

Structuring balancing within rational standards? The data screening case

É possível estruturar a ponderação por meio de critérios racionais? O caso busca de dados

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Abstract

The practice of balancing as a method of reasoning and decision making in cases of collision between constitutional rights has been frequently debated in legal literature worldwide as well as adopted by many national and international courts. The expansion of the method raises many objections and questions about its structure and rationality. In this paper the method will be analyzed by means of (1) its definition, (2) the main objections to its practice, (3) its structuring by means of the weight formula, and (4) a case study, in order to analyze the possibility of structuring the method within rational standards in a concrete case. The chosen case is a decision of the German Federal Constitutional Court regarding the permission from local courts to perform a data screening in order to look for potential terrorists that could have been planning attacks in Germany after the 11th September 2001 events in the USA.

Keywords: Balancing. Rational standards. Weight formula. Data screening. Data protection. Counterterrorism.

Resumo

O recurso à ponderação como método de decisão em casos de colisão entre direitos fundamentais tem sido debatido com frequência pela literatura jurídica assim como tem sido adotado por cortes em nível nacional e internacional. A expansão do método levanta muitas objeções e perguntas a respeito de sua estrutura e racionalidade. Neste artigo, o método será analisado por meio de (1) sua definição, (2) principais objeções contra a sua aplicação, (3) sua estrutura por meio da fórmula do peso, e (4) um estudo de caso, a fim de se analisar a possibilidade de se estruturar o método por critérios racionais de decidibilidade em um caso concreto. O caso escolhido corresponde a uma decisão da Tribunal Constitucional alemão sobre a permissão de cortes locais para a realização de busca de dados pessoais, a fim de se procurar terroristas em potencial que poderiam estar planejando ataques na Alemanha após os ataques de 11 de setembro de 2001 nos Estados Unidos.

Palavras-chaves: Ponderação. Critérios racionais de decidibilidade. Fórmula do peso. Busca de dados. Proteção de dados. Combate ao terrorismo.

1 Introduction

The practice of balancing as a method of reasoning and decision making in cases of collision between constitutional rights has been frequently debated in legal literature worldwide as well as being adopted by many national and international courts.¹ Its frequent use is observed not only by means of the various theoretical works about the theme in the last years,² but also by means of the case law of many courts, as well as in countries with a *common law* tradition and in international courts such as the European Court of Human Rights (ECtHR).

In the academic debate, there are authors that evaluate the method as the most suitable method of reasoning and decision making in the courts.³ Others emphasize the expansion of the idea of balancing in legal theory as well as in national and international jurisdictions.⁴ The expanded use of the method is often questioned in legal theory. While balancing has been used in the case law of some countries without questioning its basis and structure, new theoretical objections to the method have arisen. Therefore, it is possible to observe that the controversy regarding the practice of balancing is still current and has reached an international level.

In this paper, the method will be analyzed by means of (1) its definition, (2) the main objections to its practice, (3) its structure by means of the weight formula as a response to the objections, and (4) a case study, in order to analyze the possibility of structuring the method within rational standards in a concrete case.

1 See A. Stone Sweet and J. Mathews, 'Proportionality Balancing and Global Constitutionalism', *Columbia Journal of Transnational Law* (2008).

2 See, for example, D. Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence', *University of Toronto Law Journal* (2007), 383-97, S. Tsakyrakis, 'Proportionality: An assault on human rights?', *International Journal of Constitutional Law* (2009), 468-93, J. Bomhoff, 'Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law', *Hastings International & Comparative Law Review* (2008), 555-86, C. Bernal Pulido, 'Grundrechtsprinzipien in Spanien: Rationalität und Grenzen der Abwägung' in J.-R. Sieckmann (ed.), *Die Prinzipientheorie der Grundrechte: Studien zur Grundrechtstheorie Robert Alexys* (Baden-Baden: Nomos, 2007), J. Andrade Neto, 'The Debatable Universality of the Proportionality Test and the Wide-Scope Conception of Fundamental Rights', *Revista Brasileira de Direito* (2016), 4-19, F. S. d. Morais and L. Zolet, 'Constitutional Rights Expansion and Contributions from Robert Alexy's Theory', *Revista Brasileira de Direito* (2016), 127-36; F. S. d. Morais, *Ponderação e arbitrariedade: a inadequada recepção de Alexy pelo STF* (Salvador: Editora JusPODIVM, 2016)

3 See D. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2002).

4 See Stone Sweet and Mathews, 'Proportionality Balancing and Global Constitutionalism'.

2 The definition of balancing

This paper depends on the definitions of and the distinction between principles and rules. The discussion regarding that distinction is not new.⁵ The distinction defined by Alexy is a norm-theoretic one.⁶ According to him, rules are definitive commands, meaning “norms that can only be either complied with or not”.⁷ On the other hand, principles are optimization commands; in other words, norms commanding that something be realized to the highest degree relative to both the factual and legal possibilities.⁸ This distinction implies different forms of application of rules and principles.

A conflict between rules “can only be solved by (1) either introducing an exception clause into one of the two rules or (2) declaring at least one of them invalid”.⁹ The justification of that form of application is based on the fact that rules are situated in a dimension of validity, and the definition of validity cannot be graduated.¹⁰ Rules as definitive commands do not accept graduations of this characteristic. Therefore, a conflict between rules has to be solved by subsumption. One norm must be completely applied in the case and the other will then be declared as invalid.

On the other hand, when two principles collide one principle takes priority over the other depending on the circumstances of the concrete case. The conflict is centered in the dimension of weight of each principle. It is necessary to consider the factual and legal possibilities of the concrete case to evaluate the weights of each principle and determine which principle has priority.¹¹ Under different circumstances, the priority relation between principles can be differently defined. Therefore, principles always comprise merely *prima facie* requirements.¹² The priority of a principle is determined by means of balancing.¹³ Thus, balancing in a broad sense can be defined as an evaluation between two or more competing goods.¹⁴ In terms of a simple and introductory explanation, balancing is a decision-making method to resolve collisions of principles.

