PART I

A THEORY OF CONSTITUTIONAL RIGHTS REVISITED

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1. DISCOURSE THEORY AND FUNDAMENTAL RIGHTS

The relation between discourse theory and fundamental rights is close, deep, and complex. It comprises three dimensions, which are intrinsically connected.

I. THREE DIMENSIONS

The first dimension concerns the foundation or substantiation of fundamental rights. One might call this the "*philosophical"* dimension of fundamental rights. The second concerns the institutionalization of fundamental rights. In order to distinguish this problem from the first, one might call it "*political*." The third dimension concerns the interpretation of fundamental rights. This problem might be classified as "*juridical*." I will concentrate on the philosophical and juridical problems.

II. THREE CONCEPTS OF FUNDAMENTAL RIGHTS: FORMAL, SUBSTANTIAL AND PROCEDURAL

It is difficult to say how something can be substantiated, institutionalized, and interpreted without having an idea about what it is that is to be buttressed by reasons, transformed into reality, and made vivid by way of an interpretive practice. The question of what fundamental rights are is the question of the concept of fundamental rights. Where fundamental rights are concerned, there are three kinds of concept: formal, substantial, and procedural.

A *formal concept* is employed if fundamental rights are defined as rights contained in a constitution or in a certain part of it, or if the rights in question are classified by a constitution as fundamental rights, or if they are endowed by the constitution with special protection, for example, a constitutional complaint brought before a Constitutional Court. Without any doubt, formal concepts are useful, but they are not enough if one wants to understand the nature of fundamental rights. Such an understanding is necessary not only for reasons theoretical in nature, but also for reasons that concern the practice of applying the law. An example that illustrates this is Article 93(1) (no. 4*a*), Basic Law of the Federal Republic of Germany, which provides that a constitutional

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complaint can be raised by anyone on the ground that his or her fundamental rights *qua* rights, listed in the first part of the Basic Law under the heading "Grundrechte," or rights contained in Articles 20(4), 33, 38, 101, 103, and 104, have been infringed by a public authority. The second group contains, *inter alia*, the classical *habeas corpus* rights. It seems, on the face of it, to be quite natural to conceive of all rights named in Article 93(1) (no. 4*a*) of the Basic Law as fundamental rights. On closer inspection, however, this first impression proves to be mistaken. This decidedly literal reading of Article 93(1) (no. 4*a*) would include too much. One item in the list is Article 38, Basic Law. Article 38 not only grants – in the first sentence of its first paragraph – the right of the citizen to vote, which can without difficulty be conceived of as a fundamental right, but – in the second sentence of its first paragraph – also grants rights that define the basic position of a representative, that is, a member of the *Bundestag*. These rights, however, are fundamentally different from the rights of the citizen against the state. They are rights that determine the status of the representative not *qua* private person but as an element of the organization of public power. The Federal Constitutional Court has therefore decided that these rights cannot be defended by means of a constitutional complaint, but only by an action between state organs, which is regulated in Article 93(1) (no. 1).[1] The reason for this decision, which is a decision against the wording of the constitution, is that the rights of representatives – notwithstanding the fact that they are rights granted by the constitution – are not fundamental rights in the proper sense of the word.

Such a claim, however, is only possible if there also exists a *substantial concept* of a fundamental right, one that serves to revise results stemming from the application of the formal concept. Thus understood, a substantial concept of a fundamental right must include criteria that go above and beyond the fact that a right is mentioned, listed, or guaranteed in a constitution. A classical example of such a substantial concept has been presented by Carl Schmitt and Ernst Forsthoff.[2] They claim that the only genuine fundamental rights are defensive rights of the citizen against the state. To follow Schmitt and Forsthoff here would be to accept an exclusively libertarian understanding of fundamental rights. To be sure, there are good reasons to include libertarian rights in a substantial concept of fundamental rights. There are, however, also good reasons not to restrict this concept to these rights. Protective rights, rights to organization and procedure, and social rights ought not to be excluded from the club of genuine fundamental rights merely because a concept follows the tradition. If one then decides to expand the concept of a fundamental right, only one criterion seems to be adequate to define a substantial concept of fundamental rights. It is the concept of human rights. Again, there is a difference between the initial impression and what

