

Limited Review in Balancing Fundamental Rights

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During the last decades, proportionality has become the most important criterion for assessing claims stemming from fundamental rights in most jurisdictions throughout the world – in national constitutional law,¹ international law,² and European Union law³. Proportionality in its broader sense comprises three criteria.⁴ ‘Suitability’ requires that the state pursue a legitimate end,⁵ and the means must be appropriate to achieve or, at the very least, to promote that end. Illegitimate ends – for example, racial ‘purity’ or religious homogeneity of the population – are excluded from the outset; they have no basis that would justify interferences with basic

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- 1 On proportionality in the assessment of rights claims, see generally Robert Alexy, *A Theory of Constitutional Rights*, Julian Rivers trans. (Oxford University Press 2002), pp. 66-69. On the proliferation of proportionality see David M. Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004); Alec Stone Sweet and Jud Matthews, ‘Proportionality Balancing and Global Constitutionalism’, 47 *Columbia Journal of Transnational Law* (2008) p. 73-165, at pp. 112-160; Aharon Barak, *Proportionality, Constitutional Rights, and their Limitations* (Cambridge University Press 2012, pp. 181-210; Carlos Bernal Pulido, ‘The Migration of Proportionality across Europe’, in: *New Zealand Journal of Public and International Law* 11 (2013), pp. 483-515. Often the German origins of proportionality in Prussian Police law is mentioned (see, for example Moshe Cohen-Eliya and Iddo Porat, ‘American Balancing and German Proportionality: The Historical Origins’, in: *International Journal of Constitutional Law* 8 (2010), pp. 263-286, at pp. 271-275; Yutaka Arai-Takahashi, *Proportionality*, in: *Oxford Handbook of International Human Rights Law*, Dinah Shelton (ed) (Oxford University Press 2013), pp. 446-468, at p. 447. The origin in and of itself, however, should not count as an argument – neither on behalf nor against proportionality as a structure.
 - 2 See, for example, Steven Greer, ‘Balancing“ and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate’, in: *Cambridge Law Journal* 63 (2004), pp. 412-434; James Crawford, *Brownlie’s Principles of Public International Law*, 8th edn (Oxford University Press 2012), p. 665; Anne Peters in *The Charter of the United Nations – A Commentary*, Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, and Andreas Paulus (eds), 3rd edn, vol. 1 (Oxford University Press 2012), Article 25 UN Charter, marginal number 106; Arai-Takahashi, *Proportionality* (n. 1), pp. 448-464; David Harris, Michael O’Boyle, Edward Bates, and Carla Buckley, *Law of the European Convention on Human Rights*, 3rd edn. (Oxford University Press 2014), pp. 13-14; Michael Newton and Larry May, *Proportionality in International Law* (Oxford University Press 2014); Robert Kolb, *Theory of International Law* (Oxford and Portland, Oregon: Hart, 2016), pp. 401-412.
 - 3 See, for example, Paul Craig and Grainne de Burca, *EU Law*, 6th edn (Oxford University press 2015), pp. 551-558; Alina Kaczorowska-Ireland, *European Union Law*, 4th edn (Routledge 2016), pp. 126, 650-653 *et passim*; Stephen Weatherill, *EU Law*, 12th edn (Oxford University Press 2016), pp. 48-54 *et passim*; see also Steve Peers and Sacha Prechal in *The EU Charter of Fundamental Rights – A Commentary*, Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward (eds) (Oxford and Portland, Oregon: Hart, 2014), marginal number 52.65 to 52.86.
 - 4 See, for example, Alexy, *A Theory of Constitutional Rights* (n. 1), pp. 66-69; Craig and de Burca, *EU Law* (n. 3), p. 526; Cohen-Eliya and Porat, ‘American Balancing and German Proportionality’ (n. 1), p. 267.
 - 5 While the requirement of a ‘legitimate end’ is traditionally understood as an element of the suitability test, it is sometimes considered to be an independent requirement. In this conceptualization a four-pronged test emerges: legitimate end, suitability, necessity, and proportionality in its narrower sense. See, for example, Stone Sweet and J. Matthews, ‘Proportionality Balancing and Global Constitutionalism’ (n. 1), p. 76; Michael Fordham and Thomas de la Mare, ‘Identifying the Principles of Proportionality,’ in Jeffrey Jowell and Jonathan Cooper (eds), *Understanding Human Rights Principles* (2001), pp. 27-89, at p. 28. This four-pronged test is, however, only a different conceptualization of one and the same set of requirements of the three-pronged test.

rights. To use a positive example, ‘public safety’ according to Article 10(2) ECHR counts as a legitimate end for limiting freedom of expression, Article 10(1) ECHR. Applying the criterion of ‘necessity’, the means must have the least restrictive effect. This is to say that there is no alternative means that infringes to a lesser degree on the individual’s rights but promotes the end at least as well as the means employed by the state.⁶ Finally, ‘proportionality in its narrower sense’ requires that the interference with the individual’s right and the promotion of public authority’s legitimate end be balanced. If the former outweighs the latter, the interference counts as disproportionate.⁷ Even though cases may well be decided at the first and second stages of proportionality analysis, the balancing requirement at this third stage represents the core of proportionality analysis.

It is precisely this balancing test that has met with a great deal of criticism. To mention here only the two most important strands of criticism, critics have argued that ‘balancing’ fundamental rights provides for either too little or too much commitment. The first strand of criticism claims that balancing fundamental rights deprives them of the force that they ought to exhibit in law, for ‘balancing’, the critics would have us believe, does not count as a rational method. In reply to this criticism, Alexy developed some fundamental laws of balancing in the 1980s⁸ and developed the internal justification of balancing judgments further in the early 2000s by proposing the weight formula.⁹ The second strand of criticism – powerfully expressed by Ernst-Wolfgang Böckenförde in the 1990s – holds that constitutional review of parliamentary statutes by means of proportionality deprives the democratic process of the central role it deserves.¹⁰ If the judges of the constitutional court are empowered to annul parliamentary statutes on the basis of proportionality considerations, they seize the role of ‘judge-kings’. This issue seems to be aggravated by the assumption that supporters of proportionality and balancing adhere to the ‘one-right-answer-thesis’, according to which there is

6 See, for example, Alexy, *A Theory of Constitutional Rights* (n. 1), pp. 67-68.

7 Following to the common definition of proportionality in its narrower sense, an interference counts as disproportionate only if the interference with the right outweighs the promotion of the legitimate end being pursued by public authorities. It does not require, however, that the promotion of the legitimate end pursued by public authorities outweigh the interference with the right. There are cases in which balancing leads to a stalemate – one cannot say either that the interference with the right outweighs the promotion of the end pursued by public authority or vice versa. On such cases, see Alexy, ‘Postscript’, in: Robert Alexy, *A Theory of Constitutional Rights*, J. Rivers trans. (Oxford University Press 2002), pp. 388-425, at pp. 408-414. The common definition gives the benefit of the doubt to the government. It deserves to be emphasized that the question of which side enjoys the benefit of the doubt is a substantive rather than a structural issue.

8 See, *infra*, section A. I.

9 See, *infra*, section A. II.

10 Ernst-Wolfgang Böckenförde, ‘Grundrechte als Grundsatznormen’, in: *Staat, Verfassung, Demokratie*, id. (ed), 2nd edn (Frankfurt on Main: Suhrkamp, 1992), pp. 159-199, at p. 190. See also Ernst-Wolfgang Böckenförde, ‘Wie werden in Deutschland die Grundrechte im Verfassungsrecht interpretiert?’, in: *Europäische Grundrechte-Zeitschrift* 2004, pp. 598-603, at p. 603.

one and only one right answer for every balancing. It is true that Ronald Dworkin both made important contributions to the modern theory of legal principles¹¹ and supported the ‘one-right-answer-thesis’.¹² Principles theory has moved on, however, in developing different forms of discretion in balancing. This is the reply of principles theory to the second strand of criticism – constitutional court judges are not transformed into judge-kings, because they have to grant sufficient discretion to the democratically legitimated parliament.

The aim of this paper is to develop the reply given by principles theory to the second strand of criticism, understood broadly, further. This reply is, unfortunately, not fully developed. To begin with, Alexy’s recent attempts at reconstructing formal principles, a crucial device in understanding limited review of balancing, are less than convincing. Apart from a sound theoretical reconstruction in legal theory, the relevance of this reconstruction for legal doctrine needs to be comprehensively explained.

To begin with, (A.) the structure of balancing fundamental rights will be sketched. This includes an exposition of different kinds of structural discretion. In what follows, (B.) some characteristics of the review of balancing fundamental rights will be outlined. This begins with the insight that there is usually not one balancing of fundamental rights, but (B. I.) there are many balancing processes in a chain of instances. After (B. II.) a brief distinction between limited review of subsumption and balancing, the (B. III.) relation between the ‘decision to be reviewed’ and the ‘review decision’ will be introduced. Structural discretion is definitively a matter for the ‘decision to be reviewed’ and the organ that took it. It will be (B. IV.) briefly emphasized that the limitation of review is a matter of law – ‘overreview’ is actually an act *ultra vires*. One can distinguish (B. V.) the review of the process leading to the result and review of the result, this paper focusses on the latter. Then (B. VI.) the nature of limited review as opposed to strict review will be characterized in abstract terms. Finally, (B. VII.) three examples from legal doctrine will illustrate why a reconstruction of limited review of balancing fundamental rights is so important – the respect for democratic legitimacy of parliamentary decisions, the division of labour and competences between and among different courts, both in the German constitutional system, and the margin of appreciation accorded to Member States and their organs and bodies by the European Court of Human Rights in Strasbourg. Finally, (C.) an outline of the reconstruction of limited review of balancing fundamental rights by means of the amended weight formula will be given. This reconstruction is different

11 See, in particular, Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), pp. 22-45.

12 See, in particular, Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), pp. 119 et seq.

from Alexy's understanding of formal principles as developed in his most recent publications on this issue.

