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Rights

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# *Lüth* and the ‘Objective System of Values’: From ‘Limited Government’ towards an Autonomy-based Conception of Constitutional Rights

Kai Möller \*

**Abstract:** In its *Lüth* judgment of 1958, the German Federal Constitutional Court famously claimed that the German Basic Law erects an ‘objective system of values’ (*objektive Wertordnung*) in its section on rights. This paper shows that *Lüth* was the birth hour of the now globally dominant conception of constitutional rights, according to which rights are not primarily concerned with the limitation of the power of the state (or ‘limited government’) but rather with the adequate protection of the right-holder’s personal autonomy. As an exception to this trend, the paper considers and discusses the U.S. Supreme Court’s judgment in *DeShaney v. Winnebago County of Social Services*. It concludes by spelling out some of the implications of the commitment to an autonomy-based conception of rights and outlines how these have been addressed in the theoretical literature in the decades since *Lüth* was decided, including in the theories of rights as principles (Robert Alexy), judicial review as Socratic contestation and as giving effect to the fundamental right to justification (Mattias Kumm), the culture of justification (Moshe Cohen-Eliya and Iddo Porat, among others), and the global model of constitutional rights (in my own work).

**Key words:** constitutional rights, limited government, autonomy, rights as principles, Socratic contestation, right to justification, culture of justification, global model

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## INTRODUCTION

The German Federal Constitutional Court's *Lüth* judgment<sup>1</sup> of 1958 is famous for its claim that the basic rights of the Basic Law erect an 'objective system of values' (*objektive Wertordnung*) and for its acknowledgement of horizontal effect of constitutional rights. In this paper, I show that *Lüth* was the birth hour of the now globally dominant conception of constitutional rights, according to which rights are not primarily concerned with the limitation of the power of the state (or 'limited government') but rather with the adequate protection of the right-holder's personal autonomy, that is, the control a person has over his or her life (section II.). As an anti-canonical judgment, I introduce the US Supreme Court's judgment in *DeShaney v. Winnebago County of Social Services*, which places U.S. rights jurisprudence in a stark contrast to that of large parts of the liberal democratic world (III.). The final section (IV.) spells out some of the implications of the commitment to an autonomy-based conception of rights and outlines how these have been addressed in the theoretical literature in the decades since *Lüth* was decided, including in the theories of rights as principles (Robert Alexy), judicial review as Socratic contestation and as giving effect to the fundamental right to justification (Mattias Kumm), the culture of justification (Moshe Cohen-Eliya and Iddo Porat, among others), and the global model of constitutional rights (in my own work).

### I. LÜTH

In 1950, Erich Lüth called for a boycott of the movie 'Unsterbliche Geliebte' ('Immortal Beloved') by director Veit Harlan, on the ground of the latter's involvement with the Nazi regime (Harlan was the author and director of the 1940 movie 'Jud Süß' ('Süß the Jew'), an antisemitic propaganda movie commissioned by the Nazi government). The companies that produced and distributed the new movie applied for and were granted an injunction against Lüth, based on §826 of the German Civil Code (Bürgerliches Gesetzbuch), which prohibited him from repeating his call for a boycott. Lüth challenged this judgment before, ultimately, the German Federal Constitutional Court (FCC), arguing that it violated his constitutional right to freedom of expression (or 'freedom of opinion' in the language of the Basic Law). The main legal questions were whether Lüth's right to freedom of expression was applicable in the context of a private law dispute and if so, whether it had been violated by the lower court's judgment.

The FCC's judgment of 1958 is significant in three regards. First, it held that the Basic Law set up an 'objective system of values'. Second, it specified the

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<sup>1</sup> BVerfGE 7, 198 (*Lüth*). An English translation of the most significant parts of the judgment is available at <https://germanlawarchive.iuscomp.org/?p=51>. The quotes from *Lüth* in this paper are from this translation; references to paragraphs of the judgment refer to the German original.

implications of this in the context of the applicability of the basic rights in a private law context, the so-called 'Drittwirkung' or horizontal effect of rights. Third, it set out certain basic doctrines regarding the right to freedom of expression. What made the judgment a rightful part of a *global* canon on human rights are the claims about the objective system of values and horizontal effect.

