

## CONSTITUTIONAL RIGHTS AS PRINCIPLES AND THE PRINCIPLE OF PROPORTIONALITY. A COMMENT ON ALEXY'S THEORY

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*„The significance of constitutional rights as principles stems from their connection to the principle of proportionality. The connection is as close as it could possibly be. (...) The principle of proportionality with its three sub-principles of suitability, necessity, and proportionality in the narrower sense follows logically from the definition of principle.” (Robert Alexy)<sup>1</sup>*

The principle of proportionality, an important doctrine and practical tool seen by many as a guide in leading judges to the correct solution of a case when two competing constitutional rights are involved, achieved world-wide success over the last sixty years.<sup>2</sup> The purpose of this essay is to shed light on the question of whether there is indeed, as Alexy argues, a logical connection between the perception of constitutional rights as principles under his definition and the application of the principle of proportionality. The criticism of proportionality as a principle itself goes beyond the scope of this essay and the focus will bear instead on the presumed logical connection and not on potential alternatives to proportionality.

Firstly, I will give a short overview of Alexy's theory of rights as principles and of his original approach in establishing a structural theory, which stands in opposition to many other substantive ones. After summarizing the key concepts of the theory, I will try to demonstrate that the claim of a logical connection between constitutional rights as principles and proportionality can not be upheld. I will underpin my

argument by showing that cases do exist where courts do not engage in the balancing of principles.

Unlike the substantive theories of many other philosophers or scholars, who try to derive constitutional rights from substantive principles such as human dignity, freedom or equality, Alexy pursues the ambitious project of creating a formal or structural theory of all constitutional rights. The “*basic pillar*” of this structural constitutional rights theory is Alexy's distinction between rules and principles.<sup>3</sup> Whereas principles are norms which require realisation “*to the greatest extent possible given the legal and factual possibilities*” and are thus “*optimization requirements*”, rules on the contrary are norms that can be only fulfilled or not fulfilled with no alternative option in between their full realization or non-realization.<sup>4</sup> If two principles conflict in a certain situation and both of them should be realised to the greatest possible extent as optimization requirements, the solution to this problem needs to be found in the application of the principle of proportionality, which enables us to weigh the principles in this particular case and to take a decision. The definition of principles as optimization requirements, Alexy's thesis that constitutional rights are principles in reality and his concept of proportionality are crucial to an understanding of why he puts forward the claim of a logical connection between them. It is therefore inevitable to dissect Alexy's principle of proportionality and its three sub-principles of suitability, necessity and proportionality in its narrow

<sup>1</sup> Alexy, *The Construction of Constitutional Rights, Law & Ethics of Human Rights*, Vol. 4, Iss. 1 (2010), p. 24.

<sup>2</sup> With exception of the US.

<sup>3</sup> Alexy, *A Theory of Constitutional Rights* (2002), p. 44.

<sup>4</sup> *Ibid.* pp. 47-48.

sense.<sup>5</sup> On the one hand, suitability and necessity are concerned with what is factually possible. While suitability uncovers whether the interference of one principle with another principle is suitable to further the aim pursued, necessity looks for the least intrusive but nevertheless equally effective way to achieve a certain goal. On the other hand, proportionality in its narrow sense deals with what is legally possible and the balancing process must be applied in accordance with Alexy's "Law of Balancing": "*The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.*"<sup>6</sup> Hence, the act of balancing weighs the seriousness of the interference with one principle<sup>7</sup> against the importance of the satisfaction of the other principle;<sup>8</sup> as a result, the clash of conflicting principles is reconciled and an objectively correct decision can be reached. To sum up, according to Alexy only balancing lives up to the nature of constitutional rights as principles: no principle can ever be declared invalid, on the contrary to rules, but one principle outweighs the other under the specific circumstances of the case in question.

The problem of Alexy's theory of the logical connection between competing principles and the application of proportionality lies in the fact that every principle needs therefore to be balanced as soon as it conflicts with another principle. Other scholars like Dworkin, Nozick or Habermas, who attribute special normative force to rights and consider them as "trumps", "side constraints upon action" or "firewalls", could probably agree on Alexy's first step of categorizing rights as principles, but would clearly disagree on the logical consequence of balancing the principles concerned.<sup>9</sup> Kumm offers an explanation for the different points of view of philosophers and constitutional courts, with the former generally considering a limited number of strong rights and the latter dealing with an increasing number of relatively weak rights.<sup>10</sup> In their daily work of solving cases

involving conflicting principles courts have to deal with the phenomenon of "*rights inflation*". Letsas got to the heart of this development by raising the question, with regards to the case *Hatton v UK*<sup>11</sup>, of whether we really have the "*right to sleep well*".<sup>12</sup> Bearing in mind the recent development of rights inflation with relatively weak rights at stake, Alexy's solution of the application of the principle of proportionality gains in significance, because it can be seen as a concrete guide in solving these cases and identifying the weakness of the claim to sleep well. But how would Alexy's approach and his claim of a logical connection between principles and proportionality solve the conflict between an absolute right and another right? Would he consider the right not to be tortured, codified i.e. in Art. 3 ECHR<sup>13</sup> as a principle or as a rule?<sup>14</sup> If it were categorized as a rule, the prohibition of torture could under certain circumstances be limited by an exception or could be declared invalid. The mere possibility of invalidating the absolute right of prohibition of torture, even if this would usually be likely to prevail over the other rule, is very unsatisfactory. Assuming that the prohibition of torture is classified as a principle, would the court need, in case of a clash with a competing principle, to enter the balancing stage or should it take a decision based on a different reasoning? The problematic character of the principle of proportionality in cases like the ticking-bomb scenario or the ECtHR's case *Gäfgen v Germany*<sup>15</sup> is connected to the understanding

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Requirement, in *Pavlakos: Law, Rights, Discourse: Themes of the Work of Robert Alexy* (2007).