A. The Structure of Balancing and Structural Discretion

Two periods of Robert Alexy's reconstruction of the structure of balancing can be distinguished.

I. The First Period – from the 1980s to 2001

When Robert Alexy developed modern principles theory in the 1980s, he characterized balancing fundamental rights by means of two fundamental laws, the law of competing principles and the law of balancing. According to the 'law of competing principles' (*Kollisionsgesetz*), if and when two principles – P_1 und P_2 – compete, their balancing establishes a rule: 'If principle P_1 takes precedence over the principle P_2 in circumstances C : ($P_1 \mathbb{P} P_2$) C , and if P_1 gives rise to legal consequences Q in circumstances C , then a valid rule applies which has C as its protasis and Q as its apodosis: $C \rightarrow Q$.'¹³ This is to say balancing principles necessarily leads to rules – there cannot be a legal system that consists of principles only.¹⁴ The second law is the 'law of balancing' (*Abwägungsgesetz*) – with an eye to the 'epistemic law of balancing' that Alexy introduced later,¹⁵ I shall call it the 'substantive law of balancing'.¹⁶ It reads: 'The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other'.¹⁷

13 Alexy, *A Theory of Constitutional Rights* (n. 1), p. 54.

14 A legal system that contains principles necessarily contains rules dependent on balancing principles. This is not to say that it contains any rule independent from balancing principles. What is more, the rule that is created according to the law of competing principles has definitive legal validity only in the respective legal system, (1) if all relevant principles in this legal system are considered in the balancing, and (2) if all relevant factual circumstances (which are expressed by ' C ' in the law of collision) are considered. Only under these circumstances the rule established in the balancing is fully concretized. If not all relevant principles or not all relevant facts are taken into consideration, a merely partially concretized rule is created.

15 Robert Alexy, 'Postscript', in Robert Alexy, *A Theory of Constitutional Rights*, Julian Rivers trans. (Oxford University Press 2002), pp. 388-425, at p. 418: 'The more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premisses'. Nearly identical ('interference with' instead of 'interference in') in Robert Alexy, 'The Weight Formula', B. Brozek and S. L. Paulson trans., in: *Frontiers of Economic Analysis of Law – Studies in the Philosophy of Law*, vol. 3, Jerzy Stelmach, Bartosz Brozek, and Wojciech Zaluski (eds) (Cracow: Jagellonian University Press, 2007), pp. 9-27, at p. 25.

16 Martin Borowski, *Grundrechte als Prinzipien*, 3rd edn (Baden-Baden: Nomos, 2018), p. 127: 'materielles Abwägungsgesetz'.

17 Alexy, *A Theory of Constitutional Rights* (n. 1), p. 102.

II. The Second Period – 2002 to today

In four publications from 2002 and 2003, (i) the ‘postscript’¹⁸ to his English translation of his ‘*Theorie der Grundrechte*’ from 1985,¹⁹ (ii) the article ‘Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit’²⁰, (iii) the book chapter ‘Gewichtsformel’,²¹ and (iv) the article ‘On Balancing and Subsumption’²², Alexy developed his weight formula.

1. The Weight Formula

There are different versions of the weight formula. The core formula, which Alexy calls the ‘complete weight formula’, reads in the short notation as follows:²³

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

This formula expresses the relative weight of principle ‘*i*’ and principle ‘*j*’ (‘ $W_{i,j}$ ’). It is, however, unfortunate that the same letter ‘*W*’ is used both for the relative weight of principle ‘*i*’ and principle ‘*j*’ in ‘ $W_{i,j}$ ’ and for the abstract weight of principle ‘*i*’ in ‘ W_i ’ and of principle ‘*j*’ in ‘ W_j ’. This suggests to use ‘*RW*’ for the relative weight and ‘*AW*’ for the abstract weight.²⁴ With this minor amendment, the ‘complete weight formula’ takes on the following form:

$$RW_{i,j} = \frac{I_i \cdot AW_i \cdot R_i}{I_j \cdot AW_j \cdot R_j}$$

18 Alexy, ‘Postscript’ (n. 15).

19 Robert Alexy, *Theorie der Grundrechte* (Baden-Baden: Nomos, 1985).

20 Robert Alexy, ‘Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit’, in: *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* 61 (2002), pp. 7-33.

21 Robert Alexy, ‘Die Gewichtsformel’, in: *Gedächtnisschrift für Jürgen Sonnenschein*, Joachim Jickeli, Peter Kreutz, and Dieter Reuter (eds) (Berlin: de Gruyter, 2003), pp. 771-792. Translation into English: Alexy, ‘The Weight Formula’ (n. 15).

22 Robert Alexy, ‘On Balancing and Subsumption. A Structural Comparison’, in: *Ratio Juris* 16 (2003), pp. 433-449.

23 Alexy, ‘The Weight Formula’ (n. 15). p. 25; Alexy, ‘On Balancing and Subsumption’ (n. 22), p. 446. See, for the same formula in the long notation, Alexy, ‘The Weight Formula’ (n. 15), p. 25, footnote 37.

24 On this modification in the corresponding German version of the weight formula, see Martin Borowski, ‘Formelle Prinzipien und Gewichtsformel’, in: *Prinzipientheorie und Theorie der Abwägung*, Matthias Klatt (ed) (Tübingen: Mohr Siebeck, 2013), pp. 151-199, at p. 168.

If the relative weight of principle ‘*i*’ and principle ‘*j*’ ($RW_{i,j}$) is greater than 1, then principle ‘*i*’ takes precedence over principle ‘*j*’. By contrast, if ‘ $RW_{i,j}$ ’ goes below 1, principle ‘*j*’ takes precedence over principle ‘*i*’. Finally, if ‘ $RW_{i,j}$ ’ is precisely 1, then there is a stalemate, which gives rise to ‘discretion in balancing’, a form of structural discretion.²⁵

2. The Three Variables – ‘*I*’, ‘*AW*’, and ‘*R*’

‘ I_i ’ and ‘ I_j ’ express the degree of non-satisfaction of the principles ‘*i*’ and ‘*j*’. If this principle represents a constitutional right or Convention right, the degree of non-satisfaction is referred to with the phrase ‘intensity of interference’.

‘ AW_i ’ and ‘ AW_j ’ represent the abstract weight of the principles ‘*i*’ and ‘*j*’. The distinction between the degree of non-satisfaction of a principle and its abstract weight as different factors of the relative weight of a principle is justified by the insight that there are cases, in which a principle, which is not satisfied to a lower degree, can outweigh a principle, which is not satisfied to a higher degree, because the former principle boasts of higher abstract weight than the latter. This is expressed by the ‘most elementary form of the Weight Formula’,²⁶ which is less complex than the ‘complete weight formula’. This ‘most elementary form’ reads, with my modest modification with an eye to ‘*RW*’ and ‘*AW*’:

$$RW_{i,j} = \frac{I_i \cdot AW_i}{I_j \cdot AW_j}$$

Thus far, the factors for balancing have not changed, compared to Alexy’s initial reconstruction of balancing in the 1980s, they have only been reconstructed in mathematical form.

What is new in his publications from 2002 and onwards is, however, the variable ‘*R*’, which brings into play the reliability of the empirical and normative premisses,²⁷ on which the classification propositions for ‘ I_i ’, ‘ I_j ’, ‘ AW_i ’, and ‘ AW_j ’ rest. If the reliability of the empirical and normative premisses for ‘ I_i ’, and ‘ AW_i ’ (‘ R_i ’) on one hand and ‘ I_j ’ and ‘ AW_j ’ (‘ R_j ’) have

25 Alexy, ‘Postscript’ (n. 15), pp. 396-414; Robert Alexy, ‘The Absolute and the Relative Dimension of Constitutional Rights’, in: *Oxford Journal of Legal Studies* (2016), pp. 1-17, at p. 15. See section B. II. 7. a).

26 See Alexy, ‘On Balancing and Subsumption’ (n. 22), p. 446. See also, Alexy, ‘The Weight Formula’ (n. 15), p. 23: ‘extended version of the weight formula’ – not to be confused with the ‘Extended Weight Formula’ on p. 27, see section A. II. 5.

27 While Alexy was initially hesitant to extend ‘*R*’ to the reliability of the normative premisses (see Alexy, ‘Postscript’ (n. 15), pp. 419, footnote 97), he later endorsed this explicitly (Robert Alexy, ‘Comments and Responses’, in: Matthias Klatt (ed), *Institutionalized Reason* (Oxford University Press 2012), pp. 319-356, at p. 331; Robert Alexy, ‘Formal Principles: Some Replies to Critics’, in: *International Journal of Constitutional Law* 12 (2014), pp. 511-524, at p. 514

the same value, they do not influence the outcome of the balancing – in this case the simpler ‘most elementary form’ of the weight formula is perfectly sufficient. The picture changes, however, if and when the values for the reliability in the denominator (lower part of the fraction) and the numerator (upper part of the fraction) are different. A lack of reliability reduces the weight of the relevant principle.²⁸ This is particularly obvious in the context of the reconstruction of so-called ‘absolute rights’,²⁹ but may well prove relevant in every balancing, in which the reliability of empirical and normative premisses differs between denominator and numerator of the weight formula.

