Interpreting Fundamental Rights:

Freedom versus Optimization

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Table of Contents

I. Why the Balancing Dispute Matters

"More Freedom, Less Balancing!" That is the battle cry in contemporary human rights law. It sounds throughout public international law and has its reflections in national constitutional law. The German version of this debate emanates from the case law of the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG, "Court"). The Court has adopted wide ranging balancing in its interpretation of fundamental rights, thereby encouraging the theory that basic rights generally have the structure of principles rather than rules.

Ronald Dworkin has introduced the theory of principles in the United States. In Germany, the theory of principles is most strongly emphasized by *Robert Alexy*. The German version has a specific flavor. While the anglo-american discussion of principles focuses on judicial activism and mostly glances over the structural analysis of principles, *Alexy* introduces additional characteristics to the concept, namely the **duty to optimize** the principles' normative impact. Structure, optimization, and balancing are seen as an interrelated functional framework forcing courts – and that is: *all* human rights courts, nationally and internationally – to adopt a balancing approach with fine-tuned control as their major tool of adjudication. As a matter of fact, most courts now follow this jurisprudential guideline.

II. Balancing in German Case Law and in Jurisprudence

1. A Matter of Principle: Balancing Endangers Freedom

Moving from legal rules to legal principles endangers freedom. This view is rarely questioned, not even by proponents of the theory of principles. It holds true in a double sense:

In the libertarian sense of freedom meaning 'absence of restrictions', freedom is endangered because principles are more pervasive in their scope of application than rules tend to be. As *Dworkin* pointed out when characterizing the somewhat distorted image of "positivism" he was criticizing: "To say that someone has a 'legal obligation' is to say that his case falls under a valid legal rule that requires him to do or to forbear from doing something. ... In the absence of such a valid legal rule there is no legal obligation ..." (Dworkin 1977: 17). For *Dworkin*, this is all the more reason to resort to principles because he considers the absence of obligation to be a danger for individual rights. The judge's discretion is "not bound by standards set by the authority in question", and, therefore, his decision "is not controlled by a standard" (Dworkin

1977: 32 f.). However, the libertarian reading of the situation is quite the opposite: Where a judge has no legal rule to apply, the court's power to impose state law ends and individual freedom reigns. By moving from a system of legal rules limited in scope to a system of legal principles with much wider potential application, freedom is therefore reduced.

In the liberal sense of freedom meaning 'freedom by protection', the move from rules to principles endangers freedom in a different way. Legal rules work as safeguards of the law and against state intervention. If a basic right is protected by a rule, the protection tends to be stronger than the protection afforded by a principle. A legal rule can only be compromised by explicit exceptions specified in the law. In contrast, a legal principle is always subject to balancing against other principles, so its protection cannot ever afford the same degree of legal certainty. Accordingly, the rule "Human dignity is inviolable" (Art. 1 Par. 1 Sent. 1 of the German Constitution, Basic Law, Grundgesetz, "GG") results in stronger protection than any (hypothetical) equivalent principle to the effect that "The principle of human dignity is to be protected." As another example of this effect, within international human rights law, the rule of non-refoulement would be compromised if questions of extradition were submitted to balancing against the principle of national security (Scheinin 2005: 2).

2. German Federal Constitutional Court Case Law

Notwithstanding the risk of endangering freedom, the German Federal Constitutional Court has generally adopted balancing in its interpretation of fundamental rights. The interpretation of the German Constitution (Basic Law, Grundgesetz, GG) took a decisive turn with the Lüth decision in 1958. When the court upheld the plaintiff's right to call for a boycott on grounds of free speech, it opened the floodgates for a broad control over private law. This was achieved by interpreting constitutional rights as "an objective order of values" intended to strengthen the effect of theses rights (BVerfGE 7, 198 [205] – Lüth). The term "order of values" was subsequently abandoned and was replaced by the notion that basic rights have an "objective dimension" in addition to their subjective dimension as individual claims. The Court now no longer refers to values and instead refers to “the principles [...] expressed by constitutional rights” (BVerfGE 81, 242 [254] – Handelsvertreter).

