

Juliano Zaiden Benvindo

On the Limits of Constitutional Adjudication

Deconstructing Balancing
and Judicial Activism



Springer

On the Limits of Constitutional Adjudication

Juliano Zaiden Benvindo

On the Limits of Constitutional Adjudication

Deconstructing Balancing
and Judicial Activism

Professor Juliano Zaiden Benvindo
Faculty of Law
University of Brasília
Campus Darcy Ribeiro
Asa Norte
Faculdade de Direito
Brasília - DF
Brazil 70.919-970
juliano@unb.br

ISBN 978-3-642-11433-5 e-ISBN 978-3-642-11434-2
DOI 10.1007/978-3-642-11434-2
Springer Heidelberg Dordrecht London New York

Library of Congress Control Number: 2010931461

© Springer-Verlag Berlin Heidelberg 2010

This work is subject to copyright. All rights are reserved, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilm or in any other way, and storage in data banks. Duplication of this publication or parts thereof is permitted only under the provisions of the German Copyright Law of September 9, 1965, in its current version, and permission for use must always be obtained from Springer. Violations are liable to prosecution under the German Copyright Law.

The use of general descriptive names, registered names, trademarks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

Cover design: WMXDesign GmbH, Heidelberg, Germany

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

For Dani

Acknowledgements

This book is the result of the doctoral research originally entitled *Towards a Conception of Limited Rationality in Constitutional Adjudication: a Critical Response to Balancing in German and Brazilian Constitutional Cultures*, which was carried out at the Humboldt University of Berlin (*Humboldt-Universität zu Berlin*), Germany, and University of Brasília (*Universidade de Brasília*), Brazil.

I am especially grateful to Professor Dr. Bernhard Schlink, of the Humboldt University of Berlin, for supervising this research. Certainly, his precious remarks on its contents and systematization and the way he encouraged me to explore the relevant development of German constitutional culture were essential to this result. His concern for the need to develop the effective critique of the way constitutional courts make decisions was an inspiring message that accompanied me throughout the investigation. I would also like to express my gratitude to Professor Dr. Miroslav Milovic, of the University of Brasília, who also supervised this work, for his relevant suggestions, especially the dialogue between Jürgen Habermas's *intersubjectivity* and Jacques Derrida's *différance*.

This research would not have been possible without the support of Professor Dr. Menelick de Carvalho Netto, of the University of Brasília, especially because of his suggestion to investigate this connection between Brazil and Germany in decision-making, and the problems arising from the belief in the rationality of balancing. My special gratitude also extends to Professor Dr. Vera Karan de Chueri, of the Federal University of Paraná (*Universidade Federal do Paraná*), for her careful observations on the contents of this research; Professor Dr. Cristiano Paixão, of the University of Brasília, for encouraging me to enter into the fascinating world of constitutional history; Professor Dr. Dieter Grimm, of the Humboldt University of Berlin, for his precious lessons on the worldwide development of the principle of proportionality in his seminar; Professor Dr. George Galindo, of the University of Brasília, for all debates on the internationalization of legal studies; Professor Dr. Márcio Iorio Aranha, Professor Dr. Marcus Faro de Castro, Professor Dr. Ana Frazão, and Professor Dr. Loussia Musse Felix, of the University of Brasília, for

their support in the construction of the partnership between Humboldt University of Berlin and the University of Brasília regarding this research.

My gratitude extends to Professor Dr. Alexandre Araújo Costa, Professor Dr. Sven Peterke, Professor Dr. Gustavo Rabay Guerra, Dr. Leonardo Barbosa, Maria Cristina Peduzzi, Paulo Maia, Paulo Blair, Fábio Portela, Guilherme Scotti, Renato Bigliazzi, Lucas Aganetti, Juliana Martins, Tatiana Baena, Thiago Jabor Pinheiro (especially for the suggestion of the title of this book), Douglas Pinheiro, Gamela, Guilherme Cintra, João Telésforo Medeiro Filho, Ricardo Lourenço Filho, and all members of the research group *Sociedade, Tempo e Direito*, of the University of Brasília, whose debates were a fundamental source for many of the themes herein examined.