one arrives at upon reflection. On first glance it seems that a substantial concept of fundamental rights is possible which simply defines fundamental rights as human rights transformed into positive constitutional law. On this basis, human and fundamental rights would become extensionally equivalent. This, however, would count both as over- and under-inclusive. Constitutions may contain rights that are not to be classified as human rights and there may well be human rights that have not found entry into a certain constitution. Still, one can, on closer inspection, take account both of these two possible directions of divergence, and of an intrinsic relation between human and fundamental rights if one holds that fundamental rights are rights incorporated into a constitution with the intention of transforming human rights into positive law.[3] This intention theory makes it possible to conceive of the catalogues of fundamental rights of different constitutions as different attempts to transform human rights into positive law. As with attempts generally, attempts to transform human rights into positive law can be successful to a greater or lesser extent. The intention theory has far-reaching consequences for the philosophical problem of the foundation or substantiation of fundamental rights. The foundation of fundamental rights is essentially a foundation of human rights. By this means, a critical dimension is brought into the concept of fundamental rights. If human rights *qua* rights that ought to be constitutionally protected can be substantiated and if a constitution does not contain these rights, then the foundation becomes a critique. This critique can lead to constitutional reform or to a change in the constitution through constitutional review. The latter shows that there is an intrinsic connection between the philosophical and juridical problems. In any case, one point seems to be clear: one cannot raise the question of the substantiation or foundation of fundamental rights without raising the question of the substantiation or foundation of human rights.

The third concept of fundamental rights is *procedural* in character. This concept mirrors the institutional problems of transforming human rights into positive law. Incorporating human rights into a constitution and granting a court the power of judicial review with respect to all state authority is to limit the power of parliament. In this respect, fundamental rights are an expression of distrust in the democratic process. They are, at the same time, both the basis and the boundary of democracy. Corresponding to this, there is a procedural concept of fundamental rights holding that fundamental rights are rights which are so important that the decision to protect them cannot be left to simple parliamentary majorities.[4] The three concepts are closely connected. An adequate theory of fundamental rights has to address not only all three concepts but also the relations in which they stand to each other.

III. THE FOUNDATION OF FUNDAMENTAL RIGHTS

As already mentioned above, the intrinsic relation between constitutional and human rights, which is expressed by the substantial concept of fundamental rights, answers the question of why the problem of the foundation of fundamental rights is basically a problem of the foundation of human rights. That is, if human rights can be substantiated, fundamental rights can, too, whereas if human rights cannot be substantiated, then fundamental rights, too, must remain without foundation. This state of affairs would have far-reaching consequences for the legitimacy and interpretation of fundamental rights. The insight that there is no foundation of fundamental rights without a foundation of human rights makes it possible for us to treat the question of the foundation of human rights as a part of the question of the foundation of fundamental rights.

The concept of human rights is highly contested for reasons both philosophical and political in nature. It is not possible to take up this debate here, and, happily, it is not necessary to do so either. The answer to the question of whether a foundation of human rights is possible requires only a general idea of what human rights are. The required general idea can be expressed by means of a definition that employs five properties that serve to explain what human rights are. According to this definition, human rights are, first, universal, second, fundamental, third, abstract, and, fourth, moral rights that are, fifth, established with priority over all other kinds of rights.[5]

On the basis of this definition, the question of how to substantiate human rights can now be formulated as the question of how moral norms or rules that grant, with priority, universal, fundamental, and abstract rights may be substantiated. This shows that the problem of the substantiation or justification of human rights is nothing other than a special case of the general problem of the justification of moral norms.

