

Chapter 6

Legislation as Implementation of Constitutional Law: A Foundation for the Demand of Legislative Rationality

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6.1 Introduction

A crucial demand of a normative theory of legislation is that legislators should act rationally. From the perspective of practical reason, this demand of rationality seems to be undeniable. But does it also have legal or constitutional force? A general answer to this question will depend on the theory of legislation as well as on the theory of law and, in particular, constitutional law. The constitutional or legal validity of the demand of rationality is, at the very least, not obvious. Analogously to the conflict of positive law and morality, conflicts between positive law and rationality may occur, and it is far from clear that rationality will always prevail in this conflict. One might defend a *prima facie*-demand for rationality, which, however, may be overridden—to a certain extent—by arguments from authority, practicality, or convenience, similar as with regard to the legal validity of immoral or unjust norms. Accordingly, there will be limits for the legal validity of extremely irrational legislative or legal acts, just as one can deny the legal validity of extreme injustice. However, rationality will not hold as a constitutional or legal requirement without qualifications.

These are issues for a general theory of the relations among rationality and law. The purpose of my analysis is more limited, however. It aims at showing that the demand of rationality has constitutional force at least

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as far as the application of fundamental rights-principles is concerned, and this applies also to legislative organs of democratic constitutional states.

Legislation in the democratic constitutional state is limited by requirements of constitutional law and of democratic legitimacy. In particular, fundamental rights restrict legislative freedom. This forms part of the “constitutionalisation” of the political system, which has been criticized,¹ in particular, because it leads to a “judiciary state” (*Jurisdictionsstaat*).² However, one may well doubt that this constraint on politics³ deserves to be criticized.⁴ Just to the contrary, it may well be seen as an essential element of the legitimacy of politics. Politics consists in making decisions for a certain political community or society. Since it claims these decisions, and the norms established by them, to be binding on the citizens, it needs a justification that supports this claim to bindingness. This justification must include reference to constitutional requirements, which are procedural and substantive in character. Procedural requirements concern legislative competences and processes. Substantive elements are, in first place, fundamental rights and other constitutional principles protecting interests of the people.

I will argue that legislation in a democratic constitutional state consists to great extent, and in particular as far as fundamental rights apply, in the implementation of constitutional law. In this context, implementation means, not the mere application of constitutional norms, but a creative or constructive process of establishing norms based on the balancing of constitutional principles. More specifically, I will argue the following theses:

- (1) Constitutional law includes not only directly applicable norms, but also ideals or principles that figure as normative arguments in procedures of balancing.

¹See, for example, Haltern (2007).

²Cfr. Böckenförde (1991).

³In addition, one must ask whether this effect of constitutional review really exists. As to the German Constitutional court, von Komorowski and Bechtel deny that one can descriptively confirm a tendency towards increasing interference of the Court with legislative decisions. See von Komorowski and Bechtel (2006: 296).

⁴For a defense based on an argument from political economics, see von Komorowski and Bechtel (2006: 297).

- (2) The legislature is the primary addressee of the requirement to balance constitutional principles.
- (3) The interpretation of fundamental rights as principles to be balanced against competing principles is a requirement of democracy itself.

The last thesis is supported by two assumptions about the nature of democracy and of fundamental rights:

- (4) Democracy requires, in particular, the comprehensive consideration of all relevant interests and demands of the citizens, and their balancing in order to reach a reasonably acceptable solution.
- (5) Fundamental rights point to the most important interests of human beings and, therefore, protect interests that legislation must necessarily take into account.

The connection with the demand of rationality follows from two further theses:

- (6) The balancing of fundamental rights or other constitutional principles must follow the principle of proportionality.
- (7) The principle of proportionality presents—in legal terminology—requirements of rationality respecting normative decisions or judgments.