#### 1. THE BASIC LAW AS 'ERECT[ING] AN OBJECTIVE SYSTEM OF VALUES'

The FCC began the judgment with some general reflections on the Basic Law. It first repeated the conventional idea that constitutional rights protect the individual from the state:

There is no doubt that the main purpose of the basic rights is to protect the individual's sphere of freedom against encroachment by public power: they are the citizens' bulwark against the state.<sup>2</sup>

This statement is followed, in the next paragraph, by a qualification, and this is the best known passage from the judgment:

But far from being a value-free system, the Constitution erects an objective system of values in its section on basic rights. This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.<sup>3</sup>

As I will explain in the next section, the terminology that the Court uses here is confusing and unfortunate. But even a cursory glance tells us that the Court takes the view that constitutional rights do more than protect people against the state, and that the analytical move which makes this possible is to regard them as being part of a 'system of values'.

#### 2. HORIZONTAL EFFECT

The Court goes on to explain how the impact of the constitution on private law comes about. It cites the 'extreme'<sup>4</sup> views on this issue proposed in the scholarly literature, according to which rights either have no, or alternatively full and direct, applicability in private law, and then chooses what presents itself as a middle route (although it produces the same results as direct applicability), an approach that has

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<sup>2</sup> Ibid., para. 24.

<sup>3</sup> Ibid., para. 25.

<sup>4</sup> Ibid., para. 23.

become known as ‘indirect horizontal effect’ (*mittelbare Drittwirkung*): there is no direct applicability of constitutional rights in private law, but private law has to be interpreted or construed in the spirit of the constitution.<sup>5</sup> In particular, German private law contains many so-called ‘general clauses’ (*Generalklauseln*) which guide the interpretation of private law. These general clauses, the FCC claims, should be regarded as ‘points of entry’<sup>6</sup> (*Einbruchstellen*) for basic rights into private law. Note that the Court does not simply say that rights must be ‘taken into account’, implying that if in a given case private law cannot adequately be interpreted in line with the requirements of the constitution, then so be it. On the contrary, the court is clear in the quote above that ‘no rule of private law may conflict with [the objective order of values erected by the Constitution]’.<sup>7</sup> Correspondingly, a judgement which fails to observe the ‘modifications of the private law’<sup>8</sup> which result from rights violates the constitution and can be challenged by way of a constitutional complaint (*Verfassungsbeschwerde*).<sup>9</sup>

## II. THE ‘OBJECTIVE SYSTEM OF VALUES’

*Liith* is famous for being the first judgment that acknowledges the existence of horizontal effect and for its claim that the constitution ‘erects an objective system of values’. What this ‘objective system of values’ means is far from clear, though, and the terminology is unfortunate. Let us consider a few possibilities.

### 1. VALUES

The FCC contrasts the ‘objective system of values’ with ‘a value-free system’. From the context it is clear that this ‘value-free system’ would be one which regards rights as protecting ‘the individual’s sphere of freedom against the encroachment of public power’ and therefore as ‘the citizen’s bulwark against the state’. But this contrast between value-free and value-bound does not work, for two reasons. First, given that constitutional rights are essentially human rights turned into positive law, they are of course a matter of values, and as such creatures of morality. Thus, there cannot be a conception of constitutional rights that is ‘value free’. Second, the idea that the FCC mentions as an example of a ‘value free system’, namely the protection of the individual from the government, too, is clearly value-bound in that it claims

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<sup>5</sup> While this approach presents itself as a middle route, the significance between direct and indirect horizontal effect is much smaller than commonly assumed; see Mattias Kumm and Victor Ferreres Comella, ‘What is so Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Effect’, in Sajó and Uitz (eds.), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven, 2005).

<sup>6</sup> *Liith* (above n 1), para. 27.

<sup>7</sup> *Ibid.*, para. 25.

<sup>8</sup> *Ibid.*, para. 28.

<sup>9</sup> *Ibid.*, para. 28.

that it is morally important to give people some protection from their governments. So we cannot make sense of the FCC's claim by contrasting a 'value-free' and a 'value-based' conception of rights. Rather, the 'objective system of values' approach pursues *different* values than the 'citizens' bulwark against the state' approach. So the question is not whether this model is value-bound but what its values are.