5 See R. Alexy, ‘On the Structure of Legal Principles’, *Ratio Juris* (2000), 294–304, at 294, and R. Alexy, ‘Rechtsregeln und Rechtsprinzipien’ in R. Alexy, H.-J. Koch, L. Kuhlen and H. Rüßmann (eds.), *Elemente einer juristischen Begründungslehre* (Baden-Baden: Nomos, 2003), pp. 217–34, at p. 217.

6 R. Alexy, *A Theory of Constitutional Rights*, Repr. 2010 (Oxford: Oxford University Press, 2010), pp. 47–9, R. Alexy, ‘The Construction of Constitutional Rights’, *Law and Ethics of Human Rights* (2010), 20–32, at 21.

7 Alexy, ‘On the Structure of Legal Principles’, 295.

8 *Ibid.*, p. 295.

9 *Ibid.*, p. 295.

10 R. Alexy, *Teoria dos direitos fundamentais* (São Paulo: Malheiros, 2008), p. 92.

11 *Ibid.*, p. 83.

12 R. Alexy, ‘Formal Principles: Some Replies to Critics’, *International Journal of Constitutional Law* 12 (2014), 511–24, at 512.

13 *Ibid.*, p. 512.

14 In this paper, I will make reference to a conflict between two goods or principles as a matter of simplification. It is possible that more than two principles collide.

Due to their optimization nature, colliding principles cannot be realized to their highest degree simultaneously. The balancing of principles implies the determination of a conditional priority relation between competing principles.¹⁵ The core of balancing consists in the relation formulated by the “Law of Balancing”:¹⁶ “The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other”.¹⁷ The evaluation of the weights of the principle follows this law.

Balancing is also the subject of the third sub-principle of the principle of proportionality, also known as the principle of proportionality in the narrower sense.¹⁸ It concerns the optimization relative to the legal possibilities at hand.¹⁹ The first two sub-principles, the sub-principles of suitability and necessity, concern optimization relative to the factual possibilities of the concrete case.²⁰ As the principle of proportionality in the narrower sense is the main objection related to the proportionality test, this paper will concentrate on the issues related to balancing and not to the proportionality as a whole.

3 Objections to balancing

In this section, an overview of the objections to balancing will be delineated. Objections of various types against balancing are raised, but it is not possible to examine them only in a sealed manner, as there are close connections between and among them.

First of all, three main groups of objections will be delineated. Alexy, for example, points out the following three main critical approaches against balancing: objections to (1) its structure; (2) its rationality; and (3) its legitimacy.²¹ These objections are interrelated: the legitimacy of balancing depends on its rationality; in other words, its legitimacy depends on the development of a rational method within a coherent and consistent argumentation, and not an arbitrary one. The structure of the method is essential to define its rationality, because its rationality is evaluated by means of its structure. Therefore, as Alexy affirms, the core of the problem of balancing in law is a matter of its structure.²² In order to complete the critical

15 See Alexy, ‘On the Structure of Legal Principles’, 297.

16 Alexy, ‘Formal Principles: Some Replies to Critics’, 513.

17 See R. Alexy, ‘Constitutional Rights, Balancing and Rationality’, *Ratio Juris* (2003), 131–40, at 136, Alexy, *A Theory of Constitutional Rights*, p. 408.

18 Alexy, ‘The Construction of Constitutional Rights’, 27.

19 *Ibid.*, p. 27.

20 *Ibid.*, p. 27.

21 R. Alexy, ‘The Weight Formula’ in J. Stelmach, B. Brozek and W. Zaluski (eds.), *Studies in the Philosophy of Law* (Kraków: Jagiellonian Univ. Press, 2007), pp. 9–27, at p. 9.

22 *Ibid.*, 9.

overview, it is necessary to point out the specific objections that derive from those groups and the authors making the objections.

One of the specific objections related to the rationality, structure and methodology of balancing concerns its conceptual indeterminacy. The reason for this objection is the rhetorical formulation of the method, which does not have a well-defined and clear structure. Moreover, balancing presents a lack of objective criteria for its practice. Without such criteria, a public monitoring of the decision, especially its argumentation and reasoning, would not be possible.²³ Balancing would be practiced, therefore, through subjective and ideological judgments.

Another objection concerns the incommensurability and incomparability of the practice of balancing. A common unit of measure for the weights of the competing rights would be impossible to be established: there would be no available scale to measure and determine the principles' weights.²⁴ Some authors that criticize the method in this sense are Walter Leisner,²⁵ Fischer-Lescano and Christensen,²⁶ Jacco Bomhoff,²⁷ and Stravros Tsakyrakis²⁸, among others. Habermas also addresses - although not so directly as the other authors - this objection, but his considerations are mainly related to the structure and character of the norm of values and their consequences.²⁹

There are also objections to balancing as a metaphor of weights and the vagueness of its language. The method, as a metaphor of weights, they say, would not work because the definition of weights is too vague and therefore could include a great variety of human reasons and actions.³⁰ In this sense, balancing should not be accepted as a method to resolve conflicts between constitutional rights, because it aims to be a neutral method, while in fact hiding an inherent moral judgment. In addition, the method suggests the idea of mathematical precision and a quantification of values through the metaphor of weights. There would be an illusion that here is a possible mechanical and precise way of weighing values, disregarding the complexity of the rights at stake.³¹

The impossibility of predicting the outcome of balancing is another objection. The consequence of this would be the creation of an “*ad doc case law*”, bringing instability to the

23 See Bernal Pulido, ‘Grundrechtsprinzipien in Spanien: Rationalität und Grenzen der Abwägung’, 201–2.

24 Ibid., 202, and L. P. Sanchis, ‘Neoconstitucionalismo y ponderación judicial’ in M. Carbonell (ed.), *Neoconstitucionalismo(s)* (Madrid: Trotta, 2003), pp. 123–58, at p. 151.

25 W. Leisner, *Der Abwägungsstaat* (Berlin: Duncker & Humblot, 1997).

26 R. Christensen and A. Fischer-Lescano, *Das Ganze des Rechts: Vom hierarchischen zum reflexiven Verständnis deutscher und europäischer Grundrechte* (Berlin: Duncker & Humblot, 2007).