6.2 The Model of Principles of the Constitution

A crucial presupposition of the thesis that legislation is and ought to be to great extent the implementation of constitutional law is that fundamental rights are conceived of as ideals or principles that ought to be realized to an extent as great as possible.⁵ Thus, the first thesis states:

- (1) Constitutional law includes not only directly applicable norms, but also ideals or principles that figure as normative arguments in procedures of balancing.

As a consequence, constitutional rights and principles may enter into conflict with each other, in case of which a balancing is required in which rights and other principles figure as normative arguments for particular results.⁶

⁵On this idea Alexy (2002). This should not, however, be made the definition of principles, but only serves as a characterization of the content of principles. See below.

⁶On this notion of principles as arguments to be balanced against each other and its diverse interpretations, Alexy (2002) and Sieckmann (2009a).

Since such fundamental rights-principles have a wide range of application, they penetrate the whole legal order and are relevant for almost all important legislative decisions. Thus, the legislator must apply these principles in his decisions, and legislation becomes the implementation of constitutional principles.

The character of fundamental rights as principles has been emphasized most prominently by Robert Alexy, who defines principles as optimization requirements, that is, as norms that require something to be realized to an extent as great as possible, relative to the factual and juridical possibilities. Some objections have been made against this definition.⁷ In particular, it does not correspond to the thesis of the strict separation of rules and principles as logically distinct classes of norms, for requirements of optimization are second-order rules about the normative force and the type of application of the respective first-order norms, but do not have a logical structure distinct from rules. Consequently, the definition of principles as requirements of optimization does not allow one to understand how principles can figure as arguments in a procedure of balancing precisely in the situation of conflict with competing arguments.⁸ Nevertheless, these norm-theoretical issues do not affect the adequacy of the idea of optimization as an explication of the manner in which rights and other norms of an ideal character guide normative decisions.⁹ The point is that one has to strive for an approximate realization of a state of affairs defined by a right or other type of principle.

The interpretation of fundamental rights as principles allows one to extend the scope of these rights. For example, one can recognize

- a general right to freedom, permitting one to do what one wants,
- a right against the state to protect life, health, or property,
- social rights, for example, to state assistance, medical assistance, education, or housing,
- a right to an adequate demarcation of the scope of private rights against the rights of other citizens.

⁷See the discussion in Alexy (2009).

⁸Sieckmann (2010a, 2011).

⁹There are, however, other objections that refer to the notion of fundamental rights as exempt from state interference and not subject to a comprehensive balancing with all other relevant arguments. See, for example, Sieckmann (1995a). Therefore, it is a matter of dispute whether all contents of fundamental rights can be understood as requirements of optimization or norms resulting from balancing understood as optimization.

All these rights have been recognized, to more or less extent, by many democratic constitutional states, but also in supranational and international law. The extensive interpretation of these rights would not be possible, however, if rights had the character of definitive norms to be strictly applied and followed whenever their conditions of application are met. Only by interpreting them as principles to be balanced against competing principles, the content of these rights can be made as comprehensive as possible.

The normative tool to handle the balancing of rights-principles in constitutional law is the principle of proportionality.¹⁰ According to this principle, any interference with fundamental rights principles must be proportionate. This requires,

firstly, that the interference pursues a legitimate objective,
secondly, that the interference is a suitable means for promoting this objective,
thirdly, that there is no alternative that is equally effective with regard to the objective but less detrimental to the fundamental right in question, and,
fourthly, that the interference is not disproportionate in the narrow sense, that is, that the intensity of the interference keeps a reasonable proportion to the importance of its objective in the circumstances of the concrete case.

The principle of proportionality applies to conflicts between rights-principles and other principles both in cases of interference with rights and in cases in which rights are not fulfilled. In both cases, rights are—at least in part—not complied with. The justification of such non-compliance requires that the applied measure pursue a legitimate objective. The objective may be the protection of rights of other agents, constitutional principles, but also a political goal.¹¹ If there is a legitimate objective for an action that leads to non-compliance with a right, there is at least an argument that might justify such non-compliance.

For example, a prohibition of offensive speech has the objective to protect personal honour. This is a legitimate objective. Therefore, there is an argument that might justify the prohibition of offensive speech.

