Introduction

A. The local meanings of balancing

This book is about the origins and meanings of one of the central features of postwar Western legal thought and practice: the discourse of balancing in constitutional rights jurisprudence. This discourse is pervasive in legal systems around the globe. Paradoxically though, its very ubiquity makes it in some ways more difficult to grasp. One important reason for this is the widespread assumption that identical, or nearly identical, terminology will mean more or less the same thing wherever it appears. That – normally unstated – assumption is only reinforced by the ways in which the imagery of weights and proportions corresponds to popular and scholarly notions of what constitutional rights justice should look like.

The central argument of this book is that references to balancing, of rights, values or interests, in case law and legal literature, have a far wider and richer range of meanings than conventional accounts allow for. On a most basic level, this argument builds on a change in perspective from balancing as something we think judges do, to something we know judges say they do – a shift in emphasis, that is, from balancing as doctrine, technique or principle to balancing as discourse. The project for the next few chapters is to uncover what this balancing discourse means to local actors in different legal systems.

These local meanings of balancing, as I show in a case study of German and US constitutional rights jurisprudence, can and do differ dramatically. Uncovering these different meanings matters. This is, after all, the legal language that, more than any other currently in use, constitutional rights jurisprudence turns to for justification, legitimization and critique. This book aims to contribute to an understanding of how so much has come to be invested, in so many different and contradictory ways, in this one particular, talismanic form of legal language.

B. A puzzle: reconciling turns to balancing and legalism

The discipline of comparative law offers a hard-won but simple lesson for any study of legal discourse: it would be little short of astonishing if similar language, even the same words translated as literally as possible, *did* have the same meaning in different legal systems and cultures. In comparative project after project, as soon as rudimentary elements of context, history and mentality are taken into account, cracks quickly begin to appear in even the sternest façades of uniformity.

And yet, curiously, when it comes to one of the central preoccupations of late twentieth- and early-twenty-first-century constitutional jurisprudence, these lessons are often, apparently, forgotten. Instead, the rise of the language of balancing and proportionality is commonly invoked as the foundation for extraordinarily far-reaching comparative claims.[1] Such claims tend to amalgamate a familiar torrent of references to weighing in case law and legal literature into some form of 'globalization of constitutional law', understood to be a worldwide, or almost worldwide, movement of convergence on a 'global model' of rights adjudication, possibly underpinned by an emergent, shared 'ultimate rule of law'.[2]

Some of this may in fact capture contemporary trends. It is not unreasonable to assume that judiciaries operating in interconnected societies and often facing similar issues might turn to somewhat similar legal methods, doctrines or philosophies. But certainly insofar as they relate to balancing, these claims of convergence also face some formidable obstacles. One way of bringing these into focus is by asking how this inferred global turn towards a shared model relates to classic accounts of differences between styles of legal reasoning among different legal systems and cultures. Of particular interest, from that perspective, are studies from within a rich tradition that has sought to cast such differences in terms of a formal versus substantive dichotomy.

Classic comparative accounts of law and legal reasoning in the US and Europe have often invoked sets of sliding scales that run between some

[1] The relationship between balancing and proportionality is a contested issue in many legal systems. But whether, in analytical terms, 'balancing' is seen as part of proportionality, or whether proportionality is seen as a 'balancing' test (the two most common perspectives), the two categories are clearly part of the same broad family of discourse. See further Chapter 1, Section B.2.

[2] See, e.g., Beatty (2004); Law (2005); Möller (2012); Schlink (2012). These convergence accounts tend to take an ambivalent position on the position of the US. See, e.g., Weinrib (2006); Tushnet (2009); Möller (2012), pp. 17ff.

