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## Interpreting Fundamental Rights – Freedom versus Optimization

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### I. THE IMPORTANCE OF THE BALANCING DISPUTE

‘**M**ORE FREEDOM, LESS balancing!’ That is the battle cry in contemporary human rights law. It sounds throughout public international law and has a knock-on effect in national constitutional law. The German version of this debate emanates from the case law of the Federal Constitutional Court (Bundesverfassungsgericht, ‘BVerfG’, ‘FCC’ or ‘Court’). The Court has adopted a broad variety of balancing measures in its interpretation of fundamental rights, thereby encouraging the theory that basic rights generally have the structure of principles rather than rules.

Ronald Dworkin introduced the theory of principles in the United States. In Germany, the theory of principles is most strongly advocated by Robert Alexy. The German version has a specific flavour. 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

### A. A Matter of Principle: Balancing Endangers Freedom

Moving from legal rules to legal principles endangers freedom. This view is rarely questioned, even by proponents of the theory of principles, and 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<sup>1</sup>

For Dworkin, this is all the more reason to resort to principles because he considers the absence of obligations 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'.<sup>2</sup> 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 matter of 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

<sup>1</sup> R Dworkin, *Taking Rights Seriously* (Cambridge, MA, Harvard University Press, 1977) 17.

<sup>2</sup> Dworkin, *Taking Rights Seriously* (n 1) 32.

certainty. Accordingly, the rule ‘Human dignity is inviolable’ (Article 1(1), sentence 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.<sup>3</sup>

## B. 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 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 broad control over private law. This was achieved by interpreting constitutional rights as ‘an objective order of values’, intended to strengthen the effect of these rights.<sup>4</sup> The term ‘order of values’ was subsequently no longer used 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’.<sup>5</sup>

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 international and national human rights law: suitability, necessity and proportionality in the narrower sense. The suitability requirement prohibits any means being adopted which are unhelpful for or obstruct promoting the legislative goals. It puts a stop to self-contradictory laws. The necessity requirement demands 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 requirement for proportionality in the narrower sense is synonymous with balancing. The Court weighs the advantages to the public of implementing the means (eg national security) against the disadvantages to the individual of having his or her freedom reduced (eg by phone tapping). In cases where competing basic rights apply, the Court weighs the basic rights of the one group (eg the right to publicly call for a boycott) against the basic rights of the opposing group(s) (ie economic freedom of merchants). Whenever the advantage achieved is out of proportion to the disadvantage inflicted, the means is considered to be an

<sup>3</sup> M Scheinin, 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) [www.un.org/sc/ctc/pdf/ScheininCTC2005.pdf](http://www.un.org/sc/ctc/pdf/ScheininCTC2005.pdf).

<sup>4</sup> *Lüth* BVerfGE 7, 198, 205.

<sup>5</sup> *Handelsvertreter* BVerfGE 81, 242, 254.

unconstitutional infringement on basic rights. Almost every decision of the German Federal Constitutional Court that strikes down a statute on the basis of substantive control 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’s interest in protecting minors from pornography on the other hand, ‘with the goal of optimization’ for both principles.<sup>6</sup> The same formula had already been applied in the conflict between artistic freedom and state symbolism in a flag case<sup>7</sup> and had been taken up by other courts, most notably the German Federal Administrative Court.<sup>8</sup> Optimization in this series of rulings was however explicitly distinguished from ‘maximization’. A variety of television programmes is in the interests of optimizing the freedom of journalists, but this must be distinguished from ‘maximizing’ this right.<sup>9</sup>

### C. Dworkin’s Principle as a 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.<sup>10</sup> Such considerations can be part of the law, ie binding on officials, without stating the conditions for their application or their relative strength compared with other considerations. A principle such as ‘No man may profit from his own wrong’ only implies one reason (amongst others) for the principle; it may prevail today and yet be superseded 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.<sup>11</sup> The examples he gives of circumstances where general legal principles overrule rules are cases of strong principles. 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 are so strong and 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.

<sup>6</sup> *Josephine Mutzenbacher* BVerfGE 83, 130, 143.