27 Bomhoff, ‘Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law’.

28 Tsakyrakis, ‘Proportionality: An assault on human rights?’.

29 J. Habermas, *Between Facts and Norms* (Cambridge, Mass. [u.a.]: MIT Press, 1998), chapter 6.

30 See Tsakyrakis, ‘Proportionality: An assault on human rights?’, 469.

31 See *ibid.*, p. 474.

legal order and problems regarding legal certainty. Each outcome resulting from balancing would be unique, depending on the circumstances of each case and therefore it would be impossible to define general criteria and precedents. Because it is a method with significant conceptual indeterminacy, open to subjectivism, any pretension of universalization of the decisions coming from the application of balancing would be weakened.³²

Another objection is related to the concept of State and to the legitimacy of the practice of balancing by the judiciary. These objections are made as a consequence of the indeterminacy of the structure and irrationality of the method as well as independent objections. If the result of balancing corresponds to a personal opinion involving preferences and priorities, without coherent reasoning in the decision, then there would be a lack of legitimacy for the judiciary to apply the method. The judiciary's decisions are legitimized if they are developed based on a consistent and coherent reasoning. The legitimacy of this power is different from the legislative, as the latter is democratically elected and not appointed.

In this sense there are objections to the theory of principles and balancing related to the concept of constitutional rights as principles, the role of the German Constitutional Court and the lack of legitimacy of the court.³³ The concept of optimization commands is criticized because it would be so broad that it could justify any state limitation of constitutional rights.³⁴ The decision regarding which right should be protected and which should be limited in the concrete case would be merely arbitrary, guided by the personality of the judges and the current political atmosphere in the court. In addition, all the difficult cases would become a matter of constitutional rights and it would cause an over-constitutionalization of the legal system, which implies a violation of both the democratic principle and the separation of powers. Moreover, the optimization of a principle could not be objectively recognized by means of balancing. Therefore, a constitutional court could not adopt balancing objectively.³⁵

Some authors that criticize the method in this sense are, for example, Ladeur³⁶, Böckenförde³⁷ and Schlink³⁸. Böckenförde criticizes the difficulties of an interpretation

32 See, for example, E.-W. Böckenförde, 'Grundrechte als Grundsatznormen – zur gegenwärtigen Lage der Grundrechtsdogmatik' in E.-W. Böckenförde (ed.), *Staat, Verfassung, Demokratie* (Frankfurt am Main: Suhrkamp, 1991), pp. 159–99, at p. 174, K.-H. Ladeur, *Kritik der Abwägung in der Grundrechtsdogmatik* (Tübingen: Mohr Siebeck, 2004), p. 29.

33 See, for example, B. Schlink, 'The Dynamics of Constitutional Adjudication', *Cardozo Law Review* (1995-1996), 1231–8, and B. Schlink, 'German Constitutional Culture in Transition', *Cardozo Law Review* (1992-1993), 711–36.

34 See *ibid.*, p. 721.

35 See Bernal Pulido, 'Grundrechtsprinzipien in Spanien: Rationalität und Grenzen der Abwägung', 204.

36 Ladeur, *Kritik der Abwägung in der Grundrechtsdogmatik*.

37 Böckenförde, 'Grundrechte als Grundsatznormen – zur gegenwärtigen Lage der Grundrechtsdogmatik', and E.-W. Böckenförde, 'Grundrechtstheorie und Grundrechtsinterpretation', *NJW* (1974), 1529–38.

38 B. Schlink, 'Der Grundsatz der Verhältnismäßigkeit' in *Festschrift 50 Jahre Bundesverfassungsgericht*, 2 vols. (Tübingen: Mohr Siebeck, 2001), pp. 445–65, B. Schlink, 'Freiheit durch Eingriffsabwehr

of constitutional rights by means of a value theory as well as the lack of legislative discretion as a consequence of the concept of optimization.³⁹ According to him, a value theory could not offer a solution for a conflict between constitutional rights because there would be neither rational justification for the values involved and for a legal order of values as a whole, nor a recognizable system of rational preferences for the evaluation of the principles and for the establishment of the priority relationships.⁴⁰ Schlink affirms that it is not necessary to apply the method to resolve conflicts between constitutional rights. According to him, the practice of the two first sub-principles of the principle of proportionality – the sub-principles of suitability and necessity – would already provide the possibility of a technical and sufficient judgment to solve those conflicts. This is because this part of the principle of proportionality works only with prognostics; in other words, with judgments based on probability and not with mere subjective evaluations.⁴¹

4 The concept of rationality in the law⁴²

After pointing out the objections to balancing, the weight formula as a response to the critics will be investigated. However, first it is necessary to provide some preliminary theoretical explanations, starting with which kind of rationality is sought and is desirable in law. This definition is important in order to determine whether balancing can be structured using rational standards and whether the decision resulting from its practice can be intersubjectively reasoned and justified.

The possible rationality of the social sciences in general, including law, is not the same as that which can be established by the natural sciences.⁴³ Neither a mathematical exactness nor a mathematical-geometric model can be achieved in a legal decision. This is independent of whatever method is applied: neither balancing nor any reasoning in general can achieve them.⁴⁴ For this reason, it is assumed that it is not possible to seek a strict rationality for law that completely excludes any subjectivity in the interpretation

- Rekonstruktion der klassischen Grundrechtsfunktion', *Europäische Grundrechte-Zeitschrift* (1984), 457–68, Schlink, 'The Dynamics of Constitutional Adjudication', and B. Schlink, *Abwägung im Verfassungsrecht*, Schriften zum öffentlichen Recht (Berlin: Duncker & Humblot, 1976), vol. 299.

39 See Böckenförde, 'Grundrechte als Grundsatznormen – zur gegenwärtigen Lage der Grundrechtsdogmatik', and Böckenförde, 'Grundrechtstheorie und Grundrechtsinterpretation'.

40 See *ibid.*, p. 1530.

41 See Schlink, 'Der Grundsatz der Verhältnismäßigkeit'.

42 It is not the intention here to exhaust the great debate about objectivity and rationality in law. The only objective is to establish theoretical assumptions of the subject which will be developed in the following sections of this paper.