In order to be able to assess whether and to what degree discourse theory is able to provide for a justification of human rights, it is necessary to have considered other attempts at providing such a foundation. No attempt is perfect. Thus, the comparative concepts of being better and being good enough play a pivotal role in the context of the foundation of human rights.

The theories about the justifiability of moral norms in general as well as those theories that refer only to the justifiability of human rights can be classified in many different ways. The most fundamental distinction is that between approaches that generally deny the possibility of any such justification and approaches claiming that some kind of justification is possible. The general denial may have its roots in radical forms of emotivism, decisionism, subjectivism, relativism, naturalism, or deconstructivism. The general assumption of the possibility of a justification may well include one or more of these sceptical

elements, but it insists that there exist the possibility of giving reasons for human rights, reasons that can raise a claim to objectivity, correctness, or truth.

The approaches reflecting this latter view differ greatly. This does not, however, preclude various combinations. Eight approaches shall be distinguished here.

The first is the *religious* model. A religious substantiation of human rights provides for a very strong foundation. Whoever believes that human beings are created by God in his own image has a good reason for considering human beings as having value or dignity. This value or dignity is a good basis for human rights. These strong reasons serve, however, as reasons only for those persons who believe in God and his creation of man in his own image. The same applies to all other kinds of religious arguments.

The second approach is the *intuitionistic* one. Human rights are justified according to the intuitionistic model if it is claimed that they are self-evident. Self-evidence, however, does not count as a reason if it is possible not to share the self-evidence without thereby exposing oneself to any reproach other than that one does not share this form of self-evidence. If intuitionism is not embedded in reasoning, it boils down to emotivism. If it is embedded in arguments, it is no longer intuitionism. Self-evidence can be the result of argument, but it is not a substitute for argument.

The third approach is the *consensual* one. If a consensus is nothing more than a mere congruence of beliefs, then consensualism is nothing other than collective intuitionism. Its only source of objectivity is the fact of congruence. If this congruence embraces all human beings and if it is stable, then it ought not to be underestimated. Even then, however, reasons for the concurrent beliefs can be demanded. Once consensus is connected with argument, the approach is more than a merely consensual approach. It moves in the direction of discourse theory. If the consensus is not complete, the role of reasons counts more than mere majorities, which might well be based on bad arguments.

The intuitionistic and the consensual models are based on beliefs or claims without argument. The forth approach dismisses even beliefs and claims, substituting them for behaviour. It is the *biological* or, more precisely, the *socio-biological* approach. According to this model, morality is a species of altruism. Certain forms of altruistic behaviour, such as, in particular, caring for one's own children and helping relatives but also reciprocal altruism generating mutual help, are said to be better for the survival of the genetic pool of individuals than is mutual indifference or even aggressiveness. The tendency to maximize one's reproductive success may in some cases lead to respect and help *vis-à-vis* some persons, but it is a pattern of behaviour "often accompanied by indifference and even hostility towards outsiders."[6] This is incompatible with the universalistic character of human rights. If human

rights can be justified, then it is not by means of any observations of empirical facts about the biological nature of human beings, but only by means of an explication of their cultural nature. This is the path of discourse theory.

The fifth approach is the *instrumentalistic* one. A justification of human rights is instrumentalistic if it is argued that the acceptance of human rights is indispensable to the maximization of individual utility. This approach appears in decidedly primitive forms as well as in highly sophisticated models. An example of the primitive version is the argument: "If you do not want to be killed, you must respect others' right to life." Highly sophisticated models have been developed, for instance, by James Buchanan and David Gauthier. If it is possible for some people to increase their utility by violating the human rights of others, then the primitive argument breaks down. History shows that this possibility cannot be ruled out, not at any rate as long as human rights have not been transformed into positive law backed by effectively organized sanctions. The sophisticated models must either work with provisos that exclude unacceptable outcomes, as Gauthier does when he says that "(r)ights provide the starting point for, and not the outcome of, agreement,"[7] or their proponents must be willing to accept outcomes that, to put it in Buchanan's words, "may be something similar to the slave contract, in which the 'weak' agree to produce goods for the 'strong' in exchange for being allowed to retain something over and above bare subsistence, which they may be unable to secure in the anarchistic setting."[8] Buchanan's model is a purely instrumental model, but the possibility of a slave contract shows that it is not compatible with human rights. Gauthier's model may be compatible, but this is entirely owing to reasons addressing elements that can be justified only within a non-instrumentalistic approach. All of this does not mean that the instrumentalistic approach has no value with respect to human rights. In so far as it can provide reasons for respecting human rights, it should be incorporated in a more comprehensive model. This model, however, must be governed by principles that purely instrumentalistic reasoning cannot generate.

