THE OXFORD HANDBOOK OF

COMPARATIVE CONSTITUTIONAL LAW

Edited by

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and

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OXFORD
UNIVERSITY PRESS

V. Conclusion

It would not be impossible to contemplate other examples to prove the difference in outlook between the state-centred doctrine of jurists from the Roman law family and the state-decentred doctrine of jurists from the common law family. The place of the courts might be indicative of another major difference: the courts are related to the state in the European tradition but, rather, to civil society in the common law tradition. One might also point out the differences in the way in which citizenship and nationality are thought of in the various cultural spaces. But the purpose of this chapter has been to show that political power is not perceived in the same way by constitutional law scholars. In other words, the question of whether to ascribe a central position to the concept of 'state' is indeed a question that divides the world of constitutional law.

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CHAPTER 13

RIGHTS AND LIBERTIES AS CONCEPTS*

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The debate over rights and liberties—not unlike the debate over justice—is a never-ending discussion, reflecting normative, analytical, and institutional considerations. Questions respecting the rights and liberties that an individual can lay claim to are fundamental normative questions in every society. They represent major themes not only in the law, especially constitutional law, but also in practical philosophy, and they count as central points of political

* I should like to thank Stanley L. Paulson for suggestions and advice on matters of English style.

dispute, too. This fundamental normative character is connected with a high degree of complexity. With respect to liberties, Isaiah Berlin has spoken of 'more than two hundred senses of this protean word recorded by historians of ideas'.[1] Rights are no less complicated. To these analytical problems, one has to add, finally, the institutional dimension. As soon as rights and liberties are recorded in a constitution as constitutional rights and liberties that bind the legislature and are subject to constitutional review, questions respecting the democratic legitimation of constitutional adjudication arise.

Not losing track in this tangle of problems requires conceptual clarity. In the first section, I will present a brief analysis of the general structure of rights and liberties. The themes of Section II are the concepts of human and constitutional rights. Finally, Section III concerns the construction of constitutional rights, especially the connection between constitutional rights and proportionality.

I. Rights and Liberties in General

1. Will and Interest Theory

Ever since the nineteenth century, various versions of the will and interest theories have competed on the question of the most adequate explanation of the concept and nature of rights or, more precisely, of subjective rights.[2] Adherents of the will theory claim that an individual's having a right means that his will or his choice, his freedom, is recognized. With this, rights are closely connected with liberties. Proponents of the interest theory, by contrast, argue that it is essential for rights that they protect or promote the interests or the benefit, the well-being, of the holder of the right. This applies, for example, to social rights.

2. A Three-Stage Model of Rights

The division of the theories of rights into will theories and interest theories is, if they are interpreted as strict alternatives, unfortunate. Some norms conferring rights may aim at the recognition of freedom of the will, others may have the purpose of protecting and advancing interests, and still others may do both. The puzzles stemming from this, puzzles that have occupied so very many legal theorists for such a long time, can easily be avoided if one grounds the analysis of rights on the distinction among (1) reasons for rights, (2) rights as legal positions and relations, and (3) the enforceability of rights. This distinction leads to a three-stage model of rights.[3]

[1] Isaiah Berlin, *Four Essays on Liberty* (1969), 121.

[2] Proponents of the will theory in the nineteenth century are, eg, Friedrich Carl von Savigny, *System des heutigen Römischen Rechts*, vol 1 (1840), 7: 'the power to which an individual person is entitled: a realm ruled by his will' (translation by Robert Alexy), and John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, vol. 1 (5th edn, 1911), 398: 'Right;—the capacity or power of exacting from another or others acts or forbearances;—is nearest to a true definition.' Early exponents of the interest theory are Jeremy Bentham, *Of Laws in General* (H.L.A. Hart ed, 1970), 57: '*By favouring one party in point of interest the law gives another a right to* services', and Rudolf von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Part 3 (5th edn, 1906), 339: 'Rights are *legally protected interests*' (translation by Robert Alexy). More recently, H.L.A. Hart, 'Legal Rights' in H.L.A. Hart, *Essays on Bentham. Studies in Jurisprudence and Political Theory* (1982), 188, has defended a version of the will theory, whereas Neil MacCormick, 'Rights in Legislation' in P.M.S. Hacker and Joseph Raz (eds), *Law, Morality, and Society. Essays in Honour of H.L.A. Hart* (1977), 204–5, has argued for a version of the interest theory. These are, of course, simply two examples among many.