Collisions of principles are resolved by balancing. For this task, the court resorts to an even more general principle in constitutional interpretation: the meta-principle of proportionality. The three tenets of this meta principle are well known in interna-

tional and national human rights law: suitability, necessity, and proportionality in the narrower sense. The suitability requirement prohibits any means which are unhelpful for or obstruct the legislative goals. It puts a stop to self-contradictory laws. The necessity requirement means that if an alternative, less interfering and equally suitable means is available, this must be adopted. This requirement calls for efficiency in the sense of Pareto optimality for the law. Finally, the proportionality requirement in the narrower sense is synonymous with balancing. The court weighs advantages to the public of implementing the means (e.g., national security) against disadvantages to the individual of having his or her freedom reduced (e.g., by phone tapping). In cases where competing basic rights apply, the Court weighs the basic rights of the one group (e.g., the right to publicly call for a boycott) against the basic rights of the opposing groups (i.e., economic freedom of merchants). Whenever the advantage achieved is out of proportion to the disadvantage inflicted, the means is considered to be an unconstitutional infringement on basic rights. Almost every decision of the German Federal Constitutional Court that strikes down a statute has its roots in this balancing procedure.

"Optimization" has been mentioned by the German Federal Constitutional Court as the overall purpose of the balancing procedure. When considering whether a book should be classified as pornography, the Court balanced artistic freedom on the one hand with the state interest in protecting minors from pornography on the other hand, "with the goal of optimization" for both principles (BVerfGE 83, 130 [143] – Josephine Mutzenbacher). The same formula had already been applied in the conflict between artistic freedom and state symbolism in a flag case (BVerfGE 81, 278 [292] – Bundesflagge) and had been taken up by other courts, most notably by the German Federal Administrative Court (BVerwGE 87, 37 [45 f.] – Glykolwein). Optimization in this line of rulings was however explicitly distinguished from "Maximization". The freedom of journalists may not be maximized, but only be optimized with regard to the variety of television programs (BVerfGE 83, 238 [321] – 6. Rundfunkentscheidung).

3. Dworkin's Principle as Generic Term for Non-Rules

What constitutes a principle and may thus be subject to balancing? According to *Dworkin*, principles are legal considerations that lack the all-or-nothing applicability of legal rules (Dworkin 1977: 24). Such considerations can be part of the law, i.e., binding on officials, without ever stating conditions for their application or their rela-

tive strength compared with other considerations. A principle like 'No man may profit from his own wrong' only implies one reason (amongst others) for the principle; it may prevail today and yet be superceded by a competing consideration tomorrow. A rule such as 'A will is invalid unless signed by three witnesses' applies provided the specific set of conditions is satisfied; it is definitive in application as long as it is not overruled by superior law.

Dworkin never draws a clear line between "principles, policies, and other sorts of standards", but uses the term 'principle' generically to refer to everything but rules (Dworkin 1977: 22 f.). His examples are cases of strong principles, i.e., general legal principles overruling rules. For example, he refers to a will being invalidated as a result of the principle 'no man may profit from his own wrong', and a contract clause about limited liability being declared void as a result of the principle 'no man may unjustly take advantage of the economic necessities of others'. Not all principles in *Dworkin's* broad sense have this power. In not attributing a specific force to legal principles, he leaves unanswered the question as to what a legal principle requires judges to do.

4. Alexy's Principle as Duty to Optimize

Alexy's theory of principles specifies the requirement missing in *Dworkin's* theory. Principles require balancing, i.e., the application of the meta-principle of proportionality, and this necessarily involves optimization (Alexy 2003a: 135 ff.). Wherever legal principles exist, the duty to optimize their normative impact follows. In particular, the meta-principles of suitability and necessity address optimization relative to what is *factually* possible. The necessity requirement, for example, dictates that if an alternative means exists that is equally suitable in promoting the state interest and yet interferes less with individual rights, this means must be chosen. Since this does not diminish any of the interests realized and one interest is further promoted by the alternative means, the sub-principle expresses Pareto optimality.

