

The Institutional Aspect of Balancing

Comments on Neil Walker's Doubt Concerning International Balancing

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Introduction

1. My focus would be the more general aspects of Neil Walker's argument against international balancing¹ – as opposed to the specific aspects relating to specific institutional institutions.
2. Most of my comments would be in the form of request for clarifications.

Clarifying the Argument

1. Walker makes the (normative) argument that the justification for the employment of the doctrine of balancing (or proportionality) within an international legal system is less founded (“more elusive and more fragile”) than the justification for the employment of this doctrine within a local legal system (§ 2).

¹ Neil Walker, “Transnational Law and the Limits of Balancing.” All references in the text are to this paper.

A. The examples of international legal systems that he mentions are the European Union, the European Convention of Human Rights and the World Trade Organization and their institutions (§ 2).

2. **The doubt** concerning the justification for the employment of the doctrine of balancing within an international legal system **could be understood in several ways**.

A. The most general doubt concerns the **abstract content** of the doctrine of balancing as a **moral** norm, namely, its general principles of capability, necessity and balancing in the strict sense. This doubt seems misguided. Indeed, it seems that the principles included in the doctrine of balancing are part of every reasonable normative – and particularly moral – theory. I assume that this is not the doubt Walker has in mind.

B. A more specific doubt concerns the justification of the balancing doctrine as a **legal** doctrine, namely, as a doctrine that entails a binding legal obligation to follow it. I assume that this too is not Walker's concern, although this is somewhat less clear.

C. An even more specific doubt concerns the justification of the **institutional** sense of the (legal) doctrine of balancing, namely, its **enforcement by a court**. In other words, this doubt concerns the identity of the persons who implement the (legal) doctrine of balancing – merely the officials who have the relevant power or also judges. This seems to be Walker's concern. This assumption is corroborated by Walker's classifications of the doctrine of balancing as part of what he calls the "structural" category of the law that includes institutional and procedural principles (§ 6). It is also corroborated by Walker's doubt as to the universal nature of the doctrine of balancing (as I explain below).

D. Finally, the most specific doubt concerns merely the justification of **comparison**, namely, **of** straightforward **inference** from the **specific substantive or institutional details** of the local version of the doctrine of balancing to the international version of this doctrine. This is certainly a valid doubt in principle, since an implementation of a normative principle depends on facts that might be different in a different place or time. The more difficult question is to what extent are there relevant differences of this kind between two systems. Walker, like all of us I assume, has this doubt in principle (in

addition to the previous doubt concerning the institutional aspect of the doctrine of balancing).

3. I will focus on the doubt concerning the institutional aspect of the doctrine of balancing.

- A. With respect to this doubt, the question is what considerations support the discretion of the relevant official rather than that of judges?
- B. The institutional aspect of the doctrine of balancing is of special importance since this doctrine is unique in that its content is very vague – both because its normative principles – especially the principle of balancing in the strict sense – are vague and since the implementation of these principle requires factual knowledge that is often in doubt. Therefore, a person who interprets this principle has a wide discretion. So the question is whether it is better that officials or (also) judges would have this wide decision. Is this indeed the correct question?

4. Overall justification and Comparison

- A. Walker's claim is **not** that it is a bad idea to employ the doctrine of balancing within an international legal system, since the hypothesis that this is justified is compatible with the claim that its justification is less founded than the justification of this doctrine in a local legal system. In other words, the doctrine of balancing might be justified in both these contexts.
- B. The overall conclusion with regard to the proper place of balancing should be made based on a **comparison** of the advantages and disadvantages of balancing and to those of the each alternative. It is possible that an alternative would be the best even if it has serious drawbacks. It is therefore not enough to point out the disadvantages of balancing. Rather, we need to consider also its advantages and in light of them determine its overall value and then consider the advantages and disadvantages of each alternative in order to determine its overall value. Indeed, Walker writes that “alternative solutions... seem even less suited to the transnational level” (§ 15). If this is the case, then balancing should be adopted in this context too.
- C. The claim that the justification for the employment of the doctrine of balancing within an international legal system is **less founded** than the justification for

the employment of this doctrine within a local legal system could be understood in (at least) two ways:

- I. **The balance of considerations** concerning this doctrine is more favorable in the local arena compared to the international arena, namely, the considerations in favor of this doctrine are stronger or the considerations against it are weaker or both in the local arena compared to the international arena.
- II. The justification for the doctrine of balancing is **less clear** in the local arena, namely, while it is clearly justified in the local arena, it is not clearly justified in the international arena. Notice that this interpretation is different from the previous one since a conclusion that the justification for the balancing doctrine is less clear in the international arena is compatible with the possibility that it is justified in exactly the same way that it is justified in the local arena in terms of the force of the relevant considerations.