I would also like to thank Dorothea Münchberg, for her gentle support in all administrative issues at the Humboldt University of Berlin; Dr. Jakob Nolte, for his lessons on the principle of proportionality and for inviting me to participate in the invaluable debates with Professor Dr. Bernhard Schlink's and Professor Dr. Volker Neumann's staff at the Humboldt University of Berlin.

My friends Renata Camilo de Oliveira, Professor Dr. João Paulo Carvalho Lustosa da Costa, Brand Arenari, Carlos Cardonha, Fábio César Scherer, Roberto Muterle, Flaviano Isolan, Gevson Silva Andrade, Nike Bernhardt, Alexandre Hahn, Davi Tangerino, Daniela Sequeira, Ana Guimarães, Napoleon Molina, Miguel Montero-Baker, Felipe Muanis, Raphaella Luppi, thank you for all friendship and support during my stay in Berlin.

This research was supported by DAAD (German Academic Exchange Service), the Programme Alßan (the European Union Programme of High Level Scholarships for Latin America), and CAPES (*Coordenação de Aperfeiçoamento de Pessoal de Nível Superior*), to which I am very grateful. Particularly, my special thanks goes to Maria Salgado and Dr. Gabriele Althoff, of DAAD, for all kindness and helpfulness. My gratitude also extends to Konrad Redeker Foundation, for its support for the publication costs.

The dedicated and passionate support of my beloved wife, Daniela Azoubel, and the infinite presence of my family, Ângela, Francisco, Aldo, Érica, Nenzica, Regina, Zefinha, were vital to the result of this investigation, to whom I am eternally grateful.

Juliano Zaiden Benvindo

Contents

Part I German and Brazilian Constitutional Cultures: Constitutional Adjudication and Activism

1 An Approach to Decision-Making	3
1.1 Introduction	3
1.2 The Crucifix Case	4
1.3 The Cannabis Case	11
1.4 The Ellwanger Case	19
1.5 Final Words	29
2 Balancing Within the Context of German Constitutionalism: The <i>Bundesverfassungsgericht</i>'s Shift to Activism	31
2.1 Introduction	31
2.2 Balancing Within the Triadic Framework of the Principle of Proportionality: A Brief Introduction	39
2.3 The Bundesverfassungsgericht in the Postwar Crisis: The New Representative of the Legal and Social Order	48
2.4 The Bundesverfassungsgericht's Shift to Activism: From Subjective Rights to Objective Principles and the Consequences in Judicial Review	57
2.5 The Constitutional Scholarship Reaction Against the Bundesverfassungsgericht's Shift to Politics and the Irrationalism of Balancing	68
2.6 Final Words	80
3 Balancing Within the Context of Brazilian Constitutionalism: The <i>Supremo Tribunal Federal</i>'s Shift to Activism	83
3.1 Introduction	83
3.2 The Supremo Tribunal Federal in the Democratization Process: the Federal Constitution of 1988 and the Opening to Activism	88

3.3	Balancing in the Decisions of the Supremo Tribunal Federal: The Quest for Rationality in Decision-Making	109
3.4	Final Words	130