43 See V. Afonso da Silva, *Grundrechte und gesetzgeberische Spielräume* (Baden-Baden: Nomos, 2003), p. 102.

44 See *ibid.*, p. 102.

and practice of the law.⁴⁵ Those who criticize balancing specifically for being a purely subjective method seem to suppose that there are other methods in juridical argumentation that would allow for a mathematical rationality.⁴⁶

Therefore, a claim of hyper-rationality of balancing is rejected by this paper. Objectivity in an absolute sense cannot be guaranteed in law, because that would be utopia. It cannot be achieved or obtained in any legal order.⁴⁷ Rationality in law and for balancing specifically can only be achieved within a certain limit; in other words, rationality in a weak sense.⁴⁸ Rationality in a weak sense does not necessarily imply judgments reasoned only by the mere personal opinions of judges. It is not about judging in a decisionistic manner, according to personal wishes or beliefs, but according to reason. It is about the effort to justify each step taken to reach the decision. Each decision should aim to achieve a universally reasonable result.

In this sense, it is important to develop a procedure capable to structure the decision, explaining its justification and considering each part of its reasoning. This means a procedure that controls whether it is possible to identify and analyze the arguments in a decision. The arguments have to be considered acceptable and the results of the decision must be consistent with the underlying arguments. Thus, the rationality that is sought within a decision-making method corresponds to the possibility of justifying the arguments put forth to reach the decision.

Accepting this concept of rationality in a weak sense, any claim for absolute neutrality and impartiality in the practice of legal methods is also rejected. The practice of balancing and its structure as a legal method do not exclude the existence of personal opinions by practitioners of the law. However, this does not mean that the decisions are based solely on those opinions. Each decision has to observe requirements of reasoning and justification.

5 Models of balancing

Many of the objections that were analyzed above assume an exaggerated practice of balancing, speaking of an unjustified expansion of balancing or a “constitutional adjudicative state” in the current legal order, as if every legal issue becomes a matter of balancing.⁴⁹ This kind of objection normally characterizes the method as arbitrary, without rational standards. It is argued that any result could be achieved within the practice of balancing. Use of the method would be the expression of the personal opinions

45 See V. Afonso da Silva, *O conteúdo essencial dos direitos fundamentais e a eficácia das normas constitucionais* (São Paulo, 2005), p. 190.

46 In this sense, see Afonso da Silva, *Grundrechte und gesetzgeberische Spielräume*, pp. 103–4.

47 See Bernal Pulido, ‘Grundrechtsprinzipien in Spanien: Rationalität und Grenzen der Abwägung’, 206.

48 See Afonso da Silva, *Grundrechte und gesetzgeberische Spielräume*, pp. 103–4.

49 In this sense about the objections, see L. Clérico, *El examen de proporcionalidad em el derecho constitucional* (Buenos Aires: Eudeba, 2009), p. 295, and Alexy, ‘Formal Principles: Some Replies to Critics’.

of the legal practitioners, because there are no rational standards for its practice and weighting. However, this argument corresponds to a decisionistic model of balancing.⁵⁰

The decisionistic model is just one of the two possible models of balancing. There exist two concepts of balancing: (1) the decisionistic model, and (2) the justified model. The definition used in this paper considers a justified model of balancing, but without the claim of finding a single correct answer in every case.⁵¹ According to this model, legal practitioners have to justify the conditional priority relation that results from the use of balancing. The justification of their decision has to properly follow rules of rational argumentation.⁵² In this concept, the method has to follow forms of argument in a rational legal discourse.

Moreover, the outcomes of balancing can be different considering (1) a decisionistic model; (2) a definitive model; or (3) a moderate model. The first model corresponds to the model the critics object to: every outcome is possible, without a claim of justification. The second one corresponds to a model where “balancing leads in a rational way to one outcome in every case”.⁵³ This thesis, however, is not in accordance with the theory of principles; according to this theory, “balancing is not a procedure which leads necessarily to precisely one outcome in every case”.⁵⁴ The third model asserts that “one outcome can be rationally established through the use of balancing, not in every case, but in at least some cases, and that the class of these cases is interesting enough to justify balancing as a method”.⁵⁵ This aspect does not make balancing an arbitrary method.⁵⁶ Therefore, a moderate and justified model of balancing is considered in this paper.

6 The weight formula

The weight formula represents a way of explaining, structuring and illustrating the reasoning within balancing in order to clarify how the evaluation between the principles is made and how the conditional priority relation is established. According to Alexy, the formula provides “a demonstration of how and why balancing is possible as a form of rational legal argument”.⁵⁷ It expands the Law of Balancing, cited above.

By means of the Law of Balancing, what is compared and evaluated within the method can be clearly viewed: the degree of interference of one principle in detriment to

50 In this sense, see Afonso da Silva, *Grundrechte und gesetzgeberische Spielräume*, p. 105.

51 See Alexy, *Teoria dos direitos fundamentais*, pp. 164–5.

52 Cf. Giorgio Maniaci, “Algunas notas sobre coherencia y balance en la teoría de Robert Alexy”, p. 164.

53 Alexy, *A Theory of Constitutional Rights*, p. 401.

54 *Ibid.*, p. 402.

55 *Ibid.*, p. 402.

56 *Ibid.*, p. 402.

57 Alexy, ‘The Construction of Constitutional Rights’, 20.

the importance of satisfying the other. Therefore, the evaluation consists in deciding the priority of a principle in a concrete case, where one is limited and the other is satisfied. The importance of the weight formula is that it provides standards for balancing decisions. It provides also a greater intersubjectivity in the establishment of the decision, as through it the choice between one principle or another is more detailed than a simple preference. In this sense, the formula represents an argument against the critics:

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

It is important to explain in detail how the weight formula is well structured through variables and a scale that permits an evaluation of the variables through rational standards. First of all, P_i represents the principle that is limited or not satisfied. P_j represents the colliding principle. $W_{i,j}$ represents “the concrete weight of the principle P_i relative to the colliding principle P_j ”.⁵⁸ In order to construct the formula, the Law of Balancing is divided into three steps.⁵⁹ In the first, the degree of restriction or non-satisfaction of one principle in detriment of the other is established. In the second, the importance of satisfying the competing principle is evaluated. The third and last one analyses if the importance of satisfying the competing principle justifies the limitation or the non-satisfaction of the other principle.⁶⁰ These steps are present in the formula through the variables I_i and I_j .

