Constitutional Rights through Discourse

On Robert Alexy’s Legal Theory - European and Theoretical Perspectives

Agustín J. Menéndez and Erik O. Eriksen (eds)

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Fundamental Rights through Discourse

Agustín J. Menéndez and Erik O. Eriksen (eds)

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ARENA
Centre for European Studies
University of Oslo
P.O.Box 1143, Blindern
N-0317 Oslo, Norway
Tel: + 47 22 85 76 77
Fax: + 47 22 85 78 32
E-mail: arena@arena.uio.no
http://www.arena.uio.no

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§1. [Why the publication of *A Theory of Constitutional Rights* is a major event] The publication of the English translation\(^1\) of Robert Alexy’s *Theorie der Grundrechte* is a major event for at least two reasons. First, the book is one of the major contributions to contemporary legal and constitutional theory. Together with *Theorie der juristischen argumentation*\(^2\) and *Begriff und Geltung des Rechts*, *A Theory of Constitutional Rights*, makes Alexy one of the major modern legal philosophers, on a par with Hans Kelsen, H.L.A. Hart, Ota Weinberger, Ronald Dworkin, Neil MacCormick and Joseph Raz. Second, *A Theory of Constitutional Rights* is one of the most authoritative expositions of German fundamental rights provisions. The German constitutional tradition is among the most, if not the most, influential of such traditions. It has exerted and keeps on exerting a major influence on most other European legal systems. As such, it is likely to leave its imprint on the interpretation of the UK Human Rights Act 1998.\(^4\) It is also bound to be extremely influential in the interpretation of European Union fundamental rights norms, as stemming
from the constitutional traditions common to the Member States, and as consolidated in the solemnly proclaimed Charter of Fundamental Rights of the European Union. The eventual debate and ratification of a European Constitution renders the constitutional analysis of Union fundamental rights even more relevant. The exquisite translation into English by Julian Rivers gives to all of us the further benefit of an English lexicon on the subject matter.

§2. [The plan of this chapter] In this chapter, I will try to do three things: (1) situate A Theory of Constitutional Rights within Alexy’s legal theory; (2) expose the basic contributions of the book to constitutional theory; (3) summarise the arguments made by each of the contributors to this report.

I. The Main Elements of Alexy’s Legal Theory

§3. [The theoretical sources of Alexy’s legal theory: analytical philosophy and critical theory] Robert Alexy’s legal theory has two main theoretical springs. On the one hand, analytical philosophy, in general philosophical terms and as applied to jurisprudential endeavours, especially by H.L.A. Hart. Analytical philosophy is mainly concerned with the

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9 See his The Concept of Law, Oxford: Oxford University Press, 1961 (2nd edition with the post-face published in 1994); Essays on Bentham: Studies in jurisprudence and political theory,
elucidation and clarification of the categories of ethical discourse. Not surprisingly, this provides the analytical ground of Alexy’s legal theory. On the other hand, critical theory and discourse ethics. Discourse ethics is based on the insight that individuals solve conflicts and coordinate action through the use of language, by means of talking to each other. This implies that discourse, not violence or propaganda, is the most basic form of human action. As such, it provides the normative ground of his legal theory.

§4. [The pragmatic assumptions we make when we assert; the domain of argumentation] A very basic observation that Alexy makes is that human beings are characterised by their practice of making assertions. This might seem rather trivial, but if one reflects about it, one realises that asserting, whatever is asserted, implies raising a claim to the correctness of what is being asserted. In its turn, the claim to correctness entails a claim to justifiability, which in itself presupposes that the person or persons with whom we are discussing is/are capable of putting forward arguments; and therefore, that she or they is/are capable of entering into practical reasoning: of determining what is correct in universalisable terms. All this implies that when we assert something, we cannot but assume the autonomy of the audience, their freedom (or capacity to decide what is correct and what is wrong) and the basic equality of ourselves and the audience (what would be the point of discussing if others could not make arguments as equally well-formed as ours?). This involves that when we assert, we assume a certain conception of the person as


12 On the ensuing tensions, see also Massimo La Torre, chapter 3 of this report, Section IX.
a discursive or deliberative person, that is, as a person who has an interest in correctness.  

This subtle and seductive train of reasoning renders explicit the pragmatic assumptions we make when we enter the discursive or deliberative space by means of making an assertion. This exercise has an obvious limit, namely, that it does not guarantee that we actually follow such assumptions when we act. To put it differently, the argument in itself is not enough to answer the vexing question of the motivational force of reasons. The fact that if people enter into deliberation, they have to assume the basic autonomy and equality of those who are also within the domain of argumentation does not imply that such assumptions are binding when they act. Alexy tackles this problem with three further observations. First, a stable social order cannot be based only on force. Coercion and force are the most expensive and less effective technologies of power. This entails that a stable social order has to rely on opinion, on the belief among the governed that the government is a legitimate, fair one (that is, on legitimacy in a factual, social sense). This does not directly imply that common action norms will be based on good reasons, but the more modest premise that there would be a demand for reasons of common action norms. Second, factual legitimacy is more easily and permanently established if it comes hand in hand with critical, normative legitimacy than if it is merely based on propaganda or mischief. Counter-factual validity is a more reliable source of social legitimacy in the long run, precisely because it is counter-factual, and not purely factual. Third, if a sizeable part of the population is genuinely interested in correctness, in doing what is right, those arguing about what should be done in common (that is, about laws and political decisions) will have to pretend (if they do not genuinely believe it) that they abide by the principles of autonomy and equality, or what is basically the same, that they endorse the

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14 Alexy, supra, fn 11, p. 219: “Force is expensive, and an order formed by it is unstable and therefore a risk for the elite. A legitimation is cheaper and in the long run also more secure”

15 This is the basic insight of Hume’s ‘Of the First Principles of Government’: “When we inquire by what means this wonder [the rule of the few over the many] is effected, we shall find, that, as Force is always on the side of the governed, the governors have nothing to support them but opinion. It is, therefore, an opinion only that government is founded; and this maxim extends to the most despotic and the most military governments, as well as the most free and the most popular”. David Hume, Selected Essays, Oxford: Oxford Classics, 1993, p. 24.

16 Alexy, supra, fn 11, p. 219.
pragmatic assumptions of discoursive interaction.  

This is done for purely self-interested reasons, namely, to be successful with their arguments. However, buying into such pragmatic assumptions might require paying the price of coherence at later stages, when the arguments previously upheld can be reversed against the present interests of whoever upheld them before. This is the basis of the civilising force of hypocrisy.

§5. [Why social integration cannot be trusted to moral discourses; positive morality and law] Even if discourse practices are genuinely prevalent in a society, this does not guarantee that people will spontaneously coordinate their action in order to achieve common goals, or that there will not be conflicts due to incompatible courses of action.  

Even if citizens are genuinely willing to act morally, moral discourse has a limited capacity to ensure social integration, because it is exclusively a system of knowledge, and a limited one for that purpose.  

Pure moral discourses revolve around universalisability, which is too indeterminate a criterion to provide knowledge of what to do in complex situations; moreover, forming a fresh moral judgment in each and every case is extremely burdening, if not paralysing.  

Thus, social integration must be trusted to a system which is not only a system of knowledge, but which combines moral with ethical and prudential concerns, and which is also a system of action which, by institutionalising coercion, offers additional reasons to comply to the addressees of the norms.  

This is so for three main reasons: (1) cognitive, because it is only through the combination of moral with prudential and ethical arguments that we can determine what to do in specific cases (as just hinted at); (2) motivational, because even if we are willing to do what is correct, we cannot always be sure of our strength of will; (3) coordinative, because effective coordination in order to

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17 Ibidem. The key passage is the following: “Tyrants, dictators, and despot have always known this and have usually attempted legitimations by employing arguments. That those arguments were regularly bad and mere propaganda is not important here. Decisive is the fact that they try to use these arguments at all. In this way, the maximization of individual utility leads into argumentation and consequently into the field of discourse rules, because a sufficient interest in correctness has to be taken into account”

18 Habermas, supra (1996), fn 10, p. 106: “To be sure, moral and legal questions refer to the same problems: how interspersed relations can be legitimately ordered and actions coordinated with one another through justified norms, how action conflicts can be consensually resolved against the background of intersubjectively recognised normative principles and rules”.


20 TLA, pp. 287ff.
achieve common goals requires the conventional determination of what to do; what is morally correct depends in many cases of what is conventionally decided to do.  

The characteristic system of social integration in pre-modern societies was positive morality, the one accepted and enforced within a given society in a diffused way. Under modern circumstances, positive morality is no longer apt to this task, and for two main reasons. First, social relationships go clearly beyond face-to-face interactions within close-knit communities. This renders rather inoperative the limited means of coercion characteristic of positive morality, mainly diffused social sanctions. Second, reflexive thinking challenges the authority of purely positive morality, undermining its socially integrative potential. Norms whose validity is exclusively traditional are bound to be contested once tradition is itself challenged by critical practical thinking.

This is why law must replace positive morality as a complement of critical morality under modern circumstances. Law can specify concrete actions which are required, prohibited and permitted, and does so in ways which are more precise and predictable than traditional morality. Moreover, it further institutionalises the enforcement of legal norms, by means of establishing a division of labour within modern societies, according to which civil servants and judges monitor the extent of compliance with the law and apply previously defined sanctions in case of non-compliance. Courts are expected and mandated to provide authoritative and final interpretations of legal norms.

The main purpose of institutionalising coercion is not to bring bad men into line, as legal realists tend to claim, but to create the conditions under which citizens willing to comply with the law can do so without being taken


23 Oliver Wendell Holmes, 'The Path of the Law', 110 (1997) Harvard Law Review, pp. 991-1012, at p. 992: "You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbours is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can".
advantage of by recalcitrant citizens. Modern law aims at allowing us to be moral in our action without being fooled, so to say.\textsuperscript{24}

\section*{§6. [The open texture of law]}

This does not entail that law can be described in an uncontroversial way, that it can be systematised into an unproblematic set of norms. A basic contribution of contemporary legal scholarship has been the elucidation of the open texture of law,\textsuperscript{25} which renders unavoidable a certain degree of indeterminacy of legal norms.

This is due to three basic factors, namely, (1) the vagueness of the natural languages in which law is necessarily formulated; (2) the conflict between different legal norms, the formulation of which might seem compatible in general terms but which leads to contradictory results in concrete cases; (3) the absence of a legal norm which can solve an underlying conflict or serve as standpoint for the coordination of action (what are referred to as gaps in the law).\textsuperscript{26}

Therefore, the open texture of law is caused not only by the features proper of the natural language in which legal norms are written, but also by the limited knowledge of human beings, both in a factual sense (as we cannot know all the factual situations that might present themselves and regarding which it might be necessary to solve a conflict or to coordinate action) and in a normative sense (as we cannot determine what should be done in all concrete cases).

\section*{§7. [The special case thesis: what “special” and “case” entail; legal and moral correctness]}

This is why legal orders cannot be conceived of as mere systems of norms (even if their integrative social function requires that they are mostly systems of norms, in quantitative terms),\textsuperscript{27} but also as systems of practical reasons, and as such open to general practical discourse. Thus, law complements morality and ensures social integration by providing cognitive

\textsuperscript{25} Hart, supra, fn 9, pp. 124ff.
\textsuperscript{26} TLA, 1ff
certainty and additional motivational force, but it must remain anchored to general practical discourses if it is to solve conflicts and coordinate action despite its open texture. This constitutes the basic insight of Alexy’s special case thesis, according to which legal reasoning is to be considered as a special case of general practical reasoning.\footnote{TLA 211-20; see also Robert Alexy, supra, fn 14.}

To put it differently, legal reasoning must ultimately be considered as a special instance of practical reasoning, and as such, connected to practical reasoning\footnote{Alexy advocates a three-fold connection between law and general practical reasoning. See infra, §10.} to the extent that legal questions are concerned with practical questions, with what is mandated, prohibited or permitted. This is reflected in the claim to correctness which is necessarily implicit in the very concept of legal order,\footnote{AFI, 34: “The claim to correctness is a necessary element of the concept of law (...) a system of norms that neither explicitly nor implicitly lays claim to correctness is not a legal system. Every legal system lays claim to correctness”.} and which is also raised by each legal norm or decision.\footnote{AFI, 93: “Individual norms forfeit their legal character and thereby their legal validity if they are unjust in the extreme”. Injustice must be extreme, because cognitive certainty of its wrong moral condition increases proportionally to the wickedness of norms. See also Robert Alexy, ‘Law and Correctness’, in Michael Freeman, Legal Theory at the end of the millennium. Current Legal Problems 51. Oxford: Oxford University Press, 1998, pp. 205-222. See also the extremely illuminating chapter by Ota Weinberger, ‘Beyond Positivism and Natural Law’, in Neil D. MacCormick and Ota Weinberger, The Institutional Theory of Law, Dordrecht: Reidel, 1986, pp. 111-126.} The claim to correctness basically entails that conflicts between norms are to be decided correctly and not wrongly. This implies getting rid of any kind of strict separation between law and general practical reasoning.\footnote{On the relationship between the nature of law and the description of legal reasoning, see La Torre, chapter 3 of this report, section VII.} Quite obviously, one thing is to raise a claim to correctness, and another thing is to redeem such a claim. However, the very raising of the claim, which is part of the conditions of legal argumentation, is not in itself irrelevant. This is proved by the fact that legal deliberations actually revolve around the question whether the arguments put forward by the other party can be considered as correct, by the fact that the justification of judicial decisions consists of putting forward reasons which, it is claimed, everybody should agree with, and by the fact that the correctness of legal decisions is a major question in public discussions on law and judicial decisions.

That law is a special case of general practical reason also entails that it cannot be reduced to standard practical reasoning. As indicated, the certainty
Introduction

and institutionalised enforcement characteristic of law is needed in modern societies in order to ensure social integration. Law can ensure such a task only if it is not akin to general practical reasoning, for the very simple reason that in such a case it will be permanently open for discussion. Legal reasoning must be bound to statutes and to precedents and has to observe the system of law elaborated by legal dogmatics, and this for the very good normative reasons which require law complementing morality in order to ensure social integration. This is what makes of law a special case, not merely a case, of general practical reasoning. And this is also what explains that the claim to legal correctness cannot be equated with the claim to moral correctness tout court. A legal decision is a decision which is correct taking into account the moral salience of the fact that compliance with the solutions authoritatively required by the legal order contributes to conflict solving and coordination of action.

§8. [Dealing with the open texture while realising that law is a special case of practical reasoning] The open texture of law (§5) implies the existence of hard cases, in which judges cannot limit themselves to be the mouthpieces of the law, simply because legal norms do not provide an uncontroversial, authoritative solution to the case at hand. Characterising law as a special case of practical reasoning has direct consequences for determining how hard cases should be tackled.


34 AFI, 94: “Because there are moral advantages to the existence of a legal system, the legal validity of a norm belonging to the system can exhibit a minimum moral justifiability even if the norm by itself, being unjust, does not do this”. On the tensions between the ideal and the authoritative sides of law, see Carlos Santiago Nino, Denacho, Moral y Política, Barcelona: Ariel, 1995 and The Constitution of Deliberative Democracy, New Haven and London: Yale University Press, 1996.

35 TLA, 5: “Suppose that there are situations in which the decision of an individual case does not follow logically from either empirical statements taken together with presupposed norms or strictly grounded presuppositions of some system however conceived, and also that such decisions cannot be completely justified by reference to rules of legal method”.
First, the *special case thesis* implies that law has both an *authoritative* and an *ideal* side. Law is not merely a system of rules, as legal positivists tend to claim, but also a process through which applicable rules can be determined. This involves that we do not have to rush into the conclusion that hard cases are decided *a-legally*, or to put it differently, that in hard cases judges argue *politically*, not *legally*. The ideal side of law, its intimate connection with general practical reasoning, leads us to the contrary conclusion, namely, that hard cases can be solved within the province of legal reasoning, and therefore, within the province of law. In fact, *A Theory of Legal Argumentation* is mainly intended to answer the question of *how to argue hard cases legally*:

"The question is where and to what extent value-judgments are required, how the relationship between these value-judgments and the methods of legal interpretation as well as the propositions and concepts of legal dogmatics are to be determined, and how these value-judgments can be rationally grounded or justified".  

This does not entail reducing the solution of hard cases to *syllogistic reasoning*, but rendering as explicit and transparent as possible *legal reasoning in hard cases*. The aim is to establish criteria which allow replicating the judgment in order to test its correctness. If only for the cognitive limitations of humans, it is not possible to establish a theory of argumentation which leads in each and every case to a precise outcome. Legal reasoning can never achieve the precision of mathematical calculus. The aim is indeed a more modest one, namely a theory which leads to "preferential statements which stand a chance of being justified in rational terms". To put it differently, the point is not whether one can render the application of law a fully bound activity, but how far one can push the element of rationality.

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36 Hart, supra, fn 9, p. 147: "When the area of the open texture of law is reached, very often all we can profitably offer in answer to the question: 'What is the law on the matter?' is a guarded prediction of what the courts will do".

37 TLA, 7.

38 TCR, 100, concerning balancing: "[B]alancing is not a procedure leading in every case to a precise and unavoidable outcome", even if it is not "a non-rational or irrational procedure". On the limits of weighing and balancing in light of the Postscript and Alexy’s recent work, see chapters 1 (Alexy), 3 (La Torre), 5 (Bernal) and 8 (Kumm).

39 TCR 102.

40 TCR 105. Indeed, many a criticism of the different theories of legal argumentation is based on an insufficient consideration of the fact that there are very good reasons, even normative reasons, to structure legal systems as a combination of principles and rules, and thus, to render adjudication unavoidable. In such a context, the key question is not whether one should have a theory of adjudication, but which should is the best theory of adjudication available, by
This is done by means of putting forward an outline of a theory of legal argumentation. In doing so, Alexy distinguishes neatly between two aspects of justification in legal argumentation: internal (or logical justification on the basis of given premises) and external (which concerns the justification of the premises of legal argumentation). On what concerns the latter, Alexy distinguishes six forms and rules of justification: (1) interpretation; (2) dogmatic argumentation; (3) use of precedents; (4) general practical reasoning; (5) empirical reasoning; (6) special legal argument forms. To put differently what has already been said, Alexy’s theory does not preclude the answer to be given to those cases, but it brings analytical clarity and precision in the reasoning of hard cases, and thus, renders possible to replicate the train of reasoning of judges; consequently, it increases the extent to which decisions can be criticised inter-subjectively.

Such an approach builds on the ground established by legal scholars such as Theodor Viehweg and Chaïm Perelman. It shares a basic objective with Alius Aarnio or Neil D. MacCormick, whose treatises on legal argumentation were contemporaneous to Theorie der juristischen argumentation. It also shares some of the basic insights of Ronald Dworkin’s criticism of legal positivism. In Chapter 2 of Taking Rights Seriously (“The Model of Rules”), Dworkin criticises Hart’s legal theory for reducing law to a system of rules. By

reference not only to its conceptual clarity, but also to the extent to which it promotes a self-understanding of judicial activity in line with a democratic theory of law and adjudication.

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41 TLA, 221-86.
42 TLA 221.
43 TLA 231-2.
46 See Theodor Viehweg, Topik und Jurisprudenz, Munich: Beck, 1974 (Spanish translation, which was consulted, Tópica y jurisprudencia, Madrid: Taurus, 1964).
49 MacCormick, supra (1978), fn 27.
means of considering legal principles, Dworkin recaptures as legal (relegalises, so to say) the solution of hard cases.  

§9. [Rules vs. principles; conflicts between principles, the law of balancing and the principle of proportionality] An additional building block in Alexy’s answer is his theory of rules and principles, which comprises the distinction between rules and principles, the formulation of conflict rules, which in the case of principles is the law of balancing, the structure of which is rendered explicit by the principle of proportionality in a wide sense.

Alexy distinguishes neatly between (1) legal rules, which provide definitive reasons for action and (2) legal principles, which put forward prima facie reasons for action; 51 principles are norms “which require that something be realised to the greatest extent possible given the factual and legal possibilities”. 52

Such a distinction is rendered clearer by means of considering the different collision rules applicable to both types of norms. A conflict between legal rules is solved by means of either declaring that one of the rules is void or by means of establishing an exception to one of the rules. 53 A conflict between legal principles is solved by means of weighing and balancing the two conflicting principles and formulating a derivative legal rule 54 which embodies the normative solution applicable to the concrete factual context. 55 Such a rule establishes the “conditional relation of preference between the principles in the light of the circumstances of the case” 56. Thus, conflicts between rules are solved at the level of validity of norms, while conflicts between principles are solved at the level of weight of the norms. 57

The conflict rule of principles points to the principle of proportionality in the wide sense, 58 to the idea of weighing and balancing principles, which

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50 Ronald Dworkin, Taking Rights Seriously, London: Duckworth, 1978, p. 44: “If we treat principles as law we must reject the positivists’ first tenet, that the law of a community is distinguished from other social standards by some test in the form of a master rule” (my italics).
52 TCR, 47.
53 TCR, 49.
54 TCR, 54. See also supra, fn 44.
55 TCR, 48ff.
56 TCR, 52.
57 TCR, 50.
58 TCR, 66.
operationalises the characterisation of principles as optimisation requirements. The principle of proportionality in a wide sense implies three sub-principles: suitability, necessity and proportionality in a narrow sense. Both suitability and necessity are requirements of optimisation relative to what is factually possible. Suitability requires an adequacy between ends and means, while necessity requires exhausting alternative solutions which will allow rendering compatible the two principles which collide in the case at hand. Proportionality in the narrow sense is a requirement of optimisation of what is legally possible, and as such, refers to the balancing requirement. In cases of conflict, the legal possibilities of realising a given principle depend on the competing principle. The law of competing principles summarises this by stating (in its non-technical version) that:

“The circumstances under which one principle takes precedence over another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence.”

Proportionality in a wide sense offers the wide formal framework within which competing principles are weighed and balanced according to the principle of proportionality in the narrow sense. This principle has two dimensions: one substantive, the other epistemic.

The substantive law of balancing, that:

“The level of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.”

59 TCR, 66ff and 397: “The principled character of fundamental rights follows logically from the principle of proportionality. This equivalence means that the three sub-principles of the principle of proportionality define what the theory of principles understands by optimisation”
60 TCR 66.
61 TCR 66.
62 TCR 67.
63 TCR 54.
64 TCR 102, see also fn 24 in p. 48; See also 103 and the Postscript in TCR, pp. 401-14, which includes in p. 412 the mathematical formalisation of the basic intuition behind the law of conflicting principles. See also Robert Alexy, ‘On Balancing and Subsumption. A Structural Comparison’, 16 (2003) Ratio Juris, pp. 433-49, at pp. 440ff. The constraining element in the Law of Balancing is rendered explicit in TCR 105: “Those who say that a very intensive infringement can only be justified by a very important satisfaction of an opposing principle are not saying when a very intensive infringement and a very important satisfaction are present. But they are saying what has to be shown in order to justify the conditional preferential statement which is to result from the balancing exercise, namely statements about the degree of infringement and importance”.
The substantive law of balancing implies that balancing is to be broken down in three stages:

“The first stage involves establishing the degree of non-satisfaction of, or detriment to, the first principle. This is followed by a second stage in which the importance of satisfying the competing principle is established. Finally, the third stage establishes whether the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first.”

The detriment to the first principle and the importance of satisfying the second can be determined by reference to a three-fold weight scale (light, moderate, serious). Such a scale presupposes standards which are not given in the Law of Balancing itself, but for which it is possible to offer reasons relatively easy to understand.

*The epistemic law of balancing* states that:

“The more heavily an interference in a fundamental right weighs, the greater must be the certainty of its underlying premises.”

Alexy insists once and again that the principle of proportionality does not fully ensure rationality in weighing and balancing, that is, it does not lead with mathematical precision to one single answer. This is so for the simple reason that it does not lead to one single answer, not only because of the structural discretion established by the Constitution in favour of the legislature, but also due to the limits of knowledge about facts and norms, which might lead to a stalemate in the application of the two laws of balancing. However, this does not mean that weighing and balancing is a mere mask of an arbitrary process of decision-making, because it frames and constrains the power of courts or whoever interprets and applies the law.

§10. [Consequence: the three-fold connection between law and general practical reasoning] The special case thesis has direct implications for the way in which law is conceptualised. This is, indeed, the central question in An

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65 TCR, 401.
66 TCR, 402.
67 TCR, 405.
68 TCR, 418.
69 TCR 402, referring to 100, 83, 105, 362, 364, 366, 383, 385, 386.
Argument from Injustice, where Alexy puts forward a conception of law which could be characterised as post-positivistic. It systematises the three different ways in which law and general practical reasoning are connected, and to which reference has already made in this introduction. First, there is a conceptual connection between law and morality at a systemic level. A legal system which does not even raise a claim to correctness cannot be considered a legal order (§7). Second, there is a substantive connection between law and morality at the level of individual norms. Norms which are extremely unjust should be forfeited the legal character, they cannot be regarded as valid legal norms (also §7). Third, the principled, argumentative character of law implies a substantive connection at the level of application of legal norms. Hard cases are to be solved with the help of the structure and substantive inputs of general practical reasoning. This refers mainly to the law of conflicting principles, to the principle of proportionality in a wide sense. This reflects that the positivisation of moral principles does not entail a complete transformation of their nature. By legalising them, their connection between law and general practical reasoning is confirmed, so to say (§§8 and 9).

II. A Theory of Constitutional Rights

A) A Structural Theory of Fundamental Rights

§11. [A structural theory with a practical purpose] Alexy’s Theory of Fundamental rights is characterised by two main features. First, Alexy’s theory is a structural theory of fundamental rights. This means that it is basically an analytical theory, aiming at the systematic and conceptual elucidation of valid law. This establishes the ground on which it could be claim that Alexy’s theory has a universal vocation. As such, it might be a proper tool to reconstruct or interpret fundamental rights provisions in different legal systems, and it might be compatible with different substantive positions on the justification of fundamental rights. Second, Alexy’s theory has a practical purpose. It aims at being a guide to the interpretation of actual constitutional provisions. In that regard, it constitutes a further step forward in the research program commenced by A Theory of Legal Argumentation.

TCR, 366; see also Alexy, supra, fn 19, pp. 382ff; AFI, especially at p. 129: “The third part of the definition [of law according to Alexy] expands the sphere of what belongs to the law by including in the concept of law the process or procedure of law application.

See my chapter in this report.
B) Some Elements of Fundamental Rights

§12. [The basic analytical distinctions] *A Theory of Constitutional Rights* builds on a proper analytical distinction between (1) normative statements and norms; (2) the distinction between rules and principles; (3) the distinction between fundamental rights positions and complete fundamental rights; (4) the distinction between fundamental rights which express individual rights and collective goods. In this paragraph, I will summarise the criteria according to which he differentiates in (1) and (3); the distinction between rules and principles has already been considered in some detail in §9.