The first stage comprises reasons for rights. Each and every argument that can be put forward for establishing rights of whatsoever kind has its place at this first stage. This includes not only the recognition of freedom of the will and the protection and promotion of the interests of the holder of the right, that is to say, individual goods, but also collective goods. It is possible, for instance, to attempt to justify private property through the general economic effectiveness of an economy based on private ownership, that is, by reference to a collective good. To be sure, an exclusively collective justification of individual or subjective rights gives these rights a much weaker standing than a justification based exclusively or supplementarily on individual goods. But this does not suffice to exclude collective goods from the first stage of the three-stage model, for this model is no more than an analytical tool and has, as such, a formal character. It comprises all conceivable reasons for subjective rights. Whether they are good or bad reasons remains a matter of substantive normative argument.[4]

At the second stage rights as legal positions and relations are to be found. An example is the right of *a* as against *b* that *b* should not obstruct *a* in φ-ing, for instance the right a citizen has against the state, namely, that the state should not obstruct this citizen's freedom of speech.

Finally, the third stage comprises those legal positions that are related to the enforcement of legal rights, especially by bringing an action. This stage connects powers concerning enforcement with the positions and relations of the second stage.

All three stages are important for a theory of constitutional rights. The central elements, however, are the positions and relations at the second stage. They are what the reasons for rights located at the first stage intend to justify and they, again, are reasons for the enforceability to be found at the third stage. Their nature and their different kinds can be expounded by means of a system of basic legal positions and relations.

3. A System of Basic Legal Positions and Relations

The basis of the system of basic legal positions and relations is a threefold division into (1) rights to something, (2) liberties, and (3) powers. This division is linked both to Bentham's distinction between 'rights to services', 'liberties', and 'powers'[5] and to Bierling's distinction between 'legal claim' (*Rechtsanspruch*), 'simple legal permission' (*einfache*[*s*] *rechtliche*[*s*] *Dürfen*), and 'legal ability' (*rechtliche*[*s*] *Können*).[6]

(a) Rights to Something

Rights to something or claim rights are three-place relations of which the first element is the beneficiary or *holder* of a right (*a*), the second is the *addressee* of the right (*b*), and the third is the *subject matter* or object of the right (*S*).[7] This three-place relation can be expressed by '*R*'. The most general form of a statement of a right to something can thus be expressed by

[3] See on this Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans, [1985] 2002), 115–18.

[4] See on this Robert Alexy, 'Individual Rights and Collective Goods' in Carlos Nino (ed), *Rights* (1992), 170, 175–6, where the thesis is presented that a legal system that comprises no subjective rights established by individual reasons cannot be justified.

[5] Bentham (n 2), 57–8, 83–92, 119.

[6] Ernst Rudolf Bierling, *Zur Kritik der juristischen Grundbegriffe*, Part 2 (1883), 49–50.

[7] In *A Theory of Constitutional Rights* (n 3), 120, the subject matter or object is represented by '*G*'. This is due to the fact that a subject matter or an object in German is '*Gegenstand*'.

(1) *RabS*.

This scheme can give rise to a great variety of rights, depending on what *a*, *b*, and *S* stand for. When *a* refers to a natural person and *b* to the state and *S* to an omission, a classical liberal defensive right is expressed. If *S* represents a positive act of the state, a right to positive state action is at hand, for example a protective right or a social right. Many other problems of the theory of constitutional rights can be constructed as questions of what can be substituted for each of the three variables. If, for instance, one puts the question of whether natural persons can be substituted not only for *a*, the holder, but also for *b*, the addressee, the problem of the horizontal effect of constitutional rights is drawn up, and if, to give a further example, the questions is raised of whether not only individuals but also groups, for instance minorities of whatever kind, can be substituted for *a*, the problem of collective constitutional rights is at stake.

It is of great importance for the theory of rights that

(1) *RabS*

is logically equivalent to

(2) *ObaS*.

'*O*' in this formula is a three-place or relational form of the elementary deontic operator '*O*' which can be read as 'It is obligatory that ...'.[8] When (1) expresses

(3) *a* has a right against *b* that *b* grant *a* asylum,

(2) expresses

(4) *b* is vis-à-vis *a* obligated to grant *a* asylum.

(1) and (2) are what Wesley Newcomb Hohfeld terms 'right' and 'duty' qua 'jural correlatives'.[9] Jural correlatives are converse relations. For this reason, the sentence

(5) $RabS \leftrightarrow ObaS$

represents an analytical truth. This does not mean that every obligation or duty implies a right. The non-relational duty

(6) *ObS*

does not imply

(1) *RabS*.

[8] On more details see Alexy (n 3), 131–8.

[9] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919), 36.

But it does mean that rights imply duties. There cannot exist a right without a correlative duty.[10] This is of considerable systematic importance, for it connects the concept of a right with the concept of the 'ought'. Sentences that contain an 'ought' express—individual or general—norms. This leads to the further corollary that there cannot exist rights without norms.

