind of practice. In this respect, the account of law as a legal practice has a sociological element.

7.4.1 The Normativity of Legal Practice

However, as a legal practice, law cannot be a purely empirical phenomenon. The point of the practice is to determine what are the legally valid norms and how cases ought to be decided according to the law. In the end, legal statements regarding a legal practice are normative. In this respect, they resemble the normative claim of law included in individual legal judgements of the participants of a legal system. However, acting within a legal practice changes the issue of legal judgement. The question is not what is the normative view of the individual agent is, but what is

[38] One should note that arguments referring to consent might not only be used in the context of balancing. Normative argumentation includes other types of reasoning.

[39] As to this characteristic of the "model of principles" Sieckmann (2009), p. 15.

[40] The implausibility of Urbina's view becomes obvious when he starts to argue with "benefits" of legally constrained argumentation, Urbina (2017), p. 160ff. This presupposes at least a balancing model, if not a maximisation account. One could avoid inconsistency only by assuming that there are no disadvantages, that is, "costs" of his model of authoritative guidance, a view that, again, is obviously wrong.

required according to the legal practice, interpreted in a correct manner, respecting moral requirements as far as possible, but accepting the existing legal practice as authoritative. That is, the question is how should one correctly decide within a legal practice. In contrast, the individual normative perspective asks how one should decide morally correctly, facing the existing legal practice.[41]

7.4.2 Interpreting Legal Practice

The issue, hence, is the interpretation of a legal practice. However, interpretation requires balancing. Interpretation must present arguments to decide a disputed issue, and as these arguments collide, balancing will be necessary.[42] Balancing and interpretation are not incompatible. The legal practice is the frame in which balancing takes place, and this balancing interprets the legal practice. The legal practice consists of numerous interrelated individual judgements, which result from the balancing of legal arguments. Two questions arise: how do individual legal judgements constitute a legal practice, and how does an established legal practice affect individual legal judgements?

7.4.2.1 The Emergence of a Legal Practice

The existence of a legal practice implies that legal judgements display some regularity. This may result from a natural convergence of individual legal judgements. Some cases are clear, so that all reasonable agents come to the same conclusion. Secondly, regularities may also emerge because individual agents orient themselves towards the judgements of other agents. This establishes conventions. Conventions are accepted not merely because of their content but because one expects that other agents will follow them, too.[43] Legal practice will incorporate such conventional rules. A third possibility is that legal norms are established authoritatively. This requires the existence of legislative or, more generally, norm-creating competences. Such competences are characteristic of modern legal systems.

The existence of legislative competences connects the notions of a legal practice and of a legal system. Nevertheless, both are distinct. The existence of a legal

[41] See also Shapiro (2011), p. 185: correct from law's point of view. The difference can be made clear regarding a shift in Dworkin's theory of law. First, he assumed that theories of law have two dimensions: fit and value. An interpretation of law must have sufficient fit in order to count as an interpretation of law. Later, Dworkin regards law as a branch of morality (in contrast to a "two-systems picture", 402). See Dworkin (2011), pp. 400ff., 405. Legal argumentation hence is a kind of moral reasooning. The issue is what is the correct moral view regarding a legal practice. On Dworkin's later view see also Waldron (2013), p. 6.

[42] Sieckmann (2009), p. 151ff. On interpretation see also below, Chap. 9.

[43] Lewis (1969).

system requires criteria according to which the membership of norms in a legal system is determined. The existence of a legal practice is a social fact that certain norms are regularly followed in a legal community.

7.4.2.2 Legal Practice and Individual Legal Judgements

The question of how an established legal practice affects individual legal judgements is answered by the device of formal principles. Formal principles are norms that demand to apply and follow norms identified by some formal criteria, as, for example, legislative or judicial enactment, but also social recognition. They constitute the authority of law,[44] and the weight attached to them determines how strong the authority of law is. In a wider sense, any principle that demands to recognise a norm as legally valid independently of its substantive correctness qualifies as a formal principle. As pointed out above, in a narrower sense, formal principles are those that assign legal competences to some organ to establish the legal validity of norms by their own decision.[45]

However, the device of formal principles is not enough to distinguish the individual normative view of law from the legal practice account. The legal practice account exempts some formal principles from moral evaluation. In this approach, the legal practice as such cannot be rejected. There must be sufficient continuity in order that one can claim to be deciding within the respective legal practice instead of changing it. In this respect, the legal practice-approach is distinct from a theory of law grounded on autonomous reasoning.

Hence, a conflict between legal practice and individual legal judgements remains possible. Norms established by a legal practice can always be questioned, and one cannot assume that legal practice always can demand priority over individual views.

7.5 Conclusion

Law is a complex phenomenon, which must be analysed in analytical, normative, and empirical respect. These perspectives lead to diverse notions of law. First, law is conceived as a system of norms, identified by certain criteria of validity. Second, law must be conceived as a normative system, which must include requirements that are necessary conditions of normative justification, in particular, human rights principles and the principle of proportionality. Third, law consists in a legal practice and, hence, has empirical existence as a social or institutional fact.

These dimensions of law are distinct, but also interrelated, so that a complete theory of law cannot be confined to one of these dimensions.

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[44] See also Sieckmann (2012), p. 167ff.

[45] On the notion of formal principles see above Sect. 7.2.1, and below, Chap. 8, Sect. 8.3.

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Chapter 8
Competences and Formal Principles

8.1 Introduction

Normative competences are a crucial feature of law, but also of autonomy as self-legislation. A normative competence implies the capability to change the normative situation because of an intentional act directed to this change.[1] Competence norms confer such a power to an agent, depending on certain conditions. Legal competences confer the power to change the legal situation. Autonomous morality includes the competence to present normative arguments, thus making them valid as arguments, as well as the competence to form normative judgements based on the balancing of normative arguments. A characteristic of normative competences is that the intention to determine the normative situation is the reason for recognising a certain norm as valid. Hence, they present a specific type of normative position of the competence holder.

However, the norm that is established as valid is not necessarily definitively valid. It might hold only in principle. This is clear regarding moral autonomy. Autonomous agents can create normative arguments and form normative judgements, but these constitute only normative demands on other agents to take these arguments or judgements into account in their own autonomous reasoning. They constitute only arguments that are valid in principle and have to be balanced with competing arguments.

Also, legal competences might merely empower the creation of norms that are valid in principle. In contrast, in a traditional positivistic understanding of law, the

[1] See Hohfeld (1923), p. 50f.; Hart (1994), p. 27; Ross (1968), p. 130; Spaak (1994), pp. 9, 75; Lindahl and Reidhav (2017), p. 158. For different notions and their inadequacies see e.g. Lindahl and Reidhav (2017), p. 159ff.

J.-R. Sieckmann, *Autonomy and Law*, Law and Philosophy Library 150,
https://doi.org/10.1007/978-3-031-96578-4_8

exercise of norm-creating competences is understood as constituting definitively valid norms.[2] According to the positivist view, legal norms are created by legislative acts complying with the requirements of norms conferring legislative powers. In the model of a hierarchically ordered legal system, the constitution confers powers to legislative organs to enact statutes; statutes may delegate powers to executive organs to enact legal instruments; finally, courts or administrative organs are empowered to make decisions in particular cases. The legal validity of the established norms or decisions follows from the power conferred by some legally valid power-conferring norm.

However, the exercise of a legal competence might be subject to normative requirements, so that the norm that is enacted is valid only in principle. This structure can be presented in two ways: a definitively valid legal competence includes the power to establish normative arguments, or a legal competence is valid merely in principle, insofar as it includes the power to establish a norm as definitively valid.

Indeed, a normative theory of law based on autonomous morality will only admit that the exercise of normative competences establishes norms that are valid in principle; that is, normative arguments that have to be taken into account by the addressees of the respective normative system. From the point of view of a participant, a normative system cannot exclude normative requirements made by alien legal systems or morality. Hence, the enacted norms can only be regarded as valid in principle, constituting arguments to be balanced by the respective participants.[3] In this respect, the theory offered here differs from common theories of law and their understanding of legal competences.

The result of the exercise of a normative competence is that the enacted norm ought to be regarded as valid in principle by the addressees of the norm because of the mere fact that it has been presented by someone having the competence to do so. Norms that imply this consequence can be referred to as "formal principles".[4] The following analysis aims to explicate the underlying conceptions of competences and formal principles, their relation to other views of legal competences, and their consequences for the theory of law.

[2] Kelsen (1960); Hart (1994).

[3] Against the weighing regarding authoritative directives, Gur (2018), p. 131, who argues that this weighing often will lead to mistakes. However, this is no reason to discard weighing but rather an argument to respect authoritative competences that, if sound, might lead to deny the competence of the participants of law to form balancing judgements on their own.

[4] On the notion of formal principles see above, Chap. 7, Sect. 7.2.1. Also Sieckmann (2009), p. 137; id. (2018a), p. 196.

8.2 Normative Competences

8.2.1 Problems of Defining Legal Competence

Legal competence grants the power to determine the normative situation in a legal system according to one's will.[5] The existence of a normative situation can be presented as the validity of a norm of certain content.[6] A normative competence, hence, is the power to determine that a particular norm is valid. We can also say, it is the power to enact or bring into existence a norm of certain content.[7] This can also be referred to as achieving a legal effect.[8] Any legal effect may be expressed in the form of a statement of the validity of a legal norm.[9]

A crucial feature of normative competences is the capacity to establish the validity of some norm according to one's intention. In addition, this intention must be a reason for recognising the established norm as valid. We can then define competences as follows:[10]

DF_{C1}: An agent A has a normative competence to determine that a certain norm N is valid if the norm N will be valid in case that and because A has performed an act of a certain character with the intention to make N valid.

The "because" must be read as the condition that the intention of A to make N valid is the reason for the validity of N, not merely a condition of its validity.[11] As a reason, it is a sufficient argument for recognising the validity of N; that is, N will be valid if this argument is not superseded by counterarguments. Accordingly, the exercise of a legal competence constitutes a reason for the validity of the respective norm.

[5] See also Sieckmann (2023), p. 70.

[6] One might doubt whether all normative situations can be represented by statements of the validity of norms. A normative situation might be, for example, a legal status, as that of a judge. It is not clear that such a status can be represented completely by statements of norms. However, I will ignore such cases.

[7] See also Ruiter (1993), p. 92; MacCormick (1986), p. 65.

[8] See Lindahl and Reidhav (2017), p. 158.

[9] It does not matter whether there is a normative change in the sense that the definitive legal position of someone has changed. At least, the exercise of a normative competence creates normative arguments. See also Sieckmann (2023), p. 75.

[10] Similarly Lindahl and Reidhav (2017), p. 169.

[11] In this respect, the "because" is stronger than the legal ground-consequence relation used by Lindahl and Reidhav (2017), p. 166.

The formal structure of a competence is then that someone (A) has the capacity regarding some norm (N) to make this norm valid (VAL) by acting in a certain way (ACT)[12] intending (INT) the validity of this norm:

$$\mathrm{COMP}(\mathrm{A},\mathrm{N}) =: \mathrm{ACT}(\mathrm{A},\mathrm{INT}(\mathrm{VAL}(\mathrm{N}))) -> \mathrm{VAL}(\mathrm{N})$$

The consequence "->" must be understood as including the justificatory relation that the norm is regarded as valid because of the intentional act aimed at making it valid.

8.2.2 Competences and Constraints

According to the traditional view, competences constitute reasons to recognise certain norms as definitively legally valid. The correct exercise of competence leads to the legal validity of the enacted norm. It constitutes a sufficient reason for recognising the legal validity of the enacted norm.

A problem with this view is that the exercise of competence might not constitute a sufficient reason for the validity of the established norm.[13] In some cases, there are always counterarguments against recognising the validity of the established norm. In autonomous morality, the equal standing of autonomous agents excludes that one agent can establish definitively valid norms for other agents. In law, a conflict with competing normative systems might occur. Even within one legal system, a legislator is subject to normative constraints in the exercise of legislative competences. At least in a constitutional system, any enacted norm must conform with constitutional law. Exercise of competence, therefore, is not sufficient to create a valid norm, but this norm must conform to constitutional law.

One might respond to this problem in two ways. The first approach is to restrict the scope of the legislative competence, including in the competence only the enactment of laws that conform with constitutional law. A disadvantage of this approach is that one could not state that the Legislature has the competence to enact a certain law without constitutional review of this law. One might regard this disadvantage as a mere technical drawback, requiring a more precise statement of the scope of the Legislature's competence. However, it is also a practical problem regarding arguments of judicial deference to decisions of a democratic Legislature. If one cannot state the competence of the Legislature before constitutional review, one cannot assume that there is a constitutional reason for judicial restraint against the Legislature.

[12] The predicate "ACT" might include procedural and substantive conditions regarding the successful exercise of the competence. One could explicate these conditions, but for reasons of simplicity I leave this predicate unanalysed. For a more complex definition see, for example, Spaak (2008), pp. 67–80.

[13] See also Sieckmann (2023), p. 74.

Alternatively, one might define a legislative competence as the power to establish, not definitive validity, but merely a legal reason for the recognition of the definitive validity of the enacted norm. One could explain this distinction by referring to the difference between rules in the sense of definitively valid norms and principles in the sense of reasons for balancing judgements.[14] The exercise of legislative competence constitutes a norm with the character of a principle, not of a definitively valid norm.

This has consequences for the usual positivist representation of the dynamics of legal systems. In a complex legal system, including substantive constitutional requirements superior to other legal norms, no power-conferring norm can guarantee that an act complying with this norm creates a valid legal norm. All that can be created is a legally valid argument for recognising the enacted norm as valid. This argument is directed, in particular, to the law-applying organs. These organs have to check whether there are competing legal requirements that act against recognition of the legal validity of the enacted norms. The final decision on the definitive legal validity of a norm has to be taken by the law-applying organ in charge.

This implies a modification of the role of intention in the creation of norms.[15] The intention in the exercise of normative competence might be directed towards creating the definitive validity of a norm. The legal effect is, however, the creation of a legal argument to recognise the enacted norm as legally valid.

The intention to enact a norm can then have two objectives: the creation of a legal argument or the creation of a definitively valid legal norm. If the intention is creating a legal argument, we have no problem with the notion of intention. However, legislators usually will not understand their intention as creating a legal argument, but as creating a definitively valid legal norm. Then, we have a problem. Following the analysis above, the legislator will not be able to establish a definitively valid norm by his decision alone. How can the legislator then have the intention to do so? However, an intention to do something does not presuppose the ability to achieve this aim. It only presupposes knowledge of the possibility of bringing about the intended result, and the possibility of bringing about a definitively valid norm, although the final recognition of the definitive validity of a norm is not in the hands of the legislator, but in those of the law-applying organs. It is, therefore, admissible to say that the legislator intends to establish the definitive validity of a norm.

8.2.3 Competences as the Power to Create Legal Arguments

The suggestion to regard the creation of a legal argument as a legal change corresponds to the above thesis that legal competences include the power to establish legal reasons, although these might be valid only in principle, not as definitively

[14] See above, Chap. 3. Also Sieckmann (1990), p. 25ff.

[15] See also Sieckmann (2023), p. 75.

valid norms.[16] As a principle, the competence norm in conjunction with its exercise is a sufficient argument for the validity of the respective norm in case that there are no counterarguments.

We can then describe the structure of a normative competence as follows:
DF_{C2}: A has the competence to make N valid if, and only if, it is the case that if A acts in a certain way with the intention to make valid N, then this act constitutes a reason for the validity of N.

$$\mathrm{COMP}(\mathrm{A,N}) =: \mathrm{ACT}\left(\mathrm{A,INT}\left(\mathrm{VAL}(\mathrm{N})\right)\right) -> \mathrm{REASON}\left(\mathrm{VAL}(\mathrm{N})\right)$$

The competence thus defined is a definitively valid legal position. It includes the power to create legal arguments, which are requirements to recognise the enacted norms as definitively legally valid.

Regarding definitive validity, one can include the absence of counterarguments as a condition of the norm that defines legal validity based on acts of the legislator:

$$\mathrm{ACT}\left(\mathrm{A,INT}\left(\mathrm{VAL}(\mathrm{N})\right)\right) \& \mathrm{NO-REASON}\left(\mathrm{NOT-VAL}(\mathrm{N})\right) -> \mathrm{VAL}(\mathrm{N})$$

In this sense, the legislator has a conditional competence to create definitively valid norms. However, the competence as such includes only the power to create legal arguments.

Regarding the enactment of definitively valid norms, one might assume that if a legal competence exists to establish a reason for the validity of N, then in principle, a competence exists to establish the definitive validity of the respective norm. However, this conclusion is not justified. If a competence existed in principle, there would be a requirement of recognising this competence as far as there are no superseding counterarguments. But if the exercise of a competence is incompatible with a higher law, there is no argument that one should recognise this competence as legally valid. All one could justify is a statement of a *prima facie*-competence, that is, an imprecise statement disregarding the possibility of legal restrictions on the exercise of this competence.

8.2.4 Definitive Norms and Validity in Principle

Regarding their structure, competence norms seem to be rules, not principles. Competences are normative relations, which, depending on certain conditions, exist or do not exist; principles include an ideal "ought", which exists only as an ideal, not as a real relation.[17] Competence norms ascribe such competences. This structure is different from that of principles.

[16] See also Sieckmann (2023), p. 76f.

[17] Sieckmann (1990), p. 75; id. (2018a), p. 102f.

Principles are understood as normative arguments, which require that a certain norm ought to be accepted as definitively valid.[18] As requirements for validity, normative arguments have a categorical structure. That is, they include an unconditional "ought". Although this "ought" is to be applied in a certain situation of conflict (a certain justificatory context), this situation does not constitute an antecedent of the normative argument that is to be applied. The validity of the normative argument is constituted by the possibility to justify its reiteration. It does not depend on the situation in which the argument is applied. Therefore, the normative argument holds categorically, not conditionally.

By contrast, competence norms have a conditional structure.[19] They make the validity of a particular norm depend on the exercise of the competence, which might be subject to further conditions. Hence, competence norms always have the structure of rules,[20] consisting of antecedent and consequence, and a competence is a position that exists on the basis of a competence rule. Accordingly, the demand that a certain competence should exist or ought to be recognised, is not the statement of a competence, and a corresponding norm demands, in principle, recognition of a certain competence, but does not confer this competence to a competence holder.

Demands or requirements referring to the existence of competences might be regarded as competence norms in a wider sense. In this sense, formal principles are competence norms, demanding certain competences for certain subjects.[21] Still, norms regarding competences in the narrow sense have a structure different from that of principles.

The distinction between principles and competence norms presupposes that one must distinguish two normative structures:[22]

It ought to be valid that if A enacts[23] N, then N is valid.
If A enacts N, then N ought to be valid.

Formally:

$$O\left(\mathrm{ENACT}\left(A,N\right) - > \mathrm{VAL}\left(N\right)\right)$$

$$\mathrm{ENACT}\left(A,N\right) - > O\,\mathrm{VAL}\left(N\right)$$

[18] Sieckmann (2012), p. 46; id. (2018a), p. 113; id. (2023), p. 79.

[19] See also Sieckmann (2023), p. 79.

[20] This does not imply that rules cannot hold categorically. There is no necessary relation between strict validity and conditional structure. See de Fazio (2019), p. 317f. However, rules resulting from a balancing always hold relative to the balancing procedure.

[21] Sieckmann (2018a), p. 196.

[22] See also Sieckmann (2023), p. 80f.

[23] I will understand enactment of a norm N by an agent A as an intentional act of making this norm valid: ENACT(A,N) =: ACT(A,INT(VAL(N)).

Both forms are not equivalent. The basic structures are:

$$O(p -> q)$$

$$p -> Oq$$

Besides these logical issues, there is a practical difference between the competence to enact a norm that is valid in principle, and a principle that one has the competence to enact a definitively valid norm. If this principle is superseded by a competing principle, there is no competence at all, and not a competence to enact a norm that is valid in principle. Hence, we must distinguish both structures.

Nevertheless, competence norms are related to principles. In a normative system, they need justification. Any justification will demand recognition of the competence norm, and hence take the form of a formal principle. This demand again needs justification. For example, one might accept the competence of a certain legislative authority because it will secure peace and order, justice, or human rights. The justification of a legal competence will hence depend on material, substantive principles. The dependence on substantive principles will have two effects.

First, there will be substantive restrictions on the scope of the competence, which aim at guaranteeing deference to the relevant substantive principles.

Second, the exercise of a legal competence must be orientated towards the fulfilment of the relevant substantive principles.

As a consequence, in a legal system, there will be no unlimited or unbound legal competences. In this sense, legal competences have a necessary connection with principles, although competence norms in a narrow sense cannot have the structure of principles.

8.3 Formal Principles

In the model of principles of law, the notion of competences is linked with that of formal principles. In the sense that is of interest here, formal principles include requirements to assign legal competences for taking certain normative decisions in certain circumstances, thus claiming obligatory the result of previous normative procedures.[24] Since they demand to recognise norms as valid because of their enactment and not regarding their content, they establish an authoritative character for the enacted norms.

[24] Sieckmann (1990), p. 147; see also Afonso da Silva (2003), p. 145.

8.3.1 The Scope of Formal Principles

Beyond the general characterization of formal principles as assigning normative competences, a problem regarding the content of formal principles, in general, is how to reconcile formal principles with constitutional requirements addressed to the empowered organ. Formal principles support any normative consequence that is established by means of the assigned competence. However, in a constitutional state, normative decisions are subject to constitutional law. Hence, even if a normative competence is recognised, not any norm can be enacted by means of this competence.

For example, one might assume that a formal principle in favour of the legislator demands that one respects legislative decisions to the greatest extent possible. This would include, however, decisions that are incompatible with constitutional law.[25] In a constitutional state, such decisions cannot be legitimate. Therefore, one cannot assign, even in principle, a competence to the legislator that includes the violation of constitutional requirements.

One might object that this argument uses to strong a notion of the constitutional state and that it is possible to weaken this notion, permitting to balance constitutional requirements with those of democratic legitimacy. In a strict sense, the idea of the constitutional state requires that political decisions are always subordinated to constitutional law and can never prevail against it. In a weaker sense, the idea of a constitutional state might be understood as a requirement that, in principle, political decisions must follow constitutional law, but that, in some cases, demands of political morality or democratic decisions based on political autonomy might set aside constitutional requirements. The requirement to respect decisions with greater democratic legitimacy presents a principle of political philosophy. This principle can conflict with requirements to respect constitutional law. Since constitutional law is not necessarily legitimate from the perspective of political morality, such conflicts are possible.

However, in a democratic constitutional state, where constitutional principles encompass all relevant requirements of political morality, such conflicts cannot occur. A principle of respecting democratic decision-making cannot deserve priority against the requirements of a democratic constitutional state, for it forms part of the constitutional principles of this state. Whatever respect for democratic decisions is required is a matter of constitutional law, not an issue that could be used to restrict the validity of constitutional law.

On the other hand, it is a fact that in constitutional systems, some norms or decisions that violate constitutional norms are accepted as legally valid. This is at least the result of procedural regulations, which, for example, restrict access to a constitutional court. Hence, to some extent, unconstitutional acts are accepted as legally valid even by constitutional law. However, the idea of the constitutional state is that acts can only be valid if they conform to constitutional law. There may be

[25] See also Scherzberg (1989), p. 176.

shortcomings for practical reasons, but one should require that at least the intention to act in accordance with the constitution must be required from the legislator.

Hence, in a constitutional state, respect for democratic decision-making must not infringe upon constitutional requirements. Formal principles cannot justify a demand that courts, even in principle, ought to respect legislative decisions that violate constitutional law. Therefore, no formal principle can demand respect for any legislative decision, whatever content it might have. The scope of formal principles must be defined in a way that preserves constitutional requirements.

