

***Lüth*'s 50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing**

By *Jacco Bomhoff**

On January 15th 2008, it was precisely fifty years ago that the First Senate of the Federal Constitutional Court (FCC) (*Bundesverfassungsgericht*) handed down its seminal decision in the *Lüth* case.¹ The *Lüth* decision can be seen as a foundational moment for at least two transformative Post-War developments in constitutional thinking that continue to influence legal systems around the world.

The judgment, first of all, stands at the origin of the phenomenal spread in the acceptance of doctrines on the 'horizontal effect' of constitutional norms. With its principled and affirmative answer to "the fundamental question of whether Constitutional norms affect private law",² the FCC set in motion an expansion of the sphere of influence of rights that has rippled through countries as diverse as South Africa and Canada,³ and that has arguably culminated in last year's decision of the Court of Justice of the European Communities on the 'horizontal effect' of Community rules on freedom of movement.⁴

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¹ BVerfGE 7, 198. For characterizations of the decision as 'seminal' and as a 'linchpin of German constitutional law', see for example DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (2nd ed., 1997), 48 and 361; see also THOMAS HENNE & ARNE RIEDLINGER, *DAS LÜTH-URTEIL AUS (RECHTS-)HISTORISCHER SICHT* (2005).

² BVerfGE 7, 198, 204 (the decision is translated in part in KOMMERS (note 1), 361-369).

³ Constitutional Court of South Africa, *Du Plessis v. De Klerk*, 1996 (3) S.A. 850, citing *Lüth* several times, in particular in paras. 40 and 103; see also Supreme Court of Canada, *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. For a comparative analysis of doctrines of horizontal effect, see Mark Tushnet, *The issue of state action/horizontal effect in comparative constitutional law*, 1 I-CON 79 (2003).

⁴ See Case C-438/05, *International Transport Workers' Federation & Finnish Seamen's Union v. Viking Line ABP & Ou Viking Line Eesti*, decision of 11 December 2007 (not yet published). The Opinion of Advocate General Poiares Maduro in the case refers explicitly to *Lüth* (in its footnote 38). [Editors' note: see the case commentary by Norbert Reich - in this issue]

Secondly, and, if possible, even more importantly, the *Lüth* decision can be regarded as the foundation of what has come to be called the 'Postwar Paradigm' of constitutional rights adjudication.⁵ With *Lüth* – and with the *Apotheken*⁶ decision of a few months later – a movement began on the part of increasing numbers of courts around the world to adopt *the language of judicial balancing* to justify their decisions on constitutional rights. The literature on the German model of rights adjudication – the model of 'balancing rights and duties', as in Donald Kommers's recent description –,⁷ and on the 'Postwar paradigm' generally, is immense and extraordinarily rich. *Lüth's* 50th anniversary, hopefully, should offer at least some justification for briefly reflecting, from a comparative perspective, upon the originality of a vision of rights adjudication that will undoubtedly continue to inspire judges and scholars for decades to come.

The originality of *Lüth's* balancing language can probably best be framed through juxtaposition with the legal system that dominated thinking about rights adjudication in the early Post-War years: that of the United States. Although the American Bill of Rights obviously is much older than the German Basic Law, fundamental rights adjudication by the US Supreme Court, in particular with regard to the right to freedom of expression at issue in *Lüth*, had really only been going on at most for a few decades by 1958. Interestingly, in its adjudication on freedom of expression, the Supreme Court began to use balancing language virtually contemporaneously with the FCC.⁸ Although the American court invoked the same weighing metaphor that was so dominant in *Lüth*, its balancing discourse, from the very outset, looked very different, and was seen very differently by contemporary commentators. Open and explicit judicial weighing was, in the US, viewed with great suspicion from its first uses onwards. Commentators and dissenting judges argued fiercely either that the court was balancing important

⁵ Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* (Sujit Choudhry ed., 2006).

⁶ BVerfGE 7, 377 (*Apotheken*).

⁷ Donald P. Kommers, *Germany: Balancing Rights and Duties*, in *INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY* (Jeffrey Goldsworthy ed., 2006).