3. The Triadic or Double-Triadic Scale

What is also new, from 2002 on, is the idea of a triadic or double-triadic scale. While many people intuitively assume that values in balancing can be expressed in an infinitesimal scale, Alexy argues that in law only limited scaling is possible and proposes the triadic scale, which distinguishes only three values, ‘light’ (l), ‘moderate’ (m), and ‘serious’ (s).³⁰ In contexts, in which finer scaling is possible, the triadic scale can be extended to a double-triadic scale. This leads to the distinction of nine values, ‘light-light’ (ll), ‘light-moderate’ (lm), ‘light-serious’ (ls), ‘moderate-light’ (ml), ‘moderate-moderate’ (mm), ‘moderate-serious’ (ms), ‘serious-light’ (sl), ‘serious-moderate’ (sm), and ‘serious-serious’ (ss).³¹

4. Geometric Sequences

The values in the weight formula are expressed as values of a geometric sequence rather than of an arithmetic sequence. While an arithmetic sequence for the triadic scale would be 1, 2, 3 and for the double-triadic scale 1, 2, 3, 4, 5, 6, 7, 8, 9, the geometric sequence for the triadic scale is $2^0, 2^1, 2^2$ ($1 - 2 - 4$) and for the double-triadic scale $2^0, 2^1, 2^2, 2^3, 2^4, 2^5, 2^6, 2^7, 2^8$ ($1 -$

28 In the context of balancing individual rights and collective goods, this is a plausible reading. There are other contexts in law, in which it might be useful or required, however, to set a threshold value for reliability in the sense of an all-or-nothing fashion, for example in criminal law, see Borowski, ‘Formelle Prinzipien und Gewichtsformel’ (n. 24), pp. 172-173.

29 See, in particular, Martin Borowski, ‘Absolute Rights and Proportionality’, in: *German Yearbook of International Law* 56 (2013), pp. 385-423, at pp. 410-412; Borowski, *Grundrechte als Prinzipien* (n. 16), pp. 354-356; see also Robert Alexy, ‘Menschenwürde und Verhältnismäßigkeit’, in: *Archiv des öffentlichen Rechts* 140 (2015), pp. 497-513, at p. 511.

30 See Alexy, ‘Postscript’ (n. 15), pp. 405-414; Alexy, ‘Verfassungsrecht und einfaches Recht’ (n. 20), p. 21; Alexy, ‘On Balancing and Subsumption’ (n. 22), pp. 440-443; Alexy, ‘The Weight Formula’ (n. 15), pp. 14-20.

31 On the double-triadic scale, see Alexy, ‘Postscript’ (n. 15), pp. 412-413; Alexy, ‘The Weight Formula’ (n. 15), pp. 22-23.

2 – 4 – 8 – 16 – 32 – 64 – 128 – 256). This serves as a reconstruction of the disproportionately increasing weight for the increasing non-satisfaction of principles. The values of ‘ I_i ’, ‘ I_j ’, ‘ AW_i ’, and ‘ AW_j ’ are expressed in these geometric sequences. Increasing non-satisfaction and increasing abstract weight imply increasing weight of the relevant principle.

By contrast, increasing unreliability of the underlying empirical and normative premisses implies decreasing weight of the relevant principle.³² This has lead Alexy to use a slightly different geometric scale for ‘ R_i ’ and ‘ R_j ’, namely, 2^0 , 2^{-1} und 2^{-2} (1 – 0,5 – 0,25) for the triadic scale.³³

5. More than Two Competing Principles

There may be more than only two competing principles. In this case there are two or more principles either in the denominator or numerator of the weight formula, or in both denominator and numerator, and the weight of the principles is added.³⁴ To mention here just one example of the different combinations, one finds in Alexy’s ‘Complete Extended Weight Formula’ two principles in both the denominator and the numerator:

$$RW_{i-m,j-n} = \frac{I_i \cdot AW_i \cdot R_i + I_m \cdot AW_m \cdot R_m}{I_j \cdot AW_j \cdot R_j + I_n \cdot AW_n \cdot R_n}$$

Generally, the sum of the weight in either denominator and numerator depends on whether and to which extent the principles substantively overlap – ‘heterogeneity is a presupposition of additive cumulation’.³⁵

6. Justifying The Classification Propositions – The External Justification

The weight formula is merely a mathematical structure, which is alone incapable of justifying any normative conclusion. Considering the ‘law of competing principles’, which is still a valid tenet of principles theory, balancing according to the weight formula represents a deductive

32 Borowski, ‘Formelle Prinzipien und Gewichtsformel’ (n. 24), pp. 176-177.

33 Alexy, ‘Postscript’ (n. 15), p. 419, footnote 97; Alexy, ‘The Weight Formula’ (n. 15), p. 25. That would be 2^0 , 2^{-1} , 2^{-2} , 2^{-3} , 2^{-4} , 2^{-5} , 2^{-6} , 2^{-7} , 2^{-8} for the double triadic scale.

34 Alexy, ‘The Weight Formula’ (n. 15), p. 27

35 Alexy, ‘The Weight Formula’ (n. 15), p. 27.

structure. This deductive structure is the internal justification³⁶ of a balancing judgment. This needs to be complemented with the external justification, the justification of the empirical and normative premisses. For example, why is which is provided by the theory of legal argumentation.

7. Three Kinds of Structural Discretion

Based on the weight formula explained thus far, three kinds of structural discretion can be distinguished.

a) Discretion in Balancing

Alexy calls the form of structural discretion that emerges from a stalemate in balancing competing principles ‘discretion in balancing’.³⁷ If there is a stalemate in balancing the constitutional principles ‘*i*’ and ‘*j*’ under the circumstances ‘*C*’, neither the interference nor an omission of the interference violate the constitution. The finer the scaling, the less frequently will there be a stalemate. The coarser the scaling, the more frequently will there be a stalemate. While there is a strong tendency towards stalemates with the triadic scale, it is less pronounced in the case of a double-triadic scale. This form of discretion is the reason why the state is not required to act proportionately, but required not to act disproportionately.³⁸

b) End-Setting Discretion

‘End-setting discretion’ arises owing to the fact that the democratically legitimated legislator has the constitutional power to bestow the power to limit constitutional rights on legitimate

36 See, on the distinction between internal and external justification, Jerzy Wróblewski, *Legal Decision and its Justification*, in: *Le Raisonnement Juridique – Actes du Congrès Mondial de Philosophie du Droit et de Philosophie Sociale*, H. Hubien (ed), Brussels 1971, pp. 409-419, at p. 411-412; Jerzy Wróblewski, ‘Legal Syllogism and Rationality of Judicial Decision’, in: *Rechtstheorie* 5 (1974), pp 33-46, at p. 39. See furthermore Robert Alexy, *A Theory of Legal Argumentation*, Neil D. MacCormick trans. (Oxford: Clarendon, 1989), pp. 221-231.; Neil D. MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press, 1978), p. 101; Aulis Aarnio, *The Rational as the Reasonable* (Dordrecht, Boston, Lancaster, Tokio: Reidel, 1987), pp. 119-120; Josep Joan Moreso, ‘On Relevance and Justification of Judicial Decisions’, in: *Erkenntnis* 44 (1996), pp. 73-100, at pp. 73 et seq.

37 Alexy, ‘Postscript’ (n. 15), pp. 396-414; Alexy, ‘The Weight Formula’ (n. 15), p. 19. This phrase is rather pale, for also the other forms of structural discretion and even epistemic discretion emerge ‘in balancing’. For the sake of technical clarity, I shall use the phrase in what follows in the meaning that Alexy has coined.

38 See, for example, Julian Rivers, ‘Proportionality and Variable Intensity of Review’, in: *Cambridge Law Journal* 65 (2006), pp. 147-207, at p. 193.

ends. This legal power is conferred upon the legislator by means of limiting clauses in the constitutional provisions that record fundamental rights. In other words, a merely potential limiting reason is transformed into an actual limiting reason by the activity of the legislator; the end becomes a principle that exhibits ‘constitutional status of the second degree’ (*Verfassungsrang 2. Grades*), as opposed to principles that exhibit ‘constitutional status of the first degree’ (*Verfassungsrang 1. Grades*),³⁹ which are as such provided for by constitutional provisions. The result is that an end as an actual limiting reason appears in the constitutional balancing, because the legislator decided to base a statute on this end. This is to say that the legislator has discretion to ‘create’⁴⁰ a principle that appears in the constitutional balancing, with all that this implies.

c) Means-Selecting Discretion

‘Means-selecting discretion’ is a particular kind of structural discretion that arises in the context of positive rights. In assessing claims stemming from negative rights or liberty rights, proportionality analysis takes on the form of the ‘prohibition of excessive means’ (*Übermaßverbot*). The counterpart for assessing claims stemming from positive rights is the ‘prohibition of insufficient means’ (*Untermaßverbot*). There is a fundamental distinction between positive action and omission. In short: In the case of negative rights or liberty rights, there is positive action by the state – the interference – that is either unconstitutional or not. If and when there is an obligation for the state to act on behalf of furthering a certain constitutional goal, there may well be alternative courses of state action that further this goal and are actually proportionate with an eye to the cost or damage they imply respectively. The state is not under an obligation to perform all alternatives, but only under an obligation to perform one of

39 On this distinction, see Alexy, *A Theory of Constitutional Rights* (n. 1), pp. 80-82; Borowski, *Grundrechte als Prinzipien* (n. 16), p. 165, with further references. One could also say that principles with ‘constitutional rank of first degree’ are substantive constitutional principles, while principle with ‘constitutional rank of second degree’ are only in a formal sense constitutional principles.