The intensity of the intervention in P_i is represented by I_i .⁶¹ Alexy uses the terms “intensity of intervention” and “degree of restriction or non-satisfaction” as being the same terms.⁶² I_i represents a concrete quantity, because interferences in principles are always concrete.⁶³ Its abstract weight is represented by W_i . On the other side of the formula, I_j represents the importance of satisfying P_j or, in other words, the degree of importance of satisfying it. The abstract weight of P_j is represented by W_j . In collisions between constitutional rights, the abstract weights of the colliding rights are frequently equal. In these cases, the abstract weights cancel each other out and therefore they are not a relevant factor in the decision.⁶⁴

The objection concerning the lack of rational standards within the balancing decision would be justified only if rational judgments regarding (1) the intensity of the interference in a principle, (2) the degree of importance of the other principle, and (3) the relation between them could not be achieved.⁶⁵ However, Alexy affirms that rational

58 Alexy, ‘Formal Principles: Some Replies to Critics’, 513.

59 Alexy, *A Theory of Constitutional Rights*, p. 401.

60 Ibid., p. 401.

61 Ibid., p. 405.

62 Ibid., p. 405.

63 Ibid., p. 405.

64 Ibid., p. 406.

65 Ibid., p. 401.

judgments are possible in those cases if a scale is established. Alexy's classification follows a three-grade or triadic scale classifying the stages as 'light' (l), 'moderate' (m) and 'serious' (s), and which are then used to define the degrees of interference (*Ii*) and importance of satisfying a principle in a concrete case (*Ij*).⁶⁶ The establishment of clear degrees provides rational standards for balancing decisions.⁶⁷ The triadic scale can be represented also by the simple geometric sequence 2^0 , 2^1 , and 2^2 , that is, 1, 2, and 4.⁶⁸ The allocation of numbers turns the relations to be evaluated through the weight formula more illustrative and clearer. The variables are thus evaluated through this triadic scale.

The establishment of a scale within a three-grade model, that evaluates the intensity of the intervention in a principle and importance of satisfying the other, does not represent an attempt to commensurate the rights in question. What is established is an ordinal scale related to the degrees of the intensity of the intervention in a principle or of the importance of satisfying the other and not to the principles themselves, with an argumentative purpose for the practice of balancing, with no objective to establish a cardinal scale.⁶⁹ The scale allows different legal practitioners to use the method based on the same standards – namely the three degrees of the scale - in relation to the degrees of the colliding principles.

Based on these definitions, the controversy would be how to determine and evaluate the intensity of intervention in one right and the degree of importance of satisfying the other using the triadic scale. To define those degrees, the elements of the concrete case have to be considered, namely the questioned measure and the effects that its implementation and non-implementation have on the relevant principles.⁷⁰ Thus, in a conflict between the freedom of expression and personality rights, the intensity of a intervention in the first principle could be determined by the question how intensively the prohibition of an expression interferes with the freedom of expression, considering the expression itself, the situation, the limited measure and damages of the concrete case.⁷¹ To determine the degree of importance of satisfying the personality rights, the question would be “what omitting or not implementing

66 Ibid., p. 402. The abstract weights of the principles (*Wi* and *Wj*) are also defined by this scale.

67 As Alexy affirms, the triadic model does not exhaust the possibilities of graduation (See Alexy, 'The Construction of Constitutional Rights', 30, and Alexy, *A Theory of Constitutional Rights*, p. 412). But the more values are inserted in a scale, the more difficult it will be to evaluate the variables, as the differences between the degrees will be less clear (ibid., p. 413). And as “the justifiability of statements about intensities is a condition of the rationality of balancing”, a graduation of the variables in the weight formula can work only with relatively crude scales. (Alexy, 'The Construction of Constitutional Rights', 31).

68 Ibid., p. 31.

69 See the detailed explanation about commensurability and comparability: V. Afonso da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision', *Oxford Journal of Legal Studies* 31 (2011), 273–301, at 287–8.

70 Alexy, *A Theory of Constitutional Rights*, p. 406.

71 Ibid., p. 406.

the interference with the freedom of expression ... would mean for the protection of personality".⁷² Therefore, the evaluation considers the concrete case and also the exact opposite case to determine the degrees in balancing, considering the hypothesis if the limited right had not been interfered with. Moreover, other concrete situations of interference or satisfying a right can be compared to determine the degrees in question. Through such a comparison, some criteria can be defined, and based on these criteria it can be established if the degree of an intervention is serious, moderate or light.

The other variable in the weight formula concerns the reliability of the empirical and normative assumptions in relation to "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".⁷³ It is represented by R_i and R_j .⁷⁴ As Alexy affirms, it is a variable that refers to the knowledge of things.⁷⁵ It is not always possible to be certain about the empirical and normative premises used to evaluate the degrees of interference and importance of the principles. The relation between the reliability levels of the premises and the concrete weights of the principles is explained through the epistemic law of balancing, also known as "the second law of balancing": "The more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premises".⁷⁶ A triadic scale is also used to evaluate the epistemic degrees of the reliability variables. The degrees of an epistemic scale are defined as: certain or reliable (r), maintainable or plausible (p) and, not evidently false (e).⁷⁷ As epistemic uncertainty weakens the evaluations regarding the intensity of the interference and of the importance of the principles in the concrete case, these epistemic grades are expressed by the following simple geometric sequence: 2^0 , 2^{-1} , and 2^{-2} , that is, 1, 1/2, and 1/4.⁷⁸

Having established the degrees of the variables by means of the triadic scale, the third and last step of balancing corresponds to evaluating if the importance of satisfying the competing principle justifies the limitation or the non-satisfaction of the other principle, considering also the other variables. The weight formula illustrates how the relationship between those degrees is evaluated (see above). The overall concrete weight of P_i is represented by $I_i \cdot W_i \cdot R_i$ and the overall concrete weight of P_j is represented by $I_j \cdot W_j \cdot R_j$.

