

# Constitutional Rights, Balancing, and Rationality\*

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ROBERT ALEXY

*Abstract.* The article begins with an outline of the balancing construction as developed by the German Federal Constitutional court since the *Liith* decision in 1958. It then takes up two objections to this approach raised by Jürgen Habermas. The first maintains that balancing is both irrational and a danger for rights, depriving them of their normative power. The second is that balancing takes one out of the realm of right and wrong, correctness and incorrectness, and justification, and, thus, out of the realm of the law. The article attempts to counter these objections by showing that there exists a rational structure of balancing that can be made explicit by a “Law of Balancing” and a “Disproportionality Rule.” These rules show, first, that balancing is not a danger for rights but, on the contrary, a necessary means of lending them protection, and second, that balancing is not an alternative to argumentation but an indispensable form of rational practical discourse.

## I. Two Constructions of Constitutional Rights

Modern democratic constitutions comprise two classes or categories of norms. The first class contains norms that constitute and organize legislation, adjudication, and administration. The central theme of these norms is empowerment. The second class contains norms that constrain and direct public power. Norms conferring constitutional rights are most prominent here. This dichotomy seems to be universally valid, at least in the universe of democratic constitutions. The broad-based validity of this thesis is owing to its highly abstract character. Just below this level of abstractness, different possibilities come into play. This concerns public power as well as individual rights. Here I will consider only the latter.

There are two main constructions of constitutional rights: one is narrow and strict, a second is broad and comprehensive. The first of these can be called the rule construction, the second, the principle construction. These two constructions are nowhere realized in pure form, but they represent

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different tendencies, and the question of which of them is better is a central question of the interpretation of every constitution that provides for constitutional review.

According to the narrow and strict construction, norms conferring constitutional rights are not essentially distinguishable from other norms of the legal system. To be sure, as constitutional norms, their place is at the highest level of the legal system, and their foci are highly abstract rights of the greatest importance, but none of this—according to the rule construction—gives rise to any fundamental structural difference. They are legal rules, and they are applicable just like all other legal rules. Their defining characteristic is that they protect certain abstractly described positions of the citizen against the state.

According to the comprehensive or holistic construction, norms conferring constitutional rights do not simply protect certain abstractly described positions of the citizen against the state. This enduring function of constitutional rights is embedded in a broader framework. In Germany, this broader framework was first fully developed in the *Lüth* decision of the Federal Constitutional Court in 1958. Lüth had appealed to the German public, to the owners of movie theaters, and to the film distributors to boycott movies produced after 1945 by Veit Harlan on the ground that Harlan has been the most prominent Nazi film director. Lüth referred, in particular, to the film “Jud Süß,” the leading anti-Semitic Nazi propaganda movie. The District Court in Hamburg held that Lüth must forbear from making any appeal to boycott Harlan’s new film “Immortal Lover” (*Unsterbliche Geliebte*). The reason given for this judgment was that an appeal to boycott such films violated section 826 of the German Civil Code, as being contrary to public policy. Lüth brought a constitutional complaint against this decision.

The German Federal Constitutional Court considered Lüth’s appeal to boycott such films as *prima facie* protected by the freedom of expression guaranteed in article 5 (1) of the Basic Law. Article 5 (2) of the Basic Law contains, however, three clauses limiting the freedom of expression guaranteed in the first section. The first of them is the “general law” clause. The Constitutional Court granted that section 826 of the Civil Code, applied by the Hamburg Court, was a general law in the sense of the first limiting clause, the “general law” clause (Decisions of the Federal Constitutional Court, *BVerfGE* vol. 7, 198, 211f.). It is at precisely this point that the dichotomy between the narrow and strict, that is, the rule construction, and the broad and comprehensive, that is, the principle construction, comes into play. If one follows the rule construction, the task is simply that of answering two questions. The first is whether Lüth’s appeal to boycott is a case that is to be subsumed under freedom of expression. The Constitutional Court gave a positive answer here, and I think this is correct. The second question is, whether section 826 of the Civil Code applies here. This is the case when the

appeal to boycott is against public policy. The Hamburg Court argued that it is indeed against public policy, for it aims at preventing the reemergence of Harlan as a representative creator of movies notwithstanding the fact that he had not only passed the procedure of “Denazification” but had also not been sentenced in a criminal proceeding for having committed Nazi crimes. In such a case, an appeal to boycott must be declared as being—according to the Hamburg Court—contrary to “the democratic convictions of law and morals of the German people” (*BVerfGE* vol. 7, 198, 201).