1) Fundamental rights statements and fundamental rights norms. On the one hand, fundamental rights statements are defined in a formal way, that is, as those rights statements contained in the formal, written constitution,\(^{72}\) which in the German legal system is the Basic Law of 1949. On the other hand, fundamental rights norms are defined materially, as “all those norms for which correct constitutional justification is possible.”\(^{73}\) This definition is wide-embracing, as it captures not only those norms expressed through fundamental rights provisions (that is, those norms which are the normative content of a constitutional provision), but also those norms implicitly affirmed in the said provisions, or more specifically, those norms which are required if the norm expressed by a constitutional provision is to be applied to specific cases. Thus, Alexy can distinguish between explicit fundamental rights norms and derivative fundamental rights norms.\(^{74}\) As discussed in §9, the standard example of derivative fundamental rights norms is the rule result of the weighing and balancing of conflicting fundamental rights principles.\(^{75}\)

2) Fundamental rights positions and complete fundamental rights. While fundamental rights positions correspond to the specific fundamental rights norms which derive from fundamental rights provisions, the idea of a complete fundamental right refers basically to bundles of fundamental rights provisions.\(^{76}\) The most fruitful conception of a complete fundamental right is, according to the author of *A Theory of Constitutional Rights*, one which defines it as a bundle of definitive and prima facie fundamental rights positions [that is, which combines rules and principles, as is characteristic of fundamental

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\(^{72}\) TCR 30.

\(^{73}\) TCR 37.

\(^{74}\) TCR 33 and 36: “a derivative norm is valid and is a fundamental rights norm when it is possible to provide correct constitutional justification for its ordering under a directly established norm”.

\(^{75}\) TCR 56.

\(^{76}\) TCR 159.
rights norms, see infra, §13], along with the clearly definable relations between these positions, relations of precision, of means to ends, and of balancing. It must be said that the usual *fundamental rights talk* refers to complete fundamental rights. Thus, reference to the right to private property, for example, indeed tends to refer to a bundle of rights positions, and the clearly defined relations between them.

3) Types of fundamental rights positions bundled in complete fundamental rights. Complete fundamental rights bundle different types of fundamental rights positions; two main criteria of differentiation can be established; (i) *fundamental rights rules vs fundamental rights principles*: Fundamental rights usually comprise both constitutional rules and principles. Alexy exemplifies this by reference to the right to human dignity, as stated in Article 1 of the German Basic Law. According to Alexy, this fundamental right provision expresses both a rule of dignity and a principle of dignity; (ii) fundamental rights comprise not only subjective individual positions, but also collective goods. As we will see, however, the *standard* fundamental rights position is an individual or subjective right.


§13. *[Fundamental rights as a matter of principle]* Fundamental rights norms are first and foremost a matter of principle, and these are indeed the main building block in arguments about derivative constitutional norms. This is so because fundamental rights norms are closely related to the ideal, argumentative side of law. Indeed, fundamental rights norms constitute the positive expression of the most basic principles of practical morality. As a

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77 TCR 162.
79 TCR, 80ff.
80 Another example is constituted by Article 2 of the Charter of Fundamental Rights of the European Union, which rules out capital punishment. It contains a fundamental right rule, but also a fundamental right principle, which could be relevant in the interpretation not only of the criminal laws of Member States (something which paradoxically would not be the case in a direct way, given that the Union has no direct competence over criminal law) but also, for example, of the *commercial treaties signed by the European Communities*. See chapter 4 (La Torre), for a criticism, and chapter 7 (Menéndez), for an analysis in the context of European Union Law.
81 TCR 65–6, 80–81 and 188.
82 TCR, Chapter IV.
83 TCR, 55.
consequence, the normative consequences of applying a fundamental right norm to a concrete case depend on the balancing exercise with other concurrent fundamental rights principles. The fact that fundamental rights are mainly a matter of principle explains why fundamental rights adjudication is the area of law where the relationship between general practical reasoning and legal argumentation is most evident. Indeed, fundamental rights as principles are not only reasons for action, but also reasons for other norms. Thus, they do not only prescribe what should be done in concrete cases, but they are also the main argumentative block with which to formulate specific rules applicable to concrete cases. This reflects the “foundational character” of fundamental rights, that is, what Alexy calls their radiating force over the whole legal system. This entails the need to reinterpret all legal norms in line with the basic constitutional principles contained in the Constitution.

§14. [Fundamental rights as Legal Positions, as Subjective Rights] Alexy claims that a structural theory of fundamental rights needs to tackle the analysis of rights as legal positions, as subjective rights, from the standpoint of a three-fold distinction between 1) rights to something; 2) liberties; 3) powers. These positions are differentiated on the basis of the relationships that they presuppose.

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84 TCR, 82.
85 TCR 366.
86 TCR 60.
87 TCR 66, 350. This is a phenomenon rather well-known to the legal scholars who have experienced processes of constitutionalisation of the legal system, that is, the shift from the characterisation of the constitution as a policy program to a legal norm. In recent history, this has been characteristic of the transition from authoritarian to democratic political systems. The constitutionalisation of Union law is, paradoxically enough, another example.
88 This can be exemplified by reference to the consequences of affirming, as a legal principle, the principle of equality and the interdiction of discrimination on sexual grounds. This requires the reinterpretation of, among others, all the provisions of family law in the light of the principle of equality. As a consequence, the said principle radiates its normative force to the whole legal system.
89 In this regard, Alexy acknowledges the influence of the analysis of rights positions contained in Jellinek’s status theory. Alexy finds that such theory is still of much value to the extent that it aims at providing an abstract analysis of legal positions, despite its manifold shortcomings. Jellinek distinguished, as it is rather well-known, between the passive, the negative, the positive and the active statuses of citizens. Those statuses broadly comprised the commands and prohibitions placed upon the individuals by the state, the unprotected liberties, the rights to actions vis-à-vis the state and legal powers. Defensive rights are hard to locate in any of the statuses, and for that matter, in the normative theory which underpins Jellinek’s analysis. A criticism in chapter 4, La Torre.
Rights to something imply a triadic relation between the beneficiary, the addressee and the object of the right [138]. Among rights to something, we can distinguish between: defensive rights, rights to the no-affecting of characteristics and situations of the right-holder, rights to the non-removal of legal positions (related to institutional contexts, and therefore, to powers) and rights to positive acts.

Liberties imply a triadic relationship between the person lacking the liberty, the obstacle to liberty and the liberty object (thus, the object which the obstacle makes impossible or difficult to obtain) [139]. Liberties can be classified as unprotected liberties (which stem from permissions) and protected liberties (which derive from a permission combined with objective norms which secure the right-holder the possibility of carrying out the permitted act). In their turn, protected liberties can be related to a right against the state to non-obstruction or to a right against the state to action.

Powers enlarge the ability of the individual to act, by means of allowing her to alter her legal state of affairs by her own acts [150]. Thus, legal powers enable acts which cannot be performed merely on the basis of the natural abilities of the individual, but which presuppose constitutive rules. In such, they come very close to institutional guarantees, that is, the guarantee by the constitution of a given legally created institution, by means of prohibiting the legislature its suppression.

D) Arguing with Fundamental Rights

a) Conflicts: Weighing and Balancing

§15. [Weighing and balancing fundamental rights and the dignity of democratic laws] The characterisation of fundamental rights as a matter of principle, as reasons for other norms, combined with the practical purpose of A Theory of Constitutional Rights, explain the central place assigned in the book to the question of how to solve conflicts between fundamental rights. However, this question was basically considered in the first part, in §9. Thus, it will not be repeated here. However, it is necessary to add that the adjudication of conflicts between conflicting fundamental rights norms is further complicated by their constitutional status. Any proper democratic theory of fundamental rights must, indeed, uphold the principle of the formal competence of the democratic legislature, according to which democracy
requires that the legislature adopts as many important decisions as possible.\textsuperscript{90}
This requires respecting the dignity of democratic legislation when balancing and weighing takes place in the context of the judicial review of the constitutionality of legislation.\textsuperscript{90}

b) The Scope of Rights and Their Limits

\textbf{§16. [Scope of rights, rights limits and the conception of rights as a matter of principle]} A further central claim of \textit{A Theory of Constitutional Rights} is that a structural theory of fundamental rights must keep distinct the scope and the limits of fundamental rights. In the usual terms of constitutional theory, Alexy claims that a proper structural theory of fundamental rights must comprise an \textit{external theory of limits to rights.}\textsuperscript{92}

The importance of this claim is to be understood in contrast to \textit{internal theories} of limits to rights.\textsuperscript{92} According to the latter, the distinction between scope and limits can only be maintained in a \textit{superficial} discourse of rights; at a deeper level, \textit{all limits to rights are but part of the definition} of the right in question. However, Alexy claims that the distinction between scope and limits is more than a mere way of talking, as it actually reflects the \textit{argumentative character of law}. The scope and limit of rights should be kept distinct because such a distinction: (1) allows us to distinguish between rights as \textit{prima facie guarantees}, which basically refer to rights as individual rights, and \textit{rights as limited}, not giving rise to unlimited rights and obligations; (2) increases the \textit{replicability} of the argumentative steps leading to a judgment, as the interaction between \textit{reason} and \textit{counter-reason} which ends up defining the actual limits to a right is not \textit{hidden}, but exposed.

These two reasons justify the claim that a proper structural theory of fundamental rights should define widely both the scope and the limits of fundamental rights.\textsuperscript{93} This renders transparent that constitutional protection is always dependent on the balance between the reasons which support constitutional protection and the contrary reasons.\textsuperscript{94} This reveals the \textit{discretionary gap} implicit in adjudication, but at the same time is the best recipe against intuitionistic adjudication wrapped in formalistic reasoning.

\textsuperscript{90} TCR 81.
\textsuperscript{91} TCR 190, 213, 274-75, 396ff, 414ff.
\textsuperscript{92} In chapter 8, Kumm draws a clear-cut contrast between the approach of the US Supreme Court and the German Federal Constitutional Court on scope and limits of rights.
\textsuperscript{93} TCR, 225.
\textsuperscript{94} TCR, 205.
Under such a light, it becomes clear why the idea of a fundamental right limit is closely related to the characterisation of fundamental rights as a matter of principle. A proper catalogue of the limits to any given fundamental right should include not only specific or explicit “fundamental rights limits”, but also “substantive limits”, stemming from the systematic reading of the whole set of fundamental rights provisions. Indeed, any other constitutional principle is potentially a limit to every other constitutional principle.

§17. [Types of Fundamental rights Limits] Alexy establishes a two-fold distinction among fundamental rights limits: immediate and mediate fundamental rights limits, depending on whether they are fixed by fundamental rights norms or by infra-fundamental rights norms on the basis of a constitutional empowerment. On the one hand, immediate constitutional limits are those directly established by the Constitution. On the other hand, mediate constitutional limits are those which the Constitution does not fix, but empowers some organ or body to define. Things can be further complicated when immediate constitutional limits are defined by reference to infra-constitutional norms. In this latter case, as also in the case of mediate limits, the validity of the limiting norm is dependent upon their constitutionality, that is, upon the normative content of the limits being compatible with the Constitution.

§18. [An inalienable core of rights?] The most controversial discussion concerning fundamental rights limits revolves around the existence or inexistence of an “inalienable core of fundamental rights”. Under such a conception, there would a substantive hard-core within the scope of each fundamental right which could not be limited, no matter which is the contrary reason invoked to that effect. In Alexy’s view, the idea of the “inalienable core” is of scarce guidance in constitutional adjudication, and must be more properly considered as an emotive expression.

An additional related practical question is the distinction between limitation and outworking of fundamental rights. It is not infrequent to differentiate limits from outworking norms, and to characterise the latter as

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95 TCR, 185ff.
96 TCR, 189ff.
97 TCR, 191.
98 Cf. on the deontological core of fundamental rights, chapter 3 (La Torre) and 4 (Eriksen).
those norms which “realise the goals of fundamental rights in social life”, which “implement them”, without actually limiting them.\textsuperscript{[99]}

Whether this distinction might make sense in other types of discourses or not, Alexy finds inadequate to distinguish between limiting and outworking norms.\textsuperscript{[100]} It is much better to characterise any norm interfering with the protection of rights as a limitation, as this minimises the risk of the violation of fundamental rights in the name of outworking them. By characterising outworking norms as limits, we subject them to the same dynamics between arguments and counter-arguments which is characteristic of the interaction between scope and limit of any fundamental right.

E) Liberty, Equality and Solidarity
\textsuperscript{[S19. [Fundamental rights as carriers of the practical morality which underpins the legal system] It has already beensaid that the characterisation of fundamental rights as a matter of principle, and mainly as a matter of individual, subjective rights, has major implications for the characterisation of the legal system as a whole. This is so because this implies that fundamental rights are to be regarded as the carriers of the most basic principles of practical morality which underpin the legal system. That is, they are, in one sense, the positive formulation of the most basic principles of practical morality.\textsuperscript{[101]} Such principles are, in Alexy’s view, liberty, equality and solidarity, to the consideration of which Alexy devotes three chapters of the book.

\textit{a) The General Right to Liberty}
\textsuperscript{[\$20. [The defence of the general right to liberty]} Alexy finds that a structural theory of fundamental rights should affirm the general right to liberty.\textsuperscript{[102]} This right would comprise a principle of negative freedom of action, a high degree of non-interference with states of affairs, maximum non-removal of legal positions of fundamental rights.\textsuperscript{[103]}

Alexy offers two main lines of defence against those who do not accept the idea of a general rights to liberty, on the basis of their redundant character

\textsuperscript{[99]} TCR, 217.
\textsuperscript{[100]} TCR, 221-2.
\textsuperscript{[101]} TCR, 366.
\textsuperscript{[102]} TCR 223.
\textsuperscript{[103]} As Mattias Kumm argues in Chapter 8, this is closely related to the broad definition of the scope of fundamental rights argumentation, and with the broad definition of the scope and limits of fundamental rights.
and that what matters is not the existence of a general right, but the specific liberties which can be enjoyed by the addressees of the Constitution.

First, some critics claim that the general right to liberty is redundant. This would be so given that its scope would include ‘any action’ and, as such, it will amount to a generally permissive norm. According to Alexy, such a line of reasoning fails to appreciate the convenience of a clear and explicit identification of the range of what is prima facie protected under the general right to liberty.104

Second, it is sometimes claimed that what matters is not the general right to liberty, but the set of constitutionally entrenched specific liberties. However, our German legal theorist counter-claims that the affirmation of specific liberties can critically depend on the affirmation of a general right to liberty. Finally, there is a ‘communitarian’ line of reasoning according to which the general right to liberty leads to the defence of the ‘unencumbered self’, of the neglect of duties towards others. The author of A Theory of Constitutional Rights replies that such criticism fails to take into account that the affirmation of a general right to liberty does not say much about the interaction between its scope and its limiting clauses. The mere affirmation of the general right to liberty does not ground the claim that citizens have only negative liberties. It only requires that “the liberty of the individual, along with the situation in which she finds herself, and the legal rights she has, are only interfered when there are justifying reasons for the interference”.105

§21. [The general right to liberty and conceptions of distributive justice]
The characterisation of the general right to liberty as a matter of negative liberty is not to be interpreted as a hidden defence of neo-liberal conceptions of justice. This is so for two reasons. First, because one must distinguish neatly between negative freedom in a narrow and in a wide sense. Second, negative liberty has value in itself, but this does not entail that it is the paramount value to be upheld by the legal system.106

b) The General Right to Equality

§22. [The different dimensions of the general right to equality] Together with a general right to liberty, Alexy affirms that A Theory of Constitutional

104 TCR, 227ff.
105 TCR, 251.
106 TCR 230-1.
Rights should also affirm a **general right to equality**. In very general terms, the right to equality requires treating equally what is equal, and differently what is different. It can be rendered more specific by means of considering the rights-holders (and therefore, their subjective features) and the factual situations to which the right is applied.

Alexy distinguishes neatly two dimensions of equality: *legal equality*, which requires equal treatment by the law; and factual equality, which requires the law ensuring that individuals are, as a matter of fact, in an equal position. While *legal equality* focuses on the action of the state, *factual equality* focuses on the consequences of state action.

§23. **[Legal Equality]**. In its turn, *legal equality* has two dimensions. First, *equality in the creation of the law*, which would frame the discretion of the legislature in drawing differences, both in a positive and in a negative sense, and *equality in the application of the law*, which would require the administration and the courts to apply the law equally, something which in a strict sense is equivalent to *actually implementing the law*.

In constitutional terms, *equality in the creation of the law* is more interesting (and problematic). In formal terms, it would impose a mere requirement of coherence on the legislature, allowing it to discriminate as much as it wanted, provided that it did so *coherently*. If interpreted substantially, as it tends to be by constitutional courts, it would require framing the discretionality in picking and choosing factors of differentiation.

Alexy defends interpreting *legal equality* as a limit to arbitrariness. This would entail that (1) similar treatment is required if no plausible reason can be established in favour of drawing a difference; judicial review would be limited to those cases in which the reason for differentiating would be arbitrary, that is, no merely *incorrect* (2) differential treatment is required if there is a clearly adequate reason for it.
This leaves the legislature with a wide margin of discretion, at the same time as it avoids encumbering constitutional courts.

§24. [Factual Equality] As indicated, factual equality concerns not only state action, but the consequences of state action. Most of the problems related to this principle derive from its (uneasy) relationship with legal equality. Alexy favours keeping the two neatly distinguished analytically, as well as recognising the preference of the principle of legal equality.\textsuperscript{116}

Factual equality is in tension with legal equality, for the very reason that achieving factual equality might well require undermining legal equality.\textsuperscript{117} It is simply not possible to abandon one of the principles in favour of the other. On the one hand, legal equality is constitutionally mandated in most (if not all) legal systems (indeed, it could be said to be part of the grammar of law, whatever will happen in the actual application of legal norms), it is structurally required in legal argumentation, and its abandonment will clearly result in an over-burdening of the law, and of courts. On the other hand, factual equality is constitutionally mandated in some legal systems, either explicit (such as it is the case in the Italian or the Spanish Constitution), or derivatively (such as it is the case in Germany); moreover, it tends to be upheld, at least in some cases, by constitutional courts. This is why Alexy proposes to operationalise the right to factual equality as a “right to a certain instance of legal difference that serves the promotion of factual equality”,\textsuperscript{118} something which implies turning the right into one of the factors and counter-factors within the analysis of whether there is a right to legal equality. As such, the right to factual equality accrues if, and only if, it trumps the default preference for legal equality, the principle of respect of the discretion of the democratically elected legislature and rights to negative liberties which could be infringed by positive state action.

c) Positive State Action: Defence, Procedure and Solidarity

§25. [Positive rights and complete fundamental rights] Alexy further claims that complete fundamental rights include not only negative rights, aimed at shielding the individual from state action, but also positive rights, more precisely, rights to positive state action or entitlements in a wide

\textsuperscript{116}This echoes the structuring of the relationship between the two principles of justice in Rawls’ Theory of Justice. See John Rawls, \textit{A Theory of Justice}, Cambridge: Harvard, 1971, p. 61.

\textsuperscript{117}TCR, 277.
The right to life, usually classified as a negative right, comprises fundamental rights positions which require positive state action. Thus, the state might be called to defend the life of the individual (through the police force), something might presupposes an institutional and procedural organisation that ensures the effectiveness of the right to life (in addition to the proper organisation of the police, the existence of court procedures through which assaults on the life of others could be punished).

This entails a very different analytical and substantive perspective on positive rights, or rights to state action. Their role in defining and determining the purposes of state action would become unavoidable, and not a despicable consequence of endorsing a socialising legal and constitutional theory.

§26. [Types of rights to positive state action] Alexy distinguishes three types of rights to positive state action: (1) Rights to protection, or what is the same, rights against the state that it protects the individual from interference by third parties; (2) Rights to organisation and procedure, or what is the same, procedural rights in a wide sense, that is that certain organisational structures and procedures are established, and that the rights of individuals in relation to and within them are interpreted in a constitutionally sound way; there are four main sub-types: (i) private law powers; (ii) court and administrative procedures; (iii) organisation rights in a narrow sense; (iv) rights to participation in public decision-making (such as the right to vote in elections); (3) Rights to entitlements in a narrow sense, which are defined as rights to something which the right-holder could obtain from private individuals if she had the financial means, and there were sufficient offers on markets. These are usually referred as social fundamental rights.

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118 TCR, 280.
119 TCR, 288 and 294-5.
120 This has been shown through the perspective of the actual costs of rights by Stephen Holmes and Cass Sunstein, The Costs of Rights, New York: Norton, 1999.
121 TCR, 288.
122 TCR, 300
123 TCR, 315.
124 TCR, 324.
125 TCR, 326.
126 TCR, 328.
127 TCR, 334.
128 TCR, 294.
§27. [The substantive case for social fundamental rights] Alexy adds to the said typology a substantive argument in favour of social fundamental rights. The claim is three-pieced. First, legal liberty is valueless without the “factual possibility of choosing between permitted alternatives”. This establishes a direct and clear connection between formal and factual freedom. Second, the material basis of freedom under modern political and economic conditions depend on state action for large numbers of citizens. This is indeed a factual claim. Third, factual freedom has to be secured through fundamental rights for two reasons: (i) because it is required by the very idea of fundamental rights as those rights which ensure the free development of the personality of the individual; (ii) because the protection of factual liberty through rights is determinant for those who risk being deprived of economic resources, even if only instrumentally; that is, what they value is actual access to economic resources, but it is also correct that fundamental rights can be a decisive means in order to ensure it.

III. Contents of the Report
The report is divided into four sections.

The first section is devoted to Robert Alexy’s ‘Discourse Theory and Fundamental rights’. The chapter aims at three main goals: (1) to elucidate the concept of fundamental rights, and more precisely, three different conceptions of fundamental rights, namely formal, substantial and procedural; (2) to distinguish eight different foundations of fundamental rights: religious, intuitionistic, consensual, socio-biological, instrumental, cultural, explicative and existential; Alexy further claims that a deliberative-democratic conception of fundamental rights makes its own the two latter justifications, as it is based on rendering explicit the pragmatic assumptions we make when we make assertions, and also on the characterisation of assertion as the most basic human experience; (3) to show the rationality of balancing as a way of solving conflicts between principles; this is done by means of explicating the rational insights which underlie the Law of Balancing with the help of the Weight Formula. By doing all this, the chapter brings further clarity to the relation between fundamental rights and human rights in Alexy’s theory, and also

129 TCR, 337.
130 TCR, 338.
131 TCR, 339.
132 Ibidem.
renders more precise his reply to Habermas’ criticisms, more specifically, his well-known firewall and irrationality criticisms.

The second section deals with Alexy’s theory of fundamental rights theory in the light of his general legal theory. Erik Oddvar Eriksen challenges Alexy’s legal and constitutional theory from the standpoint of deliberative democracy. He starts by reconstructing some of the key issues which underlie the classical discussions between Alexy on the one hand and Habermas and Günther on the other. More particularly, he considers the ultimate foundation of deliberative democracy (substantial or procedural?) and the justification of human rights (rational consensus or explicative cum existential?). He then claims that Alexy’s constitutional theory might be descriptively correct, but it is normatively unacceptable. By means of characterising legal reasoning as a special case of general practical reasoning, and judicial application as a combination of justification and application discourses, Alexy is bound to shift the authorship of legal norms from democratic legislatures to judges and courts. This is so because the distinction between legislation and implementation of norms is blurred, at the same time that the legal medium is overburdened with the task of picking up correct solutions from a general practical reason standpoint. Finally, he criticises the reconstruction of conflicts between fundamental rights in terms of weighing and balancing the underlying principles. This does not only imply the expansion of constitutional legal reasoning to the detriment of political processes and the right to self-government, but it also leads to a relativistic conception of correctness, as at the end of the day what is correct is to be determined by the judges (and consequently, be critically dependent on their capacity to make correct judgments). Kaarlo Tuori contrasts Alexy’s and Dworkin’s characterisation of legal principles. While both philosophers offer a rather similar characterisation of the distinction between rules and principles, Alexy fails to establish a further distinction between principles and policies. This is extremely problematic as it implies downplaying the deontological character of principles (as also La Torre and Eriksen claim). Tuori claims that Alexy fails to make a distinction because of his analytical approach to fundamental rights. Such an approach also blinds Alexy to the central paradox of the modern conception of fundamental rights as limits to state power which are established by state power, limits to law that are legal in themselves. Such paradox cannot be tackled or sorted out from such analytical perspective, but requires deconstructing the very idea of modern law. Tuori indeed proposes to distinguish between the surface level of law,
the legal culture and the deep structure of law. Fundamental rights only act as
limits of state power and of positive law if they are sufficiently sedimented in
sub-farce levels. Massimo La Torre puts forward nine challenges to Alexy’s
legal and constitutional theory. He does so by means of reconstructing not
only Habermas’ critical assessment of Alexy’s theory, but also the critical
points made by Hart to Dworkin (as if they had been addressed to Alexy, so
to say). La Torre wonders whether the purely semantic conception of norm
put forward by our German legal philosopher is not incompatible with a
substantive idea of a rule of recognition, and therefore, with the very idea of
legal system; whether a proper distinction between rules and principles will
not be precisely just the reverse of the one put forward by Alexy, because
only then the deontological character of principles will be properly
acknowledged; whether fundamental rights are to be considered as a matter
of principle, given that this entails their characterisation as optimisation
requirements, and consequently, their “prescriptivisation”; whether Alexy’s
three-stand theory of rights does really explain away the difference between
interest or will theories of rights; whether his erasure of a neat distinction
between discourses of justification and application might not be descriptively
accepted, but normatively unpalatable (echoing one of Eriksen’s central
criticisms), and whether the nature of law should not be immediately derived
from the characterisation of legal discourses. La Torre dwells at some length
with one of the recurrent themes of the second part, namely, whether the law
of balancing actually ensures the rationality of judicial decisions, or, whether it
is just a mask which hides the discretionality of judges. All these criticisms reveal,
in view of the author of the chapter, the structural tension in Alexy’s theory,
due to his simultaneous endorsement of critical theory and prescriptivist
theories of law. Finally, Carlos Bernal offers a critical reconstruction of a key
element of Alexy’s constitutional theory, namely the principle of
proportionality in a narrow sense, that is, the balancing between competing
principles, in light of the Postscript and the most recent articles by Alexy. By
means of a detailed analysis of the law of balancing, the weight formula, and
the allocation of the burden of argumentation, Bernal shows the
transformation of Alexy’s understanding of the law of balancing and of the
burden of argumentation in the Postscript to the English translation of A Theory of
Constitutional Rights. He claims that the weight formula contributes to the
clarification of the structure of argumentation, even if it cannot point to the
one right answer in each and every case. If only because there are several
steps at which discretionality is bound to creep in, such as the assessment of the
abstract weight of the competing principles, or the empirical facts which
determine the graduation of the competing principles.