40 One might argue that this is the concretization of a certain kind of formal principle rather than lending validity to a substantive principle, see Martin Borowski, ‘The Structure of Formal Principles. Robert Alexy’s “Law of Combination”’, in: *On the Nature of Legal Principles*, Martin Borowski (ed) (Stuttgart: Steiner, 2010), pp. 19-35, at pp. 31-32.

the alternatives.⁴¹ There is structural discretion to choose one of the constitutional alternatives for respecting the constitutional obligation to act – ‘means-selecting discretion’.⁴²

B. The Review of Balancing Fundamental Rights

Balancing is a structure for deciding normative problems. To be sure, in the course of deciding a certain legal case, there is typically a plurality of balancing processes undertaken by different organs.

I. The Typical Plurality of Balancing Processes in Deciding a Legal Case

In administrative law, the case usually begins with an act by the administration. The relevant administrative authority is, as part of the state, committed to constitutional rights (and, in so far as the municipal legal system of a member state of the Council of Europe provides for that, has to ‘take into consideration’ the European Convention of Human Rights [ECHR] and the case law of the European Court of Human Rights in Strasbourg [ECtHR]).

What is more, it is often required that administrative action is ‘provided for by law’ – in Germany, owing to the *Gesetzesvorbehalt*, ‘provided for by parliamentary statute’ in cases of interference with liberty or property. This is to say that the legislator has to have taken a decision on competing principles – rights and goods – with constitutional status at the general-abstract level, which has resulted in a set of certain requirements for a conditioned legal consequence in the statute. The administrative authority concretizes this general-abstract statutory provision further to decide the case at hand. It has to make sure that this further concretization at the individual-concrete level is proportional with an eye to the relevant principles with constitutional status.

The citizen may challenge the administrative decision before the Administrative Court (in the German example, the *Verwaltungsgericht*). The Administrative Court will undertake review as to whether the administrative act is lawful, namely, whether it is in conformity with the constitution, parliamentary statutes or statutory instruments. If the citizen loses the case before the *Verwaltungsgericht*, he may challenge the judgment before the Administrative

41 See Alexy, *A Theory of Constitutional Rights* (n. 1), pp. 308-314; Robert Alexy, ‘On Constitutional Rights to Protection’, in: *Legisprudence* 3 (2009), pp. 1-17, at p. 5; Borowski, *Grundrechte als Prinzipien* (n. 16), pp. 254-281.

42 Alexy, ‘Verfassungsrecht und einfaches Recht’ (n. 20), p. 17; Alexy, ‘On Constitutional Rights to Protection’ (n. 41), p. 16; Borowski, *Grundrechte als Prinzipien* (n. 16), pp. 177 and 277-281.

Court of Appeals (*Oberverwaltungsgericht*), or, finally, before the Federal Administrative Court (*Bundesverwaltungsgericht*). Finally, if the citizen is convinced that the final court decision represents a violation of his constitutional right, recorded in the German Basic Law of 1949 (BL), he may file a constitutional complaint to Germany's Federal Constitutional Court (GFCC in what follows, *Bundesverfassungsgericht*). Even if all these remedies are exhausted, it is still possible to file an individual complaint according to Article 34 of the ECHR to the ECtHR in Strasbourg, with the claim that Germany's treatment of the complainant amounts to a violation of a Convention right. All these decisions of parliament, the administration, different instances of ordinary courts and constitutional or international courts, involve, to a greater or lesser extent, the balancing of constitutional rights or Convention rights.

II. Subsumption and Balancing in Assessing Claims Stemming from Fundamental Rights

In the context of analyzing the review of balancing fundamental rights, such as German constitutional rights (national legal instruments for the protection of human rights) or rights of the ECHR (regional instruments for the protection of human rights in public international law), it is worth emphasizing that the application of fundamental rights always involves both subsumption and balancing.⁴³ For example, in assessing a claim stemming from Article 10 ECHR, freedom of expression, it needs to be established whether a certain activity of the complainant counts as 'expression' in the sense of Article 10 (1) ECHR. This is assessed by means of subsumption of the activity of the complainant under the definition of 'expression', in applying the traditional canons of interpretation, such as the wording of the provision, the intent of the law-giver, the systematic context of the provision concerned and the ends pursued by the provision. This is to say that a comprehensive analysis of limited review of assessing claims stemming from fundamental rights has to embrace not only limited review of balancing, but also limited review of subsumption. A more detailed enquiry into limited review of subsumption goes, however, beyond the scope of this paper. Suffice it to say that to the extent that a decision on subsumption involves balancing,⁴⁴ an enquiry into limited review

⁴³ Borowski, *Grundrechte als Prinzipien* (n. 16), pp. 166-167.

⁴⁴ It has proven impossible to establish a hierarchy, let alone a strict hierarchy, between and among the different canons of interpretation. This and the practice of legal interpretation suggests that the canons exhibit the dimension of weight and can be balanced against each other in deciding on an interpretation, see Martin Borowski, 'Prinzipien als Grundrechtsnormen', in: *Zeitschrift für Öffentliches Recht* 53 (1998), pp. 307-335, at p. 315; Martin Borowski, 'Die Bindung an Festsetzungen des Gesetzgebers in der grundrechtlichen Abwägung', in: Laura Clérico and Jan-Reinard Sieckmann (eds), *Grundrechte, Prinzipien und Argumentation* (Baden-Baden: Nomos, 2009), pp. 99-128, at p. 103; Borowski, *Grundrechte als Prinzipien* (n. 16), pp.

of balancing decisions may provide helpful insights also into – at least certain aspects of – limited review of decisions on subsumption.

III. The Distinction of the ‘Decision to be Reviewed’ and the ‘Review Decision’

With an eye to the chain of balancing decisions explained in section B. I., it is not the case that every decision undertakes a balancing of the principles with constitutional status from scratch, simply ignoring all preceding decisions in the chain. Rather, a subsequent decision *reviews* the preceding decision. A typical yardstick for review is whether the ‘decision to be reviewed’ is *lawful*. For example, the *Verwaltungsgericht* (Administrative Court) decides the case on the basis of German statutory law, interpreted against the backdrop of the German constitution and the ECHR. The *Oberverwaltungsgericht* (Administrative Court of Review) undertakes review on points of law and facts of the decision of the *Verwaltungsgericht* – it is successful, if, and to the extent that, this ‘decision to be reviewed’ proves *unlawful*.

It is crucial to understand that the review whether a preceding decision is unlawful leaves structural discretion to the ‘decision to be reviewed’ and the organ that took that decision. This can be illustrated by the following example: Let us assume that Parliament balances, with an eye to a limit on nitrogen oxide in waste gas stemming from brown coal power plants, freedom to conduct one’s business as one wishes according to Article 12 (1) BL⁴⁵ with environmental protection, Article 20a BL.⁴⁶ Let us assume further that the degree of non-satisfaction with an eye to Article 12 (1) BL (principle ‘*i*’) and Article 20a BL (principle ‘*j*’) respectively can be classified on the double-triadic scale, and the same applies to the abstract weight. The abstract weight of both Article 12 (1) BL and Article 20a BL is ‘moderate-moderate’ so that both ‘*AW_i*’ and ‘*AW_j*’ take on the value ‘16’. The legislator decides that certain brown coal power plants are supposed to emit no more than 150 mg per m³ nitrogen oxide in waste gas. This is an interference with Article 12 (1) BL – while allowing for some emission of nitrogen oxide, this limit requires investment in filters. This results in a degree of non-satisfaction, or, in other words, intensity of interference of ‘moderate-moderate’, namely, ‘16’ for ‘*I_i*’. There is non-satisfaction of Article 20a BL, the principle of environmental pro-

166-167, footnote 389; see also Jan-Reinard Sieckmann, *Recht als normatives System* (Baden-Baden: Nomos, 2009), pp. 164-166.

45 ‘All Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.’