The sixth approach is the *cultural* one. It maintains that the public conviction that there are human rights is an achievement of the history of human culture. Radbruch presents a combination of this argument with a consensual one: "To be sure, their details remain somewhat doubtful, but the work of centuries has established a solid core of them and they have come to enjoy such a far-reaching consensus in the declarations of human and civil rights that only the deliberate sceptic can still entertain doubts about some of them."[9] The cultural model, too, is useful but not sufficient. Human rights are not the result of the history of all cultures. The mere fact that they have been worked out in one or more cultures is not enough to justify their universal validity, which is included in their very concept. Cultural history can only have

significance in justification as a process that connects experience and argument. Universal validity cannot be established by tradition but only by reasoning.

Our consideration of the six approaches has shown that if anything can establish the universal validity of human rights, that is reasoning that establishes it. Discourse theory is a theory centred on the concept of reasoning. That is the most general ground for the view that discourse theory can contribute to the foundation of human rights. The discourse-theoretical approach might be called "*explicative*," for it attempts to give a foundation of human rights by making explicit what is necessarily implicit in human practice. Making explicit what is necessarily implicit in a practice follows the lines of Kant's transcendental philosophy. The discourse-theoretical argument is not only complex, it is also in need of support by means of other arguments. I attempted to elaborate this some time ago,[10] and my arguments are doubtlessly in need of improvement. This cannot, however, be done here. I will confine myself to a handful of considerations that may perhaps suggest how it is that discourse theory can serve to justify human rights.

The argument proceeds in three steps or at three levels. At the first level, it attempts to show that the practice of asserting, asking, and arguing presupposes rules of discourse that express the ideas of freedom and equality as necessarily connected with reasoning. This first step concerns what Robert Brandom calls the "practices of giving and asking for reasons."[11] The assumption that discourse necessarily presupposes freedom and equality as rules of reasoning is, however, by no means sufficient to justify human rights. It implies neither that these practices as such are necessary nor that the ideas of freedom and equality presupposed by them as rules of reasoning imply human rights which are not only rules of discourse but also rules of action. Thus, a second and a third step must follow the first step.

The second step concerns the necessity of discursive practices. I have attempted to argue that someone who in his life has never participated in any moves of any discursive practice has not taken part in the most general form of life of human beings.[12] Human beings are "discursive creatures."[13] It is not easy for them to forbear from participating in any discourse whatever. One possibility here would be to abolish the factual ability to do so, but this would be a akin to self-destruction. Another possibility would be systematically to substitute for any practice of giving and asking for reasons for a practice of expressing desires, uttering imperatives, and exercising power. The choice of such a farewell to reason, objectivity, and truth is an existential choice. This will be the topic of our last approach, the eighth.

Before we can proceed to this last model, however, we have to take the third step of the explicative justification of human rights. This step concerns the transition from discourse to action. In order to bring about this transition,

additional premises are necessary. The first is the autonomy argument. It says that whoever takes part in discourse seriously, presupposes the autonomy of his partners.[14] This excludes the denial of autonomy as the source of the system of human rights. The second additional premise is established by the argument of consensus. It says that the equality of human rights is a necessary result of an ideal discourse.[15] The third additional premise connects the ideas of discourse, democracy, and human rights.