The third section explores the extent to which Alexy’s theory of
fundamental rights can be fruitfully applied to constitutional orders other than
the German one. Julian Rivers aims at a double target; first, testing whether
the first two years of case law on the UK Human Rights 1998 can be
reconstructed rationally, and if so, whether they tally with Alexy’s theory;
second, assessing whether Alexy’s fundamental rights theory is as structural as
the German philosopher claims it to be; by means of applying the theory to
the British fundamental rights practice, Rivers is able to detect the hidden
institutional assumptions implicit in many elements of Alexy’s fundamental
rights theory. This is the case of claim that the formal recognition of
fundamental rights plays a central role in any theory of fundamental rights.
While the Human Rights Act 1998 does not introduce a catalogue of
fundamental rights proper, but the obligation to interpret British law in line
with the rights acknowledged in the European Convention of Human Rights (and for
that purpose, only some of them), British courts have derived fundamental
rights from the Act in a similar way as the German, Italian or Spanish
constitutional courts derive fundamental rights norms from their national
constitutional provisions. Similar points are raised on what concerns the
horizontal effect of fundamental rights (whether this does not call for a rich
enough content of rights, which allows them to capture the morality of
interpersonal private relationships) and on the relationship between legislature
and courts under the principle of proportionality, and more specifically, the
second law of balancing as defined in the Postscript to the English translation.
Rivers notices that Alexy’s assignment to Courts of the critical decision
whether to review or not the knowledge basis on which administrative or
state action is based, actually presupposes that the only alternative deciding
body is a majoritarian legislature and that the rights are stake are typical
individual rights against state action. But both presuppositions might not fit
into the facts of the case. In my own chapter (Agustín J. Menéndez), I aim at
testing the extent to which Alexy’s theory can bring clarity to fundamental
rights reasoning in the European Union. It seems to me that this is so on four
grounds. First, it is very helpful in understanding the validity basis of
European constitutional law. While the validity of fundamental rights norms
in national constitutions tends to be positive, that is, based on their enactment
by the pouvoir constituent, this is not exactly the case in Union law.
Fundamental rights norms stem from the constitutional traditions common to the Member States (and as such they have a positive basis); but what is common is something to be determined through a critical comparative approach. On such a basis, the validity basis of fundamental rights norms in Union law is better approached from the standpoint of a theory such as Alexy’s legal theory. Thus, it is not only the case that the interpretation of fundamental rights norms in Union law renders explicit the connection between law and general practical reasoning (as arguably it is the case in all legal systems where fundamental rights are affirmed), but the very individuation of the fundamental rights norms in Union points to a specific conceptual connection to general practical reasoning. Second, it is claimed that Alexy’s clear distinction between fundamental rights and ordinary rights, and between individual subjective rights and collective goods establish the right angle from which to systematise the fundamental rights provisions of the Charter of Fundamental Rights of the European Union. Third, it also provides an adequate theoretical perspective from which to analyse and adjudicate conflicts between the basic economic freedoms enshrined in the founding Treaties of the Union and the fundamental rights consolidated into the Charter of Fundamental Rights. Fourth, and rather paradoxically, it reveals the egalitarian potential of the case law of the Court on the principle of non-discrimination on grounds of nationality. In the last chapter of the third section, Mattias Kumm aims at the double objective of reconstructing the main elements of Alexy’s constitutional theory and to assess it in comparison to alternative theories of fundamental rights. In doing both things, he situates Alexy’s theory in the development of German Constitutional law, at the time that he draws a comparison with US Federal fundamental rights practice (and dogmatics). Kumm stresses the structural character of A Theory of Constitutional Rights, which revolves around the characterisation of fundamental rights as a matter of principle, and of principles as optimisation requirements, which makes of the principle of proportionality in the wide sense central in fundamental rights adjudication. However, the very structural character of the theory involves that it cannot provide but “a structure which functions as a checklist for the individually necessary and collectively sufficient conditions that determine whether the reasons that can be marshalled to justify an infringement of a right are good reasons under the Constitution”, and not the one right answer in each and every case. This echoes the points made by Eriksen, La Torre and Bernal. Kumm considers in some detail the implications of Alexy’s affirmation of general rights to liberty and equality,
and his characterisation of positive rights to state action as part and parcel of the province of constitutional law. In his view, such an approach grounds Alexy’s wide definition of both the scope and the limits of fundamental rights, and also the radiation force that fundamental rights exert over the legal system as a whole. Indeed, Kumm constructs Alexy as claiming that the domain of constitutional justice is prima facie co-extensive with the domain of political justice generally. This marks two deep differences between Alexy’s theory and the leading accounts of fundamental rights in US constitutional practice (and theory). First, his wide definition of both the scope and limits of rights contrasts with the narrow definition established by the US Supreme Court. Second, Alexy’s theory departs, in a logical sense, from the institutionalisation of a system of rights, and not from the institutionalisation of a democratic process, in contrast to what is usually done in American constitutional dogmatics (and as Eriksen seemed to consider normatively mandated). Finally, Kumm defends Alexy’s structural theory against competing structural theories of fundamental rights as trumps and as shields. The risks of enlarging excessively the tasks of constitutional courts are to be balanced against the principled character of court decisions, which might have a positive and beneficial spillover effect upon the general political debate.

Finally, section four includes a complete list of the works of Robert Alexy.
I.

A Theory of Constitutional Rights Revisited
Chapter 1
Discourse Theory and Fundamental Rights

Robert Alexy
Professor, University of Kiel

The relation between discourse theory and fundamental rights is close, deep, and complex. It comprises three dimensions, which are intrinsically connected.

I. Three Dimensions
The first dimension concerns the foundation or substantiation of fundamental rights. One might call this the philosophical dimension of fundamental rights. The second concerns the institutionalization of fundamental rights. In order to distinguish this problem from the first, one might call it 'political'. The third dimension concerns the interpretation of fundamental rights. This problem might be classified as 'juridical'. I will concentrate on the philosophical and juridical problems.

II. Three Concepts of Fundamental Rights: Formal, Substantial and Procedural
It is difficult to say how something can be substantiated, institutionalized, and interpreted without having an idea about what it is that is to be buttressed by reasons, transformed into reality, and made vivid by way of an interpretive practice. The question of what fundamental rights are is the question of the
concept of fundamental rights. Where fundamental rights are concerned, there are three kinds of concept: formal, substantial, and procedural.

A formal concept is employed if fundamental rights are defined as rights contained in a constitution or in a certain part of it, or if the rights in question are classified by a constitution as fundamental rights, or if they are endowed by the constitution with special protection, for example, a constitutional complaint brought before a constitutional court. Without any doubt, formal concepts are useful, but they are not enough if one wants to understand the nature of fundamental rights. Such an understanding is necessary not only for reasons theoretical in nature but also for reasons that concern the practice of applying the law. An example that illustrates this is article 93 (1) (no. 4a), Basic Law of the Federal Republic of Germany, which provides that a constitutional complaint can be raised by anyone on the ground that his or her fundamental rights qua rights, listed in the first part of the Basic Law under the heading 'Grundrechte', or rights contained in articles 20 (4), 33, 38, 101, 103, and 104, have been infringed by a public authority. The second group contains, inter alia, the classical habeas corpus rights. It seems, on the face of it, to be quite natural to conceive of all rights named in article 93 (1) (no. 4a) of the Basic Law as fundamental rights. On closer inspection, however, this first impression proves to be mistaken. This decidedly literal reading of article 93 (1) (no. 4a) would include too much. One item in the list is article 38, Basic Law. Article 38 not only grants – in the first sentence of its first paragraph – the right of the citizen to vote, which can without difficulty be conceived of as a fundamental right, but – in the second sentence of its first paragraph – also grants rights that define the basic position of a representative, that is, a member of the Bundestag. These rights, however, are fundamentally different from the rights of the citizen against the state. They are rights that determine the status of the representative not qua private person but as an element of the organization of public power. The Federal Constitutional Court has therefore decided that these rights cannot be defended by means of a constitutional complaint but only by an action between state organs, which is regulated in article 93 (1) (no. 1). The reason for this decision, which is a decision against the wording of the constitution, is that the rights of representatives – notwithstanding the fact that they are rights granted by the constitution – are not fundamental rights in the proper sense of the word.

1 BVerfGE 43, 142 (148-9); 64, 301 (312); 99, 19 (29).
Such a claim, however, is only possible if there also exists a *substantial concept* of a fundamental right, one that serves to revise results stemming from the application of the formal concept. Thus understood, a substantial concept of a fundamental right must include criteria that go above and beyond the fact that a right is mentioned, listed, or guaranteed in a constitution. A classical example of such a substantial concept has been presented by Carl Schmitt and Ernst Forsthoff.² They claim that the only genuine fundamental rights are defensive rights of the citizen against the state. To follow Schmitt and Forsthoff here would be to accept an exclusively libertarian understanding of fundamental rights. To be sure, there are good reasons to include libertarian rights in a substantial concept of fundamental rights. There are, however, also good reasons not to restrict this concept to these rights. Protective rights, rights to organization and procedure, and social rights ought not to be excluded from the club of genuine fundamental rights merely because a concept follows the tradition. If one then decides to expand the concept of a fundamental right, only one criterion seems to be adequate to define a substantial concept of fundamental rights. It is the concept of human rights. Again, there is a difference between the initial impression and what one arrives at upon reflection. On first glance it seems that a substantial concept of fundamental rights is possible which simply defines fundamental rights as human rights transformed into positive constitutional law. On this basis, human and fundamental rights would become extensionally equivalent. This, however, would count both as over- and under-inclusive. Constitutions may contain rights that are not to be classified as human rights and there may well be human rights that have not found entry into a certain constitution. Still, one can, on closer inspection, take account both of these two possible directions of divergence and of an intrinsic relation between human and fundamental rights if one holds that fundamental rights are rights incorporated into a constitution with the intention of transforming human rights into positive law.³ This intention theory makes it possible to conceive of the catalogues of fundamental rights of different constitutions as different attempts to transform human rights into positive law. As with attempts generally, attempts to transform human rights into positive law can be successful to a greater or lesser extent. The intention theory has far-reaching consequences

for the philosophical problem of the foundation or substantiation of fundamental rights. The foundation of fundamental rights is essentially a foundation of human rights. By this means, a critical dimension is brought into the concept of fundamental rights. If human rights *qua* rights that ought to be constitutionally protected can be substantiated and if a constitution does not contain these rights, then the foundation becomes a critique. This critique can lead to constitutional reform or to a change in the constitution through constitutional review. The latter shows that there is an intrinsic connection between the philosophical and juridical problems. In any case, one point seems to be clear: one cannot raise the question of the substantiation or foundation of fundamental rights without raising the question of the substantiation or foundation of human rights.

The third concept of fundamental rights is *procedural* in character. This concept mirrors the institutional problems of transforming human rights into positive law. Incorporating human rights into a constitution and granting a court the power of judicial review with respect to all state authority is to limit the power of parliament. In this respect, fundamental rights are an expression of distrust in the democratic process. They are, at the same time, both the basis and the boundary of democracy. Corresponding to this, there is a procedural concept of fundamental rights holding that fundamental rights are rights which are so important that the decision to protect them cannot be left to simple parliamentary majorities. The three concepts are closely connected. An adequate theory of fundamental rights has to address not only all three concepts but also the relations in which they stand to each other.

**III. The Foundation of Fundamental Rights**

As already mentioned above, the intrinsic relation between constitutional and human rights, which is expressed by the substantial concept of fundamental rights, answers the question of why the problem of the foundation of fundamental rights is basically a problem of the foundation of human rights. That is, if human rights can be substantiated, fundamental rights can, too, whereas if human rights cannot be substantiated, then fundamental rights, too, must remain without foundation. This state of affairs would have far-reaching consequences for the legitimacy and interpretation of fundamental

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rights. The insight that there is no foundation of fundamental rights without a foundation of human rights makes it possible for us to treat the question of the foundation of human rights as a part of the question of the foundation of fundamental rights.

The concept of human rights is highly contested for reasons both philosophical and political in nature. It is not possible to take up this debate here, and, happily, it is not necessary to do so either. The answer to the question of whether a foundation of human rights is possible requires only a general idea of what human rights are. The required general idea can be expressed by means of a definition that employs five properties that serve to explain what human rights are. According to this definition, human rights are, first, universal, second, fundamental, third, abstract, and, fourth, moral rights that are, fifth, established with priority over all other kinds of rights.\(^5\)

On the basis of this definition, the question of how to substantiate human rights can now be formulated as the question of how moral norms or rules that grant, with priority, universal, fundamental, and abstract rights may be substantiated. This shows that the problem of the substantiation or justification of human rights is nothing other than a special case of the general problem of the justification of moral norms.

In order to be able to assess whether and to what degree discourse theory is able to provide for a justification of human rights, it is necessary to have considered other attempts at providing such a foundation. No attempt is perfect. Thus, the comparative concepts of being better and being good enough play a pivotal role in the context of the foundation of human rights.

The theories about the justifiability of moral norms in general as well as those theories that refer only to the justifiability of human rights can be classified in many different ways. The most fundamental distinction is that between approaches that generally deny the possibility of any such justification and approaches claiming that some kind of justification is possible. The general denial may have its roots in radical forms of emotivism, decisionism, subjectivism, relativism, naturalism, or deconstructivism. The general assumption of the possibility of a justification may well include one or more of these sceptical elements, but it insists that there exist the possibility of giving reasons for human rights, reasons that can raise a claim to objectivity, correctness, or truth.

The approaches reflecting this latter view differ greatly. This does not, however, preclude various combinations. Eight approaches shall be distinguished here.

The first is the religious model. A religious substantiation of human rights provides for a very strong foundation. Whoever believes that human beings are created by God in his own image has a good reason for considering human beings as having value or dignity. This value or dignity is a good basis for human rights. These strong reasons serve, however, as reasons only for those persons who believe in God and his creation of man in his own image. The same applies to all other kinds of religious arguments.

The second approach is the intuitionistic one. Human rights are justified according to the intuitionistic model if it is claimed that they are self-evident. Self-evidence, however, does not count as a reason if it is possible not to share the self-evidence without thereby exposing oneself to any reproach other than that one does not share this form of self-evidence. If intuitionism is not embedded in reasoning, it boils down to emotivism. If it is embedded in arguments, it is no longer intuitionism. Self-evidence can be the result of argument, but it is not a substitute for argument.

The third approach is the consensual one. If a consensus is nothing more than a mere congruence of beliefs, then consensualism is nothing other than collective intuitionism. Its only source of objectivity is the fact of congruence. If this congruence embraces all human beings and if it is stable, then it ought not to be underestimated. Even then, however, reasons for the concurrent beliefs can be demanded. Once consensus is connected with argument, the approach is more than a merely consensual approach. It moves in the direction of discourse theory. If the consensus is not complete, the role of reasons counts more than mere majorities, which might well be based on bad arguments.

The intuitionistic and the consensual models are based on beliefs or claims without argument. The forth approach dismisses even beliefs and claims, substituting for them behaviour. It is the biological or, more precisely, the socio-biological approach. According to this model, morality is a species of altruism. Certain forms of altruistic behaviour, such as, in particular, caring for one’s own children and helping relatives but also reciprocal altruism generating mutual help, are said to be better for the survival of the genetic pool of individuals than is mutual indifference or even aggressiveness. The tendency to maximize one’s reproductive success may in some cases lead to respect and help vis-à-vis some persons, but it is a pattern of behaviour ‘often
accompanied by indifference and even hostility towards outsiders. This is incompatible with the universalistic character of human rights. If human rights can be justified, then it is not by means of any observations of empirical facts about the biological nature of human beings but only by means of an explication of their cultural nature. This is the path of discourse theory.

The fifth approach is the instrumentalistic one. A justification of human rights is instrumentalistic if it is argued that the acceptance of human rights is indispensable to the maximization of individual utility. This approach appears in decidedly primitive forms as well as in highly sophisticated models. An example of the primitive version is the argument: ‘If you do not want to be killed, you must respect others’ right to life’. Highly sophisticated models have been developed, for instance, by James Buchanan and David Gauthier. If it is possible for some people to increase their utility by violating the human rights of others, then the primitive argument breaks down. History shows that this possibility cannot be ruled out, not at any rate as long as human rights have not been transformed into positive law backed by effectively organized sanctions. The sophisticated models must either work with provisos that exclude unacceptable outcomes, as Gauthier does when he says that ‘(r)ights provide the starting point for, and not the outcome of, agreement’, or their proponents must be willing to accept outcomes that, to put it in Buchanan’s words, ‘may be something similar to the slave contract, in which the “weak” agree to produce goods for the “strong” in exchange for being allowed to retain something over and above bare subsistence, which they may be unable to secure in the anarchistic setting’. Buchanan’s model is a purely instrumental model, but the possibility of a slave contract shows that it is not compatible with human rights. Gauthier’s model may be compatible, but this is entirely owing to reasons addressing elements that can be justified only within a non-instrumentalistic approach. All of this does not mean that the instrumentalistic approach has no value with respect to human rights. In so far as it can provide reasons for respecting human rights, it should be incorporated in a more comprehensive model. This model, however, must be governed by principles that purely instrumentalistic reasoning cannot generate.

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8 James M. Buchanan, The Limits of Liberty, Chicago and London; Chicago University Press, 1975, p. 60.
The sixth approach is the cultural one. It maintains that the public conviction that there are human rights is an achievement of the history of human culture. Radbruch presents a combination of this argument with a consensual one: ‘To be sure, their details remain somewhat doubtful, but the work of centuries has established a solid core of them and they have come to enjoy such a far-reaching consensus in the declarations of human and civil rights that only the deliberate sceptic can still entertain doubts about some of them.’ The cultural model, too, is useful but not sufficient. Human rights are not the result of the history of all cultures. The mere fact that they have been worked out in one or more cultures is not enough to justify their universal validity, which is included in their very concept. Cultural history can only have significance in justification as a process that connects experience and argument. Universal validity cannot be established by tradition but only by reasoning.

Our consideration of the six approaches has shown that if anything can establish the universal validity of human rights, then it is reasoning that establishes it. Discourse theory is a theory centred on the concept of reasoning. That is the most general reason for the view that discourse theory can contribute to the foundation of human rights. The discourse-theoretical approach might be called ‘explicative’, for it attempts to give a foundation of human rights by making explicit what is necessarily implicit in human practice. Making explicit what is necessarily implicit in a practice follows the lines of Kant’s transcendental philosophy. The discourse-theoretical argument is not only complex, it is also in need of support by means of other arguments. I attempted to elaborate this some time ago, and my arguments are doubtlessly in need of improvement. This cannot, however, be done here. I will confine myself to a handful of considerations that may perhaps suggest how it is that discourse theory can serve to justify human rights.

The argument proceeds in three steps or at three levels. At the first level, it attempts to show that the practice of asserting, asking, and arguing presupposes rules of discourse that express the ideas of freedom and equality as necessarily connected with reasoning. This first step concerns what Robert

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Brandom calls the ‘practices of giving and asking for reasons’.\textsuperscript{11} The assumption that discourse necessarily presupposes freedom and equality as rules of reasoning is, however, by no means sufficient to justify human rights. It implies neither that these practices as such are necessary nor that the ideas of freedom and equality presupposed by them as rules of reasoning imply human rights which are not only rules of discourse but also rules of action. Thus, a second and a third step must follow the first step.

The second step concerns the necessity of discursive practices. I have attempted to argue that someone who in his life has never participated in any moves of any discursive practice has not taken part in the most general form of life of human beings.\textsuperscript{12} Human beings are ‘discursive creatures’.\textsuperscript{13} It is not easy for them to forbear from participating in any discourse whatever. One possibility here would be to abolish the factual ability to do so. This would be a kind of self-destruction. Another possibility would be systematically to substitute for any practice of giving and asking for reasons a practice of expressing desires, uttering imperatives, and exercising power. The choice of such a farewell to reason, objectivity, and truth is an existential choice. This will be the topic of our last approach, the eighth.

Before we can proceed to this last model, however, we have to perform the third step of the explicative justification of human rights. This step concerns the transition from discourse to action. In order to bring about this transition, additional premises are necessary. The first is the autonomy argument. It says that whoever seriously takes part in discourse, presupposes the autonomy of his partners.\textsuperscript{14} This excludes the denial of autonomy as the source of the system of human rights. The second additional premise is established by the argument of consensus. It says that the equality of human rights is a necessary result of an ideal discourse.\textsuperscript{15} The third additional premise connects the ideas of discourse, democracy, and human rights. By means of this third premise, the philosophical dimension of human rights is connected with the political problem. This connection expresses the fact that the discourse-theoretical justification of human rights is holistic in character. It consists of the construction of a system that expresses as a whole the discursive nature of human beings.

\begin{itemize}
  \item\textsuperscript{12} Alexy, \textit{supra}, fn 10 (1996), at p. 217.
  \item\textsuperscript{13} Brandom, \textit{supra}, fn 11, at p. 26.
  \item\textsuperscript{14} Alexy, \textit{supra}, fn 10 (1996), p. 222.
  \item\textsuperscript{15} Ibid.
\end{itemize}
By this means, the explicative approach of discourse theory is connected with an eighth approach, which might be called ‘existential’. It concerns the necessity of the discursive nature of human beings. Is it really impossible to give up this discursive nature? It seems, on the contrary, to be possible to do so, at least to a certain degree and in certain respects. This means that the degree of discursivity depends on decisions concerning the acceptance of our discursive nature and thereby, of ourselves.

IV. The Institutionalization of Fundamental Rights

Human rights are institutionalized by means of their transformation into positive law. If this takes place at a level in the hierarchy of the legal system that can be called ‘constitutional’, human rights become fundamental rights. The incorporation of a catalogue of human rights at as high a level in the legal system as possible is not the only demand discourse theory makes with respect to the constitution. The second constitutional requirement is the organization of a form of democracy that expresses the ideal of discourse in reality. This form of democracy is deliberative democracy. Instead of ‘deliberative democracy’ one could also speak of ‘discursive democracy’.

One might think that the institutionalization of human rights qua fundamental rights would be perfect once they were connected with discursive democracy. This, however, would mean that the parliamentary legislature would be controlled only by itself and by public argument. In the world as it is, this could not rule out violations of fundamental rights by just that power that ought to protect and realize them, namely the legislature. To avoid this as far as possible, the institutionalization of constitutional review has to be added to fundamental rights and democracy.

This, however, not only resolves problems, but also gives rise to new ones. Discourse theory is compatible with constitutional review in a deliberative, that is, discursive democracy only if constitutional review for its part is discursive in character. Constitutional review has a discursive character if the interpretation of the constitution, and especially of the fundamental rights contained in it, can be conceived of as a discourse that can be linked to general democratic discourse in a way that comes closer to discursive ideals than general democratic discourse is able to arrive at alone. This criterion leads to a cluster of problems. Here only the question of whether and under what conditions the interpretation of human rights can be conceived as a rational discourse shall be of interest.
V. The Interpretation of Fundamental Rights

A) The Principle of Proportionality
One of the main topics in the current debate about the interpretation of fundamental rights is the role of balancing or weighing. In the actual practice of many constitutional courts, balancing plays a central role. In German constitutional law balancing is one part of what is required by a more comprehensive principle. The more comprehensive principle is the principle of proportionality (Verhältnismäßigkeitsgrundsatz). The principle of proportionality consists of three sub-principles: the principles of suitability, of necessity, and of proportionality in its narrow sense. All these principles express the idea of optimization. Interpreting fundamental rights in the light of the principle of proportionality means to treat fundamental rights as optimization requirements, that is, as principles, not simply as rules. As optimization requirements, principles are norms requiring that something be realized to the greatest extent possible, given the legal and factual possibilities.\textsuperscript{16}

The principles of suitability and necessity concern optimization relative to what is factually possible. They thereby express the idea of Pareto-optimality. The third sub-principle, the principle of proportionality in its narrow sense, concerns optimization relative to the legal possibilities. The legal possibilities are essentially defined by competing principles. Balancing consists in nothing other than optimization relative to competing principles. The third sub-principle can therefore be expressed by a rule that states:

\begin{quote}
The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.
\end{quote}

This rule might be called ‘Law of Balancing’.\textsuperscript{17}

B) Habermas’ Critique of the Balancing Approach
The phenomenon of balancing in constitutional law leads to so many problems that even a list of them is not possible here, much less a discussion. I will confine myself to two objections raised by Jürgen Habermas.

Habermas’s first objection is that the balancing approach deprives fundamental rights of their normative power. By means of balancing, he

\begin{hangitem}
\item[16] TCR, 47.
\item[17] TCR, 102.
\end{hangitem}
claims, rights are downgraded to the level of goals, policies, and values. They thereby lose the ‘strict priority’ that is characteristic of ‘normative points of view’. Thus, as he puts it, a ‘fire wall’ comes tumbling down:

‘For if in cases of collision all reasons can assume the character of policy arguments, then the fire wall erected in legal discourse by a deontological understanding of legal norms and principles collapses.’

This danger of watering down fundamental rights is said to be accompanied by ‘the danger of irrational rulings’. According to Habermas, there are no rational standards for balancing:

‘Because there are no rational standards here, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies.’

This first objection speaks, then, to two supposed substantive effects or consequences of the balancing approach: watering down and irrationality. The second objection concerns a conceptual problem. Habermas maintains that the balancing approach takes legal rulings out of the realm defined by concepts like right and wrong, correctness and incorrectness, and justification, and into a realm defined by concepts like adequate and inadequate, and discretion. ‘Weighing of values’ is said to be able to yield a judgment as to its ‘result’ but is not able to ‘justify’ that result:

‘The court’s judgment is then itself a value judgment that more or less adequately reflects a form of life articulating itself in the framework of a concrete order of values. But this judgment is no longer related to the alternatives of a right or wrong decision.’

This second objection is at least as serious as the first one. It amounts to the thesis that the loss of the category of correctness is the price to be paid for balancing or weighing.

19 Ibid, at p. 258.
20 Ibid, at p. 259.
If this were true, then, to be sure, the balancing approach would have suffered a fatal blow. Law is necessarily connected with a claim to correctness. If balancing or weighing were incompatible with correctness and justification, it would have no place in the law.

Is balancing intrinsically irrational? Is the balancing approach unable to prevent the sacrifice of individual rights? Does balancing really mean we are compelled to bid farewell to correctness and justification and, thus, to reason, too?

C) The Triadic Scale
It is difficult to answer these questions without knowing what balancing is. To know what balancing is presupposes insight into its structure. The Law of Balancing shows that balancing can be broken down into three stages. The first stage involves establishing the degree of non-satisfaction of or detriment to the first principle. This is followed by a second stage in which the importance of satisfying the competing principle is established. Finally, in the third stage it is established whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former. If it were not possible to make rational judgments about, first, intensity of interference, secondly, degrees of importance, and, thirdly, their relationship to each other, then the objection raised by Habermas would be justified. Everything turns, then, on the possibility of making such judgments.

