The Construction of Constitutional Rights

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There are two fundamentally different constructions of constitutional rights: the rule construction and the principle construction. Neither of these constructions is at any point realized to the fullest extent, but they nevertheless represent two opposing ideas on which the solution of nearly all questions of the doctrine of constitutional rights turns. Questions pertaining to constitutional rights are not simply questions in a particular area of law. The answers given to such questions have consequences for the structure of the entire legal system. The spectrum extends from the third party or horizontal effect, that is, the bearing of constitutional rights on private law, right up to the relation between the legislature and the practice of constitutional review, behind which the tension between constitutional rights and democracy is found. The question of which construction, the rule construction or the principle construction, is to be preferred is, therefore, by no means a problem of theoretical interest alone. It also has far-reaching practical import. For this reason, it is a basic question of constitutionalism.

I. The Rule Construction

1. Rules and Principles

The basis of both the rule and the principle construction is the norm-theoretic distinction between rules and principles.[1] 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 requir-

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[1] See Robert Alexy, *A Theory of Constitutional Rights*, trans. Julian Rivers (Oxford: Clarendon Press, 2002), 47-9.

ing 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.

The distinction between rules and principles is at the heart of a theory that might be called 'principles theory'. The principles theory is the system drawn from the implications of the distinction between rules and principles. These implications affect all areas of the law. As far as constitutional rights are concerned, one may speak of the 'principles theory of constitutional rights' as well as of their 'principle construction'. The debate over the principles theory is, first of all, a debate over weighing or balancing – and, therefore, since balancing is the core of the proportionality test, a debate over proportionality analysis.

2. The Postulate to Avoid Balancing

The counterpart of the principle construction, the rule construction, can be seen as an attempt to avoid the problems connected with balancing. Constitutional rights norms are considered as rules that are applicable, in essence, without balancing. This does not mean that the application of constitutional rights is conceived, in all instances, as an unproblematic subsumption. Subsumption, here as elsewhere in the law, can be rather difficult, and may require intermediate steps as well as further arguments of different kinds in order to justify these intermediate steps.[2] Thus, it can be very doubtful whether a certain statement is an ex-

[2] See Robert Alexy, *A Theory of Legal Argumentation*, trans. Ruth Adler and Neil MacCormick (Oxford: Clarendon Press, 1989), 221-30.

pression of one's opinion, protected by the freedom of speech, or whether a certain activity is an exercise of religion, or whether a certain valuable advantage counts as property, as protected by the constitution. It is decisive for the rule construction that not only such questions as these but, going beyond them, all other questions that may arise in the application of constitutional rights be resolved in essence *without* balancing.

This solution, freedom from balancing, may acquire either a positivistic or a non-positivistic character. An example of a positivistic construction, free of balancing, is Ernst Forsthoff's postulate that all questions connected with the application of constitutional rights be resolved by means of the traditional canons of interpretation[3] – that is, by appealing, above all, to the wording of the constitutional rights provisions, the intentions of those who framed the constitution, and the systematic context of the provision being interpreted. Today the best-known version of a non-positivistic construction, free of balancing, is found in the work of Ronald Dworkin. According to him, the application of constitutional rights is not a matter of striking a balance. Rather, it concerns 'the very different question of what morality requires'.[4] If the principle construction is defined as a proportionality construction that includes balancing essentially, then this, too, is a rule construction, albeit one of a special kind.

3. Problems of the Rule Construction

The problems of the rule construction emerge most clearly in connection with the question of the limits of constitutional rights. Here only two constellations will be considered: that of a constitutional right with a statutory reservation, and that of a constitutional right guaranteed without this reservation.

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[3] Ernst Forsthoff, 'Zur Problematik der Verfassungsauslegung', in Forsthoff, *Rechtsstaat im Wandel*, 2nd ed. (Munich: C. H. Beck, 1976), 173.

[4] Ronald Dworkin, *Is Democracy Possible Here*? (Princeton: Princeton University Press, 2006), 27; see Kai Möller, 'Balancing and the Structure of Constitutional Rights'; *International Journal of Constitutional Law*, 5 (2007), 458-61.