46 ‘Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.’

tection, for there is some emission of nitrogen oxide permitted, It could be, however, worse. We assume that there is also ‘moderate-moderate’, namely, ‘16’, for ‘ I_j ’. To keep things at this stage as simple as possible, ‘ R ’ plays no role at all, so that the ‘most elementary form’ of the weight formula is sufficient. With ‘16’ for both ‘ I_i ’ and ‘ I_j ’ and ‘2’ for both ‘ AW_i ’ and ‘ AW_j ’, the result is:

$$RW_{i,j} = \frac{16 \cdot 16}{16 \cdot 16}$$

Obviously, ‘ $RW_{i,j}$ ’ takes on the value ‘1’, which is to say that there is a stalemate. This stalemate gives rise to structural discretion on the form of ‘discretion in balancing’.⁴⁷ My point is, however: This discretion is parliament’s discretion, it is not the constitutional court’s discretion. Neither does freedom to pursue one’s business as one wishes according to Article 12 (1) BL require definitively a higher limit, nor does the principle of environmental protection according to Article 20a BL definitively require a lower limit. Since the limit chosen by parliament is constitutional, the constitutional court cannot declare it unconstitutional. This applies also to the other two forms of structural discretion, end-setting discretion⁴⁸ and means-selecting discretion.⁴⁹ In so far as structural discretion extends and review by the yardstick of legality or constitutionality is undertaken, the ‘decision to be reviewed’ will definitely stand up to review. This follows implicitly from the nature of the relation between the ‘decision to be reviewed’ and the ‘review decision’ and the yardstick of ‘legality’ or ‘constitutionality’, but can also be explicitly expressed as a *formal rule*. This has nothing to do with ‘formal principles’.⁵⁰ Owing to its definitive nature, the legal norm that expresses that the decisions inside the frame established by structural discretion stand up to review is a *rule*. Structural discretion is a *limitation of the yardstick for review*, not a *limitation of review*.

IV. The Limitation of Review as Matter of Law

One clarification might be useful: The ‘limitation’ of review in the sense of ‘limited review’ analyzed in this paper is a matter of law.⁵¹ This is to say that the review organ does not have a

47 See above, section A. II. 7. a).

48 See above, section A. II. 7. b).

49 See above, section A. II. 7. c).

50 In so far, I completely agree with Alexy: ‘[F]ormal principles play no role with respect to substantial discretion’, Alexy, ‘Formal Principles’ (n. 27), p. 519 – he uses ‘substantial discretion’ as a synonym for ‘structural discretion’, *ibid*.

51 Which is to say that whether and to what extent review is limited is determined by means of legal argumentation.

more encompassing legal power or competence to review the ‘decision to be reviewed’, but refrains for reasons of courtesy, political wisdom or the like from exercising its review competence fully. The limitation of review meant here is a limitation of the review competence of the review organ. This is to say that a review organ, which is supposed to undertake only limited review (this will be explained in greater detail in what follows, section B. VI.), but undertakes strict review, acts beyond its legal review competence – this is actually *unlawful* rather than merely impolite or unwise. To the extent that a ‘decision to be reviewed’ is subject only to limited review, any instance of ‘overreview’⁵² violates the relative immunity (being not immune to limited review, but immune to review beyond limited review) of the ‘decision to be reviewed’ and the organ that took it.

V. Review of the Balancing Process and Review of the Balancing Result

The review of a ‘decision to be reviewed’ may scrutinize the *result* of a balancing decision, the *process* of balancing that has led to the result or both. For example, a core sentence from the jurisprudence of the ECtHR in Strasbourg on the competition between Article 8 and 10 ECHR reads: ‘Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court’s case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.’⁵³ The phrase ‘balancing exercise between those two rights has been undertaken’ sounds as if the actual process of balancing is scrutinized in review undertaken by the ECtHR. This raises the question if a defect of the process alone renders the balancing decision unlawful, even if the decision arrives at the correct result. The relation between a correct process and the correct result is, without any doubt, complex. Suffice it to say here that in the legal protection of human rights the objective result is what counts first and foremost. Procedural requirements may play a certain role,⁵⁴ the review of the result cannot, however, be replaced fully by the review of a process. In what follows, I shall focus on the review of the result.

52 The opposite problem is ‘underreview’ – limited review instead of strict review or more limited review in cases, in which less limited review was called for.

53 European Court of Human Rights, Judgment of the Grand Chamber, 7 February 2012, No. 39954/08, *Axel Springer AG v. Germany*, marginal number 88.

54 To give an example, the deliberative quality of a democratic decision may well play a role for the extent of discretion granted on democratic grounds. A frantic decision by a handful of Members of Parliament under strong pressure of time may formally count as a ‘decision of Parliament’. It should be obvious, however, that it deserves less deference compared to the result of a thorough, comprehensive, and rational democratic debate, see Martin Borowski, ‘Subjekte der Verfassungsinterpretation’, in: *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Josef Isensee and Paul Kirchhof (eds), vol. 12, 3rd edn (Heidelberg: C.F. Müller, 2014), pp. 761-782, at p. 779.

VI. On the Nature of Limited Review of Balancing

The review itself can be strict or limited. Limited Review implies a distinction between two levels of correctness.

1. Strict Review and Limited Review

Where the yardstick for review is ‘legality’ without any qualification (for example, the review of decisions of the *Verwaltungsgericht* by the *Oberverwaltungsgericht*), *strict review* is undertaken. *Any deviation* from the yardstick, however marginal or insignificant, will give rise to the conclusion that the ‘decision to be reviewed’ does not stand up to review – with the legal consequence that this implies.⁵⁵

By contrast, in the case of *limited review* only a *qualified deviation* from the relevant yardstick leads to the conclusion that the ‘decision to be reviewed’ does not stand up to review. Typical expressions for indicating limited review are, for example, ‘plausible’, ‘without manifest error’, ‘not arbitrarily’, ‘not evidently false’, or the like.

Limited review is a matter of degree – it can be more or less limited. Alexy distinguishes, referring to a distinction made by the GFCC in the Co-Decision-Judgment,⁵⁶ three different intensities of review, namely, ‘intensive review’ (*intensivierte Kontrolle*), ‘plausibility review’ (*Vertretbarkeitskontrolle*), and ‘evidential review’ (*Evidenzkontrolle*).⁵⁷ The first intensity of review is not limited, it is actually strict review. A decision to be reviewed passes ‘plausibility review’, if and when the balancing decision is plausible. Finally, it passes ‘evidential review’, if it is not ‘evidently’ or ‘manifestly’ wrong. Sometimes the third intensity of review – or an intensity of review akin to it – is called ‘arbitrariness review’ (*Willkürkontrolle*), which only asks whether the ‘decision to be reviewed’ proves arbitrary.

2. Purely Substantive Correctness and Substantive-Formal Correctness

55 For example, the legal consequence that the ‘decision to be reviewed’ is rescinded and replaced by a decision of the review organ or that the ‘decision to be reviewed’ is declared unlawful and proves no longer enforceable, or the like.

56 BVerfGE 50, 290 (333).

57 Alexy, ‘Postscript’ (n. 15), p. 419; Alexy, ‘The Weight Formula’ (n. 15), p. 25.

Limited review of balancing means that the review organ refrains from imposing the result it regards to be the *correct* balancing of the competing substantive rights and goods. Rather, the review organ pays more or less deference to the ‘decision to be reviewed’ and asks only whether it proves ‘plausible’ (some deference) or ‘not evidently wrong’ (much deference). Unlike in the case of strict review, there are not only two possible outcomes (‘correct balancing result’ or ‘wrong balancing result’), there are, however, three possible outcomes for limited review. Using the example of ‘evidential review’, the three possible outcomes are:

- (i) substantively fully correct balancing result,
- (ii) not substantively fully correct, but not evidently wrong balancing result,
- (iii) the balancing result is evidently wrong.

In ‘evidential review’, the ‘decision to be reviewed’ passes review in the cases (i) and (ii), but not in case (iii).

To put a sharp edge on it, the ‘decision to be reviewed’ may well not be fully substantively correct and at the same time ‘correct’ from the point of view of ‘evidential review’ – if it is not evidently wrong, case (ii).⁵⁸ This is to say that two different levels of correctness need to be distinguished – purely substantive correctness on one hand and correctness based on balancing substantive rights and goods under epistemic uncertainty in a situation, in which there are reasons to give relative deference to a ‘decision to be reviewed’ (substantive-formal correctness) on the other. The latter level of ‘correctness’ combines both substantive and formal aspects.

VII. Reasons for the Limitation of Review

Why would the review organ allow anything else to pass review than a substantively fully correct result? A limitation of review always requires epistemic uncertainty – the cognition of the premisses undergirding the weight of the variables in the weight formula proves less than fully reliable. What is more, there needs to be a reason for the review organ to defer to the ‘decision to be reviewed’ under epistemic uncertainty. This shall be illustrated by three examples, where limited review becomes practical in legal doctrine.

1. Democratic Legitimacy

⁵⁸ In Alexy’s words: ‘If a decision may be taken because it falls within an epistemic discretion, then the possibility cannot be excluded that this decision may be false, even though it is permitted’, Alexy, ‘Postscript’ (n. 15), p. 422.

The classic reason that has taken centre stage in the debate on the reconstruction of epistemic discretion by means of the weight formula is the legitimacy of decisions taken by a democratically legitimated parliament.⁵⁹ The idea of ‘legislative supremacy’ was already crucial for Dworkin’s ‘conservative principles’⁶⁰ at the very beginning of modern principles theory in the 1970’s and formed the linchpin of the reply of principles theory to the ‘democratic objection’ powerfully made by Ernst-Wolfgang Böckenförde in the 1990’s, which has already been mentioned at the very beginning of this paper. For example, the Co-Decision-Judgment of the German Federal Constitutional Court (GFCC) requires certain deference of the Court towards decisions of the democratically legitimated German Parliament under empirical epistemic uncertainty. This reason for limited review implied by epistemic discretion is a crucial element of the philosophical justification of constitutional review of democratically legitimated decisions.