(b) Liberties

One has to distinguish the general concept of liberty and the concept of legal liberty as a special case of general liberty. Liberties, in general, are three-place relations between a liberty-holder, a liberty-obstacle, and a liberty-object.[11] The paradigmatic cases of liberty-holders are natural persons. But it is also possible to talk about the liberties of associations. With respect to the liberty-object the most fundamental distinction is the difference between a choice of action and a single act. An example of a choice of action is the option of professing a certain religion or not. In this case one can speak of a negative liberty. An example of a single act as the object of liberty is the profession of a certain religion. In this case one can speak of a positive liberty.[12] Positive liberty stands at the centre of Kant's moral philosophy: 'The positive concept of freedom is that of the ability of pure reason to be of itself practical. But this is not possible except by the subjection of the maxim of every action to the condition of its qualifying as universal law.'[13] Herewith, positive liberty is defined as the liberty to do what is right or correct, and as not the liberty to do whatever one wishes to do. In the moral life of a person positive liberty can be of great importance. Making positive liberty the basis of the political system, however, has despotic consequences. For this reason, constitutional rights are essentially guarantees of negative liberties. Therefore, only negative liberties shall be considered here.

The liberty-obstacles, too, can be of very different kinds. Economic want and social pressure are examples. In these cases one can speak of economic and social 'unfreedom'. With a view to constitutional rights, legal liberty-obstacles are of special importance. Legal liberty-obstacles consist, first and foremost, of legal prohibitions and legal commands. If *a* is both free from legal prohibitions to express his opinion and free from legal commands to do so, no legal liberty-obstacles exist, and *a* is free to express his opinion. This implies an intrinsic relation between legal liberty and permission. If the expression of *a*'s opinion is neither prohibited nor required, *a* is both permitted to express his opinion and permitted not to do so. For this reason, legal liberty can be defined as the conjunction of the permission to perform an act and the permission to omit it.[14]

[10] Against the triadic construction of rights it might be objected that rights without addressees are possible. An example would be a right to medical aid in cases of serious sickness. This right could acquire the following structure: *RaS*. *RaS* represents what traditionally is designated as '*ius in rem*', in contrast with a '*ius in personam*'. It is, indeed, for reasons of simplicity often sufficient to speak of rights in the sense of relations between a legal subject and an object. If, however, there exists no duty of any addressee at all, in our case, for instance, no duty at all for those who are able to help, then talk about the existence of a right would make no sense. See on this Alexy (n 3), 121.

[11] Ibid 140.

[12] Ibid 140–2.

[13] Immanuel Kant, 'The Metaphysics of Morals' in Mary J. Gregor (ed and trans), *Immanuel Kant. Practical Philosophy* (1996), 375.

[14] If '*P*' is used to express a permission, '*S*' to express the subject matter or object of the permission, and '*L*' to express liberty as a normative modality, legal liberty can be defined as follows:

$LS = PS \,\&\, P\neg S$.

It is, of course, possible to transform this scheme into a scheme that expresses a legal relation:

$LabS = PabS \,\&\, Pab\neg S$

All constitutional rights that refer to actions of their holders, for instance exercise of religion, expression of opinion, and choice of profession, are liberties in the sense just defined. But if they were only such liberties, they would be poor liberties. A liberty as such does not imply a right to be unhindered in the realization of this freedom. Such a right is a right to something and is fundamentally different from a combination of permissions. In order to obtain a fully-fledged constitutional right the unprotected liberty must be protected by a substantively equivalent right against the state that the state should not prevent the liberty-holder from doing what he is constitutionally free to do.[15] This right against the state—which, again, has to be combined with a power to challenge infringements before the courts—is the core of constitutional rights. For this reason, rights to negative or positive actions on the part of the state, that is, rights to something, are the centre of the theory of constitutional rights. One might call this the 'centre thesis'.

(c) Powers

The centre thesis is true also with respect to powers. Legal powers or competences consist of the normative possibility to change the legal situation by means of a declaration that expresses the (actual or imputed) intention to bring about this change. An example is the power to acquire and to dispose of property. This power is an essential element of the constitutional guarantee of property.[16]

Legal competences are closely related to liberties. They 'add something to the freedom of action of the individual, that he does not have by nature'.[17] Any removal, limitation, or obstruction of powers or competences of an individual is an infringement of the individual's respective constitutional right. The central character of the right to something results from the fact that the decisive question in such cases is whether the right of the individual against the state to omit such infringements is violated. In what follows, therefore, the right to something as a right to either negative or positive action will be in the foreground of the discussion.

II. Constitutional and Human Rights

1. Constitutional Rights

All constitutional rights are rights, but not all rights are constitutional rights. This leads to the question of the specific character, the *differentia specifica*, of constitutional rights. This question concerns the concept and the nature of constitutional rights. Three concepts have to be distinguished: a formal, a procedural, and a substantial concept.

(see on this Alexy (n 3), 145). '*LabS*' is not the same as Hohfeld's 'privilege'. According to Hohfeld a privilege 'is the mere negation of a *duty*' (Hohfeld (n 9), 39). This means that Hohfeld's privilege is nothing else than *Pab*¬*S*, for *Pab*¬*S* is equivalent to ¬*OabS*, that is to say, the negation of the (relative) duty of doing *S* (Alexy (n 3), 134–6). For this reason, legal liberty necessarily comprises two privileges, one with a negated subject matter (¬*S*), and one with a non-negated subject matter (*S*).