How can one show that rational judgments about intensity of interference and degrees of importance are possible, such that an outcome can be rationally established by way of balancing? One possible method is the analysis of examples, an analysis that aims at bringing to light what we presuppose when we decide cases by balancing. As an example, I shall take up a decision of the German Federal Constitutional Court on health warnings (The Tobacco judgment). The Court qualifies the duty of tobacco producers to place health warnings respecting the dangers of smoking on their products as a relatively minor or light interference with freedom to pursue one’s profession (Berufsausübungsfreiheit). By contrast, a total ban on all tobacco products would count as a serious interference. Between such minor and serious cases, others of moderate intensity of interference can be found. In this

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24 BVerfGE 95, 173.
way, a scale can be developed with the stages ‘light’, ‘moderate’, and ‘serious’. Our example shows that valid assignments following this scale are possible.

The same is possible on the side of the competing reasons. The health risks resulting from smoking are great. The reasons justifying the interference therefore weigh heavily. If in this way the intensity of interference is established as minor, and the degree of importance of the reasons for the interference as high, then the outcome of examining proportionality in the narrow sense can well be described – as the Federal Constitutional Court in fact described it – as ‘obvious’.25

The conclusions drawn from the Tobacco Judgment are confirmed if one looks at other cases. A rather different one is the Titanic Judgment. The widely-published satirical magazine, Titanic, described a paraplegic reserve officer first as a ‘born murderer’ and then, in a later edition, as a ‘cripple’. A German court ruled against Titanic and ordered the magazine to pay damages to the officer in the amount of DM 12,000. Titanic brought a constitutional complaint. The Federal Constitutional Court undertook a ‘case-specific balancing’26 between the freedom of expression of the magazine (article 5 (1) (1) Basic Law) and the officer’s general right to personality (article 2 (1) in connection with article 1 (1) Basic Law). In the Postscript of A Theory of Constitutional Rights I tried to show that this case, too, can be reconstructed by means of the triadic scale ‘light’, ‘moderate’, and ‘serious’.

D) The Idea of an Inferential System
The triadic structure as such is, however, not enough for a showing that balancing is rational. For this it is necessary that an inferential system is implicit in balancing, which, in turn, is intrinsically connected with the concept of correctness. In the case of subsumption under a rule such an inferential system can be expressed by means of a deductive scheme called ‘internal justification’, which is constructed with the help of propositional, predicate, and deontic logic. It is of central importance for the theory of legal discourse that in the case of the balancing of principles, a counterpart to this deductive scheme exists. It shall be called ‘Weight Formula’.

25 BVerfGE 95, 173 (187).
26 VerfGE 86, 1 (11).
E) The Weight Formula
The most simple form of the Weight Formula goes as follows:

\[ W_{i,j} = \frac{I_i}{I_j} \]

‘I’ stands for the intensity of interference with the principle \( P_i \), say, the principle granting the freedom of expression of Titanic. ‘I’ stands for the importance of satisfying the competing principle \( P_j \), in our case the principle granting the personality right of the paraplegic officer. ‘\( W_{i,j} \)’ stands for the concrete weight of \( P_i \). The Weight Formula makes the point that the concrete weight of a principle is a relative weight. It does this by making the concrete weight the quotient of the intensity of interference with this principle (\( P \)) and the concrete importance of the competing principle (\( P \)).

Now, the objection is clear that one can only talk about quotients in the presence of numbers, and that numbers are not used in the balancings carried out in constitutional law. The reply to this objection can start with the observation that the logical vocabulary we use in order to express the structure of subsumption is not used in judicial reasoning, and that it is nevertheless the best means to make explicit the inferential structure of rules. The same applies to the expression of the inferential structure of principles by numbers that are substituted for the variables of the Weight Formula.

F) Geometric Sequence
The three values of our triadic model, light, moderate, and serious, shall be represented by ‘\( l \)’, ‘\( m \)’, and ‘\( s \)’. There are various possibilities for allocating numbers to \( l \), \( m \), and \( s \). A rather simple and at the same time highly instructive one consists in taking the geometric sequence \( 2^0, 2^1, \) and \( 2^2 \), that is, 1, 2, and 4. On this basis, \( l \) has the value 1, \( m \) the value 2, and \( s \) the value 4. The Federal Constitutional Court considered the intensity of infringement (\( I \)) with the freedom of expression (\( P \)) in the Titanic Judgment as serious (\( s \)), and the importance of satisfying the right to personality (\( P \)) of the officer (\( I \)) in case of describing him as a ‘born murderer’ because of the highly satirical context as only moderate (\( m \)), perhaps even as light (\( l \)). If we insert the corresponding values of our geometric sequence for \( s \) and \( m \), the concrete weight of \( P_i \) (\( W_{i,j} \)) is in this case \( \frac{4}{2} \), that is, 2. If \( I \) were \( m \) and \( I \) were \( s \), the value would be \( \frac{2}{4} \), that is \( \frac{1}{2} \). In all stalemate cases this value is 1. The precedence of \( P_i \) is expressed by a concrete weight greater than 1, the
precedence of $P$ by a concrete weight smaller than 1. The description of the officer as ‘cripple’ was considered as serious. This gave rise to a stalemate, with the consequence that Titanic’s constitutional complaint was not successful in so far as it related to damages for the description ‘cripple’.

G) Transfer of Correctness
The rationality of an inferential structure essentially depends on the question of whether it connects premises that, again, can be justified in a rational way. The structure expressed by the Weight Formula would not be a structure of rational reasoning if its input had a character that excluded it from the realm of rationality. This, however, is not the case. The input that is represented by numbers is judgment. An example is the judgment that the public description of a severely disabled person as ‘cripple’ is a ‘serious breach’ of that person’s personality right. This judgment raises a claim to correctness and it can be justified as a conclusion of another inferential scheme in a discourse. The Federal Constitutional Court does so by presenting the argument that the description of the paraplegic as a ‘cripple’ was humiliating and disrespectful. The Weight Formula transfers the correctness of this argument, together with the correctness of arguments that concern the intensity of the interference with the freedom of expression, to the judgment about the weight of Titanic’s right in the concrete case, which, again, implies – together with further premises – the judgment expressing the ruling of the court. This is a rational structure for establishing the correctness of a legal judgment in a discourse.

H) Fire Wall and Over-proportional Growth of Resistance
The Weight Formula is presented here in its most simplest form. This simplification is sufficient in order to express that part of the inferential structure of the Tobacco and the Titanic Judgment which has been of interest up to now. Often, however, refinements are necessary. They run in any of four directions. The first concerns the inclusion of the abstract weights of the principles, what becomes necessary where they are different; the second refers to the reliability of the empirical assumptions incorporated into the inferential structure; the third concerns the inclusion of more than one principle on one side or the other, or on both sides of balancing; the forth aims at a refinement of the scale. Only this last refinement is of interest here, for the possibility of

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27 BVerfGE 86, 1 (13).
refining the scale is necessary in order to render complete the rejection of Habermas’s fire wall objection.

It cannot be ruled out that there could be cases in which not even the rather rough triadic scale is applicable. These are cases in which it is only possible to distinguish two grades, say, light and serious. There a dual scale must be used. This would be enough for balancing. Balancing is excluded only if no gradation at all is possible, which is the case when everything has an equal value. Of much greater practical importance is the possibility of refining the scale. A method that seems to correspond well to our practice of balancing consists in an iteration of the triadic scale. By this, a double-triadic scale is produced, which looks like this: (1) \( ll \), (2) \( lm \), (3) \( ls \), (4) \( ml \), (5) \( mm \), (6) \( ms \), (7) \( sl \), (8) \( sm \), (9) \( ss \). This scale comports well with expressions like ‘very light’ \( ll \), ‘already medium’ \( ml \), ‘already serious’ \( sl \), ‘really serious’ \( sm \), or ‘extremely serious’ \( ss \). The decisive point is that the application of a geometric sequence makes it possible, unlike an arithmetic sequence, to express the over-proportional growth of resistance of fundamental rights against infringements. This is not very easy to recognize in the case of the simple triadic scale. Here, \( 2^0 \), \( 2^1 \), \( 2^2 \) only expresses rather small differences, namely, those between 1, 2, and 4. This is completely different from the case in which one uses a double triadic scale. The geometric scale \( 2^0 \), …, \( 2^8 \) ranges from 1 to 256. The distance between \( sm \) and \( ss \) is 128.

This provides for a more subtle reconstruction of the *Titanic Judgment*. The humiliation and the disrespect expressed by the public designation of a severely disabled person as a ‘cripple’ violates his dignity. Violations of dignity are, at any rate often, not only simply \( (s) \) or already serious \( (sl) \) infringements, but really \( (sm) \) of even extremely serious \( (ss) \) infringements. That makes it difficult to justify the existence of counter-reasons that come up to this level. It is exactly this structure which erects something like a fire wall, precisely where Habermas thinks the balancing approach must fail.
II.

Theoretical Perspectives
Chapter 2
Fundamental Rights Principles: Disciplining the Instrumentalism of Policies

Kaarlo Tuori
Professor of Law, University of Helsinki

Introduction
The following paper has two main themes: first, the distinction between principles and policies, and, secondly, the problem of the limits of law in the age of modern, positive law. I shall examine the distinction between principles and policies by comparing the views of two central participants in recent legal theoretical debates: Ronald Dworkin and Robert Alexy. I shall argue that in order to account for the solution to the problem of the law’s limits – and, in fact, even to pose the problem – we have to keep the distinction between principles and policies in the way suggested by Dworkin. This argument also establishes the connecting link between my two themes. When discussing the issue of the law’s limits, I shall also try to dissolve two paradoxes which I call the paradox of the Rechtsstaat and the paradox of fundamental rights. Both of these paradoxes result from the essential positivity of modern law.

Fundamental-rights principles play a crucial role in determining the law’s limits in our era of positive law. Protecting fundamental rights also means protecting these limits. At least in established constitutional democracies, which meet the criteria of a democratic Rechtsstaat, the emphasis in this protection still lies at the level of the nation-state; monitoring mechanisms
established by international human-rights treaties, such as the European Convention on Human Rights (hereafter, ECHR), play only a complementary, although growing role.¹ This may justify the by-passing of the international aspect, especially in a paper which focuses more on issues of legal theory questions than on issues of legal doctrine.

I. Principles and Policies: The Positions of Alexy and Dworkin

In his *Theorie der Grundrechte*² (hereafter, TGR), Alexy is very careful in specifying the object and the level of his discussions. He characterises his book³ as presenting a general juristic theory of the fundamental rights of the German Basic Law; put in another way, it deals with the general part of the fundamental-rights doctrine of the Basic Law.

According to Alexy⁴, legal doctrine (*Rechtsdogmatik*) includes three dimensions: an analytical, an empirical and a normative one. At issue in the analytical dimension is the conceptual-systematic elaboration (*Durchdringung*) of positive law; the empirical dimension of legal doctrine deals with the contents of the positively valid law; and, finally, the normative dimension includes normative or value-based positions on the interpretation and application of positively valid law. The main focus of Alexy’s book lies on the analytical dimension; its primary aim is to develop a structural theory of the fundamental rights of the Basic Law⁵. The distinction between rules and principles and the possible significance of the distinction between principles and policies are clearly issues which fall to the first, conceptual-systematic dimension. In fact, it seems that for Alexy, they are legal theoretical issues whose bearing cuts across the borders of the various fields of positive law and which by no means concern only the general theory of the fundamental rights of the Basic Law. Thus, Alexy has also analysed these distinctions as general legal theoretical issues, that is, detached from their links to the fundamental-rights doctrine of the German Basic Law.⁶

¹ See chapters 6 and 7 of this report.
³ TGR, 18.
⁴ TGR, 22ff.
⁵ TGR, 32.
Alexy’s analysis of rules and principles often has been compared to that of Dworkin, and when elaborating on the characteristics of these types of legal norms, Alexy explicitly refers to Dworkin. And, indeed, their analyses have much in common. They both link the defining features of rules and principles to situations of norm conflict. The conflict between legal rules is solved either by subsuming one of the rules under the other one as an exception to it or by declaring one of them invalid. The collision between two principles, by contrast, is to be solved in a process of weighing; neither of the colliding principles loses its validity but the losing principle is considered merely to have less significance in the situation at hand than its counter-principle. It is true, though, that Alexy’s understanding of the concept of principle is not wholly identical to that of Dworkin. Dworkin’s principles are of a deontological nature, whereas Alexy, by defining principles as requirements of optimisation, takes a decisive step in an axiological direction. In accordance with their character as requirements of optimisation, “principles can be fulfilled to different degrees and the required measure of their realisation depends not only on factual but also on legal possibilities”. The scope of what is legally possible, in turn, is determined by counter-principles and counter-rules. The divergence of Dworkin’s and Alexy’s conceptions of principles has important consequences, but I shall not dwell on them here. My interest lies in another, though related, difference in the views of the two theorists.

Dworkin introduces another distinction which complements that between rules and principles and which is of equal importance for his argument. Principles in the broad sense of the term may be of two kinds: principles in the strict sense and policies. Policies are standards which determine ends concerning the economic, political or social state of the community. Principles in the strict sense are not attached to such states but express moral demands, such as the demand for justice; they are characterised by their ties to morality. Principles, in contrast to policies, justify individual rights: “Arguments from principle are arguments which are supposed to justify a right; arguments from policy are arguments which are supposed to justify some collective end. Principles are propositions describing rights; policies are

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7 Ibid.
9 TGR, pp. 75-76.
propositions describing ends. The goods protected by rights are distributive in nature, whereas policies concern non-distributive collective goods.

Alexy\(^\text{10}\) has conceded that distributive rights and non-distributive collective goods are conceptually distinct, and he also has analysed possible relations between them. Collective goods and individual rights may, for example, be connected by a relation of justification: collective goods may justify individual rights and individual rights, in turn, collective goods. What is, however, important for our present topic is that Alexy does not see any need for complementing the division between rules and principles with an additional analytical distinction between principles and policies; he argues that Dworkin’s principles and policies behave in the same way in legal decision-making.

Alexy’s argument may be seen as a consequence of his axiological definition of principles as requirements of optimisation: if even principles in Dworkin’s strict sense are characterised by scale-like, gradual realisation, they indeed behave in the same way as policies aiming at collective goods. However, Dworkin’s and Alexy’s differing views on the importance of the distinction between principles and policies also reflect different views of the characteristics of jurisprudential research. For Alexy, norm-theoretical distinctions belong in the analytical dimension of legal doctrine. At the same time, he stresses the connections between the analytical, the empirical and the normative dimension: they constitute a whole, the doctrine of a certain field of positive law. In this whole, the task of the analytical approach is to create conceptual clarity for both the empirical exposition of positive law and normative argumentation concerning its interpretation and application. Thus, the distinction between rules and principles, as presented within a general theory of the fundamental rights of the Basic Law, supports normative fundamental-rights argumentation by enhancing its rationality.

In spite of the existence of such relations between the analytical and the normative dimension, conceptual-systematic distinctions, like the one between rules and principles, are supposed to be normatively uncontaminated; according to Alexy, they do not involve or imply any normative position with regard to the interpretation or application of positive law. The specific perspective of legal doctrine is that of the judges, and the distinction between rules and principles is based on the different behaviour of

\(^{10}\) Dworkin, supra, fn 7, p. 22.

the two types of norms in legal decision-making, especially in situations of norm conflict. This is the only relevant difference; the distinction abstracts from all further variances in the contents of norms. In Alexy’s view, a principle functions in the same way in legal decision-making irrespective of whether it is related to individual rights or collective goods; therefore, at least in an analytical, conceptual-systematic exposition Dworkin’s distinction between principles and policies must be abandoned.

I have already noted that for Dworkin, the distinction between principles (in the strict sense) and policies is (at least) as important as that between rules and principles (in the large sense). The purport of the very title of his breakthrough-work, *Taking Rights Seriously*, would be impossible to grasp without this distinction; what taking-rights-seriously means is that in hard cases, principles justifying and protecting individual rights trump policies related to common goods. For Dworkin, there is no point of making analytical distinctions independently of normative concerns. The purpose of the distinctions he introduces is not merely to increase the analytical clarity of normative argumentation and to raise the level of its rationality; these distinctions are part and parcel of normative argumentation. The very idea of a distinction between analytic, empirical and normative dimensions is foreign to Dworkin’s style of jurisprudence.

Dworkin too introduces his distinctions from the perspective of the judges. However, his primary normative concern is not with legal decision-making in courts but with the law or the legal system as a whole; as a full-blooded philosophical and political liberal, he is worried about the threat that the increasing policy-orientation of legislation poses to individual rights. Dworkin needs the distinction between principles and policies in order to be able to conceptualise the menace created by instrumentalist legal regulation and to explicate how the courts should try to fend it off. With respect to his main normative point, the first distinction (between rules and principles), is of a merely preparatory nature; what really matters for his argument is the second distinction (between principles and policies).

Although taken in the analytical dimension, Alexy’s decision to discard the distinction between principles and policies has obvious normative-doctrinal implications in the interpretation and application of constitutional provisions on fundamental rights. In German debates, he has been criticised for locating standards related both to individual rights and to collective goods at the same level and, thus, according them equal initial argumentative weight. As an
example of balancing between principles, he has used a case of the German Federal Constitutional Court (hereafter, FCC) where the central issue was whether legal proceedings could be launched against a defendant whose health, and even life, could be endangered if he were obligated to appear in court. According to Alexy (and the FCC), the solution depends on which of two principles of equal rank was assigned greater weight in this specific case: the principle of the efficiency of criminal justice or the principle establishing the right to life and personal integrity. Let me present a rather lengthy citation from Ingeborg Maus’ critique of Alexy (and the Constitutional Court):

“Alexy accommodates the constitutional jurisdiction … by combining rights and common goods as equal objects of principles. This extension of the concept of principles … extends the limit of what prevailing constitutional law is, whilst, at the same time, subjecting constitutionally guaranteed individual rights to greater restrictions. If, for example, the ‘common good’ of the efficiency of criminal justice is declared to be a constitutional principle – although the text of the Basic Law does not give the slightest indication for this – only then can it be introduced as an equal point of view into a constitutional ‘weighing up’ in which, for example, it is opposed to the basic rights to life and physical integrity enjoyed by an accused person unfit to stand trial and in danger of suffering a heart attack. … (T)his artificially induced collision of principles in individual cases … owes its existence to a concept of constitution which is diametrically opposed to the liberal constitutional concept asserted in the 18th/19th centuries. The constitution in the classical sense of the rule of law (the Rechtsstaat – KT) always presupposed as a fact the functional efficacy of the organs of the state and criminal prosecution and determined their limitations. This functional efficacy itself need not be guaranteed by a constitution, but is greatest without any constitutional regulation whatsoever. The classical constitutional concept of the state of emergency clearly indicates the contradiction of the state’s functional efficacy and constitutional law; in order to increase efficiency, the constitution (or part of the constitution) is temporarily revoked. Therefore, the efficiency of constitutional organs of the state cannot itself the content of a constitutional principle, because the ratio essendi of the constitution consists precisely in restricting this efficiency. … This approach … jeopardizes freedom when common goods can also be regarded as principles. In this case, constitutional guarantees of freedom compete with principles which are opposite not only in terms of their content, but also in terms of their entire structure, such as the efficiency of

12 TGR, 79 ff.
criminal justice, the ‘efficiency of the Bundeswehr’ or the ‘efficiency of national defence’ (BVerfGE 28, 243, 261; 48, 127, 159 f.), the ‘efficiency of the enterprise and the economy as a whole’ (BVerfGE 50, 290, 332). … Not only the basic rights guaranteeing freedom, but also the freedom-limiting state functions themselves are a measure of judicial review. It is precisely in this way that the constitution loses its function of limiting the spread of government powers.”

The significance of the distinction between principles and policies can be tackled at different levels or – to use Alexy’s vocabulary – in different dimensions of legal doctrine (legal dogmatics), although at the same time bearing in mind the interdependencies between these levels or dimensions. First, the discussion can be focused on the deontological / axiological character of principles; here we can point to Habermas’ critique of Alexy in his Faktizität und Geltung. Another possibility is to concentrate on a legal doctrinal assessment of the implications the alternative analytical positions have in the interpretation of constitutional fundamental-rights provisions. Indeed, at the end of my article, I will take up some such legal doctrinal issues, concerning the Finnish Constitution and the ECHR. However, the main thrust of my argument will be of neither an analytical nor an immediate normative doctrinal nature. I shall discuss a topic which is rather hard to locate in the standard divisions of legal scholarship: the problem of the law’s limits. This problem is of great importance to both the philosophy and the (macro) sociology of modern law, and it also underlies Dworkin’s treatment of principles and policies. Alexy’s approach, by contrast, risks its disappearance.

II. The Paradox of the Rechtsstaat
Let us return for a moment to Maus’ criticism of Alexy. The criticism is related to the interpretation of the German Basic Law and, thus, is legal doctrinal in its orientation. However, she also outlines a more general background to her critical point.

In agreement with Dworkin, Maus emphasises the limiting task of individual (fundamental) rights, a task which is easily ignored, if principles (individual rights) and policies (collective goods) are equalized in the way suggested by Alexy. However, in a significant respect, Maus’ approach differs

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from that of Dworkin. Maus anchors her argument in the function the law – especially the constitution – of a Rechtsstaat fulfils with regard to politics; in her analysis, what law – here fundamental-rights norms – restricts is located outside the law. Dworkin, by contrast, is interested in what can be termed an intra-legal relation of limitation. Before elaborating on Dworkin’s theme, let us follow for a moment the path of argumentation opened up by Maus. This path leads to a dilemma, which is related to a vital problem we will confront when examining the intra-legal issue of limitation.

The constitution has a double domicile. It is both a legal and a political phenomenon; it fulfils important functions not only in the legal but also in the political sub-system of modern society. However, as Niklas Luhmann, 15 for example, has stressed, the constitution’s main societal function consists of mediating the mutual relations between these two sub-systems: the constitution channels the influences of the legal into the political system and, correspondingly, those of the political into the legal system. The constitution confers on the organisation of political power its legal form, and contributes to its stability and legitimacy. In addition, as the German Rechtsstaat theory as well as the Anglo-American constitutionalist doctrine have stressed, the constitution draws the legal boundaries to the exercise of this power; it is this very function that constitutes the kernel of Maus’ argument against Alexy. On the other hand, through its provisions on legislative power, the constitution opens the channels through which political actors can influence the formation and development of the legal order.

After the positivisation of the law, the Rechtsstaat solution to the disciplining of political power runs into a difficulty which can be termed the paradox of the Rechtsstaat.

When the concept of the Rechtsstaat is – as is the case in Maus’ criticism of Alexy – applied to the relations between the law and political power, the central requirement of the concept can be formulated as follows: political power (state power) can only be exercised on the basis of authorisation conferred, and in the forms defined and the limits drawn by the law. In Germany, the concept of the Rechtsstaat was introduced by the early constitutionalist school of the first half of the 19th century. However, for this school the law which was supposed to impose restrictions on political power was not yet identified with positive, enacted law; the law was essentially

conceived of as a supra-positive ethical order. It was only the late constitutionalist school, which dominated German state-law doctrine after the unification and the issuance of the Constitution of 1871, that accomplished the turn to statutory positivism and reduced all law to enacted norms. In line with their predecessors, the representatives of the late constitutionalist school retained the *Rechtsstaat* as a key doctrinal concept. But their positivistic understanding of the law gave rise to a new problem. According to the idea of the *Rechtsstaat*, the law is supposed to impose restrictions on state power but, at the same time, after the positivistic turn, the origin of all law is seen in this very power. The circle seems to close: state power is supposed to limit state power. The late constitutionalist school proposed to dissolve the paradox with the doctrine of the self-limitation of the state: in analogy with the Kantian moral subject, the state imposes limitations on itself through its own laws. But this analogy does not really solve the problem; at the most, it only provides it with a new formulation.

I shall leave the paradox of the *Rechtsstaat* and take up again Dworkin’s intra-legal perspective on principles and policies. From this perspective, the question is no longer how the law can discipline extra-legal power but how it can limit itself.

### III. The Paradox of Fundamental Rights

The problem of the law’s limits is a perennial one, accompanying the law throughout its history and the different forms it has assumed in the course of this history. Attached to the law is the possibility of external coercion which ultimately resorts to physical force. Hence the issue of the limits of law: *not all coercion in the name of law can be justifiable.*

In the Western legal tradition, the question about the boundaries of the powers of human law enactment, application and enforcement, up to the era of modern law, had been posed and answered in terms of natural law. However, cultural modernisation has destroyed the basis of a natural law which could limit the reach of positive law. Not only objective nature as a cosmic world order but even the subjective nature of human beings has lost its credibility as a point of reference for the law: we no longer believe in an immutable human nature, defined as universal attributes of human beings, their ever identical rationality and/or their structure of needs and instincts. Natural law can no longer fulfil the function of natural law, that is, the task of

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being the critical and reflexive instance of the law, to use expressions coined by François Ewald.\(^{17}\)

Modern law is positive law, which is based on conscious human action and which is continuously amendable. Never before has such a plethora of regulations called law been issued as in the modern welfare state. It is to the credit of F. A. Hayek\(^{18}\) to have drawn our attention to the at least implicit danger of totalitarianism that has been entailed by the law’s positivisation. Hayek’s analysis cannot be overlooked by simply pointing to his extreme liberal – or even libertarian – premises.

If modern law is characterised by a fundamental positivity, the traditional way of posing and solving the problem of the law’s limits is no more available. The positivity of the law means that only positive norms are accorded legal validity in legal practices, such as adjudication. The requirement of positivity obviously also concerns the criteria by which the law’s limits are determined; otherwise these criteria would not be respected in the practices of modern law. If this is the case, the limits of modern law should be determined within its very positivity.

Above, in the context of the Rechtsstaat, we examined the functions of the constitution with regard to the political system. Now we can continue our examination by turning to the specific functions that the constitution accomplishes within the legal system of a modern democratic Rechtsstaat. First, through its provisions on the use of legislative power, the constitution creates the very possibility of modern law’s positivity: the constitution lays down the intra-legal validity criteria of positive law. This could perhaps be called its Kelsenian function. But particularly through the provisions on fundamental rights and constitutional review, the constitution of a modern democratic Rechtsstaat fulfils also another essential task. It appears to provide a solution to the problem of the law’s limits through arrangements which respect modern law’s positivity.

However, this solution appears to be plagued by a dilemma akin to the paradox of the Rechtsstaat. This paradox concerned the law’s limiting function with regard to political power: how can the law impose restrictions on state power, if it itself is – as positive law – created by that very power? In order to capture Hayek’s (and Dworkin’s) concern, the dilemma must be reformulated

from the law’s internal perspective: the totalitarianism that Hayek was worried about does not result from illegal or extra-legal use of state power but from legal regulation which takes advantage of the opportunities offered by modern law’s positivity. One possible re-formulation of the paradox of the Rechtsstaat would be the following: how can the law fend off the menace of totalitarianism, if it itself is a vehicle of this menace?