P_i takes precedence over P_j when the value of $W_{i,j}$ is greater than 1. This means that the overall concrete weight of P_i is heavier than the overall concrete weight of P_j ,

72 Ibid., p. 407.

73 Alexy, 'Formal Principles: Some Replies to Critics', 513.

74 Alexy divides the variable R in two other variables in his most recently published article (See *ibid.*). But for the objective of this paper, the explanation of a common reliability variable is sufficient.

75 Ibid., p. 514.

76 Alexy, *A Theory of Constitutional Rights*, p. 418.

77 Ibid., p. 419.

78 Ibid., p. 419.

considering also eventual uncertainties in the case. As an example, considering if the reliability of all the empirical and normative assumptions is certain ($r = 1$), the intensity of intervention in P_i is serious ($s = 2^2 = 4$), the importance of satisfying P_j is moderate ($m = 2^1 = 2$), and the abstract weights of both principles are the same (both serious, $s = 2^2 = 4$), then they cancel each other out and are not a relevant factor in the decision. The weight formula would illustrate this constellation:

$$W_{i,j} = \frac{I_i \cdot W_i \cdot R_i}{I_j \cdot W_j \cdot R_j} = \frac{4 \cdot 4 \cdot 1}{2 \cdot 4 \cdot 1} = 2$$

On the other hand, P_j takes precedence over P_i when the value of $W_{i,j}$ goes below 1. There are also cases where the result of the weight formula is exactly 1. These cases represent stalemate situations. A stalemate situation occurs if the overall concrete weights of the colliding principles are evaluated in the same way.

In a stalemate situation, the balancing stipulates no result, as no principle takes precedence through the balancing decision.⁷⁹ The critics frequently justify their objections by basing them on stalemate cases. However, this does not mean that the procedure of evaluation using balancing is not rational. Actually, it can only be concluded that the overall concrete weights of the principles are the same by comparing the principles and applying the weight formula. This is a counter-argument against the objection, which states that the stalemate cases prove incomparability.

Moreover, a stalemate gives cause for legislative discretion in the concrete case. The legislator has the discretion to decide which solution is better according to political reasons. A stalemate case means that the constitutional court must defer to the legislative power in this case. The legislative decision regarding the preference of principles must be followed by the judiciary. Thus, stalemates represent an answer to the objection that affirms that the theory of optimization does not allow for any legislative discretion.

There are other details and new discussions concerning the development of the weight formula.⁸⁰ However, in this paper the main features of the formula have been presented and explained. In order to better exemplify the possibility of structuring balancing within rational standards, a concrete case will now be analyzed and investigated through the criteria exposed within the weight formula.

79 See R. Alexy, 'Die Gewichtsformel' in J. Jickeli, P. Kreuzt and D. Reuter (eds.), *Gedächtnisschrift für Jürgen Sonnenschein* (Berlin, 2003), pp. 771–92, at p. 782.

80 See, for example, M. Klatt and J. Schmidt, 'Epistemic Discretion in Constitutional Law', *International Journal of Constitutional Law* 10 (2012), 69–105

7 Case study: Data screening, the protection of personal data and counterterrorism

After the terrorist attacks on the 11th September 2001 in the United States of America, it came out that a few of the terrorists that were involved in the planning and execution of the attacks had residences in Germany and had attended German universities. After this discovery, some German federal states enacted laws that permitted data screening in order to uncover other potential terrorists (called “sleepers”), that might be planning attacks.⁸¹ The case analyzed by the German Federal Constitutional Court⁸² questioned the authorization of local courts to proceed with data screening that was based on the law of the federal state of North Rhine-Westphalia.

The data screening defined by the law corresponds to a preventive instrument, which determines the profile of suspects or “potential terrorists” based on personal information matches, such as information obtained through residence registration and bank accounts, among others. This procedure was developed and applied in Germany in 1970 to combat terrorism, in an attempt to discover people involved in the “Red Army Fraction” (RAF – “Rote Armee Fraktion” in German) terrorist organization.⁸³ As the terrorists of that organization used to pay their bills in cash, it was determined that electric power and telephone companies had to inform which of their clients had been paying their bills in that manner. The data provided was matched with other information, so that people with false identities could be identified.⁸⁴ By the end of the procedure, a list with suspects was compiled, and based on this data the police investigated the addresses on the list.

In the current case, the law that permitted data screening was the Policy Law of the federal state of North Rhine-Westphalia (*PolG - Polizeigesetz des Landes Nordrhein-Westfalen*). Its article 31, paragraph 1^o, determines that the police are allowed to request the transfer of personal data and other related data of certain groups of persons that is stored in the archives of public and non-public institutions if deemed necessary for defense against a current threat or for the security of the State, of the federal states, or for the security of the physical integrity, life or liberty of a person. Moreover, the law stipulates that an authorization of a local court is necessary for the realization of the data screening. On 2nd October 2001, a data screening was allowed by the local court of Düsseldorf (*Amtsgericht Düsseldorf*), following a request of the Düsseldorf police. The

81 More information about the concept of “sleepers”, see W. Achelpöhler and H. Niehaus, ‘Data Screening as a Means of Preventing Islamist Terrorist Attacks on Germany’, *German Law Journal* (2004), 495–513, at 495.

82 Decision of the German Federal Constitutional Court 1 BvR 518/02, 4th April 2006.

83 See G. Kett-Straub, ‘Data Screening of Muslim Sleepers Unconstitutional’, *German Law Journal* (2006), 967–75, at 968; and decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 3.

84 See F. Müller and T. Richter, ‘Report on the Bundesverfassungsgericht’s (Federal Constitutional Court) Jurisprudence in 2005/2006’, *German Law Journal* (2008), 161–94, at 179.

current threat was justified by the fact that, after the September 11th attacks, the danger of new attacks was still present, given that the terrorist groups were organized and active on an international basis.