⁸ See e.g. *Dennis v. United States*, 341 U.S. 494 (1951), concurring opinion by Frankfurter J; *Barenblatt v. United States*, 360 U.S. 109 (1959); and *Konigsberg v. State Bar*, 366 U.S. 36 (1961). For one of the earliest analyses of 'balancing' in freedom of expression cases at the Supreme Court, see Laurent B. Frantz, *The First Amendment in the Balance*, 71 *YALE LAW JOURNAL* 1424 (1962).

rights 'away', or that balancing meant undue judicial activism.⁹ From the American perspective, as described for example in Duncan Kennedy's critical analysis, judicial balancing was and is seen as necessarily *ad hoc*, policy-oriented rather than law-focused, as well as rationally weak and under a heavy cloud of suspicion of ideological bias.¹⁰ Balancing should, therefore, be tightly delimited to narrow questions or areas of law and, in so far as possible, constrained and structured in terms of an array of tailored 'balancing tests'.¹¹ The result of this effort is reflected in Louis Henkin's statement that balancing as "an overarching principle of constitutional construction has never been Supreme Court doctrine".¹²

This perspective on balancing has not only determined American evaluations of their own practices, but has also come to dominate their views on balancing elsewhere; for example, in Germany. An illustration of this influence can be seen in Professor Frederick Schauer's highly interesting and recent comparative analysis of freedom of expression adjudication in Europe and the US.¹³ Professor Schauer writes: "In theory, it remains possible that freedom of expression adjudication in Canada, in Europe and in other countries other than the United States will remain, in Q'adi-like fashion, continuously open-ended and continuously case- and context-specific. But this possibility is highly remote, and were it to occur it would constitute a challenge not only to American free speech development, but to all we know about the growth and rigidification of the common law generally".¹⁴

Taken together, what these characterizations suggest is that mainstream U.S. legal thinking has: (a) given up on any kind of hope that judicial balancing could be, at least to some degree, formally rational in the Weberian sense, (b) that balancing should therefore be evaluated in terms of substantive or goal-oriented rationality,

⁹ For an overview of these debates, see John Hart Ely, *Flag Desecration: A Case Study in the roles of Categorization and Balancing in First Amendment Analysis*, 88 HARVARD LAW REVIEW 1482 (1975).

¹⁰ DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* 99 and 147 (1997).

¹¹ On the formalizing importance of 'balancing tests', see MITCHEL LASSER, *JUDICIAL DELIBERATIONS* 78 (2004).

¹² Louis Henkin, *Infallibility under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1024 (1978)

¹³ Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, in EUROPEAN AND U.S. CONSTITUTIONALISM (Georg Nolte ed., 2005).

¹⁴ *Id.*, 59.

and, again therefore, in terms of institutional legitimacy, and (c) that balancing, as measured on these standards, risks falling short in significant ways.¹⁵

Read against this admittedly brief and heavily simplified parallel American story of balancing language in the late 1950's and early 1960's, the peculiarity of the FCC's conception of balancing in *Lüth* and its progeny becomes clear. *Lüth*, in this view, becomes the embodiment of the European legal culture's will to believe that a formal, legal conception of the judicial weighing of interests or values is possible.¹⁶ Balancing, in this German or Continental view, does not have to be about policy choices, compromises or *ad hocery*, but can be about interpreting constitutional rights within a pyramidal, 'objective' system of values.¹⁷ Balancing is not a discretion or an option; it can be a necessity, a constitutional obligation.¹⁸ Balancing may very well not 'rigidify' in the way American adjudication has according to Schauer, because it already is *highly formal in other ways*. And balancing does not need to be associated with ideology in the same way as Duncan Kennedy describes it for the U.S., because, put (perhaps too) bluntly: judicial balancing in constitutional cases does not have to be politics, *it can be law*.

This, then, is perhaps one of the most fascinating aspects about the *Lüth* decision and its aftermath *from a comparative perspective*; that the German model of rights adjudication developed in 1958 signifies, simultaneously, both the foundation of a whole new 'paradigm of rights adjudication', and the lasting influence of much older, deeply rooted Continental ideas about law and judicial lawmaking. If this observation is at least partially true, it would mean that, as the *Lüth* decision and the German model of constitutional rights justly continue to inspire judges and scholars from around the world, readers would do well to keep in mind the very special meaning with which Germany's FCC imbued its revolutionary invocations of the Scales of Justice.¹⁹

¹⁵ Compare Duncan Kennedy and Marie-Claire Belleau, *La place de René Demogue dans la généalogie de la pensée juridique contemporaine*, 56 REVUE INTERDISCIPLINAIRE D'ETUDES JURIDIQUES 163, 180 (2006) for an indication that institutional considerations are much more important in U.S. discourses on balancing than in European views.

¹⁶ For the culmination of this formal conception of balancing, see ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2004).

¹⁷ Compare BVerfGE 7, 198, 205.

¹⁸ Compare *id.*, 210-211.

¹⁹ *Id.*, 212.