While constitutional review undertaken by constitutional courts has been front and centre in the debate on democratic legitimacy as a reason for limited review, it proves relevant in other contexts, too. For example, the German Federal President, *Bundespräsident*, has generally an obligation to promulgate bills adopted by the *Bundestag*, the German Federal Parliament. Article 82, paragraph 1, clause 1, BL reads: ‘Laws enacted in accordance with the provisions of this Basic Law shall, after countersignature [by the competent member of Federal Government] be certified and promulgated in the Federal Law Gazette.’ There is little doubt that the phrase ‘enacted in accordance with the provisions of this Basic Law’ provides for the power of the *Bundespräsident* to undertake strict review with an eye to the formal constitutionality of the bill adopted by the *Bundestag*.⁶¹ Things are less clear with an eye to the substantive constitutionality of the bill adopted. There are basically two competing views.

According to the *first view*, the *Bundespräsident* is empowered to undertake strict review also of the substantive constitutionality of the bill adopted. The supporters of this view generally also support the idea that the *Bundespräsident* is under a constitutional obligation to refuse promulgation in cases, in which the bill adopted is ‘evidently’ or ‘manifestly’ un-

59 See, in particular, Alexy, ‘Postscript’ (n. 15), p. 416; Alexy, ‘Formal Principles’ (n. 27), p. 516. See further, for example, Rivers, ‘Proportionality and Variable Intensity of Review’ (n. 38), p. 204, referring to Law L.J.: ‘greater deference should be paid to Parliament than to subordinate legislative or executive acts’.

60 Dworkin, *Taking Rights Seriously* (n. 11), p. 38.

61 See, for example, Martin Nettesheim, ‘Die Aufgaben des Bundespräsidenten’, in: *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Josef Isensee and Paul Kirchhof (eds), vol. 3, 3rd edn, (Heidelberg: C.F. Müller, 2005), pp. 1073-1103, at p. 1091.

constitutional from the substantive point of view.⁶² This implies that if the bill adopted proves unconstitutional, but not ‘evidently’ or ‘manifestly’ unconstitutional, the *Bundespräsident* is empowered, but not under an obligation to refuse promulgation.

The second view, however, assumes that there is only a review competence for the *Bundespräsident* if the bill adopted proves ‘evidently’ or ‘manifestly’ substantively unconstitutional.⁶³ Following this view, the *Bundespräsident* is not empowered – and, consequently, not under an obligation – to refuse promulgation in a case, in which the bill adopted proves unconstitutional, but not ‘evidently’ or ‘manifestly’ unconstitutional.

This is to say that limited review in the form of ‘evidential review’ is relevant for both views – according to the first view, to determine the constitutional *obligation* of the *Bundespräsident* to review the substantive constitutionality, according to the second view, to determine his *competence* to review the substantive constitutionality.

2. No ‘Super-Review’ of Judgments of Ordinary Courts by the Constitutional Court

The German judicial branch of government consists of (i) civil and criminal courts, (ii) administrative courts, (iii) tax courts, (iv) labour courts, and (v) social courts, with two to four instances each. Their task is primarily to apply statutory law, but they are also committed to protect constitutional rights. The code of procedure of the respective jurisdiction determines a certain instance as final. From the point of statutory law, the final instance of these five jurisdictions hands down the ‘final judgment’.

The finality of these ‘final judgments’ is, however, relative. An individual who has lost his or her court case in the ‘final instance’ can still lodge a constitutional complaint before the GFCC. All branches of government are committed to constitutional rights, Article 1 (3) BL.⁶⁴ Their acts are subject to constitutional review by the GFCC, including ‘final judgments’ taken by, for example, the Federal Court of Justice (*Bundesgerichtshof*) or the Federal Administrative Court (*Bundesverwaltungsgericht*).

Strictly speaking, the GFCC only undertakes review as to whether the ‘final judgment’ is constitutional. It does not examine whether this judgment is ‘lawful’, measured against

62 *Nettesheim*, ‘Die Aufgaben des Bundespräsidenten’ (n. 61), pp. 1093-1094. See also Hartmut Bauer in Horst Dreier (ed), *Grundgesetz Kommentar*, 3rd edn, vol. 2 (Tübingen: Mohr Siebeck, 2015), Article 82, marginal number 13 with further references.

63 See, for example, Michael Brenner in Hermann von Mangoldt, Friedrich Klein, and Christian Starck (eds), *Grundgesetz Kommentar*, 7th edn, vol. 2 (Munich: C.H. Beck, 2018), Article 82, marginal number 29 with further references.

64 ‘The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.’

statutory law or statutory instruments – which is regularly emphasized by the GFCC.⁶⁵ This distinction is, however, more problematic than it might seem on first glance. According to the ‘*Elfes*-Construction’ of assessing claims from liberty rights,⁶⁶ any act of the state counts as a violation of a constitutional right that protects a liberty, if there is an interference with the area of protection and if this interference cannot be constitutionally justified. It can only be constitutionally justified, if there is a ‘lawful’ (*notabene* – not ‘constitutional’) statute that was applied lawfully. This is to say that, according to the *Elfes*-Construction of constitutional rights, an interference by relying on *unlawful* subconstitutional provisions and/or on an unlawful interpretation of such provisions implies that the act of the state counts as a violation of a constitutional right and is, thereby, unconstitutional.⁶⁷ To complicate things further, the German doctrine of constitutional rights is characterized by the wide theory of scope.⁶⁸ Nearly every act of state counts as an interference with this or that constitutional right, so that nearly every unlawful ‘final judgment’ represents at the same an unconstitutional ‘final judgment’.

To be sure, it is not the role of the GFCC to undertake strict review of every ‘final judgment’ of the German judiciary; there is a distribution of review competences according to which the GFCC is supposed to undertake generally limited review only.⁶⁹ What is more, it would be completely overwhelmed with the task of strict review of all final judgments of ordinary courts. Thus, the GFCC emphasizes that it is not the ‘instance for super-review’ (*keine Superrevisionsinstanz*) and that it reviews judgments of ordinary courts only as to whether ‘specific constitutional law’ (*spezifisches Verfassungsrecht*) has been breached.⁷⁰

What is, however, ‘specific constitutional law’ against the backdrop of the *Elfes*-Construction of constitutional rights? The GFCC basically ignores the implications of this construction and undertakes only limited review. Apart from a special and rather rare category, the review of legal interpretation beyond the wording of statutes (*Rechtsfortbildungskontrolle*),⁷¹ there are two main categories. The first category is review as to whether the ordinary court ‘fundamentally misjudged the area of protection’ (*grundlegende Verknennung*

65 See, for example, BVerfGE 18, 85 (93); 102, 347 (362); 111, 366 (373).

66 Named after the seminal decision of the GFCC, BVerfGE 6, 32 – *Elfes*, in which it was developed.

67 This is a generally accepted conclusion, see only Klaus Schlaich and Stefan Koriath, *Das Bundesverfassungsgericht*, 11 edn (Munich: C.H. Beck, 2018), marginal number 284; see also Christian Hillgruber and Christoph Goos, *Verfassungsprozessrecht*, 4th edn (Heidelberg: C.F. Müller, 2015), p. 81.

68 Alexy, *A Theory of Constitutional Rights* (n. 1), pp. 210-217; Borowski, *Grundrechte als Prinzipien* (n. 16), pp. 327-333

69 See, for example, Schlaich and Koriath, *Das Bundesverfassungsgericht* (n. 67), marginal number 285, with further references. See also BVerfGE 22, 93 (98); 51 130 (139); 96, 27 (40).

70 See, for example, BVerfGE 7, 198 (207); 18, 85 (92).

71 See Schlaich and Koriath, *Das Bundesverfassungsgericht* (n. 67), marginal number 301-304 with further references.

des Schutzbereichs) of the relevant constitutional right.⁷² This refers to subsumption in applying constitutional rights, which shall not be pursued further here.⁷³ The second category is whether the ordinary court ‘fundamentally misjudged the import of constitutional rights for the case at hand’ (*grundsätzliche Verkennung der Bedeutung der Grundrechte im konkreten Fall*). This second category refers to balancing. To be sure, the case-law of the GFCC is not fully consistent and coherent with an eye to the intensity of review.⁷⁴ What can be said is, however, that the GFCC chooses a variable intensity of review and that the intensity of review depends, first and foremost, on the intensity of interference with the right in question.⁷⁵ Even though the GFCC does not use the three levels of intensity of review developed in the *Co-Decision-Judgment* in this context explicitly, it suggests itself to use them here, too: Light interferences call for ‘evidential review’ only, medium interferences for ‘plausibility review’, and severe interferences for ‘intensive review’.⁷⁶

3. The ECtHR and the ‘Margin of Appreciation’

The problem of limited review arises also under the ECHR. In short: According to the principle of subsidiarity, the ECtHR has only a subsidiary role. It held that ‘the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights’.⁷⁷ What is more, the Member States agreed the ‘15th Protocol amending the Convention on the Protection of Human Rights and Fundamental Freedoms’ in 2013, which, among other changes, amends the Preamble to the effect that a new recital is added. This new recital will provide for the ‘principle of subsidiarity’ and the ‘margin of appreciation’ in the text of the Convention.⁷⁸

72 See, for example, BVerfGE 43, 130 (138); 59, 231 (270-271); 71, 162 (178-179); 77, 346 (359); 95, 28 (37); 97, 391 (406).