[15] Alexy (n 3), 149.

[16] Ibid 156–8.

[17] Georg Jellinek, *System der subjektiven öffentlichen Rechte* (2nd edn, 1905), 47 (translation by Robert Alexy).

(a) Formal Concept

A formal concept of constitutional rights is employed if fundamental rights are defined as rights contained in a constitution, or in a certain part of it, for instance in a catalogue of constitutional rights, or as rights endowed by the constitution with special protection, for example a constitutional complaint brought before a constitutional court.[18] Concepts of this kind are useful in many cases. They do not suffice, however, where the question arises of whether a right recorded in a constitution is really a constitutional right and not, for instance, a competence of an instrument of state, or when the problem is posed of whether a right established outside a catalogue of constitutional rights is a constitutional right or not, or when a dispute comes up of whether a right not explicitly endowed with special protection requires such protection. Questions like these cannot be excluded from the beginning, and they cannot be answered on the basis of an exclusively formal concept.

(b) Procedural Concept

The procedural concept of constitutional rights focuses on the institutional problems connected with constitutional rights. Recording constitutional rights in a constitution and granting a court the power of judicial review with respect to all state authority is to limit the power of parliament. In this respect, constitutional rights are an expression of distrust in the democratic process. They are, at the same time, both the basis and the boundary of democracy. Corresponding to this, the procedural concept of constitutional rights holds that constitutional rights are rights which are so important that the decision to protect them cannot be left to simple parliamentary majorities.[19]

The procedural concept, indeed, points out an important feature of constitutional rights, but this concept, too, is not able to grasp the nature of constitutional rights. The reason for this is that the procedural concept, as such, is unable to provide for an answer to the question of which rights are so important that the decision about their protection cannot be left to simple parliamentary majorities. This can be elaborated only within the framework of a substantial concept of constitutional rights.

(c) Substantial Concept

Human rights are at the core of the substantial concept of constitutional rights. Constitutional rights are, as the formal and the procedural concept illustrate, positive, institutionalized rights, that is to say, positive law at the level of the constitution. But this does not suffice to explain their nature. Positivity is but one side of constitutional rights, namely, their real or factual side. Over and above this they also possess an ideal dimension. This might be termed the 'dual nature thesis'. The ideal dimension stems from their connection with human rights qua moral rights. Constitutional rights are rights that have been recorded in a constitution with the intention of transforming human rights into positive law—the intention, in other words, of positivizing human rights.[20] This intention is often an intention actually or subjectively held by the constitutional framers. And, over and above this, it is a claim necessarily raised by those who set down a catalogue of constitutional rights. This claim is a special case of the claim to

[18] Robert Alexy, 'Discourse Theory and Fundamental Rights' in Augustín José Menéndez and Erik Oddvar Eriksen (eds), *Arguing Fundamental Rights* (2006), 15–16.

[19] Alexy (n 3), 297.

[20] Alexy (n 18), 16–17.

correctness necessarily connected with law in general.[21] A catalogue of constitutional rights is correct if and only if it matches the requirements of human rights. All catalogues of constitutional rights, therefore, can be conceived as attempts to transform human rights into positive law. As with attempts generally, attempts to transform human rights into positive law can be successful to a greater or lesser extent. To this extent, the ideal dimension plays a critical role even after the transformation into positive law. This is of pivotal importance for the interpretation and application of constitutional rights. Their wording and the concrete original intent of the framers of the constitution by no means lose their importance. But wording and concrete original intent are relativized by the ideal intent directed to the realization of human rights. For this reason, the dual nature of constitutional rights necessarily requires a certain degree of judicial activism.

2. Human Rights

The dual nature thesis presupposes the existence of human rights. It might be objected that human rights qua moral rights do not exist. A reply to this objection requires an answer to two questions. The first concerns the problem of what it means to say that a human right qua moral rights exists, whereas the second concerns the problem of whether the conditions for the existence of moral rights can be fulfilled.

(a) The Concept of Human Rights

Human rights are, first, moral, second, universal, third, fundamental, and, fourth, abstract rights that, fifth, take priority over all other norms.[22] With respect to the problem of existence only the first of these five defining properties of human rights need be considered: their moral character. Rights, in general, exist if they are valid. The validity of human rights qua moral rights depends on their justifiability and on that alone. Human rights exist if and only if they are justifiable.