The specific balancing procedure that implements the third sub-principle is expressed by a rule called "Law of Balancing" (Alexy 2002a: 102): "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other." Press freedom can, for example, legitimately be curtailed in the interest of national security as long as the weight of the security principle at least equals the weight of the infringement and thereby compensates for the loss. In always choosing the principle of greater weight, the Law of Balancing makes

sure that an optimization takes place to the extent that public policies, if they are implemented, always increase the total level of interest satisfaction, and never decrease it. *Alexy* calls this an optimization relative to what is *legally* possible (Alexy 2003a: 136, 2003b: 772).

But how does one weigh principles, even relatively? According to *Alexy,* three factors relating to interest satisfaction have to be considered within a "weighing formula" (Alexy, 2003b: 790): the *importance* of the objective and of the right, the *probability* of realizing the objective and of the interference with the right, and the *intensity* of the loss for either the objective (if the measure is not applied) or for the right (if the measure is applied). Applied to the example of national security versus press freedom: On the one side, how important is the part of national security protected by the measure, how certain is its protection, and how far does the protective effect carry? On the other side, how important is the part of press freedom affected by the measure, how likely is the measure to result in a loss of freedom, and how intensely does this effect the general operation of the press? Even though there is no intersubjectively binding determination of the relative weights of the various interests, the "law of balancing" identifies what is significant for balancing (Alexy 2002b: 105). By way of illustration, both sides of the balancing could be considered as a product of the factors importance, probability, and intensity in favor of or against the proposed measure. The total weight in favor of the state's side must be equal to or greater than the opposing total weight in favor of the individual's side.

5. Carrying the Argument Even Further

Alexy is not satisfied with identifying the optimization within balancing. He links all parts of his legal philosophy to this interpretive approach, even deducing the necessity of non-positivism (Alexy 2002b: 68 ff.). If principles are *optimizing commands* whereas rules are *definitive commands* (and free from balancing), then any incidence of legal balancing implies the existence of principles: "A criterion for whether or not a judge appeals to principles for support is whether or not he undertakes to strike a balance." (Alexy 2002b: 72). Accordingly, every legal system that is at least minimally developed necessarily includes principles (incorporation thesis). This leads *Alexy* to refute legal positivism. If every legal norm, every legal decision, and every legal system as a whole necessarily lays a claim to legal correctness (the correctness argument) and if principles, as optimizing commands, require a realization to the greatest possible extent (the principles argument), then at least some of the arguments with

which the judge justifies the balance he strikes must, regarding their content, have the character of moral arguments (Alexy 2002b: 77). A non-justifiable norm is either defective (qualifying connection) or, in the case of extreme injustice, even forfeits legal character (classifying connection).

III. Criticism of the Balancing Approach

1. Early Criticism in General

Since the first decisions of the Federal Constitutional Court, there has been emphatic criticism of the balancing approach, including the following allegations: "The freedom of the legal subject is replaced by the objectivity of a value" (Forsthoff 1968: 190). Court practice leads to a "purposeful interpretive reversal of basic rights" (Schmitt 1967: 37). Critics feared all along that an objective order of values or principles – later combined with a duty of all state powers to optimize – would subject the entire legal system to constitutional determination (Forsthoff 1971: 149 ff., Böckenförde 1992: 187 ff.).

2. Criticism of Fundamental Rights as Principles

Nearly three decades later, *Habermas* raised similar concerns, claiming a downgrading of constitutional rights to the level of policies: "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." (Habermas 1996: 258 f.) By understanding most, if not all, constitutional provisions as principles, everything becomes a matter of balancing and hardly any decision of the Federal Constitution Court can be persuasively criticized: "By being open to everything and excluding only the obvious, nearly everything is possible." (Poscher 2003: 75 f.). The theory has so little structure that it must be considered the "zero-point of dogmatics"; it draws so many conflicts into the realm of constitutional court adjudication, that it works like a "constitutionalization trap" (Poscher 2003: 81 f.).

Along the lines of these critics, the notion of basic rights as principles is critisized as undermining the effective *material* protection of individual rights in sub-constitutional law. It also undermines the *institutional* protection of individual rights achieved by the separation of legislative and adjudicative functions. The Constitution determines everything; the Constitutional Court rules supreme. Overall, the application of the balancing approach, even if it were well suited to explain contemporary

court practice, results in "dogmatic and methodological collateral damages" (Jestaedt 2007: 260).