8.3.2 The Requirement of Defensible Constitutional Interpretations

The solution to the problem of how to take account of constitutional limitations in formal principles is that only such legislative decisions can demand respect that at least can claim to be constitutional.[26] That is, the legislator must present them as based on a defensible interpretation of constitutional law, or the legislative decision must at least be capable of a reconstruction that presents it as based on a defensible interpretation of constitutional law.[27]

Thus, the subjection of the legislator to demands of constitutional law is preserved. Formal principles do not legitimate that the legislator goes beyond the limits of the constitution. They support, however, decisions based on the constitutional interpretation made by the legislator and demand respect from the courts for legislative decisions that can claim to be justified in this way. Hence, a competition results between diverse interpretations of constitutional law presented by courts and legislator.[28] A balancing of competing constitutional interpretations is required, and this includes the balancing of formal principles.

8.4 The Balancing of Formal Principles

A matter of dispute is whether formal principles complement and modify the balancing of substantive principles (combination model)[29] or whether the balancing of formal principles presents a second-order balancing distinct from that of substantive

[26] Thus, decisions that clearly violate constitutional law cannot gain support by formal principles. See also Alexy (2002b), p. 27.

[27] Kaufmann (1997), p. 179. On the requirement of justification regarding parliamentary legislation see also Oliver-Lalana (2024), p. 2ff.

[28] See Sieckmann (1990), p. 162 (konkurrierende Rechtskonzeptionen); id. (2009), pp. 200ff., 204 (Abgrenzung von Entscheidungskompetenzen).

[29] The aggregation or combination model, see in particular Borowski (2007), pp. 127–128, with further references in note 357.

principles (separation model[30]), as suggested in the model of "competing constitutional interpretations".[31] Regarding the second-order balancing of formal principles, a further issue is whether substantive principles are relevant in it or whether the balancing of formal principles is completely separate from substantive principles.[32]

A crucial point regarding the balancing of formal principles is the distinction between exclusionary and simple formal principles. Whilst simple formal principles can be balanced with substantive principles, exclusionary formal principles require a separation of a balancing as to whether the exclusion holds or not, and a balancing of substantive principles.

8.4.1 The Combination of Formal and Substantive Principles

The combination model suggests that formal principles are added to the balancing of substantive principles, so that the side favoured by the legislator receives additional weight because of the formal principles that demand respect for the decision of the legislator. It was introduced by Robert Alexy[33] and adopted by various authors,[34] although Alexy later abandoned this view.[35]

For example, following the combination model, regarding the conflict between liberty and the protection of health, the justification of the prohibition of cannabis is justified not only by the principle demanding the protection of health, but also by the principle that demands respect for legislative decisions.

This approach is adequate regarding the foundation of the authoritative character of law by means of formal principles.[36]

For example, in the conflict between the principles of legal certainty, which supports the validity of positive law, and of justice, which demands that law be just, the validity of positive law will be based not only on its substantive merits but also on the demand of legal certainty, acting as a formal principle in the wider sense explained above. Formal principles that merely assign non-exclusionary competences can be balanced against substantive principles. A non-exclusionary

[30] Terminology used by Borowski (2017), p. 455 ("Trennungsmodell").

[31] Sieckmann (1990), p. 162; (2009), p. 204; see also Klatt (2014); Klatt and Schmidt (2010), pp. 61, 65ff. (Ebenenmodell); Klatt and Meister (2012), p. 141ff. (two-level-model); Rivers (2007), pp. 183, 187.

[32] A strict separation is defended by Klatt (2014); Klatt and Schmidt (2010), p. 69; Klatt and Meister (2012), p. 139.

[33] Alexy (1985a), pp. 89, 121.

[34] Borowski (2007), pp. 127–128; Raabe (1998), p. 207ff.; Afonso da Silva (2003), p. 113ff.

[35] Alexy (2014), p. 518. Alexy's new model is founded on his "weight formula" and, since this formula is rejected here (see above, Chap. 5, Sect. 5.1), need not be considered. On this model Borowski (2017), p. 449ff.

[36] Sieckmann (1990), p. 147ff.; id. (2009), p. 137ff.

competence does not exclude other agents from deciding on the same issue. They have to consider a decision supported by a formal principle, but may take into account substantive arguments in their decision.

However, the combination of formal and substantive principles is not adequate regarding conflicts of exclusionary competences. The discussion of formal principles is often concerned with power-distributing principles, in particular regarding the limits of constitutional review or the recognition of a "margin of appreciation".[37] This problem may be regarded as a balancing of normative competences. The issue of balancing formal principles is, accordingly, which organ—for example, court or legislator—should have the power to decide certain legal issues. In this case, formal principles are exclusionary.

Regarding the assignment of competences, a decisive objection against the combination of formal and substantive principles in a balancing is that both types of principles refer to different issues: formal principle to the attribution of competences, and substantive principles to the recognition of certain norms as valid. Therefore, substantive principles cannot—at least not directly—be involved in a balancing regarding competences.[38] They only might support formal principles that are involved in the balancing regarding competences. For example, the weight of a formal principle demanding the judicial competence to constitutional review might be the greater the more intensive is the interference with a fundamental right. But they are not the direct reasons for a certain attribution of competences.

Against this view, it is claimed that another construction of the balancing is possible, which is equivalent in its results.[39] However, it is not clear what this construction should be. One might assume that the balancing is concerned with a substantive issue, and formal principles are relevant insofar as they demand to take into account the decisions, for example, of the legislator in the balancing as to which decision should be taken.[40] This argument presupposes, however, that a legislative competence to take the respective decision actually exists. If, however, this competence is questioned, the issue of competence must be decided before one can claim that the decision of the legislator should be relevant to the court's judgement. If the competence of the legislator is denied, there is no reason why its decision should be relevant to the court's decision. The attribution of competences is, however, exactly the problem regarding the limits of constitutional review and the demand to respect

[37] See Alexy (1985a), pp. 89, 121; Borowski (2017), pp. 449–476; Klatt (2014); Raabe (1998); Portocarrero Quispe (2014); Gorzoni (2019); Azevedo Palu (2019).

[38] For the contrary view see Borowski (2009), p. 115; Azevedo Palu (2019), pp. 318, 320; Gorzoni (2019), p. 283.

[39] See Borowski (2017); id. (2009), p. 116f. Fn 72; Azevedo Palu (2019); Gorzoni (2019), p. 282f.; Portocarrero Quispe (2014), p. 188.

[40] See Borowski (2009), p. 117 Fn 72. Also Raabe (1998), p. 241.

legislative decisions.[41] Therefore, it is necessary to distinguish between the balancing of formal and substantive principles, as far as judicial review is concerned.[42]

In general, in case that an exclusionary competence is claimed and supported by a formal principle, the issue is the distribution of competences. Competing claims can only be considered if the claim that some organ has an exclusionary competence is rejected. If an exclusionary competence is accepted, claims based on competing competences have no foundation. Therefore, any relevant argument must offer a conclusion regarding the issue of who should have the competence to make a binding decision. Since demands for the assignment of competences constitute formal principles, only formal principles can be directly relevant to the problem of the delimitation of constitutional review.[43]

8.4.2 The Model of Competing Constitutional Interpretations

In contrast to the combination model, the separation model suggests that one has to balance formal principles against other formal principles. All principles that stand in conflict in this balancing must be formal principles. This balancing of formal principles must be distinguished from that of substantive principles and hence has the character of a second-order balancing.[44] It is not a balancing as to which substantive principle prevails but a balancing as to which organ should finally decide on the issue of which substantive principle prevails.

The model of competing constitutional interpretations or, more generally, competing interpretations of law assumes a separation of the balancing of formal and substantive principles, however, with an important constraint. The balancing of formal principles requires a decision about whose substantive balancing should finally count. Diverse organs claim to have the competence to take the decision, but all of these

[41] One cannot presuppose a formal principle that assigns a competence to the legislator to take constitutional decisions. The authority of the ordinary legislator does not suffice, because it is bound by constitutional law. Hence the question is why a constitutional court should respect decisions of the legislator when interpreting the constitution. From the perspective of the court, the legislator must comply with constitutional law, as the court defines it. Respect for legislative decisions regarding constitutional interpretation requires a specific justification.

[42] See also Klatt (2014), p. 191ff., with a similar model of balancing formal principles.

[43] One might try to construe an indirect support by substantive principles, arguing that the legislative decision favours the protection of health. Accordingly, the principle of the protection of health offers an argument for recognising the competence of the legislator to take this decision. Thus, one assigns competences in order to achieve a better result in substance. It seems that one cannot reject this approach straightforwardly. Nevertheless, it does not help as an argument in favour of the legislator. For whilst protection of health is favoured by the decision of the legislator, individual freedom might be supported by the Court's decision. So substantive principles act on both sides. In the end, the principle that prevails on the substantive level will act as an argument for the assignment of the competence of final decision-making to the legislator or to the Court.

[44] Against this view Borowski (2009), p. 117.

decisions must be based on an interpretation of law and claim that this interpretation is correct.

This indicates that a complete separation of the balancing of formal principles from that of substantive principles is not possible. Formal principles must refer to decisions that are based on the balancing of substantive principles, so that these decisions can count as defensible interpretations of the law. In a constitutional state, no formal principle can require a competence to make decisions that do not respect the constitution. Thus, formal principles must refer to the balancing of substantive principles. However, substantive principles do not directly act within the balancing of formal principles.

To sum up, the model of competing constitutional interpretations assumes that formal principles act on both sides, on the side of the legislator, but also on the side of the Court. This model leads to the distinction of two types and levels of balancing:

(1) A substantive balancing, for example, between the principles of liberty and protection of health, and
(2) The balancing of formal principles.

That is, some formal principle requires that one assign the competence of taking a final decision on a certain issue to the legislator. Another formal principle requires assigning such a competence to the Court. In both cases, the decision of this organ must present itself as interpreting the Constitution, or at least must be capable of being represented as such. Thus, formal principles cannot support any decision, but only decisions that a defensible interpretation of constitutional law can support.

8.4.3 The Relation of Formal and Substantive Principles

An issue that needs clarification is which role substantive principles have to play with regard to the balancing of formal principles. The "model of competing interpretations of law" holds that only formal principles can be balanced against formal principles.[45] It applies where the issue is assigning competence. Then, by definition, all principles relevant to this issue must be formal principles. However, in the model of competing interpretations, formal principles are not unrelated to substantive issues.[46] They support certain decisions, which again must be based on a balancing of substantive principles. This is the crucial point of the model of competing interpretations. It constitutes a relation between formal principles and substantive principles, which, however, does not concern the balancing of formal principles.[47]

[45] See also Afonso da Silva (2003), p. 156.

[46] See also Sieckmann (2009), p. 204.

[47] One might describe the substantive balancing, using a phrase of Alexy (2014, p. 522), as the "Archimedian point" of the balancing of formal principles, for all relevant formal principles must refer to a particular balancing of substantive principles. However, Alexy regards this as an argument against the model of competing conceptions of law, or, as denoted here, constitutional inter-

In addition, a relation regarding the balancing of formal principles results because formal principles need a normative foundation. Formal principles are defined by their normative consequence, that is, they require a particular assignation of legal competences. Their foundation, however, rests on some substantive principle. The foundation of competences of the Legislator is that a democratic legislator is expected to realise best the common good, or to integrate the competing interests of the citizens. The foundation of the Court's competence to constitutional review is that one expects the Court to protect fundamental rights and preserve the Constitution in general. None of them receives a legal competence for its own sake. Formal principles, at least in law, always serve to realise some substantive principle and, hence, are justified on the basis of substantive principles.[48] Also for this reason, the balancing of formal principles cannot be strictly separated from substantive principles.[49]

Nevertheless, substantive principles have no independent role to play in the balancing of formal principles, that is, they cannot be relevant without relation to formal principles. Principles can enter into the balancing regarding competences only insofar as they demand a certain assignation of legal competences. Thus, they act as formal principles.

This separation thesis holds where exclusionary formal principles are involved, so that the issue of the balancing is which organ should have the competence to make a final decision. However, this is not the case regarding non-exclusionary principles. Non-exclusionary formal principles demand respect for decisions or judgments of certain organs without excluding demands to respect decisions or judgments of other organs. Hence, the issue is not the competence to make a final decision. Instead, the question is how one should decide regarding diverse decisions or judgments of different organs, which, in principle, should be followed. This question must be addressed from the perspective of each organ. There is no exclusion of their views by an exclusionary competence of some other organ.

For example, both the European Court of Human Rights and national constitutional courts adjudicate cases involving fundamental rights. They decide from the perspective of their own legal system. None of them has the competence to exclude

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pretations. As Alexy does not describe this model one might suppose that his thesis rests an a misunderstanding.

[48] See also Afonso da Silva (2003), p. 154; Borowski (2007), p. 117 Fn. 72. In Sieckmann (1990), p. 149, the democratic legitimation of the legislator was regarded as an intrinsic formal principle, not based on substantive principles. However, as a legal organ, the legislator receives its competence only in order to promote the interests of the governed. Only moral autonomy includes a competence to make demands merely because one wants it and without further justification. In law, all competences of public organs and the formal principles that ascribe them must have a substantive justification. By contrast, Klatt (2014), p. 165, n. 188, advocates a strict separation of formal and substantive principles, without, however, giving an argument.

[49] This does not, however, imply that the balancing of formal principles is merely a specific form of presenting the balancing of substantive principles, as Afonso da Silva (2003), p. 154, suggests. Regarding the balancing of exclusionary formal principles, there is no way to replace it by a balancing of substantive principles. In contrast, as far as simple formal principles are concerned, a balancing regarding substantive issues can include them.

the demands of other organs. Hence, their judgments might diverge. However, courts might try to reach some convergence of their judgments and to find a common solution in a deliberative, non-authoritative manner, taking into account also the judgments of the other courts.

This pluralistic model can be grasped with the idea of competing interpretations of fundamental rights issues. These issues are resolved separately by diverse legal systems. But a competition of fundamental rights interpretations exists. Each interpretation claims to be correct and hence demands to be respected by other agents. However, the issue is not who should have the competence to decide finally, but how should one decide regarding the plurality of interpretations of fundamental rights. To this issue, formal as well as substantive principles are relevant. However, the substantive principles are the normative material that is used to form normative judgements that constitute the competing interpretations of fundamental rights. So in the end, the judgment of one court stands against the judgments of other courts.

However, there are various ways to present this conflict. One might set a balancing of substantive principles, as seen from one court, against the judgments of other courts backed by formal principles. This way, it seems as if formal principles enter the balancing of substantive principles, as the combination model suggests. On the other hand, one might regard the result of the balancing of substantive principles, which is represented by the judgment of a particular court. This judgment is supported by a formal principle demanding respect for the decisions of this court. Hence, the balancing includes formal principles on both sides, which refer to substantive judgments of different courts.

It might seem rare that the court itself regards its decisions as backed by a formal principle and not simply as correct in substance. However, the construction by formal principles becomes necessary when the relation to other courts must be assessed. The judgment of a court might have different strengths compared to competing interpretations of other courts, depending on the institutional character and legitimation of the involved courts. Hence, the model of competing interpretations appears to be more powerful than the combination model, even regarding the balancing of non-exclusionary formal principles.

8.5 Conclusion

The notion of normative competence is crucial for the model of autonomous reasoning and for the theory of law. The understanding of competences as a power to bring about a change in the normative situation according to and because of one's intention is well established. It has to be connected with the notion of formal principles, for in the model of autonomous reasoning, definitive obligations cannot be established by a norm-giver alone, but the norm addressee, in particular a law-applying organ, has to consider whether there are counterarguments against recognising the validity of a norm.

Formal principles also are the foundation of authoritative structures in law, insofar as they claim to exclude consideration of competing reasons. However, this exclusionary claim can only be raised in principle. The crucial element of law as a normative system, then, is the balancing of formal principles.

Regarding the balancing of formal principles, diverse constructions compete, in particular, the combination of the balancing of formal and substantive principles and the separation of the balancing of formal principles from a balancing of substantive principles. The "combination model" serves to justify (weak) legal authority. The "separation model" is necessary where exclusionary formal principles are involved, and the issue of the distribution of competences must be decided before substantive judgements can be relevant. Even where different systems compete, and both constructions are possible, the separation model has the advantage of allowing for a more subtle analysis.

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Chapter 9
Balancing and Interpretation

9.1 Introduction

In the model of autonomous reasoning, balancing is the characteristic form of normative argumentation. However, in legal argumentation, it seems complimentary, whilst the usual method is that of interpretation within a syllogistic structure of subsumption and deduction.[1] The issue of legal argumentation is to identify a legally valid norm and then interpret and apply it to a particular case. One starts with a statement of the legal norm to be applied. The interpretation aims not at establishing the definitive validity of a norm, but at the explication of the meaning of a norm. In contrast, balancing presupposes a conflict of normative demands, and the issue is to determine which norm is definitively valid regarding this conflict in the circumstances of the particular case. Balancing is required only when the definitive validity of a norm is contested. This might be the case, for example, for reasons of constitutional law in the balancing of fundamental rights, but also in the frame of interpretation, where different interpretive arguments compete.

Hence, the relation between autonomous and legal reasoning needs to be examined in more detail. First, one should note that the interpretive approach is not strictly incompatible with balancing. The model of balancing does not deny the existence of legally valid norms. The norms to be balanced must be legally valid. And since balancing aims at establishing definitively valid norms, the assumption that some norms exist in the sense that they are normatively valid is no problem from the perspective of balancing. These norms can be the object of interpretation. On the other hand, the justification of the assumption that the presupposed norms are valid, is not a problem of interpretation. The balancing approach is more fundamental in this respect; that is, interpretation refers to norms established by means of balancing.

[1] Möllers (2023), p. 126f.

J.-R. Sieckmann, *Autonomy and Law*, Law and Philosophy Library 150,
https://doi.org/10.1007/978-3-031-96578-4_9

Second, the opposition of interpretation and balancing must not be conflated with the dichotomy of subsumption and balancing. Subsumption and balancing are clearly distinct modes of norm application.[2] Subsumption presupposes a consistent set of norms, balancing a normative conflict. However, a complete argument cannot consist either in subsumption or in balancing. Balancing arguments include elements of subsumption, for example, in order to determine the applicability of some principle to a case. On the other hand, subsumption is part of an interpretation that, will apply norms justified by means of balancing, or itself may require the balancing of competing interpretive arguments. Hence, the dualisms of, on the one hand, interpretation and balancing, and on the other, subsumption and balancing, must be distinguished.

The difference between balancing and interpretation exists, although one can present balancing in a syllogistic form, by stating premises that explicitly or implicitly require balancing. For example, one can state as a first premise that one should find an optimal or appropriate solution regarding conflicting principles or rights. The balancing then determines what is considered to be optimal or appropriate. But this does not make balancing an instance of interpretation. The balancing does not determine the meaning of the terms "optimal" or "appropriate". Rather, it determines which solutions are considered as optimal or appropriate.[3] Hence, it determines the scope of application of the norms involved, not their meaning. In contrast, interpretation is regarded here as defining the meaning of some object.

The crucial characteristic of legal interpretation, in contrast to balancing, is that it presupposes the validity of the interpreted norm, at least hypothetically, in the sense that its validity is not the issue of the argumentation. In the model of balancing, legal interpretation may proceed in two ways. First, balancing establishes priority rules according to the concrete weight of the competing arguments. These priority rules can be applied in new cases without again entering into a fresh balancing. Second, the result of the balancing is a definitive norm that gains an existence independent from the balancing. The result of a balancing can be considered from outside the balancing. It is not merely a balancing judgement, but also a regulation, which has norm-addressees and a norm-creator, and can be applied by norm-applying organs distinct from the one forming the balancing result. Hence, the definitive norm resulting from a balancing can be treated not merely as a balancing judgement but as a valid norm with semantic content on its own. This norm can be the object of interpretation.

[2] See Sieckmann (1990), p. 18; Stück (1998), pp. 405–419; Alexy (2003a), p. 433.

[3] Regarding the distinction between intension and extension, the issue is the determination of the extension of terms like "optimal" in a particuar context, not their meaning in the sense of the intension of this concept.

9.2 Reasoning with Priority Rules

Priority rules are justified through balancing, which applies a balancing scheme together with assessments of abstract weights and degrees of fulfilment to the facts of a case.[4] The case is described by certain features. Hence, it is not a single state of affairs, but a class of individual cases that display the respective features.[5] The balancing scheme can be defined by an evaluative function that connects combinations of values of abstract weight and degrees of fulfilment with priorities.[6] For example, one might use the values high (h), medium (m), and low (l) for both types of factors and stipulate that the steps on these scales are equal. Hence, the possible values of the concrete weight of an argument are: hh, hm, hl, mh, mm, ml, lh, lm, ll. An ordering of combinations of these values would be:

(1) hh
(2) hm, mh
(3) hl, mm, lh
(4) ml, lm
(5) ll

Balancing functions can be more complex. However, it seems advisable to start with a function that is not more complicated than necessary.

A balancing will assess abstract weights and degrees of fulfilment. For example, in the domain of fundamental rights, in general one may regard fundamental rights as equally important. However, some are more important than others, for example, freedom of expression in the context of democratic debate, or less important, for example, freedom of expression where the intention is merely to humiliate someone else. On the other hand, personal honour may be more important than normal if children are concerned, or less important than normal if someone himself actively participates in debates. Regarding freedom of expression, the interference might be qualified as high if some speech is prohibited and threatened with a penal sanction, as medium if a prohibition is supported by a civil claim to damages, and as low if it is a mere prohibition without further sanction. Regarding personal honour, the interference may be regarded as high if the infringement of personal honour also affects human dignity, or as low if it is directed not against the person but against a particular behaviour. All these assessments are related to a particular context, but in this context, it is at least possible to make plausible assessments.

The balancing may, thus, lead to priority relations and definitive rules. For example, freedom of speech receives priority over personal honour and hence must be

[4] See Sieckmann (2018a), p. 152ff.

[5] A critique of balancing is that it only decides single cases and does not establish general rules. See Klement (2008), p. 759 Fn. 49; Jestaedt (2007), pp. 259f., 267f. This, however, rests on a confusion of the relevance of the facts of a case for the balancing and the generic or non-generic description of the facts of a case.

[6] Sieckmann (2018a), p. 166ff.

permitted where it is part of a public debate and not merely meant to humiliate, but addresses a problematic behaviour of the attacked person. This follows, for example, from a priority of an argument that is assigned a concrete weight hl against one with concrete weight ml. However, the applied priority rule does not refer to these concrete weights, but to specific features of the case (act of speech, part of public debate, not meant to humiliate).

After such a rule has been established, one can apply this rule in further cases instead of going through a fresh balancing. The relevant issues of this application will be whether a particular speech forms part of a public debate, and whether it is humiliating. Regarding the feature of public debate, one might further differentiate whether the attacked person herself takes part in the debate, and whether the speech attacks the person or merely her behaviour. The application of these features may require interpretation. However, the application is concerned with the meaning of these features and not directly with assessments of abstract weight and degrees of fulfilment.

Hence, the rules resulting from balancing can be applied according to their semantic content. Of course, a requirement of coherence is that both lines of argument must come to the same results. In the case of divergence, semantic interpretation or priority rules must be adapted so that the divergence is removed.[7]

9.3 Interpretive Balancing

Interpretation presupposes the validity of the interpreted rule. This validity will be justified by some balancing. However, rules do not act merely as a result of a balancing. After they have come into existence, they may be regarded from different perspectives: those of the norm-addressees, the norm-creator and the norm-applying organs. In contrast, reasoning with priority rules remains in the perspective of the balancing judgement. Regarding priority rules, one can follow a previous balancing judgement or make a fresh one, but both options are considered from the perspective of someone who is in charge of the balancing.

After a norm has been established, diverse perspectives are possible. Hence, the norm has an independent existence. It is not merely the expression of a balancing judgement but may be regarded as a norm with content on its own. It cannot be regarded as a mere result of a balancing because other agents might not be able to enter into a balancing on the substantive issue. Hence, from their perspective, a rule might have an authoritative character, and the issue is how to understand the established rule.[8]

[7] On the requirement of coherence regarding different presentations of balancing, Sieckmann (1995a), pp. 55ff., 64f.; id. (2018a), p. 180.

[8] A further issue is how strong the authoritative character is. If the established rule is strictly binding, the issue can only be what it means. However, the authoritative character might hold only in

The independence of norms from balancing judgements that established these norms is important because norms often are indeterminate. The indeterminacy makes necessary interpretation. One might remove the indeterminacy by a more concrete balancing, which can consider interest-based arguments or other types of arguments.

