Introduction

RATIONALE, METHOD AND SCOPE OF THE RESEARCH

Justice holding a set of scales in her hand is the classic representation of the idea that rights have to be balanced against one another. The scales evoke the idea of weighing opposite factors to reach a fair, stable solution. In legal terms – and in this book – balancing is the procedure by which courts take conflicting rights and their intrinsic weight into consideration in order to estimate which are the ‘heavier’ and must therefore prevail over the other(s).¹ This method of judging has gradually been endorsed – first by scholars and then by courts – as a way to adjudicate in an increasing number of decisions. Although the very idea of ‘balancing’ is by no means easily accepted or defined by legal scholars, it is now established practice and here to stay.

The aim of this book is to offer a humble contribution to the study of the balancing that the courts engage in; I intend to demonstrate how the decisions of judges are affected by what I call the ‘conceptions’ of the colliding rights. By ‘conception’ I mean the essence of the idea that a legal system has about that right. In order to understand the conception of a given right, one must look at the entire system of norms and policies introduced to enhance or to limit that same right. The conception of a right is ‘strong’ when that right is safeguarded through tools that are peculiar to it, such as – for instance – specific remedies or tribunals, or if it is protected by an independent authority. The conception of a right describes (and is described by) the level of its protection: the more a right is protected, the stronger the conception of that right is. And vice versa.

I use a case study in my attempt to shed light on the ways in which judges balance conflicting rights. The book focuses in particular on the conflict between copyright and information privacy. In recent decades

Copyright and information privacy

technological advances have caused these two rights to collide more and more frequently. The research illustrated in this book is centred around a selection of lawsuits in which copyright holders tried to enforce their rights against Internet users suspected of illegal file-sharing. A common feature of these cases is that users were usually only partially identifiable through their Internet Protocol (IP) addresses; their real identities were only known to the ISPs (Internet Service Providers) who were providing their Internet connections. The copyright holders therefore asked the ISPs to disclose the users’ real identities. Some ISPs refused to collaborate, forcing copyright holders to sue them in order to obtain a judicial provision obliging the disclosure of users’ data. A vibrant conflict between users’ data protection and copyright holders’ enforceable rights arose.

The conflicts analysed share two peculiarities. First, in each of the countries in my study, although in different fashions, the colliding rights are considered to be equally ranked and both are constitutionally protected. Second, judges are allowed some leeway in deciding which right should prevail: the norms do not clearly state whether or not one right must necessarily be dominant.

The cases analysed have another common trait: they were all decided by national ‘lower courts’, meaning by courts other than Supreme Courts or Constitutional Courts. To date, most of the research done on balancing relates to Supreme Courts; I have chosen instead to concentrate on ‘lower courts’, which also, on occasion, find themselves confronting the issue of balancing rights.

From a methodological point of view, this book is built on a case study in which judicial decisions are analysed in detail in order to understand the influence of conceptions of copyright and informational privacy on courts’ decisions. The judgments examined were given in three different countries, the US, Canada and Italy. These jurisdictions were chosen for several reasons. Since the US is one of the biggest, most powerful countries in the world, its understanding of privacy and copyright has been influencing the rest of the world for at least a century. Europe’s influence has also been considerable. Within the EU, the book focuses particularly on Italy, taking it as an example of the effects of Europeanization on both copyright and privacy regulations.2

My analyses of the Italian decisions also take into account the European cases on the same issues. However, the European level can

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2 As will be demonstrated throughout the book, Italy has implemented most EU Directives on copyright and privacy almost verbatim.
only be considered to a limited extent, given that this book is primarily a study on the decisions taken by ‘lower courts’, in order to demonstrate that the methods they apply are very similar to those applied by Supreme Courts when balancing conflicting rights in constitutional cases. Since the decisions of the EU Court of Justice are more properly grouped with those of Constitutional and Supreme Courts they cannot be placed squarely within the overall frame of this book. This is why my focus is on a single Member State (Italy).