## 2. SUBJECTIVE AND OBJECTIVE

The 'system of values' that the Basic Law erects is, in the view of the FCC, 'objective'. German commentators often insist on the significance of a distinction between 'subjective' rights and 'objective' law (possibly because in German, the term 'Recht' refers to both 'law' and 'right').<sup>10</sup> Now, obviously 'rights' and 'law' are two different things. However, in the view of the FCC, the 'objective' system of values' is not only 'objective' law but creates 'subjective' rights as well. The Court makes it perfectly clear in *Lüth* that a private law judgment which fails to give effect to basic rights is not only 'objectively' wrong but also, 'subjectively', violates basic rights and can accordingly be challenged by way of constitutional complaint. Thus, the distinction between subjective and objective is a doctrinal technicality without corresponding substantive relevance and in any case cannot explain why the *Lüth* judgment should be part of a global canon.

## 3. THE TURN FROM LIMITED GOVERNMENT TO AN AUTONOMY-BASED CONCEPTION OF RIGHTS

The real significance of the idea of the objective system of values lies in its rejection of the once uncontroversial idea that the point of rights is to protect us from our governments, and its corresponding endorsement of the idea that the point of rights is to protect personal autonomy. Thus, rights are not about *disabling* (the government) but about *enabling* citizens to live their lives autonomously.<sup>11</sup>

The distinction between negative and positive freedom helps illuminate this idea. Negative freedom, or 'freedom from', regards freedom as a matter of being 'left alone': a person is free if nobody interferes with her. Positive freedom, or 'freedom to', is about being in control of one's life: a person is free to the extent that she is able to give her life meaning and direction. Positive freedom is often referred to as personal autonomy.<sup>12</sup>

The conventional conception of rights that the FCC rejects in *Lüth* is about negative freedom from the government, or 'limited government'. Under this conception, rights entitle an individual to be 'left alone' by the government in certain

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<sup>10</sup> See, for example, Oliver Lepsius, 'The Standard-Setting Power', in Matthias Jestaedt, Oliver Lepsius, Christoph Möllers, and Christoph Schönberger, *The German Federal Constitutional Court: The Court Without Limits*, translated by Jeff Seitzer (Oxford University Press, 2020), ch. 3, 84-89.

<sup>11</sup> Kai Möller, 'Two Conceptions of Positive Liberty: Towards an Autonomy-Based Theory of Constitutional Rights', 29 (2009) *Oxford Journal of Legal Studies* 757, 758.

<sup>12</sup> Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012), 29-30.

areas. For example, the government must not, or not unjustifiably, interfere with the individual's life, liberty, physical integrity, expression, religious practice, and so on. The underlying moral concern of this approach to rights appears to be the view that the government is the greatest threat to freedom and that therefore its power has to be limited. Note that the limited government conception *cannot* be based on the view that the areas of freedom that it recognises as worthy of protection are valuable for the individual. If the value of these areas for individuals was the primary reason for protecting them, then these important values would have to be protected not only against state interference but also against private interference, and in fact they would have to be protected not only against interference, but individuals' ability to enjoy them would have to be actively promoted. This, however, is precisely what the limited government conception cannot achieve and why the FCC is so keen to abandon or at least supplement it with its theory of rights as creating a system of values.

The 'objective system of values' embraces the state's duty to protect people not only from the state but also from other private individuals, as well as the state's duty to actively promote the values underlying rights. Now we can make sense of the claim that the basic rights erect a system of 'values'. What is valuable is 'the freedom of the individual to develop in society'<sup>13</sup>. The focus is not on limiting the government, but on creating the conditions of individual development. This is a commitment to personal autonomy, which has a number of doctrinal implications.

First, if the constitution is at its core about a commitment to creating the conditions of individual development or personal autonomy, then it follows naturally that horizontal effect of rights must be acknowledged: the areas of autonomy that are important for individual development can be threatened not only by the state but also by private actors relying on private law.<sup>14</sup> *Lüth* is a good example: Lüth's freedom to develop in society was threatened not only by a government potentially censoring his speech, but also by a private company that relied on private law to stop him from expressing himself.

Second, a commitment to the idea of rights as based on personal autonomy necessitates not only horizontal effect but also *positive obligations* (as they are called, for example, in the jurisprudence of the European Court of Human Rights (ECtHR)) or protective duties (as they are called in German constitutional law).<sup>15</sup> The idea is that the state is under an obligation to take active steps to protect people from threats to the sphere of autonomy protected by constitutional rights. Thus, states are under an obligation to protect people from the criminal acts of others that threaten, for example, their life or physical integrity.<sup>16</sup> They have to protect a person's picture against abuse by others<sup>17</sup> and demonstrations from counter-

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<sup>13</sup> *Lüth* (above n 1), para. 25.