Notwithstanding this criticism, the meta-principle of proportionality and the balancing procedure it incorporates are broadly accepted in German academic literature and court practice. There remains strong controversy, however, as to whether these elements should be based on a theory of principles and, moreover, whether principles should be understood as duties to optimize. When the governments of Germany's states recently argued against the Federal Constitutional Court's control over their specific rates for funding public broadcasting, they challenged the Court's "optimization of value judgments" as a fundamental contradiction to their legislative powers (BVerfGE 119, 181 [203] – Rundfunkfinanzierungsstaatsvertrag). Some commentators emphasize that the principle of proportionality does not require optimization at all (Starck 2005: 162).

3. Criticism of Organizational Principles

Germany "is a democratic ... state" (Art. 20 Par. 1 GG). This provision can be read as a rule with strong formal properties, e.g., that any authoritative decision must ultimately be based on an act of the people themselves or on the activity of officers democratically elected by the people. It can also be read as a principle requiring as much citizen participation as possible in the circumstances, i.e., the highest possible "level of democracy" rather than a mere "label of democracy". This "principalization" approach has been criticized as endangering the "normativity of the constitution" (Unger 2008: 164 ff.).

IV. Some Analysis

The following analysis will first test the merits of the two forms of criticism (1., 2.) and then look for alternatives to the Alexy-type theory of principles prevailing in German constitutional law (3., 4.).

1. How Arbitrary is Balancing?

Even among the few critical voices, the criticism falls into two opposing directions regarding the impact of fundamental rights when interpreted as principles. Some critics fear an inadequately *strong* impact of fundamental rights in ruling every part of the legal system. Other critics focus on the *weak* protection of the rights them-

selves. Combining both lines of thought, the conclusion is that the theory both endangers the structure of the legal system whilst also failing to protect the individual holder of rights.

A two-pronged counter-argument has been raised against the everything-is-possible critique of balancing. In its radical form, the skepticism is simply not persuasive because it would imply that balancing could *never* yield rational results. There are clear cases where balancing leads to rational outcomes – for example, the unconstitutionality of a law imposing the death penalty for littering (cf. Borowski 2006: 209). On the other hand, no proponent of balancing ever claimed that *every* case could be decided by this procedure in only one definitively rational way. The procedure is helpful, but not fool-proof.

2. What Remains Exempt from Balancing?

Notwithstanding the ubiquitous presence of principles in German constitutional law, some areas remain exempt from balancing. Most notably, the protection of human dignity is absolute (Art. 1 Par. 1 Sent. 1 GG) and it follows a different pattern of adjudication and is not subject to any balancing. Furthermore, the core meaning of basic rights is to be protected irrespective of how strong the state's interest in regulation may be (Art. 19 Par. 2 GG). The Basic Rights section of the German Constitution provides that some forms of restrictions may only apply in specific conditions, whilst others are prohibited altogether. Censorship and the death penalty are absolutely prohibited (Art. 5 Par. 1 Sent. 3 GG, Art. 102 GG). Forced labor may only be imposed on persons who are deprived of their liberty by court sentence (Art. 12 Par. 3 GG). In cases of expropriation, the extent of the compensation is subject to balancing, but the requirement for compensation as such is a rule, not a principle, and therefore it is mandatory that the state give compensation (Art. 14 Par. 3 GG). Similarly, the protection of German citizens against extradition to a country outside the European Union (Art. 16 Par. 2 Sent. 1 GG) and the guarantee of citizenship (Art. 16 Par. 1 GG) are not subject to balancing. These are examples of rules within the protection of fundamental rights. They establish islands of absolute protection within a sea of balancing.

In addition to explicit rules within the law, unwritten rules result from jurisprudence or court practice. The duty to optimize, for example, is itself a rule and does not share the basic right's character as being a principle (Borowski 1998: 76 f.). Most importantly, the results of balancing tend to take the form or rules. While the German legal system does not contain a doctrine of formally binding precedent like the com-

mon law systems, a material notion of *stare decisis* nevertheless underlies court practice. Therefore, in practice the rules achieved by balancing are materially binding for future decisions. A balancing decision that acknowledges the superior weight of free political speech as expressed in the public distribution of pamphlets, notwithstanding that such activity disturbs the free flow of commerce in a marketplace, is a rule. This rule will be applied whenever the same conflict arises in future cases. Citizens, therefore, are not submitted to the uncertainties of balancing over and over again, but can rely on a progressively more extensive system of rules about the effective extent of their freedoms.