By means of this third premise, the philosophical dimension of human rights is connected with the political problem. This connection expresses the fact that the discourse-theoretical justification of human rights is holistic in character. It consists of the construction of a system that expresses as a whole the discursive nature of human beings.

By these means, the explicative approach of discourse theory is connected with an eighth approach, which might be called "*existential*." It concerns the necessity of the discursive nature of human beings. Is it really impossible to give up this discursive nature? It seems, on the contrary, to be possible to do so, at least to a certain degree and in certain respects. This means that the degree of discursivity depends on decisions concerning the acceptance of our discursive nature and thereby, of ourselves.

IV. THE INSTITUTIONALIZATION OF FUNDAMENTAL RIGHTS

Human rights are institutionalized by means of their transformation into positive law. If this takes place at a level in the hierarchy of the legal system that can be called "constitutional," human rights become fundamental rights. The incorporation of a catalogue of human rights at as high a level in the legal system as possible is not the only demand discourse theory makes with respect to the constitution. The second constitutional requirement is the organization of a form of democracy that expresses the ideal of discourse in reality. This form of democracy is deliberative democracy. Instead of "deliberative democracy" one could also speak of "discursive democracy."

One might think that the institutionalization of human rights *qua* fundamental rights would be perfect once they were connected with discursive democracy. This, however, would mean that the parliamentary legislature would be controlled only by itself and by public argument. In the world as it is, this could not rule out violations of fundamental rights by just the public power that ought to protect and realize them, namely the legislature. To avoid this as far as possible, constitutional review has to be institutionalised.

This, however, not only resolves problems, but also gives rise to new ones. Discourse theory is compatible with constitutional review in a deliberative, that

is, discursive democracy only if constitutional review for its part is discursive in character. Constitutional review has a discursive character if the interpretation of the constitution, and especially of the fundamental rights contained in it, can be conceived of as a discourse that can be linked to general democratic discourse in a way that comes closer to discursive ideals than general democratic discourse is able to arrive at alone. This criterion leads to a cluster of problems. Here only the question of whether and under what conditions the interpretation of human rights can be conceived as a rational discourse shall be of interest.

V. THE INTERPRETATION OF FUNDAMENTAL RIGHTS

A. *The Principle of Proportionality*

One of the main topics in the current debate about the interpretation of fundamental rights is the role of balancing or weighing. In the actual practice of many constitutional courts, balancing plays a central role. In German constitutional law balancing is one part of what is required by a more comprehensive principle. The more comprehensive principle is the principle of proportionality (*Verhältnismäßigkeitsgrundsatz*). The principle of proportionality consists of three sub-principles: the principles of suitability, of necessity, and of proportionality in its narrow sense. All these principles express the idea of optimization. Interpreting fundamental rights in the light of the principle of proportionality means to treat fundamental rights as optimization commands, that is, as principles, not simply as rules. As optimization commands, principles are norms requiring that something be realized to the greatest extent possible, given the legal and factual possibilities.[16]

The principles of suitability and necessity concern optimization relative to what is factually possible. They thereby express the idea of Pareto-optimality. The third sub-principle, the principle of proportionality in its narrow sense, concerns optimization relative to the legal possibilities. The legal possibilities are essentially defined by competing principles. Balancing consists in nothing other than optimization relative to competing principles. The third subprinciple can therefore be expressed by a rule that states:

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

This rule might be called "Law of Balancing."[17]

B. *Habermas's Critique of the Balancing Approach*

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

Habermas's first objection is that the balancing approach deprives fundamental rights of their normative power. By means of balancing, he claims, rights are downgraded to the level of goals, policies, and values. They thereby lose the "strict *priority*" that is characteristic of "normative points of view."[18] Thus, as he puts it, a "fire wall" comes tumbling down:

> For if in cases of collision all reasons can assume the character of policy arguments, then the fire wall erected in legal discourse by a deontological understanding of legal norms and principles collapses.[19]