The Constitutional Court argued that it is not enough to carry out these two isolated subsumptions (*BVerfGE* vol. 7, 198, 207f.). Rather, the Court required that there be a balancing or weighing of the colliding constitutional principles where the application of rules of the civil law might limit a constitutional right. The result of its balancing was that the principle of freedom of expression must be given priority over the competing constitutional considerations. It demanded that the clause “against public policy” in section 826 of the German Civil Code had to be interpreted in accordance with this priority. In a word, Lüth prevailed.

The *Lüth* decision connects three ideas that have served fundamentally to shape German constitutional law. The first is that the constitutional guarantee of individual rights is not simply a guarantee of classical defensive rights of the citizen against the state. The constitutional rights embody, to cite the Federal Constitutional Court, “at the same time an objective order of values.”<sup>1</sup> There has been debate about what the Court could have meant by “objective order of values.” Later the Court simply talks about “the principles [ . . . ] that are expressed by the constitutional rights.”<sup>2</sup> Taking up this line,<sup>3</sup> one might say that the first basic idea of the *Lüth* decision is that constitutional rights have not only the character of rules but also the character of principles. The second idea, closely tied to the first, is that the values or principles found in the constitutional rights apply not only to the relation between the citizen and the state but, well beyond that, “to all areas of law.”<sup>4</sup> Thanks to this, a “radiating effect”<sup>5</sup> of constitutional rights over the entire legal system is brought about. Constitutional rights become ubiquitous. The third idea is implied by the structure of values and principles. Values and principles tend to collide. A collision of principles can only be resolved by balancing. The lesson of the *Lüth* decision that is most important for everyday legal work runs, therefore, as follows: “A ‘balancing of interests’ becomes necessary.”<sup>6</sup>

<sup>1</sup> *BVerfGE* vol. 7, 198, 205: “auch eine objektive Wertordnung.”

<sup>2</sup> *BVerfGE* vol. 81, 242, 254: “den Prinzipien [ . . . ], die in den Grundrechten zum Ausdruck kommen.”

<sup>3</sup> On a closer analysis of the relation between the concept of principle and the concept of value see Alexy 2002, 86–93.

<sup>4</sup> *BVerfGE* vol. 7, 198, 205: “für alle Bereiche des Rechts.”

<sup>5</sup> *BVerfGE* vol. 7, 198, 207: “Ausstrahlungswirkung.”

<sup>6</sup> *BVerfGE* vol. 7, 198, 210: “Es wird deshalb eine ‘Güterabwägung’ erforderlich.”

From a methodological point of view, the concept of balancing is the central concept in the adjudication of the Federal Constitutional Court, which has developed further the line first set out in the *Liith* decision. Instead of opposing a broad and comprehensive to a narrow and strict construction of constitutional rights, one could, then, juxtapose a balancing approach with a subsumption approach. It is at this point that the question arises: Which of these two constructions provides for greater rationality in constitutional review—the one demanding subsumption or the one demanding balancing?

## II. Habermas's Critique of the Balancing Construction

The phenomenon of balancing in constitutional law leads to so many problems that it is not even possible to list them here, much less talk about them. I will confine myself to two objections raised by Jürgen Habermas.

Habermas's first objection is that the balancing approach deprives constitutional rights of their normative power. By means of balancing, he claims, rights are downgraded to the level of goals, policies, and values. They thereby lose the "strict priority" that is characteristic of "normative points of view" (Habermas 1996, 256). Thus, as he puts it, a "fire wall" comes tumbling down:

For if in cases of collision *all* reasons can assume the character of policy arguments, then the fire wall erected in legal discourse by a deontological understanding of legal norms and principles collapses. (Ibid., 258f.)