With the authorization, all public residence archives in the Federal State of North Rhine-Westphalia, the central archive of foreigners in Cologne and all the universities in the region were obligated to transmit all the data related to males born between 1st October 1960 and 1st October 1983.⁸⁵ The profile sought by the police as being possible terrorists corresponded to men of the Islamic faith,⁸⁶ aged between 18 and 40 years, students, or who had been students, in German universities, and from a country or citizens of certain countries with a predominantly Islamic population.⁸⁷ Approximately 5.2 million people's data was transferred due to the screening.⁸⁸

A Moroccan Muslim student then legally questioned the authorization of the local court. He obtained negative responses both from the regional court (*Landgericht Düsseldorf*) and from the higher regional court (*Oberlandesgericht Düsseldorf*). Because of these negative responses, he filed a complaint with the Constitutional Court, arguing a violation of the fundamental right to self-determination of information (based on Article 2 (1) in conjunction with Article 1 (1) of the Basic Law of Germany).⁸⁹ In addition, he argued the lack of evidence demonstrating the existence of a current danger justifying the authorization of data screening, a presupposition of the law itself.⁹⁰

8 The practice of balancing in the concrete case

Using this concrete case, the practice of balancing and the possibility of structuring it within rational standards will be analyzed. In order to reach a decision, the court tried to establish criteria and standards to determine the intensity of intervention and the importance of satisfying the colliding principles. In the course of the construction of the justification of the case, the court sought concepts from its own past decisions, making references to several precedents and to other similar balancings.⁹¹ The argumentation of the court will be investigated here in detail.

85 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 12.

86 Obtaining information regarding a person's "religion" is easy through public archives in Germany because people must inform their religion while registering their residences.

87 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 13.

88 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 28.

89 Article 1 (1): "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority". Article 2 (1): "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law".

90 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 34.

91 Thus, the practice of the balancing is not "ad hoc", as it considers precedents and concepts that were already adopted by the court.

In the collision between constitutional rights of the concrete case, the principles to be protected through the data screening are the security of the State, of the federal states, and the physical integrity, life or liberty of a person. On the other side, the limited principles are the right to self-determination of information and the rights of personality, as the right to privacy. The constitutional court based its analysis on the following assumption and general rule: “intense fundamental rights’ limitations must be considered whether the levels of suspicion or of danger are determined”⁹² and “this assumption is served by the data screening, if the legislator connects the existence of a concrete danger against the threatened fundamental right”⁹³.

To investigate this assumption, the court evaluates first the concrete weight of the intervention on the right to informational self-determination in the constitutional complaint. For this purpose, the court establishes some criteria, such as: how many people’s data were screened by means of the measure; if the people investigated gave any reason for the information screening; the extension of the individual damage in relation to the people that were investigated; how intensive was the collective damage during the data screening; and under which conditions the damages could have occurred. To evaluate these criteria, the court considers if those affected by the data screening remained anonymous during the process, which information was collected, and which are the disadvantages of the measure against the individuals.⁹⁴ The court affirms that these criteria were developed by itself in previous decisions in its jurisdiction, where fundamental rights related to information were limited, as, for example, in decisions on bank secrecy and related to the inviolability of the domicile.⁹⁵

Based on the precedents, the court affirms that even when the information found by data screening provokes a low intensive interference in the right of personality, as the screening generally intervenes within the scope of protection of the fundamental right of article 10(1) and 13(1) of the German Basic Law, the interference falls in the case of a considerable intervention in the general fundamental right of informational self-determination.⁹⁶ Moreover, it is necessary to evaluate the interference considering the extension of the authorization for the data screening, as well as the possibilities of matches between the collected data. This first analysis, based on previous decisions, serves as a general standard to be considered in the evaluation of the degree of the restriction in the right of self-determination in the concrete case.

After this analysis, the court focuses on examining the criterion “content” to determine the degree of the intervention in the constitutional law. The intensity of

92 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 137.

93 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 89.

94 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 94.

95 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 95.

96 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 96. Article 10 (1): “The privacy of correspondence, posts and telecommunications shall be inviolable”; article 13 (1): “The home is inviolable”.

the intervention in the right of self-determination of the information depends on the contents that were obtained through the screening. Especially considered is to what degree the information found and its matches with other data reach the essence of the personality and how this content will be used and disseminated. In addition, the matches of the transmitted data can, to a certain extent, result in new information about the investigated individuals and increase the intensity of intervention in the constitutional law.

The law that substantiated the authorization in the concrete case establishes that the only content that cannot be transmitted in any case is the information protected by professional secrecy. There is no other limitation for an authorization of screening of other contents. The possible authorization in the law also includes the collection of personal data of a high importance to the private sphere of the individual, such as religious conviction.⁹⁷ In the concrete case, the court argues that there was a high intensive limitation in the constitutional right because of the variety and the extent of the data screening that was authorized by the local court.⁹⁸

Based on the data that can be collected, the court is concerned about the possibility of generating a stigmatizing effect for those who meet the screening criteria.⁹⁹ In this case, the data screening had focused on foreigners from certain origins and of the Muslim faith. The investigative measure can have a stigmatizing effect on those individuals and indirectly increase the risk for them of being discriminated in their daily or professional life. The consequences of differentiating a religion and people belonging to a certain region increase the intensity of the intervention in the constitutional right.

Moreover, the risk that such data can flow beyond the State's objectives must be considered.¹⁰⁰ The law does not allow the development of catalogs or registers of personal profiles, but the gathering and matching of data can lead to the elaboration of personal profiles and, through this, enable particularly intense interventions in the constitutional rights.¹⁰¹ In the concrete case, this issue is very problematic because, considering the criteria "number of affected people" and "data extension", the screening reached a great number of people, with a great extension of data. In relation to the criterion if the investigated people presented concrete reasons for the search, many of them did not raise any suspicion. The court evaluates that the freedom of an individual is limited more intensely the less he or she gives reason for the state intervention. Thus, not only the overall number of people that were screened but also the number of suspected people in the search must be considered to evaluate the intensity of the

97 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraphs 99, 101.