The simplest form of a statutory reservation is present, for example, when a constitutional rights provision guarantees, in a first step, constitutional rights such as the right to life and to bodily integrity, and, in a second step, then empowers the legislature by means of a clause such as 'These rights can only be interfered with on a statutory basis'[5] to limit these rights. If one follows the rule construction and takes these provisions literally, the limitation clause makes possible any interference with life and bodily integrity as long as the interference is based on a statute. Thus, the constitutional right is reduced to a special statutory reservation. It loses the power it would otherwise have had to bind the legislature. From the standpoint, then, of substantive law, such a constitutional right simply has no bearing on the legislator. This, however, stands in contradiction to the binding force of constitutional rights on the legislature. One may attempt to avoid this situation by adding more rules. The systematically most demanding attempt here is the prohibition to infringe on the core content of a constitutional right, as found in article 19 (2) German Basic Law. 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 in a manner that is free from balancing.[6]

No less serious are the problems of the rule construction in case of constitutional rights guaranteed without a statutory reservation, that is, constitutional rights with respect to which the constitution explicitly provides for no limits. In the German Basic Law this is the case, for instance, with freedom of religion and of science. If one were to subsume, as an isolated instance, religious suppression, when required by a particular religious faith, and medical experiments with human beings, when advancing scientific progress, such isolated instances of subsumption as these would be allowed. The alternative of not classifying these measures as religious acts or scientific research would contradict the wording of the constitutional rights provisions. If, however, the rights to freedom, life

[5] See article 2 (2) (2) German Basic Law.
[6] See Alexy, *A Theory of Constitutional Rights*, n. 1 above, 192-6.

and bodily integrity of those concerned are employed as reasons for imposing limitations, one inevitably confronts the need to balance. In this way, the postulate of systematic interpretation warrants, indeed, requires that one move beyond the scope of the rule model.

II. Principle Construction and Proportionality Analysis

The principle construction attempts to resolve these and a great many additional problems by conceiving of constitutional rights as principles, that is, as optimization requirements.

The significance of constitutional rights as principles stems from their connection to the principle of proportionality. This connection is as close as it could possibly be. It consists in a relation of mutual implication. The principle of proportionality with its three sub-principles of suitability, necessity, and proportionality in the narrower sense follows logically from the definition of principle, just as the definition of principle follows from the principle of proportionality with its three sub-principles.[7] This means that the principle of proportionality is valid if constitutional rights have the character of principles and that constitutional rights have the character of principles if the principle of proportionality determines the application of constitutional rights. The core of the principle construction consists in this necessary connection between constitutional rights and proportionality.

III. Objections to the Principle Construction

To the principle construction as well as to the principles theory in general a great many objections of various sorts have been raised, and it is impossible to discuss all of them here. But because the objections, despite their diversity, have a certain systematic relation to each other, a short general account of them shall be offered before taking up the most central objection. A classification into seven

[7] Alexy, *A Theory of Constitutional Rights*, n. 1 above, 66-9.

groups seems to be advisable. The first group comprises the *norm-theoretic* objections. Here the concern is over such questions as whether there exist legal principles at all,[8] whether and how principles can be distinguished from rules,[9] whether principles are norms,[10] and whether a basic opposition of rules to principles is not misguided, in light of the extraordinary variety of norms.[11] The objections of the second group may be designated as *argumentation-theoretic*. Here the central issue is whether balancing is properly seen as rational argumentation or whether it must not be classified as a non-rational or irrational method.[12] The objections of the third group turn on the question of whether the principle construction counts as a danger to constitutional rights, eliminating as it does their strict validity as rules.[13] Objections of this kind concern the doctrine of constitutional rights. They may, therefore, be termed *doctrinal* objections. Whereas the doctrinal objections appeal to the danger of too little force in constitutional rights, the opposite, the danger of too much force, stands at the centre of the objections of the fourth group. These objections claim that the optimization thesis leads to a proliferation of constitutional rights, leading in turn to an overconstitutionalization of the legal system. The institutional consequence is said to be a 'shift from the parliamentary legislative state to a constitutional adjudicative state'.[14] One may refer here to *institutional* objections. The fifth group consists of *interpretation-theoretic* objections. They concern the question of whether and how the principle construction can be established as a correct interpretation of a catalogue of constitutional rights as understood in positive