This danger of watering down constitutional rights is said to be accompanied by "the danger of irrational rulings" (ibid., 259). According to Habermas, there are no rational standards for balancing:

Because there are no rational standards here, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies. (Ibid., 259; transl. altered)

This first objection speaks, then, to two supposed substantive effects or consequences of the balancing approach: watering down and irrationality. The second objection concerns a conceptual problem. Habermas maintains that the balancing approach takes legal rulings out of the realm defined by concepts like right and wrong, correctness and incorrectness, and justification, and into a realm defined by concepts like adequate and inadequate, and discretion. "Weighing of values" is said to be able to yield a judgment as to its "result," but is not able to "justify" that result:

The court's judgment is then *itself* a value judgment that more or less adequately reflects a form of life articulating itself in the framework of a concrete order of values. But this judgment is no longer related to the alternatives of a right or wrong decision. (Habermas 1998, 430)

This second objection is at least as serious as the first one. It amounts to the thesis that the loss of the category of correctness is the price to be paid for balancing or weighing.

If this were true, then, to be sure, the balancing approach would have suffered a fatal blow. Law is necessarily connected with a claim to correctness (Alexy 1998, 209–14). If balancing or weighing were incompatible with correctness and justification, it would have no place in law. The development of German constitutional law in the last 50 years would, at its very core, be contaminated by error.

Is balancing intrinsically irrational? Is the balancing approach unable to prevent the sacrifice of individual rights? Does balancing really mean we are compelled to bid farewell to correctness and justification and, thus, to reason, too?

It is difficult to answer these questions without knowing what balancing is. To know what balancing is presupposes insight into its structure. A glance at actual instances of balancing will, I think, be instructive here.

### III. The Structure of Balancing

In German constitutional law, balancing is one part of what is required by a more comprehensive principle. This more comprehensive principle is the principle of proportionality (*Verhältnismäßigkeitsgrundsatz*). The principle of proportionality consists of three sub-principles: the principles of suitability, of necessity, and of proportionality in the narrow sense. All three principles express the idea of optimisation. Constitutional rights as principles are optimisation requirements. As optimisation requirements, principles are norms requiring that something be realized to the greatest extent possible, given the legal and factual possibilities (Alexy 2002, 47).

The principles of suitability and necessity concern optimisation relative to what is factually possible. The principle of suitability excludes the adoption of means obstructing the realisation of at least one principle without promoting any principle or goal for which they were adopted. If a means  $M$ , adopted in order to promote the principle  $P_1$ , is not suitable for this purpose, but obstructs the realisation of  $P_2$ , then there are no costs either to  $P_1$  or  $P_2$  if  $M$  is omitted, but there are costs to  $P_2$  if  $M$  is adopted. Thus,  $P_1$  and  $P_2$  taken together may be realised to a higher degree relative to what is factually possible if  $M$  is abandoned.  $P_1$  and  $P_2$ , when *taken together*, prohibit the use of  $M$ . This shows that the principle of suitability is nothing other than an expression of the idea of Pareto-optimality: One position can be improved without detriment to another.

The same applies to the principle of necessity. This principle requires that of two means promoting  $P_1$  that are, broadly speaking, equally suitable, the one that interferes less intensively in  $P_2$  ought to be chosen. If there exists a less intensively interfering and equally suitable means, one position can be

improved at no cost to the other. The applicability of the principle of necessity presupposes, however, that there is no third principle or goal,  $P_3$ , that is affected negatively by the adoption of the means interfering less intensively in  $P_2$ . If this constellation arises, the case cannot be decided by considerations concerning Pareto-optimality. When costs are unavoidable, balancing becomes necessary.

Balancing is the subject of the third sub-principle of the principle of proportionality, the principle of proportionality in the narrow sense. This principle expresses what optimisation relative to the legal possibilities means. It is identical with a rule that might be called "Law of Balancing" (Alexy 2002, 102). This rule states:

The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.

This expresses the point that optimization relative to competing principles consists of nothing other than balancing.

The Law of Balancing shows that balancing can be broken down into three stages. The first stage is a matter of establishing the degree of non-satisfaction of, or detriment to, the first principle. This is followed by a second stage, in which the importance of satisfying the competing principle is established. Finally, the third stage answers the question of whether or not the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first.

Habermas's first objection would be justified if it were not possible to make rational judgments about, first, intensity of interference, second, degrees of importance, and, third, their relationship to each other. As principles, constitutional rights would then permit—the contribution of suitability and necessity aside—any solution. The "fire wall" would not merely collapse but vanish into thin air.