Categories of Law

1. Walker draws a distinction between three categories of the law relating to “form”, “substance” and “structure”. Walker defines these categories as follows:
 - A. **The “formal” category** includes principles relating to the nature of law as a normative system – that is, principles such as “legality” (following a rule), “transparency”, “clarity” and “stability” (§ 4).
 - B. **The “substantive” category** includes moral principles adopted by the law (“the idea that the law does or should incorporate certain substantive values whose origin is external to the law”) (§§ 5-6).
 - C. **The “structural” category** includes institutional and procedural principles (§ 6).
 - D. The general idea behind this classification is clear, but their definition and consequently the distinction between them in terms of the extent of their universality is puzzling.
2. First, the definition of the “substantive” category – **moral rules adopted by a legal system** – seems applicable also to the other categories. Both “formal” principles such as “legality”, “transparency”, “clarity” and “stability” and procedural and

institutional principles are presumably justified – to the extent they are justified – based on moral rules whose origin is beyond the law.

3. Second, Walker’s claim that (according to **legal positivism**), “law’s substantive ethical claims... tend to emanate from the particular community” (§ 5), to the extent that it is a reasonable (and I assume that it is) – applies to all these categories of law.
4. Moreover, the **content** of the law and the **source** of the law are different matter. A rule could be universal in content although its legal validity is based on a local source.
5. Finally, and most importantly, **the claim that the justification of the substantive aspect of the law is limited to the local or particular sphere** (§ 5) is vague (what exactly is the scope of the “particular”?). But in any case, it seems puzzling, since **values** – that substantive rules of law are supposed to reflect – are presumably **universal**. Of course, as I have noted. rules that reflect universal values might be local in the sense that they implement these values to a specific set of facts. But this too seems right also to the “formal” and “structural” principles of law. The importance of “clarity” and “stability”, as well as advantages and disadvantages of institutional and procedural details, might be different in different factual contexts. Therefore, **it is not clear why there should be a difference in the level of generality of these categories**. Perhaps there is a difference in the degree of generality of the typical rules between these categories, but this is not a necessary difference.
6. For this reason, I think that **the analysis in terms of this classification to categories of law is unhelpful**. The required course of action seems to be the analysis of each specific principle and particularly the specific principles of balancing.

The Generality of the Doctrine of Balancing

1. My conclusion is thus that while the abstract content of the doctrine of balancing is universal, Walker is concerned with the institutional aspect of the doctrine of balancing, namely, he refers to the enforcement of this doctrine by courts. This sense of balancing might indeed be relatively specific (particular). But the level of generality or particularity of the idea that the general principles of balancing should be enforced by courts is far from obvious. Walker makes several arguments in this

respect against the justification of the institutional aspect of the doctrine of balancing within an international legal system.

2. One argument is based on the idea of **democracy**. Walker argues that while local constitutional principles, including the institutional aspect of the doctrine of balancing, are endorsed in a democratic manner, international principles are not or are endorsed in a democratic manner to a lesser extent (§ 9). However, the assumptions underlying this claim are not obvious.

- A. One assumption is that **a democratic endorsement of a principle is a consideration in favor of this principle**. I will not dispute this assumption, namely, I will assume, at least for the sake of this argument, that democracy is the best form of government and therefore that a democratic endorsement of a principle is a consideration in favor of this principle.

- B. Another assumption is factual, namely, that **the doctrine of balancing is (always) endorsed in local legal systems in a democratic manner** (this assumption is discussed in § 10). I will not dispute this claim too, although it is unclear that the difference between local and international constitutional principles is often not very substantial.

- C. A further assumption is that **a democratic endorsement of a principle is the only consideration in favor of a principle**. This assumption is clearly false in general – there is at least one clear alternative potential justification for a principle, namely, its content – but this justification is irrelevant with respect to the doctrine of balancing in its institutional sense and therefore I will not consider this assumption too (subject to a qualification that I will mention immediately).

- D. Finally, the last assumption is that **the idea of democracy is incompatible with the doctrine of balancing in its institutional sense**. With respect to this assumption, I wish to note a possible interpretation of democracy – concerning its justification and consequently its content – which supports the doctrine of balancing in its institutional sense. This justification for democracy is that it is a way to distribute political power so that no one would have too much power – in order to minimize the danger of abuse based on the assumption that a concentration of power is the most serious danger in this respect. If this is the case, then democracy should be defined as a system that prevents the

concentration of power. And then perhaps the institutional sense of balancing promotes this goal. This depends on the distribution of power in other respects in the relevant system. Of course, whether or not this consideration is classified as part of a conception of democracy or of another, independent conception is not important in itself (that is, this claim could be understood to dispute not the assumption that the idea of democracy is incompatible with the doctrine of balancing in its institutional sense but the previous assumption that a democratic endorsement of a principle is the only consideration in favor of a principle).

3. Another argument against the justification of the institutional aspect of the doctrine of balancing within an international legal system is **epistemic**. Walker argues that, at best, balancing does not always entail a unique correct answer. He argues that “the transnational judge then, even in theory still less in practice, cannot elevate his role in balancing beyond legitimate challenge by resort to the sheer strength and completeness of his knowledge claims” (§ 12). The question whether there is in principle always a unique correct answer with regard to the principles of balancing is complex and I will not discuss it here. But even if Walker is right in his suggestion that there is not always such answer, this does not entail that the position of the judge who implements these principles is different in this respect than that of any other person who implements these principles. And therefore, if the judge’s position is better in other respects, for example, in terms of impartiality (the danger of bias), then there is a consideration in favor of balancing in the institutional sense. Moreover, it is unclear in what respect the **international** judge is in a worse position in this respect compared to a judge in a local legal system.