(b) The Justification of Human Rights

Theories about the justification of human rights can be classified in many ways. The most fundamental division is that into theories which generally deny the possibility of any justification of human rights and theories which claim that some kind of justification is possible. An example of the sceptic view is Alasdair MacIntyre's thesis that 'there are no such rights, and belief in them is one with belief in witches and in unicorns'.[23] The less or non-sceptic approaches can be divided in eight groups: first, religious, second, intuitionistic, third, consensual, fourth, sociobiological, fifth, utility maximizing or instrumentalistic, sixth, cultural, seventh, explicative, and, eighth, existential approaches. The first six approaches are confronted with serious difficulties.[24] The seventh, the explicative approach, however, is of special interest. This approach attempts to provide a foundation for human rights by making explicit what is necessarily implicit in human practice. Its starting point is the practice of asserting, asking, and arguing, that is to say, the practice of discourse. This practice presupposes rules of discourse that

[21] On the claim to correctness as connected with law in general see Robert Alexy, *The Argument from Injustice. A Reply to Legal Positivism* (Bonnie Litschewski Paulson and Stanley L. Paulson trans, [1992] 2002), 35–9.

[22] Alexy (n 18), 18.

[23] Alasdair MacIntyre, *After Virtue* (2nd edn, 1985), 69.

[24] Alexy (n 18), 19–21.

express the ideas of freedom and equality. Freedom and equality, in turn, are central elements of human rights.

This argument as such, however, does not suffice to justify human rights. Why should we take our discursive capabilities seriously? The answer can be given only within the framework of the eighth approach, the existential approach. We must take our discursive capabilities seriously if we want to take ourselves seriously as, to use an expression of Robert Brandom's, 'discursive creatures',[25] or, in classical terms, as reasonable beings. This is a decision about our identity. The explicative argument can be conceived as objective, the existential argument as subjective. The combination of both is the explicative-existential argument. The explicative-existential argument is objective as well as subjective. As an objective-subjective justification it offers, on the one hand, much less than pure objectivity, but it establishes, on the other, much more than pure subjectivity. Perhaps one can say that it provides enough objectivity to be qualified as a justification. If this is true, human rights exist.

III. The Construction of Constitutional Rights

The concept of constitutional rights depends not only on their general structure as rights and on their relationship to human rights but also on their construction. There are two fundamentally different constructions of constitutional rights: the rule construction and the principles construction.

1. Rules and Principles

The basis of both the rule and the principles construction is the norm-theoretic distinction between rules and principles.[26] Rules are norms that require something definitively. They are *definitive commands*. Their form of application is subsumption. If a rule is valid and applicable, it is definitively required that exactly what it demands be done. If this is done, the rule is complied with; if this is not done, the rule is not complied with. By contrast, principles are norms requiring that something be realized to the greatest extent possible, given the factual and legal possibilities at hand. Thus, principles are *optimization requirements*. As such, they are characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. Rules aside, the legal possibilities are determined essentially by opposing principles. For this reason, principles, each taken alone, always comprise a merely prima facie requirement. The determination of the appropriate degree of satisfaction of one principle relative to the requirements of another principle is balancing. Thus, balancing is the specific form of the application of principles.

2. Proportionality

The struggle between the rule construction and the principles construction is far more than a discussion of a norm-theoretic problem. It is a debate about the nature of constitutional rights, which has far-reaching consequences for nearly all questions of the doctrine of constitutional rights. For this reason, it is a basic question of constitutionalism.

[25] Robert Brandom, *Articulating Reasons* (2000), 26.

[26] See Alexy (n 3), 47–9.

If the principles construction should prove to be correct, that is to say, if constitutional rights are to be conceived as optimization requirements, constitutional rights are necessarily connected with proportionality analysis.[27] The principle of proportionality, which in the last decades has received ever greater international recognition in the theory and practice of constitutional review,[28] consists of three sub-principles: the principles of suitability, of necessity, and of proportionality in the narrower sense. All three sub-principles—and this is the gist of the matter—express the idea of optimization. Principles qua optimization requirements require optimization relative both to what is factually possible and to what is legally possible.

The principles of suitability and necessity refer to optimization relative to the factual possibilities. The principle of suitability precludes the adoption of means that obstruct the realization of at least one principle without promoting any principle or goal for which it has been adopted. If a means M, adopted in order to promote the principle P_1, is not suitable for this purpose, but obstructs the realization 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 realized to a higher degree relative to what is factually possible, if M is abandoned. P_1 and P_2, when *taken together*, that is, as elements of a single system, proscribe 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 the other.

The second sub-principle of the principle of proportionality, the principle of necessity, requires that of two means promoting P_1 that are, broadly speaking, equally suitable, the one that interferes less intensively with P_2 has 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. Under this condition, P_1 and P_2, *taken together*, require that the less intensively interfering means be applied. This is, again, a case of Pareto-optimality.

In the debate about proportionality analysis the first two sub-principles, that is, optimization relative to the factual possibilities, is scarcely contested. This shows that even opponents of balancing do not completely dismiss the idea of optimization. The real difference begins where costs are unavoidable. Costs are unavoidable when principles collide. Then, according to the principles construction, balancing becomes necessary. Balancing is the subject of the third sub-principle of the principle of proportionality, the principle of proportionality in the narrower sense. This third sub-principle, that is, balancing, is the central issue of the proportionality debate.