The Canadian system serves as my tertium comparationis. Canada is in many ways a middle ground between the EU and the US as it has historically mixed elements from each. With regard to both copyright and privacy, it represents a different model, in which both the European and the American approaches are partly applied; Canada thus serves as a useful aid in the comparison between the US and the EU.

The research upon which this book is based demonstrates the extent to which judges are influenced by the conception of each right when faced with conflicts between them. While the conception of rights is not – and cannot be – the only approach taken by judges when reaching conclusions, it is undoubtedly an important factor that carries weight when courts are balancing conflicting rights.

The results proposed in this monograph can be extended to similar cases involving other colliding rights, and conceptual balancing can be seen as one of the many concurring causes of any one court judgment. It is, in the end, just a way of describing the act of balancing that judges are called upon to carry out. Conceptual balancing can be applied to judicial reasoning regardless of the country in which a court is operating. In fact, comparing the solutions adopted in different countries is the best way to reveal the process of conceptual balancing; it is only by understanding a particular legal system’s conception of the rights involved in a case that conceptual balancing can be understood.

This book builds upon the existing literature in its comparison of the three legal systems. Although it does not presume to propose new methodologies, or new approaches to comparative law, it attempts to make a useful contribution to the study of this approach to legal science.

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3 Countless articles and books have been written on comparative law and its methodologies. Consider Rodolfo Sacco, "Legal Formants: A Dynamic Approach to Comparative Law" [1991] AJCL 1; and [1991] AJCL 343; Konrad Zweigert and Hein Kötz, An Introduction to Comparative Law (3rd edn, OUP 1998); Mathias Reimann and Reinhard Zimmermann (eds), The Oxford Handbook of Comparative Law (OUP 2006); Pier Giuseppe Monateri (ed), Methods of
The research contained in this book is, inevitably, limited by certain factors. First of all, a number of basic structural differences exist between the three legal systems analysed: many aspects of the creation and interpretation of law, and of the selection and organization of the judiciary, differ sharply between the three countries. Perhaps the most immediate, and obvious, differences are those between countries that belong to the common law family and countries that belong to the civil law family. Following this classification, the approaches of the US and Canada probably have commonalities not shared with the Italian system. The creative role of judges, for instance, is much greater in common law countries. However, judges create law in any country.

My research is not intended to question the role of judges or that of legislators. With regard to judges, I would not dream of opining on which right should prevail or by what means judges should resolve conflicts. As for legislators, the existence of ambiguous norms, and their interpretation, are ontological characteristics of all legal systems. Ambiguity may actually be desirable, since it allows different situations to be encompassed by a single norm, as required in subsumption.

In other words, the study is not prescriptive; it is not looking for, nor does it propose, an optimal solution. Instead, it aims to shed some light on the way judges balance conflicting rights and, in particular, to highlight how the conception of rights may play a decisive role in judicial decisions.

The book contains five chapters, and Chapters 1 and 5 are conceptually linked to one another. Chapter 1 provides a literature review on the theme of ‘balancing’ and collocates the book in the field of comparative law.

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5 David and Brierley (n 4) 117ff.

and, in particular, within studies on judicial decisions. The chapter then introduces the conflicting rights that will be analysed and defines the scope of the research; lastly, it presents the idea of ‘conceptual balancing’, key to the entire book. To illustrate the conceptions of copyright and information privacy, Chapters 2 and 3 focus on the main features of the regulation of copyright (Chapter 2) and privacy (Chapter 3) in each of the three systems. Chapter 4 analyses in detail the judicial decisions that constitute the case studies of the research. It examines the procedures applied and the reasoning of the judges in the cases decided in the three systems.

Drawing on the previous chapters, in Chapter 5 I illustrate the conception of copyright and privacy in the three systems, before setting out my conclusions and explaining how ‘conceptual balancing’ constitutes a new lens through which judicial decisions can be read.