On the one hand, one can ask what is the abstract weight and the degree of fulfilment regarding the interest-based demands involved, taking into account more specific features of a case. However, it is not obvious that this method is adequate for problems of interpretation. In addition, it is not clear whether this interest-based balancing is admissible regarding the application of the established norm, for the established norm might be backed by the authority of the norm-creating organ, and this might require asking what is the way the norm-creator understood the established norm. At least it might be admissible for norm-addressees or norm-applying organs to apply different reasoning and not to follow the assessments of a previous balancing.

On the other hand, the method of balancing does not necessarily need to be interest-based, but it may also apply to issues of interpretation, where one must attribute meaning to some text or other object and must choose among alternative interpretations. These issues may concern linguistic interpretation or legal interpretation. However, it is not clear what the features of this interpretive balancing are, in contrast to an open balancing, where no substantive norm is presupposed as valid that rules the case at hand.

9.3.1 Linguistic Interpretation

The issue of linguistic interpretation is how some terms, sentences, or more complex linguistic expressions are to be understood.[9] In general, interpretation is concerned with attributing meaning to some object. One might conceive it as an enterprise of finding the meaning of some text. This presupposes that the meaning of the text exists independently of the act of interpretation. The assumption of meaning that exists independently from interpretation is, however, difficult to maintain.[10] One might suppose that the meaning of terms depends on semantic rules, and that these rules consist in linguistic conventions, which are empirical in character. However, these conventions must be established, and this requires interpretation that does not already presuppose its result. In addition, the problem remains that linguistic conventions are incomplete and leave the assessment of some cases open.

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principle. Then a balancing will be possible, which includes formal principles grounding the authority.

[9] Alexy (1995), p. 73, calls this "interpretation sensu stricto", in contrast to interpretation regarding non-linguistic entities.

[10] See also Neumann (2023), § 2, 80 (no. 205).

In contrast, one might conceive interpretation as constructive,[11] that is, as assigning meaning to a text without presupposing that this is the meaning of the text independently of interpretation. Constructive interpretation can be understood as a kind of balancing. It uses competing arguments as to which meaning should be attributed to some text or some other object. The interpretive arguments differ from interest-based arguments that might be used to justify norms. However, they can be conceived as competing arguments as to which meaning ought to be attributed to the object of interpretation, and hence have to be balanced against each other.

In this line of argument, linguistic interpretation presents a normative problem.[12] The meaning of terms depends on semantic rules. These rules will consist, at least to some extent, in linguistic conventions, hence, are empirical in character. However, an empirical investigation into the conventional linguistic use of a term might show that semantic vagueness exists or does not exist, but it cannot present a solution to a problem of semantic vagueness, for vagueness exists when there are no semantic rules, and therefore empirical investigation cannot come up with such a rule. In addition, the convention as an empirical fact is not a normative argument. Hence, identifying a linguistic convention cannot answer the problem of how to interpret a term. This requires normative argumentation, in particular, regarding the question of whether an existing linguistic convention ought to be followed.[13]

One can distinguish between the meaning that the speaker assigns to some expression[14] and the way the audience understands it; that is, between intended and conventional meaning. With regard to the latter, there may be various ways of using or understanding an expression, which might be more or less well-established. Thus, the linguistic situation may include several elements: the intended meaning and diverse and more or less well-established ways of understanding it.

For example, if someone uses the term “cripple”, we face various issues of interpretation. Who can correctly be called a “cripple”? That is, what is the criterion to call someone a cripple, and what is the extension of this criterion? And what are the implications of using the term “cripple”? Is the designation “cripple” neutral, or has it some additional connotation? Is it offensive, or is it even meant to humiliate and, hence, an attack on human dignity? As to the latter, is such a connotation intended or the conventional meaning of this term? When one tries to describe the linguistic situation, one will probably find that the term is sometimes used neutrally, though in a somewhat rude manner; sometimes, it will be slightly offensive, and sometimes, it will be meant to humiliate a person. Hence, we will not find a

[11] The term “constructive interpretation” is used also by Dworkin. See Dworkin (1986), p. 52. However, the balancing approach developed here differs from Dworkin’s account, who rejects the method of balancing. However, one may well doubt that constructive interpretation is possible without balancing.

[12] See also Alexy (1995), p. 73.

[13] On the problem of normativity of linguistic meaning in general Klatt (2004), p. 122ff.

[14] On intentionalist semantics Koch and Rüssmann (1982), p. 139ff. Of course the speaker will make use of some linguistic convention, but the way he wants his expression to be understood does not necessarily conform with established linguistic conventions.

well-established and clear convention as to the use of the term "cripple" regarding its intension, its extension, and its implications.

If we face a concrete use of a term, like "cripple", it makes little sense to ask for the "true" meaning of the term. It seems that the answer as to the meaning of the term depends on what we want to know. Do we want to know the intended meaning, or do we want to know how the audience will probably understand the term? Hence, we might ask what is the intended meaning, or start a balancing of diverse arguments, stemming from the conventional and intended meanings of the term. In neither case, however, will we strike a balance amongst arguments for diverse interpretations. As long as we do not ask a normative question, we do not need a balancing of normative arguments.

However, we can ask how a term ought to be used or understood. Then, we face a practical problem, and competing arguments can be balanced against each other. It is a pragmatic problem of what to do, and the arguments may be of any kind that is relevant to the issue of interpretation. This problem of linguistic interpretation requires balancing, but in a general sense of deliberation. It is not a normative issue that requires an obligatory solution; that is, a norm that all ought to follow. It may be convenient to have a common understanding. However, this is not a normativity issue as in law or morality. Therefore it is not clear that the specific structure of balancing normative arguments applies.[15]

9.3.2 Legal Interpretation

Things are different if we have to interpret an expression in a legal context. Then, we face the question of which meaning we should attribute to the expression in order to achieve a correct judgement,[16] that is, we face a normative issue. This issue is not to be decided by linguistic interpretation alone.[17]

9.3.2.1 The Structure of Legal Interpretation

Consider, for example, the "Titanic"-case.[18] A satirical journal has called a paraplegic person a "cripple". Is this a neutral expression, or offensive, or humiliating? Do we have to look for the intended meaning or for the way the term is usually understood by the audience, and by which audience? This interpretation is not a purely linguistic issue but is guided by normative requirements. Freedom of expression requires not to attribute an offensive meaning to an ambiguous expression if one

[15] On this issue see below, Sect. 9.3.2.2.

[16] See also Alexy (1995), p. 77.

[17] See also Neumann (2023), p. 84 (no. 224).

[18] See BVerfGE 86, 1 – "Titanic". See also Alexy (2002a), p. 403ff.; id. (2003a), p. 437ff.

cannot prove that an offensive use was intended. Hence, the interpretation is a normative issue, although, at least at this stage, it is not one of normative balancing, where a conflict between competing norms has to be decided. There is only one norm that guides the interpretation in this case, which is a rule based on the freedom of speech. This rule is based on balancing, but the issue of interpretation to which it applies is, in the first place, not a matter of balancing.

However, issues of balancing occur in this case if we ask when we have to consider a particular speech as ambiguous, and what we have to require in order to prove the intention to offend. We might then argue that an effective protection of personal honour requires not being too demanding as to the strength or uniformity of the conventional use of a term, or with regard to the demands for proving the intention to offend. So, issues of balancing will appear. In many cases, legal interpretation will include judgements based on the balancing of competing normative arguments.

The typical case of legal interpretation concerns concepts included in the norm to be interpreted. In this case, the need for balancing normative arguments is even clearer, for the interpretation determines the way in which the norm is applied. This interpretation cannot be merely semantic, but must be constructive, determining the content of the norm in question by means of balancing.

An example is the right to the free development of one's personality, according to Art. 2 sect. 1 of the German Basic Law (*"Grundgesetz", GG*).[19] The scope of this right is disputed. One interpretation, established by the German Federal Constitutional Court, is that this provision includes the right to do whatever one wants, though subject to the constraint referred to in Art. 2 sect. 1 GG. Another interpretation is that only activities of some importance to the individual or of some value are protected as part of this fundamental right.[20]

The arguments relevant to this interpretation start from traditional rules of legal interpretation. The literal meaning rather favours the second position, that is, a narrow interpretation. However, the original intention of the framers of the constitution supports the first interpretation, for the materials of the process of the formation of the constitution show that the first interpretation was intended and the formulation was only changed to make the provision appear more solemn. A systematic argument in favour of the first interpretation is that the restricting clauses in the second part of Art. 2 sect. 1 GG would lose sense, at least in part, if the extension of the right to liberty were already restricted. Finally, there are arguments respecting the consequences of the alternative interpretations for other principles or values of law or of political morality. The first interpretation extends the protection of individual interests and makes possible a nearly complete judicial control of state action that

[19] Art. 2 sect. 1 GG: Everyone has the right to the free development of his personality as far as he does not violate the rights of others or acts against the constitutional order or the moral law ("Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.")

[20] See, for example, BVerfGE 80, 137 - Reiten im Wald, with dissenting opinion of judge Grimm, BVerfGE 80, 164.

interferes with individual liberty. It will, however, also enhance the judicial power to interfere with the decisions of political institutions, although they might have a stronger democratic legitimacy. Moreover, the idea of fundamental rights might suggest that not just any individual interest deserves constitutional protection but only important and valuable interests. Hence, there are competing principles and normative conceptions that make necessary balancing in order to decide on a priority among them. Moreover, the choice between different conceptions of fundamental rights, democracy, and judicial review is not determined by the constitution itself but depends on arguments from political morality.

The upshot of all this is that the interpretation of the legal concepts, for example, the concept of developing one's personality, is concerned with a great deal more than the semantics of this concept and the intentions of the legislator. Although linguistic arguments and legislative intentions form an essential part of interpretive balancing, this balancing may and usually will include a number of additional normative arguments. The semantic interpretation, as well as the intentions of the framers of the constitution, count as considerations in this balancing, for their legal relevance can be supported by normative arguments, such for example, the publicity and reliability of legal provisions, or the democratic legitimacy of the enactment of the legal provision. But the search for the semantic meaning of a legal provision or the subjective intention of a legislator will be no more than part of the argument and, especially in constitutional interpretation, often not even a decisive part.

Moreover, the search for semantic meaning or legislative intention need not lead to a conclusion regarding the linguistic meaning of the interpreted terms. The issue of the correct interpretation in linguistic respect can remain open. What matters in legal interpretation is the balancing of substantive normative arguments as to how a norm ought to be applied.

9.3.2.2 Criteria of Interpretive Balancing

The question remains whether the criteria of normative balancing apply to the balancing regarding legal interpretation. Can one apply the criteria of the degree of fulfilment or interference and of the abstract weight of legal principles to the arguments from the literal meaning, legislative intent, or systematic coherence?

It seems that this is indeed possible. For example, there are more or less clear cases of literal meaning. Accordingly, an interpretation against the literal meaning affects more or less the demand to follow the literal meaning of the terms. The same holds for legislative intent and for arguments of systematic coherence. Hence, the criterion of the degree of interference is applicable.

As to the dimension of abstract weight, it is important to note that the rules of legal interpretation respond to constitutional principles.[21] To follow the literal

[21] See also Koch and Rüssmann (1982), pp. 179, 181; justification by political theory ("staatstheoretische Begründung"), and below, Sect. 9.5. Underlying Principles.

meaning is a requirement of, for example, the principle of legal certainty and the protection of legitimate expectations, as well as of democracy, to the extent that the system is democratic. To follow the will of the legislature is a requirement of the principle of democracy and of the division of powers. Systematic coherence is a requirement, for example, of equal treatment. Thus, interpretive rules are connected with constitutional principles. One can assign abstract weight to them, depending on the abstract weight of these principles and the degree to which they are fostered or affected by following or disregarding the respective interpretive rule. Hence, the application of the model of balancing to problems of legal interpretation seems possible.

9.4 Rules of Legal Interpretation

The standard rules of statutory interpretation are literal meaning, systematic coherence, the "will" or intention of the legislature, and the reasonable meaning of the respective provision.[22] Although somewhat ambiguous, these rules indicate topics that mention crucial aspects of interpretation. They refer to the perspectives of three types of agents: the norm-addressees, the norm-creator, and the norm-applying organ. And they refer to three levels of interpretation: the particular norm, the legal system, and the general principles of law or political morality.

9.4.1 Perspectives

The perspective of the norm-addressees is decisive for determining the literal meaning of a norm. The issue is how norm-addressees normally understand the respective text. Alas, there may be sub-classes of norm-addressees. Norms might apply in a special domain, where the people involved have developed their own linguistic rules, for example, the terminology of experts. In addition, different groups of norm-addressees might follow different rules. The criterion of literal meaning is not uniform and unambiguous. But it is the criterion that must be applied from the perspective of the norm-addressees.

The perspective of the norm-creator is taken into consideration with the criterion of the "will" of the legislator. Norm-creation is an intentional act, and in order to understand its meaning, the intentions of the norm-creator are crucial. These intentions may concern the established norm, or a further goal that this norm is meant to realise. Hence, the legislative intention may require a particular semantic interpretation, or an interpretation that is suitable to promote the legislative goal. In addition,

[22] See Möllers (2023), p. 125ff.; Koch and Rüssmann (1982), p. 166.

legislative intentions may concern goals or values of the whole legal system, or even express a particular political morality not related to particular legal norms.

The perspective of the norm-applying organ is referred to by the requirement of reasonable interpretation. The norm-applying organ must consider which interpretation appears best according to its own judgement. However, it is a normative issue regarding the legal competences of adjudicative organs, whether they may interpret according to what they believe the reasonable meaning of a statute. A legal system might restrict adjudicative organs to the perspective of the norm-addressees or the legislator, so that they may only consider what is the ordinary meaning of the norm (or the system) or what is the intention of the legislator. Another issue of judicial competence is whether adjudicative organs may develop a reasonable solution based on their own balancing, or whether they merely may control the balancing of the legislator.[23]

9.4.2 Levels

Regarding the levels of interpretation, the most concrete level refers to the particular norm. The interpretation may proceed from the perspectives of the agents involved: the norm-addressees, the norm-creating organ, and the norm-applying organ. The corresponding questions are, respectively, what is the literal meaning of the text, as usually understood by the norm-addressees, what is the meaning that the norm should have according to the intentions of the norm-creating organ, and what is the meaning that appears reasonable from the perspective of the norm-applying organ.

The level of the positive legal system concerns the question of which interpretation coheres best with the other legal norms of the system. This coherence may concern the norm texts, the intentions of the legislator regarding other regulations, or the principles the law-applying organ regards as embedded in the legal system.

The level of general principles of law or political morality goes beyond positively established norms and concerns the question of what is the most reasonable interpretation of a legal norm or of the legal system. Alas, it is a matter of dispute how far the interpretation according to reasonable principles of political morality may go, and whether it qualifies as legal interpretation or as mere moral argument, with the further question of whether courts should engage in such moral argument. These are questions regarding the methodology applied in a particular legal system. In systematic respect, it is a specific type of interpretive argument.

[23] On the distinction between positive balancing judgements and balancing critique Sieckmann (2018a), p. 177ff.

9.4.3 Combinations

In theory, distinguishing three types of agents and three levels of interpretation permits nine combinations. Each perspective could be applied to each level of interpretation, and each level of interpretation can be considered from each perspective. In fact, not all of these combinations make sense or must be considered as admissible in legal interpretation. The possible combinations can be represented in a scheme (Table 9.1).

The perspective of the norm-addressees certainly is relevant regarding the usual understanding and, hence, the semantic meaning of the norm. However, it is not clear why the interpretation of the whole legal system by the norm-addressees should be relevant for legal interpretation. First, such a comprehensive view might rarely be developed by norm-addressees. Second, even if it exists, the question is which relevance it should have for legal interpretation. Its relevance might be founded on a discursive theory of law, but as the view of a single norm-addressee, its normative impact on the argumentation will be rather low. One cannot assume that a single normative view should determine the result of legal interpretation. Also, norm-addressees can sustain a particular political morality. Again, the impact of individual views on legal interpretation will be low. However, the question of whether the political morality dominating society is relevant to legal interpretation is a serious issue of debate.

The perspective of the norm-creating organ can refer to the interpretation of a particular norm, of the legal system, or to a non-positive political morality. The question is whether there are intentions of the norm-creating organ regarding these issues,[24] and why they should be relevant for legal argumentation. If one can state what the intentions are, their relevance depends on the status of the respective institution. One can hardly dispute that the intentions of a legislator with democratic legitimation matter. The remaining question is what importance should be given to them in a legal argumentation. On the other hand, regarding political morality, one may well ask why the political views of a norm-creating organ should be legally relevant if they do not form part of the legal system but merely represent a political ideology with no institutional support in law.

Table 9.1 Perspectives and levels of interpretation

	Norm	Legal system	Political morality
Norm-addressees	x	?	?
Norm-creating organ	x	x	?
Norm-applying organ	x	x	x

[24] The existence of a legislative "will" is an issue of debate. See, in particular, Dworkin (1986), p. 313ff. However, although the legislative "will" is a matter of construction, at least in some cases legislative intentions can clearly be ascribed.

The perspective of the norm-applying organ, asking what a reasonable interpretation of the law is, refers to the view of the law-applying organ itself, but must also be founded on "objective" criteria beyond a mere subjective judgement.[25] These criteria may refer to a particular norm, to the legal system, or to political morality. Regarding the particular norm to be interpreted, its literal meaning and its objectives must be taken into consideration. Regarding the legal system, a coherent interpretation must be presented or strived for. Regarding political morality, a debated issue is whether such arguments are to be considered as legal. However, even if they are considered as extra-legal, the competence of law-applying organs to use such arguments may be recognised. Indeed, it seems that legal interpretation will not work without such arguments.

One should note, however, that the systematic elaboration of *possible* interpretive arguments does not determine which of these arguments are admissible in a particular legal system. Also, an open question is how priorities between these arguments should be determined in case that the arguments conflict.[26] These are issues that can only be judged regarding particular legal systems.

9.5 Underlying Principles

The "rules" of legal interpretation (literal, intentional, systematic) are not rules in the sense of norms that determine a result whenever they are applicable. Rather, they are *topoi* that indicate where to find interpretive arguments. In order to construct normative arguments, one must explain why one should regard these *topoi* as rules that, in principle, one should follow. This raises the question of what the underlying principles that constitute interpretive rules are.

Why should one interpret a norm according to the meaning that norm-addressees attach to it? This follows from the action-guiding function of norms. Interpreting a norm in a way that norm-addressees understand facilitates obedience to the norm; interpreting it differently presents an obstacle to the fulfilment of the norm. Hence, the character of the norm itself requires interpretation according to its usual meaning. In addition, this helps the norm-addressees to direct their actions successfully, diminishing the risk that their goals are frustrated because of an interpretation of the norm they did not foresee. Hence, principles of personal autonomy and of legal certainty also support an interpretation of norms according to their literal meaning.

Why should one interpret a norm according to the intentions of the norm-creating organ? This helps the norm-creating organ to achieve its aims, and if its authority to create norms is legitimate, there is a reason to comply with the norm the norm-creating organ intended to establish. In addition, a system with a division of powers works better if the diverse powers support each other and do not act against each

[25] On the issue of objectivity see above, Chap. 6.

[26] On this issue in particular Koch and Rüssmann (1982), p. 176ff.; Alexy (1995), p. 90.

other. Hence, constitutional principles of (democratic) legitimacy and the division of powers support the requirement to interpret norms according to the intentions of the norm-creating organ.

Why should one interpret a norm according to the goals and values one finds in the legal system beyond the particular norm to be interpreted? The argument is similar to that for the interpretation according to the intentions of the norm-creating organ. The intentions of other organs of the legal system also should be respected, as far as they have legitimately found expression in the legal system, for example, in the form of a set of constitutional values or general principles underlying the legal systems or parts of it. A systematic interpretation that takes into account the whole legal system is also required by principles of rationality and equal treatment. A rational application of law should not include differentiations without sufficient reason. Hence, the same rules should apply as long as there is no justification for a differentiation.

To conclude, there are a number of normative principles that demand the use of the mentioned interpretive arguments. These have the character of formal principles in the sense of requirements to follow certain determinations notwithstanding their substantive correctness. Most of these principles have constitutional rank in democratic constitutional states. The theory of statutory interpretation sketched here hence has a solid normative foundation in constitutional principles. However, as these principles can conflict, the application of interpretive arguments in a concrete case requires balancing.

9.6 Conclusion

Legal interpretation should be regarded as a normative problem. This leads to the thesis that the interpretation of norms is a matter of balancing.

However, legal interpretation presents a specific structure of balancing. It is not merely concerned with a balancing judgement and its coherent application, but considers a balancing judgement from different perspectives: those of the norm-addressees, the norm-creator, and the norm-applying organs. This requires considering a norm established by means of balancing as an entity with its own content. Interpretation aimed at determining this content differs from the balancing by which the norm was established. Interpretive balancing introduces new arguments and requires a more complex form of balancing.

In particular, the independence of norms from the balancing that established them invests them with authoritative character. Their interpretation is not merely a matter of autonomous reasoning, but must take into account this authoritative character. The connection between the theory of legal interpretation and autonomous reasoning is provided by formal principles, which demand interpreting norms according to principles of, for example, legal certainty, democratic legitimation, or the division of powers.

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Chapter 10
The Foundation of Fundamental Rights

10.1 Introduction: The Notion of Fundamental Rights

The term "fundamental rights" is ambiguous and needs clarification.[1] Fundamental rights must have a special status against positive law, which makes their recognition in some sense necessary and independent from positive legislation. Their validity does not follow from mere positive enactment, but they present requirements to be recognised by positive law.[2] Hence, they are normatively justified by moral arguments, particularly by human rights principles. This implies that positive law cannot dispose of their validity. They must be recognised in positive law as in principle legally valid. Positive law might restrict them, but such restrictions need justification. In particular, such restrictions must be proportionate.[3]

Hence, although founded on human rights principles, fundamental rights are not mere moral rights, but legal rights. That is, they do not only demand legal recognition but actually ought to be applied in a legal system. Because of their special status, they are constitutional rights in a substantive sense.[4] The question, then, is why certain rights ought to be accepted as constitutional rights.

[1] On the notion of fundamental rights, in particular, Alexy (2006), p. 15. In Alexy's terms, the notion applied here corresponds to a substantial conception of fundamental rights.

[2] For a similar view see Palombella (2007), p. 398.

[3] See Sieckmann (2018b), p. 3ff., and above, Chap. 7, Sect. 7.3.

[4] On the notion of constitutional law as binding on legislation, Sieckmann (2007b), p. 31.

J.-R. Sieckmann, *Autonomy and Law*, Law and Philosophy Library 150,
https://doi.org/10.1007/978-3-031-96578-4_10

10.2 The Justification of Rights

Fundamental rights must be justified as normatively necessary, so that positive law must comply with them unless deviation is justified by proportionate reasons. Justifying rights independently of positive enactment implies that these rights hold as normative demands on each legal system. Hence, they are universally valid and, in this sense, human rights.

In the model of autonomous reasoning, various requirements of autonomous reasoning allow to justify universal rights:[5]

(1) a requirement of universality, that normative arguments, demanding recognition of certain rights, must apply to every autonomous agent who is in the circumstances to which the argument in question applies;
(2) the universalisability of individual normative conceptions, resulting from the balancing of normative arguments of autonomous agents, so that every reasonable agent can accept them;[6]
(3) the need to recognise a normative competence[7] on the part of autonomous agents to introduce arguments into a discourse and to make judgements based on the balancing of such arguments and, correspondingly, an obligation on the part of other agents to give due consideration to the respective arguments and judgements;
(4) equal weighting of individual normative conceptions of autonomous agents, in order for a rational consensus be possible;[8]
(5) recognition of equal rights on the part of every autonomous agent.[9]

These requirements imply certain universally valid autonomy rights.[10] They hold within every normative system, being necessary conditions of the legitimacy of its claim to be binding.