This danger of watering down fundamental rights is said to be accompanied by "the danger of irrational rulings."[20] According to Habermas, there are no rational standards for balancing:

> Because there are no rational standards here, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies.[21]

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

> The court's judgment is then *itself* a value judgment that more or less adequately reflects a form of life articulating itself in the framework of a concrete order of values. But this judgment is no longer related to the alternatives of a right or wrong decision.[22]

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

If this were true, then, to be sure, the balancing approach would have suffered a fatal blow. Law is necessarily connected with a claim to correctness.[23] If balancing or weighing were incompatible with correctness and justification, they should have no place in legal argumentation.

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

C. *The Triadic Scale*

It is difficult to answer these questions without knowing what balancing is. To know what balancing is presupposes insight into its structure. The *Law*

of Balancing shows that balancing can be broken down into three stages. The first stage involves 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, in the third stage it is established whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former. If it were not possible to make rational judgments about, first, intensity of interference, secondly, degrees of importance, and, thirdly, their relationship to each other, then the objection raised by Habermas would be justified. Everything turns, then, on the possibility of making such judgments.

How can one show that rational judgments about intensity of interference and degrees of importance are possible, such that an outcome can be rationally established by way of balancing? One possible method is the analysis of examples, an analysis that aims at bringing to light what we presuppose when we decide cases by balancing. As an example, I shall take up a decision of the German Federal Constitutional Court on health warnings (The *Tobacco* judgment).[24] The Court qualifies the duty of tobacco producers to place health warnings respecting the dangers of smoking on their products as a relatively minor or *light* interference with 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 valid assignments following this scale are possible.

The same is possible on the side of the competing reasons. The health risks resulting from smoking are great. The reasons justifying the interference therefore weigh heavily. If in this way the intensity of interference is established as minor, and the degree of importance of the reasons for the interference as high, then the outcome of examining proportionality in the narrow sense can well be described – as the Federal Constitutional Court in fact described it – as "obvious."[25]

The conclusions drawn from the *Tobacco* Judgment are confirmed if one looks at other cases. A rather different one is 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"[26] between the freedom of expression of the magazine [Article 5(1) (1) Basic Law] and the officer's general right to personality [Article 2(1) in connection with Article 1(1) Basic Law]. In the Postscript of *A Theory of*

Constitutional Rights I tried to show that this case, too, can be reconstructed by means of the triadic scale "light," "moderate," and "serious."

D. *The Idea of an Inferential System*

The triadic structure as such is, however, not enough for a showing that balancing is rational. For this it is necessary that an inferential system is implicit in balancing, which, 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," which is constructed with the help of propositional, predicate, and deontic logic. It is of central importance for the theory of legal discourse that in the case of the balancing of principles, a counterpart to this deductive scheme exists. It shall be called "Weight Formula."

E. *The Weight Formula*

The most simple form of the Weight Formula goes as follows:

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

"I_i" stands for the intensity of interference with the principle P_i, say, the principle granting the freedom of expression of Titanic. "I_j" stands for the importance of satisfying the competing principle P_j, in our case the principle granting the personality right of the paraplegic officer. "$W_{i,j}$" stands for the concrete weight of P_i. The Weight Formula makes the point that the concrete weight of a principle is a relative weight. It does this by making the concrete weight 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 balancings carried out in constitutional law. The reply to this objection can start with the observation that the logical vocabulary we use in order to express the structure of subsumption is not used in judicial reasoning, and that it is nevertheless the best means to make explicit the inferential structure of rules. The same applies to the expression of the inferential structure of principles by numbers that are substituted for the variables of the Weight Formula.