<sup>7</sup> *Bundesflagge* BVerfGE 81, 278, 292.

<sup>8</sup> *Glykolwein* BVerwGE 87, 37, 45–46.

<sup>9</sup> *Rundfunkentscheidung* BVerfGE 83, 238, 321–26.

<sup>10</sup> Dworkin (n 1) 24.

<sup>11</sup> Dworkin (n 1) 22.

#### D. Alexy's Principles as a Duty to Optimize

Alexy's theory of principles specifies the requirement missing in Dworkin's theory. Principles require balancing, ie the application of the meta-principle of proportionality, and this necessarily involves optimization.<sup>12</sup> 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 being 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 the rule called the 'law of balancing': 'The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other'.<sup>13</sup> 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 optimization takes place to the extent that public policies, if implemented, always increase the total level of interest satisfaction, and never decrease it. Alexy calls this an optimization relative to what is *legally* possible.<sup>14</sup>

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:<sup>15</sup> 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 affect the general operations of the press? Even though there is no binding determination of the relative weights of the various interests, the law of balancing identifies what is significant for balancing.<sup>16</sup> By way of illustration, both sides of the balancing could be considered as a product of the factors' importance, probability and intensity in favour of or against the proposed

<sup>12</sup> R Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 *Ratio Juris*, 131, 135.

<sup>13</sup> R Alexy, *A Theory of Constitutional Rights*, J Rivers tr (Oxford, OUP, 1985) 102.

<sup>14</sup> Alexy, 'Constitutional Rights, Balancing, and Rationality' (n 12) 136; R Alexy, 'Die Gewichtsformel' in J Jickeli and others (eds), *Gedächtnisschrift Jürgen Sonnenschein* (Berlin, de Gruyter, 2003) 772.

<sup>15</sup> *ibid* 790.

<sup>16</sup> Alexy, *The Argument From Injustice: A Reply to Legal Positivism*, L & B Paulson tr (Oxford, OUP, 2002) 105.

measure. The total weight in favour of the state's side must be equal to or greater than the opposing total weight in favour of the individual's side.

### E. 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.<sup>17</sup> 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'.<sup>18</sup> Accordingly, every legal system that is at least minimally developed necessarily includes principles (the incorporation thesis). This leads Alexy to refute legal positivism. If every legal norm, every legal decision, and every legal system as a whole necessarily claims to be legally correct (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 contents of the arguments with which the judge justifies the balance he strikes must have the character of moral arguments.<sup>19</sup> A non-justifiable norm is either defective (the qualifying connection) or, in the case of extreme injustice, even lacks legal character (the classifying connection).

## III. CRITICISM OF THE BALANCING APPROACH

### A. 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'.<sup>20</sup> Court practice leads to a 'purposeful interpretive reversal of basic rights'.<sup>21</sup> Critics feared all along that an objective order of values or principles (which was later combined with a duty on all state powers to optimize) would subject the entire legal system to the jurisdiction of the Federal Constitutional Court.<sup>22</sup>

<sup>17</sup> *ibid* 68.

<sup>18</sup> *ibid* 72.

<sup>19</sup> *ibid* 77.

<sup>20</sup> E Forstthoff, 'Zur heutigen Situation einer Verfassungslehre' in H Barion and others (eds), *Epirrhosis: Festgabe für Carl Schmitt* (Berlin, Duncker & Humblot, 1968) 190.

<sup>21</sup> C Schmitt, 'Die Tyrannei der Werte' in *Säkularisation und Utopie* (Stuttgart, Kohlhammer, 1967) 37.

<sup>22</sup> E Forstthoff, *Der Staat in der Industriegesellschaft: Dargestellt am Beispiel der Bundesrepublik Deutschland*, 2nd edn (Munich, CH Beck, 1968) 149; EW Böckenförde, 'Grundrechte als Grundsatznormen: Zur gegenwärtigen Lage der Grundrechtsdogmatik' in EW Böckenförde, *Staat, Verfassung, Demokratie: Studien zur Verfassungstheorie und zum Verfassungsrecht*, 2nd edn (Frankfurt am Main, Suhrkamp, 1992) 187.