<sup>11</sup> *Hatton v UK* (App. 36022/97), 8 July 2003 (Grand Chamber), 37 EHRR 28. The applicants, who lived close to Heathrow Airport, complained about the noise caused by night flying, basing their claim on Art. 8 ECHR.

<sup>12</sup> Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007), p. 129.

<sup>13</sup> Art. 3: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*"

<sup>14</sup> Alexy suggests a constitutional rights' model of rules and principles, where constitutional rights as hybrids can be classified under both categories. See: *Alexy, Theory* (2002), p. 80. However, in his further discussion constitutional rights tend to be principles in reality.

<sup>15</sup> *Gäfgen v Germany* (App. 22978/05), 1 June 2010 (Grand Chamber), 52 EHRR 1. The 11-year-old boy Jakob von Metzler was kidnapped and immediately killed by his kidnapper Magnus Gäfgen. After his arrest the police officer in charge threatened Gäfgen with considerable pain in order to force him to disclose the whereabouts of the boy,

<sup>5</sup> Alexy, *Theory* (2002), pp. 66-69.

<sup>6</sup> *Ibid.* p. 102.

<sup>7</sup> It can be categorized as light, moderate and serious.

<sup>8</sup> Likewise, this can be classified in three grades: light, moderate and serious.

<sup>9</sup> Möller, Balancing and the structure of constitutional rights, *International Journal of Constitutional Law*, Vol. 5, No. 3 (2007), pp. 460-461.

<sup>10</sup> Kumm, Political Liberalism and the Structures of Rights: On the Place and Limits of the Proportionality

of principles as optimization requirements. If interpreted from a purely utilitarian perspective, the outcome of the ticking-bomb scenario and the kidnapping case would strongly point toward the permissibility of torturing the suspected terrorist or kidnapper. A very serious interference with the right not to be tortured weighed against the very serious importance to torture in order to save the lives of many people or even the single life of an innocent child, would be decided in favour of the greatest good for the greatest number in contradiction with the absoluteness of prohibiting torture. On the other hand, optimization of the two competing principles to the greatest possible extent, interpreted from a deontological standpoint and seen as a process of finding the one and only morally right solution in the specific case,<sup>16</sup> would favour the outcome of prohibiting torture by weighing the serious interference stronger than the serious importance of the competing principle and would therefore live up to its underlying belief of considering torture as an act inherently wrong and against our human dignity.

Why then, given the assumption that we consider the prohibition of torture or the prohibition of slavery<sup>17</sup> as absolute rights, should we lose time and energy in cases where an absolute right conflicts with another principle by engaging in balancing, especially when keeping in mind that the wrong application of the principle of proportionality might lead to a morally wrong outcome, and not simply skip that stage?

As long as no absolute rights are at stake, Alexy's claim that a principle does not have special importance or special normative force per se, but needs to be balanced in conflict with another principle under the circumstances of the specific case, can be upheld. However *balancing-free norms*<sup>18</sup>, as Möller calls them in his article, do exist. The example Möller gives is a judgment of the German Federal Constitutional Court (FCC) on whether human dignity can be balanced or not.<sup>19</sup> The German parliament passed a law in reaction to the terrorist attacks of 9/11, the *Luftsicherheitsgesetz* (Aviation Security Act),

which allowed the shooting down of hijacked planes considered as potential terrorist weapons. The FCC declared the law unconstitutional, as violating the right to human dignity of Art. 1 (1) Basic Law.<sup>20</sup> No act of balancing was undertaken by the court: the mere reference to the human dignity of the innocent passengers on board of the plane and the perception of the principle of human dignity as a balancing-free norm could solve the case without the application of the principle of proportionality.<sup>21</sup>

On the basis of the two examples discussed, the absolute prohibition of torture and the balancing-free norm of human dignity, it can be demonstrated that the connection between the understanding of constitutional rights as principles, the conflict of two such principles and the principle of proportionality may be close but not logical. Even if the outcome after the balancing stage would be the same, courts do not always take their decisions after applying the principle of proportionality and weighing the seriousness of the interference of one principle against the importance of satisfying the other principle.

In conclusion, Alexy's categorization of principles as optimization requirements and his practical connection with proportionality in case of two competing principles are helpful functional tools to solve most of the cases concerning constitutional rights, especially under the light of the ongoing rights inflation, but are not applicable to all circumstances.



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believing that the child was still alive and could be saved by this confession.

<sup>16</sup> Möller, Balancing (2007), pp. 462.

<sup>17</sup> Art. 4 (1) of the ECHR: „No one shall be held in slavery or servitude.”

<sup>18</sup> Möller, Balancing (2007), pp. 463.

<sup>19</sup> BVerfG, 1 BvR 357/05 of 15 February 2006.

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<sup>20</sup> Art. 1 (1) Grundgesetz: „Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.“

<sup>21</sup> Möller, Balancing (2007), pp. 466.