conception of legal formality on one extreme, and one or more of formality's opposites on the other, in order to frame salient differences. In this way, the syllogistic mode of reasoning found in the official, published decisions of the French *Cour de cassation* and the efforts by the German nineteenth-century Pandectists and their successors to build a coherent and gapless legal system have long served to ground the argument that law and legal reasoning in Continental Europe are traditionally overwhelmingly 'formal', or 'legalist'.[3] Legal reasoning in the US, by contrast, is commonly thought to be more 'pragmatic', 'policy-oriented', 'open-ended', or, in the most general terms, more 'substantive'. The orthodox argument in this field is that while American and Continental-European jurisprudence were both strongly formal in orientation at the end of the nineteenth century, American legal reasoning has since been subjected to a devastating Realist critique that has unmasked legal formality as 'merely a kind of veneer'.[4] Legal thinking in Europe, notably in Germany, was at one time early in the twentieth century in thrall of a very similar line of critique. But attacks on legal formality, or belief in law's autonomy, simply have never had the same long-term impact on mainstream European jurisprudence as they had in the US.[5]

It is when this historical narrative is extended to take postwar developments into account that a close connection to the topic of balancing appears. The rise of constitutional rights adjudication during this period, this story typically continues, has come to undermine these long-established differences. This is because leading courts in Europe and elsewhere outside the US have adopted a style of reasoning in rights cases that appears to be surprisingly and radically open-ended and pragmatic – in short: *informal*, or less legalist. 'A common cliché has it that legal systems from the common law tradition produce case law, while so-called continental legal systems strive for codification and a more systematic jurisprudence', Georg Nolte notes, for example, in a comparative study of European and US constitutional rights law. Nolte continues: 'The question, however, is whether *the opposite* is not true for today's constitutional adjudication', adding that '[i]n its freedom of expression case law, for example, the US Supreme Court strives to develop "tests" that are on a similar level of abstraction as legislation [while] The European Court of Human Rights and the German *Bundesverfassungsgericht* on the other

[3] For discussion and nuance see Lasser (2004).
[4] See, e.g., Riles (2000), p. 5.
[5] On legal formality, see further Chapter 1, Section D.

hand, typically insist on a balancing of "all the relevant factors of the case"'.[6] Nolte sees these European examples as following an approach to constitutional adjudication that is, overall, 'less rigorous' than that found in the US.[7]

As this quotation illustrates, the stories of the rise of balancing and of the supposed de-formalization of postwar legal reasoning in the constitutional rights context, are intimately related. The turn towards balancing and proportionality reasoning by European courts and other non-US courts is read as a turn away from legal formality – a turn away from reliance on legal rules, from 'rigour' in legal thinking, and from belief in the possibility of juridical autonomy more generally. Conversely, it is the US Supreme Court's preference for 'rules' and its encasement of balancing in the form of 'tests' that make its constitutional rights reasoning more formal.

This account of the role of balancing in constitutional rights adjudication, it seems, can support only one conclusion. And that is that judicial balancing and legal formality are radical opposites. This, certainly, is the dominant American view in this area.[8] The idea of constitutional law 'in an age of balancing', as one famous depiction has it, is very much the idea of law in an age of lost faith in legal formality. Adjudication, on this view, can be no more – and is no more – than a pragmatic, ad hoc, instrumentalist approach to deciding cases. The courts' balancing rhetoric is the principal expression of this realization. And so, it is not surprising to see US lawyers describe value- and interest-balancing, 'all things considered judgments', and proportionality reasoning as manifestations of '*the form that reason will take when there is no longer a faith in formalism*'.[9] 'As long as belief in a formal science of law is strong', Yale Law School's Paul Kahn writes, 'the reasoned judgments of a court look different from the "all things considered" judgments of the political branches. When

[6] Nolte (2005), pp. 17–18 (emphasis added). See also, e.g., Grey (2003), p. 474: '[A]ccording to conventional wisdom, the general style of legal thought in [the US] has long been more pragmatic, or less formalistic, than in other systems. Over the last half-century, other legal systems have taken up judicial review, and now seem themselves to be moving away from traditionally more formal approaches to law'.

[7] *Ibid*., p. 18. For a classic German statement, see Forsthoff (1959), pp. 145ff. See also Schlink (2012), p. 302 (under influence of proportionality and balancing '[c]onstitutional cultures with a doctrinal tradition will progressively be transformed in the direction of a culture of case law').

[8] See, e.g., Schor (2009), p. 1488 ('Courts around the globe have turned away from formalism and towards proportionality analysis or balancing tests.')