73 See section B. II.

74 See Schlaich and Koriath, *Das Bundesverfassungsgericht* (n. 67), marginal number 295-297 with further references.

75 See the references in Schlaich and Koriath, *Das Bundesverfassungsgericht* (n. 67), marginal number 307-309.

76 Martin Borowski, ‘Die verfassungsgerichtliche Rechtfertigung des Grundrechtseingriffs – Teil II’, in: *Studentische Zeitschrift für Rechtswissenschaft Heidelberg* 2016, pp. 115-128; at p. 127.

77 See, for example, European Court of Human Rights, Judgment of the Grand Chamber, 26 March 2006, *Scordino v. Italy I*, Appl. No. 36813/97, ECHR 2006-V, marginal number 140.

78 Article 1 of this Protocol reads: ‘At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: “Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.”. This Protocol will

The Court introduced the idea of the ‘margin of appreciation’ as early as in *Handyside*: ‘Article 10 para. 2 [...] leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator [...] and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force’.⁷⁹ This margin is, without any doubt, a rather complex phenomenon and extends to the whole process of assessing claims stemming from Convention rights. The ‘Interlaken Follow-Up on the Principle of Subsidiarity’, a note by Jurisconsult of the ECHR from 2010, emphasizes the importance of the margin for the review of balancing: ‘In practice, the task of reviewing compliance with the third criterion – proportionality or “necessity in a democratic society” – is the most difficult, the most delicate and the most dependent on the particular circumstances of the case. This is where the principle of subsidiarity, in the form of the margin of appreciation doctrine, comes directly into play. The concept of margin of appreciation is based on the principle, [...] according to which the national authorities, who are in direct and continuous contact with the vital forces of their countries, are best placed to assess the multitude of factors surrounding each particular situation.’⁸⁰ It is not, however, fully clear, which criteria determine the extent of the margin. In some contexts the Court emphasizes that the margin is greater where there is less ‘European consensus’ on relevant normative issues.⁸¹ At any rate, the following quotation from the Interlaken Declaration of 19 February 2010 by the ‘High Level Conference on the Future of the European Court of Human Rights’ suggests that the intensity of interference ought to play a role: The Court is urged ‘to concentrate on its essential role of guarantor of human rights and to adjudicate well-founded cases with the necessary speed, in particular those alleging serious violations of human rights’.⁸² The Court’s attention is a scarce resource and should be spent very consciously – this echoes the division of labour and competences in the German legal system between the GFCC and German ordinary courts. To be sure, the ‘democratic reason’

enter into force once all Member States will have ratified it. There are currently two ratifications outstanding, namely, by (i) Bosnia and Herzegovina and (ii) Italy.

79 European Court of Human Rights, Plenary, 7 December 1976, *Handyside v. United Kingdom*, Appl. No. 5493/72, marginal number 48.

80 Jurisconsult of the ECHR, ‘Interlaken Follow-Up on the Principle of Subsidiarity’, 8 July 2010, marginal number 45.

81 See William A. Schabas, *The European Convention of Human Rights – A Commentary* (Oxford University Press 2015), pp. 81-82 with further references.

82 Jurisconsult of the ECHR, ‘Interlaken Follow-Up on the Principle of Subsidiarity’, 8 July 2010, marginal number 9. In the same direction, for example, European Court of Human Rights, Judgment of the Fifth Section, 21 June 2012, *E.S. v. Sweden*, Appl. No. 5786/08, marginal number 58: ‘[W]here a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State is correspondingly narrowed’.

for limited review is also part and parcel of the ‘margin of appreciation’, which is already suggested by the reference in the quotation above from *Handyside* – ‘the legislator’.⁸³

C. The Formal Principle in Limited Review of Balancing Fundamental Rights

Having sketched key aspects of the logic of balancing fundamental rights and collective goods – substantive principles – and having characterized limited review, the question arises how the limitation of review can be reflected in the weight formula. The short answer is: by means of a formal principle.

I. Three Models of Reconstruction Formal Principles

Unfortunately, opinions on what formal principles are and how they are or can be reflected in the weight formula differ to a great extent. A detailed analysis of this issue goes certainly far beyond this paper. I shall confine myself here to outline the three different fundamental models. I tend to assume that the numerous different reconstructions of formal principles are actually variations of these three models.

1. The Combination Model – Balancing Substantive Principles and a Formal Principle

The ‘combination model’ considers a formal principle in the balancing of at least two competing substantive principles. The review balancing necessarily contains three principles, which is to say that is an instance of Alexy’s ‘Complete Extended Weight Formula’.⁸⁴ This third⁸⁵ principle is not, however, a third substantive principle (which Alexy has in mind with the ‘Complete Extended Weight Formula’), rather, it is a principle with particular characteristics. It requires *prima facie* that the balancing decision of the parliament, court or other organ that took the ‘decision to be reviewed’, be respected.

This combination model was developed at the outset of modern principles theory by Dworkin and supported by Alexy in the first period of his writings on principles theory in the 1980s and 1990s. Alexy’s position at the beginning of the second period, in his writings in

83 See footnote 79 and the accompanying text.

84 See section A. II. 5. This formal principle is considered only in the ‘review decision’, not in the ‘decision to be reviewed’.

85 In the case, in which two substantive principles compete. If in the ‘balancing decision to be reviewed’ three substantive principles compete, then the formal principle is the fourth principle, and so on.

2002 and 2003, is not entirely clear.⁸⁶ In recent publications it has become clear, however, that he abandoned the combination model in favour of a model he calls the ‘epistemic model’.

2. The Model of Competing Formal Principles

According to Jan-Reinard Sieckmann, a constitutional court that performs constitutional review of a statute balances two formal principles. The first principle requires *prima facie* that the result of balancing of two (or more) substantive principles by the organ that took the ‘decision to be reviewed’ be respected. This formal principle is balanced with the *prima facie* commitment of the review organ to enforce its own result of balancing the two (or more) substantive principles.⁸⁷ I tend to think that this is generally a possible reconstruction, if a number of assumptions are understood. For example, to treat one’s own result of balancing substantive principles merely as an epistemic phenomenon with *prima facie*-nature rather as the definitive yardstick is plausible only under epistemic uncertainty. What is more, the extent of uncertainty needs to be considered in the determination of the relative weight of the competing principles. Nevertheless, there is a misgiving I have with this model. This misgiving is based on the fact that the two competing formal principles are much in the limelight and substantive principles are rather relegated to the fringe. The key task of the adequate model of formal principles is to combine substantive and formal aspects in a plausible, understandable and convincing fashion. For example, the severity of interference with a fundamental right counts as an argument on behalf of less limited – in other words: stricter – review, which implies that (i) either the *prima facie*-commitment to the ‘balancing result to be reviewed’ is weaker or (ii) the commitment to the review organ’s own result of balancing substantive principles is stronger, or (iii) both. Sieckmann has finally admitted that the weight of substantive principles in the case at hand needs to be considered in attributing weight to the competing formal principles.⁸⁸ To be sure, how this is supposed to work has remained abstract at best.

86 See, in particular, the analysis in Borowski, ‘Formelle Prinzipien und Gewichtsformel’ (n. 24), pp. 165-181.

87 On this ‘model of competing formal principles’ (a literal translation of the German phrase *Modell der konkurrierenden Rechtskonzeptionen* makes little sense in English) see Jan-Reinard Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems* (Baden-Baden: Nomos, 1990), pp. 162-164; Jan-Reinard Sieckmann, ‘Grundrechtliche Abwägung als Rechtsanwendung. Das Problem der Begrenzung der Besteuerung’, in: *Der Staat* 41 (2002), pp. 385-405, at pp. 398-403; Sieckmann, *Recht als normatives System* (n. 44), pp. 200-204; Jan-Reinard Sieckmann, *Rechtsphilosophie* (Tübingen: Mohr Siebeck, 2018), pp. 200-211.

88 Sieckmann, *Recht als normatives System* (n. 44), p. 204; Sieckmann, *Rechtsphilosophie* (n. 87), pp. 210-211.

3. Alexy's 'Epistemic Model'

As mentioned above, Alexy abandoned the combination model in favour of a model he calls 'epistemic model'.⁸⁹ The problems begin actually with this name, for all three models claim to reconstruct the effects of epistemic uncertainty on decisions reviewing a balancing decision.⁹⁰ In the early stage of the development of this model it seems that the variable '*R*' in the weight formula *is* the formal principle. That has led to the criticism that a variable for the weight of a substantive principle does not boast of the characteristics of a principle in the sense of modern principles theory.⁹¹ In reply to this criticism, Alexy recently presented the variable '*R*' as a result of a balancing at a meta-level, namely, a balancing of a formal principle and the epistemic dimension of a substantive principle.⁹² The key problem of this reconstruction is, however, that the variable '*R*' in the weight formula does not give rise to epistemic discretion.