<sup>14</sup> Möller (above n 12), 35-37.

<sup>15</sup> Möller (above n 12), 37-38.

<sup>16</sup> See, for example, *Osman v. United Kingdom*, (2009) 29 EHRR 245.

<sup>17</sup> *Von Hannover v. Germany*, (2005) 40 EHRR 1, para. 115.

demonstrations.<sup>18</sup> It is interesting to note in this context that the ECtHR often does not even distinguish whether a case involves negative or positive obligations. Take, for example, the case of *Hatton v. United Kingdom*,<sup>19</sup> which was about night flights at Heathrow airport which created noise pollution and affected some residents' sleep. The case could be construed as being about negative obligations (the UK government had given permission to conduct night flights to the private company that operated the airport) or as being about positive obligations (the UK had failed to prevent the private company that operated the airport from allowing night flights). The ECtHR simply remarked that '[w]hether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under para. 1 of Art. 8 or in terms of an interference by a public authority to be justified in accordance with para. 2, the applicable principles are broadly similar.'<sup>20</sup> This indicates that the view that rights protect personal autonomy (as opposed to limiting the government) is firmly entrenched in European, indeed global, legal thought today: if rights are about autonomy, then indeed, the distinction between positive and negative obligations is a mere technicality without substantive implications for the outcome of the case.

Finally, regarding rights as based on personal autonomy also creates the necessity for the acknowledgement of *social rights*: these rights protect the *preconditions* of autonomy.<sup>21</sup> Obviously, a person who has no access to food, drink, housing, healthcare, or education cannot, or only with much more difficulty and less likelihood of success, live his or her life autonomously. Thus, the increasing acknowledgement of social rights over the last decades is not an isolated occurrence but is indeed required by the turn from negative to positive freedom that *Lüth* initiated.

To conclude this section: the 'objective system of values' is best understood as pointing to a conception of fundamental rights that regards them as based on personal autonomy – the 'freedom of the human being to develop in society', as opposed to the limitation of the power of the state. This starting point inevitably leads to the acknowledgment of horizontal effect (because private people relying on private law can also affect the right-holder's autonomy), positive obligations (because autonomy can also be threatened by private people or even by natural occurrences such as pandemics), and social rights (which protect preconditions of autonomy). In order to assess the appeal of this idea, this paper will now turn to the discussion of an anti-core case, the U.S. Supreme Court case of *DeShaney v. Winnebago County of Social Services*, before returning to the idea of the objective order of values in section IV, where the implications of the shift initiated by *Lüth* will be considered.

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<sup>18</sup> *Plattform 'Ärzte für das Leben' v. Austria*, (1991) 13 EHRR 204, para. 31.

<sup>19</sup> *Hatton v. United Kingdom*, (2003) 37 EHRR 28.

<sup>20</sup> *Ibid.*, para. 119.

<sup>21</sup> Möller (above n 12), 38.



### III. AN ANTI-CANONICAL CASE: *DESHANEY v. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES*<sup>22</sup>

Joshua DeShaney was a little boy who was being physically abused by his father Randy DeShaney. The Winnebago Department of Social Services (DSS) was involved with the family at several stages over a time period of roughly two years, when Joshua was between two and four years old. The case worker did not take action when she was informed on several occasions that Joshua was treated for suspicious injuries at the emergency room, nor when she made monthly visits to the family home and noticed suspicious injuries and other worrying facts, such as that Joshua had not been enrolled in school. She merely ‘dutifully recorded these incidents in her files, along with her continuing suspicions that someone in the DeShaney household was physically abusing Joshua, but she did nothing more.’<sup>23</sup> Eventually his father beat Joshua so badly that he fell into a coma, and while his life was saved at the time, he suffered permanent brain damage and it was predicted that he would spend the rest of his life in an institution ‘for the profoundly retarded’<sup>24</sup> (in fact he was adopted later and died in 2015 at the age of 36).