[9] Kahn (2003), pp. 2698–99 (emphasis added).

reasonableness replaces science, however, the work of a court looks like little more than prudence.'[10]

This conception, of course, fits snugly with the broader American story in which balancing and the rise of scepticism – the more familiar designation of a loss of faith – in law are intimately related. But when developments in other countries than the US are taken into account, problems emerge. The loss of faith narrative quite clearly *does not work*. To begin with, the available evidence suggests rather strongly that legal systems outside the US have not, over the past decades, experienced anything like an American-style surge in scepticism about law and judicial institutions. So, for example, where US lawyers continue to fret over the familiar counter-majoritarian dilemma, German writers and judges worry, conversely, that '[t]he German faith in constitutional jurisdiction must not be allowed to turn into a lack of faith in democracy'.[11] But the evidence against a sceptical turn outside the US is much broader and encompasses many more systems. The embrace of supra-national courts such as the European Court of Human Rights or the International Criminal Court, for example, but also the fundamentally constructive nature of most doctrinal writing in many legal systems are telling signs of a pervasive 'faith in and hope for law'.[12] These are, if anything, manifestations of a 'turn to legalism' rather than any turn towards scepticism and pragmatism.[13]

Further tangles to this basic puzzle are now quick to surface. Is it really plausible that legal cultures with a long tradition of high formalism and of attachment to legal doctrine and legal rigour, like those in Continental

[10] *Ibid*.

[11] Häberle (1980), p. 79. Cited by the then president of the *Bundesverfassungsgericht*, Jutta Limbach, in Limbach (2000), p. 9. See also Casper (2002).

[12] Kennedy (1985), p. 480 (describing the seminal work of Rudolf Wiethölter). See also Zimmermann (1996), p. 583 (contrasting American scepticism with European – Continental and English – faith in law as an autonomous discipline). For recent case studies voicing similar observations, see Saiman (2008) and Kuo (2009).

[13] Pildes (2003), pp. 147ff. Pildes continues: 'It is quite intriguing – and enormously significant […] – that the attachment to legalism and judicial institutions outside the United States is reaching this peak in the same period in which within the United States there has been general and increasing scepticism about judicial institutions' (*Ibid*.). Legalism, in all of its common meanings – rule-following, logical deduction, conceptualism and most comprehensively, belief in some form and degree of autonomy for the juridical – is essentially connected to the idea of legal formality. Cf. Shklar (1964), pp. 33ff; Wieacker (1990), pp. 23ff. Here, legalism and formalism are both used to refer to an attitude of faith in and commitment to the possibility of the (semi)-autonomy of the juridical field. If there is any difference between the terms, it is that formalism refers more specifically to the one-sided concern to *uphold* this autonomy, whereas legalism designates a commitment to managing the *co-existence* of formal and substantive elements in law.

Europe, would suddenly have abandoned these long-held views? If so: did lawyers in these systems retain their belief in legal formality in other areas of law, but abandon it completely in the field of constitutional rights adjudication, where balancing now dominates? Or has legal formality been entirely disenchanted, and have German judges and legal scholars, to use the most striking example, really 'replaced legal science' and centuries of conceptual refinement with mere reasonableness and prudential reasoning? If so, it might be asked, why does private law adjudication and scholarship in European countries, like Germany, still look so very different from American legal theory and practice? Why, come to think of it, does German and European *constitutional* law scholarship still look so very different from its US counterpart?

And on the American side of this story, too, matters do not quite fit. Granted, the specific idea of balancing as anti-formality, or non-law, could still hold in this setting. But if there really has been a comprehensive loss of faith in the formal attributes of law and legal reasoning, why would American courts and commentators still bother to encase balancing-based reasoning within the confines of strict rules and multi-part tests? Surely these elaborate legal constructs, designed specifically to dam in what are seen as the most pernicious aspects of open judicial weighing, must signal some remaining commitment to legal formality and doctrinal craftsmanship?