We can try to specify the self-limiting function and attribute it to fundamental rights, guaranteed by a system of constitutional review: the fundamental rights draw the boundaries to legal regulation. But this specification does not yet rid us of our dilemma. The positivity of modern law entails that even fundamental rights must be understood as being based on positive norms, such as constitutional provisions; otherwise, the legal practices of modern law would not recognize them as legally relevant at all. Unlike in the natural-law thinking of the early modern age – say, from Hobbes to Kant – fundamental rights can no longer be grounded in universal moral principles, independent of time and place. But if the norms establishing fundamental rights must be conceived of as norms of positive law, are they not exposed to the possibility of amendments and even annulment which is a central characteristic of the very notion of positivity? If this is the case, how can they accomplish their task of guaranteeing the self-limitation of modern law? Obviously, a mere appeal to fundamental rights is not enough to account for the solution of the problem of the law’s limits. The paradox of the Rechtsstaat has now been developed into what might be termed the paradox of fundamental rights.

IV. The Dissolution of the Paradoxes
In his solution to the paradox of the Rechtsstaat, Habermas indicates a way out of the dilemma in power-theoretical terms, by “deconstructing” the concept of political or state power. He argues that the Rechtsstaat is possible only as a democratic Rechtsstaat. According to Habermas, what Jellinek called the self-limitation of the state can function only because the limiting power, in fact, is not exactly of the same nature as the power to be limited. In state power, Habermas distinguishes between communicative and administrative power. Communicative power is the power of common convictions and public opinion, power of influence rooted in discourses within the civil society and its public sphere. Democratic law-making procedures, which involve such unofficial discourses, engender communicative power, which is distilled into legitimate laws. In a Rechtsstaat, these laws bind the coercion-backed
administrative power, wielded by administrative and judicial authorities. In power-theoretical terms, the idea of the *Rechtsstaat* consists of the subjection of administrative to communicative power. ¹⁹

The present context does not allow for commenting at length on Habermas’ conception of the democratic *Rechtsstaat*. Let me only re-state that the mere *Rechtsstaat* requirement of binding the exercise of state power to law cannot by itself provide a sufficient guarantee against the threat of totalitarianism which Hayek was concerned about and which also motivated Dworkin’s discussion of policies and principles. What engenders this threat is not illegal or extra-legal power but power exercised through positive law; *power in a legal guise*. If Habermas’ solution to the paradox of the *Rechtsstaat* is based on a deconstruction of the concept of state power, my proposal for dissolving the intra-legal paradox of fundamental rights proceeds through a deconstruction of the concept of (positive) law. I would like to stress that I will be discussing what I call a “mature” modern legal system; a legal system which has fully realised the potentials of modern law; which, to put it in a Hegelian way, corresponds to its concept. The “mature” modern legal system is an idealisation, a Weberian ideal type, of the same type as, say, John Rawls’ “well-ordered society” or H. L. A. Hart’s “healthy society”.

The kernel of my solution lies in recognising modern law’s multi-layered nature. ²⁰ Law, as a symbolic normative phenomenon, does not consist merely of the surface level of explicit, discursively formulated normative material, such as statutes and other legal regulations, and court decisions; it also includes “deeper”, sub-surface layers, for which I have proposed the terms “the legal culture” and “the deep structure of law”. The levels of the law – the surface level, the legal culture and the deep structure – obey different paces of change: the surface is the level of incessant movement, caused by ever new regulations and decisions; the legal culture also evolves, but according to a slower rhythm; and finally, even the deep structure, although constituting the most stable layer in law, is not immune to change. If we are

¹⁹ Habermas, supra, fn 13, pp. 182 ff.

²⁰ I have developed the idea of the law’s multi-layered nature at greater length in my *Critical Legal Positivism*, Aldershot: Ashgate, 2002. My focus has been on an ideal-typical national legal system which meets the criteria of a “mature” modern legal system. An open question is whether one could employ a similar theoretical framework when examining international law in general and the role of fundamental-right provisions and principles play therein in particular. In the further elaboration of the multi-layered view of the law, due attention should also be paid to the interaction of domestic and international law, as well as to the other aspects of the legal pluralism characteristic of our contemporary legal situation.
justified in talking about different historical types of law, such as our own modern law or the preceding type of law, called somewhat vaguely “traditional law”, this is because they are distinguished by the specificities of their respective deep structures.

According to my interpretation, the deep structure of modern law involves three kinds of elements: conceptual, normative and methodological. By conceptual deep-structural elements, I allude to the basic legal categories which open up the conceptual space of law and, thus, constitute the very possibility of legal thinking and legal argumentation in our era of modern law; categories such as “legal subject” or “subjective right”. Normative elements consist of the most fundamental principles characterising modern law, and by methodological elements, I refer to the basic form of rationality distinctive of modern law and its practices. What is crucial to my argument now are the normative elements in modern law’s deep structure.

At this point, I would like to resort again to Habermas’ *Faktizität und Geltung*. Its legal philosophical chapters can be read as a reconstruction (and an interpretation) of modern law’s normative deep structure. If we accept his reconstruction, the main elements in the normative deep structure of modern law would consist of fundamental rights as general normative ideas, as well as certain (other) fundamental Rechtsstaat principles, such as the separation of powers and the legality of administration. In different legal cultures and at different stages of modern law’s evolution, these principles are interpreted in somewhat divergent ways; for example, the US legal culture assigns greater weight to liberty rights than European legal culture(s), and the status of a “super” right accorded to freedom of expression in the USA has no counterpart in Europe, to take two conspicuous examples. At the level of legal cultures, Habermas’ examines legal paradigms, that is, different interpretations of how fundamental rights should be specified and realised in varying historical circumstances. Reference can also be made to the material or substantive fundamental-rights theories which, according to Alexy, have guided the interpretation of the German Basic Law’s provisions on fundamental rights. Finally, when we reach the law’s surface level, fundamental-rights principles find their most precise expression in individual constitutional provisions and court decisions.

Now, I would like to argue that fundamental-rights principles can only fulfil their restrictive role in virtue of their being sedimented into the sub-

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21 Habermas, supra, fn 13, pp. 468 ff.
22 TGR, pp. 508 ff.
surface layers of the law, that is, into the legal culture and into the law’s deep structure. The multi-layered view of modern law also holds the key to the solution to what I have called the paradox of fundamental rights. In order to make my point, let me turn to the relations prevailing between the law’s levels in a “mature” modern legal system.

The sub-surface layers of the legal culture and the deep structure constitute the very possibility of the legal practices which continuously bring new material to the law’s surface in the form of legal regulations and court decisions: the sub-surface levels provide the conceptual, normative and methodological means without which the legislature could not make its laws or the judge formulate her decisions, or – we may add – the legal scholar write her learned treatises or articles. In quasi-Kantian terms, we can speak here of a constitutive relation. But the reverse side of this constitutive relation consists of a relation of (self-)limitation. This relation can, first, be examined in the functioning of the conceptual elements of the sub-surface levels; thus, the most basic legal categories do not only open the space for legal thinking and argumentation, they also close this space from fundamentally alternative ways of thinking and arguing legally. However, what is of primary interest for our present topic is the relation of limitation working through the normative principles established in the legal culture and the law’s deep structure.

The normative self-limitation of the law is realised through a kind of censorship which the sub-surface principles exercise with respect to surface-level material, such as individual statutes and other legal regulations. The relations between the law’s levels are maintained and channelled through legal practices, primarily through law-making, adjudication and legal scholarship; the relations are not realized automatically through an internal movement within a closed normative sphere of the legal order. This also holds for the relation of limitation which can only be brought into fruition through legal practices. The totalitarian threat is posed by the instrumentalism of a purposive rational legislator, by policy-oriented legislation. The main responsibility in securing the self-limitation of the law, in turn, falls to other legal practices, to adjudication in particular.

Legal practices are social practices whose main agents are professional lawyers. In legal practices, lawyers employ two kinds of knowledge: discursive and practical. Discursive knowledge is knowledge of which the actor is immediately aware. In every kind of social action, a major part of the actor’s knowledge is embedded in her action in its practical state. Practical knowledge is implicit and self-evident, something which the actor does not
question, at least not in routine action; it is openly thematised only in problematic situations. Correspondingly, a major part of the legal knowledge that legal actors rely on is in a practical state. This concerns especially the knowledge they have of the law’s sub-surface layers. In every criminal case, *nulla poena sine lege* is applied, and in every case of contract law, *pacta sunt servanda* plays an integral role. However, these principles are not usually spelled out in the decisions; in routine cases, the judges may not even be immediately aware of employing them. They are expressly taken into examination only when their bearing in an individual case appears to be problematic. The analysis of legal cases in terms of the knowledge required for their solution allows for the following definition of a hard case: in hard cases, judges must openly thematise sub-surface elements of the law, transform part of their knowledge of the law’s sub-surface layers from a practical into a discursive shape.

In a ‘mature’, well-functioning modern legal system, the normative self-limitation of the law – the censorship to which sub-surface principles submit instrumentalist, policy-oriented legislation – works primarily through the practical knowledge of legal actors; already during their university education, they have internalised the central principles of modern law, as these have been interpreted in the relevant legal culture. The normative censorship which guarantees the law’s self-limitation is operative every time when, e.g., a judge interprets in the light of morally- and/or ethically-laden legal principles, statutes which the law-giver has issued from its mainly instrumentalist, purposive rational perspective. Conceived of in this way, the law’s self-limitation is a daily phenomenon, accomplished through routine legal practices.

Constitutions contain provisions on institutional practices which have been expressly specialised in the task of the law’s self-limitation. Although these practices constitute the most conspicuous aspect of this auto-censorship, in a well-functioning modern legal system their role is only complementary; the major responsibility in the law’s self-limitation falls to routine legal practices, where it is realised through the practical knowledge of legal actors. Of course, even in such a legal system, it is conceivable that, for instance, the legislator issues a statute violating human-rights principles and that we encounter at the law’s surface level formally valid norms which stand in contradiction to sub-surface legal principles. If such a case should arise in our idealised ‘mature’ modern legal system, the floor would now belong to the specific institutional arrangements which have been created through constitutional provisions to
ensure the functioning of the law’s self-limitation. These arrangements include constitutional review either in ordinary courts or in a specific constitutional court. We can also point to examples of \textit{ex ante} control of constitutionality, such as the scrutiny of government bills by the Constitutional Committee of the Parliament of Finland.\textsuperscript{23}

**V. Meeting Some Objections**

There are obvious objections to my account of the law’s self-limitation. As regards constitutional review or other institutional arrangements expressly fashioned for the purpose, do they not operate at the law’s surface level? Is it not a question of assessing the mutual relations between norms which all are located at the law’s discursively formulated surface: sub-constitutional legal regulations are appraised in the light of constitutional provisions? My answer is yes and no. Constitutional provisions, including those affirming fundamental rights or \textit{Rechtsstaat} principles, belong to surface-level normative material. But they are specific among such normative material, not only because of their formal hierarchical status, but also because of their intimate links to the deep-structural normative principles on which they confer an explicit discursive formulation. Therefore, it can be argued that constitutional review, where the fundamental-rights provisions of the Constitution are used as a criterion for assessing a statute’s validity, also manifests the law’s self-limitation, as exposed in the framework of the law’s multi-layered nature. Another counter-argument can be built on the hard-case nature of cases brought before constitutional review. In private and criminal law justice, routine cases make up a clear majority of the cases before ordinary courts. In constitutional justice, the reverse holds: most of the cases in constitutional justice are hard cases whose solution requires the opening up of the sub-surface layers. These cases cannot be decided merely on the basis of discursive knowledge about surface-level constitutional provisions but call for probing into the sub-surface foundations of these provisions.

Another probable objection challenges the positivism of my account of how modern law can, in the absence of natural-law yardsticks, meet the persistent problem of the law’s limits. Have I not, with my assumption of sub-surface layers in the law, drifted into a contradiction with the positivity of modern law and taken a step in the direction of natural law?

\textsuperscript{23} We should also bear in mind the monitoring mechanisms established by international human-rights treaties, although their role can, as I have already claimed, be regarded as complementary with respect to the constitutional arrangements of a democratic \textit{Rechtsstaat}. 
Let us continuously keep in mind that we are discussing a “mature” modern legal system, where, for instance, constitutional provisions giving explicit expression to the principles of a democratic Rechtsstaat are supported by an established legal culture and a legal deep structure which include these principles as integral normative elements. But how do such sub-surface layers arise? What can we say about the formation of a “mature” modern legal system? One of the relations connecting the law’s layers is that of sedimentation: the sub-surface layers result from processes of sedimentation with their origins in the normative material with which legal practices continuously enrich the law’s surface. Through this relation of sedimentation, the sub-surface levels also partake in the positivity of modern law; positivity is not a characteristic only of the surface of modern law but reaches out to the levels of the legal culture and the deep structure.

The position in modern law of such fundamental normative ideas as human-rights principles should also be approached through the relation of sedimentation. These principles can be justified with moral arguments, but this is not enough to make them into elements of the law’s deep structure. In the rationalist natural-law thinking of the early modern age, these principles were seen as universal norms, whose justification was supposed to lie in an immutable human nature. They have established themselves as elements of the deep structure of modern law only as a result of a long process of sedimentation. The early steps of this process can be traced back – in addition to the debates of natural-law theorists – to the American and French constitutional documents of the late 18th century. In the 20th century, the process continued through new constitutional documents, international human-rights treaties, decisions by national and international monitoring bodies, as well as publications by legal dogmaticians, theorists and philosophers. Seen from a legal point of view, this process has signified the positivisation of human-rights principles, their transformation from morally-philosophically justified natural-law principles into elements of modern, positive law.

Now, I believe, we have dissolved the paradox of fundamental rights. Fundamental-rights norms can play a crucial role in the self-limitation of modern law, not only despite, but expressly in virtue of their positivity. However, the positivity of modern law has to be understood in a larger and profounder sense than is common in positivistic legal theory. Positivity is not a property only of surface-level legal norms; through the relation of sedimentation, it extends to the law’s sub-surface layers, including human-
rights-related principles as integral normative elements of the legal culture and the deep structure of a “mature” modern legal order.

VI. Fundamental Rights and the grounds for their limitation
I have tried to show that discussing the problem of the law’s limits in the context of modern, positive law necessitates something resembling Dworkin’s distinction between principles and policies. This, of course, is not the same discussion in which Alexy participates when he, from the perspective of an analytical, legal-theoretical examination of legal decision-making, rejects this distinction. Yet another context is provided by the legal doctrinal task of interpreting and systematising the fundamental-rights provisions of a specific constitution or international human-rights instrument. We may recall that the criticism to which Ingeborg Maus subjected Alexy’s fundamental-rights theory, although building on an exposition of the general Rechtsstaat background of fundamental rights, focused on the doctrine of the German Basic Law. In the final part of this article, I shall briefly comment on two other legal doctrinal issues where it appears to be important to conceive of fundamental rights as individual rights and to maintain their separation from collective goods.

These issues concern Finnish constitutional law and the ECHR. In 1995, a new Chapter on fundamental rights was adopted into the Finnish Constitution. The Chapter includes the right to security which, according to the governmental bill, was modelled after Article 5 of the ECHR. Article 7(1) of the Finnish Constitution states that “everyone has the right to life, personal liberty, integrity and security”. Correspondingly, Article 5(1) of the ECHR lays down that “everyone has the right to liberty and security of person”.

“Security” is a tricky concept; it can be interpreted as connoting either a collective good – in the sense of “national security” or “public safety and order” – or an individual right, the right to personal security. In its praxis, the Human Rights Court has adopted the latter alternative when interpreting Art. 5(1) of the ECHR. This interpretation, which has been shared by the most legal commentators, has entailed that the right to security has in general been treated as a non-independent, auxiliary right. By contrast, in the praxis of the Constitutional Committee of the Finnish Parliament, one can notice a tendency to raise security as a collective good to the rank of fundamental
Fundamental Rights Principles

rights. Such a reading of the Constitution’s fundamental-rights provisions has been propped up by three argumentative steps.

First, the right to security has been detached from the rights to personal liberty and integrity, and assigned independent legal relevance. This already points to the direction of a common good: it is hard to see what independent legal meaning, not included in the rights to liberty and integrity, could be attributed to an individual right to personal security. The second step in the argument consists of an appeal to the horizontal effect or Drittwirkung of fundamental-rights norms: these norms not only regulate the relations between public power and private individuals but extend their effects to the mutual relations of the latter.24 Thirdly, the argument refers to Art. 23 of the Finnish Constitution which establishes a general obligation for public power to secure the realization of fundamental and human rights; this obligation corresponds to what in German fundamental-rights doctrine is called the Schutzpflicht of the state. Taken together, these arguments - the independent nature of the right to security, the horizontal effect of fundamental rights and the Schutzpflicht of public power - lead to the conclusion that the state (public power) is obliged to ensure the realization of the independent right to security in the horizontal relations between private individuals. Public safety and order as a collective good has been transformed into a fundamental right with a rank equal to that of individual liberty rights, such as the rights to personal integrity, privacy and the confidentiality of correspondence. With the same move, the Dworkinian distinction between policies aiming at collective goods and principles focusing on individual rights has been obliterated from constitutional doctrine.

Now the doctrine allows for justifying, say, new powers requested by police authorities in terms of fundamental rights: the powers can be said to be necessary for the fulfilment of the state’s obligation to guarantee the fundamental right to security. If and when the powers encroach on individual fundamental rights, such as the rights to personal integrity, privacy and the confidentiality of correspondence, their constitutional acceptability is claimed to depend on the mutual weighing of fundamental-rights principles of equal rank. What according to the liberal understanding of the constitution and the Rechtsstaat was to be restricted through the system of fundamental rights has itself been absorbed into this system; there is an evident parallelism to that

24 The bill put forward by the government, which led to the adoption of the new fundamental rights provisions in 1995, explicitly mentioned the possibility of such a horizontal effect.
interpretation of the German Basic Law which constituted the object for
Ingeborg Maus’ criticism.

The constitutional doctrine of the Rechtsstaat involves a peculiar dialectic
between collective goods and individual fundamental rights. On the one
hand, the main thrust of fundamental rights – here I am alluding to the first-
generation liberty rights – is seen in the creation of a sphere of private
autonomy, secured against infringements from the side of public power in the
name of collective goods, such as public safety and order or national security.
However, the guarantees that fundamental rights offer are not – with certain
important exceptions – absolute: limitations to these rights can be adopted,
with appeal to the same collective goods whose purport the rights are
supposed to restrict. This might seem paradoxical, but the solution to the
paradox is quite simple: the limitations may not touch upon the kernel (the
Wesensgehalt of the German doctrine\(^25\)) of the right in question. Thus,
Dworkinian policies (re-)enter the constitutional doctrine in the form of
grounds for limitations to fundamental rights. The determination of the
relevance that these grounds can be accorded certainly involves weighing and
balancing, for example when applying the principle of proportionality.
However, at issue is not a weighing within the system of fundamental-rights
principles but between such a principle and an external factor of a policy
nature. Such a view of the relation between fundamental rights and the
grounds for their limitation also corresponds to the structure of the ECHR.

The ECHR includes references to policy standpoints but these references
are included in the provisions laying down the grounds for limitation, and
not in the provisions confirming the rights to be protected. Some of the
provisions also mention “security” in the sense of a collective good as a
ground for limiting a right. In Article 8(1), everyone is guaranteed the right
to respect for his private and family life, his home and his correspondence.
According to par. 2 of the same article “there shall be no interference by a
public authority with the exercise of this right except such as is in accordance
with the law and is necessary in a democratic society in the interests of
national security, public safety or the economic well-being of the country, for
the prevention of disorder or crime, for the protection of health or morals, or
for the protection of the rights and freedoms of others”. Correspondingly,
par. 1 of Article 9 guarantees everyone’s right to freedom of thought,
conscience and religion, while par. 2 of the same article provides that

\(^25\) The Basic Law includes an explicit provision (19(2)) on the Wesensgehalt: “In no case may a
basic right be infringed upon in its essential content.”
“freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others”.  

In the context of the ECHR, the abolition of the distinction between principles and policies would amount to eradicating the boundary separating the protected rights from the grounds for their limitation. Here we have an additional legal doctrinal reason for siding with Dworkin in the debate about the relevance of the distinction between principles and policies.

**Conclusions**

We are ready to conclude. The position Alexy has taken with regard to the distinction between principles and policies can be discussed at different levels and in different dimensions. In the analytical, legal-theoretical dimension, one can challenge Alexy’s axiological understanding of principles (in Dworkin’s strict sense). This is the line followed by Habermas but not taken up in this article. Alexy’s position can also be attacked at the level of normative, legal doctrinal argumentation, as has been shown by Ingeborg Maus and as I have tried to demonstrate in relation to the Finnish Constitution and the European Convention on Human Rights. However, my main arguments for the significance of Dworkin’s distinction concern the problem of the limits of modern law.

The problem of the law’s limits accompanies all law but is aggravated by the positivity of modern law: the simultaneous loss of credibility suffered by natural law in the wake of cultural modernization and the increasing instrumentalist, policy-oriented use of the law. As a result there arises the specific threat of totalitarianism of which Hayek has warned us: a totalitarianism proceeding by legal means. The constitution of a Rechtsstaat assigns the definition and the safeguarding of the law’s limits to fundamental rights and constitutional review. However, this solution runs against a dilemma which can be termed the paradox of fundamental rights and which is akin to the paradox of the Rechtsstaat. The latter paradox concerns the law’s relation to state power: how can the law fulfil its task of disciplining the

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26 The last chapter of the Charter on Fundamental Rights of the European Union contains general provisions on the scope of the protected rights. Thus, according to Art 52(1), “subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others”.
exercise of state power, if it itself, as positive law, is a creation of this very power? In the examination of the fundamental rights’ contribution to the solution to the intra-legal problem of limitation, the paradox receives the following form: how can fundamental rights fulfill the function of the law’s self-limitation, if they too, in the age of modern law, must be understood as being grounded in positive law and if they, consequently, seem to be exposed to the possibility of amendments and even annulment, a possibility characteristic of positive law?

Habermas has dissolved the paradox of the Rechtsstaat by arguing that the Rechtsstaat is possible only as a democratic Rechtsstaat and by subjecting state power as administrative power to state power as communicative power, distilled in legitimate laws. The key to the dissolution of the paradox of fundamental rights lies in the law’s multi-layered nature. In a “mature” modern legal system, fundamental-rights principles have firmly sedimented into the law’s sub-surface layers and, through the practical knowledge of legal actors, exercise their limiting function in everyday legal practices; for instance, every time when a judge interprets policy-oriented legislation in the light of principles. Cases of constitutional justice, where constitutional provisions on fundamental rights are expressly applied, represent only the visible top of the iceberg in the law’s self-limitation, which, in a well-functioning modern legal system, primarily operates in an inconspicuous way in ordinary, every-day legal practices.
Chapter 3

Nine Critiques to Alexy’s Theory of Fundamental Rights

Massimo La Torre
Professor, Università Magna Graecia di Catanzaro & Law School, University of Hull

Introduction
I do not intend to propose a theory of fundamental rights alternative to the one masterly outlined by Robert Alexy. Nor would I like to advocate one or the other alternative conception of fundamental rights based on other conceptions of discourse theory. My intention here is a more modest one. I will put forward a series of criticism to Alexy’s theory, combining my own interpretation of his theory with a rather liberal borrowing from two main sources: (i) Jürgen Habermas’ overt or covert criticism of Alexy’s Theory of Fundamental Rights; and (ii) H. L. A. Hart’s Postscript to the Concept of Law, where the British scholar replies to Ronald Dworkin’s formidable attack against his positivism. The latter source of inspiration might seem rather intriguing, but I believe that in fact some of Hart’s arguments can be reconstructed as a full-blown criticism to Alexy. Before starting, I must add that not all the objections seem to me to have the same strength - I will however abstain from objecting to the objections, even if I do not fully share them. The ultimate goal is to show some possible weak points of Alexy’s theory, and in that way, to contribute to its further elucidation.
I. Alexy’s Purely Semantic Conception of Norm

Serious doubts can be raised on the semantic notion of norm adopted expressis verbis by Alexy and shaped along the three deontic operators of order, prohibition and permission. “Eine Norm ist [...] die Bedeutung eines Normsatzes”- we read in A Theory of Constitutional rights (hereafter, TGR).

A first problem with such a conception is that it boils down to a purely semantic conception of a norm. And such a purely semantic conception of a norm cannot account for rules such as the rule of recognition. This is so because a central, if not the central feature of such a norm, is that of being embedded in a practice, something which falls beyond a purely semantic conception of a norm.

This is bound to have devastating consequences. It is very important to keep in mind that without a rule such as the rule of recognition, it is simply not possible to conceptualise law as a legal order or system, or to introduce and use the idea of a hierarchy of norms. How to make sense of the concept of Grundrechtsnorm, of “fundamental right norm”, a concept so central for Alexy’s reconstruction of fundamental rights, having being deprived of the idea of legal system and the idea of legal hierarchy? Quite obviously, a merely presupposed Fundamental Norm à la Kelsen (his famous basic norm, or Grundnorm), will not do the trick, since such a norm is purely “presupposed”, that is, it is a purely epistemological devise. It is only by means of a rule of recognition “abstracted” from a practice, quite in the way that Hart defined his rule of recognition, or in the sense of Leonard Nelson’s “Abstraktion” that the rule of recognition can be conceived as a valid and effective norm - since it is the existing practice, and not a mere semantic content, from which it draws its “point”.

Moreover, a mere semantic notion of the norm does not explain either the constitutive effects of special fundamental norms or their pragmatic character. In fact, a purely semantic notion of legal norm creates a considerable risk of a

3 Herbert L. A. Hart, The Concept of Law, Oxford: Oxford University Press, 1961, pp. 94-5: “This will specify some feature or features possession of which by a suggested rule is taken as conclusive indication that it is a rule of the group to be supported by the social pressure it exerts”.
strong metaphysical jump into normative Platonism, or normative realism, that is, the assumption that deontic modalities are entities in the world.\footnote{Such is the outcome, for instance, of Georges Kalinowski’s legal theory (see \textit{La Logique des normes}, Paris: Presses Universitaires de France, 1972) and somehow of Weinberger’s use of Popper’s “World Three” to explain the “ideal” side of norms (see Neil D. MacCormick and Ota Weinberger, \textit{An Institutional Theory of Law}, Dordrecht: Reidel, 1986, chapter 1).} This point is further proved when one considers the recent ‘post-Hartian’ discussion on the question of legal determinacy. It has been argued that a semantic notion of the norm, understood as reflecting the reality of the world, offers a way out of the problem. However, the purely semantic conception of the norm implies as a matter of fact two highly controversial implications: (1) the definition of meaning as correspondence to, or picture of, states of affairs or essences in the world, and further (2) the advocacy of moral realism, that is the assumption of normative, moral things or “entities” in the world. It thus seems that a semantic theory of norms, in order to ensure an acceptable degree of determinacy, should embrace an essentialist approach towards language.