The core of human rights consists of autonomy rights as applied to human beings. As necessary conditions of the justification of norms, autonomy rights can be qualified "*a priori* rights". One needs to know nothing about human beings, their properties, and interests, in order to justify these rights, but autonomy rights follow directly from the structure of normative justification, which requires that every autonomous

[5] See also Sieckmann (2012), pp. 144–145.

[6] This comes close to Kant's "Categorical imperative", however, not regarding action-guiding norms, but applied to individual normative conceptions. In Kantian terms, one could speak of coherent maxims. The requirement of universalizability serves to exclude incoherent maxims from rational argument, but not to establish the validity of binding norms.

[7] Normative competence in the sense of power to bring about normative change. See also Chap. 8, Sect. 8.2.

[8] This resembles the demand of equal concern and respect, see Dworkin (1978), pp. 180ff., 272ff.

[9] See also the "discourse principle D" of Habermas (1996), p. 107.

[10] Autonomy rights apply universally to all who participate in normative argumentation, including human beings. See also Sieckmann (2022a), p. 90.

agent and every normative system recognise these rights.[11] According to the conditions of justification stated above, one can distinguish rights to:[12]

(1) equal concern for each autonomous agent, precluding arbitrary differentiation;
(2) respect for autonomy, including participation in argumentation and due concern for the arguments put forward;
(3) a normative competence of autonomous agents to put forward normative arguments and judgements, enabling them to establish argumentative obligations for other agents,
(4) the equal value of the individual normative conceptions of autonomous agents, and
(5) the impartiality of binding norms.

In addition, human rights also include "*a posteriori* rights", which refer to specific interests, normative attitudes, or judgements of human beings. Since they refer to specific human interests, they can be called "specific human rights".[13] Human rights principles demand respect for the fundamental interests of human beings.[14] In contrast with autonomy rights, such interests depend on what human beings actually are and want. They are based not directly on the structure of normative justification but on specific claims of autonomous agents, expressing their fundamental interests. These claims ought to be fulfilled as far as possible regarding competing principles and are capable of being balanced against other principles.[15]

One might doubt that there are specific human rights principles that are universally valid; that is, principles that act against any public authority quite apart from the legal culture in question. However, if one applies a wide conception of human rights, comprising every fundamental individual interest, such as life, liberty, property, happiness, political participation, and the like, there is no reason to deny the universal validity of such principles. What is demanded is merely that those principles be taken into account and be balanced against competing claims by the legal authorities. This implies that there is a human right to the correct balancing of interest-based claims of autonomous agents. One cannot avoid balancing in the domain of human rights.[16]

A complete account of human rights must not only state human rights principles and the requirement of correct balancing, but also which substantive human rights are definitively valid; that is, are justified as a result of the balancing of human rights principles with competing normative claims.[17] The problem here is whether there

[11] This need not be understood as a transcendental "*a priori*" in a Kantian sense, but rather that one can know something about the possible result of an argumentation before commencing with it.

[12] Sieckmann (2012), p. 146.

[13] See Sieckmann (2012), p. 148.

[14] Sieckmann (2012), pp. 148–149.

[15] On this notion of principles, Sieckmann (2011), p. 178ff. See also Chap. 3.

[16] On the relation between human rights and balancing see also below, Chap. 11.

[17] Sieckmann (2012), pp. 150–151.

are definitive human rights that hold universally against every public power. The balancing of principles requires value judgements on which reasonable agents may differ. It is also possible, and even likely, that different cultural backgrounds will, in some respect, lead to different value judgements and, accordingly, to different normative judgements. Thus, the limits of definitive human rights may differ among legal cultures. This does not, however, rule out a universal core of definitive human rights.

For example, the right to free speech rules out the case in which one's speech is met with the death penalty. This claim can be objectively justified as a definitive human right. One can easily imagine other examples of evidently unjustified interference with human rights claims.

Even if definitive human rights as moral rights can be justified by autonomous reasoning, this only constitutes normative arguments to be considered by the organs of legal systems. The question remains to what extent human rights that are definitively justified in moral respect, must be implemented by legal systems. This is the same question that arises with regard to human rights principles. Hence, from a legal perspective, it does not really matter whether pure moral reasoning provides a justification for definitive human rights, or whether mere human rights principles have to be considered.

10.3 Fundamental Rights

Fundamental rights are constitutional rights, founded on human rights principles. In this sense, they constitute necessary conditions for the legitimacy of a legal system. However, legal systems have some autonomy regarding the implementation of human rights principles. This leads to the problem in which sense fundamental rights are necessary.

10.3.1 The Legal Validity of Fundamental Rights

Legal systems must address the task of implementing human rights principles. Without recognising fundamental rights, no system can be legitimate in its claims to authority and bindingness.[18] Human rights principles require that certain rights be legally recognised. As principles, they cannot claim strict validity, and even recognition of human rights principles as legally valid is not completely determined by moral argument; rather, some leeway exists on the question of which rights are actually to be recognised as constitutional rights. Thus, the system of fundamental rights may vary among legal systems and is, to a certain extent, contingent. Therefore, by

[18] See, in particular, Habermas (1994), p. 151; see also Sieckmann (2012), p. 151.

contrast with human rights, fundamental rights need not be the same in each legal system. Recognition of a certain right might be fundamental in one system but not in another.

For example, the right to general liberty may well be justifiable as a human rights principle. However, constitutional law might decline its recognition as a fundamental right because of the consequences the subsequent extension of constitutional review would have for the principle of democracy or the division of powers. Or, the neutrality of the state in matters of religion may be crucial for the legitimacy of political authority in one society, so that state interference in religious matters must be excluded, but have little importance in another society.

Hence, positive constitutional law has a certain autonomy vìs-à-vìs human rights, which implies that it is bound by human rights principles but is, to a certain extent, free in balancing these principles.[19] On the other hand, this leeway is not unrestricted. Even though law might be regarded as binding for some other reasons than for implementing human rights principles, disrespecting human rights claims makes the law's claim to bindingness vulnerable. Hence, the issue is law's claim to bindingness, not yet its claim to validity.[20]

10.3.2 A System of Fundamental Rights

10.3.2.1 The Implementation of Autonomy Rights

With regard to morality, autonomy rights must be recognised as definitively valid, operating as constraints on balancing, without being themselves subject to substantive balancing; that is, a balancing with arguments that are not founded on requirements of autonomous reasoning. The only limitations that might be justified must be derived from the need to make rational argumentation possible. Any demand of such a limitation is itself subject to the need for rational justification and, since no substantive foundation of norms is available without autonomous reasoning, must presuppose the requirements of autonomous reasoning.

Where, on the other hand, legal systems are concerned, moral rights constitute normative claims that are only valid in principle. This holds also for autonomy rights. If there are valid arguments against their complete implementation, a legal system might limit such rights. For example, free discourse must be implemented in institutional procedures. This might require limitations of autonomy rights.

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[19] Sieckmann (2012), p. 151f.

[20] Legal validity might follow from reasons apart the legitimacy of law's claim to bindingness. For example, a legal system might provide order and security for the citizens. Resistance against the law might lead to violence and hence be unjustified for general moral or prudential reasons. This gives the system some legitimacy, although this claim may be attacked if the system violates autonomy rights in other respect.

It is difficult, however, to imagine what might justify such a limitation. Some rights, particularly rights to participation, might require specification as to their application, which might include some limitations. Hence, autonomy rights might generate internal conflicts. In general, however, no justification seems to be available for a limitation of autonomy rights that is not directed to implement autonomous reasoning, and hence, as far as autonomous reasoning permits, these rights must be recognised as definitively valid legal rights. If this requirement is not met, law's claim to legitimate authority is undermined, and its claim to validity is threatened.

10.3.2.2 The Implementation of Specific Human Rights Principles

Another question is whether there are specific human rights principles that are universally valid as legal rights; that is, that act against any public authority quite apart from the the legal culture in question. As with autonomy rights, the issue is the legitimacy of law's claim to bindingness, not yet its claim to validity.

Regarding the recognition of human rights principles, one cannot assume that every individual interest must be recognised as legally relevant in every legal system. An individual interest as such does not suffice to constitute a human rights principle. A justification is required for the obligation of law-applying organs to apply and follow such rights. An additional requirement that might justify the obligation of law-applying organs to recognise certain rights is that of sufficient importance of the advanced interest for human beings.[21] The question, then, is whether a demand to protect a particular interest is sufficiently important so that each legal system must recognise it as valid. The criterion of importance is, however, indeterminate, leaving it to some extent up to the positive law to determine which rights a legal system recognises as in principle valid. The set of human rights principles recognised as legally valid can, hence, vary among different constitutional systems.

Regarding the implications of human rights principles, what is demanded is merely that those principles be taken into account and be balanced against competing claims by the legal authorities. As a consequence, at least the correct balancing of these principles is a fundamental demand of autonomous reasoning, which holds for every legal system. Legal systems must, therefore, in principle recognise the right to the correct balancing of interest-based claims of autonomous agents.[22] Nevertheless, legal systems will have to determine which organs will be in charge of such balancing decisions and define the procedures in which balancing takes place.

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[21] See also Sieckmann (2012), p. 149.

[22] The right to correct balancing is, in first place, a moral right. It might suffer limitations with respect to its legal validity. A legal or even constitutional right to the correct balancing of interest-based claims might be too demanding or detrimental to the constitutional system, for example, respecting its consequences for a system of judicial review. Therefore, legal systems have to determine the extent to which they are willing to recognize such a right. However, in this decision at least they are subject to the claim of correct balancing.

On the other hand, the right to correct balancing might suffer limitations with respect to its definitive legal validity. A legal or even constitutional right to the correct balancing of interest-based claims might be too demanding or detrimental to the constitutional system, for example, respecting its consequences for a system of judicial review. Therefore, legal systems have to determine the extent to which they are willing to recognise such a right. However, in this decision at least they are subject to the claim of correct balancing.

10.3.2.3 Definitive Substantive Fundamental Rights

Another problem is whether there are definitive fundamental rights that hold universally in each legal system. The balancing of principles requires value judgements on which reasonable agents may differ. It is also possible, and even likely, that different cultural backgrounds will, in some respect, lead to different value judgments and, accordingly, to different normative judgments. Thus, definitive fundamental rights may differ among legal cultures.[23]

On the other hand, there are clear cases in which definitive substantive rights must be legally recognised. This might be required because of the overwhelming importance of some protected interests, or because there are no serious reasons for interfering with a fundamental interest. Demarcating of a core of definitive fundamental rights might be difficult and fuzzy, but this does not justify the conclusion that such rights do not exist. Rather, the problem is that in a developed constitutional state, the quest for such a core of fundamental rights is of little interest, because the protection of fundamental rights goes much further than these core rights.

10.4 The Emergence of Fundamental Rights

Having explained the system of fundamental rights and the different structures of their justification, another issue is how fundamental rights come into existence; that is, under which conditions the requirement of their justification are met. This issue may be called the emergence of fundamental rights. It is a normative issue that includes empirical elements.

[23] See also Sieckmann (2012), p. 150; id. (2001), pp. 235–249.

10.4.1 A priori- and a posteriori-Rights

The emergence of rights concerns *a posteriori*-rights. Whilst *a priori*-rights are justified as necessary conditions of normative justification and, hence, exist independently of particular empirical conditions, *a posteriori*-rights are justified as the result of argumentative procedures. The question then is when such procedures lead to the recognition of certain fundamental rights.

As pointed out above, definitive *a posteriori*-rights result from the balancing of human rights principles. Since this balancing is to some extent open in its result, definitive statements of which rights ought to be recognised will not be possible from a mere theoretical perspective. One must in fact carry out processes of balancing, and also intersubjective reflection of diverse balancing judgements. Also, this balancing will often not remove conflicts between diverse normative views. Finally, authoritative decisions are required as to which rights ought to be recognised as definitive fundamental rights. This is a matter of constitutional law, not of mere human rights discourse.

Hence, engagement in arguments about constitutional law is necessary. Since different constitutional systems exist, fundamental rights are relative to particular constitutional systems and, hence, are not universally valid rights. Still, constitutional argumentation must apply universal human rights principles. It is a balancing within constitutional law, but nevertheless not completely determined in its result and, hence, the entrance for human rights principles on which fundamental rights are founded. As far as constitutional law does not exclude consideration of these principles, they have to be applied in constitutional balancing. Hence, this balancing must be conceived as an interpretation of human rights, and this focus is common to all constitutional systems, considered as normative systems.

10.4.2 Reasonable Convergence

The issues that require decisions in the form of constitutional law are, first, which human rights principles ought to be recognised as principles of constitutional law, and, second, which substantive rights ought to be recognised as definitive constitutional rights. The final criterion for these judgements is that of reasonable convergence.[24]

The presupposition to apply this criterion is that a commonly binding norm is required. If no common norm is required there is no justification to state some norm as objectively valid.[25] If, however, a common norm is required, a norm that gains more and increasing support in a rational argumentation can legitimately be applied as objectively valid. Regarding fundamental rights, the need for a common solution

[24] See Sieckmann (2012), pp. 83f., 121–125.

[25] See also Sieckmann (2012), p. 82.

exists because rights issues cannot be left open. Denial of a normative solution would act against the claimed rights and, hence, would not be neutral. Therefore, a norm is required to determine whether, and to what extent, certain rights are recognised.

Hence, the question is which rights are founded on reasonable convergence. This foundation may be substantive, referring directly to the right's content, or formal, by justifying a legal authority that establishes rights.

10.4.2.1 Formal and Substantive Support

Legal validity is usually founded on authoritative enactment. However, legislative authority again must be justified according to the criterion of reasonable convergence. In addition, at least in theory, legal validity can be founded directly on the acceptance of a norm as legally valid resulting from rational argumentation and reasonable convergence. Also, combinations of formal and substantive justifications are possible. Authoritatively enacted norms might leave space for interpretation by substantive arguments, or authoritatively enacted norms might, in addition, be supported by substantive arguments. Hence, different structures of justification for statements of legal validity exist.[26]

For example, the right to general freedom, that is, the right to do whatever one wants is in principle recognised in German constitutional law.[27] The wording of the German constitution, the "Basic Law", is, however, not clear. It states a right to develop one's personality insofar as compatible with other people's rights, the moral law, and the constitutional order. However, the intentions of the constitutional legislator favour the interpretation as a right to general freedom, as well as the teleological argument for having an effective protection of personal autonomy. This led the German Federal Constitutional Court to recognise a general right to personal freedom. However, this formal foundation can be corroborated by substantive arguments. In particular, a general right to personal freedom must be recognised as a consequence of the idea of moral autonomy.[28] Autonomous agents will demand such a right, and this establishes a normative argument that cannot be set aside without a sufficient justification. The acceptance of the right to general freedom, hence, is founded on formal as well as on substantive arguments. Both are necessary to establish its recognition as a constitutional a right. Neither formal nor substantive arguments alone would be sufficient to establish such a right, but both types of argument together are.

Another example is the development of the general right of personality, founded on art. 1 sect. 1 in conjunction with art. 2 sect. 1 GG. This right is not explicitly mentioned in the Basic Law, but is founded on the guarantees of human dignity and

[26] For an analysis of the emergence of fundamental rights see also Crump (1996), pp. 795–916.

[27] Since BVerfGE 6, 32 - Elfes.

[28] See Sieckmann (2022a), p. 116ff.

of the right to general freedom. In fact, if one had chosen a narrow interpretation of art. 2 sect. 1 GG regarding the wording "right to the free development of one's personality", this construction would not be necessary. However, not only general freedom to act as one wants needs protection, but also some goods related to individual personality, like personal honour, one's own representation in the public in words and pictures, a sphere of privacy, the dominion about personal data, or the chance to reintegrate oneself into society after serving a criminal sentence. In this case, again we have formal recognition by the jurisdiction of the German Federal Constitutional Court, but also a substantive justification based on ideas of human dignity and, more specifically, individual personality.

More complicated are problems of balancing. In these cases, different constitutional rights or principles conflict. Balancing requires priority judgements according to the concrete weights assigned to the demands in conflict. Such judgements may appear clear, but often are a matter of reasonable dispute. Nevertheless, such disputes might find a solution.

For example, regarding freedom of speech and personality rights, the German Constitutional Court has established a system of rules,[29] which basically includes:

- a presumption in favour of the freedom of speech in cases of public debate;
- a presumption in favour of personality rights in cases of merely humiliating speech;
- the demand of balancing in the concrete case where these (and other) priority rules do not apply.

These rules are plausible, but could be different. Their constitutional status depends on the jurisdiction of the Constitutional Court, which again is supported by substantive arguments.

The relevance of substantive arguments is displayed by changes in the judicial practice due to a different weighting of the involved rights. Rights to personality may be given greater relative weight, because more importance is given to the protection of individuals, but also because the link between freedom of speech and democracy is weakened. Free speech might not longer be seen as always fostering democracy. Democratic discourse is hindered and damaged by insulting and infamous speech (hate speech). As a reaction, the application of the stated rules might change. Humiliating speech might not already be regarded as admissible if there is some legitimate motivation behind it, but even if there is a legitimate motivation, it might be regarded as a violation of personality rights.

[29] See, for example, BVerfGE 93, 266, 290.

10.4.2.2 Conflicts Between Formal and Substantive Arguments

Fundamental rights are out of dispute if formal and substantive arguments together support them. On the other hand, court decisions may conflict with substantive arguments. Constitutional rights' jurisprudence might be held up authoritatively against substantive arguments.

For example, in German constitutional law, the traditional view is that public taxes do not interfere with property rights, but only with the general freedom to act as one wants.[30] However, taxes imply the necessity to give up some property right, so that, in the end, property is affected. The motive for the traditional view is that interference with property rights had been identified with expropriation, with the consequence that compensation had to be paid. This would not make sense regarding taxes, so taxes were not regarded as interference with property rights. In contrast, nowadays, constitutional protection is also granted against interferences with property rights that are not qualified as expropriation. This could apply also to taxes. However, the traditional view is still upheld.

Another example where authoritative judgements are upheld against substantive arguments concerns the definition of expropriation and its demarcation against the regulation of property rights. The German Constitutional Court holds the view that this demarcation cannot follow the criterion of whether an interference deserves compensation. In contrast, it advances a formal demarcation, according to which expropriation is the taking of property rights, whilst regulation is conceived as the definition of property rights by general rules.[31] There is an obvious problem with this demarcation, that the general rules can take property rights; for example, patents could be derogated. Also, any act of expropriation requires a general rule that authorizes it, so that any expropriative act is an act based on the general regulation of property rights. The Constitutional Court has responded to this problem by limiting expropriation to compulsory purchase (Güterbeschaffung).[32] This, however, has the problem that from the point of view of the property holder, the interference is the same, whether a property right is deleted or given to someone else. If one understands fundamental rights as the protection of individual interests, this perspective should govern the interpretation of fundamental rights, and, hence, the taking of property rights should be regarded as expropriation regardless of whether the property is given to someone else.

In the end, a substantive counterargument does not change the jurisprudence of a court, but inhibits to regard this jurisprudence as justified by reasonable convergence. There may be convergence, but it is not reasonable. Of course, this assessment is a matter of dispute. Hence, there is no agreement on whether reasonable convergence exists. This remains a contested issue. This also implies that one

[30] See, for example, BVerfGE 95, 267 (300f.) (1. Senat).

[31] BVerfGE 52, 1 (27); 58, 300 (330).

[32] BVerfGE 143, 246.

cannot state the contrary position as valid constitutional law, as it is only a subjective judgement and not supported by general convergence.

10.4.2.3 Mere Substantive Support

An open question is whether fundamental rights can be established merely on substantive grounds. Then, convergence must result from rational argumentation, without support by authoritative arguments. This is a theoretical possibility. In fact, however, it seems unconceivable that a right might be recognised based on reasonable convergence, but there is no authoritative judgment of a court or some other organ supporting this view. The authoritative support needs not to be uniform, and there may be decisions for or against the recognition of a certain right. However, without any authoritative support, a right cannot be regarded as legally valid.

10.4.3 Criteria for Reasonable Convergence

Although reasonable convergence has an empirical foundation, it cannot be identified merely empirically. It remains a normative criterion and hence requires normative assessments. Certain aspects are relevant for the emergence of reasonable convergence:[33]

- the scale of support
- the quality of argument
- the urgency of interests
- authoritative support.

Authortitative support is a special issue, which is treated by the device of formal principles.[34]

Regarding the scale of support, convergence presupposes a great extent of support for a particular solution. Hence, the scale of support matters. Complete consent is not required. Even a minority opinion might claim to be supported by reasonable convergence if only some participants are qualified to judge and a particular solution finds greater support among them. On the other hand, the mere majority is not sufficient. A majority opinion might be attacked regarding its reasonableness. It might be based on faulty arguments and, hence, be rejected.

Regarding the quality of argument, reasonableness of convergence requires compliance with the demands of rational argumentation. This includes requirements of formal rationality (consistency, coherence, empirical correctness) as well as of practical rationality (universalisability in various respects, completeness, and coherence

[33] See also Sieckmann (2003a), pp. 105–122.

[34] See Chap. 7, Sect. 7.2.1, Chap. 8, Sect. 8.3.

of balancing). If such requirements are not met, a position might be attacked and rejected. However, the quality of argument is a matter of degree. Not any mistake disqualifies a position. In addition, mistakes might be corrected from a different perspective. In any case, arguments can be better or worse.

Regarding the urgency of interests, this is a general issue of fundamental rights. These rights protect interests sufficiently important to justify an obligation of law-applying organs to recognise these rights as legally valid. Although all of these interests have some importance, they can still be deemed more or less important. This depends on the assessment of the people affected, but also on assessments from different perspectives. Interests that are related to human dignity, personal identity, or individual conscience are particularly important. Other interests, for example, professional liberty, are less important.

The arguments from the scale of support, quality of argument, and urgency of interests may point into the same direction, but they can also conflict. If they point into the same direction, we have an easy case to state reasonable convergence. In the case of conflict, a particular type of balancing is required, distinct from the interest-based balancing of rights. Still, it is a balancing based on assessments of the importance of the diverse aspects of reasonable convergence. For example, strong empirical support may conflict with the quality of argument. This might lead to denying reasonable convergence regarding a majority decision. It might even lead to claim reasonable convergence for a minority position, if the majority opinion can be shown to be faulty and the minority position can be expected to win in a rational argumentation.

Strong empirical support may also conflict with the urgency of interests. For example, freedom of conscience may be regarded as prior to majority opinions, although it need not be based on better arguments. But as it is essential to the individual, majority opinions might have to yield.

Similarly, conflicts between rationality and urgency of interests can occur, and might be resolved in favour of the urgency of interests. On the other hand, a different solution might be chosen if deficits in rational argumentation are particularly great.

Since all of these aspects are a matter of degree, the respective arguments can be more or less strong. Hence, it is not possible to state general rules regarding the relations between the aspects of support, rationality, and urgency. Reasonable convergence, hence, can remain a contested issue.

10.5 Expected Convergence

Another issue is whether one can justify constitutional interpretations as objectively valid independently from and before the emergence of convergence. This concerns, in particular, cases of balancing. Can one determine which solution is correct without going through an argumentation at the end of which a solution finds general support?

Since the criterion of objective validity is reasonable convergence, the question is whether one can identify solutions that will find reasonable convergence, before and independently of the fact that such convergence exists. If this should be possible, we must be able to identify solutions that will find reasonable convergence by criteria that do not again refer to convergence, but let one expect that the solution will be accepted as the result of rational argumentation.

An approach that might be useful in this context is Hart's idea of a "minimum content of natural law".[35] Because of certain anthropological conditions, Hart assumed that some rights would always be recognised in legal systems. Hence, one can expect that autonomous reasoning will lead to reasonable convergence about the legal validity of these rights. I will not, however, pursue this anthropological approach, but merely consider the structure of balancing.

10.5.1 Preference for Medium Solutions

One might expect that a balancing will lead rather to intermediate solutions than to extremes. This might be seen as an Aristotelian demand of moderation, implying that extremes should be avoided. One can support this with an argument for equal treatment. Everyone shall have equal consideration in the balancing; hence, no position should, in the end, be completely disregarded. This line of argument one finds also in the demand of practical concordance ("praktische Konkordanz"[36]) as a guideline for the balancing of constitutional rights. In addition, there are also arguments from the structure of balancing that suggest a bias for moderation and compromise.