¹⁰See Alexy (2002), Clérico (2001) and Bernal Pulido (2006a, b).

¹¹Political goals or “policies” are excluded as justification for limitations of rights by the “rights as trumps”-thesis of Dworkin (1977). However, such limitations are quite common and often accepted as legitimate. Therefore, the “rights as trumps”-thesis cannot be taken for granted, but is rather dubious.

The assessment as to whether the non-compliance with a right is proportional usually proceeds in three steps, applying, as sub-principles of the requirement of proportionality, the criteria of suitability, necessity, and proportionality in strict sense.

Suitability means that an act promotes or at least is capable of promoting the pursued objective. If a means in no way contributes to the fulfilment of its end, there is no reason to accept any negative effect on the fulfilment of rights.

Necessity means that there is no alternative to the applied means that is better with regard to the fulfilment of the affected right and equally effective with regard to the pursued objective. Again, there is no reason to apply such a means if its detrimental effects for the affected rights can be avoided without costs for the pursued objective. This—as well as the criterion of suitability—follows the idea of Pareto-optimality, although adapted to the case of conflicting principles instead of the positions of individual parties.¹²

Proportionality in strict sense means that a reasonable relation holds between the intensity of interference or affection of the right and the importance of the objectives that are meant to justify this interference or affection. This criterion requires the balancing of the conflicting rights-principle and the objectives that require interference or non-compliance with the rights-principle. The factors that are relevant for this determination are the degree of affection of the competing requirements and their relative weights.¹³ Degree of affection and relative weight determine the importance of a principle in the concrete case. The requirement that is more important in the concrete case deserves priority.¹⁴

¹²See Schlink (1976) and Alexy (2002).

¹³See Sieckmann (1995b) and Clérico (2001).

¹⁴Although the usual application of the principle of proportionality includes three steps—suitability, necessity, and proportionality in strict sense—all relevant information is provided by the balancing that determines the proportionality in strict sense. For if a means is not suitable or not necessary for pursuing the objective that is meant to justify interference or non-compliance with a right, the objective is not affected if the means is not applied or an alternative is applied that complies better with the right in question. Hence it cannot justify non-compliance with the right. Consequently, one might reduce the principle of proportionality to the demand of balancing and skip the stages of suitability and necessity.

The important point is that the balancing required to determine the proportionality of an interference or non-compliance with a right is based on evaluations regarding the relative weights of the competing principles. These evaluations cannot be derived from previous determinations, for if so, no balancing would be needed but one could apply the previous determinations directly. Evaluations as to the relative importance of competing principles, however, imply that a normative determination is made, and this has the character of an act of legislation. This leads to the second thesis.

6.3 The Legislator as the Primary Addressee of Constitutional Law

As explained above, implementation of constitutional law consists in particular in the balancing of fundamental rights with other constitutional principles. This structural thesis forms the basis for a second, normative thesis:

(2) The legislature is the primary addressee of the requirement to balance constitutional principles.

As already pointed out above, the argument for this thesis is that the structure of balancing constitutional principles requires a normative determination and that this is the primary task of legislative organs. Thus, parliament or other legislative organs must be regarded the primary addressees of constitutional principles.¹⁵ Other organs, in particular the judiciary, should apply the laws established on the basis of constitutional principles, but should not make an own decision based on the balancing of these principles directly if the legislature has correctly made such a decision or will do so in reasonable time.

The general idea of balancing is that of determining the priority amongst competing demands or requirements according to their importance in the concrete case.

For example, if someone says about someone else that he is lying, the right to personal honour, demanding protection against insults, conflicts with the right to free speech, demanding that everyone should be allowed to say what he

¹⁵The fact that the legislator itself is the addressee of norms binding the legislative process has been pointed out also by Atienza (1997) and Wintgens (1997).

thinks. Both rights cannot co-exist unrestrictedly. Hence we have a conflict of rights. Both rights apply to the case but cannot dictate the solution. They can hold only in principle, requiring a certain solution, but in need of being weighed and balanced against each other.