How can one show that rational judgments about intensity of interference and degrees of importance are possible, such that an outcome can be rationally established by way of balancing? One possible method seems to be the analysis of examples, an analysis that aims at bringing to light what we presuppose when we resolve cases by balancing. As a first example, a decision of the Federal Constitutional Court about health warnings will be considered (*BVerfGE* vol. 95, 173). The Court qualifies the duty of tobacco producers to place health warnings regarding the dangers of smoking on their products as a relatively minor interference with freedom of occupation. By contrast, a total ban on all tobacco products would count as a serious interference. Between such minor and serious cases, others of moderate intensity of interference can be found. In this way, a scale can be developed with the stages "light," "moderate" and "serious." Our example shows that valid assignments following this scale are possible.

The same is possible on the side of the competing reasons. The health risks resulting from smoking are high. The reasons justifying the interference therefore weigh heavily. If in this way the intensity of interference is established as minor, and the degree of importance of the reasons for the interference as high, then the outcome of examining proportionality in the narrow sense can well be described—as the Federal Constitutional Court has in fact described it—as “obvious” (*BVerfGE* vol. 95, 173, 187).

Now one could take the view that the example does not tell us very much. On the one hand, there are economic activities, on the other, quantifiable facts. That makes scales possible. This, the objection continues, is however not applicable to areas in which quantifiable factors such as costs and probabilities play no role, or at any rate no significant role.

To deal with this objection, a second case shall be considered, one that concerns the classic conflict between freedom of expression and personality rights. A widely-published satirical magazine, *Titanic*, described a paraplegic reserve officer who had successfully carried out his responsibilities, having been called to active duty, first as a “born Murderer” and in a later edition as a “cripple.” The Düsseldorf Higher Regional Court of Appeal ruled against *Titanic* in an action brought by the officer and ordered the magazine to pay damages in the amount of DM 12,000. *Titanic* brought a constitutional complaint. The Federal Constitutional Court undertook “case-specific balancing”<sup>7</sup> between the freedom of expression of those associated with the magazine (art. 5 (1) (1), Basic Law) and the officer’s general personality right (art. 2 (1) in connection with art. 1 (1), Basic Law). To this end, the intensity of interference with these rights was determined and they were placed in relationship to each other. The judgment in damages was treated as representing a “lasting”<sup>8</sup> or *serious* interference with freedom of expression. This conclusion was justified, above all, by the argument that awarding damages could affect the future willingness of those producing the magazine to carry out their work in the way they had done heretofore. The description “born Murderer” was then placed in the context of the satire published by the *Titanic*. Here several persons had been described as having a surname at birth in a “recognisably humorous” way, from “puns to silliness”; for example, Richard von Weizsäcker, then the Federal President, was described as a “born Citizen” (*BVerfGE* vol. 86, 1, 11). This context made it impossible to see in the description “unlawful, serious, illegal harm to personality right.”<sup>9</sup> The interference with the personality right was thus treated as having a moderate, perhaps even only a light or minor intensity. Corresponding to this, the importance of protecting the officer’s personality right by means of an award of damages was moderate, and perhaps only light or minor. These assessments completed the first part of the judgment. In order

<sup>7</sup> *BVerfGE* vol. 86, 1, 11: “fallbezogene(n) Abwägung.”

<sup>8</sup> *BVerfGE* vol. 86, 1, 10: “nachhaltig(en).”

<sup>9</sup> *BVerfGE* vol. 86, 1, 12: “eine unerlaubte, schwere, rechtswidrige Persönlichkeitsrechtsverletzung.”

to justify an award of damages, which is a serious interference with the constitutional right to freedom of expression, the interference with the right to personality, which was supposed to be compensated for by damages, would have had to have been at least as serious. But according to the assessment of the Federal Constitutional Court, it was not. That meant that the interference with the freedom of expression was disproportionate.

Disproportionality stands here for a relation between, so to speak, "competing real and hypothetical interferences." Each interference with a constitutional right that is not justified by a hypothetical interference at least as intensive with another principle either contained in the constitution or admitted by it as a reason for interference, an interference that would become real in the event that the first interference were omitted, is disproportional. This rule, together with the assessments of the Federal Constitutional Court, implies that the order of the Düsseldorf Higher Regional Court of Appeal to pay damages of DM 12,000 violated *Titanic's* rights in so far as calling the officer a "born Murderer" was the ground for awarding damages.