Optimal solutions are those that are evaluated as best among the actually feasible solutions. Graphically, this can be represented by the Pareto-optimality frontier and indifference curves. Optimal solutions are situated where the highest achievable indifference curves touches upon the Pareto-optimality frontier.[37] Now, it is plausible that the Pareto-optimality frontier is represented by a convex curve and indifference curves as concave. Then, the optimal solutions will be found in the intermediate areas, not at the extremes.

This argument has, however, some presuppositions. Regarding the factual possibilities, it is plausible that gains in the fulfilment of a principle are more difficult to achieve the higher the degree of fulfilment is. On the other hand, the marginal rate of substitution of goods diminishes the more of the respective good one possesses. In terms of principles, the relative weight of a principle is lower the higher its degree of fulfilment, and increases the lower its degree of fulfilment.[38]

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[35] Hart (1994), p. 193ff.

[36] See Hesse (1999), Rn. 72; BVerfGE 83, 130, 143; Marauhn and Ruppel (2008), pp. 273–295.

[37] See, in particular, Hurley (1989), p. 70, and above, Chap. 4, Sect. 4.2.

[38] See Alexy (1985a), p. 270f.

These assumptions are plausible regarding interest-based arguments. However, some cases are different.[39] For example, the violation of trust causes the principle of trust to lose importance. The first breach of trust is most difficult to justify. The justification becomes easier the more often trust is broken, until there is no basis for reliance at all. However, in general, the preference for intermediate solutions seems to be well-founded.

10.5.2 Salience of Solutions

It is characteristic of balancing problems that solutions are a matter of degree. Sometimes, however, there are disruptive changes in the degree of fulfilment that is achievable, or in the relative weight assigned to the competing principles. This makes the respective solutions salient.[40]

A disruptive change in the degree of fulfilment occurs if particular circumstances affect it. For example, a television report about some crime affects personality rights to a much higher degree if the name or foto of the delinquent is published.

The relative weight of a principle changes disruptively if the underlying interest ceases. For example, the public interest in keeping something secret fades if data have already been made public.

Also, a disruptive change of concrete weights occurs when an additional argument comes into play. For example, free speech is particularly important in the discourse on public affairs because of the principle of democracy, since free speech is a condition for democracy.

Salience of some solutions does not necessarily determine the case. But it is at least plausible that a solution will be chosen at one of these points of disruption or salience.

10.6 Conclusion

Fundamental rights are constitutional rights founded on autonomy rights as well as on human rights principles. Legal systems are bound by these rights and principles when defining their constitution. However, regarding the recognition of morally justified rights as constitutional rights, legal systems have some autonomy. There may exist legitimate institutional reasons not to recognise morally justified rights as constitutional law.

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[39] See also Sieckmann (1995b), p. 179ff.

[40] This is inspired by the idea of salience in Lewis' theory of conventions. On the discussion of salience regarding conventions Postema (2008), pp. 41–55.

The foundation of fundamental rights usually includes not only substantive principles but also formal support. Formal and substantive reasons together may lead to reasonable convergence about the recognition of certain rights as constitutional law. There are diverse criteria for the assessment of reasonable criteria: scope of support, quality of argument, urgency of interests. In addition, authoritative support may generate convergence, although it must also be judged as to its argumentative quality. The arguments for reasonable convergence may point in one direction, but also conflict with each other. In the end, reasonable convergence can be a contested issue and is not immune from individual critique.

An issue for further research is whether one can assess reasonable convergence without completing procedures of autonomous reasoning, that is, from the perspective of an observer. Regarding the structure of balancing, two aspects have been identified: the aversion against extremes and a preference for moderate solutions; and the salience of solutions due to disruptive changes in the factors of balancing. However, these criteria only justify presumptions and do not determine a normative solution.

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Chapter 11
Rights Balancing

11.1 Introduction

Law as a normative system must include human rights principles and the principle of proportionality. Human rights principles follow from the demands of autonomous agents to respect their fundamental interests. The principle of proportionality requires a correct balancing of competing normative arguments.[1] Recognition of these principles hence presents a minimal requirement of the protection of human rights or fundamental rights. In this view, rights are connected with interests, that is, with demands of autonomous agents of what they want to be realised or protected. Rights serve or protect interests.[2] The derivation of rights from interest-based demands suggests that the structure of balancing corresponds to that of balancing individual interests.

This assumption, however, is not beyond doubt. The doubt results from the fear that a balancing of a right with other interests might give too little protection to the right. Rights are meant to protect individuals, and the interests of individuals might be overcome by collective interests. The objection is that the model of balancing is incompatible with the specific character of fundamental rights, which makes fundamental rights strict limits to state interference.[3] Hence, it is claimed that they must

[1] Sieckmann (2022a), p. 135; id. (2021), p. 119.

[2] There may be other theories of rights. However, the main reason to recognise rights is the protection of individual interests.

[3] See Habermas (1994), p. 315; Nozick (1974); Tsakyrakis (2009), pp. 468–493.

J.-R. Sieckmann, *Autonomy and Law*, Law and Philosophy Library 150,
https://doi.org/10.1007/978-3-031-96578-4_11

not be subjected to the proportionality test,[4] and a rights-based model is set against the model of balancing.[5]

This objection does not, however, put in doubt balancing and proportionality as minimal requirements for the protection of fundamental rights.[6] This minimal protection does not exclude stronger forms of human rights protection. On the other hand, a possible stronger protection of fundamental rights does not justify allowing disproportionate interferences with these rights. The problem is how to construct a stronger form of human rights protection within the model of principles.

A stronger form of protection must assign fundamental rights a status that makes them more than arguments in a simple balancing procedure. This is possible in two ways:[7] The first way is to modify the balancing. A second option is to exclude balancing in principle, an exclusion that holds, however, only in principle and might be overridden by particularly strong counterarguments.[8]

11.2 Modifying Balancing

A modification of balancing might take the form that rights should be assigned a particularly high weight.[9] If this is meant to express the actual weight of rights, assuming that this weight is high, however, this would not modify balancing but simply apply the demand of a correct balancing. If, on the other hand, the suggestion is that rights are assigned a relative weight that they do not have in a simple balancing, this would mean balancing incorrectly. Therefore, a specific protection of rights cannot result from the demand of assigning a particularly high weight to rights. The modification of balancing must take some other form.

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[4] Urbina (2017); Šušnjar (2010); Webber (2010), p. 179; id. (2009); Tsakyrakis (2009), pp. 468–493; Möller (2007), p. 454; Çali (2007), p. 251ff.; Greer (2004), pp. 412–434; Huscroft et al. (2014), p. 3 (“range of different understandings”).

[5] See also Tremblay (2014), pp. 864–890, who distinguishes “priority of rights-model” and the model of “optimisation of values”. See also Urbina (2017), p. 75ff., who considers the possibility to combine maximisation and rights model, ibid. 97, claiming that only one of them can be controlling the issue. In contrast, the view defended here is that proportionality presents a minimal form of rights protection, which can be combined with stronger forms. One should also note that it is not quite true that proponents of the “maximisation account” have not explicitly addressed this problem. See Sieckmann (2012), pp. 139, 149f., regarding exclusionary human rights principles, also Sieckmann (2013c), p. 292f.; id. (2001), p. 235; id. (1995b), p. 164ff.

[6] For a defense of proportionality see also Alexy (2002a); Barak (2012); Klatt and Meister (2012); Petersen (2015); Stone Sweet and Mathews (2019); Pou-Giménez et al. (2022).

[7] See also Sieckmann (2021), pp. 127–131.

[8] No solution is to limit the concept of rights to acutally existing, definitive rights See, for example, Webber (2014), who identifies rights with what is right (153) and distinguishes rights and claims to rights (144f.). The question remains of how to justify definitive rights.

[9] See, for example, Schauer (2014), p. 176.

11.2.1 The Problem of Aggregation

A first aspect in which the balancing of fundamental rights is distinct from a simple balancing according to the weight of competing arguments is that, in contrast to utilitarian balancing, the balancing of rights does not consider the number of agents affected. The risk that rights can be overcome by competing interests results, at least in part, from the fact that interest-based balancing can take the form of utilitarian balancing, which aims at achieving the greatest overall utility regarding the relevant interests. However, in this balancing, interests of low importance, if held by a great number of people, can supersede even very important interests of individuals or minorities. Regarding fundamental rights, this consequence cannot be accepted. It is the point of fundamental rights to exclude the marginalisation of individuals or minorities by the interests of majorities. Therefore, one must consider a different form of balancing for fundamental rights.

The problem is that in a utilitarian balancing, the effects on the interests of diverse people must be aggregated. Consequently, the number of the affected people counts.

For example, in the "trolley case",[10] where a decision has to be made as to whose life is to be sacrificed, a utilitarian would suggest saving as great a number of lives as possible.

By contrast, it is common to deny that the number of lives matter. An argument for this position can be found in Rawls' thesis of the separateness of people, which is directed against utilitarianism.[11] The separateness of people excludes the aggregation of the interests of all individuals on equal footing, without regard to the fact that they belong to different human beings.

The separateness of human beings is a consequence of the individualistic character of normative judgement. Which norm should be accepted can only be judged by individuals. There is no external perspective from which this question could be decided. Even if one accepted a moral obligation to give equal respect and consideration to each human being, this would conflict with the right of each individual agent to decide about his life. This conflict cannot be judged from an independent perspective but only from the perspective of each individual agent.

Therefore, one cannot presuppose that all individuals form part of a moral community in which all individual interests can be aggregated. Whether one should accept this utilitarian view is itself a normative issue that individuals have to decide upon. Hence, the separateness of persons is an assumption from which normative reasoning must start. This does not necessarily imply that the number of agents does not count. The fact that a great number of people are harmed is a relevant argument for balancing. However, the way in which it is considered in balancing is an issue of argumentation. This argumentation must be done by autonomous agents.

[10] See Engisch (1930), p. 288; Kumm (2007), p. 255.

[11] Rawls (1971), p. 27 ff.

11.2.2 Equal Standing

Hence, instead of aggregative balancing, balancing must be done from the perspective of each individual. Following Habermas, one can characterise fundamental rights as those rights that citizens must mutually attribute to each other in order to regulate their legal relations in a legitimate manner.[12] This means that the relevant criterion for the balancing of rights is the reasonable consent of the people and, in particular, of the affected rights-holders. Hence, a solution must be acceptable from the perspective of each individual.

However, reasonable consent is the general aim of autonomous reasoning and is not specific to fundamental rights. Normative justification is not possible if the interests or judgements of some autonomous agents are ignored or discriminated against. However, also utilitarian balancing complies with this requirement. Equal respect for the interests and judgements of each individual agent does not yet guarantee that the result of the balancing respects the fundamental interests of each agent involved. One might consider it reasonable that someone has to waive even fundamental interests for reasons of the common good. Someone might object, but this might be rejected as unreasonable. Reasonableness does not guarantee fundamental rights. The special status of individual rights needs another explanation.

The question then is which regulation of their fundamental interests will find reasonable consent. One can state as a general negative criterion that the regulation must be capable of finding general consent; that is, it must be universalizable in the sense that each agent could reasonably accept it.[13] This does not require acceptance by each reasonable agent, nor a presumption that reasonable agents would accept the respective regulation. It must only be possible that, as a result of rational argumentation, each agent accepts this regulation as a general law. This rules out, for example, regulations that are accepted only as long as oneself is not affected, but also any form of discrimination that does not give equal respect to each individual. Such regulation cannot reasonably be accepted.

However, the negative criterion is not sufficient to protect fundamental rights. As long as someone can reasonably reject a restriction to a fundamental right, the restriction is not justified. Hence, the issue is which restrictions all agents must reasonably accept. A suitable device for implementing this demand of universalisability is that of role-exchange.[14] Each individual must take up the perspective of any other affected agent and ask himself whether he would reasonably accept this regulation if he were in the position of the affected agent.

The criteria of universalisability and role-exchange do not, however, provide criteria that could guide the judgement in substance. Here, the criteria of abstract weight, degree of satisfaction, and concrete weight appear to be useful. It seems that the rule to decide in favour of the argument that has greater or greatest concrete

[12] Habermas (1994), p. 151.

[13] For different aspects of universalizability see Alexy (1989), pp. 65, 116, 190, 203, and 222–223.

[14] See Alexy (1989), p. 203.

weight regarding the circumstances of the case is universalizable. It can be accepted from the diverse perspectives of each individual agent.

11.2.3 Individual vs. Society

The question remains: which relative weight should be assigned to fundamental rights and public interests? One might explain the structure of rights balancing as putting the right of an individual against the interest of society, or the common good, conceived as comprising all the competing interests. Both parts have *prima facie* equal importance.

One might then assume that the priority depends on which interests are affected to a higher degree. However, it is not clear how this criterion could be applied to individuals or society. They might be regarded as subjects in conflict, or one might define their interests as the objects of balancing.

In a conflict between individual and society, the existence of the individual or the society itself may be at stake.

For example, sacrificing the life of a human being can only be justified to defend the existence of society. An issue of debate might be whether the existence of society only means physical existence, or whether some kind of "identity" may be declared a necessary part of the existence of a society. It is quite common that national identity is regarded as important enough to receive priority over the life of individuals. This, however, is a normative issue of debate. On the other hand, it is clear that the sacrifice of life cannot be demanded for societal interests that cannot be associated with the existence of society itself.

On the other hand, freedom of conscience or religion might also be regarded as part of personal identity, and, hence, as an issue of existence in an immaterial sense. As a consequence, these freedoms ought to receive priority against societal interests where the personal identity is endangered, whilst the interests of society are affected not in a way that puts in question the existence of society. For example, conscientious objection against the military affects society's in having effective armed forces. However, the effect is small, so freedom of conscience or religion must be given priority.

More generally, one might describe conflicts between individual and societal interests in a way that the possible solutions are assessed according to the degree to which they fulfil or detract from the overall interests of the individual on the one hand and society on the other hand. However, there is no measurement of degrees of the fulfilment of interests.

For example, which degree of fulfilment or infringement should be assigned to the integrity of a limb, to the possibility of expressing something, or to the exercise of a profession? There is no scale on which the magnitude of the fulfilment of interests could be measured.

A problem of comparing interests is that they are of diverse importance for the individual or for society. An approach that offers a possibility of comparison is to

consider individual and society separately, and require that both positions are fulfilled to an equal degree.[15] One might ask how important the fulfilment of an interest, or of some degree of fulfilment of an interest, is. This cannot be discerned objectively, but only by the individual or by society. Individuals, as autonomous agents, are capable of making such assessments. They can, or at least are expected to develop life plans or conceptions of a good life, in which they determine how important certain aspects of their life are for them. Regarding society, such an assessment is more complicated, for there is no single agent that could make the assessment. A construction of an ordering among societal interests is required, which will be a matter of dispute among individuals. However, although there will be no strict objectivity and no consensus, it is at least possible to try to develop such an ordering, and in some cases, the assessment will be quite clear.

The assessment will order particular interests according to their concrete weight,[16] that is, depending on the importance of the respective interest in the abstract, and the degree of realisation of the respective interest achieved or forgone by a particular solution. Within a particular context, one can distinguish interests of the highest order, for example, the existence of the individual or of society, of medium order, for example, fundamental freedoms or what society considers to be important, and of low interest. The scale can be more refined. In any case, one can compare suggested solutions according to the importance of the particular interests that they realise. The solution that realises the more important interest deserves priority. In many cases, there will be no clear solution, or the assessment will be disputed, but in some cases, the assessment of the importance of the particular interests will be possible, and there may even be clear cases where a particular solution is commonly accepted as correct.

For example, the choice of a professional career is important to the individual, but society is affected only to a low degree by individuals' decisions.

Regarding the balancing of the liberty of expression and the interest in public security, requiring to keep certain information secret, the priority depends on the assessment of the particular interests. In particular, the concrete weight of public interest in keeping secrets might be low where political mischief is disclosed.

Regarding the right to private property, the importance of private interest depends on the relevance of a property to personal life. Is it an economic good, which may be replaced by any other good of equal commercial value, or is it the centre of one's life? On the other hand, the public interest may be more or less important. In particular, there might be alternatives that realise the public interest to some degree, so that the loss of the societal interest is diminished.

It seems that an ordering of interests according to their concrete weight or importance is possible, and that on this basis, priority judgements can be developed. They often will be unclear or disputed, but a rational debate is possible.

[15] See the suggestion of Chapman (2013), pp. 259–274.

[16] See above, Chap. 4, Sect. 4.4.

A fundamental problem, however, is that the basic assumption of a confrontation between individual and society on equal footing is a particular individualistic view. This assumption itself needs justification. It is not clear that the individualistic view on the relation between the individual and society is the only option that is rationally justifiable.

One might even debate whether this solution is coherent. For it applies a balancing in which the factors are defined in a particular way. One might object that a balancing should follow the requirement to consider all relevant aspects in a comprehensive and unbiased manner. In this line of reasoning, the modification of balancing in favour of individual interests would be a manipulation of balancing for certain ideological reasons.

11.3 Exclusion of Balancing

The modification of the balancing of fundamental rights still accepts the need to balance these rights and therefore encounters the objection that it weakens the protection of individual rights, but also faces all problems of rational balancing. One might, therefore, suggest to avoid balancing. This will not be possible completely, but balancing can be limited to a second-order balancing, which might make decisions easier.

The claim to avoid balancing might be seen as a reconstruction of the interpretations of fundamental rights as "firewalls"[17] or "trumps".[18] According to these views, fundamental rights do not admit a balancing of the protected interest.[19] This suggests that rights are absolutely or strictly valid and not subject to balancing.[20] However, the exclusion of balancing can hold only in principle, for in the model of principle each normative justification has to start with normative arguments that figure as reasons in balancing procedures.[21] Apart from *a priori* rights, which must be recognised as necessary conditions of the possibility of normative justification, rights need a justification by normative arguments, but normative arguments do not hold strictly but allow for balancing. They do not exclude counterarguments. Indeed,

[17] Habermas (1994), p. 315.

[18] Dworkin (1978).

[19] A similar idea is Dworkin's thesis of rights as trumps, see Dworkin (1984), p. 153. However, this thesis proposes the priority of rights against policies, it does not exclude balancing.

[20] A weaker form of exclusion is Dworkin's suggestion to exclude external preferences from balancing rights. This, however, might work in some cases, but does not explain the character of fundamental rights as excluding balancing.

[21] In contrast, Urbina (2017), p. 34, claims that there is no reason to think that some form of maximisation morally matters in human rights cases, ibid. 38. Rights are regarded as categorical, not permitting balancing, ibid. 97. However, there is no justification for the claim that rights do not permit balancing. Even if rights have exclusionary character, this holds only in principle with respect to conflicting arguments.

it would be irrational to exclude relevant arguments from consideration. Therefore, the idea of substantive rights that are strictly valid and can never be subject to balancing is untenable. The solution can only be found in a modification of the structure of balancing.

11.3.1 Rights Exempt from Balancing

The notion of exclusionary principles suggests a way to incorporate the idea of rights as restrictions of state powers into the model of principles founded on autonomous reasoning. At least some fundamental rights include the claim that, in principle, they ought not to be subject to balancing. This implies that they are, in principle, immune[22] against state interference.

Hence, human rights not only protect fundamental individual interests as principles to be balanced against competing demands, but also by principles that exclude the balancing of such interests. However, as founded on principles, the exclusion of balancing can be overridden. Therefore, the protection by exclusionary principles is not absolute. Rather, it creates a specific structure for the application of exclusionary rights. First, the legitimacy of balancing must be justified against an exclusionary right. Only if balancing is justified in procedural respect, a substantive balancing of the respective fundamental interest can take place.

As a consequence, two models of rights protection are to be distinguished. The protection by simple human rights principles leads to a balancing with all relevant arguments, which must follow the principle of proportionality interpreted by the model of optimisation. The protection by exclusionary human rights principles forbids state interference with exclusionary rights as long as the balancing of these rights cannot be justified.

11.3.2 The Justification of Fundamental Rights Exempt from Balancing

A justification of fundamental rights exempt from balancing must demarcate legal spheres that, at least in principle, are exempt from political power and, in addition, show that their recognition is a presupposition of the legitimacy of the legal system and its claim to bindingness.[23]

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[22] For the notions of competence (power), subjection, and immunity and their relations see Hohfeld (1923), pp. 36, 50 ff.; Alexy (2002a), pp. 155–156.

[23] This justification can follow exclusionary human rights principles, or might have independent grounds, where constitutional laws recognises exclusionary rights beyond human rights principles. Some fundamental rights might not be based on human rights claims. However, I will not address this issue here.

Legal systems claim that their norms are binding, but the bindingness of norms can be justified only if this claim respects the autonomy of the norm addressees. A legal system that claims to be legitimate must recognise the validity of autonomy rights[24] and aim to realise them. Therefore, legal systems must necessarily include certain kinds of fundamental rights required by individual autonomy. These rights are of two types: first, procedural rights that are necessary to justify the binding character of the results of the respective legal procedures, and second, substantive rights that demarcate individual spheres the outcomes of legal procedures must respect.

The idea of substantive fundamental rights exempt from balancing leads to the notion of exclusionary principles. Such principles demand that a balancing is not to take place on certain issues. However, principles may collide with other principles and be overridden by them. Fundamental rights principles, though exclusionary, need not be absolute. Nevertheless, the balancing, at least initially, must concern the issue of whether a competence to interfere with the fundamental right exists at all. A regulation of the substantive issue will be legitimate only if this question is answered positively. As a result, it may be the case that fundamental rights exclude such a regulation, even if it would be justifiable on substantive grounds.

The next issue is which rights should be regarded as, in principle, exempt from balancing. This idea seems quite plausible in the case of at least some fundamental rights. Even the general right to personal autonomy implies that individual lives should not be subjected to authoritative determination and, hence, must, in principle, be exempt from balancing. On the other hand, personal autonomy permits any choice regarding one's life and hence might well collide with the rights or interests of other people. Therefore, one cannot assume that personal autonomy, in principle, ought not to be subject to balancing if it is understood as the liberty to do whatever one wants to do. Although there is a normative argument that personal autonomy should be exempt from balancing, it is not plausible to accept this demand, even in principle regarding the right to do what one wants. Therefore, a general demand on legal systems that personal autonomy be exempt from balancing is not justified.

Arguments for the exclusion of rights, hence, can be justified only for specific liberties or rights, or under specific conditions. Only specific liberties can be recognised as, in principle, immune to balancing.

For example, the State should have no authority regarding the personal lives of the citizens as long as these decisions do not negatively affect other people. This holds even if their decisions are objectively wrong. Consuming drugs might be regarded as objectively wrong, but as long as no other people are concerned, there is no justification to interfere.

The choice of a professional career is up to the individual and not up to the state, even if a highly qualified person who could save many people as a surgeon decides to tend sheep in the mountains.

[24] See Sieckmann (2012), pp. 146; (2022a), p. 80ff.

The right to physical integrity contains the claim that legislation on how a living human being's organs are to be distributed in order to achieve an optimal result regarding the life and health of the whole population is precluded. It would be wrong, from the perspective of a fundamental right to physical integrity, even to begin an argument on this point.

Regarding the balancing of the liberty of expression and the right to privacy or personal honour, if one were to compare the importance that the publication of certain types of information or expression has, for example, photos showing prominent figures in everyday activities, with the need to protect privacy or personal honour, one might well conclude that the latter deserves priority. The point of the right to free expression, however, should be understood as excluding such a balancing, at least in general.

Similarly, the right to private property requires that there be no legislation on the use of this property, and that this decision is to be left to the property holder. Even if legislation might yield better results respecting the balancing of competing interests, a right to property as a fundamental right excludes such legislation in principle.

These examples show that a core of liberty rights indeed should be understood as exclusionary rights, in principle exempt from balancing. Regarding these rights, the State needs not only good reasons for an interference but also, in the first place, a strong justification as to why the State should be permitted to interfere with such a right. This view goes beyond the interpretation of rights as conditions of legitimacy of the legal order. It protects individual private spheres even in cases where there are sufficient reasons to restrict them. One might call rights that have this status "individualistic" rights. They are not only individual rights but presuppose a particular substantive view that emphasizes personal integrity, defining an individual legal sphere exempt from state interference.