## B. Criticism of Fundamental Rights as Principles

Nearly three decades later, Jürgen 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’.<sup>23</sup> By understanding most, if not all, constitutional provisions as principles, everything becomes a matter of balancing and hardly any decision of the Federal Constitutional Court can be effectively criticized. ‘By being open to everything and excluding only the obvious, nearly everything is possible’.<sup>24</sup> The theory has little structure and is very dogmatic, and as it draws so many conflicts into the realm of constitutional court adjudication, it works like a ‘constitutionalization trap’.<sup>25</sup> Similarly, the notion of basic rights as principles is criticized 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’.<sup>26</sup>

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 German state governments recently argued against the Federal Constitutional Court’s control over the specific rates for funding public broadcasting, they challenged the Court’s ‘optimization of value judgements’ as a fundamental contradiction to their legislative powers.<sup>27</sup> Some commentators emphasize that the principle of proportionality does not require optimization at all.<sup>28</sup>

## C. Criticism of Organizational Principles

Germany ‘is a democratic . . . state’ (Article 20(1) GG). This provision can be read as a rule with strong formal properties, eg that any authoritative decision must

<sup>23</sup> J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, W Rehg tr (Cambridge, Polity Press, 1996) 258–59.

<sup>24</sup> R Poscher, *Grundrechte als Abwehrrechte* (Tübingen, Mohr Siebeck, 2003) 75–76.

<sup>25</sup> *ibid* 81–82.

<sup>26</sup> M Jestaedt, ‘Die Abwägungslehre – ihre Stärken und ihre Schwächen’ in Otto Depenheuer and others (eds), *Festschrift für Josef Isensee* (Heidelberg, CF Müller, 2007) 260.

<sup>27</sup> *Rundfunkfinanzierungsstaatsvertrag* BVerfGE 119, 181, 203.

<sup>28</sup> C Starck in *von Mangoldt/Klein/Starck: Kommentar zum Grundgesetz*, vol I, 5th edn (Munich, Franz Vahlen, 2005) Art 1(3), 162.

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, ie 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’.<sup>29</sup>

#### IV. SOME ANALYSIS

The following analysis will first test the merits of the two groups of criticism and then look for alternatives to the Alexy-type theory of principles prevailing in German constitutional law.

##### A. 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 inappropriately *strong* impact of fundamental rights if they were to rule every part of the legal system. Other critics focus on the *weak* protection of the rights themselves. Taking account of both schools 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 criticism that balancing renders everything possible. In its radical form, the scepticism is simply not persuasive because it would imply that balancing could *never* yield rational results. There are clear cases where balancing gives rational outcomes – for example, the unconstitutionality of a law imposing the death penalty for littering.<sup>30</sup> On the other hand, no proponent of balancing ever claimed that *every* case could be decided by this procedure or that there was only ever one definitive rational way. The procedure is helpful, but not foolproof.

##### B. 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 (Article 1(1), sentence 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

<sup>29</sup> S Unger, *Das Verfassungsprinzip der Demokratie: Normstruktur und Norminhalt des grundgesetzlichen Demokratieprinzips* (Tübingen, Mohr Siebeck, 2008) 164.

<sup>30</sup> cf M Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes* (Tübingen, Mohr Siebeck, 2006) 209.



interest in regulation may be (Article 19(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 (Article 5(1), sentence 3 GG, Article 102 GG). Forced labour may only be imposed on persons who are deprived of their liberty by court sentence (Article 12(3) GG). In expropriation cases, 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 (Article 14(3) GG). Similarly, the protection of German citizens against extradition to a country outside the European Union (Article 16(2), sentence 1 GG) and the guarantee of citizenship (Article 16(1) GG) are not subject to balancing. These are examples of rules which are protected as 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.<sup>31</sup> Most importantly, the results of balancing tend to take the form of rules. While the German legal system does not contain a doctrine of formally binding precedent like the common 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 at times as an indeterminate *framework* for law. Within his 'theory of leeway' he acknowledges institutional and substantive discretion, which he considers to build a counterforce to the duty to optimize. 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 the control of the Federal Constitutional Court.<sup>32</sup> Structural leeway gives the legislators 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 on tobacco advertisements to be an adequate means of fighting smoking-related illnesses. The weight of this

<sup>31</sup> M Borowski, *Grundrechte als Prinzipien* (Baden-Baden, Nomos, 1998) 76–77.