It could be further added that a semantic notion of a norm implies a semantic theory of rights. As a matter of fact, this implication is drawn by Alexy himself.\footnote{Alexy, supra, fn 1, pp. 45-46.} Now, this semantic theory of rights is strongly criticized by Jürgen Habermas.\footnote{Jürgen Habermas, \textit{Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtstaats}, Frankfurt: Suhrkamp, 1992, pp. 164-165.} This is so on the basis that it cannot take account of two fundamental aspects of rights: (1) firstly, of their pragmatic character of ‘claims to be right’; (2) secondly, of the circumstances of reciprocity and mutual recognition in which rights are born and embedded. The triadic relationship around which Alexy, following Hohfeld,\footnote{Wesley Newcomb Hohfeld, \textit{Fundamental Legal Concepts as applied in judicial reasoning}, New Haven: Yale University Press, 1919.} reconstructs rights positions can plausibly be said to be the representation of a situation of subordination of one party to the other, in which no claim to correctness is raised or, for that purpose, could be raised. Hohfeld’s rights do not imply any claim to be right (even if they are claims in a paradigmatic sense). This is actually the point of Dworkin’s “rights thesis”. As it is known, Dworkin claims that holding or claiming a right, and accordingly denying a right, cannot be fully understood if having a right is not also explained in terms of \textit{being right}. Denying a right implies not only a certain damage to the interests of the right-holder, but
also, and above all, downplaying his moral status, by means of implying that she is wrong.

II. Alexy’s Notion of Fundamental Right Norm

The very notion of a fundamental rights norm (Grundrechtsnorm) can be challenged. More specifically, one can put into question that fundamental rights derive conceptually from norms or prescriptions. This is very closely related to the influence of the doctrine held by the German Federal Constitutional Court over Alexy’s conceptualisation of fundamental rights norms. It is true that Alexy presents his theory as a legal-dogmatic exercise, which takes as its point of reference German law. Having said that, it is also clear that his ambitions are clearly much higher, and that at any rate, his theory of law drives him towards a universal configuration of fundamental legal concepts. Therefore, it is legitimate to question whether the long shadow of the doctrine of the German Constitutional Court, and the will to fit it, does not lead to a dangerous general reductionism of rights to commands.

The problem can be better illustrated with the help of a comparison with the legal theory of John Austin. The British positivist denied rights an independent legal conceptual status, which led him to the conclusion that constitutional law as such is an extra-legal enterprise. Alexy clearly prefers to speak of fundamental rights norms, but still defines fundamental rights as “commands” of optimization. So, what is really a fundamental rights norm?

Alexy claims that a fundamental right norm is correctly founded (grundrechtlich), that is, founded through valid fundamental rights. It is explicitly affirmed that “Grundrechtsnormen alle die Normen sind, für die eine korrekte grundrechtliche Begründung möglich ist”. However, it also seems that Grundrechtsnorm is a more fundamental concept than Grundrecht. Whenever there is a Grundrecht, there must be a corresponding Grundrechtsnorm. The opposite does not hold: there may well be

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1 Actually, this is one of the most controversial points of Alexy’s theory, at least when confronted with the liberal notion of rights, rather openly or overtly played against the notion of rules. In fact, the history of legal positivism can be summarised as a permanent attempt at taming the idea of rights by means of transferring them into the more convenient context of norms. However, such attempts are not always convincing and, at any rate, the rationale of such a move is obviously not free of strong normative and political implications.

10 As tested in chapters 6, 7 and 8 of this report.


12 Alexy, supra, fn 1, p. 63.
Grundrechtsnormen without corresponding Grundrechte. But if this is so, the question arises what is exactly a grundrechtliche Begründung and which role this plays in the production and recognition of a Grundrechtsnorm. Is a grundrechtliche Begründung a justification through fundamental rights or through fundamental rights norms? In either case, Alexy’s definition of a Grundrechtsnorm as an entity given through a grundrechtliche Begründung seems to be circular.

III. The Distinction between Principles and Rules, and the Deontological Character of Rights

A very common line of attack against A Theory of Constitutional Rights is the denial of the fundamental distinction between principles and rules. In a different context, the inexistence of such different normative structure was defended by H.L.A. Hart:

“There is no reason why a legal system should not recognize that a valid rule determines a result in cases to which it is applicable, except where another rule, judged to be more important, is also applicable to the same case. So a rule which is defeated in competition with a more important rule in a given case may, like a principle, survive to determine the outcome in other cases where it is judged to be more important than another competing rule”.

Even if Hart’s point was specifically addressed against Dworkin’s legal theory, it could also be fittingly forwarded to Alexy, perhaps even more fittingly, as Alexy does not share Dworkin’s central distinction between principles and policies. In fact, once we conceive of principles as goals (optimization commands), as Alexy does, the fact that rules, as well as rights, can be interpreted as establishing and prescribing goals (something clearly proven by the wide resort to teleological interpretation of status), the difference between principles and rules becomes indeed very thin.

One could further question why we could not adopt Marcus Singer’s view of the difference between rules and principles:

“Moral rules - he says - do not hold in all circumstances; they are not invariant; in a useful legal phrase, they are ‘deafeasible’. A moral principle, however, states that a certain kind of action (or, in some

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13  Hart, supra, fn 3, pp. 261-262.
cases, a certain kind of rule) is always wrong (or obligatory), and does not leave open the possibility of justifying an action of that kind. Moral principles hold in all circumstances and allow of no exceptions; they are invariant with respect to every moral situation. They are thus ‘indefeasible’\(^\text{15}\).

Following Marcus Singer, we might thus say that, while rules are defeasible, principles are not. In this view principles therefore are submitted to a greater deontological “discipline” than rules.

IV. Fundamental Rights Norms as Principles

One can further criticise the claim that fundamental rights norms (\textit{Grundrechtsnormen}) are basically principles, and wonder why they could not be rules. After all, in Alexy’s theory of norms, rules offer a higher degree of protection than principles, to the extent that they are not open to weighting and balancing. If this is so, why should we not put at the foundation of the system rules (and thus offering stronger protection to individual freedoms) instead of principles (actually unable to guarantee freedoms in an indefeasible way)?

The reader will quickly realise that this question is closely related to one of the central tenets of \textit{A Theory of Constitutional Rights}, namely the characterisation of principles as “optimization commands”. Here again - I believe - we are confronted with a reductionist (one could also say prescriptivist) strategy. At the end of the day, principles are collapsed into the category of commands and precepts.

A further objection is that principles so conceived are no longer clearly distinguished from policies, which entails that they can lose their deontological character. This is in a sense recognized by Alexy himself, when he equates principles to “values”, and adds that the distinction principles/rules, in the sense of prima facie and definitive commands, applies also to values:

\begin{quote}
“Der Strukturunterschied zwischen Regeln und Prinzipien findet sich also auch auf der axiologischen Ebene. Den Prinzipien entsprechen die Bewertungskriterien, den Regeln die Bewertungsregeln”.\(^\text{16}\)
\end{quote}


\(^{16}\) Alexy, \textit{supra}, fn 1, p. 131.
But Alexy denies that this entails the loss of the deontological character of principles. He claims that principles are deontological practical concepts, and optimization commands are just... commands, that is deontological entities.

This rebuttal based on reversing the criticism is not very convincing to me, for the following reasons. First, if principles were expressing a *Sollen*, were *gesollten*, if their content was apt to be expressed through a deontic operator, deontic logic would then apply to them. But in such a case, their application will follow an “all-or-nothing” logic, and not the gradualistic logic proper of *Abwägung*. Second, Alexy’s characterisation has problems in dealing with standard cases of norms. Consider the following two examples. The minimum content of natural law, its bedrock (so-to-say), was traditionally summarised in two precepts: *malum vitandum, bonum faciendum*. This at least is Aquinas’ view. 18 Now the question arises which kind of precepts these two are. Are *malum vitandum* and *bonum faciendum* optimisation commands? If Alexy says they are, should we then forget that they are clearly expressing of a teleological morality? Or let us take the principle which lies at the bottom of utilitarian moral doctrine: the pursuit of “the greatest happiness of the greatest number”. This principle can be reformulated as the “command” that the greatest happiness of the greatest number should be realised or pursued. Should we then say that the utilitarian principle is the expression of a deontological doctrine or that it has a deontological content?

On this issue Habermas is strongly critical of Alexy’s theory. In particular, the Frankfurt philosopher stresses two points. First, he is very keen to point out that justice is not just a value among other values:


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19 Habermas, *supra*, fn 7, p. 190.
Values are agent-relative and can be provisionally measured and traded-off from the agent’s perspective and only from this. Such is not the case of justice, which is a value claiming “absolute”, universal validity, that is, validity for all. Habermas’ point is thus that values are particularistic, while justice is universalistic. It is true that legal norms are addressed to the concrete members of a concrete political community. However, legal norms raise a claim to correctness and thus transcend the concrete political community in which they are formulated and somehow refer to an ideal discourse. The key point is that such an ideal discourse is not value-based, is not grounded on individual preferences, but is rather embedded in deontological requirements. Second, principles, as well as rules, are not teleological devices, that is, they cannot be portrayed as optimization commands:

“Prinzipien haben ebensowenig wie Regeln eine teleologische Struktur. Sie dürfen nicht - wie es die “Güterabwägung” in der üblichen Methodenlehre nahelegt - als Optimierungsgebote verstanden werden, weil damit ihr deontologischen Geltungssinn verloren ginge”\textsuperscript{20}.

V. The Rationality of Weighing and Balancing

The next controversial point which I would like to stress is that fundamental rights according to Alexy are applied, exercised, or implemented through balancing, Abwägung. This is again related to the discussed conceptualization of rights in terms of principles, sharply distinguished from rules. The idea of rights applicable through weighing depends on the thesis that fundamental rights are ascribed through principles, and that principles are applicable only through weighing – an idea which is shared, as is well known, by Ronald Dworkin. Now, balancing or weighing – this is the objection – is at the end of the day a procedure consigned to judicial discretion, since it cannot be given a fully formal and rational structure. Alexy believes to solve such problem through the so-called Law of Balancing, whose non-technical formulation reads as follows:

“Die Bedingungen, unter denen das eine Prinzip dem anderen vorgeht, bilden den Tatbestand einer Regel, die die Rechtsfolge des vorgehenden Prinzips anspricht”\textsuperscript{21}.

\textsuperscript{20} Habermas, supra, fn 7, p. 255.
\textsuperscript{21} Ibid, p. 84.
Alexy’s *Law of Balancing*, which turns principles into definitive rules, is, however no guarantee, since the relevance of principles and the configuration of the conditions of priority of a principle over another are shaped by judiciary discretion. The *Law of Balancing* gives only an appearance of rationality to a procedure which is in the end irrational and at its core decisionistic.

In this respect a further interesting objection is advanced by Habermas. The question with balancing is also that each party in a legal dispute claim to be right and fully right and thus take the ideal stance of the one only right answer. Now, Alexy excludes - contrary to what is held by Dworkin - the ideal necessity of one such right answer, though he recognizes that in easy cases it could be reached. However, there is another implication of the claim to justice raised by parties and of their presupposition of the one right answer (which is, in Dworkin’s theory, the substantive core of his “rights thesis”): such implication concerning the way a case is decided before a court. Balancing, which strikes a kind of compromise, seems to deny the parties’ claims to rightness:

“Eine an Prinzipien orientierte Rechtsprechung hat darüber zu befinden, welcher Anspruch und welche Handlung in einem gegebenen Konflikt rechtens ist - und nich über die Ausbalancierung von Gütern und über die Relationierung von Werten”.22

A very important line of criticism concerns the idea that fundamental rights can be balanced against collective goods (meant as non-distributive entities). The question here is that by so doing we are confronted with a strong re-introduction of consequentialist and utilitarian considerations in the assessment of rights. In particular, in a perspective of this kind no rights could resist an utilitarian reasoning. Rights will no longer be “trumps” (to use Dworkin’s expression) against policies, and there will be no “absolute” rights. Torture would thus be eventually *grundrechtlich* justified. Such a conclusion might suffice – I believe – to make Alexy’s theory unpalatable to a liberal.

A further critical point very much connected with the latest one is the assumption of the notion of *Wesensgehaltsgarantie* (Basic German Law, Article 19, section II) as equivalent to the proportionality principle. That is, the essential core of rights is to be assessed through the principle of proportionality and in the end to be considered as embedded in this principle:

22 Habermas, supra, fn 7, p. 317.
“Die Wesensgehaltsgarantie des Art. 19 Abs. 2 GG. formuliert gegenüber dem Verhältnismäßigkeitsgrundsatz keine zusätzliche Schranke der Einschränkbarkeit von Grundrechte”. 23

The consequence has been already announced, and is that there are no absolute rights:

“Die Überzeugung, daß es Rechte gibt, die auch unter den extremsten Umständen nicht zurückweichen – nur solche Rechte sind genuin absolute Rechte –, mag der einzelne, der die Freiheit hat, sich für bestimmte Grundsätze zu opfern, für sich für verbindlich halten, vom Standpunkt des Verfassungsrechts aus kann sie nicht gelten”. 24

Now, here the question is whether a fundamental right’s fundamental task is not just to be there, that is, to protect individual autonomy and dignity, especially “under the most extreme conditions” – to use Alexy’s words. Is not the function of a right to physical integrity and dignity, of the right not to be tortured, to act as an “absolute”, intangible right just for the most extreme conditions of a terrorist menace or of an impending civil war? As a matter of fact, fundamental rights apply not in normal conditions, when people recognize or ignore each other, but especially whenever there is a special occurrence that endangers the peaceful co-existence of individuals. If we deny an absolute core to individual rights, what is then left of them?

Elsewhere Alexy, replying to the accusation of irrationality launched against his equivalence between Wesensgehaltsgarantie and proportionality principle, has connected the notion of proportionality to the intensity of attack brought against the right. He introduces a “disproportionality rule”, which reads as follows:

“An interference with a fundamental right is disproportional if it is not justified by the fact that the omission of this interference would give rise to an interference with another principle (or with the same principle with respect to other persons or in other respects), provided that this latter interference is at least as intensive as the first one”. 25

Here nevertheless Alexy does not face the fundamental problem raising from his treating rights and principles as a common unity of measure, especially  

23 Alexy, supra, fn 1, p. 272.
24 Ibidem.
given that principles are not distinct from policies. Policies and fundamental rights can thus legitimately be introduced in a common structure of reasoning leading to a decision concerning fundamental rights: rights can be weighed and measured against policies, and the latter can trump the former if the omission of the policy in question would bring about an interference with another policy which is more intensive than the interference against the principle upholding the fundamental right in question:

“Fundamental rights gain over-proportionally in strength as the intensity of interferences increase. There exists something like a centre of resistance”. 26

However, this resistance is not “absolute” against policies. It is in the end a matter of intensity, a value indeed which moreover allows for an intense judicial discretion. And such resistance is not absolute and really effective, because according to Alexy fundamental rights are themselves in the end conceived as policies.

If fundamental rights are seen as policies, they will however lose their point, which is controlling and limiting State action. On the contrary fundamental rights shaped as optimization commands - prescriptions of positive, not negative actions - would contribute to a further expansion of State powers in the social domain. One might reply to this objection by pointing out that fundamental rights are not only of the liberal kind (Abwehrrechte), but that there are several very relevant fundamental rights which consist of political and social rights, demanding positive action from the State. However, even after accepting such an objection, a disquieting problem remains: that negative fundamental rights will then be conceived as claims for positive State intervention, which is by necessity tendentially expansive. Optimizing might know no boundaries. The limits of optimization - if there are some - are never stable and can be enlarged endlessly.

Recently, Robert Alexy has elaborated further on the notion of discretion, following a two-fold aim. On the one hand he has articulated principles in two classes, (i) formal and (ii) substantive and has rendered precise the content and the shape of legislative discretion through a further distinction between (a) structural and (b) epistemic discretion. On the other side he has introduced a “Weight Formula” based on a triadic scale, rendering it easier

26 Ibid, p. 140.
for constitutional adjudication to avoid a possible decisionistic slippery slope. However, with all these refinements, the essential critical points - that of the ascription of a common, particular, quantifiable value to all variables considered and especially that of weighing as trade-off and prudential compromise - are really not tackled.

VI. A Three-stage Theory of Rights? Competences and Deontic Reductionism

I would like to devote special attention to Alexy’s three-stage theory of individual rights and his notion of a right as \( \textit{mögliches Sollen} \). According to such a theory of conceptualization of a right, we should carefully distinguish three different dimensions: (1) justification; (2) legal position and relation; and (3) enforcement. In this way we would be able – Alexy claims – to solve the perennial controversies on the nature and range of rights. These controversies - Alexy believes - are the outcome, in fact, of a confusion of these three distinct dimensions. For instance, Windscheid’s will theory would be better understood as a doctrine of the legal position dimension of rights, Ihreing’s interest theory would rather offer a justification basis to them, while Kelsen’s claim theory would focus on the enforcement dimension. Now, such a solution, though interesting, is not fully convincing. Particularly unconvincing is - I believe – Alexy’s distinction between (1) the dimension of justification and (2) the dimension of legal position and relation, at least as far as the traditional doctrinal controversy on rights is concerned. The dispute between “will theories” and “interest theories” is not really a meaningless dispute originating from a methodological confusion. In fact, it can be seen both as (a) dispute about justification (indeed, will, autonomy is sometimes produced as a justification for having rights) and (b) as a dispute on legal positions: interest theories usually stress more the passive element of entitlements’ ascription than the active one of claim and are more willing to see as rights holders even individuals with a reduced autonomy or with no autonomy at all. Paradigmatic in this regard is the controversy about children’s rights, which interest theories tend to affirm without additional qualifications, the analysis of which is rather embarrassing for will theories.

28 See also chapter 1 of this report.
The second highly controversial point is the ideal of “possible or potential ought”, which according to Alexy should serve to explain individual rights as powers and competences. Alexy distinguishes rights in three categories: (1) rights to something, (ii) liberties and (iii) competences. Accordingly a negative right against the State, an Abwehrrecht, the traditional type of a liberal right, is according to Alexy a bundle of three positions: a right to something, a liberty, a power or competence. Now, according to Alexy individual rights, whatever their form, are grounded on the traditional deontic modalities, that is, commands, prohibitions, and permissions. To such a reduction the right as competence or power is more resistant than the other two. Then Alexy’s ingenious way out is the following. A power in his view would be the possibility at a meta-level of commanding, prohibiting, or permitting. To this configuration one may nonetheless object that there is (as far as legal powers are concerned) a fourth possibility, the possibility at a meta-level not only of commands, prohibitions, and permissions, but of legal powers as well. Why should powers be banned from the meta-level? A (legal) power may indeed consist of ascribing a legal power, that is a power on or of power, a (legal) meta-power. That means, however, that its content would not be a traditional deontic modality. The contingent fact that the ascribed (second order) power may in its turn have as contents a command, a prohibition, or a permission, is not sufficient to explain the contents of the first order power in terms of one or more deontic modalities. In any case, Alexy elsewhere admits that “the relation between a right and its subject matter is not a relation of identity”.

Alexy’s explanation of individual rights in terms of traditional deontic modalities recall various legal positivistic attempts of conceptualising rights as obligations or duties and of conceiving rules of competence in terms of rules of conduct. Such are Alf Ross’ attempts of reducing rights to “presentation techniques” of legal norms and of conceiving norms of competence as “fragments of norms”. Alf Ross, however, to justify his views, should finally deny that a (strong) permission, an explicit permission, be an independent deontic modality (as it was defended by Von Wright). Ross in the end proposed that even (strong) permissions are to be conceived as simple negations of a command. Command here is the only pure deontic operator, the alpha and the omega of the whole of law and practical domain. Ross was therefore only consequent in defending his reductionist strategy, since he held

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the assumption of “the unity of ought”, which meant that there is one and only one supreme deontic modality, command. Now, the postulate of the unity of ought is warmly defended by Robert Alexy in terms which are identical to Ross’ view. In the case of Ross it was then only a matter of course that such an authoritarian view (the centrality or the fundamentality of command), I dare call it, a real obsession, could not tolerate an independent notion of rights - which, as Vilhelm Lundstedt (another legal realist) proposed, had rather be mentioned in italics.

Now, coming back to Alexy’s notion of mögliches Sollen, how should we interpret this idea? “Possible” or “potential” might be conceived in analogy to the “possibility” modality of modal logic. However, this would have as a consequence the denial of the normative character of legal powers- which for sure is not what Alexy intends to do. “Possible ought” in modal terms is equivalent to the statement “it is possible that ought”, or, said differently, “it is possible that ought takes place”. However, such a phrase would be trivial, since for an ought to hold or take place or to be meaningful, the said ought has not to be “necessary”. But if “it is not necessary that non-ought”, then “it is possible that ought”. In this sense whatever ought is a “possible ought”.

If the “possibility” in question is not the modal possibility, we have then two other ways out: (i) either mögliches Sollen is the deontic possible, that is, a permission, or (ii) it is a power, a competence - which clearly is not a permission. But this second way out is exactly what Alexy seems to want to avoid. What is left is the first way out: mögliches Sollen is a permission. However, if it is a permission, it is not a competence or power – according to the same Alexy, who carefully distinguishes between the two positions. Moreover, Alexy in TGR denies that rules of competence are equivalent to rules of conduct. Given that a permission is the modality of a rule of conduct, and if we reduce powers to permissions, we would accordingly agree that there is no rule of conduct distinct from a rule of competence and that competences are fully equivalent to permissions. This is an outcome, it seems, that Alexy might not be happy with.

To Alexy’s (and Ross’) search for the unity of ought one could reply by recalling Hart’s criticism against the “fragments of norms” thesis according to which rules prima facie not imposing duties, e.g. rules of competence or rule ascribing powers, would just set conditions for the holding of rules imposing duties and could thus be considered as internal to the latter rules’ formal structure. Such a thesis - argues Hart - would amount to say that “all the rules
of a game are ‘really’ directions to the umpire and the scorer’. But this would “distort the ways in which these are spoken of, thought of, and actually used in social life”. According to the “fragments of norms” thesis, defended among others by Alf Ross, the rules of a game would not be anything but “orders” or “prescription” issued to the person in charge as scorer or umpire. In a similar way the constitutional rules of a country would be only assumptions needed for the judge to inflict sanctions. In this way, however, the “puzzled man”, who is the subject around whom the normative experience revolves, being rules deviced to orient the disoriented, would see his being “puzzled” brought to extremes.

VII. Discourses of Justification and Application: Coming too Close?

A further possible weak point in Alexy’s powerful theory is that application of law (and rights) is ruled by the same criteria which guide the justification of rules (and rights). However, one could believe that the discourse of application which should give account for the factual features of a case and of its specificity, is different from the discourse of justification which assesses the validity of the final ruling. What we need in reasoning about legal facts - it has been argued - is not balancing, but coherence, or “integrity”. Integrity however does not assume rights as optimization commands, and coherence is sought between strong deontological criteria which exclude policies. This seems to be Ronald Dworkin’s strategy, later followed by Klaus Günther and Jürgen Habermas.

Disputable is also the view that legal positivism is inclusive, or rather, that positivism being necessarily inclusive (as Alexy seems to hold), it should at the end of the day be rejected (which is Alexy’s contention). Indeed, we might assume that (moral) principles are included in the rule of recognition, and in this way are transformed in positivistic prescriptions. This is the strategy that Hart uses to rebuff Dworkin’s criticism, and that he elaborated in detail in his Postscript to The Concept of Law. Such a strategy might be damaging to Alexy’s theory, insofar as he ascribes to idealism (the connection thesis in the dispute around the relationship between law and morality). By their inclusion in the rule of recognition, principles are legally recognizable and applicable in terms

30 Hart, supra, fn 6, p. 80.
31 Ibidem.
32 Ibid., p. 40.
of pedigree criteria. Reference to principles accordingly does not imply that legal argumentation should jump into moral reasoning - as is claimed by Alexy.

Nonetheless, should legal reasoning be doomed to lapse into general practical reasoning, there is no conceptual need to connect a theory of the nature of law with a theory of legal reasoning. We can conceive the first enterprise as fully neutral and descriptive, while defending legal reasoning as moral and political. This is Joseph Raz’s line (“exclusive positivism”), echoed by the late Hart as well.

VIII. Alexy’s Discoursive Foundation of Human Rights

My eighth point concerns Alexy’s discursive foundation of human rights. Through discourse theory alone - one can object - we are not able to transform discursive requirements into action or conduct requirements. Alexy’s three step strategy - moving from (1) a claim to correctness to (2) a claim to justifiability to eventually land into (3) a claim to justice - 33 fails, since discourses are not the whole of human experience (human beings unfortunately are not fully discursive beings). Somehow connected with this objection is Eugenio Bulygin’s criticism to the pragmatic assumption of a claim to correctness embedded in legal discourse, based on contesting the meaningfulness of the idea of “normative necessity”. 34

We could add that rights (as claims) cannot offer the bedrock for morality whose main task is precisely the control over, and the limitation of, our claims and rights. Rechthaberei is not a moral attitude, but rather the opposite. The same objection could be, and has been, directed against all “rights-based” theories of morality, and especially against those rights theories which centre around the notion of “autonomy” and “agency”.

IX. The Tension between Critical Theory and Prescriptivism

There is a final issue to consider, which can serve as a conclusion and a coda for this short paper. When considering Alexy’s views one faces - I believe - a strange incongruence between a general philosophy based on discourse and language (its Habermasian roots) and a strong insistence on a prescriptivist, behaviourist jurisprudence (stemming from Alf Ross’ reductionist strategies). To put it differently, there is on the one side a development of a pragmatic, post- or anti-positivistic philosophy (whose main tenet is the idea that concepts are embedded in social practice and discourses, and that discourses are ideally free and non-hierarchical experiences) and on the other side high fidelity to a positivistic account both of social reality and of law (where the central view is that concepts are just tools external to reality and that in law the fundamental notion is command and the central experience is hierarchy and subjection). At the one corner, the Habermasian one, there is a defense of the priority and fundamentality of communicative rationality over other forms of reason; at the other corner, the Rossian one, practical rationality is only instrumental, Zweckrationalität. Alexy - it seems to me - perpetually goes to and fro between the two.
Chapter 4
Democratic or Jurist-Made Law: On the Claim to Correctness

Erik Oddvar Eriksen
Professor, ARENA, University of Oslo

Introduction*
The interconnections between law and politics are many and intricate. For one there is a mutual relationship as only politics can give the norms that courts act upon. It is the legislative process that furnishes the legal system with normative inputs. But politicians can not work unless they observe the legal procedures that judges monitor. No valid law without politics and no legitimate politics without the law. Law is the lingua franca of democracy and democracy is the sole remaining legitimation principle in modern societies.

However, also in another sense is there an intricate relationship as majority vote, which is the operative principle of representative democracy, can not ensure correct decisions, viz., a rational and just outcome. The majority principle does not ensure political equality. The phenomenon of permanent minorities is well-known: certain groups are not likely ever to become a majority or to be a part of majority alliances. Outcomes of majority voting

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represent the voice of the winners, not the common will. But can procedures ensure correct results by themselves?