These "individualistic" rights are, accordingly, in principle immune against balancing. They are not merely rights that are very important, but have a specific structure, which implies a specific structure of balancing. The prohibition of balancing means that legal organs do not have the competence to subject this right to a balancing procedure. Even if the result would be the same, the structure of the argument is different.

11.3.3 Consequences for the Structure of Balancing

How, then, do exclusionary fundamental rights principles affect the structure of balancing rights? They lead to a distinction between the issues of, on the one hand, whether one may interfere with the fundamental right at all, and, on the other, whether the interference is justified in substance. The answer to the first question follows from a balancing of exclusionary fundamental rights principles. The second question concerns the substantive issue of the correct balancing of competing principles. How significant this distinction will be depends on the weight that a particular legal system assigns to the exclusionary fundamental rights principles. If one

assigns very great weight to them, fundamental rights may become nearly absolute. If their weight is low or even zero, there will be no substantive protection of fundamental rights distinct from the demand of correct balancing. The weight of the exclusionary fundamental rights principles indicates the extent to which a legal system protects substantive fundamental rights.

The weight of these principles will be determined by the constitution and by the practice of constitutional interpretation, based on a normative theory of fundamental rights. This practice may be assessed according to criteria of objective validity. However, the weight of exclusionary fundamental rights principles cannot be determined independently of constitutional practice.

11.4 Conclusion

The normative validity of law implies the recognition of certain human rights principles, and of a demand for correct balancing of legitimate normative claims, in particular, of human rights principles. In addition, human rights principles might claim to be exclusionary, so that the protected rights are, in principle, immune to balancing. This construction takes up the idea of fundamental rights as "firewalls" against state intervention, although only in principle and not as an absolute protection.

Hence, the minimal protection of fundamental rights consists in their character as legal principles and the requirement to justify interference with these rights according to the principle of proportionality. In addition, fundamental rights can receive special protection. The special status of rights in a model of principles is due to an individualistic political morality, which assigns rights a status that is stronger than a mere normative argument in the balancing against competing interests.

Two constructions have been suggested for this special status. First, individuals and society can be regarded as subjects with equal standing in the balancing. The priority in a conflict of their interests will then be determined according to the importance that is assigned to the conflicting interests within the normative framework of each party. Second, rights can be conceived as, in principle, exempt from balancing. This constitutes a stronger and, indeed, plausible interpretation of a core of rights, which leads to a specific structure of the balancing of fundamental rights.

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Chapter 12
Normative Legal Pluralism

12.1 Introduction

The model of legal systems with ultimate power within their jurisdiction is challenged by the emergence of a plurality of legal systems, which all claim authority on their own and apply to the same legal cases, for example, national constitutional systems, the European Union, and the system of the European Convention on Human Rights.[1] This development threatens the idea that law could resolve conflicts in a normatively justified way and not by mere political power. The issue, hence, is how the emergence of legal pluralism can be accommodated in a normative theory of law, normative in the sense that law constitutes a justified system of norms.[2]

In a discourse-theoretical approach,[3] law as a normative order must organize society in a way that can be accepted by all its members.[4] In this sense, laws must be as such that everyone could reasonably consent to them.[5] One may further conclude that reasonable consent will be possible only if certain requirements are met, in particular, that the fundamental rights of each person are respected. To realise this ideal, law requires a political organisation that is not only able to enact legal rules, but also to apply and enforce them. This task has been assigned to national states, which have the authority to determine legal rules and a monopoly on the use of force in their territory, in order to guarantee compliance with the law. Indeed, following Kant, the existence of a single authority might be considered as essential for

[1] On the phenomenon of legal pluralism Berman (2012); Klatt (2014), p. 2ff.; Roughan (2014), p. 43ff.; Seinecke (2015); Encinas (2021), p. 103ff.; id., (2022), pp. 75–90; id. (2023), pp. 14–34; Scarcello (2023).

[2] See also Roughan (2014), suggesting a justification of authority based on an account of "relative authority" (8).

[3] See, in particular, Alexy (1989).

[4] See, for example, Habermas (1994), p. 151.

[5] See Kant (1968), § 46, A 166–167.

J.-R. Sieckmann, *Autonomy and Law*, Law and Philosophy Library 150,
https://doi.org/10.1007/978-3-031-96578-4_12

realising the idea of law.[6] This authority must, however, be bound in certain ways. On the one hand, individual rights should be guaranteed. On the other hand, the political legitimacy must be founded on democratic procedures.[7]

This model of a democratic constitutional state is challenged by the emergence of a pluralism of competing legal systems.[8] Since this pluralism is a fact,[9] the question is how to incorporate this pluralism in a theory of law as a normative system.

12.2 The Emergence of Normative Legal Pluralism

Normative legal pluralism requires the existence of diverse legal systems that make competing claims to obedience. Hence, the first issue is what is a legal system; another issue, what are conflicts between legal systems, which types of conflict exist, and how conflicts between legal systems should treated.

12.2.1 Legal Systems

A legal system is a set of norms identified by certain criteria of legal validity.[10] Different legal systems exist where systems apply their own criteria of legal validity, and none of the competing systems is in a position to impose its norms on the other system.

This includes two conditions for the existence of legal systems:

– criteria of legal validity of the respective system,
– no imposition of another system.

A legal system in a wider sense already exists when the first condition is met, that is, whenever specific criteria of legal validity are applied.

For example, in a federal system, as that of the Federal Republic of Germany, we have different legal systems in the form of the federal law and the law of its member states. These are distinct legal systems because they have criteria of legal validity on their own. A federal law does not form part of the law of a particular state, and a law of a state does not belong to federal law.

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[6] Kant (1968), § 41, A 155; § 42, A 157.

[7] See also Sieckmann (2022a), p. 17ff.

[8] Another aspect of legal pluralism is the interaction and cooperation between legal systems. See Roughan (2014), p. 48ff.; see also Roughan (2011), p. 258. However, I will focus on the phenomenon of competing legal systems.

[9] As a fact, it has been explored in sociological perspective since long. See Duve (2017), p. 90; Seinecke (2015), p. 32ff. More recently, it has been taken seriously also as a normative problem. See Roughan (2011), p. 254 with further references.

[10] See also Sieckmann (2009), p. 126, and above, Chap. 7.

A legal system in a narrower sense exists when the second condition is also met. That is, a legal system has not only its own criteria of legal validity, but, in addition, no other legal system can determine the legal situation in this system. One might describe this also as the sovereignty[11] or autonomy[12] of a legal system. In this context, the legal situation is defined by the legal norms that must be applied by the courts or other organs of a legal system. That is, it is defined by the norms that are legally valid in a normative sense. It is not identical to the norms that are valid according to the criteria of validity of the particular system. The criteria of validity of a particular system are arguments that guide the legal judgement; however, the final judgement on which norm ought to be applied is not directly determined by criteria of legal validity.[13]

For example, EU law cannot derogate the law of the member states by its own power; this would be possible only insofar as its member states granted this power. EU law has application priority against the law of the member states, but again, this is due to the fact that the member states recognise this application priority. The EU law cannot impose its priority over national law by itself. It can make this claim, but the legal situation depends on whether the member states recognise this claim as legally valid.

In contrast, although one might regard German federal law and the laws of the states as distinct legal systems, both belong to the system of German law. This is because the second condition does not hold. Federal law overrules ("breaks") the law of a state. The legal situation in a state is determined by the federal law. The courts in the state have to apply the federal law. There may be a conflict, but no competition between different legal systems.

That is, a legal system in a narrower sense exists if there is no alien legal system that can determine its content. Hence, norms that are valid according to some alien system do not automatically determine the legal situation in the former system.[14]

One might call the notion of a legal system in the wider sense, a descriptive notion of a legal system, and the notion of a legal system in the narrower sense, a normative notion of a legal system. The identification of the norms of a legal system according to certain criteria of legal validity is descriptive. It does not imply a normative claim that these norms actually ought to be applied and followed. In contrast, in the case of conflict, a legal system in a normative sense purports to impose norms[15] on another system, so that the legal situation in the latter system is determined by the norms of the former system.

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[11] On the notion of sovereignty Roughan (2014), p. 65ff.

[12] I prefer the term "autonomy" because autonomous decisions can be bound by normative principles, whilst "sovereignty" seems to imply the lack of normative restrictions. Since no normative system can be independent from moral requirements, it cannot be sovereign in this sense.

[13] See Sieckmann (2023), pp. 69–85, and above, Chap. 8.

[14] That is, a legal system in the narrow sense is not dominated by some other legal system. Hence, it is autonomous. On this terminology see Sieckmann (2012), p. 218ff.

[15] Insofar as these norms are, according to their content, applicable to the other system. It is possible that domination exists only for part of a system. Then, the system would be only partly norma-

12.2.2 Conflicts between Legal Systems

The pluralism of legal systems leads to conflicts when different legal norms have to be applied to the same legal case. A problem might arise because a court has to apply norms from different legal systems that demand incompatible solutions. This might result from the competition of normative legal systems. For example, national and supranational law that a court has to apply might conflict. However, it is also possible that a system incorporates norms of another system. For example, the constitution might incorporate international law, or international human rights law. Then, the system itself includes demands to apply norms stemming from different legal systems.[16] A more complex problem occurs when courts of different systems have to decide the same case. The first issue then is which court has the competence to decide: is there exclusive jurisdiction of one court, or are several courts competent to decide? Next, the issue is what to do if several courts have jurisdiction and hold incompatible views as to how a case should be judged.[17]

In all these cases, the question arises of how courts should act when facing demands from different legal systems.[18] The answer will depend on the normative relations between the competing legal systems, and these relations are defined, in the first place, by the systems themselves. However, the final question is how courts should decide when facing competing demands of the pertinent legal systems.

Accordingly, it is important to distinguish two levels, and two types to define the validity of legal norms.[19]

The first type is the usual juristic way to define the norms of a legal system by means of certain criteria of legal validity,[20] in particular, the enactment of a norm according to the requirements of the respective constitution. Reference to the constitution is typical for the modern constitutional state. On the other hand, legal systems may use other criteria of legal validity, for example, the sources of international law, as defined in the statute of the International Court of Justice, the sources of European law, or customary law. These criteria are, in some sense, positive. They can be identified from the perspective of an observer, that is, without judging which norm ought definitively to be applied and followed.

The question of which norm ought to be applied is the issue of the second type of defining legal validity. One can define legal validity by asking which norm a legal

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tive, partly merely a system in a descriptive sense.

[16] On this issue Mateos Durán (2023).

[17] See also Klatt (2014), p. 64.

[18] The existence of conflicts between legal systems is a fact, and one might describe how organs of the systems cope with this situation. As to such approaches Klatt (2014), p. 12. In contrast, the normative issue is how courts ought to decide in such a conflict. See also Encinas (2023), p. 16, and Hanschmann (2006), p. 364, who sees a deficit regarding explaining the normativity of theories about transnational legal processes.

[19] See Sieckmann (2009), p. 149; id. (2012), p. 206; id. (2018a), p. 61.

[20] See above, Chap. 7.

organ ought to apply and follow in a particular case.[21] In general, the first step in answering this question is identifying law according to the pertinent positive criteria of legal validity, in particular, legislative enactment. The subsequent issue is whether a legal organ ought to apply and follow the positive law. This is the question participants of the legal system, in particular judges, must address. Answering this question may require interpretation of law within the frame of the respective legal system. This interpretation may already include normative demands stemming from alien systems, but recognised by the court's own system. It might, however, even lead to a conflict between demands of positive law of the court's own system and alien normative demands.

This problem is well-known regarding the relation between positive law and morality or justice. Hence, from the participant's perspective, the occurrence of normative conflicts in the application of positive law is a common problem. However, conflicts do not only occur between positive legal systems and morality, but may also occur between normative demands from diverse legal systems. In this case, diverse legal systems direct incompatible and competing normative demands to the law-applying organs not only of the system itself but also to those of alien systems.

One might object that this is not a correct description of the situation of law-applying organs, since they have institutional obligations that are defined by the institution they belong to, and not by alien institutions. This view is, however, too simple.[22] Legal systems may react in different ways to the fact that alien legal systems make normative claims encroaching on other systems. They may explicitly reject such claims, be silent on this issue, or acknowledge that competing normative claims of alien legal systems ought to be taken into account by their own legal organs.

The last position we find in the doctrine of the German Federal Constitutional Court (BVerfG), which demands an interpretation of the German Constitution that is friendly to international and to European law.[23] Still, it upholds the priority of the constitution against international law, and, in a restricted form, limited to constitutional identity, also against the EU-law. But, the normative relevance of the claims of international law and the EU-law is recognised.

I do not have an example of an explicit rejection to consider norms of alien legal systems. Perhaps the common view in modern constitutional states is that the constitution forms the basis of the whole legal system,[24] and this implies that normative claims not based on the own constitution do not count. For this reason, an explicit rejection of alien normative claims might seem unnecessary. But even though, the question remains whether this positive rule should be upheld. For the competing normative claims exist, and participants of a legal system have to address the

[21] See also Sieckmann (2009), 15, 49, 119; id. (2018b), p. 8.

[22] See also Roughan (2011), p. 255, for the thesis that the authoritative claim of law need not be exclusionary.

[23] BVerfGE 152, 152, 177.

[24] See, for example, Radbruch (1932), p. 76.

question of how to react to them. A positive rule might constitute a strong argument, but it will not necessarily be decisive. An issue of interpretation remains.

The problem of interpretation is obvious if a legal system is indefinite regarding the consideration of alien normative claims. One can expect diverse views on this issue, some following the traditional view of the constitution as a normative foundation of the whole legal system, others suggesting that national legal systems should be open to international and supranational law. It remains an issue of interpretation of each legal system.[25] However, the problem of normative legal pluralism exists.

What is of interest here are conflicts between legal systems in a normative sense, which demand the application of their norms whenever they are applicable. Such conflicts exist irrespective of whether legal systems acknowledge normative claims of alien systems, or reject them. The problem exists as long as conflicts between legal systems are not resolved by conflict rules; that is, by rules regarding the priority of the norms of one system that determine the legal situation for the legal systems involved in a conflict. Then, the issue is how courts should resolve such conflicts.

12.2.3 Adjudicative Conflicts

A more complex problem arises if a court not only has to cope with the normative demands of competing legal systems, but if several courts have to judge on the same issue.[26] Regarding the competition of diverse courts, one has to consider two approaches: courts might claim exclusive jurisdiction, denying the competence of some other court to decide on the issue in question, or courts might recognise the jurisdiction of some other court, so that a conflict between competing jurisdictions occurs and the question arises of how a court should cope with judgments of the other court.[27]

In the first case, a conflict of claims to jurisdiction exists, and the question is which court should have jurisdiction, excluding the jurisdiction of the other court. This will be necessary, in particular when different courts apply the same norms.[28]

In the second case, both courts do not only claim, but have jurisdiction, so we have a conflict between jurisdictions, and conflicts must be resolved between

[25] In this respect, also the institutional relations between legal systems are relevant. Encinas uses the term "multilevel setting" to denote the case that different systems are related by "institutional design", Encinas (2023), p. 19.

[26] See also Sauer (2008).

[27] A special case is the incorporation of norms of an alien system. This might lead to competing demands of originary and incorporated norms. Hence, competing norms have to be balanced according to the reasons that support their normative claim. But there is no conflict of authoritative claims of diverse legal system. In this respect, the problem is the interpretation of law within a single legal system.

[28] See also Sauer (2008), p. 87ff.

incompatible judgments of the respective courts. This problem typically occurs when different courts have to apply different norms. In general, each court applies the norms of its own legal system and has jurisdiction to do this.[29]

Hence, we must distinguish two cases of conflict: conflicts about jurisdiction and conflicts between competing jurisdictions.[30] Conflicts about jurisdiction require a decision as to which court should definitively have the competence to decide. This is crucial, in particular, when distinct courts have to apply the same norms. Conflicts between jurisdictions occur when different courts have the competence to decide, and the issue is which of the competing substantive claims courts make with their judgements should receive priority.

12.3 Resolving Adjudicative Conflicts

The question then is how courts should react to competing normative claims of diverse legal systems and to conflicts about jurisdiction.

12.3.1 Competing Normative Claims

Legal systems include normative claims or requirements, which may compete in some cases. Finally, each of the competing systems determines by itself which of the competing claims it recognises and which rank it gives to it. But the normative claims of the competing systems exist and continue to exist whatever a particular system determines. Therefore, the organs of each system have to decide how to react to these claims.

If they deny taking into account the competing claims of other legal systems, the conflict cannot be resolved, and something like a "state of nature" results between the competing legal systems. Since it is reasonable to avoid such a "state of nature" and enter into a "state of law", it is necessary that courts react to normative claims of other legal systems, insofar as those can claim to be legitimate.

For example, a national system may claim that legal validity is determined by reference to its constitution. Nevertheless, the claim that EU-law is an autonomous legal system, which must be respected by the EU-member states notwithstanding its

[29] In theory, it is possible that a legal system or court denies the competence of a court of an alien system to decide according to the standards of its own system. This, however, would violate the autonomy of the other system and hence must be rejected in a model of competing legal systems, since these systems are conceived as autonomous. Hence, against Klatt (2014), p. 64, there is a relevant difference between the situation that different courts apply the same norm or different norms to the same case. It is telling that the example that Klatt offers as an argument refers to an inner-state problem, not to competing legal systems.

[30] See also the distinction of formal and material conflicts in Klatt (2014), p. 60.

constitutional law, must be considered by the courts of the member states. If they reject to do this, the conflict cannot be resolved by law.

The European Court of Justice (ECJ) can claim that EU-law has priority against the law of the member states. Nevertheless, it must consider the claims of member states that certain EU-norms or decisions contradict constitutional law and, hence, are not binding for the organs of the respective member states.

The legal systems belonging to the Council of Europe can claim that their constitution determines the validity and rank of legal norms. Nevertheless, the claim of the European Court of Human Rights (ECtHR) that some act violates human rights demands compliance notwithstanding the rules of constitutional law.

The ECtHR can claim that a state has violated the European Convention on Human Rights. Nevertheless, this claim will not become effective if the respective member state objects that this claim is incompatible with its constitutional law. Therefore, at least for pragmatic reasons, the ECtHR must consider the normative claims of the constitutional systems that are subject to its jurisdiction.

Indeed, courts respond to normative claims of competing legal systems, at least to some extent. The German Federal Constitutional Court (BVerfG) acknowledges the general priority of EU-law. Also, it demands an interpretation of the German Basic Law that is "friendly" to international law, in particular, to the jurisprudence of the ECtHR. The ECJ as well as the ECtHR recognise a "margin of appreciation" of the member states, at least in certain cases, and recognise a constitutional identity or fundamental constitutional values of the national states. Thus, conflicts are avoided to some extent. However, the possibility of conflicts persists, and actual conflicts occur.

12.3.2 Conflicts About Jurisdiction

A special type of conflict exists where courts of different legal systems have to decide on the same legal issue, that is, have to apply the same legal norms to the same case. Then, the question is who should have jurisdiction and, hence, the competence to decide.

An example is the definition of the scope of competences of the EU. The ECJ and the BVerfG have to decide on this issue, for the regulation of EU-competences has immediate effect in Germany. Hence, judgments on the same legal issue compete in this case. The conflict is resolved by the priority of the ECJ, which is established by the Treaty on the Functioning of the European Union (TFEU) and is, in general, recognised by the BVerfG, however, not without limits. The possibility of actual conflict remains. This situation is, again, in part resolved because the BVerfG accepts to some extent a violation of the German constitution by the EU, but not if it sees an evident violation. In contrast, the ECJ rejects a limitation of its exclusive

jurisdiction.[31] Hence, to some extent, the possibility of conflict persists, and the EU and its member states remain, in some respect, in a "state of nature".

Hence, conflicts about jurisdiction are a special case. In general, it is not necessary for a court to deny the jurisdiction of other courts to decide on certain issues. Rather, it will suffice to claim that the court's decisions are binding on other courts and hence affect the content of their judgments, without excluding the competence of other courts to decide on the issue.

12.4 Norm-theoretical Analysis

12.4.1 Formal Principles

The normative relations in adjudicative conflicts can be analysed with the device of formal principles.[32] In general, formal principles can be understood as demanding compliance with some norm or decision, not because it is correct in substance, but because one should follow it regardless of its correctness.[33] The notion of formal principles is, however, more complex.

The general characteristic of formal principles as demanding compliance without regard to correctness, is close to that of authoritative decisions. Authoritative decisions are characterised as binding even though wrong.[34] However, formal principles are not exactly linked to authority. Regarding the problem of competing legal systems, we can distinguish three types of formal principle, which in some way demand respect for certain norms or decisions:

(1) principles demanding compliance with legal practice, for example, the principle of legal certainty;
(2) principles demanding respect for certain decisions or views, without assigning them authoritative character, for example, the demand that constitutional interpretation be friendly to international law;
(3) principles demanding recognition of a competence to make authoritative decisions; for example, the demand for exclusive jurisdiction of the ECJ regarding the interpretation of EU-law.

These principles refer to the normative consequences attributed to some practices, decisions, or views. In addition, principles defining jurisdiction can be regarded as a fourth type of formal principles. They determine who should or may decide, and do not refer to the legal consequences of such decisions. Therefore, they form a separate type of formal principle.

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[31] See Klatt (2014), p. 121, with further references.

[32] See also above, Chap. 8 Sect. 8.3. Regarding this approach see also Klatt (2014), p. 156ff.

[33] Sieckmann (1990), 147f.; id. (2009), p. 137.

[34] Sieckmann (2012), p. 161.

Principles of the third and fourth type, assigning or distributing authoritative competence, lead to a special type of conflict with other formal principles, which demand attribution of an authoritative competence or exclusive jurisdiction to another organ. The issue, then, is who should have the competence to decide. A subsequent issue is, what effect a decision should have; that is, whether it is strictly binding or whether it is valid only in principle.

12.4.2 Issues Regarding Competing Adjudication

Following the above analysis, several issues have to be distinguished regarding competing systems of adjudication:

(1) the issue of jurisdiction: has an organ in an institutional system been permitted to judge on a certain issue?
(2) the issue of bindingness, which again comprises several issues:

    (2.1) the issue of normative competence: does a decision of an organ constitute a normative argument to follow it?
    (2.2) the issue of authority: has an organ got the normative competence to take a binding decision on a certain issue; that is, does it constitute not only a normative argument but does it receive at least *prima facie* priority against competing arguments?

The issues of jurisdiction and of bindingness can be combined, asking which effect the decisions of a particular organ within its jurisdiction will have. Two cases must be distinguished. An organ might have exclusive jurisdiction, or several organs might claim to have jurisdiction without the exclusion of other organs.

Exclusive jurisdiction leads to a distributive problem, that is:

(3) the problem of the distribution of authority: which of competing organs should have the authority to decide?

In this case, formal principles demand a particular distribution of authoritative competences. The conflict is about jurisdiction and competence.

Jurisdiction need not be exclusive, but several organs might be permitted to judge on a certain issue, and hence, several jurisdictions compete. Competing jurisdictions might lead to conflicts and to the need to define priority relations regarding competences or judgments. Formal principles compete also in this case. However, the conflict is not about the distribution of competence but about the normative effects certain decisions or judgments have for other organs.

More precisely, one should distinguish cases where some organ has an authoritative competence and cases where it might merely demand respect for its views as a simple normative argument. In both cases, the issue is:

(4) the strength of authority or of argumentative force: which effect does a decision or judgment of an organ have on the decisions of another organ?

12.5 Interlegal Balancing

Conflicts between legal systems lead to adjudicative conflicts if courts have to decide on the same case. Is this competition of different legal systems and of their organs a mere political conflict, or can it be treated as a legal problem?[35] Indeed, normative conflicts between legal systems can be resolved by means of balancing. The competing arguments are the reasons why one ought to follow the norms of a particular legal system.[36]

For example, popular sovereignty is a reason to follow the norms of a democratic constitutional state, insofar as they have democratic legitimation. A reason to follow the norms of the European Union is that it promotes legal integration and hence fulfils the reasonable demand to leave the state of nature and enter into a civil or legal state, applied to the relations between legal systems, analogous to Kant's argument regarding human beings. The norms of the European Convention on Human Rights might claim obedience not only because it is an international treaty, but also because it implements universal human rights principles founded on political morality.