Part II The Debate on the Rationality of Balancing

4	The Aim to Rationalize Balancing Within the Context of Constitutional Courts' Activism	135
4.1	Introduction: The Quest for a Systematization and Rationalization of Balancing	135
4.2	Robert Alexy's Special Case Thesis (<i>Sonderfallthese</i>)	139
4.3	The Quest for the Rationality of Balancing: The Core of Robert Alexy's Theory of Constitutional Rights	143
4.4	Final Words	157
5	When <i>Différance</i> Comes to Light: Balancing Within the Context of Deconstruction	161
5.1	Introduction	161
5.2	<i>Différance</i> and the Political-Legal Realm of Deconstruction	166
5.2.1	Jacques Derrida and <i>Différance</i>	166
5.2.2	<i>Différance</i> and Constitutional Democracy: The Democracy to Come	174
5.2.3	The to Come in the Negotiation Between Constitutionalism and Democracy	182
5.2.4	<i>Différance</i> Within the Context of Decision-Making: The Negotiation Between Law and Justice and the First Insight into Legitimacy	186
5.3	Balancing Within the Context of <i>Différance</i>	194
5.3.1	Introduction	194
5.3.2	Balancing and the Logos of Correctness-Rationality	196
5.3.3	Balancing and the Logos of Legitimacy	218
5.4	Final Words	239
6	When Procedures Towards Mutual Understanding Come to Light: Balancing Within the Context of Proceduralism	243
6.1	Introduction	243
6.2	The Claim to Coherence in Robert Alexy's View: When Rights Lapse into General Practical Discourse	246
6.3	The Post-Metaphysical Response to Balancing as an Indispensable Instrument for Coherence: The Coherence and the Single Right Answer Within Democratic Procedures of Opinion – and Will Formation	250
6.3.1	Introduction	250

6.3.2 Klaus Günther's View: Coherence Through the Distinction Between Discourses of Justification and Discourses of Application	251
6.3.3 Ronald Dworkin's View: Integrity in Legal Reasoning and the Claim to the Single Right Answer as a Response to Coherence	265
6.3.4 Jürgen Habermas's View: Between Facts and Norms Within Democratic Procedures of Opinion – and Will Formation	279
6.4 The Metaphysics of Balancing from the Perspective of the Proceduralist Account	305
6.4.1 Introduction	305
6.4.2 The First Outcome: The Construction of an Axiological Content in the Structure of Principles	310
6.4.3 The Second and Third Outcomes: The Confusion between Discourses of Justification and Discourses of Application and the Loss of Protection of Minorities	315
6.4.4 The Fourth Outcome: The Relativization and Misunderstanding of the "Single Right Answer"	320
6.4.5 The Final Analysis: The Problem of Rationality in Alexy's Thinking	322
6.5 Final Words	326

Part III The Concept of Limited Rationality

7 Between <i>Différance</i> and Intersubjectivity: The Concept of Limited Rationality in Constitutional Democracy	333
7.1 Introduction	333
7.2 When Proceduralism and Deconstruction Are Placed Side by Side: The First Insight into the Limits of Reason	336
7.3 The Quest for Justice: A Dialogue Between Symmetry and Asymmetry?	342
7.3.1 Introduction	342
7.3.2 Is Really the Quest for Consensus Incompatible with Asymmetry? A Look Into Chantal Mouffe's "Agonist Model of Democracy"	345
7.3.3 The Internal Dialects Between Modern Equality and Individuality: The Symmetry and Asymmetry in Christoph Menke's Account	352
7.3.4 The Resolution as a Non-Resolution: The "Irresolvable But Productive Tension" Between <i>Différance</i> and Intersubjectivity in the Quest for Justice	358
7.4 Final Words	362

8 Between *Différance* and Intersubjectivity: The Concept of Limited Rationality in the Realm of Constitutional Adjudication 365

8.1 Introduction 365

8.2 The Concept of Limited Rationality in the Realm of Legal Adjudication: Intersubjectivity and *Différance* in a Complementary Fashion 367