3. The Rule Construction

The rule construction claims that balancing can be avoided in the application of constitutional rights without loss of rationality. This claim would be justified if the rule construction could propose an alternative to balancing that provides for a higher degree of rationality than balancing—or, at least, as high a degree.

One alternative suggests itself: interpretation. In Germany, Ernst Forsthoff insisted that the problems of the application of constitutional rights should be resolved by means of the traditional canons of interpretation.[29] These canons of interpretation comprise, above all, the wording of the constitutional rights provisions, the intentions of those who framed the constitution, and the systematic context of the provision being interpreted. There are, indeed, numerous cases that can be resolved without any problem simply by appeal to wording, intent, or systematic context, that is to say, by subsumption or classification connected with interpretation, just as anywhere else in the law. Hearing the Rolling Stones in a library, for instance, is not an exercise of religious freedom even if someone believes that this kind of music is the highest source of inspiration. But as soon as the case becomes more complicated, the rule construction causes problems. Several constitutions guarantee freedom of religion without any limiting clause. If one takes the wording seriously and if a particular religious faith requires for religious reasons that apostates be killed, then this killing must be classified as a practice within one's religion. Naturally, adherents of the rule construction will not arrive at the result that killing required by a religious faith is allowed. But they have difficulties justifying this result. Not classifying the killing as a religious act would contradict the wording of the constitutional rights provision. For this reason, the rule construction has to explain why the religious act is a forbidden religious act. The intent of the framers of the constitution may be offered as a reason. What else, however, other than the protection of life and the religious freedom of the apostates should this argument refer to? If the argument refers to these rights, the protection of life and the religious freedom of the apostates, then the argument boils down to something ultimately based on balancing. The right to live together with the religious freedom of the apostates is given precedence over the religious freedom of those who want to kill the apostates for religious reasons. If the result of balancing were in all cases as clear as it is here, an elaborated theory of balancing might, indeed, be of some theoretical interest, but it would not have very much practical importance. But there are many cases in which the solution of collisions between constitutional rights as well as collisions between constitutional rights and collective goods are far more difficult. Here, the principles construction has the advantage of directly addressing the issue.

No less serious are the problems of the rule construction in cases in which constitutional rights are connected with a limiting clause. In Germany, a limiting clause, namely, that, 'These rights may only be interfered with on a statutory basis',[30] is attached to the right to life and to bodily integrity. If one follows the rule construction and takes these provisions literally, the limiting clause makes possible any interference with life and bodily integrity as long as the interference is based on a statute. One may attempt to avoid this by adding more rules, for instance, by applying a rule that forbids infringing on the core content of a constitutional right. Even here, however, the legislature remains completely free at every point beneath the threshold of the core content. Moreover, it is highly unlikely that the core content can be determined at all without resorting to balancing.[31]

A rule construction orientated towards wording, intent, and systematic context can be assigned to positivism. The rule construction, however, need not be positivistic. A non-positivistic alternative to balancing is proposed by Ronald Dworkin. According to Dworkin, striking a balance is a matter of 'asking whether the benefits of our policy outweigh its costs to us'.[32] This is a kind of economic calculation.[33] The application of the constitutional right is said to concern 'the very different question of what morality requires, even at the expense of our own

[27] On proportionality, see further Chapters 33 and 34.

[28] See eg David M. Beatty, *The Ultimate Rule of Law* (2004); Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72–164.

[29] Ernst Forsthoff, *Rechtsstaat im Wandel. Verfassungsrechtliche Abhandlungen 1954–1973* (2nd edn, 1976), 173.

[30] See *Grundgesetz für die Bundesrepublik Deutschland* (German Basic Law), Art 2(2)(3).

[31] Alexy (n 3), 192–6.

[32] Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (2006), 27.

[33] In this direction points also Carl Schmitt, 'Die Tyrannei der Werte' in *Säkularisation und Utopie. Ebracher Studien. Ernst Forsthoff zum 65. Geburtstag* (1967), 39.

interests'.[34] With this argument, Dworkin presupposes that there exists an intrinsic relation between balancing and interests, a relation that amounts to the thesis that each and every instance of balancing is a balancing of interests. This, however, must be contested. It is, indeed, possible to strike a balance in a conflict of interests. But this does not imply that balancing is possible only between interests and not between rights. The principles construction tries to show that balancing rights is possible. Still another point in Dworkin's argument has to be rejected. Dworkin conceives balancing and moral arguments as opposites. The reply to this is that balancing rights is a form of moral argument.