Matters, however, were different in the case where the officer had been called a "cripple." According to the assessment of the Federal Constitutional Court, this counted as "serious harm to the paraplegic's personality right."<sup>10</sup> The importance of protecting the officer by means of a judgment for damages was thus great. This was justified by the fact that describing a severely disabled person as a "cripple" is generally taken these days to be "humiliating" and to express a "lack of respect." Thus, the serious interference with the freedom of expression was countered by the great importance accorded to the protection of personality. In this situation the Federal Constitutional Court came to the conclusion that it could "see no flaw in the balancing to the detriment of freedom of expression."<sup>11</sup> *Titanic's* constitutional complaint was thus only justified to the extent that it related to damages for the description "born Murderer." As far as the description "cripple" was concerned, it was unjustified.

Without any doubt, this decision reflects the balancing approach. Does Habermas's critique apply to it? I will first consider the more general and principled objection that balancing takes one out of the realm of right and wrong, correctness and incorrectness, and justification.

The formal structure of the reasoning of the Federal Constitutional Court is represented by a rule to which I have already alluded:

An interference with a constitutional right is *disproportional* if it is not justified by the fact that the omission of this interference would give rise to an interference with another principle (or with the same principle with respect to other persons or in other respects), provided that this latter interference is at least as intensive as the first one.

<sup>10</sup> BVerfGE vol. 86, 1, 13: "verletzt(t) ihn schwer in seinem Persönlichkeitsrecht," emphasis added.

<sup>11</sup> BVerfGE vol. 86, 1, 13: "läßt [ . . . ] keine Fehlgewichtung zu Lasten der Meinungsäußerungsfreiheit erkennen."



This rule, which might be called the “Disproportionality Rule,” creates a relation between judgments about degrees of intensity and the judgment about proportionality. Judgments about degrees of intensity are the *reasons* for the judgment about proportionality. Judgments about proportionality raise, as do all judgments, a claim to correctness, and this claim is backed by judgments about degrees of intensity as reasons. This suffices for the argument that balancing does not remove one from the realm of justification and correctness.

This general point is confirmed if one looks not only at the relation between judgments about degrees of intensity and the judgment about proportionality, but also at the relation between judgments about degrees of intensity and the reasons put forward to justify them. Habermas maintains that “weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies” (Habermas 1996, 259). But the assumptions underlying judgments about the intensity of interference in freedom of expression and personality are not arbitrary. The Federal Constitutional Court treats the interference with freedom of expression as serious, because judgments to award damages could reduce the future willingness of those affected to produce their magazine in the way that they had hitherto done. This is an argument, and it is not a bad argument. It is highly disputed whether the appellation “born Murderer” really represents only a light or moderate interference. It is difficult to deny, however, that the court adduces reasons for this assessment that are at least worthy of consideration. Finally, the Court argued that the description of the paraplegic as a “cripple” was a very intensive interference with his freedom of personality, on the ground that it was humiliating and disrespectful. This is, first, an argument, and, second, a good argument. Therefore, one cannot say that the weighing takes place “arbitrarily.” It is also questionable whether the assumptions about degrees of intensity are made by the Federal Constitutional Court “unreflectively, according to customary standards and hierarchies.” It is true that the standards follow a line of precedent, which can be traced back to the *Lüth* decision. But talk of “customary” standards would be justified only if the existence of precedent were the only relevant matter for the decision, and not their correctness. Furthermore, one could talk of an “unreflective” application only if the application had taken place outside the framework of argumentation, for arguments are the public expression of reflection. But there is no lack of argumentation here. All this applies to the *Tobacco* decision as well.

There remains the question of whether, as Habermas contends, balancing leads to the collapse of the “fire wall.” Once again, the *Titanic* decision is instructive. The Federal Constitutional Court held that calling the paraplegic a “cripple” was humiliating and disrespectful. One can go even further with this characterization. Such public humiliation and lack of respect undermines the dignity of the victim. That is not only serious in some way

or other, it is a very serious—or, indeed, an extraordinarily serious violation. At this point one has reached an area where interferences can scarcely ever be justified by strengthening the reasons for the interference. This corresponds to the law of diminishing marginal utility (Alexy 2002, 103). Constitutional rights gain overproportionally in strength as the intensity of interferences increases. There exists something like a centre of resistance. This serves to erect the “fire wall” that Habermas deems to be missing in the theory of balancing. Thus, the balancing approach withstands both of Habermas’s objections.

*Christian Albrechts University  
Faculty of Law  
Olshausenstraße 40  
D-24118 Kiel  
Germany  
E-mail: alexy@law.uni-kiel.de*

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