Joshua and his mother sued Winnebago County, the DSS and various individual employees, arguing that their failure to protect Joshua from his father’s violence had violated his constitutional right under the Due Process Clause of the 14<sup>th</sup> amendment of the US constitution, which states that ‘[n]o State shall ... deprive any person of life, liberty, or property, without due process of law.’ Under the precedents, it was clear that this clause protected not only a procedural right but also included a substantive guarantee of life, liberty, and property. The question before the Court was whether the Due Process Clause could be violated by a failure on the part of the state to protect people. The Court answered in the negative. Rehnquist CJ provided two reasons, one textual and one historical. Regarding the text of the 14<sup>th</sup> amendment, he stated that ‘[t]he Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.’<sup>25</sup> And regarding history he argued:

Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government “from abusing [its] power, or employing it as an instrument of oppression,” [citation omitted] ... Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.<sup>26</sup>

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<sup>22</sup> *DeShaney v. Winnebago County Department of Social Services*, (1989) 489 U.S. 189.

<sup>23</sup> *Ibid.*, 193 (Rehnquist CJ).

<sup>24</sup> *Ibid.*, 193.

<sup>25</sup> *Ibid.*, 195.

<sup>26</sup> *Ibid.*, 196.

So in this case, the U.S. Supreme Court rejects the idea of a general doctrine of positive obligations, and its main reason is that the point of the Due Process Clause is to prevent government from abusing its power and to protect people from the state. This contrasts with the German FCC's view in *Lüth*, where the court first pointed out, similar in spirit to the U.S. Supreme Court, that the purpose of the constitution was 'to protect the individual's sphere of freedom against encroachment by public power: they are the citizens' bulwark against the state', but then went on to stress that in addition, the constitution erected an objective system of values. Such a 'system' or, as I would say, autonomy-based conception of rights, is absent in US constitutional law, which relies instead on the idea of limited government.

It should be noted that this point is uncontroversial among the justices deciding *DeShaney*. While there were three dissenting justices who would have ruled in Joshua's favour, none of them proposed a general duty of positive obligations. Rather, they claimed that the existence of Wisconsin's child protection programme constituted an active intervention by the state because it relieved other citizens of their obligation to do anything further about suspected child abuse than report it to the DSS.<sup>27</sup> This is an interesting argument; however, it stops short of embracing anything resembling an 'objective order of values' and construes the case as being about state activity, not state passivity. Furthermore, it would, if it had prevailed, set a questionable incentive for states to discontinue their respective child protection programmes in order to avoid liability: precisely by virtue of not creating a positive obligation as such, it would have remained possible for states to move out of the area of child protection altogether, whereas a general positive obligation would have required states to take active steps to protect children from abuse.

*DeShaney* illustrates in stark terms that the conception of rights and freedom that we choose *matters*. Whether rights are primarily or exclusively concerned with the limitation of the power of the state or whether, alternatively, they should be understood as being based on the value of personal autonomy is not merely an interesting but ultimately practically irrelevant question to be discussed over drinks in pubs or as a theoretical puzzle in academic ivory towers. Rather, it has consequences. The challenge that proponents of the U.S. model or substantive critics of the 'objective order of values' will have to overcome is to provide a convincing or at least plausible answer to the following question: given that human and constitutional rights include a promise of freedom to every person, how can it be consistent with this promise of freedom for a child to be beaten into a coma by his father while the state knows what is going on but does not intervene? I do not mean this primarily as an appeal to sympathy and compassion that Blackmun J demanded in his well-known dissent ('Poor Joshua!').<sup>28</sup> Rather, I am stating an analytical and moral question about the constitutional promise of freedom.

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<sup>27</sup> *Ibid.*, 209-210 (Brennan J, dissenting).

<sup>28</sup> *Ibid.*, 213 (Blackmun J, dissenting).