4. The Principles Construction

The principles construction attempts to resolve the problems of the rule construction by establishing a necessary connection between constitutional rights and balancing. Many authors have raised objections to this approach. The most serious objection is the irrationality objection. It has been prominently articulated by Jürgen Habermas and Bernhard Schlink. Habermas's central point is that there exist 'no rational standards' for balancing: 'Because there are no rational standards for this, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies.'[35] Where Habermas speaks about arbitrariness and unreflected customs, Schlink employs the concepts of subjectivity and decision: balancing is, 'in the final analysis, subjective and decisionistic'.[36]

The irrationality objection can be rejected if balancing can be established as a rational form of legal and moral argument. This is, indeed, the case. The basis of balancing is a rule that can be called the 'Law of Balancing'. This rule states:

> The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.[37]

The Law of Balancing excludes, inter alia, an intensive interference with principle P_1 that is justified only by a low importance assigned to the satisfaction of the colliding principle P_2. Such a solution would not be an optimization of P_1 *together with* P_2.

The Law of Balancing is to be found, in different formulations, nearly everywhere in constitutional adjudication. It expresses a central feature of balancing and is of great practical importance. If one wishes to achieve a precise and complete analysis of the structure of balancing, the Law of Balancing has, however, to be elaborated further. The result of such a further elaboration is the Weight Formula.[38]

The Weight Formula defines the weight of a principle P_i in a concrete case, that is, the concrete weight of P_i relative to a colliding principle P_j ($W_{i,j}$), as the quotient of, first, the product of the intensity of the interference with P_i (I_i) and the abstract weight of P_i (W_i) and the degree of reliability of the empirical assumptions concerning what the measure in question means for

[34] Dworkin (n 32), 27.

[35] Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans, [1992] 1996), 259.

[36] Bernhard Schlink, 'Der Grundsatz der Verhältnismäßigkeit' in Peter Badura and Horst Dreier (eds), *Festschrift 50 Jahre Bundesverfassungsgericht*, vol 2 (2001), 461 (translation by Robert Alexy).

[37] Alexy (n 3), 102.

[38] Robert Alexy, 'On Balancing and Subsumption' (2003) 16 *Ratio Juris* 443–8; Robert Alexy, 'The Weight Formula' in Jerzy Stelmach, Bartosz Brożek, and Wojciech Załuski (eds) *Studies in the Philosophy of Law. Frontiers of the Economic Analysis of Law* (2007), 9–27.

the non-realization of P_i (R_i), and, second, the product of the corresponding values with respect to P_j, now related to the realization of P_j. It runs as follows:

$$W_{i,j} = \frac{I_i \cdot W_i \cdot R_i}{I_j \cdot W_j \cdot R_j}$$

Now to talk about quotients and products is sensible only in the presence of numbers. This is the problem of graduation. The question of graduation is a central problem of the theory of balancing, for balancing presupposes scales.[39] At exactly this point the distinction between continuous and discrete scales is of pivotal importance. Continuous scales run over an infinite number of points between, for instance, 0 and 1. The crude nature of law excludes their application. Discrete scales are defined by the fact that between their points no further points exist. Balancing can begin as soon as one has a scale with two values, say, light and serious. In constitutional law a triadic scale is often used, which works with the values light (l), moderate (m), and serious (s). There are various possibilities in representing these values by numbers.[40] If one chooses a geometric sequence like 2^0, 2^1, and 2^2, it becomes possible to represent the fact that the power of principles increases overproportionally with increasing intensity of interference. This is the basis of an answer to the reproach that principles theory leads to an unacceptable weakening of constitutional rights. If the concrete weight ($W_{i,j}$) of P_i is greater than 1, P_i precedes P_j, if it is smaller than 1, P_j precedes P_i. If, however, the concrete weight ($W_{i,j}$) is 1, a stalemate exists. In this case, it is both permitted to perform the measure in question and to omit it. This means that the state, especially the legislator, has discretion.[41] This is of utmost importance for a reply to the reproach that principles theory leads to an overconstitutionalization.[42]

The objection has been raised to the Weight Formula that it 'expresses the ideal of a precise, one might say mathematically precise, science',[43] and that this is 'a methodological chimera'.[44] This objection rests on a misconception of the role of the Weight Formula. Its purpose is not to reduce legal reasoning to calculation, but to grasp those elements that play a role in balancing and to see how these elements are connected. The numbers that have to be substituted for the variables represent propositions, for instance the proposition 'The interference with the freedom of expression is serious'. This proposition has to be justified in order to establish its claim to correctness and this can only be done by argument. In this way, the Weight Formula is intrinsically connected with legal discourse. It does not claim to substitute calculation for discourse, but attempts to lend to discourse a rational structure.

The abstract explanation of the principle of proportionality in the narrower sense shall be illustrated by means of a case. The case in question is a decision of the German Federal Constitutional Court that concerns the classic conflict between freedom of expression and

[39] See Aharon Barak, *The Judge in a Democracy* (2006), 166: 'One cannot balance without a scale'.

[40] On this issue see Alexy, 'The Weight Formula' (n 38), 20–3.

[41] Alexy (n 3), 408, 410–14.