C. Rethinking balancing, rethinking legalism

The main argument of this book consists of a three-part answer to this puzzle of how turns to balancing and to legalism might be reconciled. First: balancing does not mean the same thing everywhere. Second: analysing these different meanings reveals that the opposition between balancing and legal formality does not hold in all contexts. These different meanings, in turn, do not allow for a simple conclusion that European and other non-US adjudication styles have become pragmatic, policy-oriented or informal in the sense these terms are commonly understood. And third: rethinking the meaning of balancing brings with it a need to rethink the nature of legalism itself.[14] Not only 'balancing', but also the

[14] There is a possibility that balancing in, say, South Africa, India or Israel could emanate from – and be embedded within – rather more indigenous legalisms, best understood as purposeful rejections of (parts of) the Western tradition. That possibility cannot be discounted on the basis of the narrower comparative project undertaken here, with its focus on US and Continental-European constitutional jurisprudence. But even if

central organizing terms of 'formal' and 'substantive', and the very character of legalism as an attitude to law, carry different meanings in these different settings.

This argument is developed by way of a case study on German and US jurisprudence. It was in these two systems that, at virtually exactly the same time in the late 1950s, high courts first began to discuss constitutional rights issues in balancing terms. Chapters 3 and 4 discuss both these judicial references and the surrounding scholarly and judicial discourse in some detail. In both these settings, these first judicial references followed earlier virtually simultaneous invocations of balancing in scholarly legal debates of the early twentieth century, in the context of the *Interessenjurisprudenz* in Germany and Sociological Jurisprudence in the US. These earlier invocations are studied in Chapter 2. Adopting this narrow lens of two parallel sets of self-identified balancing debates should make it possible to uncover the meanings of the discourse of balancing at its inception.

Throughout this book, but most particularly in Chapter 5, these different meanings will be translated into the conceptual vocabulary of the formal versus substantive opposition.[15] The discourse of balancing, I argue, is the principal contemporary site for where the formal and the substantive in law meet. And certainly as between German and US jurisprudence *everything* about these encounters is different. Where a rule-based, constraining formality is predominant in the US, legal formality in German jurisprudence is conceptual and exhortative, even perfectionist. The substantive in law, which equals policy and pragmatism in the US, finds expression in an extraordinarily powerful and complex set of ideas known as 'material constitutionalism' in Germany. And where the formal and the substantive co-exist in a constant state of conflict and unstable compromise in US law, German jurisprudence continually strives for synthesis.

In no small part, the astounding capacity of the discourse of balancing to mean all things to all people rests precisely on the many different ways it gives shape to the discursive management of the formal versus substantive opposition in law. Balancing can stand for both intuitive reasoning that is formalized to an unusual degree, and for formal legal reasoning

for these other settings a more radical rethinking of legalism may be required, it still seems difficult to sever completely the connection between legalism as a general faith in the juridical, and legal formalism as faith in the possibility of juridical *autonomy* more specifically.

[15] See further Chapter 1, Section D.

that is unusually open. Balancing can be both an admission of the limitations of formal legal analysis, and an attempt to stretch formal legal reasoning as far as it might go. Balancing can be principle and policy, conceptual synthesis and pragmatic compromise. Balancing, I argue in the final chapter of this book, can form the centrepiece of a mode of reasoning that 'substantivizes' its formality, and of a discourse that is in an important sense 'formally substantive'.[16] And when what is emblematic for legal reasoning in different settings is not so much the fact that it combines both more formal and more substantive elements, *but how it does so*,[17] studying the discourse of balancing opens up a uniquely privileged vantage point from which to analyse and compare what legal reasoning, in these different places, to a large extent, is all about.

For that last – large – question, the discourse of balancing proves revealing in a final, perhaps unexpected, way. If formalism and legalism are, at heart, expressions of beliefs relating to qualities ascribed to legal institutions – those qualities that make up the 'internal dynamics of juridical functioning',[18] – then *the character of those beliefs* may well vary in ways that could be distinctive for the communities of legal actors who hold them. And in this regard too, the discourse of balancing occupies a unique position. This is because this particular language can be the expression of both a deep-seated scepticism towards the legal, and of a faith in law of such fervour and ambition that non-believers may find difficult to take seriously. I argue in Chapters 4 and 5 that the discourse of balancing in US constitutional rights jurisprudence reveals a faith in law that is halting, tentative and always constrained by powerful sceptical tendencies. The tropes that typically surround the vocabulary of balancing show this very clearly: 'bright lines' wobble on 'slippery slopes', 'absolutes' are 'relativized' and formalism itself is 'pragmatical' and in need of 'empirical support'. The relative strengths of these contradictory impulses are continuously subject to reassessment, as 'spectres' from earlier misguided eras continue to haunt, 'revisionism' is revisited and American jurisprudence as a whole is described as existing in a permanent state of 'schizophrenia'.[19] It is revealing to compare these figures of speech with the tropes surrounding the vocabulary of balancing in Germany. There,