The basic principle of balancing states that, regarding two requirements in conflict, the one deserves priority in the respective case the fulfilment of which is more important in the circumstances of this case, or, as one might also say, the one that has the greater weight in the concrete case.¹⁶

The structure of balancing constitutional principles—and normative arguments in general—may be described as follows. It consists in establishing a priority among the conflicting principles that does not follow from given criteria. Thus, the determination of the importance of the conflicting requirements is itself a matter of balancing. It includes three elements, firstly, the arguments to be balanced against each other, secondly, the procedure of balancing aimed at establishing a priority among the conflicting arguments and, thirdly, the definitive norm that results from the balancing and the priority established.

In order to determine a definitive solution, a priority must be established among the competing requirements, regarding their relative weights and the facts of the case.¹⁷

For example, one might assume that if the offensive assertion was false the right to personal honour deserves priority. Even if the assertion was sincere but nevertheless wrong and there are no special circumstances that legitimate the offensive speech, the right to personal honour will be given priority over that of free speech.

The important point is that the validity of this rule is established only as the result of the procedure of balancing, and is not derived from pre-determined criteria.¹⁸ The result of the balancing is a normative judgment of the agent doing the balancing. It establishes the definitive validity of a norm and, thus, creates new normative content. This, however, is the task of the legislator. Therefore, legislative organs are the primary addressees of constitutional principles and the demand of balancing them.

This thesis is based on the conception of constitutional law as a model of principles to be balancing against each other. It must be defended against critiques of this interpretation of constitutional law.

¹⁶See Sieckmann (2010b).

¹⁷Thus, the balancing requires not only the conflicting arguments but also supplementary arguments concerning the relative weight and the degree of fulfillment or non-fulfillment of the requirements included in the conflicting arguments.

¹⁸See Sieckmann (2004, 2009a), on the notion of “autonomous balancing”.

6.4 The Defense of the Implementation Thesis

The conception of fundamental rights as principles as well as the interpretation of legislation as implementation of constitutional principles encounter diverse objections.¹⁹ They focus primarily²⁰ on two issues: the rationality and the legitimacy of balancing.²¹ In addition, the nature of fundamental rights and issues of the interpretation of constitutional law are advanced as arguments against this conception. Thus, one can distinguish the following objections:

- The balancing of principles lacks rationality.
- As a consequence, judicial balancing and, in particular, the review of the constitutionality of laws based on balancing, lacks legitimacy and hence interferes with the principle of democracy.
- Balancing destroys the character of rights as “trumps”²² or barriers against state intervention.²³
- There is no foundation in positive law for the interpretation of fundamental rights as principles.²⁴

I will primarily focus on the argument of democracy and the lack of legitimacy of judicial balancing of constitutional principles, and argue the thesis that

- (3) The interpretation of fundamental rights as principles to be balanced against competing principles is a requirement of democracy itself.

¹⁹For a list of such objections see Alexy (2009) and Sieckmann (2009b).

²⁰An even more fundamental objection is that principles as a distinct type of norms do not exist. However, opponents have neither attacked all proposed conceptions of principles, nor presented a general argument that it is impossible to define principles as a distinct class of norms. See Sieckmann (2009b). Another objection is that they are superfluous. See Jakab (2006) and Poscher (2007). Recently, Ralf Poscher has argued that balancing does not require principles beside requirements of optimization, which are rules of second order, and the objects of balancing. See Poscher (2010). However, the point of the notion of principles is that they figure as arguments for particular results of the balancing. Non-normative entities cannot have the function of arguments. Therefore, the objection of Poscher fails.

²¹See, for example, Alexy (2009), Bernal Pulido (2006a), Isola-Miettinen (2010) and Cai (2010).

²²Cfr. Dworkin (2006).

²³See Habermas (1994).

²⁴Against this objection, Sieckmann (2007).