8.3 The Concept of Limited Rationality In German and Brazilian Constitutional Realities 373

8.4 When the Concept of Limited Rationality Meets Constitutional Cases 385

8.4.1 Introduction 385

8.4.2 The Crucifix Case 386

8.4.3 The Cannabis Case 392

8.4.4 The Ellwanger Case 398

8.5 Final Words 404

Conclusion 407

Bibliography 413

Introduction

In the book *Comunidade da Diferença*, Miroslav Milovic suggested a dialogue between Jürgen Habermas's *intersubjectivity*, in the idea of a self-reflexive community, and Jacques Derrida's *différance*, as a sign of a "sensibility towards the 'different'."¹ Without achieving any final word,² though, this dialogue could point towards what he called a "*self-reflexive community of différance*."³ These words, inherited from two complex and rather untranslatable philosophical thinkings, came out as a motivation for this research. The proposal was how to think of this idea of a "self-reflexive community of *différance*" in a particular relevant theme from which constitutional democracies have been challenged in their very basis. On the other hand, Bernhard Schlink, in his text *German Constitutional Culture in Transition*, after having criticized German constitutional scholarship and its worship of the German Federal Constitutional Court (*Bundesverfassungsgericht*), put forward the need to establish a "significant critical potential,"⁴ one that could offer a critical investigation of the transformations in the interpretation and application of basic rights in German reality.

There were, therefore, two central ideas that flourished from these two suggestions: a theoretical and philosophical approach founded on this perspective of a "self-reflexive community of *différance*," and the direct interest in the transformations German legal dogmatics has been suffering. The investigation of the German historical context of an emerging constitutional court with a movement towards activism, one that, more and more, transformed this court into a "forum for the treatment of social and political problems,"⁵ and the consequent attempt to provide

¹Miroslav Milovic, *Comunidade da Diferença* (Ijuí, RS; Rio de Janeiro: Unijuí; Relume Dumará, 2004), 131, translation mine.

²*Ibid.*, 132.

³*Ibid.*, 132, translation mine.

⁴Bernhard Schlink, "German Constitutional Culture in Transition," *Cardozo Law Review* 14 (1993): 735.

⁵*Ibid.*, 729.

a rationalization of the way constitutional courts decide cases, made, finally, the link between the philosophical and the dogmatic suggestions. The historical background of German constitutional culture, the dualism between law and politics in the realm of the *Bundesverfassungsgericht*, the attempt to rationalize decision-making with these characteristics through the emphasis on balancing, as if it were “not an alternative to argumentation but an indispensable form of rational practical discourse,”⁶ all seemed very interesting and relevant themes for this research. Indeed, by examining the empirical context of German constitutionalism and the recent scholarly developments, it was possible to verify that one relevant discussion that should be carried out, within the characteristics of a constitutional court assuming the authority to resolve the present and future problems of German society, in a typical political fashion, was the question of the rationality of decision-making. After all, by studying the question of rationality, in this dualism between law and politics in constitutional adjudication, the debates on rightness and legitimacy of constitutional decisions appear, showing thereby the real challenge of this movement for the comprehension of the principle of separation of powers, the quest for keeping consistent the system of rights, and, lastly, the concern for otherness, all of them premises of a constitutional court committed to constitutional democracy.

Yet, these suggestions became even more interesting and challenging when we extended the analysis to other constitutional culture, in a comparative study in which many associations, empirically and methodologically, could be established. The examination of Brazilian constitutionalism and the recent developments of the Brazilian Federal Supreme Court (*Supremo Tribunal Federal*) allowed concluding that possible interconnections exist between Germany and Brazil and, chiefly, in the way the *Supremo Tribunal Federal* decides cases, both in the comprehension of basic rights, as if they were objective principles of a total legal order,⁷ and in the methodologies deployed to account for this political character it has gradually assumed. In this respect, the question of the rationality of balancing, as well as its reverberations through the themes of rightness and legitimacy of decision-making, also raises significant issues for critical investigation. Moreover, especially when the Chief Justice of this court said that “the constitutional court exists to make the most rational decisions,”⁸ it seemed that the question of rationality in decision-making, and particularly the rationality in the middle of the growing deployment of balancing as a justificatory methodology for this new Brazilian constitutionalism, was not only an important matter for this research but also a necessary and actual discussion.

⁶Robert Alexy, “Constitutional Rights, Balancing, and Rationality,” *Ratio Juris* 16, no. 2 (June 2003): 131.

⁷See Schlink, “German Constitutional Culture in Transition,” 711–736.

⁸Gilmar Mendes, interview by Izabela Torres, “Entrevista - Gilmar Mendes,” *Correio Braziliense*, Brasília (August 17, 2008), translation mine.