[16] Recourse to inelegant terminology seems inevitable in this area. See Summers & Atiyah (1987), p. 30 (coining what they call the 'ugly word' of 'substantivistic' reasoning); Kalman (1986), p. 36 (using 'autonomousness' as synonym for formalism).
[17] See Lasser (2004), p. 155.
[18] Bourdieu (1987). See also Unger (1986), pp. 1ff.
[19] For references, see Chapter 5, and especially Section E therein.

a list of dominant terms would have to include words such as *dialektisch* (dialectical), *prinzipiell* (principled), *durchtheoretisiert* (fully theorized), *Einheitsbildung* (fostering of unity), '*logisch-teleologisch*' (logical-teleological), *Optimierung* (optimization) and *Synthese* (synthesis).

In one sense, all of what follows in this book builds on a simple contrast. If there is even some marginal consensus on the kinds of differences identified in simple lists like these, then we must begin to rethink the apparent commonality of the discourse we seem to share. If so much else about the language of American and German or European lawyers is *so* different, surely when the same or similar words do appear, they will come with different meanings, even radically different meanings?

This, then, is what I hope to show: that the discourse of balancing, for all its global pervasiveness, does not mean the same thing everywhere. Balancing, instead, has come to rule our legal imagination because, Humpty Dumpty-like, it means exactly that which everyone, everywhere, expects, wants and fears it to mean. Those expectations, as illustrated in the two – really only mildly caricatured – lists above, are consistently more ambitious, more hopeful for the power of legal ideas in German and Continental-European jurisprudence than in the US. This ambition is not a good in and of itself. That much is demonstrated by the Orwellian flights of conceptual fancy engaged in by some legal scholars under fascism. But it is this same ambition that has now also served, for more than half a century, to uphold a liberal constitutional order with a reach that is unprecedented. A reach, in addition, that would be unthinkable in the US. I argue in this book that the different meanings of the discourse of balancing – as the cornerstone of a 'perfect constitutional order' and as a 'dangerous doctrine' – are central to these radically different understandings.

The irresistible propensity in balancing to conform to expectations – those of its advocates, but also of its critics – is the source of its strengths, but also of its weaknesses. The dominance of the discourse means that these strengths and weaknesses reverberate widely. And so, while this book may disappoint in not offering suggestions on how to (or how not to) balance, it does stem from the conviction that uncovering the contingency of our received interpretations must itself be a worthwhile project.

1

Questioning a global age of balancing

The aim of this book is to uncover different local meanings for the language of balancing. This chapter begins that project by first challenging the diametrically opposite claim: the suggestion that constitutional jurisprudence finds itself in a global age of balancing. In Section A, I discuss what this opposing claim means and what its foundations and implications are. The remainder of the chapter sets out the contours of the challenge. Section B shows how comparative studies of balancing and proportionality commonly fail to distinguish between balancing as discourse and as process, and discusses how this conflation sustains an overly uniform understanding of what balancing is. An alternative approach is presented in Section C. Balancing, I argue, should be approached, not as a fixed analytical structure, but as a form of legal argument. The meaning of this argument can be studied in terms of the contribution legal actors in any given system think it is able to make to the legitimization of the exercise of public authority under law. In Section D, I relate this legitimization imperative to an underlying dilemma shared by Western legal orders: that of maintaining law's essential semi-autonomy, or, in other words: of the discursive management of the formal versus substantive opposition. As a universal dilemma with local manifestations, the formal versus substantive opposition is a useful point of reference for comparative studies of legal discourse. It is also, of course, instrumental to solving the puzzle set out in the Introduction, of how turns to balancing might be reconciled with turns to legalism – a puzzle to which Chapter 5 will return. Section E, finally, introduces the case studies of balancing discourse in German and US jurisprudence that occupy Chapters 2, 3 and 4.