6.4.1 *The Conception of Democracy*

Among the diverse conceptions of democracy, one can distinguish formal and substantive accounts of democracy.²⁵ Formal accounts focus exclusively on procedure and decision-making, demanding that political decisions result from the choices of the relevant people. Substantive accounts include, in addition, a requirement that the interest of the people must be adequately represented and realized by the political process. Whilst the formal elements are beyond dispute, the crucial point is whether a conception of democracy should include substantive elements as well.

More precisely, one can state as principles of democratic systems:

- (1) Everyone who is capable of taking responsibility for his own decisions must have the opportunity to take part in political processes, as far as this does not undermine the functioning of these processes.
- (2) In case that a direct participation is not possible all citizens that are capable for it must have the chance to get into a position in which direct participation is possible, for example, that of a member of parliament.
- (3) Democratic decisions must be orientated towards the interests of all citizens and must aim at an appropriate compromise of interests, that is, a solution that is reasonably acceptable to all citizens.

The last demand represents the transition from a formal to a substantive conception of democracy, which regards substantive correctness or acceptability as a criterion for the legitimacy of political decisions. Since such legitimacy will only be achieved by argumentation or discourse, the substantive element requires some form of deliberative democracy.²⁶ However, I will not discuss the diverse conceptions of deliberative democracy, but focus on the need of balancing as a tool to find reasonable acceptance of political decisions. By contrast, a purely formal conception of democracy regards voting procedures the only source of political legitimacy. Accordingly, politics aims at gaining a majority in order to then have the possibility to decide freely and unbound. Consequently, the

²⁵See, for example, Böckenförde (1991: 289 ff.).

²⁶On deliberative democracy, Cohen (1989), Elster (1998), Nino (1996), Gerstenberg (1997) and Fishkin (1991).

substantive adequacy of a decision is not relevant, but only the issue of majority.²⁷

Formal and substantive conceptions of democracy pose different objectives for political action. A substantive conception of democracy demands the search for the highest degree possible of reasonable acceptance by the citizens. By contrast, the formal conception leads to a politics that only must seek the minimum of acceptance necessary to stay in power, but beyond this minimum can follow other objectives.

The formal conception of democracy may to large extent conform with political reality. The question remains, however, whether the legitimation of political decisions is possible on the basis on a merely formal conception of democracy or, on the contrary, democratic legitimacy requires that political decisions claim to find a solution that is reasonable acceptable to all citizens, and must strive for it. The thesis advanced here is:

(4) Democracy includes a substantive or material component, which is the reasonable acceptance of political decisions by all people involved.

Any plausible conception of political representation must acknowledge this. Representatives are not elected with the objective to invest them with political power to do whatever they want, but they receive this power in order to realize what is in the interest, and is claimed by, the citizens. Although these interests and claims may not require a certain solution, so that there is no single correct decision, this does not imply that political decisions must not be bound by these interests and claims. Therefore, striving for a solution that is reasonably acceptable to all people involved seems to be a necessary condition of legitimate power.²⁸ Any attempt to justify public governance must be oriented towards the individual interests of the citizens and to an optimal realisation of these interests. The degree to which they comply with this requirement²⁹ determines the legitimacy they gain.

²⁷See also the opposition of “voluntarism” and “orientation towards correctness” in Becker (2003: 15 f.).

²⁸See also the notion of “argumentative representation” in Alexy (1996, 2005, 2006). For a critical discussion of this conception see Oliver-Lalana (2009).

²⁹This degree depends primarily on the quality of argumentation in the political process. As to this aspect Becker et al. (2006), Oliver-Lalana (2005, 2006, 2011), Sieckmann (2005, 2010c), Steiner et al. (2003), Bächtiger and Steenbergen (2004), Steiner and Steenbergen (2004) and Tschentscher et al. (2010).