Another argument about the limited extent of balancing has been presented by *Alexy* for some time. Agreeing with his critics, he insists that the constitution should not always be understood as a determinate *foundation* of law, but also as an indeterminate *framework* for law. Within his "theory of leeway" he acknowledges institutional and substantive discretion, thereby building a counterforce against the optimizing duty. Where, for example, the constitution does not determine legal rules by prohibitions or requirements the legislator has a structural leeway and is (at least in this context) exempt from control by the Federal Constitutional Court (Alexy 2002c: 16). Structural leeway gives the legislator freedom, within bounds, to choose the goals, determine the means, and − most importantly − even set the stage for balancing because in *Alexy's* view of constitutional law, there can be more than one correct outcome of the balancing procedure. Parliament may, for example, deem the prohibition of tobacco advertisements to be an adequate means of fighting smoking related illnesses. The weight of this measure and of its interference with economic freedom will be adjudicated according to a rough assessment (i.e., low, middle, high) of the three factors (i.e., importance, probability, intensity). Accordingly, this might very well result in a draw between both sides, i.e., fall in the structural leeway of balancing. In that case, the balance determined by the legislators takes precedence over any criticism. Accordingly, the structural leeway theory is reinforced by the view that the constitution does not provide for a fine-grained control.

In addition to structural leeway, epistemic leeway results from the inability to determine the applicable conditions for prohibitions and requirements. Empirical uncertainty about causes and effects does *not* automatically lead to an optimization of basic rights (Alexy 2002c: 27 f.). On the contrary, taking into account the principles of the separation of powers and democracy, the legislator should be given discretion in adopting empirical premises for lawmaking.

3. Is Law by Rules and Without Principles Possible?

Modern law relies strongly on the flexibility of its application. Not only are judges conscious of the leeway they have in interpretation, but the legislature and government (being the other powers within the institutional balance) also require this flexibility, in order to focus on the general objectives of political decisions rather than the details. Drafting legal precepts in the form of principles fits nicely with this collective interest in flexibility. Therefore, the theoretical question of government by rules leads to the pragmatic question whether or not rules alone are suitably flexible for modern legal systems.

Due to their difference in structure, rules tend to be less flexible than principles. By definition, they either apply or do not apply if the relevant criteria are satisfied. There may be certain exceptions to a rule's application, but no balancing requirement disturbs the definitive application of the rule. If on the facts the criteria stipulated for the rule (i.e., its conditions) are satisfied, then the legal answer it supplies (i.e., its consequences) follows automatically, based on the rule's validity within the legal system.

With principles, however, even where the conditions for the legal precept are satisfied, the principle's application remains subject to balancing. The principle will have no impact on the outcome if a countervailing factor outweighs it during balancing. Accordingly, the principle "press freedom ... is guaranteed" (Art. 5 Par. 1 Sent. 2 GG) establishes a legal "guarantee" that will however in many cases be outweighed by the superior weight attributed to the right to privacy. The legislature is free to establish any number of conflicting principles without considering their relative impact *a priori*. Since conflicts of principles are not considered to exclude their application, many principles can be applicable at the same time. The court will resolve the issues of material conflict when applying the principles. Given the broad scope of applicability, legislators make use of the fact that principles are more flexible by design.

Many principles are also vague with respect to the conditions in which they apply. The principle "press freedom ... is guaranteed" does not specify what falls within the term "press freedom". It might or might not include internet blogs and the like. And the legal meaning of the term "press freedom" might very well deviate from ordinary language. Distinguishing between input side and output side of the legal provision, we can summarize that principles are always flexible on the output side (application) and often also on the input side (conditions).