There are a number of potential answers to this question, although none of them is fully convincing. First, one could turn to history and claim that as a matter of history, the constitutional conception of freedom protects only negative freedom from the government. But leaving aside the fact that in the last six decades, the constitutional history of much of the Western world has by and large followed the path set out by *Lüth*, history alone cannot determine moral truth, and it is possible that this particular aspect of history turns out to be morally indefensible. Second, one might argue that governments remain the greatest threat to freedom and that any threats that emanate from non-governmental actors exist and occasionally materialise (as they did for Joshua DeShaney) can be ignored from a constitutional perspective in order to focus on the bigger and more important problem of the governmental abuse of power. However, one problem with this view is that constitutional protection is not a scarce resource in this regard. There is no reason why it should not be possible to effectively protect people from their governments *and also* to ‘protect them from each other’ (in Rehnquist’s terminology<sup>29</sup>). Third, it could be argued that regarding rights as based on autonomy interests inevitably leads to a great expansion of the scope of judicial review and thus will have ripple effects. Perhaps the effect that would be most at odds with how US constitutional law is currently conceptualised is that taking seriously the idea that rights are about personal autonomy is the first step on a path that leads to the acknowledgement of social rights. Another change that would be necessitated by the adoption of an autonomy-based conception of rights might be that the use of balancing and proportionality, endorsed by much of the liberal democratic world but resisted by the U.S., would become inevitable. All these considerations ought to be taken seriously; however, they offer no principled argument against the autonomy-based conception which, as history has shown, is not only dominant in liberal democracies around the world but also clearly workable in practice.

#### IV. FURTHER DEVELOPMENTS

##### 1. *ELFES*: A GENERAL RIGHT TO FREEDOM OF ACTION

My claim is that *Lüth* is the birth hour of the approach to constitutional rights that is widely endorsed until today. In order to demonstrate this point, I have to add a further ‘ingredient’ to my story: rights inflation. In Germany, this was brought about by the FCC’s *Elfes* judgment in 1957,<sup>30</sup> just one year before *Lüth* was decided. That case is well known for the FCC’s claim that Article 2(1) of the Basic Law, which protects every person’s right to freely develop his or her personality, should be interpreted broadly, as a general right to freedom of action. Thus, even activities

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<sup>29</sup> Ibid., 196 (Rehnquist CJ).

<sup>30</sup> BVerfGE 6, 32 (*Elfes*).

such as feeding pigeons in a public park<sup>31</sup> or horse-riding in a forest<sup>32</sup> are protected by constitutional rights, meaning that they can be restricted only if the restriction is proportionate.

*Elfes* is a famous judgment but perhaps not part of a *global* canon; it has received less attention internationally than *Lüth*. But while other courts have not engaged with or adopted *Elfes*' reasoning, in substance the move towards a broad scope of rights is a global phenomenon. Courts have often struggled with the task of delineating those interests that ought to be protected by constitutional rights from those which ought not, and frequently they have erred on the side of including them as protected.<sup>33</sup> For example, the ECtHR takes an expansive approach to the scope of Article 8 (the right to respect for private life) and has stated that the right not to be 'directly and seriously affected by noise and other pollution' is protected by it.<sup>34</sup> The consequence of being generous with regard to the scope of rights does not imply, of course, that applicants will win their cases more often. Rather, it means that any interference with the *prima facie* right will trigger the *duty of justification*. The broad scope of rights is therefore an indicator of the shift towards a 'culture of justification',<sup>35</sup> which claims that *all* acts of the state which place a burden on a person – and not just those interfering with one of a number of narrowly defined rights – ought to be substantively justifiable and that it is ultimately the role of the highest court applying the bill of rights to assess their justifiability.

## 2. LÜTH AND CONTEMPORARY RIGHTS THEORY

Taking *Lüth* and *Elfes* together, we can see more clearly the implications of this new approach for rights adjudication. Both cases led to an expansion of the scope of judicial review: *Elfes* held that freedom has to be understood in the broadest possible sense (as being about the freedom to do as one pleases) and *Lüth*'s implications are that this freedom operates against the state and affects the relationship between private persons, and that additionally it creates positive obligations on the state to protect it. Constitutional rights are therefore in play and the duty of justification is triggered whenever an act (or omission) by the state has implications for an individual's ability to live his life autonomously. Consequently, almost all acts (and omissions) by the state will affect someone's constitutional rights, trigger the duty of justification, and be reviewable by the constitutional or supreme court applying the bill of rights.

This raises the risk of juristocracy: if more or less all policies and acts are reviewable, what's left for the democratic (majoritarian) institutions to decide? The answer to this question has to do with the intensity of review and more specifically

<sup>31</sup> BVerfGE 54, 143 (*Pigeon Feeding*).

<sup>32</sup> BVerfGE 80, 137 (*Riding in the Woods*).

<sup>33</sup> Möller (above n 12), 3-5.