F. *Geometric Sequence*

The three values of our triadic model, light, moderate, and serious, shall be represented by "*l*," "*m*," and "*s*." There are various possibilities for allocating numbers to *l*, *m*, and *s*. A rather simple and at the same time highly instructive

one consists in taking the geometric sequence 2^0, 2^1, and 2^2, that is, 1, 2, and 4. On this basis, *l* has the value 1, *m* the value 2, and *s* the value 4. The Federal Constitutional Court considered the intensity of infringement (I_i) with the freedom of expression (P_i) in the *Titanic* Judgment as serious (*s*), and the importance of satisfying the right to personality (P_j) of the officer (I_j) in case of describing him as a "born murderer" because of the 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*, the concrete weight of P_i ($W_{i,j}$) is in this case 4/2, that is, 2. If I_i were *m* and I_j were *s*, the value would be 2/4, that is, 1/2. In all stalemate cases this value is 1. The precedence of P_i is expressed by a concrete weight greater than 1, the precedence of P_j by a concrete weight smaller than 1. The description of the officer as "cripple" was considered as serious. 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 for the description "cripple."

G. *Transfer of Correctness*

The rationality of an inferential structure essentially depends on the question of whether it connects premises that, again, can be justified in a rational way. The structure expressed by the *Weight Formula* would not be a structure of rational reasoning if its input had a character that excluded it from the realm of rationality. This, however, is not the case. The input that is represented by numbers is judgment. An example is the judgment that the public description of a severely disabled person as "cripple" is a "serious breach"[27] of that person's personality right. This judgment raises a claim to correctness and it can be justified as a conclusion of another inferential scheme in a discourse. The Federal Constitutional Court does so by presenting the argument that the description of the paraplegic as a "cripple" was humiliating and disrespectful. The *Weight Formula* transfers the correctness of this argument, together with the correctness of arguments that concern the intensity of the interference with the freedom of expression, to the judgment about the weight of Titanic's right in the concrete case, which, again, implies – together with further premises – the judgment expressing the ruling of the court. This is a rational structure for establishing the correctness of a legal judgment in a discourse.

H. *Fire Wall and Over-proportional Growth of Resistance*

The Weight Formula is presented here in its most simplest form. This simplification is sufficient in order to express that part of the inferential structure of the *Tobacco* and the *Titanic* Judgment which has been of interest up to now. Often, however, refinements are necessary. They run in any of four directions. The first concerns the inclusion of the abstract weights of the principles, what

becomes necessary where they are different; the second refers to the reliability of the empirical assumptions incorporated into the inferential structure; the third concerns the inclusion of more than one principle on one side or the other, or on both sides of balancing; the forth aims at a refinement of the scale. Only this last refinement is of interest here, for the possibility of refining the scale is necessary in order to render complete the rejection of Habermas's fire wall objection.

It cannot be ruled out that there could be cases in which not even the rather rough triadic scale is applicable. These are cases in which it is only possible to distinguish two grades, say, light and serious. There, a dual scale must be used. This would be enough for balancing. Balancing is excluded only if no graduation at all is possible, which is the case when everything has an equal value. Of much greater practical importance is the possibility of refining the scale. A method that seems to correspond well to our practice of balancing consists in an iteration of the triadic scale. By this, a double-triadic scale is produced, which looks like this: (1) *ll*, (2) *lm*, (3) *ls*, (4) *ml*, (5) *mm*, (6) *ms*, (7) *sl*, (8) *sm*, (9) *ss*. This scale comports well with expressions like "very light" (*ll*), "already medium" (*ml*), "already serious"(*sl*), "really serious" (*sm*), or 'extremely serious'(*ss*). The decisive point is that the application of a geometric sequence makes it possible, unlike an arithmetic sequence, to express the over-proportional growth of resistance of fundamental rights against infringements. This is not very easy to recognize in the case of the simple triadic scale. Here, 2^0, 2^1, 2^2 only expresses rather small differences, namely, those between 1, 2, and 4. This is completely different from the case in which one uses a double-triadic scale. The geometric scale 2^0, … , 2^8 ranges from 1 to 256. The distance between *sm* and *ss* is 128.

