

Contents

Abbreviations	xiii
Note on Citations	xv
List of Figures	xvii
List of Tables	xix
List of Symbols	xxi
Table of Cases	xxiii
I Foundations	1
Introduction	3
1 Standards of Legal Reasoning	9
1.1 Nature of Law	9
1.2 Clear Cases—Hard Cases	11
1.3 Syllogism and Deductivism	13
1.4 Scepticism: Is Rationality Possible?	17
1.4.1 Interpretative Rule Sceptics	17
1.4.2 Rule Sceptics	19
1.4.3 Moral and Problem Case Sceptics	20
1.4.4 Is There a Universal Language?—the Post-Modern Chal- lenge	25
1.4.5 One Right Answer Thesis vs. Very Moderate Scepticism	28
1.4.6 Summary	29
1.5 Approaches Against Scepticism	29
1.5.1 Dworkin’s Principle Approach	30
1.5.2 Evaluation Jurisprudence	31
1.5.3 Common Problems	33
1.5.4 Summary	34
1.6 Major Tenets of Modern Legal Theory	34
1.6.1 Coherence	35
1.6.2 Consistency	39
1.6.3 Universalizability	41
1.6.4 Defeasibility	43
1.7 Justifying Fundamental Rights and Democracy	45
1.7.1 H.L.A. Hart	46

Contents

1.7.2	Neil MacCormick	47
1.7.3	Discourse Theory	47
1.7.4	The Relationship between Law and Morals—the Special Case Thesis	54
1.8	Interpretation	57
1.8.1	Ordinary Meaning	58
1.8.2	Systematic Interpretation	59
1.8.3	Teleological Interpretation	60
1.8.4	Relevance of Interpretation for this Study	61
1.9	Case Law	61
1.9.1	Case Law in England	62
1.9.2	Case Law in Germany	64
1.9.3	Comparison	66
1.9.4	Case Law and Community Law	67
1.10	Proportionality and the Application of Fundamental Rights . .	69
1.10.1	Principle Theory of Fundamental Rights	69
1.10.2	Framework Model of Fundamental Rights	77
1.10.3	Summary	79
1.11	Summary	80

II The Application of Fundamental Rights and the Proportionality Principle 81

2	Case Law	83
2.1	Overview	83
2.2	European Court of Human Rights	85
2.2.1	Background and Context	85
2.2.2	Margin of Appreciation and Proportionality	88
2.2.3	The Margin of Appreciation—a Desirable Doctrine? . .	114
2.2.4	Conclusion	116
2.3	German Federal Constitutional Court	117
2.3.1	Background	117
2.3.2	The Proportionality Principle	121
2.3.3	The Court's Role and its Methods	142
2.3.4	Conclusion	145
2.4	US Supreme Court	146
2.4.1	Marbury v. Madison and Judicial Review under the Con- stitution	146
2.4.2	Between 'Mere Rationality' and 'Strict Scrutiny'	149
2.4.3	The Role of the US Supreme Court	157
2.4.4	Conclusion	159

2.5	Summary	160
3	Case Law of the ECJ	163
3.1	Legitimate Aims	164
3.1.1	Legal Bases	164
3.1.2	Fundamental Rights	166
3.1.3	International Treaties	167
3.1.4	Summary	167
3.2	Suitability	168
3.3	Necessity	169
3.4	Proportionality in the Narrow Sense	173
3.4.1	Definition of Review Standards	174
3.4.2	The Application of the Standards	176
3.4.3	Evaluation	181
3.5	The Role of Facts	183
3.5.1	Definitions	183
3.5.2	Burden of Proof	185
3.5.3	The Precautionary Principle—Dealing with Uncertainty	191
3.5.4	Summary	195
3.6	Conclusion	196
III	Theoretical Treatment of Balancing	199
4	Balancing and Decision Theory	201
4.1	Instrumental Rationality and Utility Theory	204
4.1.1	Utility	204
4.1.2	Cardinal Scales	206
4.1.3	Combination of Utility with other Variables	208
4.2	Utility Theory and the Weight Formula	211
4.2.1	Why the Weight Formula Requires Cardinal Scales . . .	213
4.2.2	Why Cardinal Scales Are Problematic	219
4.2.3	Possible Objections	221
4.2.4	Summary	224
4.3	An Alternative Vision of Individual Choice	226
4.3.1	Overview	226
4.3.2	Satisficing—General Characteristics	229
4.3.3	Priority Heuristic	231
4.3.4	Characteristics Summarized	234
4.4	Heuristics and Legal Reasoning	235
4.4.1	Connexions	235
4.4.2	Characteristics of the Heuristics Approach Summarized	240
4.5	Summary	241

Contents

5	Balancing—A Legal Perspective	245
5.1	Methodical Objections	246
5.1.1	Principle Theory and the Structure of Legal Reasoning	247
5.1.2	Cardinal Scales and Objectivity	249
5.1.3	Balancing and Dogmatic Structures	253
5.2	Separation of Powers	255
5.2.1	The Relevance of the ‘Separation Between Powers’ Problem	255
5.2.2	The Role of Separation of Powers Arguments in Light of the Democracy Deficit	258
5.2.3	The Impact of Principle Theory on the Separation of Powers	261
5.2.4	Heightened Scrutiny of Assessments of Facts	269
5.3	The Nature of Fundamental Rights	274
5.3.1	The Analytical Distinction	274
5.3.2	Normative Aspects	281
5.4	Conclusion	295
6	A Rule Based Model of Balancing	297
6.1	The Pivotal Role of Methodical Considerations	297
6.2	Justifying the Satisficing Ideal	299
6.3	Objectivity	300
6.3.1	The Standard in General	300
6.3.2	Implementation of the Standard	301
6.3.3	Justifying Minimal Standards	310
6.4	Conformity with Constitutional Requirements	317
6.4.1	Separation of Powers—Discretion in Setting Policy Goals	317
6.4.2	Standard of Protection	322
6.5	Remaining Objections	344
6.5.1	Uniformity	344
6.5.2	Really Non-Consequentialist?	345
6.5.3	Case Law Positivism?	347
6.6	The Model Summarized	348
6.7	Conclusion	352
	General Summary	353
	The Plan of this Study Revisited	353
	A Summary of Concrete Results—in Theses	356
	References	365
	Translations	379
	Index	383