98 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 102.

99 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraphs 111, 112.

100 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 105.

101 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 106.

intervention through the screening. If the search criteria are not specific, the screening can reach a great quantity of data from people who do not raise any suspicion.

Considering that analysis, the court compared the concrete case with the RAF case.¹⁰² In the concrete case, the data screening looked for supposed terrorists that had not yet committed any attack, but who might commit one in the future. In the RAF case, the data screening had focused on criminals that were already identified as such. In the concrete case, there were no specific criteria about the profile of the criminals. The data screening was based on very general and overarching search criteria.¹⁰³ As the search criteria was very general and broad, the common well-being is also affected in this situation. This is because the right of self-determination is an elementary functional condition of the citizen's capacity to act, founded in a democratic community and with liberties. Such a screening creates a risk of abuse and a sense of being watched by the State.

However, the court affirms that this analysis itself does not determine that the authorization for the data screening was not proportional. It is necessary to investigate if the data screening had as its objective the prevention of a concrete danger.¹⁰⁴ Therefore, the importance of satisfying the colliding constitutional good in the concrete case must be evaluated. The concrete importance of the colliding constitutional good is defined by means of the concept of a concrete danger. The State has the duty to combat terrorism and to preserve democracy and the collective liberty.¹⁰⁵ The promotion and enforcement of security is a state objective, but it is necessary to establish an adequate balance between freedom of individuals and security.¹⁰⁶ The balance must be established between the intensity of the intervention in the constitutional rights, the facts of the concrete case, such as the extension of the measure, and the weight of the constitutional rights to be protected.

Considering this, the main reasoning for the decision is that the measure is only allowed in the cases of the existence of a concrete danger to the constitutional good to be protected, since the intensity of the intervention in the constitutional rights through the procedure of data screening is high.¹⁰⁷ In the concrete case, the court affirms that the authorization for that screening was not proportional, because there was a lack of a concrete danger.

To evaluate the concreteness of the danger, the tribunal investigates aspects similar to the epistemic variable of the weight formula, related to the underlying empirical and normative premises used to evaluate the degrees of interference and

102 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 119.

103 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 119.

104 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 125.

105 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 126.

106 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 128.

107 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 133.

importance of the principles in the case: “The heavier is the threat or the damage in the constitutional good [*the good to be protected, namely the security of the citizens*] and the less heavy is the intervention in the constitutional right [*the informational self-determination*], the less likely must be the probability that the threat or breach of a constitutional right can be realized, and the lesser must be the facts, which serve as a basis for suspicion”.¹⁰⁸

In other words, if the intensity of the intervention in the right to self-determination is high, the probability that the danger or the threat will be concretized must be equally high and the facts related to the suspects of committing this future threat must be clear and considerable. The higher is the intensity of the intervention in the constitutional right, the greater and the more certain must be the probability and the substantiated basis of the facts of the prognosis in the concrete case. Therefore, high intensive interventions must occur only if there are well-defined suspects and levels of danger.

Article 31 of the law of the federal state of North Rhine-Westphalia stipulated as a requisite for the authorization for a data screening the “current danger”. The definition of current danger corresponds to a situation where “the effect of the harmful event has already begun or which the immediate effect is to occur in a close time with a secure and well-delimited probability”.¹⁰⁹ Nevertheless, the court considered that the existence of a current danger is not a constitutional obligation.¹¹⁰ And while searching for data under the requirement of imminent threat or danger, there is the possibility of the measure being applied too late. To solve the disadvantages of the concept of “current danger”, the court interprets the law as the necessity of there existing a concrete danger.¹¹¹ Therefore, a concrete evaluation of the probability is necessary, since the mere assumption or possibility is not enough to justify the intervention.¹¹²

In the concrete case, the justification of the local tribunals for the authorization was based on a general and broad threat, a consequence of the attacks of 11th September 2001. However, the general and broad danger of an international terrorist attack or foreign policy tensions are not sufficient to justify a data screening.¹¹³ A concrete danger or threat of attacks in Germany was not found in the concrete case. Thus, the court decides that the contested decisions from the local and regional courts did not define the content of current danger sufficiently. The court affirms that the existence of a concrete danger is one of the requisites for an authorization of a data screening and that the concreteness represents the content of the concept of current danger.

For that reason, the German Constitutional Court argues that the decisions of the local and regional courts had not paid attention to the fact that the proportionality

108 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 136.

109 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 142.

110 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 143.

111 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 144.

112 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 145.

113 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraph 147.

of the authorization for such a data screening depends on the existence of a concrete danger and on a certain probability that a violation of the constitutional good will occur, considering not only the size of the possible damage, but also the severity and the possibility of success of the intervention that will be undertaken in order to avoid the danger.¹¹⁴ The authorization of the data screening in the case presents constitutional deficiencies and was not proportional.

By means of the reasoning of the German Constitutional Court, the variables and criteria that were analyzed through the weight formula were clearly viewed, such as the intensity of the intervention and the importance of satisfying the constitutional rights in the case as well as the epistemic premises. The evaluation of such variables was justified and the court considered also its precedents and compared the criteria used in similar past cases. The court developed the reasoning of those variables in the practice of the balancing in a justified way.

It is not necessary that the court states expressly the use of the weight formula according to a particular piece of literature or author, or by means of a long theoretical explanation or extensive descriptions about the origin of the method. In the decision of the German Constitutional Court, the only literary quotes used were in order to define new concepts related to terrorism, concepts that had not yet been addressed in its previous cases. There is no need for extensive methodological theorizations, but rather the application of criteria and standards of the formula in a clear way in practice.

Lastly, it should be noted that the fact that it is possible to structure a balancing by means of rational standards does not mean that balancing leads to a single correct answer. As was previously explained, disagreements about the evaluation of the variables and the criteria applied through the method are possible. In the above case of data screening, for example, the judge Evelyn Haas wrote a divergent opinion. She considered and investigated the same variables, but evaluated the situation differently from the majority of the court and reached a different conclusion.

114 Decision of the German Federal Constitutional Court 1 BvR 518/02, paragraphs 154, 158.

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