[8] Larry Alexander, 'There Are No Legal Principles', ms. 2008.
[9] Ralf Poscher, ‚Einsichten, Irrtümer und Selbstmißverständnisse der Prinzipientheorie', in *Die Prinzipientheorie der Grundrechte*, ed. Jan-R. Sieckmann (Baden-Baden: Nomos, 2007), 65, 70.
[10] Jan Henrik Klement, 'Vom Nutzen einer Theorie, die alles erklärt', *Juristenzeitung* 63 (2008), 760.
[11] Poscher, Einsichten, 'Irrtümer und Selbstmißverständnis der Prinzipientheorie', n. 9 above, 73-4.
[12] See Jürgen Habermas, *Between Facts and Norms*, trans. William Rehg (Cambridge: Polity Press, 1996), 259; Bernhard Schlink, 'Der Grundsatz der Verhältnismäßigkeit', in *Festschrift 50 Jahre Bundesverfassungsgericht*, ed. Peter Badura and Horst Dreier (Tübingen: Mohr Siebeck, 2001), 460.
[13] See on this Habermas, *Between Facts and Norms*, n. 12 above, 258-9, who maintains that with the principle construction a 'fire wall' is collapsing.
[14] Ernst-Wolfgang Böckenförde, 'Grundrechte als Grundsatznormen', in Böckenförde, *Staat, Verfassung, Demokratie* (Frankfurt a. M.: Suhrkamp, 1991), 190 (trans. R. A.).

law.[15] Is it possible to justify the universal validity of the principle or proportionality construction,[16] or is it to be applied, at best, only occasionally and on an *ad hoc* basis? The objections of the sixth group concern *validity-theoretic* questions. These objections reproach the principles theory for jeopardizing the superior rank of the constitution and the subjection of the executive and judiciary to statutory law.[17] The hierarchical structure of the legal system is said to collapse in the whirl of balancing.[18] The seventh group, finally, is formed by *science-theoretic* objections. The principles theory is said to consist of 'statements that for reason of their abstractness do not say anything at all',[19] statements that are capable of explaining each and every decision taken, but without any directive power for decisions to be taken in the future'.[20] For this reason, so it is argued, the principles theory cannot suffice as a doctrine of constitutional rights.[21]

IV. The Rationality of Balancing

1. The Central Role of the Rationality Problem

The argumentation-theoretic objections that concern the rationality of balancing count as the most important group. If balancing were by its nature irrational, it would have to be rejected, and with it, principles *qua* norms that require something irrational.[22] The norm-theoretic debate would have lost its point. Moreover, if balancing were irrational, it would not make sense to argue on behalf of

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[15] Matthias Jestaedt, 'Die Abwägungslehre – ihre Stärken und ihre Schwächen', in *Staat im Wort. Festschrift für Josef Isensee*, ed. Otto Depenheuer, Markus Heintzen, Matthias Jestaedt, and Peter Axer (Heidelberg: C. F. Müller, 2007), 260, 262 f., 275; Poscher, 'Einsichten, Irrtümer und Selbstmißverständnis der Prinzipientheorie', n. 9 above, 79; Klement, 'Vom Nutzen einer Theorie, die alles erklärt', n. 10 above, 761, 763.

[16] So, for instance, David M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004), 162: 'Proportionality is a universal criterion of constitutionality'.

[17] Jestaedt, 'Die Abwägungslehre – ihre Stärken und ihre Schwächen', n. 15 above, 268, 275; Poscher, 'Einsichten, Irrtümer und Selbstmißverständnis der Prinzipientheorie', n. 9 above, 76; Klement, 'Vom Nutzen einer Theorie, die alles erklärt', n. 10 above, 759.

[18] Jestaedt, n. 15 above, 269-70.

[19] Ibid., 269 (trans. R. A.).

[20] Klement, 'Vom Nutzen einer Theorie, die alles erklärt', n. 10 above, 756; Ralf Poscher, *Grundrechte als Abwehrrechte* (Tübingen: Mohr Siebeck, 2003), 76; Jestaedt, 'Die Abwägungslehre – ihre Stärken und ihre Schwächen', n. 15 above, 269.

[21] Poscher, n. 20 above, 77-8.

[22] This applies in any case to optimization relative to the legal possibilities. Optimization relative to the factual possibilities might be retained even in the case of irrationality of balancing.

balancing as the applicable criterion on the question of the admissibility of limitations on constitutional rights. The doctrinal objections would win hands down. The same would apply to the institutional critique. To be sure, the situation is more complex in the case of the interpretation-theoretic arguments. If balancing should prove to be irrational, one would adhere to it at most in instances where a constitution explicitly required a proportionality test, as, for instance, in the case of article 52 (1) of the Charter of Fundamental Rights of the European Union. Even here, however, one may ask whether a norm that requires something irrational might not be corrected more appropriately by way of interpretation. The validity-theoretic objection would carry the day, too. Who would care to assent to an irrational restriction on the validity of a norm? The irrationality of balancing would, finally, be grist for the mills of all science-theoretic objections. For these reasons, the rationality problem shall take the centre stage in what follows.