To infuse rules with similar flexibility one may resort only to the input side. The conditions as to when a rule applies can be vague, whilst the manner in which the rule is applied is always definitive. If the criteria for the rule's application are satisfied, the rule will apply in all circumstances (all-or-nothing scheme). The rule "A contract violating morality is void" (§ 138 Par. 1 German Civil Code, BGB) is strict in its application, but very flexible with respect to the vague conditions in which it will apply. There are quite a few general rules working in this way. The rule "ownership follows possession in good faith" (cf. § 932 Par. 1 Sent. 1 BGB) and the rule "parties are liable for failing in their duty to observe due diligence" (cf. § 276 BGB) are further examples. Dworkin claims that rules and principles can play much the same role, and that the difference between them is "almost a matter of form alone" (Dworkin 1977: 27). The example he gives from the Sherman Act is quite similar to the morality rule mentioned above, namely "every contract in restraint of trade shall be void". The US Supreme Court treated this provision as a rule, but added flexibility by introducing the notion of "unreasonable restraint" into its conditions. This allowed the provision to function as a rule, but in practice also substantially as a principle because a court has to take other principles into account in order to determine the "unreasonableness" of the restraint. In summary, adding flexibility to the conditions of a rule can achieve quite similar results to relying on the balancing procedure used with principles.

4. Can We Have Legal Principles Without the Notion of Optimization?

The duty to optimize principles is what distinguishes *Alexy's* view on principles from the *Dworkin's* concept. Optimization is the most contested aspect of the theory of principles in German jurisprudence. For many scholars and judges, it would be most appealing to abolish the notion of optimization whilst adhering to the balancing approach where unavoidable with respect to fundamental rights.

To illustrate the issue, we might consider three cases relating to the regulation of protest marches. In the first case it is claimed that the march should be prohibited because the protesters trespass on private property. Here the combined principle of free speech and assembly is weighed against the principle of the state's duty to protect private property. The "goal of optimization" of both principles results in the principle of free speech not being fulfilled at all in this case because the court will grant precedence to property protection and allow the prohibition of the march. In the second case it is claimed that the march should be prohibited because it reduces the amount

of business at local stores. Here the combined principle of free speech and assembly is weighed against the state's duty to protect economic freedom. The court will allow the march to take place, thereby giving precedence to free speech over business interests. However, the principle of economic freedom still protects the store owner's interests to a certain extent. The "goal to optimization" of both principles forces the state to regulate the time, place, and manner of the protest march to accommodate the interests of business and the marches as far as possible. In the third case it is claimed that the march should be prohibited because protesters are critical of local government. Here the combined principle of free speech and assembly is effectively not weighed against anything, because the government's political interest in reducing criticism is no legitimate state interest to interfere with free speech. The protesters will win.

How would these cases be affected if we retained principles, but abolished the notion of optimization? The outcome of all three cases would be the same. The protesters would lose the first case, but win the second and third cases. Furthermore, the combined principle of free speech and assembly in these cases would not be realized to any lesser extent if we abolished the notion of optimization. Protest marches would take place with no modification whatsoever. The only difference would occur in the second case and would affect only the business interests, i.e., with regard to the countervailing principle. While the notion of optimization on both sides of the scales would force the state to try to accommodate the protesters' interest as well as economic freedom as far as possible, in a legal world without optimization the court may resort to an all-or-nothing decision. Accordingly, only the combined principle of free speech and assembly would be decisive in the second case. As it would outweigh the countervailing principle of economic freedom in balancing, the preference in this case would be established and all other considerations would be irrelevant. This would relieve the government from any duty to regulate the time, place, and manner of the march. It would also relieve the court from any need to suggest specific measures to accommodate both the business interests and the marches. In effect, the court's balancing procedure is linked to the positive law established by the government.

Many other case constellations are possible, but there is no need to consider these here because the general direction of what the answer will be is clear from the few examples given above. We can in fact have legal principles without the notion of optimization. The outcome of the balancing procedure will not change without optimi-

zation. However, the control of the Federal Constitutional Court over government regulation would be less fine-tuned. Its decisions will be restricted to an all-or-nothing statement regarding the relative weight of the principles involved with regard to the specific facts of the case.