<sup>32</sup> R Alexy, 'Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' (2002) 61 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 16.

measure and of its interference with economic freedom will be adjudicated according to a rough assessment (ie low, middle or high) of the relative weight of the factors' importance, probability and intensity. Accordingly, this might very well result in a draw between both sides, ie a shortfall in the structural leeway of balancing. In such a case, the balance determined by the legislators takes precedence over any criticism. The structural leeway theory is reinforced by the view that the Constitution does not provide for fine-tuned 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.<sup>33</sup> On the contrary, taking into account the principles of the separation of powers and democracy, the legislators should be given discretion in adopting empirical premises for law-making.

### C. 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 detail. Drafting legal precepts in the form of principles fits nicely with this collective interest in flexibility. The theoretical question of government by rules leads to the pragmatic question of whether or not rules alone are suitably flexible for modern legal systems.

Owing to their difference in structure, rules tend to be less flexible than principles. By definition, they either apply or do not apply automatically 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 a rule. If on the facts the criteria stipulated for the rule (ie its conditions) are satisfied, then the legal answer it supplies (ie 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' (Article 5(1), sentence 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 them.

<sup>33</sup> Alexy, 'Verfassungsrecht und einfaches Recht' (n 32) 27–28.

Given the broad scope of their 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. The legal meaning of the term ‘press freedom’ might very well deviate from ordinary language. In summary, principles are always flexible in the manner in which they are applied (the output side) and often also with respect to the conditions for their application (the input side).

It is only possible to give similar flexibility to rules on the input side. The conditions as to when a rule applies can be vague, whilst the manner in which a rule is applied is always definitive – and if the criteria for the rule’s application are satisfied, the rule will apply in all circumstances. The rule ‘A contract violating morality is void’ (§ 138(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 similar general rules. The rule ‘ownership follows possession in good faith’ (cf § 932(1), sentence 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’.<sup>34</sup> 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.

#### **D. Can we have Legal Principles without the Notion of Optimization?**

The duty to optimize principles is what distinguishes Alexy’s view on principles from 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, let us 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

<sup>34</sup> Dworkin (n 1) 27.

the principle of free speech not being fulfilled at all in this case because the court will grant precedence to property protection and prohibit 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 local store owners' interests to a certain extent. The 'goal of 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 marchers as far as possible. In the third case it is claimed that the march should be prohibited because the 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 not a legitimate state interest, and therefore is incapable of legitimately interfering 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, ie given the countervailing principle. While the notion of optimization on both sides of the scales would force the state to try to accommodate the protesters' interests 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, 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 optimization. However, the control of the Federal Constitutional Court over government regulation would be less fine-tuned. Its decisions would 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 to think 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 (Article 14(1), sentence 1 GG) has been interpreted as a duty on the government to leave at least half of income free from taxes or burdens.<sup>35</sup> 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 chapter challenges the balancing approach as a danger to individual liberty. It finds that there are good reasons to interpret much of the contents of the fundamental rights as rule-based rather than principle-based; flexibility in a legal system does not require a structure of principles but can also be achieved with properly drafted rules; principles can be understood without the notion of optimization in order to reduce the courts’ preponderance over legislative power.