2. The Irrationality Objection

Many authors have contested the rationality and, with it, the objectivity of balancing – especially emphatically by Habermas and 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.'[23]

Where Habermas speaks about arbitrariness and unreflected customs, Schlink employs the concepts of subjectivity and decision:

> 'In the test of proportionality in the narrower sense, it is only the subjectivity of the tester that can, in the end, be effective … The operations of evaluation and balancing required by the proportionality test in the nar-

[23] Habermas, *Between Facts and Norms*, n. 12 above, 259.

> rower sense can be achieved … in the end, only in a decisionistic manner.'[24]

Is this true? Is balancing really non-rational or irrational, arbitrary, subjective, and decisionistic? Does balancing indeed mean that rationality, correctness, and objectivity are abandoned? It is difficult to answer these questions without knowing what balancing is. And to find out what balancing is, some insight into its structure is presupposed.

3. Pareto-Optimality

It has already been noted that balancing is the subject of the third sub-principle of the principle of proportionality. This is the principle of proportionality in the narrower sense, which concerns optimization relative to the legal possibilities at hand. By contrast, the subject of the first two sub-principles, the sub-principle of suitability and necessity, is optimization relative to the factual possibilities. In this respect, they are concerned with the question of whether the factual possibilities allow for the avoidance of costs to constitutional rights without bringing about costs contrary to the aims of the legislator. The issue, in other words, is Pareto-optimality.[25] This is far less problematic than balancing, which is concerned with the question of which side has to bear the costs. For this reason, the principles of suitability and necessity shall not be discussed here.[26] In any case, the mere fact that the principle construction is able to grasp this aspect, too, is a strong argument on behalf of its correctness.

4. The Law of Balancing

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[24] Bernhard Schlink, 'Freiheit durch Eingriffsabwehr – Rekonstruktion der klassischen Grundrechtsfunktion', European Journal for Constitutional Rights 11 (1984), 462 (trans. R. A.); see further Schlink, 'Der Grundsatz der Verhältnismäßigkeit', n. 12 above, 460.

[25] Alexy, *A Theory of Constitutional Rights*, n. 1 above, 67-9.

[26] See on this Laura Clérico, *Die Struktur der Verhältnismäßigkeit* (Baden-Baden: Nomos, 2001), 26-139.

The basic idea of optimization relative to the legal possibilities at hand can be expressed by a rule that might be called the 'Law of Balancing'. A statement of this rule runs as follows:

> The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.[27]

The Law of Balancing shows that balancing can be broken down into three stages. The first stage is a matter of establishing the degree of non-satisfaction of, or detriment to, the first principle. This is followed by a second stage, in which the importance of satisfying the competing principle is established. Finally, the third stage answers the question of whether or not the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first principle. If it were not possible to make rational judgments about, first, intensity of interference, second, degrees of importance, and, third, their relationship to each other, the objections raised by Habermas and Schlink would be justified.

5. The Weight Formula

In order to show that rational judgments about intensity of interference and degrees of importance are possible, I might turn first to a decision of the German Federal Constitutional Court on health warnings.[28] The Court characterizes the obligation of tobacco producers to place health warnings respecting the dangers of smoking on their products as a relatively minor or light interference with the freedom to pursue one's profession (*Berufsausübungsfreiheit*). By contrast, a total ban on all tobacco products would count as a serious interference. Between such minor and serious cases, others of moderate intensity of interference can be found. In this way, a scale can be developed with the stages 'light', 'moderate', and 'serious'. Our example shows that the intensity of interference can be determined by means of this scale.

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[27] See Alexy, *A Theory of Constitutional Rights*, n. 1 above, 102.
[28] Decisions of the Federal Constitutional Court (BVerfGE) 95, 173.