Already in the 'Postscript' Alexy ties different levels of epistemic uncertainty according to '*R*' to different intensities of review.⁹³ The variable '*R*', however, changes the relative weight of the competing principles in the denominator and numerator of the weight formula – unless it is equal in both the denominator and numerator. This is, without any doubt, an important insight.⁹⁴ This effect is, however, equally relevant for every balancing of the competing substantive principles '*i*' and '*j*'. It is equally relevant for the taking the 'decision to be reviewed' and for the 'review decision'. It cannot create discretion for the 'decision to be reviewed' that has to be respected in the 'review decision'.⁹⁵

Alexy has claimed that the variable '*R*' actually can give rise to creation – it can change the relative weight of the two competing substantive principles, so that a non-stalemate is transformed into a stalemate.⁹⁶ This is, in some sense, true – the variable '*R*' can give rise to a stalemate, which implies an instance of 'discretion in balancing'.⁹⁷ This is, however, structural discretion. In Alexy's 'epistemic model' of formal principles, epistemic discretion com-

89 Alexy, 'Formal Principles' (n. 27), p. 520 *et passim*.

90 See Borowski, *Grundrechte als Prinzipien* (n. 16), p. 183, footnote 482.

91 Borowski, 'Formelle Prinzipien und Gewichtsformel' (n. 24), p. 180.

92 Alexy, 'Formal Principles' (n. 27), pp. 520-521.

93 Alexy, 'Postscript' (n. 15), p. 419. See also Alexy, 'The Weight Formula' (n. 15), p. 25; Alexy, 'On Balancing and Subsumption' (n. 22), pp. 447-448.

94 See, *supra*, section A. II. 2.

95 Borowski, 'Formelle Prinzipien und Gewichtsformel' (n. 24), pp. 175-177, Martin Borowski, 'Alexys drittes Modell formeller Prinzipien', in: *Rechtsphilosophie und Grundrechtstheorie – Robert Alexys System*, Martin Borowski, Jan-Reinard Sieckmann, and Stanley L. Paulson (eds) (Tübingen: Mohr Siebeck, 2017), pp. 449-476, at pp. 459-460;

96 Alexy, 'Formal Principles' (n. 27), p. 523.

97 See, *supra*, section A. II. 7. a).

pletely collapses onto structural discretion. How can his thesis that formal principles give rise to structural discretion be reconciled with his claim, elsewhere in the very same article, that ‘formal principles play no role with respect to substantial [or structural] discretion’?⁹⁸

Apart from the fact that the variable ‘*R*’ – as all variables for the weight of principles in the weight formula – can give rise to structural discretion in the form of ‘discretion in balancing’ under certain circumstances, it may also avoid structural discretion. This can be illustrated by the example mentioned above,⁹⁹ in which Article 12 (1) BL (principle ‘*i*’) and Article 20a BL (principle ‘*j*’) compete with an eye to an emission limit of no more than 150 mg per m³ nitrogen oxide in waste gas from brown coal power plants. The abstract weight of both Article 12 (1) BL and Article 20a BL was ‘moderate-moderate’ so that both ‘*AW_i*’ and ‘*AW_j*’ take on the value ‘16’. The intensity of interference with Article 12 (1) BL – was ‘moderate-moderate’, namely, ‘16’ for ‘*I_i*’. The degree of non-satisfaction of Article 20a BL, the principle of environmental protection, ‘*I_j*’, was also ‘moderate-moderate’, namely, ‘16’. ‘*R*’ played no role for the initial version of the example. With ‘16’ for both ‘*I_i*’ and ‘*I_j*’ and ‘2’ for both ‘*AW_i*’ and ‘*AW_j*’, the result is a stalemate:

$$RW_{i,j} = \frac{16 \cdot 16}{16 \cdot 16}$$

Let us assume now that the prediction of the harm done to the environment is not certain, but only ‘plausible’, so that ‘*R_j*’ takes on the value 2⁻¹, namely 0.5. The negative consequences of the interference with liberty and its detrimental effects to the liberty of entrepreneurs are, however, completely certain. This is to say that ‘*R_i*’ has the value 2⁰, namely, ‘1’. The balancing changes as follows:

$$RW_{i,j} = \frac{16 \cdot 16 \cdot 1}{16 \cdot 16 \cdot 0.5}$$

The stalemate has been transformed into a non-stalemate. Now the fundamental right, Article 12 (1) BL, definitely outweighs the collective good, Article 20a BL. There is empirical-epistemic uncertainty with an eye to principle ‘*j*’, but no discretion at all – neither genuine epistemic discretion (as explained in the next section, C. II) nor even structural discretion. Alexy’s ‘epistemic model’ does not reflect key characteristics of limited review in balancing.

98 Alexy, ‘Formal Principles’ (n. 27), p. 519, see also, *supra*, footnote 50.

99 See, *supra*, section B. III.

II. The Formal Principle ‘ P_f ’ in the Balancing

This is to say that the combination model still provides the most promising solution. I can give only a brief outline here. To use the example already explained, the legislator balances two or more competing substantive principles, namely, Article 12 (1) BL and Article 20a BL – the formal principle plays no role here. The result of balancing the competing substantive principles is the ‘decision to be reviewed’. If and when this decision is reviewed by the constitutional court, the third¹⁰⁰ principle ‘ P_f ’ needs to be considered in the balancing of substantive principles.

This principle ‘ P_f ’ requires that *prima facie* the ‘decision to be reviewed’, the result of the balancing of the competing substantive principles, be respected. This formal principle is considered on the side of the balancing that the ‘decision to be reviewed’ preferred, compared to the balancing of the substantive principles undertaken by the review organ, the constitutional court – metaphorically speaking, it works as a ‘weight joker’ for the legislator. Very simply put, the formula is either

$$RW_{i,j} = \frac{I_i \cdot AW_i \cdot R_i + P_f}{I_j \cdot AW_j \cdot R_j}$$

or

$$RW_{i,j} = \frac{I_i \cdot AW_i \cdot R_i}{I_j \cdot AW_j \cdot R_j + P_f}$$

This is a simple reconstruction, for there are certainly different factors for the weight of the formal principle ‘ P_f ’ – the abstract weight of deference toward the ‘decision to be reviewed’ and the intensity of interference.¹⁰¹ For the epistemic uncertainty of the overall decision on balancing substantive principles is the very reason for the existence of limited review, this is a key factor for the weight of the formal principle. Where there is no epistemic uncertainty, the formal principle necessarily has the weight ‘zero’ and there is no limitation of review.¹⁰²

100 Or fourth and so on, see footnote 85.

101 See, in particular, Borowski, ‘Formelle Prinzipien und Gewichtsformel’ (n. 24), pp. 195-199.

102 Borowski, ‘Formelle Prinzipien und Gewichtsformel’ (n. 24), pp. 197-198; Borowski, ‘Alexys drittes Modell formeller Prinzipien’ (n. 95), p. 461. In this direction also Alexy, ‘Postscript’ (n. 15), p. 424: ‘The moment uncertainty disappears they [formal principles] go out of action’. See also Alexy, ‘Comments and Responses’ (n. 27), p. 331.

Using the reconstruction of the example in the weight formula : If one assumes that the uncertainty regarding the harmful effects of nitrogen oxide does not only lead to ‘ R_j ’ being 2¹, but also gives ‘ P_f ’ the value ‘128’, then there is, from the point of view of the review organ, (again) a stalemate, because both denominator and numerator have the value ‘258’:

$$RW_{i,j} = \frac{16 \cdot 16 \cdot 1}{16 \cdot 16 \cdot 0.5 + 128}$$

With these assumptions a maximum level of 150 mg nitrogen oxide per m³ waste gas stands up to limited review.

Now let’s assume that, owing to political changes, the legislator regards cost-efficient industrial production somewhat more important and environmental protection somewhat less important. Let’s assume further that a limit of 300 mg nitrogen oxide interferes with Article 12 (1) BL (only) ‘moderate-light’, so that ‘ I_i ’ takes on the value ‘8’, and that it represents a ‘moderate-serious’ non-satisfaction of the principle of environmental protection, so that ‘ I_j ’ takes on the value ‘32’. The values for the abstract weights and the reliabilities remain unchanged:

$$RW_{i,j} = \frac{8 \cdot 16 \cdot 1 + 128}{32 \cdot 16 \cdot 0.5}$$

Although the balancing of the substantive principles has changed significantly for the limit of 300 mg nitrogen oxide per m³ waste gas, there is still a stalemate – because the formal principle is now considered in the numerator, not the denominator. This is to say that genuine epistemic discretion emerges – the constitutional court has to accept any limit between 150 mg and 300 mg nitrogen oxide per m³ waste gas.

This reconstruction explains why genuine epistemic discretion emerges – for the formal principle ‘ P_f ’ can appear in either the denominator or the numerator of the weight formula, always for the benefit of upholding the ‘decision to be reviewed’ as much as possible. The greater the epistemic uncertainty, the more weight is accorded to the formal principle ‘ P_f ’ and, in turn, the more limited is the review of balancing substantive principles.

D. Conclusion

I am perfectly aware that the reconstruction of limited review by means of the combination model and the formal principle ‘*P_f*’ raises a great many questions. To be sure, this is in my view the most promising model for explaining the characteristics of limited review of balancing fundamental rights. Without a convincing model for limited review, I do not see how we will be able to make progress with an eye to solving the doctrinal problems of demarcating the competences to balancing fundamental rights between and among the legislator and the constitutional court, ordinary courts and the constitutional court, and international courts and municipal organs and bodies.