Discourse theory holds that it is the procedures that warrant the presumption that it is possible to reach correct decisions: A norm N is correct when it is the result the procedure P.\(^1\) In a democracy the correctness of decisions depends solely on the procedures.\(^2\) In pure procedural justice it is fair procedures that ensure the right result; there is no independent criterion for such. For example, a chance procedure like gambling is a pure procedural model that ensures just outcomes without any reference to extra-procedural elements.\(^3\) But if it is the procedure itself that warrants correct results, what, then, warrants the procedure? There is a problem with a pure procedural conception of correctness, and hence with pure procedural conceptions of democratic legitimacy. Independent standards are required in order to evaluate the process or the outcome, according to constitutionalists. The latter make use of moral arguments, of substantive conceptions of what is right or good, in order to solve the problem of rational adjudication, without this ‘substance’ being neither legitimated nor tested democratically. It opens for jurist made law. The Supreme Court becomes the final arbiter of constitutional law.

I address the relationship between law and politics when it comes to rational adjudication of constitutional questions from a discourse theoretical point of view. The question is whether the substantial factors can be tested democratically so that we can speak of democratic made law. The specific question is whether the observance of the rules for rational communication guarantees correctness, and in that case what kind of standard for correctness, pure or imperfect, is involved. My argument is that the standard is imperfect but is itself an expression of a normative procedure for justification. This is due to a larger concept of democracy. It is not merely a voting arrangement constitutionally constrained.

I start out by briefly addressing the schism between constitutionalists and proceduralists in political theory and the democratic problem involved (2) before outlining the discourse model of legal argumentation (3). This is not a pure procedural theory as certain substantial elements are involved (4). I find that the core morality of discourse theory can be proceduralised through

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the rules of argumentation but speech rules does not fully do away with normative, substantial elements and the indeterminacy problem lingers (5). Here I address Robert Alexy’s theory of rational adjudication. He sees legal discourse as a special variant of general practical discourse – *die Sonderfallthese* – that by itself can ensure rationality and correctness. But can a judicial discourse intermediate between substance and procedure in a valid manner (6)? Law and morality are interconnected but is the legal medium itself capable of handling normative questions adequately; or are additional procedures called for (7)? *Die Sonderfallthese* seems to overtax the legal medium (8). Klaus Günther’s proposal of a distinction between a justification and an application discourse fares better in normative terms (9), but it cannot ensure correctness (10). The bottom lines is that a core morality is presupposed in the procedure ensuring a fair process of reason-giving – alluding to a concept of constitutional proceduralism, which hinges on discursive proceduralism (11). It yields, however, not more than an imperfect standard of justice (12).

II. Constitution or Procedure?

The so-called constitutionalists build on substantial conceptions of justice and give priority to fair outcomes over democratic procedures - what are called correctness theories. The proceduralists put their faith in the procedures, viz. they give priority to the rights that guarantee political participation and fair processes. Among deliberationists Jürgen Habermas is supporting such a view and Robert A. Dahl is a prominent representative of this view within the ‘voting camp’. The latter holds that majority principle (as well as group bargaining) is an important part of this because it guarantees equal treatment of all the members’ interests. Majority rule reflects the principle of equal citizenship and treats everyone numerically equal. It is, however, insensitive to reasons and argumentation. Majority rule obeys by numbers not by reasons. Not only can the majority simply be wrong, the procedure itself can not ensure a rational outcome. As demonstrated in Arrows’ Impossibility Theorem, it is not possible to infer from individual preferences to collective choices. Voting means the choice between different alternatives is made on the same footing as the flipping of a coin. However, under certain circumstances, as when all parties are equal, or when there are only two alternatives and no authoritative “truths”, votes can be used without raising

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any problems. It is when this is not the case, as when the winner takes it all and the goods are unequally distributed because of it, the relevance of process-independent standards or “correctness theories” becomes clear. If we want a fair distribution, we do not decide a case as if it was a lottery. Implicitly this shows that there are independent measures as to what constitute a correct result. The problem with the majority procedure is that it can not let any interests or demands be favoured – not even for good reasons. Voting as the primary political action, based on ‘non-deliberative’ preferences, can never represent real political equality for suppressed or excluded groups. Constitutionalists oppose the procedural model, which they find wanting as it can not itself lay down the conditions for a fair procedure:

“The real, deep difficulty the constitutional argument exposes in democracy is that it is a procedurally incomplete scheme of government. It cannot prescribe the procedures for testing whether the conditions for the procedures it does prescribe are met.”

Constitutionalists such as Rawls and Dworkin, give priority to a set of rights, which, by protecting the individuals’ vital interests, have the task of ensuring fair outcomes. These are basic rights, which cannot be changed by any occasional political majority, hence the distinction between principles, referring to reasons for actions and policies relating to collective interests. This also goes for checks-and-balance mechanisms such as division of power and judicial review. Such process-independent criteria may ultimately be said to rest on meta-theoretical, pre-political, moral principles about human being’s right to life and freedom, which are themselves not subjected to democratic legislation. They do not emanate from political processes but are

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prior to them. Dworkin arrives at the fundamental egalitarian principle of treating everyone as equals. Based on the principle that everybody is entitled to equal concern and respect, the Supreme Court can reason over the correct application of a norm.

Rawls presupposes pre-political elements when he gives priority to individual freedom over democratic self-determination in his interpretation of justice as fairness. With the idea of equal freedom for all citizens as a point of departure he arrives – on contract theoretical terms – at a substantial conception of justice. The theory of justice as fairness rests on the thought experiment of an original position where the actors are placed behind a veil of ignorance. They have no knowledge of their social situation or personal resources – they have no knowledge of their future position in society. In this position the actors will be able to agree on, among other things, the following two lexically ordered principles of justice: they will only accept solutions which guarantee equal and maximum freedom for all and a distribution of resources that only favours differences which improve the situation for the least privileged. Hence the difference principle: only those economic and social differences that benefit the least advantageous will be accepted on a free basis. Here the choice situation itself is organized in such a way that even self-interested actors will choose morally acceptable solutions. Morality as such is built into the constraints on the reflection situation.

1. Reconciliation through the Public Use of Reason’ and ‘“Reasonable” versus “True”, or the Morality of Worldviews.

Consider the views of Dworkin: “Justice is a matter of the correct or best theory of moral and political rights, and anyone’s conception of justice is his theory, imposed by his own personal convictions, of what these rights actually are”, in Ronald Dworkin, Law’s Empire, Cambridge, Mass.: Harvard University Press, 1986, p. 97. Cf. Frank I. Michelman: “…justice (...) is unalterably what we may call a ‘perfectly’ process-independent standard: in judging whether fundamental laws are just (...), no reference can ever be called for to the process of their legislation”, in ‘How can the People ever make the Laws? A Critique of Deliberative Democracy’, in Bohman and Rehg, supra, fn 6, pp. 145-71, at p. 147.


Rainer Forst argues that Rawls rather conceives of the private use of public reason in public affairs than of the public use of reason, see Kontexte der Gerechtigkeit, Frankfurt: Suhrkamp,
The principles of justice is the result of an impartial agreement in an initial situation devised to ensure that no one’s interest is favoured at the expense of another’s. The concept of justice as fairness yields an independent or free-standing conception of right and justice. It is independent of disputed (religious) faiths and beliefs. Further, the “political conception of justice (...) specifies certain basic rights, liberties and opportunities, (...) assigns a special priority to these rights, and affirms measures” to make them effective. Here public reason is limited to political questions, and more specifically such that are of a constitutional nature and concern the fairness of the basic structure of society. Public reason is:

1) about the common good as it is embedded in society’s concept of political justice;

2) governed by a reciprocity norm – one appeals to reasons that are convincing enough to satisfy reasonable people, reasons that are mutually acceptable.

This reason is applicable to questions that can be decided with reference to fairness. John Rawls understands public reason as an expression of the reason employed by citizens with the same political rights in democratic states. It characterizes a situation in which equal citizens in concert exercise political power over one another in the making of statutes and in amending the constitution.

To liberals such as Rawls and Dworkin it is the discussions and reflections as carried out among public decision-makers – the judges – that constitute the ideal model of deliberation. Judges can deliberate against the background of civic virtue and with an insight into what the reciprocity norm demands. Or in Dworkin’s case lawyers can ‘imitate Hercules’ as the ideal judge. The Supreme Court of a well-ordered society is regarded the highest body for public reason; it is an exemplar of public reason according to Rawls. Deliberations in the Supreme Court and the judicial discourse form the basis

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17 John Rawls, supra, fn 10, pp. 263ff.

18 Dworkin, supra, fn 10, pp. 263ff.

19 Rawls, supra, fn 17.
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of the ‘constitutionalists’ deliberation model. Here the constitution ultimately takes precedence over the citizens’ self-legislation. The conflict between proceduralists and constitutionalists then pertains to the problem of whether there can be a democratic enactment of a constitution. We may, thus, distinguish between ‘democrats’ who prioritize the political process and ‘constitutionalists’ who claim primacy of law.

Constitutionalists have a theory for interpretation of principles and application of norms rather than a theory for creating norms and generating principles. In effect, this is an instrumental justification of democracy: it is necessary in order to realize liberal principles. “[…] according to contractualist liberalism, political institutions are justified only if they are effective instruments for enacting laws and politics that promote the justice of society’s basic structure”. Such a justification endangers democracy. A moral argument can be used to replace democracy – when you know what is RIGHT, you do not need to consult the people. Does discourse theory provide a better solution?

III. Infinite regress

One of the problems with such correctness theories is that there is little agreement on the normative standards that are used in complex and pluralistic societies. How can we know that e.g., Rawls substantial concept of justice is correct? The original position is after all a mere thought experiment and as Rawls himself concedes, “Many will prefer another criterion”. If, for example, one should vote over whether a decision corresponds with an independent standard of justice, some would probably agree, while some will


21 Paul J. Weithman, ‘Contractualist Liberalism and Deliberative Democracy’, 24(1995) Philosophy & Public Affairs, 314-43, at p. 316. Cf. ‘The best institutional structure is the one designed to produce the best answers to the essentially moral questions of what the democratic conditions are, and to secure stable compliance with those conditions’, in Dworkin, supra, fn 10, p. 34.


23 John Rawls, supra, fn 20, p. 227.
disagree.\textsuperscript{24} It is an unstable solution. This is not to say that we need to follow Waldron who does not find more of a common basis for deciding questions pertaining to justice than he does for questions concerning the good life. “We have also to deal with justice-pluralism and disagreement about rights.”\textsuperscript{25} This may be an empirical fact, but does not exclude the possibility of an inter-subjective basis for justice-questions. Without siding with moral realism we may maintain that norms that regulate the realisation of interests can be decided in a rational manner. As consequences for affected parties can be observed, moral norms can be assessed with regard to impartiality. Such questions are quite different from deciding questions pertaining to how one should live one’s life, which by their very nature are relative to a culture and a valued way of life. In this regard one may follow Rawls who prioritizes 'the right' over 'the good'.

According to discourse theory morality is built into the procedures which grant the citizens a right to participation and guarantee their freedom, but which also force them into a process of argumentation where they must give as well as respond to reasons. Democratic procedures themselves substantiate the expectation that decisions are reasonable and fair. The legitimacy of the laws emerges from the processes and procedures that have created them. Habermas claims that it is the trust in fair procedures that keep modern societies together politically, not consensus based on substantive world views, values, or virtues. The universal principles of justice that Habermas refers to are entrenched in modern constitutions as basic rights but the only source of legitimation is the autonomous will of the people. Hence the discourse principle, which claims that only those action norms are valid to which all affected persons can agree as participants in rational discourses.\textsuperscript{26}

In discourse theory it is the procedures that justify the assumption that it is possible to reach legitimate outcomes. This does not relieve the citizens of taking a moral stand such as in Rawls’ original position, but ensures that everyone is treated with equal concern and respect in order for the better arguments to prevail. It is the process, which, if it is a good one, guarantees the legitimacy of the laws. On the other hand, it is impossible to argue for everyone’s right to participate in a debate without presupposing some substantial, normative and non-procedural argument, of for example, people’s

\textsuperscript{24} Cf. David Estlund, supra, fn 6, p. 175.

freedom, equality and dignity as postulated by natural law. Procedural and substantive conceptions of justice interchange in a justification process in so far as the claims of equal access and participation, inclusiveness and openness rest on substantive principles of tolerance, personal integrity, guaranteed private life, etc. In logical terms there is an infinite regress or circular argumentation because rights that are to ensure the process must be justified procedurally, something which again rests on substantial elements, which must again be justified etc., etc.\(^{27}\)

The discourse theory does not totally do away with substantial elements. Procedural independent standards are needed for securing a fair process. In this sense the discourse principle is in itself normatively charged, it contains a certain normative content - it “…explicates the meaning of impartiality in practical judgements”.\(^{28}\) A minimum of normative content is involved in so far as claims of sound mindedness, of rationality and an ability to reason form the basis of the concept of a deliberative person, while everything else is left to the discursive process, according to Rainer Forst.\(^{29}\) However, discourse theory may also be seen to build on moral premises – on premises of a moral person who possesses certain rights and competences. There are inbuilt conceptions of free and equal citizens that are capable of reasoning about justice and the common good.\(^{30}\) Such a person participates in a discourse where validity claims are raised; the person takes a critical stand to his own as well as others’ statements and actions, and substantiates his standpoints with arguments. He or she has the ability to judge.\(^{31}\) The person is prepared to apply the same norm to him as is applied to others. In other words, a deliberative person is reflective and responsible prepared for and competent of self-correction.\(^{32}\) This comes close to Rawls’ concept of reasonableness, i.e., “...the willingness to propose fair terms of cooperation and to abide by them...”


\(^{27}\) Frank I. Michelman, supra, fn 10, p. 162ff.

\(^{28}\) Jürgen Habermas, supra, fn 26.

\(^{29}\) Rainer Forst, supra, fn 9, p. 151.


\(^{31}\) Alexy, supra, fn 26.

provided others do.". . . and "the willingness to recognise the burdens of judgement and to accept their consequences for the use of public reason."\(^{33}\)

In addition to the virtue of reasonableness, citizens have to be equipped with a duty of civility sufficient to be competent to take a stand on the common good.

Moreover, the outcome of moral discourses is not solely depending on the qualities of the procedure as the required procedures are considered appropriate only in so far that they lead to a correct or just outcome. The consensus warranting universalisation principle – the categorical imperative – is a bridging principle, it ".. ensure that only those norms are accepted as valid that express a general will".\(^{34}\) Habermas' idea of a just outcome that is referring to the likelihood that 'generalizable interests will be accepted', is 'certainly substantive'.\(^{35}\) The concept of generalizable or common interests is a procedure independent criterion.

Not only in Rawls's theory, but in discourse theory as well, one has to do with a concept of correctness that includes substantial elements. It is not procedural all the way down as an independent criterion and a core morality, is presupposed.\(^{36}\) Consequently, discourse theory has not been able to free itself entirely from 'natural law'. It seems difficult to omit such elements in establishing a principle of normative justification. In fact, then there is not much difference between discourse theory and the constitutionalists when it comes to presupposing an element of substance.

**IV. The imperfection of argumentation procedures**

Robert Alexy tries to overcome this problem by showing that the rules of the discourses, as well as basic human rights do not necessarily depend on discursive justification. They can be justified empirically with regard to what is 'the most basic human experience' as well as with regard to what purposive rational actors without an interest in rightness, must subscribe to.\(^{37}\) The first argument, that of the nature of human existence, is weak and not without exception, as consent can be enforced or be the effect of manipulation and indoctrination.

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\(^{36}\) It does not amount to pure procedural justice in Rawls's terminology.

The second argument holds that the sheer cognitive content of the speech rules will do the work as even a purposive rational person with no interest in correctness, will find it advantageous to observe the discourse rules. This can also be rebutted, first, because such rules are binding only for participants in a discourse. This has to do with the so-called collective action problem; strategists always have the possibility of opting out of communication when envisaging a better deal.\(^{38}\) Secondly, because freedom and equality are constitutive of the deliberative process, they have priority only in so far as the actors possess an interest in rightness. An interest in justice is hence to be presupposed. Moreover, only in so far as deliberative persons are equipped with the capacity to judge, do the rules apply.

The question is nevertheless whether the observance of the rules for rational communication can guarantee correctness. In other words, even though the argumentation procedure – the discourse - itself inevitably includes substantial normative elements, can it set the terms for a fair and rational deliberation process that warrant a right outcome? After all these rules form the core element of discourse theory. Regarding norms for how the discussion should be several rules and prescriptions apply.

Alexy\(^{39}\) derives some basic rules from the formal-practical presuppositions of rational communication. First of all there is a set of process rules, which have to do with securing participation, equal access, openness, freedom and non-coercion. These rules are based on the rights ensuring every communicative competent actor real opportunity to participate and that the members can utter what they want. The rules stem directly from the discourse principle. But such rules do not ensure a rational discussion, viz., the testing of the standpoints. Therefore, validation rules that ensure objectivity and coherence in deliberation are required. These rules pertain to norms such as participants voicing their real opinions without contradiction, that they consider the arguments of the opponent, and that discussions last long enough to make sure that the issues are thoroughly discussed, that is, that all stands are made clear and that all relevant information has been presented.\(^{40}\) In addition, principles for the allocation of the duty to argue are

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\(^{38}\) For the point that there is a decisionistic rest in discourse theory as the commitment to enter the discussion can not be derived from the principle of non-contradiction. Rationality presuppositions are different from the presuppositions of morality, see Albert Wellmer, *Ethik und Dialog*, Frankfurt: Suhrkamp, 1986, pp. 106ff.


\(^{40}\) Ibid, p. 188.
required in order to ensure the fairness of the deliberative process. Regarding the demand to justify assertions, it is obvious that this also should involve the opportunity to state the reasons for why one is not willing to provide a justification, if that is the case. We are here talking about rules for reason giving. Why should e.g., participants be treated unequally, why is one obliged to produce further arguments only when met with counter arguments, etc? On the other hand one should stop doubting a specific point of view once it has been defended adequately. The burden of proof is on the parties who doubt the arguments of another participant.\footnote{Ibid, p. 192 and 196ff. See also Robert Alexy, ‘Die Idee einer prozeduralen Theorie der juristischen Argumentation’, in Aalius Aarnio et al. (eds.) Methodologie und Erkenntnistheorie der juristischen Argumentation, Berlin: Duncker & Humbolt, 1981, p. 94ff, pp. 244ff. I.M.A.M. Pröpper, ‘Argumentation and Power in Evaluation-Research and in its Utilization in the Policy Making Process’, in Rene von Schomberg (ed.) Science, Politics and Morality. Scientific Uncertainty and Decision Making, Dordrecht: Kluwer Academic Publishers, 1993, pp. 138ff; Erik Oddvar Eriksen and Jarle Weigård, Understanding Habermas. Communicative Action and Deliberative Democracy, London: Continuum, 2003, pp. 199ff.}

These rules operationalize and proceduralize the moral core of the discourse to a large extent but can not guarantee rational outcomes - one single correct solution. They do not guarantee agreement because of only partly compliance, unfixed argumentation steps, and because of historic contingent and changeable normative conceptions.\footnote{Alexy, supra, fn 39, p. 206.} In other words, they cannot solve the problem of rational decision-making, because of:

1) the burdens of judgement: even reasonable actors may remain at odds with each other after a rational discussion;\footnote{Rawls, supra, fn 20, pp. 54ff.}


However, Alexy maintains that the legal medium itself lays a claim to (moral) correctness in adjudication. Even though judicial discourses aim at rational outcomes, the question is whether they accomplish this all by themselves or whether other ‘extra-legal’ procedures are called upon to redeem the claim to correctness? This pertains to the controversy between Alexy and Klaus Günther. The former holds on to die Sonderfallthese, the latter to the distinction between application and justification discourses.
V. Correctness and Indeterminacy

Against legal positivists discourse theorists maintain that law raises a claim to correctness as it is inescapably linked to the basic stipulations of justice: suum cuique tribuere, to each his due, equal concern and respect, due consideration of all interests and values, etc. that are reflective of the impartiality norm of general practical reason, viz, the reason that binds the free will of autonomous human beings. This moral norm is constitutive of the idea of a justly organised legal process. Lawyers make up their minds about practical questions, and through justifying arguments they arrive at presumptively correct answers, i.e., that equal cases must be treated equally. This is why the kind of reasoning carried out in courts can be referred to as a practical discourse, and not as logical deduction or strategic interaction. Even in a lawsuit, where lawyers struggle to obtain the best possible result on behalf of their clients and themselves, reference is made to objective legal norms and principles when they try to justify their claims. When appeal is made to impartial judges or to the members of the jury, it must be made with reference to principles on which rational actors can agree, even if the aim is not to convince the opponent.

A legal discourse is constituted and regulated by the existing laws. But positive legal norms are too unclear to give unambiguous, correct answers to normative problems. Rules are under-specified with regard to action. They are reflective and subject to interpretation and contextualisation. This is so because there can be no rule for the correct application of rules – such a claim opens for an infinite regress. As rules or norms cannot determine their own application in particular cases there is a cognitive indeterminacy of general practical discourse. But also legal discourses are faced with indeterminacy as positive law as well has an open texture. Also the legal language is vague, full of rationality gaps and norm collisions.

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45 ‘Rules are certainly not determinate enough to be predictive; they are not followed in the same way by all agents, and many often are not followed at all’, James Bohman, New Philosophy of Social Science: Problems of Interdeterminacy, Cambridge, Mass.: The MIT Press, 1991, p. 64.
“Just as norms cannot apply themselves, a legal system as such cannot produce coherence. To achieve this, persons and procedures are necessary for feeding in new contents.”

Lawyers make use of a know-how that is partly determined by the prevailing conceptions of law and partly by how the law has been practiced earlier (precedent, custom, common values, etc.). However, legal norms must first and foremost be in accordance with the criteria for rightness or justice. They must and in fact claim to be correct, even though the criteria are not given by positive law itself. This is what the discourse theory accomplishes; it specifies the criteria for correctness. The rules for legal and practical argumentation penetrate each other without destroying each other’s respective logics. This is so because judicial procedures guarantee symmetrical conditions for communication within the legal community. These procedures are not held to govern practical argumentation directly, but establish the institutional framework which makes possible a rational discourse on which norms are appropriate in a given case. How is this possible?

According to discourse theory, both judicial and argumentative procedures aim at rational outcomes, but none of them can guarantee success because the demanding procedural presuppositions of such rarely are met. It is difficult to get enough time in legal discourses, where a decision has to be reached within a given time limit. The problem with argumentation in a practical discourse is that only the participants can judge if a consensus is qualified; there is no procedure-independent criterion for the evaluation of a rational argumentation process. The legal procedure compensates for this weakness, because it subjects argumentation to temporal, social and substantive constraints. Legal procedures regulate what topics and questions may be raised, the use of time, the participants, the distribution of roles etc. The judge as a neutral third party controls that the norms are followed. These procedures limit the access of premises, they ensure an unambiguous and binding result, and they connect argumentation to decision-making. Hence, the judicial procedures compensate for the fallibility of communicative processes and improve their incomplete or quasi-pure procedural fairness.

This takes place in two ways: Firstly, argumentation is disciplined in relation to judicially binding decisions through the institutionalisation of an

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50 Jürgen Habermas, *supra*, fn 26, p. 234.
expert discourse that can interpret and adapt codified law in a professional manner, according to internal criteria and specified procedures. Judicial institutions are designed to systematise and adapt prevailing law to the matter which is to be regulated. Secondly, correct outcomes can be ensured because the discourse is tied to a legal public sphere characterised as an open, inclusive and transparent discussion forum. This can be referred to as the external justification of the principles that are operative in the expert discourse, as it provides those premises which are not derived from positive law itself. In addition to a wide supply of source material – preparatory works, customs, precedent – moral and political considerations are also taken into consideration, as is demonstrated in the discussion of so-called hard cases, i.e., fundamental, precedent-forming cases with a legal political significance. These are extra-legal factors that are used to decide which norms should have priority, on the basis of substantial conceptions of justice and freedom.

The judges cannot avoid evaluating the validity of approved norms because only a uniform and consistent legal system can ensure a rational decision. The conclusion must be inferred from rational normative premises. This is a prerequisite for solving norm-collisions and practical-ethical dilemmas in the court-room. Legal norms must be interpreted and operationalised, and even a valid legal norm, for example a constitutional norm, must be given a legal interpretation in relation to validity criteria before its correctness and relevance can be established.

In democracies legal procedures are meant to guarantee decisions are legally correct and rationally acceptable, i.e. decisions that can be defended both in relation to legal statutes and in relation to public criticism. But can the legal system through the discretion of the judges itself really autonomously settle normative or moral questions which by their very nature are political? Moral and legal questions point to different audiences, raise different validity claims and require different procedures for the resolving of

52 Ibid. p. 228. I return to the problem of who are the participants in the legal public sphere.
53 Cf. Jürgen Habermas, supra, fn 26, p. 232. Although the law has rules that regulate collisions between norms, for example lex superior, lex posterior, and lex specialis, these are too unspecified to solve disputes in a consequent and systematic manner.
54 Jürgen Habermas, 'Om förhållandet mellan politik, rätt och moral', in Erik Oddvar Eriksen and Anders Molander (eds.) Habermas: Diskurs, rätt och demokrati, Gothenburg: Daidalos, 1995, p. 55; and Dworkin, supra, fn 10 and Hart, supra, fn 47.
conflicts. The problem is whether the substantial factors are legitimate, and whether the judges’ interpretations of the situations are correct.

VI. Law and Morality

Law and morality, which both concern practical questions and claim to regulate interaction in the interest of all parties involved — the resolving interpersonal conflicts, refer to different contexts of cooperation and have different validity bases. Whereas the law applies to a concrete community of people which can be subjected to the same duties, viz., a political community, morality refers to humanity as such. Law is also different from morality in that it only regulates external behaviour. The law says nothing about the citizens’ motives for abiding by the laws; it only tells us what actions are illegal and indictable. Morality presupposes freedom to make one’s own choices. Moral duties can not be enforced. A final distinction between legal and moral questions is that the law is also a means to realise collective goals, while moral norms are ends in themselves. Legal norms apply to territorially demarcated communities and regulate behaviour that has consequences for different sets of interests, values and concerns. Hence, they are too concrete merely to be justified on a moral basis.

With regard to the claim to correctness there is a clear difference between moral and legal norms, as the latter claim validity for the members of a particular legal society, while moral norms claim are universalistic as they claim to be valid for everyone — on the basis of free and rational deliberation. But if legal norms are binding only for a community of citizens how can they be trans-culturally valid, absolute, deontological principles? This determination of legal norms as relative to their spatio-temporal embeddedness does not sit very well with the concept of legal norms as deontological — as absolutely binding. Alexy proposes to see principles as


57 Habermas, supra, fn 9, p. 256. “The moral universe, which is unlimited in social space and historical time, includes all natural persons and their complex of life histories; morality itself extends to the protection of the integrity of fully individuated persons (Einzelner). By contrast, the legal community, which is always localized in time and space, protects the integrity of its members precisely in so far as that they acquire the artificial status as rights bearers”

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non-conclusive optimization requirements.\textsuperscript{59} Principles such as freedom, equality, rule of law, democracy are not merely deontological norms, functioning like trumps in collective decision making processes; rather they are to be seen as norms to be weighted and balanced in the adjudication of particular conflicts, they are to be optimized to the greatest extent possible. Principles only take the character of a trump “... when some competing principle has a greater weight in the case to be decided”.\textsuperscript{60} In the wording of Alexy: “A principle is trumped when some competing principle has greater weight in the case to be decided (...) Principles represent reasons which can be displaced by other reasons”\textsuperscript{61} To be able to reach an optimal decision principles must be weighted and balanced. They are not anti-utilitarian trumps. Principles neither protect the separation of power unconditionally – the red-tape argument – nor human rights – the fire wall argument. I return to this. For the moment the point is that law cannot itself establish a sufficient account of the normative premises at work in legal argumentation.