The same is possible on the side of the competing reasons. The health risks resulting from smoking are high. Thus, the reasons justifying interference weigh heavily. If in this way the intensity of interference is established as minor, and the degree of importance of the reasons for the interference as high, then the outcome of examining proportionality in the narrower sense can well be described – as the German Federal Constitutional Court has in fact described it – as 'obvious'.[29]

The teachings drawn from the tobacco judgment are corroborated if one looks at other cases. A rather different case is represented by the *Titanic* judgment. The widely-published satirical magazine, *Titanic*, described a paraplegic reserve officer, first, as a 'born murderer' and then, in a later edition, as a 'cripple'. A German Court ruled against *Titanic* and ordered the magazine to pay damages to the officer in the amount of DM 12,000. *Titanic* brought a constitutional complaint. The Federal Constitutional Court undertook a 'case-specific balancing'[30] between the freedom of expression of the magazine (article 5 (1) (1) German Basic Law) and the officer's general right of personality (article 2 (1), in connection with article 1 (1) German Basic Law). This case, too, can be reconstructed by means of the triadic scale: light, moderate, and serious.

However, the triadic scale is not by itself enough to demonstrate that balancing is rational. A demonstration requires that it is possible to embed such classifications in an inferential system that is understood as implicit in balancing and that, in turn, is intrinsically connected with the concept of correctness. In the case of subsumption under a rule, such an inferential system can be expressed by means of a deductive scheme, called 'internal justification', that is constructed with the help of propositional, predicate, and deontic logic and integrated into the theory of legal discourse.[31] It is of great importance, both for the theory of

[29] BVerfGE 95, 173 (187).
[30] BVerfGE 86, 1 (11).
[31] Alexy, *A Theory of Legal Argumentation*, n. 2 above, 273-83.

legal discourse and the theory of constitutional rights, that in the case of balancing a counterpart to this deductive scheme exists.[32] This is the Weight Formula.

The core and, at the same time, the simplest form of the Weight Formula runs as follows:

$$W_{i,j} = \frac{I_i}{I_j}$$

In this formula, one finds that the variables for the abstract weights of the competing principles (W_i, W_j) and for the reliability of the empirical assumptions concerning what the measure in question means in the concrete case for the non-realization of the one principle and the realization of the other principle (R_i, R_j) are still lacking. But this can be left out of consideration here, so that the simplest form just mentioned may stand for the complete form:[33]

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

In the simplest as well as in the complete form, I_i stands for the intensity of interference with the principle P_i – in our case, the principle granting the freedom of expression of *Titanic*. I_j stands for the importance of satisfying the competing principle P_j, which, in our case, is the principle granting the personality right of the paraplegic officer. Finally, $W_{i,j}$ stands for the concrete weight of the principle whose violation is being examined – in our case, that of P_i. The Weight Formula gives expression to the point that the concrete weight of a principle is a relative weight. It does this, in the simplest form, by defining the concrete weight as the quotient of the intensity of interference with this principle (P_i) and the concrete importance of the competing principle (P_j).

Now, the objection is clear that one can only talk about quotients in the presence of numbers, and that numbers are not used in the balancing carried out

[32] Robert Alexy, 'On Balancing and Subsumption. A Structural Comparison', *Ratio Juris* 16 (2003), 448.
[33] See generally Robert Alexy, 'The Weight Formula', trans. Bartosz Brożek and Stanley L. Paulson, in *Studies in the Philosophy of Law*, vol. 3, ed. Jerzy Stelmach, Bartosz Brożek, and Wojciech Załuski (Kraków: Jagiellonian University Press, 2007), 20-6.

in constitutional law. The reply to this objection might begin with the observation that the vocabulary drawn from logic, which we are using here in order to express the structure of subsumption, is not used in judicial reasoning, but that this vocabulary is nevertheless the best means available to make explicit the inferential structure of rules. The same would apply to an expression of the inferential structure of principles by means of numbers that are substituted for the variables of the Weight Formula.

The three values of the triadic model – light, moderate, and serious – can be represented by *l*, *m*, and *s*. To be sure, the triadic model by no means exhausts the possibilities of graduation. Balancing would be possible once one had a scale with two values, say, *l* and *s*. Balancing is impossible only if everything has the same value.[34] Moreover, there are numerous possibilities for refining the scale. A double-triadic scale is of special interest. It works with nine steps or values: (1) *ll*, (2) *lm*, (3) *ls*, (4) *ml*, (5) *mm*, (6) *ms*, (7) *sl*, (8) *sm*, (9) *ss*. It is of utmost importance that the possibilities of refinement are limited. All classifications are judgments. Everybody understands a statement such as 'The infringement is light (*l*)' or a statement such as 'The infringement is a serious moderate infringement'. But how should the statement 'The infringement is a serious light infringement of moderate kind (*lsm*)' be understood, which is made possible by adding a third triad? A justification can only be given for what one understands, and the justifiability of statements about intensities is a condition of the rationality of balancing. This implies that graduation in the province of constitutional rights can work only with relatively crude scales. In the end, it is the nature of law, here, the nature of constitutional law, that sets limits to the degree to which the graduation can discriminate and altogether excludes the applicability of any infinitesimal scale.[35] Calculable measurements by way of a continuum of points between 0 and 1 cannot have any application.