Hence, each of the competing legal systems has a normative legitimation on its own, which gives reasons to obey their norms. These reasons can lead to conflicting demands of obedience, so that balancing becomes necessary. The balancing determines a priority according to the concrete weight of the conflicting reasons.[37] The concrete weight depends, on the one hand, on the relative weight of the respective reasons in the abstract and, on the other hand, the degree to which their demands are fulfilled or impeded by the envisaged results of the balancing.

For example, the weight of the argument in favour of the norms of a democratic constitutional state depends on the degree to which democratic requirements are complied with in this state, as well as in the competing legal systems. The argument in favour of the European Union depends on the importance of European integration in the respective domain. The strength of the human rights argument depends on the quality of the protection of human rights by the ECtHR compared to that in the involved constitutional system.

These are complex issues, and no easy answer can be expected. However, the question of which of the competing legal systems should be decisive can be treated in a rational manner, balancing the respective normative arguments. These arguments are, finally, the general reasons why one ought to obey the norms of a particular legal system and, more specifically, the reasons why a particular institution

[35] See also Encinas (2023), p. 16. The problem has been discussed regarding EU-law and national constitutional law. Neil MacCormick (1999), pp. 117–121, suggested a 'legal pluralism under international law', but admitted the possibility that conflicts between the systems remain unresolved and can only be decided politically (ibid., 75). Martin Borowski (2011), p. 196f., 206ff., has suggested a balancing of principles, which in most cases favours European law against national constitutional law but admits exceptions.

[36] See Sieckmann (2018a), p. 67.

[37] See above, Chap. 4; also Sieckmann (2009), p. 65ff.; id. (2018), p. 93ff.

should be invested with the competence to decide the pertinent issue. The reasons have to be assessed, according to the general structure of balancing, regarding their abstract weight and the degree to which they are affected by the respective decision.[38]

12.6 Normative Legal Pluralism as an Ideal?

Should one welcome the emergence of normative legal pluralism, or should one strive for legal systems that are unified, consistent, and comprehensive, so that any legal issue can be decided within a particular legal system? The traditional view regards the existence of one unified, consistent, and comprehensive system as an ideal of law. And that, if it is not possible to have only one legal system, then at least legal systems should be clearly demarcated and not overlap each other.

However, one might argue that normative legal pluralism is a progress in the development of law.[39] It permits the integration of diverse perspectives on legal issues and fosters opportunities for mutual learning among legal systems. This process of learning is not merely occasional, as in comparative law, but normatively necessary because legal systems will develop competing answers to the same legal issues.[40] In order to resolve the resulting conflicts between them, they have to consider the competing views developed in alien legal systems.[41]

Could one regard normative legal pluralism hence as a new ideal of law? An obvious objection is that this would suggest having as many legal systems as possible to cope with the same legal issues. This clearly could not be an ideal of law. Also it is crucial for law to have an institution that is capable of making final decisions.[42] Without it, conflicts remain unresolved, and one cannot be sure that well-founded rights will be respected. Therefore, in a pluralistic system, an authority is required to make final judgments on legal issues.

On the other hand, the existence of only one unified system in charge of each legal issue is not ideal as well. Since legal issues are often a matter of dispute, the existence of only one legal system with the authority to finally decide would suppress alternative views. Although, in the end, an authoritative decision on legal issues will be necessary, it might be an advantage that diverse legal systems develop competing answers to these issues.

But does this require to recognise a pluralism of legal authorities? Is it not an issue for academic discourse to develop and discuss diverse views on legal issues? However, the competition of diverse legal systems is not merely an academic issue.

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[38] Klatt (2014), p. 222ff., has offered a list of aspects relevant for the balancing of competences. However, the relation to the theory of balancing needs to be elaborated.

[39] See the dialogical approach of Torres Peréz (2009), p. 5, 95ff.

[40] On the idea of transnational constitutional law Sieckmann (2017), p. 411ff.

[41] For a similar idea see Besson (2005), p. 535; Roughan (2014), p. 146.

[42] Regarding EU-law, see the suggestions of Schmid (1998), p. 31, 46f.; Weiler (1999), p. 322f., 353f.

The competing legal systems have a legitimation on their own: popular sovereignty, political integration, or universal human rights. Therefore, there are independent reasons for the need to take the views developed by the respective courts and legal systems into account also from the perspective of other legal systems, and this makes normative legal pluralism a practical problem to be resolved by each system involved.

It seems that neither extreme, complete unification nor pervasive pluralism can be regarded as an ideal. Rather an equilibrium between unification and pluralism seems to be preferable. How to find such an equilibrium is, however, a contingent matter.

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Chapter 13
Law and Morality

13.1 Introduction

The normativity of law must be founded on autonomous reasoning. Hence, a crucial issue of a theory of law as a normative system is the relevance of moral argument for legal validity. No specific interpretation of morality is implied here. Moral validity is understood as normativity in the sense that the validity of a norm implies a requirement that it be applied and followed.[1] Hence, the issue is how this requirement can be justified regarding law in the model of autonomous reasoning.

In this approach, a conceptually necessary connection[2] between law and morality follows because legal validity implies an obligation to apply and follow it, at least for the law-applying organs.[3] It is a demand of practical rationality that a justification is presented for such a normative claim. Hence, legal validity requires a moral justification. Since autonomous reasoning seems to be the only viable approach for moral justification, legal validity must be justified in the model of autonomous

[1] As to this notion of normativity see also Sieckmann (2012), p. 52.

[2] The qualification as a conceptually necessary connection is redundant, for any conceptual connection is necessary. However, the duplication is useful in order to distinguish a conceptually necessary connection from a necessary conceptual connection. Since different concepts of law are possible, a conceptually necessary connection refers to the connection according to a particular concept of law, for example, the concept of law as a normative system followed here. A necessary conceptual connection would imply that each possible concept of law must recognise this connection. This would be a stronger thesis than the one analysed and defended here.

[3] See also Sieckmann (2018a), p. 8f. The focus on law-applying organs is useful because an obligation to apply and follow the law can be presupposed, and the question is whether this requires to consider moral arguments. In contrast, for ordinary law-addressees, the obligation to obey the law might be questioned.

J.-R. Sieckmann, *Autonomy and Law*, Law and Philosophy Library 150,
https://doi.org/10.1007/978-3-031-96578-4_13

reasoning. Hence, there is a necessary connection between a normative concept of law and morality, and in particular, the model of autonomous reasoning.[4]

The subsequent issues are, the implications of this connection for justifying statements of legal validity, the consequences regarding the obligation to obey the law, and the question of whether a necessary connection between law and morality also exists regarding the criteria for the identification of law, that is, the criteria of legal validity.[5]

13.2 Moral Correctness as a Criterion of Legal Validity

The primary question is how the criteria of legal validity are related to moral correctness. Is moral correctness a criterion for legal validity, and in which sense? The issue to be discussed here is, accordingly, whether it is admissible or indeed obligatory to state or to deny the legal validity of a norm owing to its moral correctness or incorrectness. The problem of the applicability of criteria of moral correctness within the law may be illustrated by the following examples:

(1) Let us assume that it is required by morality that the rights of animals be recognised, but the legal system does not lend support to such rights by authoritative decisions backed by formal principles. Is it obligatory or at least admissible to recognise legal rights of animals?
(2) Is it admissible or obligatory to deny the legal validity of norms prescribing racial discrimination on the ground that it is morally wrong?

In order to discuss these issues, several distinctions must be made. First, that between individual normative judgements and judgements claiming objective validity; second, that between direct normative judgements and normative statements of legal validity, and third, that between validity in principle and definitive validity.

[4] The notion of normativity used here is formal, but rather strong. Normativity implies a definitive obligation to accept, apply, or follow a norm. Weaker notions might merely demand a normative argument for such an obligation, to be balanced with competing arguments, or a *prima facie*-obligation holding in general but admitting exceptions, or recognition as a factor that must be considered. In contrast, a non-normative concept of law what deny any normative implicaation of legal validity, separation legal validity from an any kind of obligation to follow it. The need for justification holds for any type of normativity. However, the stong notions of normativity is presupposed in the following argument regarding the connection of law and morality with respect to the criteria of legal validity.

[5] In fact, that was the point of discussion on legal positivism in the line of the Hart-Dworkin-debate. See Sieckmann (1990), p. 174.

13.2.1 Objective Validity and Individual Normative Judgements

The first problem is that law claims to be objectively valid in the sense of being commonly binding, and an objective validity such as this cannot be claimed for mere individual normative judgements. Objective validity can only be asserted as the result of a process of inter-subjective reflection. Moreover, in order to establish the objective validity of a norm directly, not by means of an authoritative decision, this process must lead to a convergence of reasonable judgements.[6] This convergence cannot be established by the autonomous judgement of a single individual agent, even if based on inter-subjective reflection, but can only be the result of a discursive process. Still, the question remains: what is required from the result of a discursive process in order to provide an objectively valid legal judgement? There seem to be three ways to establish such judgements.

First, a reasonable convergence might support the substantive issue directly. For example, in many human rights cases, there is no serious doubt about the required solution. Also, laws enacted by an authorised legislator are objectively legally valid if there are no serious arguments against them, for example, on issues of fundamental rights. By reference to legitimate authorities, autonomous reasoning can render a bulk of legal norms as objectively valid.

Second, reasonable convergence might be achieved by rational argument, although the result is not directly supported by convergence. Objective validity may be claimed for individual normative judgements if they can be justified by objectively valid norms together with formal criteria of rationality, showing that competing views respecting the interpretation of these norms are mistaken and only the suggested individual judgement is correct.

Hence, the objective validity of a normative judgement does not presuppose direct substantive consent on the judgement in question. A normative statement of objective validity refers to the fact of the reasonable convergence of the normative judgements of the agents involved, which either stems from an argumentative procedure or from a more complex fact, which may include rational critique or reference to authorittive arguments. In particular, the result may be derived from an objectively valid legal norm together with criteria of rational argumentation.

Hence, reasonable convergence can also result from a rational critique of established legal norms. If a rational critique is based on principles not recognised by the legal system in question, it is merely an external critique and cannot show that an alternative norm is legally valid. In contrast, if recognised legal norms support another norm that mistakenly has not been recognised within the system itself, one can state the legal validity of the latter norm on the basis of the recognised norms along with the fact that there is no alternative interpretation that could be claimed to be valid. In cases where an established interpretation of a norm is rejected owing to

[6] Sieckmann (2012), p. 84. See above, Chap. 6 Sects. 6.3.1. and 6.4.

arguments of rationality, a convergence of reasonable judgements arises, for the competing judgements are qualified as mistaken on objective grounds.[7]

Third, legal validity might be claimed by a judicial authority for judgments that are not supported by reasonable convergence but present an intersubjectively reflected judgement of this authority. Disputed legal issues will not always be decidable on objectively valid grounds. In the case of a reasonable dispute, where both sides are rationally justified, and neither can prove the other to be mistaken, the question arises as to whether it is legitimate to claim legal validity for either of the suggested solutions. The issue, then, is whether legal validity may be stated in autonomous reflective judgements or whether it can only be stated in the case of convergence of reasonable judgements. In the first case, an individual may introduce moral arguments into his legal reasoning. In the second case, morality can enter into a legal judgement only if a moral norm can be established as objectively valid.

It seems that ordinary law-addressees are not justified in advancing legal judgements merely based on their autonomous reasoning. In contrast, the position of judges is different.

Let us assume, for example, that in the case of the protection of animals there is no objectively valid norm on the ground that there is no convergence of reasonable judgements. Someone might argue, after balancing the relevant principles and reflecting upon the various normative positions on the issue, that the protection of animals is morally required. According to the first position, he might claim that the principle of the protection of animals is legally valid. However, this is excluded according to the second position, for this principle lacks objective validity and cannot be considered valid law.

The exclusion of legal judgements founded merely on autonomous reasoning presents a problem for a judge who has to make a decision in a controversial case. He must claim that his judgement is correct in the sense that it is required by the prevailing principle and on the basis of inter-subjective reflection. However, if reasonable agents disagree, the norm in question is not objectively valid. If objective validity were a necessary condition for the justification of legal judgements, the normative situation of a judge in a disputed issue would be as follows:[8]

(1) There is no objective law on a certain issue, but the judge believes that one ought to recognise a particular norm as law, for the principles supporting it are of greater importance in the case to be decided than are the competing principles.
(2) Accordingly, the judge recognises the norm in question as valid. He makes a corresponding normative judgement and states the legal validity of this norm.

[7] This will not always lead to a unique result, for the possibility remains that a positively established norm is qualified as invalid but a reasonable dispute exists as to which alternative is legally valid. For example, norms instituting a dictatorship may be declared invalid, but the question remains which type of political system ought to be chosen. One cannot assume that all such problems can be decided on rational grounds.

[8] For a similar argument see Sieckmann (2009), p. 200.

(3) Thus, the judge is required to make a legal statement that is, in fact, not justified, for the norm stated is not objectively valid and, hence, not legally valid.

The problem arises from the assumption that judicial statements of legal norms must be objectively justified. A legal judgement would not be possible if reasonable convergence were required. In order to enable courts to decide reasonably disputed issues, one must give up the assumption that statements of legal validity must necessarily be objectively justified. Accordingly, judicial judgments may be based on autonomous judgements on the basis of inter-subjective reflection. They do not require or presuppose the objective validity of a norm.[9]

Accordingly, a court that has to make a decision may declare a norm to be valid law based on its inter-subjectively reflected normative judgement. This is a special type of normative competence. Legal validity is ascribed by the judgement, not merely described as a fact independent from the judgement. In fact, a court cannot avoid the step from the judgement that a certain norm ought to be recognised as valid law to the statement that this norm is valid law.

In contrast, an individual norm-addressee is not in the position of a court and cannot correctly declare his interpretation of law as definitively valid law. It would be odd if, on a disputed legal issue on which there is no reasonable convergence, an individual agent declared his normative view to be valid law. He can legitimately make a normative judgement as to which norm ought to be recognised as definitively valid law and offer his view as an interpretation of law. The further step, however, of stating this norm to be definitively valid law requires a competence to establish this norm as valid or at least a competence to make a normative statement as to this effect.

Crucial for this argument is the distinction between legal judgements and legal statements, which corresponds to the general distinction between normative judgements and statements. Any agent may form judgements as to which norm ought to be recognised as law. These judgements also present a reason to state the validity of the respective norm. However, this consequence is blocked by countervailing reasons. Regarding law, the objective character of law inhibits to state subjective normative views as presenting valid law. A subjective statement that a norm is legally valid, although it cannot claim to be objectively valid, requires the competence of a judge.

[9] In a certain sense, this might support Dworkin's view to leave aside the issue of objectivity in legal reasoning. However, the conclusion that the quest for objectivity does not make sense in general, is not justified. See also Rodriguez-Blanco (2004).

13.2.2 Legal Judgements and Legal Statements

Normative judgements are distinct from normative statements. Normative judgements express a requirement that a particular norm *ought to be* valid and state its validity, however, merely as the position of the judging agent. Normative statements state that a particular norm *is* valid, hence presenting it as a normative fact. Although these two types of expression are inter-related in the model of autonomous reasoning, they are not equivalent. The normative statement that a norm N is definitively valid complies with the demand made in a normative judgement that the norm N ought to be recognised as definitively valid. But, a justified normative judgement does not always justify a corresponding normative statement.

Analogously, legal judgements and legal statements must be distinguished. The conceptual distinction goes in hand with a difference in the mode of justification and the conditions of correctness of making legal judgements or statements. Legal judgements can be formed by every autonomous agent on the basis of the balancing of legal principles. By contrast, legal statements can correctly be made only under certain additional conditions. Conditions that allow one to correctly make a legal statement based on balancing are:

- the objective validity of the statement, based on the criterion of reasonable convergence and the need to have a commonly binding norm, or
- a competence to make a legal statement following a legal judgement based on balancing.

The first case applies to every autonomous agent. The second case responds to the need for courts to make statements about the definitively valid law, even in cases where no objectively valid solution can be established. In this sense, one can define the position of a judge by the competence to make legal statements based on legal judgements.

As to legal judgements based on autonomous balancing, they claim to present the law according to the view of the judging agent, but do not claim to state objectively valid norms. Nevertheless, they are not simple individual judgements but must be based on a process of inter-subjective reflection, including all legally relevant arguments. Moreover, a normative judgement of definitive validity will claim that the validity holds for normative reasons, not because an agent recognises its validity in his judgement.

For example, someone claiming the legal validity of a requirement for the protection of animals implies that this solution is required by the stronger argument and, hence, correct independently of his own judgement.

However, a legal judgement that a particular norm be definitively recognised as legally valid does not amount to a statement of its definitive legal validity. It includes merely a requirement as to which norm ought to be recognised as law. Any autonomous agent may put forward such requirements.

In this respect, there is a crucial difference between the legal judgements of judges presented in their authoritative decisions, and those of ordinary citizens. As

autonomous agents, following their own normative judgement, citizens might claim the legal validity of a norm in the sense that this norm be recognised as valid law. This, however, will only be their *interpretation* of law, which in this view ought to be followed also by other agents. It is not a *statement* of definitive legal validity.

In contrast to legal judgements, legal statements need an objective justification. In the case of statements based on balancing, objective validity may result from reasonable convergence. This criterion can apply to the norm itself, for substantive or for formal reasons, or to a legal competence to make statements based on normative judgements. In particular, since judges have the competence to make decisions based on their legal judgements, they can make legal statements as to the definitively valid norm even though this statement is merely based on their normative judgement. Since judicial statements claim to be founded on legal judgements, they are distinct from legislative acts.

Normative statements of legal validity, hence, require a positive as well as a normative foundation.[10] Legal validity requires reasonable convergence at some level of the justification, in substance or regarding authoritative competences, and convergence has an empirical, that is, a positive foundation. However, a legal statement can only be reasonable insofar as it is founded on rational argumentation. This argumentation must also consider moral arguments. Even if a legal system excludes moral arguments and restricts legal argumentation to positive sources, this exclusion must be justified. Hence, legal statements must, at some level of their justification, consider moral arguments; that is, assess normative arguments and judgements according to their substantive correctness.

In addition, the requirement of "reasonableness" opens the possibility to question the legal validity of positive law. Although a norm might be supported by convergence, the reasonableness of this convergence might be denied. The critique must refer to the requirements of rational normative argumentation, which are set out by the model of autonomous reasoning. On the other hand, the critique cannot merely refer to competing normative views. If a common norm is necessary, also those who hold opposing normative views must accept the legal validity of the norm supported by reasonable convergence.

To conclude, the objective character of law is not an objection against the relevance of criteria of normative or moral correctness for legal statements of what is definitively valid law. These criteria must be considered in the justification of legal statements. Failure to meet these criteria can justify a critique of statements of legal validity. However, normative views alone, without support by reasonable convergence, are not sufficient to justify statements of legal validity.

[10] In this sense, normative legal statements are based on balancing, and distinct from *a priori*-statements of necessary requirements of normative justification, which are justified analytically and hold for any legal system, not as statements of legal validity within a particular legal system.

13.3 Definitive Validity and Validity in Principle

A crucial distinction in autonomous reasoning is that between normative arguments and normative judgements, or legal principles and definitive norms. This distinction can be combined with that between normative judgements and statements. One can make judgements and statements of the legal validity of both definitive norms and principles. In both cases, one can discuss the relevance of moral correctness for legal validity. As the relation of normative judgements to normative statements has already been explained, I will confine the discussion to normative judgements.

In general, the justification of a legal judgement will be based on formal principles of law, requiring respect for authoritatively enacted law, but may also consider substantive principles of political morality and will ultimately consist of a normative judgement of an autonomous individual. Accordingly, normative correctness may come into play in two respects: respecting the selection of the principles to be considered and respecting the judgement based on the balancing of these principles. The question of whether moral correctness is or can be a criterion of legal validity requires different answers with regard to principles and to definitively valid norms resulting from the balancing of principles.

13.3.1 Legal Validity of Principles

Principles are valid on the ground that they express normative claims of autonomous individuals. In so far as these claims refer to a legal system, they form normative arguments for recognising certain legal principles. Such arguments do not directly establish the legal validity of the principles in question. There may be reasons against assuming their legal validity.

Not just any content will be suitable for a legal principle, only claims with content that refers to the formation of a legal system. Also, not just any claim might be sufficiently important to establish an obligation on the part of legal organs to consider it. Or the claim might conflict with arguments against recognising such a principle as legally valid. These might be other agents' claims. Even more important are institutional reasons against recognition of the legal validity of a particular principle, for example, because this might lead to increased judicial competences and raise a problem for the balance of powers. If, however, there are no objections or sufficient reasons to count against following the normative claims made by autonomous agents, these claims will constitute legal principles.

Accordingly, legal principles based on individual autonomy have an empirical basis. Since they are based on autonomous claims, no further justification is necessary to establish their legal validity in the sense that legal organs have to take them into account, at least regarding the reasoning about the legal validity of principles corresponding to such claims. All autonomy-based principles with legal content are legally relevant. They will also be legally valid if this is not precluded by the legal

system itself. Their legal validity does not require positive recognition. Positive law would only serve to exclude their legal validity.

On the other hand, as far as there are reasons against the recognition as legal principles, their legal validity is a matter of balancing. Accordingly, a normative judgement is required in order to establish the legal validity of a principle. This is, in the first place, an individual judgement founded on intersubjective reflection. In addition, in order to state the legal validity of a principle, a normative statement as to this effect must be justified. Hence, the general structure of autonomous reasoning applies also to the definition of the legal validity of principles.

In this reasoning, the legal system itself may intervene. A legal system might restrict the set of legally valid principles by requiring that a legal principle be identified by formal criteria, such as authoritative enactment, support by judicial decisions, or social acceptance within the legal community. The legal validity of principles may thus depend on further conditions.

For example, moral arguments might claim validity in principle within legal systems, but reasons of legal certainty might justify one's not taking into account purely moral arguments within legal reasoning.

Whilst in the field of morality, a valid normative argument will automatically be definitively valid as an argument, with respect to law or other institutionalised normative systems, one can distinguish between normative arguments that are definitively to be applied as principles of law and those which merely claim to be applicable but are excluded from the balancing of legal principles by overriding reasons. However, the restriction of the set of legally valid principles by a legal system must itself be justified. Therefore, it may turn out that the exclusion of morally valid principles from the legal order is itself unjustified and, hence, invalid.

There are two arguments suggesting that the exclusion of morally valid principles from the legal system will not hold strictly.[11] First, the formal criteria of legal validity have different weights. Direct enactment by the democratic legislator will have great weight. Indirect, slight support stemming from a judicial decision will have little weight. Since the formal support for legal principles may have very little weight, it is implausible to suppose that autonomy-based moral principles never have sufficient weight to prevail over the formal legal arguments that would exclude these principles from the legal system. Second, a legal principle might be affected to a very low degree, whereas an autonomy-based moral principle might be very weighty and, moreover, affected to a very high degree. Accordingly, the moral principle may be of great importance in the concrete case. Again, it is implausible to assume that legal principles will always override autonomy-based moral principles.

Nevertheless, it is possible that the exclusion of merely moral principles by a legal system is justified, given the features of the particular system in question. For example, a legal system might incorporate all the relevant moral principles, so that a conflict between the law and important moral principles will not occur. This may

[11] See also Sieckmann (1990), p. 197. Another line of argument against the closure of the legal system is suggested by Atria (2001), p. 218ff., relying on the idea of "images of law".

well be the case in constitutional systems that recognise human rights, democracy, and the rule of law. In this case, one can correctly state that only those principles formally recognised as law are legally valid. However, the conceptual possibility that mere moral principles can override formally recognised legal principles cannot be excluded.

The introduction of principles based on moral correctness makes it possible to declare authoritatively established norms to be legally invalid for moral reasons. This may be done in either of two ways. First, the legal validity of an authoritatively issued norm may be denied owing to a conflict with principles of justice.