Is the notion of principles without optimization the right way of thinking about fundamental rights in German constitutional law? The Federal Constitutional Court would disagree. Its jurisdiction is full of examples of fine-tuned control, even where the term "optimization" is never mentioned. It has been used (or misused, depending on one's perspective) to call for very specific limitations on legislation. For example, the constitutional principle about the protection of private property (Art. 14 Par. 1 Sent. 1 GG) has been interpreted as a duty of the government to leave at least half of income free from taxes or burdens (BVerfGE 115, 97 – Halbteilungsgrundsatz). The court's jurisdiction now extends to all areas of public and private law, leaving hardly any details untouched. Therefore, abolishing the notion of optimization might appear to be an attractive way to scale back the Court's influence and re-empower the legislature.

V. Conclusion

This paper challenges the balancing approach as a danger to individual liberty. It finds that (1) there are good reasons to interpret much of contents of fundamental rights as rule-based rather than principle-based; (2) flexibility in a legal system does not require a structure of principles, but can also be achieved with properly drafted rules; (3) principles can be understood without the notion of optimization in order to reduce the Federal Constitutional Courts' preponderance over legislative power.

Literature

Alexy, Robert. 2002a. A Theory of Constitutional Rights. Trans. J. Rivers. Oxford: Oxford University Press. (1st ed. 1985).

Alexy, Robert. 2002b. The Argument From Injustice. A Reply to Legal Positivism. Trans. L. & B. Paulson. Oxford: Oxford University Press.

Alexy, Robert. 2002c. Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit, in: VVDStRL 61, p. 8-33.

Alexy, Robert. 2003a. Constitutional Rights, Balancing, and Rationality, in: Ratio Juris 16, p. 131-140.

Alexy, Robert. 2003b. Die Gewichtsformel, in: Gedächtnisschrift Jürgen Sonnenschein. Berlin: De Gruyter Recht, p. 771-792.

Böckenförde, Wolfgang. 1992. Grundrechte als Grundsatznormen. Zur gegenwärtigen Lage der Grundrechtsdogmatik, in: W. Böckenförde (ed.), Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht. 2nd ed. Frankfurt/Main: Suhrkamp, p. 159-199.

Borowski, Martin. 1998. Grundrechte als Prinzipien, Baden-Baden: Nomos.

Borowski, Martin. 2006. Die Glaubens- und Gewissensfreiheit des Grundgesetzes. Tübingen: Mohr Siebeck.

Dworkin, Ronald. 1977. Taking Rights Seriously. Cambridge (Massachusetts): Harvard University Press.

Forsthoff, Ernst. 1968. Zur heutigen Situation einer Verfassungslehre, in: Festgabe Carl Schmitt, Berlin: Duncker & Humblot, p. 185-211.

Forsthoff, Ernst. 1971. Der Staat in der Industriegesellschaft: Dargestellt am Beispiel der Bundesrepublik Deutschland. 2nd ed. Munich: C.H. Beck.

Habermas, Jürgen. 1996. Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy. Trans. W. Rehg. Cambridge: Polity Press.

Jestaedt, Matthias. 2007. Die Abwägungslehre – ihre Stärken und ihre Schwächen, in: Festschrift Josef Isensee, Heidelberg: C.F. Müller Verlag, p. 253-275.

Poscher, Ralf. 2003. Grundrechte als Abwehrrechte. Reflexive Regelung rechtlich geordneter Freiheit, Tübingen: Mohr Siebeck.

Scheinin, Martin. 2005. Statement of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. Security Council Counter-Terrorism-Committee, New York, 24 October 2005. (Published at www.un.org/ sc/ ctc/ pdf/ ScheininCTC2005.pdf).

Schmitt, Carl. 1967. Die Tyrannei der Werte, in: Festschrift Ernst Forsthoff, Stuttgart: Kohlhammer, p. 37-62.

Starck, Christian. 2005. Art. 1 Abs. 3, in: Hermann v. Mangoldt/Friedrich Klein/ Christian Starck, Kommentar zum Grundgesetz, Band 1: Präambel, Artikel 1 bis 19, 5th ed., Munich: Franz Vahlen, p. 87-165 (n. 141-331).

Unger, Sebastian. 2008. Das Verfassungsprinzip der Demokratie: Normstruktur und Norminhalt des grundgesetzlichen Demokratieprinzips, Tübingen: Mohr Siebeck.