6.4.2 *The Connection Between Democracy and Fundamental Rights*

Following the substantive conception of democracy, political decisions must be based on a correct balancing of the interests of the citizens. Which are these interests? In first line, these interests must be determined by the citizens themselves. However, some interests can be qualified as relevant independently from concrete choices of the citizens, at least independently from the support of a majority of the citizens. These are interests protected by fundamental rights.³⁰ One knows that these interests are of great importance to at least some of the citizens, and this requires that they be given due respect in the political process without regard to whether a majority of citizens shares or accepts these interests. As a consequence, we get the thesis:

- (5) The substantive dimension of democracy consists, in first place, in an attempt to implement fundamental rights-principles, for these principles point to the most important interests of the citizens that politics and legislation must protect and realize.

6.5 The Demand of Rationality

The implementation thesis implies a demand for legislative rationality because the implementation of constitutional law is bound by the principle of proportionality, and this principle is nothing but a demand of rationality of normative decisions and judgment, framed in legal terminology.

The first element in the justification of this thesis is that, as already explained above, the constitutional guideline for the balancing of fundamental rights or other constitutional principles is the principle of proportionality. Legislative measures—as well as public decisions in general—that interfere or do not comply with fundamental rights but do not comply with the principle of proportionality are disproportionate and hence unconstitutional. Consequently, any legislative measure affecting fundamental rights must be based on a correct balancing of these rights,

³⁰On the notion of fundamental rights see Bernal Pulido (2009).

and must comply with the principle of proportionality. Thus, the following thesis results:

- (6) The balancing of fundamental rights or other constitutional principles must follow the principle of proportionality.

In addition, the principle of proportionality expresses demands of rational balancing. This leads to the following thesis:

- (7) The principle of proportionality presents—in legal terminology—requirements of rationality respecting normative decisions or judgments.

The argument suggested above draws as well on the substantive conception of democracy as on the constitutional character of fundamental rights, making legislative rationality obligatory as far the application of these rights is concerned. One might ask whether the substantive conception of democracy alone is sufficient to corroborate the demand of legislative rationality. The requirement of an adequate and correct balancing of individual interests implies at least some important demands of rationality. These requirements hold thus as general requirements on legislation.

This argument indeed is correct. It suffices, however, only to establish a demand of rationality valid in principle, which might be subject to a balancing with competing arguments. These competing arguments might stem, in particular, from the political autonomy of the democratic legislature. The democratic legislature forms and represents the autonomous will of the people. Ideally, it should act rationally. Since, however, the will of the people is not necessarily rational, a tension between demands of rationality and of political autonomy might occur.

For example, the legislature might have established some regulation that, for reasons of coherence, needs certain supplements. These supplements will not, however, find the support of the majority of the members of parliaments or of the people. The resulting legislation will remain incoherent. Should one disqualify it as unconstitutional for lack of rationality?

In this case, demands of rationality and of political autonomy conflict. Implementing the demand of rationality would restrain the right of the people to decide on political issues as it sees fit. Recognizing political autonomy in the sense that the people have the right to decide as it sees fit implies a loss in rationality. How should we resolve the conflict? It seems that this is an issue for constitutional law and its interpretation, not one that has a uniquely correct solution for theoretical reasons.

Therefore, the demand of legislative rationality applies in general only in principle, subject to a balancing with competing requirements. On the other hand, as far as the application of fundamental rights is concerned, there is no room left for such a balancing. The legislature must implement these rights so as rationality requires.

6.6 Conclusion

To conclude, the demand of rationality of legislation is a consequence of the fact that legislation in a constitutional democratic state consists in the implementation of constitutional law, in particular, where fundamental rights are concerned. These rights include principles demanding the realization of fundamental individual interests to a degree as high as possible. The ideal and approximative character of these principles requires—in cases of conflict—a balancing of fundamental rights principles with competing principles. This balancing must be done, in first place, by the legislator. Thus, legislation becomes the implementation of fundamental rights principles. It is subject, in particular, to the principle of proportionality, which gives expression to fundamental requirements of rationality with respect to the solution of normative conflicts.

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