[42] The discretion in case of stalemate can be termed 'structural discretion'. A second kind of discretion is epistemic discretion. Epistemic discretion is incorporated in the Weight Formula by means of R_i and R_j, the variables referring to the degree of reliability of the empirical assumptions on the basis of which judgments about the intensity of interferences rest. See on this ibid 414–25.

[43] Matthias Jestaedt, 'The Doctrine of Balancing—its Strengths and Weaknesses' in Matthias Klatt (ed), *Institutionalized Reason* (2012), 163.

[44] Ibid 165.

personality right.[45] 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 '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'[46] between freedom of expression of those associated with the magazine (P_1) and the officer's general personality right (P_2). 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 a 'lasting'[47] or *serious* (*s*) interference (I_1) with freedom of expression. If the Court had confined itself simply to qualifying the interference as serious, rational argument would be missing. This seems to be the picture of balancing that stands behind the irrationality objection. But the Court gives reasons for its assessment of the interference as serious. Its main argument is that awarding damages could affect the future willingness of those producing the magazine to carry out their work in the way they have done previously. To this it adds that if exaggerations and alienations were not allowed as stylistic devices, satirical magazines would have to give up their characteristic features.[48] This can be conceived as rational argumentation. In a next step the description 'born Murderer' was placed in the context of the satire published by *Titanic*. Here several persons had been described as having a surname at birth in a 'recognizably humorous' way, from 'puns to silliness'.[49] This excludes an 'isolated assessment' of the description 'born Murderer' by taking it 'literally'.[50] The interference with the personality right was thus treated as having a *moderate* (*m*), perhaps even a *light* or minor intensity (I_2). Even those who do not agree with this result must concede that this rating of the intensity of interference with P_2 is backed by reasonable arguments. More cannot be required in law. The two assessments of intensity completed the first part of the decision. In order to justify an award of damages, which is a serious (*s*) interference with the constitutional right to freedom of expression (P_1), the interference with the right to personality (P_2), which was supposed to be compensated for by damages, would have had to have been at least also serious (*s*). But according to the assessment of the Court, it was not. It was at best moderate (*m*), perhaps even merely light (*l*). This meant that the interference with the freedom of expression was, according to the Law of Balancing and, with it, the Weight Formula,[51] disproportional and, therefore, unconstitutional.

Matters, however, were different in that part of the case where the officer had been called a 'cripple'. According to the Court, this counted as 'serious harm to his personality right'.[52]

[45] Decisions of the Federal Constitutional Court, BVerfGE 86, 1. On freedom of expression more generally, see Chapter 42.

[46] BVerfGE 86, 1 (11).

[47] Ibid 1 (10).

[48] Ibid.

[49] Ibid 1 (11).

[50] Ibid 1 (12).

[51] It is of interest that the Court refers only to the intensity of interference on both sides (I_i, I_j). This makes sense of the assumption that the Court attributes the same abstract weight (W_i, W_j) to the freedom of expression (P_1) and the right to personality (P_2). Such silent graduations are to be observed in many cases. For the Weight Formula this means that W_i and W_j can be reduced. The same seems to apply to the degree of reliability of the empirical assumptions (R_i, R_j). This shows that the Weight Formula is an instrument that provides not only a description of what a court has explicitly presented but also a reconstruction of what it has implicitly assumed. In this respect, the Weight Formula can play not only a reconstructive but also a critical role.

[52] BVerfGE 86, 1 (13).

This assessment was justified by the fact that describing a severely disabled person in public as a 'cripple' is generally taken, these days, to be 'humiliating' and to express a 'lack of respect'.[53] Such public humiliation and lack of respect reaches and undermines the very dignity of the victim. The graduation of the intensity of interference is, in this way, again backed by reasons. And—this is a reply to Dworkin's separation of balancing and morality—these reasons are moral reasons. The result is stalemate. The serious (*s*) interference (I_1) with the freedom of expression (P_1) was countered by the great (*s*) importance (I_2) accorded to the protection of personality. Consequently, the Court came to the conclusion that it could see 'no flaw in the balancing to detriment of freedom of expression'[54] in the decision of the Düsseldorf Higher Regional Court of Appeal. *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.

The *Titanic* decision shows that balancing is a test of whether an interference with a right is justified. This can be generalized. All constitutional rights are rights against unjustified infringements.[55] The most rational way of distinguishing justified and unjustified infringements is proportionality analysis. This leads to a necessary connection between constitutional rights and proportionality. The claim to correctness, necessarily connected with constitutional rights as with law in general, requires that the application of constitutional rights be as rational as possible. The highest possible degree of rationality can be achieved only by proportionality analysis. In this way, the claim to correctness establishes a necessary connection between constitutional rights and proportionality. This implies that proportionality is included in the very concept of constitutional rights.

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[53] Ibid.

[54] Ibid.

[55] See on this Mattias Kumm, 'Alexy's Theory of Constitutional Rights and the Problem of Judicial Review' in Matthias Klatt (ed), *Institutionalized Reason* (2012), 213–17.