<sup>34</sup> *Hatton v. United Kingdom* (above n 19), para. 96.

<sup>35</sup> On the culture of justification, see Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013), ch. 6; Kai Möller, 'Justifying the Culture of Justification', 17 (2019) *International Journal of Constitutional Law* 1078.

the distinction between reasonableness and correctness. Under the culture of justification, an act by the state which requires justification need not be ‘correct’ (the ‘one right answer’, the ‘best possible policy’) to survive judicial scrutiny. Rather, it must merely be one of a range of reasonable answers.<sup>36</sup> The proportionality test that is used around the world to determine whether the act in question is justifiable is now widely conceptualised as a test of reasonableness.<sup>37</sup> Accordingly, constitutional rights entitle every person to be treated in a way that is reasonably justifiable.<sup>38</sup>

The conception of rights that results has been given different names in the literature: Robert Alexy’s theory of rights is known under the label of ‘rights as principles’;<sup>39</sup> Mattias Kumm has proposed his theory of judicial review as ‘Socratic contestation’ and also referred to it as institutionalising a ‘right to justification’.<sup>40</sup> Others, including Moshe Cohen-Eliya and Iddo Porat, have referred to it as the ‘culture of justification’.<sup>41</sup> In my work, I have used the term ‘the global model of constitutional rights’.<sup>42</sup> These theorists and theories share largely the same moral commitments with regard to rights but highlight different facets. Alexy’s theory of rights as principles stresses their non-conclusive nature and the centrality of proportionality analysis which has to be employed when rights/principles clash. The terms ‘the right to justification’ and ‘the culture of justification’ emphasise that there is one foundational right underlying the enumerated rights in a constitution, namely the ‘right to justification’, and the centrality of providing justifications for all state action that affects the right-holder in a relevant way (but perhaps underemphasise *Litb*’s lesson that not only actions, but also omissions need to be justified). The term ‘Socratic contestation’ highlights that courts adjudicating rights questions do not pursue a substantive agenda but rather focus on asking questions and assessing the plausibility (reasonableness) of answers that they are provided with by the state. My term of the ‘global model’ of constitutional rights points to the fact that this conception of rights has global appeal as opposed to being of relevance only in a particular jurisdiction or region (such as Europe). But despite the different facets highlighted by the various labels, the underlying substantive views are similar and belong to the same school of thought. Their central *elements* are, first, to regard rights as ‘values’ or, as I would prefer to say, based on personal autonomy interests; second, to view their scope as expansive; and third, to endorse proportionality and to conceptualise it as a reasonableness test. The *moral point* of this practice is to give effect to each person’s foundational right to justification: a right to be treated by the state in ways that are reasonably justifiable to him or her.

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<sup>36</sup> Kumm, Mattias, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’, (2010) 4 *Law & Ethics of Human Rights* 141, 168-170; Möller (above n 12), 117-123.

<sup>37</sup> Kumm, *ibid.*

<sup>38</sup> Kumm, *ibid.*; Möller (above n 35).

<sup>39</sup> Alexy, Robert, *A Theory of Constitutional Rights* (Oxford University Press, 2002).

<sup>40</sup> Kumm (above n 36).

<sup>41</sup> Cohen-Eliya and Porat (above n 35); see also Möller (above n 35).

<sup>42</sup> Möller (above n 12).

## V. CONCLUSION

*Lüth's* central claim is that the constitution sets up an 'objective system of values'. We should not dwell for too long on the unfortunate terminology: the real significance lies in the substantive idea proposed, which this paper has interpreted as the move from a conception of constitutional rights that centres on limited government towards one that places the autonomy of the individual at its heart. I have suggested that this move is not only significant but also correct: regarding the freedom that constitutional rights grant to every person as being exclusively about negative freedom from the government leads to results that strike me as unjust and unjustifiable, as seen, for example, in the *DeShaney* case. By contrast, regarding freedom as being about personal autonomy avoids these problems and sets out an attractive constitutional conception of freedom centring on 'the freedom of the individual to develop in society'. *Lüth* and, to a lesser extent, *Elfe*s laid the foundation for the conception of rights that is widely endorsed today not only in Germany but around the globe and that theorists capture with labels and concepts such as rights as principles, the global model of constitutional rights, the right to justification and the culture of justification, and judicial review as Socratic contestation.