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[34] See on this Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006), 166: 'One cannot balance without a scale'.

[35] Robert Alexy, 'Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit', *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 61 (2002), 25-6.

Even crude scales, however, cannot dispense with the allocation of numbers if the inferential structure of balancing is going to be expressed by the Weight Formula. There are various possibilities for allocating numbers to the three values of the triadic model. A rather simple and at the same time highly instructive possibility consists in taking the geometric sequence 2^0, 2^1, and 2^2, that is, 1, 2, and 4.[36] In the *Titanic* judgment, the Federal Constitutional Court considered the intensity of infringement (I_i) with the freedom of expression (P_i) as serious (*s*); it considered the importance of satisfying the right to personality (P_j) of the officer (I_j), in the matter of describing him as 'born murderer' – given its highly satirical context – as only moderate (*m*), perhaps even as light (*l*). If we insert the corresponding values of our geometric sequence for *s* and *m*, then the concrete weight of P_i ($W_{i,j}$) is, in this case, 4/2, that is, 2. If, conversely, I_i were *m* and I_j were *s*, the value would be 2/4, that is, 1/2. The priority of P_i is expressed by a concrete weight greater than 1; the priority of P_j by a concrete weight less than 1. In all stalemate cases the value is 1.

The description of the officer as a 'cripple', however, was considered by the Court as a severe (*s*) interference with the right of personality. This gave rise to a stalemate, with the consequence that *Titanic*'s constitutional complaint was not successful in so far as it related to damages stemming from the description 'cripple'. By contrast, freedom of expression enjoys priority in the case of the description 'born murderer' with the consequence that the damages were in so far as they related thereto disproportional, hence unconstitutional. The constitutional complaint was to this extent successful.

The rationality of an inferential structure essentially depends on the question of whether it connects premises that, again, can be justified. In the Weight Formula the premises are represented by numbers which stand for judgments. An example is the judgment that the public description of a severely disabled person

[36] The greatest advantage of the geometric sequence consists in its providing for the best representation of the overproportional increase of the power of rights as correlated with an increasing intensity of interference, a fact that serves as the basis for the refutation of the objection concerning the dissolution of the power of constitutional rights. See Alexy, 'The Weight Formula', n. 33 above, 22-3.

as a 'cripple' is a serious interference with that person's personality right. This judgment raises a claim to correctness, which can be justified in a discourse. The commensurability of the assessments on both sides of the balance is granted if the discourse is conducted on the basis of a common point of view: the point of view of the constitution.[37] The Federal Constitutional Court justifies its assessment with the argument that the description as a 'cripple' is nowadays considered as an expression of disrespect and humiliation.[38] Naturally, one can carry on a dispute about this, as about so many questions in the law. But contestability does not imply irrationality. If this were the case, not only balancing, but legal reasoning as such would be for the most part irrational. Precisely the opposite, however, is the case. Justifiability, despite the fact that it cannot be identified with provability, implies rationality, and, with it, objectivity, understood as lying between certainty and arbitrariness.

The end is attained. Balancing turns out to be an argument form[39] of rational legal discourse. This suffices to refute the irrationalism objection as an objection specifically directed against balancing. Of course, one might enquire quite generally into the possibility of rational legal argument, and one could also think about undertaking a reply to the objections of the other six groups on the basis of what has been elaborated here. This, however, will have to await another occasion. Here it suffices to say that the irrationalism objection, on which everything else depends, can be dismissed. Having done so, we might well be in a position to say that an important step along the way toward a full defence of the principle construction of constitutional rights has been taken.

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[37] Alexy, 'The Weight Formula', n. 33 above, 18.
[38] BVerfGE 86, 1 (13).
[39] See Alexy, *A Theory of Legal Argumentation*, n. 2 above, 93. This, perhaps, is the point of Barak's thesis that 'balancing introduces order into legal thought'. See Barak, *The Judge in a Democracy*, n. 34 above, 173; see also 164.