This provides for a more subtle reconstruction of the *Titanic* Judgment. The humiliation and the disrespect expressed by the public designation of a severely disabled person as a "cripple" violates his dignity. Violations of dignity are, at any rate often, not only simply (*s*) or already serious (*sl*) infringements, but really (*sm*) of even extremely serious (*ss*) infringements. That makes it difficult to find counter-reasons that come up to this level. It is exactly this structure which erects something like a fire wall, precisely where Habermas thinks the balancing approach is bound to fail.

NOTES

[1] BVerfGE 43, 142 (148–149); 64, 301 (312); 99, 19 (29).

[2] Carl Schmitt, *Verfassungslehre* (1928), quoted from the 1970 reprint, Berlin: Duncker and Humblot, at pp. 163–165; Ernst Forsthoff, Article: "Grundrechte," in Joachim Ritter (ed.), *Historisches Wörterbuch der Philosophie*, vol. 3, Basel and Stuttgart: Schwabe, 1974, at pp. 922–923.

[3] See Robert Alexy, "Grundrechte," in Hans Jörg Sandkühler (ed.), *Enzyklopädie Philosophie*, vol. 1, Hamburg: Felix Meiner, 1999a, pp. 525–529, at p. 526.
[4] Robert Alexy, *A Theory of Constitutional Rights*, trans. Julian Rivers, Oxford: Oxford University Press, 2002a, p. 297 (hereafter, TCR).
[5] See Robert Alexy, "Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat", in Stefan Gosepath and Georg Lohmann (eds.), *Philosophie der Menschenrechte*, Frankfurt: Suhrkamp, 1998b, pp. 246–254.
[6] Günther Patzig, "Can Moral Norms be Rationally Justified?," 41 (2002) *Angewandte Chemie. International Edition*, pp. 3553–3558, at p. 3355.
[7] David Gauthier, *Morals by Agreement*, Oxford: Oxford University Press, 1986, p. 222.
[8] James M. Buchanan, *The Limits of Liberty*, Chicago and London: Chicago University Press, 1975, p. 60.
[9] Gustav Radbruch, "Five Minutes of Legal Philosophy," trans. Stanley L. Paulson, in Joel Feinberg and Hyman Gross (eds.), *Philosophy of Law*, Belmont, California: Wadsworth, 1980, at p. 90.
[10] See Robert Alexy, "A Discourse-Theoretical Conception of Practical Reason" 5 (1992a) *Ratio Juris*, pp. 231–251; "Discourse Theory and Human Rights" 9 (1996) *Ratio Juris*, pp. 209–235.
[11] Robert B. Brandom, *Articulating Reasons*, Cambridge, Mass. and London: Harvard University Press, 2000, p. 11.
[12] Alexy, *supra*, fn. 10 (1996b), at p. 217.
[13] Brandom, *supra*, fn. 11, at p. 26.
[14] Alexy, *supra*, fn. 10 (1996b), p. 222.
[15] Ibid.
[16] TCR, 47.
[17] TCR, 102.
[18] Jürgen Habermas, *Between Facts and Norms*, trans. by William Rehg, Cambridge: The MIT Press, 1996a, at p. 256.
[19] Ibid., at p. 258.
[20] Ibid., at p. 259.
[21] Ibid., at p. 259, (translation edited).
[22] Jürgen Habermas, "Reply to Symposium Participants," in Michel Rosenfeld and Andrew Arato (eds.) *Habermas on Law and Democracy*, Berkeley, Los Angeles, and London: California University Press, 1998, pp. 381–452, at p. 430.
[23] Robert Alexy, "Law and Correctness," in M. D. A. Freeman (ed.), *Legal Theory at the End of the Millennium*, Oxford: Oxford University Press, 1998a, pp. 205–221, at pp. 209–214.
[24] BVerfGE 95, 173.
[25] BVerfGE 95, 173 (187).
[26] VerfGE 86, 1 (11).
[27] BVerfGE 86, 1 (13).