For example, one might deny that racial discrimination is valid law. From this, it follows that there is no valid positive law on this point and, as a legal decision is required, this must be taken on moral grounds. Thus, moral principles enter into the legal system.

Second, one might make a positive statement on the legal validity of a norm that contravenes an authoritatively issued norm.

With respect to the example of racial discrimination, this means that racial equality is stated as legally valid despite the authoritative regulation to the contrary.

In both cases, morally valid principles constitute legal arguments unless the legal system legitimately excludes them.

13.3.2 Legal Validity of Definitive Norms

With regard to definitively valid norms, legal judgements are justified by means of the balancing of normative arguments, and legal statements refer to the results of such balancing. This implies that definitive legal validity requires the claim to normative correctness as well as some positive fact of establishing this definitive validity.

As to the claim to normative correctness, the statement of definitive validity must be based on the relevant legal material, but it is a normative judgement that cannot be derived from pre-established premises. Instead, it is based on the balancing of normative arguments.

A normative judgement claims absolute, non-relativised validity. It expresses the actual normative view of the respective agent, rather than merely the content of a normative system defined by certain criteria of membership. It is not merely descriptive or system-relative. Since normativity in this absolute sense is seen here as the characteristic feature of moral validity, ascribing legal validity by balancing of normative arguments includes a claim to moral correctness. The legal judgement based on the balancing of principles claims to be the morally correct decision with regard to the relevant material. It does not matter whether this material also includes substantive principles or only formal legal principles and the authoritatively issued norms supported by them.

This claim to normative correctness does not imply, however, that the norms established as definitively valid are just or morally correct. The result of the

balancing depends on the principles that figure as arguments in this balancing. If a legal system includes unjust principles, the result may be unjust, too. The claim of the judgement based on balancing is still normative in an absolute sense, in that it claims to be the correct solution on the basis of the relevant principles. But, the established norm may be morally wrong. The balancing of principles as such does not guarantee morally correct or acceptable results. Nevertheless, it rules out the possibility that legal judgements might be founded on formal criteria of legal validity alone.

As to the positive foundation of definitive legal validity, the balancing judgement itself presents a fact that can be identified empirically. However, autonomous balancing alone cannot establish legal validity. Statements of legal validity must be grounded on reasonable convergence or the competence to transform normative judgements into normative statements regarding legal validity. In both cases, definitive legal validity can only be established by some positive fact, that is, the fact of convergence or that of a judicial decision.

One might regard this as an argument for the positivist thesis that law can be identified by merely empirical and analytical criteria. Regarding the criterion of reasonable convergence, this is not quite true because reasonableness includes some evaluation. However, also social facts, for example, the acceptance of norms or the existence of institutions, can hardly be stated purely descriptively, without any evaluation. Hence, reasonable convergence may count as an empirical criterion.

However, the thesis of the empirical identifiability of law encounters two objections. First, an empirical identification is possible only at the level of definitive norms, disregarding the legal arguments and the process of justification of definitive validity. This restricted account of law does not correspond to the levelled structure of legal systems that include legal rules as well as legal principles. This structure is characteristic of the modern constitutional state. Hence, an objection against an account of law that does not consider the level of principles and the procedures of legal justification as parts of law is that it is incomplete and, therefore, inadequate as a general theory of law.

Second, the definitively valid norms identified empirically do not correspond to what a judge regards as law in his judgements. Judicial judgements refer to what is normatively justified as valid law. The identification of legal norms according to these judgements is only a secondary account of law, which is possible, but necessarily builds upon the normative account of law as presented in judicial judgements.

13.4 The Obligation to Obey the Law

Justified legal validity has implications for the obligation to obey the law. Autonomous agents may reject the law in substance; however, if a common norm is needed and the legal norm is supported by reasonable convergence, legal organs are justified in claiming this norm to be binding and enforcing it. This excludes the view

that autonomous agents should be permitted to disregard the law because of their diverging normative opinions.

However, the implied bindingness does not hold unconditionally and hence might be denied if its conditions are not met. First, a commonly binding norm must be needed. This is not the case as far as anybody can lead his life without negatively affecting other people. Second, the legal norm must actually be supported by reasonable convergence. This condition might be questioned because the alleged convergence does not exist, or because it is not reasonable. In particular, rational critique of the foundation of a legal norm can undermine the claim that it ought to be followed. Hence, not only does justified legal validity imply an obligation to follow the law if a commonly binding norm is needed and the legal norm is supported by reasonable convergence, but the obligation to obey the law can also be denied if these conditions are not met.

Although an obligation to obey the law can be questioned, there are a number of reasons that might count in favour of an obligation to follow the law, or at least justify the application and enforcement of law. In an attempt to give a systematic account of reasons to obey the law, one can first distinguish between the type of justification adduced, and the positive effects that are expected by recognising the law.

The type of justification can be analytical or conceptual, referring to the concept of law itself, or normative, relying on additional arguments beyond the concept of law. Such arguments can be founded subjectively, that is, referring to what people want, or objectively, referring to values or principles that are deemed to be valid independently of what people want. Hence, one can distinguish analytical, subjective, and objective justifications of the authority of law.

Regarding the effects of recognising the authority of law, these effects may consist in the existence of law itself, that is, they are conceptually necessary, or in benefits for individuals, or in benefits for society as a whole. One might call these alternatives, an analytical, individualist, or collectivist justification.

With these distinctions, one can identify nine types of justification. This is illustrated in Table 13.1.

One can also give examples of justifications that correspond to these classifications, which one finds in the diverse philosophical approaches to the justification of the authority of law.

Regarding the concept of law, one can characterise law as a normative order of society. This implies that law serves to resolve conflicts. Indeed, as Kant held, this is necessary in order to have rights. This is a necessary effect that the existence of

Table 13.1 Types of justification

Effects	Justification		
	Conceptual	Subjective	Objective
Necessary	Conflict resolution	Democracy	Reason
Individual	Legal protection	Human rights	Good life
Collective	Cooperation	Common good	Justice

law has. Insofar as conflict resolution is regarded as a positive value, the very existence of law has an intrinsic value. Law, hence, presents a value in itself that ought to be realised.

In addition, the concept of law as a normative order of society implies that law grants legal protection to its subjects. This is an effect that serves the interests of individuals. Following Hobbes' argument, without law, human life would be "nasty, brutish, and short".

A positive effect regarding society in general, beyond particular individual interests, is that law enhances cooperation between legal subjects. Without legal rules, it would be difficult to create the necessary trust among citizens that motivates them to cooperate, that is, taking some risks in the interaction with others in order to achieve a greater benefit for all partners.

Regarding subjective justification, the existence of law is founded on the interests or "will" of the legal subjects. An effect that a subjective justification necessarily has is that law is legitimised by the will of the people, that is, has a democratic legitimation (Rousseau).

A benefit of individuals from the existence of law regarding their interests is the protection of human rights. Insofar as law protects human rights, fundamental individual interests are guaranteed or realised (Locke).

Regarding society as a collective, the existence of law furthers the realisation of individual interests insofar as the common good is promoted by the law. This justification is considered here as subjective, for the common good is defined referring to the aggregation of individual preferences (Utilitarianism).

Regarding objective justification, law can be regarded as institutionalisation of reason. Demands of practical reasons are implemented by law in the form of principles of fundamental rights, democracy, constitutionality, or the rule of law. This is an effect that follows from the very existence of law, insofar as it has reasonable content (Hegel).

In addition, the existence of law might serve individual interests that, however, are not defined by the individual itself but regarded as objectively valid. This could be a particular conception of a good life that is promoted by the law (Aristotle).

Finally, an objective justification with collective benefits might refer to the idea of justice, which is at least to some extent realised by the law (Radbruch). Insofar as justice is regarded as an objective value that is not derived from individual interests, the justification is objective. And insofar as justice concerns the formation of society as a whole, the benefits are not received by particular individuals, but by all individuals together.

One should note that only the conceptually necessary justification always presents a reason to recognise the authority of law. All other justifications are contingent from the perspective of law. Law is not necessarily democratic, reasonable, just, or protecting peace, order, and human rights. In addition, some accounts may be regarded as unjustified. If, however, law complies with justified demands, they give a reason to recognise the authority of law.

One should also note that diverse justifications of law might conflict and compete. For example, legitimation by democratic principles or by human rights might

compete, or democracy and justice, or justice and the common good. In case of conflict, some justification argues for the law, and another justification acts against recognising the authority of law. Thus, the question arises of which justification is stronger.

However, one should not exaggerate the occurrence of such conflicts. In general, several justifications of the authority of law support and reinforce each other. In case of conflict, the criteria for balancing are, the abstract weight or importance of the respective arguments, and the degree of fulfilment that is achieved or foregone by a particular solution. The balancing requires an autonomous judgement of the law-applying organ in charge. However, different organs might support the same view, so that a reasonable convergence about the obligation to obey the law emerges. Even if this should not be the case, legal statements as to the obligation to obey the law may be justified because of the competence of the respective organs to form legal judgments.

13.5 On Legal Positivism

Law based on autonomous reasoning requires a non-positivistic concept of law. A characteristic of autonomous reasoning is that the legal validity of norms must be completely justified by the balancing of normative arguments. This requires normative judgement, which cannot be founded merely on empirical and analytical grounds. In this normative account of law, the institutional and, hence, empirical character of law is represented by formal principles. The justification of legal judgements includes not only substantive principles but also formal principles, which require respect for authoritative decisions without regard to their correctness. Formal principles allow for the reconstruction of the authoritative structures of a legal system.[12]

Autonomous reasoning is also compatible with the fact that legal systems contain norms that can be applied without a balancing. Balancing aims at establishing definitively valid norms.[13] Definitive norms can be applied without balancing. Such norms may be valid in certain circumstances at a certain time. One cannot, however, exclude balancing when the legal validity of norms is not yet established but still needs to be determined, and one cannot, therefore, evade the requirement of rational justification in law and legal argumentation.[14]

[12] See also Sieckmann (2012), p. 167ff.

[13] Hence, a legal system cannot consist merely of principles, see Sieckmann (1990), p. 142.

[14] Also legal positivists accept the normative claim of law and, hence, the need for rational justification. See Raz (1979), p. 29ff.; Coleman (2001), p. 125; Shapiro (2011), p. 184. Most clearly, Shapiro assumes that law claims what, from he law's point of view, is morally required (ibid., 185). See also Roughan (2014), p. 150. However, the relevant point of view is that of the judging agent, who is morally responsible as an autonomous person. There is no point of view of law that could be defined independently of the perspective of autonomous agents.

Hence, legal positivism appears to be unacceptable as a general theory of law as a normative system. On the other hand, this does not exclude the possibility that a positivist theory correctly describes the criteria of legal validity in a particular system at a certain time. If a system adequately fulfils the requirements of justice or moral correctness, it might legitimately exclude merely moral arguments that have no institutional backing from legal arguments. Thus, a general non-positivist thesis is also not correct with respect to the criteria of validity of legal principles. It is not true that at any time in any normative legal system, principles that are merely morally valid must be considered as legally valid. However, one cannot exclude the possibility that, at some time, moral principles are considered legally valid without institutional support and only because of their moral correctness.

In addition, it seems to be possible to identify all norms that can be stated as definitively valid law by empirical criteria. Mere normative arguments are not sufficient to establish legal validity. As pointed out above, legal statements are not admissible based on mere individual legal judgements. Although autonomous reasoning is required in order to establish legal validity, the objective character of law requires more than autonomous judgements. A statement of legal validity must be supported by reasonable convergence, which may refer to the norm itself or to the authority of courts to state legal validity based on their normative reasoning. If one considers reasonable convergence as an empirical criterion, all statements of legal validity must have an empirical foundation.[15]

However, this does not support a positivistic concept of law. It only implies that the objection to legal positivism does not refer to the requirement of an empirical identification of law, but to its failure to account for the normative dimension of law in the form of legal judgements and the reasoning required to justify these judgements. Legal judgements state law from the perspective of participants, in particular, judges. In their view, what is law is not defined by empirical criteria but by judgements that they form on normative reasons. Legal positivism, hence, considers only one aspect of law, and not the most interesting one.

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[15] Hence, although the argument is different, Spaak's thesis that the social thesis is correct at the level of the sources of law, as distinct from the interpretation of law (Spaak 2021 p. 443) seems to be correct.

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Chapter 14
Resume

The account of autonomy and law defended here is founded on the notion of autonomy as the balancing of normative arguments. It is distinct from common accounts of normative reasoning and of law in various respects. Its core elements can be stated as follows.

Normative arguments are conceived as demands made by autonomous agents, not as sets of premises with certain consequences. The claim to validity of these arguments is not a claim to truth or cognitive correctness, but is normative. Since these claims are subject to requirements of rationality, one might call this approach a "non-cognitive rationalism".

The foundation of normative arguments is the **normative competence** of autonomous agents to present such arguments. The notion of normative competence seems to be neglected in practical philosophy. It is, however, essential for a constructive account of normative justification, which allows to establish the validity of norms and must not yet presuppose the validity of the proposed norms.

Moral autonomy is conceived as the balancing of normative arguments. Autonomy, hence, is a structure that consists of forming a normative judgement regarding a conflict of normative arguments. Since this judgement is not determined by given criteria, but because of the structure of normative arguments as requirements for validity must be claimed to be required, the agent is, on the one hand, free in his judgement, but must, on the other hand, regard his judgement as normatively required.

Normative judgements present the results of the balancing of normative arguments. They resolve normative conflicts by defining which norm ought to be recognised as valid, but have only subjective validity; that is, they are valid as the judgements of particular autonomous agents. Regarding other agents, they include normative demands to recognise the proposed norm as valid. Autonomous agents have the competence to form such judgements. However, a single agent cannot claim to make a normative judgement binding on other agents. Hence, in the

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https://doi.org/10.1007/978-3-031-96578-4_14

procedure of normative reasoning, normative judgements have the status of normative arguments.

Since normative judgements claim to present a norm that ought to be recognised as the result of the argumentation, they must comply with the requirements that are necessary to achieve this end, in particular, those of **rational balancing**. They must resolve all normative conflicts and propose a norm that could be accepted by each reasonable agent. In addition, since no one can claim to decide for other autonomous agents, normative judgements can only be justified if they take into account the perspectives of all agents involved. That is, they must be formed in a process of **intersubjective reflection**, in which each agent considers the views of all other agents and presents a judgement that he thinks ought to be accepted by all agents.

In contrast to normative judgements, **normative statements** claim to state normative facts and hence claim to be objectively valid in the sense that every reasonable agent must accept the proposed norm as valid. Objectively valid normative statements cannot result from autonomous reasoning alone, not even by a process of intersubjective reflection. This process again leads to subjective judgements. Objective validity requires that a norm can be stated as binding on all agents it addresses. One might call this a normative fact.

The criterion for **objective validity** of balancing statements based on balancing suggested here is **reasonable convergence**; that is, rational argumentation leads to increasing recognition of a particular norm as definitively valid, excluding equal recognition of competing norm suggestions. Then, if a commonly binding norm is needed, the norm supported by reasonable convergence must be accepted as binding, including by those who reject this norm in substance. Bindingness here means that it is justified to apply and enforce the respective norm. It does not imply that the applied norm must be accepted as objectively valid in substance. Autonomous agents might still hold opposing views. They must only accept that a view that is defeated in rational discourse cannot be claimed to be binding on other agents. If, in addition, it is necessary to have a commonly binding norm, this can only be the norm supported by reasonable convergence.

Objective validity founded on the criterion of reasonable convergence suffices to justify the application and enforcement of law. The claim to the validity of law does not necessarily require a substantive justification, but only a justification of the authoritative competences of law. What must be shown is the **legitimacy** of the authoritative claims of law.

On the other hand, reasonable convergence is not sufficient to establish the objective validity of substantive moral norms. As long as an agent complies with formal requirements of autonomous reasoning, his substantive views must be considered as admissible even though they are contrary to the view that is supported by reasonable convergence.

The criteria of reasonable convergence need further elaboration. Relevant factors are the strength of balancing judgements of the agents involved, the epistemic quality of these judgements, and the level of support for a particular solution. However, how these factors enter into an assessment of reasonable convergence is not clear. In

any case, reasonable convergence and, hence, objective validity of normative statements is a matter of degree and, in addition, of evaluation.

The **authoritative character of law** is founded on **formal principles**, which demand respect for legal competences. This implies respect for legal regulations without regard to their substantive correctness. Of special importance are exclusionary formal principles, which not only demand respect for legal regulations but exclude the consideration of competing reasons. This exclusion holds, however, only in principle and can be overridden by competing principles that are considered as stronger in the circumstances of the particular case.

Formal principles connect authoritative procedures to a **stream of balancing judgments**, each taking into account the result of previous procedures. This generates a structure of a legal system that is not strictly hierarchical. No authority can by itself completely determine what will be judged in subsequent procedures. Hence, the legislator can create normative arguments, and these may be particularly strong. But to judge what ought to be done facing the legislation is the task of the law-applying organs. They may have to take into account competing normative arguments as well, and this might lead to a judgment diverging from the legislation.

An effect of formal principles is to establish norms authoritatively. Norms, hence, get an existence on their own, not merely as the result of a balancing judgement that depends on weighing the underlying competing arguments. This requires applying authoritatively established norms by means of **interpretation** and not proceeding by making a fresh balancing judgement. Interpretation must, however, be embedded in a complex structure of balancing that gives due consideration to authoritative reasons.

In law, individual autonomy is protected by **fundamental rights** as constitutional rights founded on human rights principles. Their justificataion includes a combination of formal as well as substantive reasons. A special form of protection results from the character of fundamental rights as rights that are **in principle immune against balancing**. That is, they include prohibitions of balancing these rights, which, however, are valid in principle and hence may be overcome in a second-order balancing. This creates a specific structure of the balancing of fundamental rights, which first must show that a balancing of the respective right is admissible, and in case that it is, must balance the right with all relevant competing arguments, in particular, with the reasons for interfering with the right.

Also, formal principles can compete, requiring the balancing between the claims of different authorities. For example, this may occur within a legal system regarding legislators and constitutional courts. It may also occur regarding the competition of diverse legal systems, thus generating a **normative legal pluralism**. Even though systems might claim exclusive authority, the competition of legal systems that each has grounds for its legitimacy cannot be excluded. Hence, the law-applying organs must make the final judgment, balancing the claims to the validity of the competing legal systems.

The complexity of balancing in law also results from the objective character of law. Law as a system of norms that claims to be binding on its addressees cannot just result from individual balancing judgements. Individual judgements can include

claims of what ought to be recognised and applied as law, but as such, they cannot state what the valid law is. Such statements are possible only if the judgement itself is objectively valid or because of a normative competence to make statements of law founded on normative judgements. Objective validity may result because the judgement follows *a priori* from necessary structures of law or, as a balancing judgement, is supported by reasonable convergence. A normative competence to make legal statements based on normative judgements is assigned to law-applying organs. It defines the position of a **judge**. As the application of law cannot proceed exclusively by mere description of existing law, such a competence of law-applying organs must be recognised.

Normative statements of law, though admissible, might still be contested. Statements based on a normative competence might be contested because several law-applying organs have this competence and maintain different views regarding the valid law. Or statements based on judicial competence might compete with statements based on assessments of reasonable convergence. Also, different statements based on reasonable convergence might compete. For example, the reasonableness of a dominant view might be contested because of defects in the argumentation. A perfectly rational argumentation can hardly be expected. Hence, whether one accepts the claim that reasonable convergence exists is a matter of evaluation, which might allow for different views regarding the obligation to obey the law.

Chapter 15
Appendix

15.1 Logical Symbols and Formula

‘O’: the deontic operator ‘ought to’
‘VAL_{DEF}’: a predicate ‘. . . is definitively valid’
‘VAL_{ARG}’: a predicate: ‘. . . is valid as a normative argument’
‘N’: a term denoting a particular norm (a norm individual) ‘n’: a term denoting a variable for norms
‘|— (VAL_{DEF}, N)’: statement that a norm N is definitively valid
‘|’: assertion-sign, indicating that the following sentence is used to make a statement or an assertion
‘—’: "Gedankenstrich", indicating that the following sentence presents a proposition
‘. . .’: argument-sign, indicating that the norm presents a normative argument, which the speaker is ready to support by normative arguments of ever-higher order
‘¬’: negation ‘not . . .’
‘->’: conditional ‘if . . ., then . . .’
‘<=>’: biconditional ‘if and only if. . ., then . . .’
‘&’: conjunction ‘. . . and . . .’
$PRIOR(R/\neg R)C,P_1,P_2$: priority of consequence R against non-R under condition C regarding conflict between principles P_1 and P_2
R/C: if C then R
$VAL_{DEF,X}(R/C)$: definitive validity of R/C regarding procedure X

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https://doi.org/10.1007/978-3-031-96578-4_15

15.2 Theses, Definitions, and Rules

(T1) Autonomy consists in the balancing of competing normative arguments.
(T2) Normative arguments include demands to recognise a particular norm as valid.
(T3) Autonomous agents have the normative competence to present normative arguments and normative judgements resulting from the balancing of normative arguments.
(T4) Autonomous agents must claim their normative judgements to be correct in the sense that they are required by the prevailing argument.
(T5) Normative arguments that figure as reasons in a balancing process and normative judgements stating definitive norms as the result of such a balancing have different logical structure.
(T6) Normative arguments do not have the structure of propositions.
(T7) Normative arguments include reiterated requirements for validity of a particular norm.
(T8) Normative arguments have a form of procedural validity, which implies that they can only be rejected by means of argumentation.
(T9) Interest-based claims found the structure of reiterated requirements for validity.
(T10) The balancing of normative arguments must strive for an optimal solution.
(T11) The balancing of normative arguments must consider the relative weight of the competing arguments and the degree to which their demands are fulfilled or not fulfilled by a particular balancing judgement.
(T12) Normative judgements resulting from the balancing of normative arguments are at the same time free but also normatively required.
(T13) In principle, a demand of correct balancing of legitimate normative claims must be recognised by the participants of a legal system.
(T14) Normative validity of law implies the recognition of certain human rights principles.
(T15) The minimal form of human rights protection consists in the application of the principle of proportionality to human rights. It ought to be combined with a model of exclusionary human rights, which in principle exclude balancing and hence require stronger forms of protection than that by balancing all relevant arguments.

DF_{NA}: A normative argument for the definitive validity of a norm N_i consists of a requirement of validity O VAL N_i, backed by an infinite set of requirements for validity of higher orders referring ultimately to the norm N_i.

$DF1_{OPT}$: A solution to a balancing problem is optimal if, with respect to the conflicting principles P1 and P2, the relation between the degree of fulfilment of P1 to the loss of fulfilment of P2 equals their relative weight.
$DF2_{OPT}$: A solution to a balancing problem is optimal if the principles in conflict have equal concrete relative weight with regard to this solution.

$DF3_{OPT}$: A solution to a balancing problem is optimal if its value of fulfilment is at least as great as that of any other solution, that is, if it is maximal.
DF_{FP}: Formal principles can

- simply present arguments to accept a norm as valid independently of its substantive correctness (simple formal principles);
- establish legal authority by offering an argument that decisions of the alleged authority ought to be regarded as binding, excluding a balancing with further arguments (exclusionary formal principles);
- determine which of competing authorities should have the competence to decide on certain issues (power-distributing principles).

DF_{C1}: An agent A has a normative competence to determine that a certain norm N is valid if the norm N will be valid in case that and because A has performed an act of a certain character with the intention to make N valid.
DF_{C2}: A has the competence to make N valid if, and only if, it is the case that if A acts in a certain way with the intention to make valid N, then this act constitutes a reason for the validity of N.

(R1) The balancing of normative arguments must consider the relative weight of the competing arguments and the degree to which their demands are fulfilled or not fulfilled by a particular balancing judgement.
(R2) One should give priority to the principle that has the greater concrete weight in the circumstances of the particular case.
(R3) One should give priority to the solution that achieves the greater value of fulfilment in the circumstances of the particular case.
(R4) One should choose a solution to a balancing problem that achieves the greatest value of fulfilment.

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https://doi.org/10.1007/978-3-031-96578-4