

THE BALANCING METHOD ON THE BALANCE

Human Rights Limitations in the European Convention on Human Rights

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Abstract

Balancing as a method of resolving conflicts of rights has considerable currency in many Western legal systems. The paradigmatic example is that of the European Court of Human Rights which not only routinely uses balancing but has actually made it its primary method of adjudication.

In this paper I challenge the balancing approach as the judicial method of resolving conflicts in human rights cases. Part I explores the debate on balancing in the context of US constitutional law. My focus is on the First Amendment, a field which has given both judges and academics the chance to develop differing approaches as to the appropriate way of adjudicating conflicts between speech and other constitutional rights or state interests. In Part II I turn to the jurisprudence of the European Court of Human Rights. Here I distinguish between two functions of balancing: firstly, as a tool used to define the substantive content of the conflicting rights, and, secondly, as a method of resolving the actual conflict (strict-sense balancing). For this purpose, I discuss in some detail two well-known judgments of the Strasbourg Court, *Otto Preminger-Institut v Austria* and *IA v Turkey*. My claim here is that balancing obscures the moral questions inherent in rights adjudication and distorts our understanding of what specific rights entail. Finally, building on the critical part of my analysis, I offer, in Part III, some elements of an alternative method of adjudicating human rights disputes which stresses the need for substantive moral reasoning.