## CASES

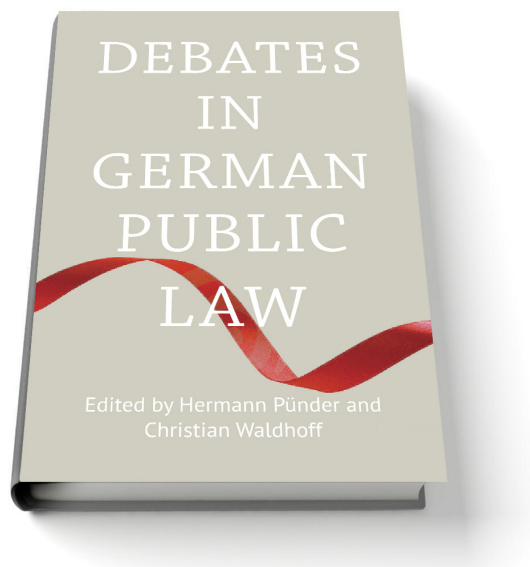
- BVerfGE 7, 198 – *Lüth* (1958)
- BVerfGE 81, 242 – *Handelsvertreter* (1990)
- BVerfGE 81, 278 – *Bundesflagge* (1990)
- BVerfGE 83, 130 – *Josephine Mutzenbacher* (1990)
- BVerfGE 83, 238 – 6 *Rundfunkentscheidung* (1991)
- BVerwGE 87, 37 – *Glykolwein* (1990)
- BVerfGE 115, 97 – *Halbteilungsgrundsatz* (2006)
- BVerfGE 119, 181 – *Rundfunkfinanzierungsstaatsvertrag* (2007)

## SELECTED LITERATURE

- Alexy R, *A Theory of Constitutional Rights*, J Rivers tr (Oxford, OUP, 1985)
- *The Argument From Injustice: A Reply to Legal Positivism*, L & B Paulson tr (Oxford, OUP, 2002)
- ‘Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit’ (2002) 61 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 16, 8–33
- ‘Constitutional Rights, Balancing, and Rationality’ (2003) 16 *Ratio Juris* 131–40

<sup>35</sup> *Halbteilungsgrundsatz* BVerfGE 115, 97.

- ‘Die Gewichtsformel’ in J Jickeli and others (eds), *Gedächtnisschrift Jürgen Sonnenschein* (Berlin, de Gruyter, 2003) 771–92
- Böckenförde EW, ‘Grundrechte als Grundsatznormen: Zur gegenwärtigen Lage der Grundrechtsdogmatik’ in EW Böckenförde, *Staat, Verfassung, Demokratie: Studien zur Verfassungstheorie und zum Verfassungsrecht*, 2nd edn (Frankfurt am Main, Suhrkamp, 1992) 159–99
- ‘Grundrechtstheorie und Grundrechtsinterpretation’ [1974] *Neue Juristische Wochenschrift* 1529–38
- Borowski M, *Grundrechte als Prinzipien* (Baden-Baden, Nomos, 1998)
- *Die Glaubens- und Gewissensfreiheit des Grundgesetzes* (Tübingen, Mohr Siebeck, 2006)
- Dworkin R, *Taking Rights Seriously* (Cambridge, MA, Harvard University Press, 1977)
- Forsthoef E, ‘Zur heutigen Situation einer Verfassungslehre’ in H Barion and others (eds), *Festsache Carl Schmitt* (Berlin, Duncker & Humblot, 1968) 185–211
- *Der Staat in der Industriegesellschaft: Dargestellt am Beispiel der Bundesrepublik Deutschland*, 2nd edn (Munich, CH Beck, 1971)
- Habermas J, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, W Rehg tr (Cambridge, Polity Press, 1996)
- Jestaedt M, ‘Die Abwägungslehre – ihre Stärken und ihre Schwächen’ in O Depenheuer and others (eds), *Festschrift für Josef Isensee* (Heidelberg, CF Müller, 2007) 253–75
- Poscher R, *Grundrechte als Abwehrrechte: Reflexive Regelung rechtlich geordneter Freiheit* (Tübingen, Mohr Siebeck, 2003)
- Scheinin M, 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) [www.un.org/sc/ctc/pdf/ScheininCTC2005.pdf](http://www.un.org/sc/ctc/pdf/ScheininCTC2005.pdf)
- Schmitt C, ‘Die Tyrannei der Werte’ in *Säkularisation und Utopie* (Stuttgart, Kohlhammer, 1967) 37–62
- Unger S, *Das Verfassungsprinzip der Demokratie: Normstruktur und Norminhalt des grundgesetzlichen Demokratieprinzips* (Tübingen, Mohr Siebeck, 2008)



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