On the one hand legal argumentation is faced with the requirement of making right decisions, on the other hand due to the contested and open texture of positive law – a law is never absolutely lucid - correctness can not be provided by legal standards alone. “Therefore only a recourse to standards other than legal standards is available, such as general reflection on utility, traditional and common ideas of what is good and evil, as well as principles of justice”.\textsuperscript{62} Legal norms certainly are premised not only on moral reasons, but on utilitarian considerations, prudent reasons, collective values, etc., as well. But how is it possible to ensure correctness in adjudication? Alexy claims that this requirement can be fulfilled by conceiving of legal argumentation as a special case of a general practical discourse.

"Under the conditions of a non-positivist concept of law nothing is left to be connected because substantial correctness, and therefore morality, are already part of law."\textsuperscript{63}

The special case thesis is objected to by legal positivists, legal realists (such as Niklas Luhmann) as well as discourse theorists such as Jürgen Habermas and

\textsuperscript{59} Alexy, supra, fn 55, pp. 47-48: “(... characterised by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible, but also on what is legally possible”.

\textsuperscript{60} Ibid., pp. 58 and 102.

\textsuperscript{61} Ibid., pp. 58 and 57.

\textsuperscript{62} Alexy, supra, fn 47, p. 216.

\textsuperscript{63} Ibid., p. 219.
Klaus Günther: It is not for the legal discourse to justify normative claims. Günther has introduced the distinction between a justification and an application discourse maintaining that it is in the particular ruling, in the individual case, that the weight of rules, norms and values can be determined. The norms that have passed the test of justification have to be implemented correctly.

VII. Justification and application

Practical rationality is about normative questions or reasons for actions and refers to what is obligatory, prohibited or permitted. Such decisions are so to say a compartment of moral obligations and conscience. The relation between autonomous morality, that refers to irreplaceable human beings or humanity as such, and positive law, which regulates actions that have diverse consequences, is a complementary one; moral norms must be implemented and the law must be justified. Moral norms can only be realised if they are formulated in legal categories which allow sanctions, and the law can only obtain legitimacy to the extent that there is equality before the law. It is the legal medium that transforms such obligations and concerns of conscience that are legally relevant valid into practical results. It entails institutional mechanisms for connecting validity and facticity such as secondary rules for legal adjudication.

While justification discourses require that all interests are considered and judged impartially, application discourses require a procedure where all relevant features of the situation are given equal treatment. Application discourses are due to the limitedness of our actual knowledge and of the interests and values of the members. In a legal debate where concrete matters are to be decided, the question of the universal validity of the norms are put into parenthesis. This validity is simply presupposed, and one proceeds to ask which norms are relevant and should apply to a particular case.

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65 Klaus Günther, 'Critical Remarks on Robert Alexy's “Special-Case Thesis”' 6 (1993) Ratio Juris, pp. 143–56, at p. 151: "Everybody who uses a valid moral norm as a reason for a justification of singular normative propositions has to observe at least two principles: (1) A justification of a singular normative proposition requires a complete description of the concrete case with respect to all those moral reasons which are relevant. (2) A justification of a singular normative proposition requires a coherent interpretation of those morally valid reasons which are directly or indirectly relevant to the concrete case".
It is the consequences which are at issue in application discourses. The point of interest is what the effect will be if justified moral norms are implemented. In an application situation, we are faced with a choice between justified norms, which must be decided in relation to a number of factors: empirical elements, the type and quality of the information available, actual power relations, the important values at stake as well as the balancing of non-generalisable interests. Legal norms have a much more complex validity basis than have moral norms. The law realises political values and ethical and moral norms by positivising them. Through this procedure, they become sanctionable and collectively binding. Morality, on its part, tests and justifies positive legal norms. Whether legal decisions are correct, ultimately depends on whether the decision process has made possible impartial judgment, which requires that certain higher-ranking conditions for argumentation have been met. While discourses of justification pertain to justifying general legal norms in abstracto and in light of the consequences its observance may have for affected parties, discourses of application have an hermeneutic structure and relate to the justification of concrete judgements given already justified norms.

These two discourses are dealing with two kinds of questions, but the question of what is correct in a situation and which moral norm is correct can not easily be distinguished.\(^{66}\) In practice they are intertwined, and to give up the claim of moral justification with regard to situational features is to renounce rational decision-making.\(^{67}\) Hermeneutics takes everything into consideration but can not tell what is valid. This strategy, according to Alexy, means giving up the claim that the application of norms should be right. “It is empty, because it does not say which aspects are to be considered in what way”.\(^{68}\) Hence, it cannot solve the problem of rational adjudication. Günther can not uphold the claim to correctness. This can only the accomplished by seeing that every application necessarily involves a justificatory discourse, complying with the rules of rational argumentation.\(^{69}\)

\(^{66}\) Robert Alexy, ‘Justification and Application of Norms’, 6 (1993) Ratio Juris, pp.157-70, at p. 167: “From the fact that those two questions have to be distinguished it does not follow that there exist two essential different kinds of discourse”.

\(^{67}\) Ibid, p. 163: “The fundamental moral demand of equal treatment runs empty because in the sparsely furnished normative universe of this construction there is nothing that could grant equal treatment”.

\(^{68}\) Alexy, supra, fn 58, p. 231.

\(^{69}\) This is possible as ‘the law is not only open to moral criticism from the outside. The critical dimension is replaced into the law itself’, see Klaus Günther, ‘Welchen Personenbegriff braucht die Diskurstheorie des Rechts?’ in Brunkhorst and Niesen, supra, fn 9, pp. 83-104, p.
VIII. Overtaxing the legal medium

For Alexy a practical discourse does not merely comprise moral questions of justice and universalisation (as in Habermas’ and Günther’s set up), but rather is a discourse encompassing the whole spectre of normative, non institutional reasons, that have to be employed to settle what ought to be done, to reach a correct decision in case of interpersonal conflicts. A legal discourse differs from a practical discourse in that it deals with what is correct within the legal framework and within a time frame and not with what is ultimately right. But the judge can not omit making use of political or moral arguments in order to justify the balance he strikes when it comes to the basic principles and their sub-principles. “It follows, then, that the claim to legal correctness necessarily attached to the decision includes a claim to moral correctness.”

Alexy’s analysis is based on the reconstruction of a four-stage procedural model of legal argumentation, which combines law and rational practical arguing in such a way that rational decision-making is possible. His point of departure is the rules of rational practical discourse, which are easy to justify but comes at a price – they are “compatible with very different outcomes”. Hence practical discourse needs to be complemented by law, first by the legislative procedure in which decisions are made but which “…is not capable of establishing in advance just one solution”, then by a legal discourse which has to “…respect statute, precedent, and legal doctrine … but … uncertainty of outcome is not totally eliminated”. There is thus need for a fourth procedure – the court process – in which one and only one decision is made and which can claim to be rational because of the process.

The problem that emerges here pertains to the limits of the law and that of the judges’ competence. How can we know that the judges are right when they do not merely apply politically laid down laws and reasons but make use of their own discretionary know-how and value-base? In the theory of Alexy

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382. It is worth quoting at length from p. 384:” General practical arguments have to float through all institutions if the roots of these institutions in practical reason shall not be cut off”.

70 Alexy, supra, fn 48, pp. 375ff.

71 Alexy, supra, fn 48, p. 375: “It is not concerned with what is absolutely correct but what is correct within the framework and on the basis of a validly prevailing legal order (…) it(…) is bound to the statutes and to precedents and has to observe the system of law elaborated by legal dogmatics”.


73 Alexy, supra, fn 55, pp. 370-71.
there are the dangers of assimilating law and morality and of overburdening the legal medium itself. These dangers are interlinked:

1) The first problem is simply this: How can the imported substance, the norms and values that are needed for reaching a single correct decision, be tested? How can we know they are right? Only norms that have been accepted by the parties in a free and rational debate can in principle be considered legitimate. As well as it is only in a discourse among affected that we can know what justice really consist in, we can not now whether the adoption of rights clauses in particular situations are right unless the ones concerned have been heard. This is underpinned by the fact that the right is permeated by the good, as also Alexy himself points to. One’s conception of justice is affected and can be changed according to altered self-understandings and revised self-descriptions. Even human rights require democratic legitimation and public deliberation to be correctly implemented. They are unfulfilled until they have been codified and interpreted (and subsequently transformed to basic rights). This means there are no fixed moral precepts, principles or concepts of justice that judges in a non-controversial way can appeal to in order to adjudicate in case of conflicts.

According to legal positivists as well as legal realists this can not be settled by the law: The medium of law, based on the binary coding legal/non-legal can not justify normative questions themselves. What is correct/right have to be settled outside of the legal media. The law itself simply can neither deny nor confirm the validity of a moral argument. This directs us to the overtaxing problem.

2) The latter pertains to the question of the addressees. There is a claim to correctness as the judges both out of conceptual and moral reasons have to contend that their decisions are right. But can the lawyers really establish the premises for redeeming this claim all by themselves? Are they so to say the right addressees? Alexy distinguishes between institutional and non-

74 The following statements originate from one of the founding fathers of legal positivism. cf. Paul Laband, Das Staatsrecht des Deutschen Reiches, vol. 2. Tübingen: Mohr, 1911, p. 178, cited from Masimo La Torre, ‘Theories of Legal Argumentation and Concepts of Law: An Approximation’, 15 (2002) Ratio Juris, pp. 377-402, at p. 379. “Legal decision consists of a given case’s subsumption under valid law; like any other logical conclusion it is independent from will. There is no freedom on the resolution whether the consequence should take place or not; it is produced—as it were-by itself, by intrinsic necessity”.

institutional circles of addressees. The former are the ones affected by respective legal acts, the latter contains relevant participants who can use all arguments allowed in a legal discourse – in the legal public sphere, as mentioned. The latter includes everyone who takes the point of view of a participant in the respective legal system. It is an inclusive public forum which can bring forward the interests and viewpoints of legal consociates that are relevant for passing a correct judgement. The premises that can not be derived from the actual law are to be justified by the external ‘jury’. But who are the participants in such a process and what arguments are permitted? It follows from the constraints of a legal discourse that only judicial arguments are allowed and that it is not the participants but the judge who has the last word. Admittedly the equality criterion can be approximated by making more open and inclusive forms of participation possible, but the legal argumentation is from its inception constrained – as an impartial judge is present and the participants are legal consociates:

“No matter how many schemes we conceive in order to increase the number of interests and arguments to which judges are exposed, the fact that it is they and not the parties who have the last word precludes any direct reference to participation as a source of legitimacy.”

In a practical discourse there is no neutral judge, no limited number of participants or constraints on time, the themes for debate, etc. In a justification discourse there can only be participants. Only the participants themselves can pass judgment over their equal interest and their common good. There can be no procedure independent criteria of correctness. From a democratic point of view these two questions, that is what is legal and what is normative or politically valid, branches out in two kinds of procedures – the legal one where the addresses are confined to the circle of legal consociates, and the political one referring to circle of citizens, which are not merely bound by the legal medium but also authorized as le pouvoir constituant to constitute power and give the law new normative content: Common action norms can only be legitimately tested in the wider public sphere where competent citizens and all affected parties are present.

76 Alexy, supra, fn 39, p. 228: “It is the task of the external justification to justify those premises which cannot be derived from positive law”; cf. also Hart, supra, fn 47, p. 89.
77 Alexy, supra, fn 48, p. 377: “[O]ne cannot deny that it is the court which is to decide and argue in the last instance”.
“Once the judge is allowed to move in the unrestrained space of reasons that such a ‘general practical discourse’ offers, a ‘red line’ that marks the division of powers between courts and legislation becomes blurred. In view of the application of a particular statute, the legal discourse of the judge should be confined to the set of reasons legislators either in fact put forward or at least could have mobilized for the parliamentary justification of the norm.” 79

IX. Deliberative democracy and legal uncertainty
Concerning the question whether legal argumentation can satisfy the conditions for legitimate law-making, as the special case thesis holds, or whether other procedures are called upon as Günther and Habermas suggest, from a democratic point of view the latter solution fares better. Even though Alexy may be right in maintaining that application discourses can not solve the problem of rational adjudication of interpersonal conflicts, the procedures for tackling normative content, substance, are better specified in the formers suggestion.

“Procedural rights guarantee each legal person the claim of a fair procedure that in turn guarantees not certainty of outcome but a discursive clarification of the pertinent facts and legal questions.” 80

The general problem with the special case thesis in this perspective is that judges should apply norms, not make them. Conceiving of the legal discourse as a special variant of the practical discourse blurs the distinction between legislation and application because it allows the judge to make use of normative reasons in general, not only the ones given by the legislators. Now Alexy may defend his thesis by pointing to the fact that in modern societies heavily strained by complexity the political system become overburdened and does not produce the required set of norms. When the legislator does not fulfil its function the courts have to intervene and upgrade the legal system so that it becomes possible to handle the complexities facing it. It leaves the generation of norms to be handled autonomously by the discretion of the judges – hence the prevalence of delegation and framework legislation. The

80 Habermas, supra, fn 26, p. 220.
politicians are not doing their job in furnishing the legal system with the required normative premises and leaves to the discretion of the judges to find the ‘correct’ normative basis for adjudication.

As far as this is the actual situation of the legal system in a modern welfare state, the Sonderfallthese is plausible in descriptive terms. But it can not be sustained normatively. It does not sit with the basic principle of democratic legitimacy that the people should be the final arbitrator of constitutional law (subjected only to a limited set of constraints). Alexy’s solution gives too much leeway to the discretion of the lawyers as they become authorized to choose the decisive reasons themselves. But how can the problems of legal uncertainty be avoided when judges have to make use of extra-legal premises in order to decide in conflicts over the law? How can affected parties know that the decision is correct and how can they check that the premises of a ruling are the right ones?

These queries makes us aware that another concept of democracy is required than the one based on majority vote. As mentioned the majoritarian model of democratic politics is inadequate. The voting procedure cannot ensure correctness because of its un-attentiveness to reasons. Rather we should conceive of it as deliberative democracy where citizens are involved in inclusive legislative processes and where inputs as well as outcomes are subjected to public critical debate. The essence of the deliberative conception of democracy is that citizens have a right to justification of those action norms that affect them. It is based on ‘the rule of reasons’ and on the moral principle of reciprocal and general justification. It defines popular rule as legitimate only if stringent prerequisites are satisfied such as equal access, autonomy, full information, openness. These prerequisites may be hard to fulfil in any real existing form of democracy, and should be conceived more of as regulative ideas. Deliberative democracy is, nevertheless, consistent with the republican idea of popular constitutionalism conceiving of the people and not the judge as the interpreter of last resort. In this perspective the whole complex of demanding communicative arrangements in the political sphere of action comes into consideration. In this sphere proposals are subjected to public debate prior to law enactment. Prior to adjudication there are comprehensive processes of norm-testing deliberation. In the general public sphere in civil society – in media and newspapers – in networks, social movements, popular assemblies etc., problems are discovered, thematized and dramatized, and social concerns are verbalised and claims are justified. Here a moral discussion
over what norms should prevail and how different and similar cases be treated, take place. The general public sphere, the generic principles of which are participation, inclusion, equality, freedom, open agenda, is the locus focus of popular sovereignty and practical reason. Here people can address the political questions of the day, can assemble and try to influence the political system and in rare moments – in constitutional moments – also change its basis rules.

What is more, politicians increasingly find the situation of jurist made law in the modern welfare state problematic and have initiated a plethora of quasi-legal and quasi-political bodies outside of the political system, in order to settle the problem of legitimate normative inputs to the political and the legal system. These bodies are so to say involved in the generation of the norms. On the input side of the political system we find different kinds of public hearings, popular meetings, citizens juries, experiments with deliberative reflection groups, ethical committees, consensus-conferences, etc. which all are oriented towards the enlightening and the resolving of controversial value- and norm-questions. On the output side of the political system as well we find a plethora of bodies where citizens are involved in the concretization and operationalisation of the political laws and regulations.

The new participatory forms of governance of a deliberative kind is important because here legitimacy is not merely a matter of the citizens’ preferences as they are expressed by the voting slip, but what reasons the participants have for agreeing or disagreeing with a standpoint. Some of these deliberative sites may be seen as forms of delegation of the norm-production of the society as they involve the citizens in reflective moral deliberation. Their democratic value pertains to the proviso that only through a fair process of argumentation between affected can one tell whether a norm is unbiased or not. A legitimate decision is not an expression of preconceived ideas of what is just or the common good but the outcome of everybody’s deliberation in a free, open and rational process. Consequently, there is, in principle, an alternative to the legal public sphere when it comes to the settling of normative questions.

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X. Proceduralism and judgement capacity

But also on a deeper level there is a problem with Alexy’s architectonic. This has to do with the aforementioned notion of principles as optimization requirements and the implied weighing criterion, which rule out the possibility of being able to criticise the principles themselves in light of higher ranking norms and validity claims. Principles conceived of as optimizing requirements are subject to weighting and balancing and hence are framed on merely axiological values and weak evaluations reflective of wants and preferences and not moral norms in the Kantian sense. What happens then when rules, which are definitive norms related to permissions/prohibitions collide, and when it is necessary to recur to higher ordered principled debates on what norms should have priority? The problem is how to solve collisions of norms rationally when the procedures for discursive meta-legal assessment are lacking.

While Alexy, on the one hand, subscribes to the discourse principle he holds, on the other hand, certain moral norms as valid prior to a discourse. The procedural concept of correctness says that a norm N is correct when it is the result of the procedure P. However P is not reserved for discursive justification: “P kann durch ein Individuum durchgeführt werden...” Norms can so to say be justified in a monological way. As we have seen Alexy 1996 justifies basic human rights in a way that does not depend on discursive justification. In this regard Alexy sides with the constitutionalists. His concept of procedure is not connected to the criterion of a rational consensus as is the justification program of Habermas, but to the carrying out of the discourse procedure. He disconnects consensus and correctness. The norm N is not correct because of a rational acceptance in actual or ideal discourses but because of the way the procedure is carried out enables judgement capacity, viz., the way the members manage to distinguish good from bad reasons. “Was ein guter Grund ist, kann sich erst im Prozess der diskursiven Überprüfung zeigen.” The achievement of the procedure depends on the judgement capacity of the members. It is the purpose of the procedure to develop such. The procedure is to enhance the capacity to judge by the

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84 According to Günther, Alexy presupposes “a teleological reinterpretation of principles” and he reduces “the justification problem to justifying decisions of preference”. Cf. Günther, supra, fn 46, p. 227.

85 Alexy, supra, fn 1, pp. 96, 104 and 110.

86 Habermas, supra, fn 34.

87 Alexy, supra, fn 1, p. 121.
particular discourse members, to distinguish between good and bad reasons with regard to what should be done. But, then, what is the criterion of correct decisions? There is no basic procedure for testing the fallible outcomes of actual discourses. In other words, there is no recurs to a more basic justification procedure. What is at stake with this conceptual strategy is the space for discretion left over to the judges, and hence the expansion of “constitutional legal reasoning” to the detriment of the political process itself and of the citizens self-government.

The substance involved, the restrictions within legal discourses needs to be checked, and this check cannot take place at the same level — it can only be tested by a higher order, justificatory discourse.88 Because the rules of the discourse are basic to justification, their correctness must be justified on a deeper level.89 Thus there is a problem of relativism in Alexy's theory. He has not provided an ‘objective’ correctness theory. His concept of correctness is relative: It depends on the (arbitrary) judgement capacity of the judges. Alexy is a proceduralist who is not a ‘democrat’ in the present use of the term. The substantial rest in Alexy's program is larger than in Habermas’, in which the rational consensus establishes a criterion for correctness, i.e., when affected parties comply with identical reasons under free and equal conditions. Here constitutional proceduralism hinges on discursive proceduralism. The task is therefore to establish a procedural standard for legitimacy where the democratic deliberation process itself makes the result right. But does the discourse theory really accomplish this?

XI. Epistemic or moral justification?
According to Habermas any substantial standpoint raises claims of justification and makes demands on knowledge which can only be met argumentatively. On the one hand, only substantial standpoints can justify outcomes. We do not know whether a case has been correctly dealt with until we know the

88 George Pavlakos, ‘The Special Case Thesis. An Assessment of R. Alexy’s Discursive Theory of Law’, 11 (1998) Ratio Juris, pp.126-54. See also, of the same author, ‘Persons and Norms: On the normative groundwork of Discourse-Ethics’ Vol. 85 (1999) Archiv für Rechts- und Sozialphilosophie, pp.1-22, at p. 9: “If one allows a picture of the discourse, where these is no room for any substantive norms at its starting point, and where consequently all discourse-rules are simply speech rules (...) then one should renounce the idea of a substantive claim for rightness; in this case the rightness-claim would remain a sheer formal concept, which would be nevertheless too weak to justify the whole enterprise of practical discourse”.
parties’ arguments – their views, reasons, valuations, etc. On the other hand, no grounds are beyond justification in a political context, something that is due to the fact that there is no reality-check of normative statements. Norms are only ‘valid’ to the extent that the actors agree on them in a rational discourse.

“All contents, no matter how fundamental the action norm involved may be, must be made to depend on real discourses (or advocacy discourses conducted as substitutes for them).”

Discourse theory brings together substance and procedure when it is maintained that in a free argumentation process the validity of the reasons can be tested, viz. they can be assessed in relation to autonomy and universality. It is therefore the process that justifies the outcomes. Neither the formal qualities of the procedure nor substantial grounds justify the outcomes. Rather it depends on whether the process has included objections and counter-arguments in such a way that outcomes can stand up to public criticism. “[L]egitimacy through procedure does not result from the structure of procedure itself, which guarantees the right of participation, but rather from the quality of discursive processes which they make possible.”

It is a qualitative good process of argumentation that is able to test the justifiableness and reasonability of claims and interests involved that bear the burden of legitimation in discourse theory. Thus it is neither the participation of all, nor expressions of will and the respect for preferences that give the democratic process its legitimating power, but rather the deliberative process. This power lies in the access to a process where standpoints can be tested in such a way that one can expect reasonable and publicly acceptable, i.e., rational results.

The problem with this solution is that the standard for evaluating the quality of the outcomes is given independently of an actually performed deliberation process. The standard is constituted by an ideal procedure, which specifies the contra-factual conditions for a public discourse where all limitations on time and resources have been suspended, and where the only authority is that of the better argument. Real communication processes can only approximate such ideals. To Habermas the rational consensus is the

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90 Habermas, supra, fn 34, p. 94. On this point see also Jürgen Habermas, Wahrheit und Rechtfertigung, Frankfurt: Suhrkamp, 1999, pp. 30ff.
91 Habermas, supra, fn 2, p. 1508.
standard by which the correct outcome can be defined. It is the criterion of legitimancy. By observing the ideal conditions for conversation one should arrive at the correct decision – one that everyone can approve of. The problem is that this does not explain why the reasons for an actual decision are good reasons. How can public deliberation be both moral and epistemic, i.e., how can features of the process justify the outcome at the same time as it has good effects? Under non-ideal conditions the problem with justifying the epistemic value of deliberation arises. This is due to the fact that actual deliberations will not generally meet ideal requirements: they will be marked by, for example, ignorance, asymmetric information, power and strategic action. Estlund and Gaus therefore ask the question of whether the reasons that can be stated publicly also are good (convincing or correct) reasons.

Ideal proceduralists attempt to avoid these problems of justification. Their claim is that the ideal deliberative procedure is constitutive for correctness as long as certain conditions are met. But if correctness is seen as what the actors will support under ideal conditions, it will be difficult to prove the epistemic qualities, i.e., that actual deliberation leads to better and fairer decisions. This is only possible when one can appeal to a process-independent standard of truth or correctness. This is what the constitutionalists put forth when they operate with a substantial measure of justice as it is formulated, for example, in the theory of justice as fairness as we have seen.

In order to defend the epistemic qualities of deliberation, process-independent standards are needed. An epistemic justification of outcomes will in that case become independent of ideal deliberative conditions, but dependent on what the deliberation leads to with regard to rational decisions – independently defined. We are therefore faced with the following paradox: if deliberative democracy defends its claims on moral qualities via an ideal process, it cannot legitimate its claims on epistemic value. On the other hand, if deliberative democracy claims to have epistemic qualities, it can only be defended by standards that not only are process-independent, but also independent of actual deliberation.

95 Bohman and Rehg, supra, fn 6, pp. ix-xxx, at p. xix.
Gutmann and Thompson argue that deliberative justification is neither entirely procedural nor substantial (constitutional) – none of them have priority, but both are necessary. They argue that substantial principles should be included but these are to be seen as moral and political provisional. Then little is won. David Estlund also argues for a mixed principle that does not make the legitimacy of the result dependent on its correctness, but on the epistemic value of the process that created it:

“Democratic legitimacy requires that the procedure is procedurally fair and can be held, in terms acceptable to all reasonable citizens, to be epistemically the best among those that are better than random.”

This is a weak principle. The only requirement is that the citizens agree that there are more or less favourable ways of evaluating arguments. Consequently a “thin substance” is involved. The normative problem with this solution is that it lacks a theory of criteria specification and of conflict resolution based on a theory of public justification. The analytical problem is that this solution does not pick up on the moral authority of the process, i.e., that the process itself has the ability to bring forth results and which by itself induces respect. It is only the moral qualities of the procedure that can explain that political decisions have a binding power also on those who disagree. It is hard to see how discourse theorists can maintain that it is the epistemic value of deliberation that makes results correct, when the procedure itself is constituted by moral (non-deliberative) norms. But what kind of standard are we talking about?

XII. Discursive proceduralism

The tension between substance and procedure that occupies such a prominent place in present day political theory reflects the very constitutional structure of modern democracies in which the citizens have the opportunity

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99 Estlund, supra, fn 6, p. 174.
100 Estlund, supra, fn 93.
101 Estlund, supra, fn 96, p. 407.
Democratic or Jurist-Made Law

to give themselves the laws that they have to obey, but where the participation is regulated by non-disposable procedures and inalienable rights. Fundamental norms like equality, autonomy, human dignity, legal certainty, democracy, which make up the basic procedures of the modern constitutional state, are higher-ranking principles, belonging to the deontological realm. The procedures themselves are normatively charged and are subjected to judicial review of one sort or the other, monitored by judicial bodies. The tension then is involved in the medium of law itself as it claims to hand down correct solutions but can not accomplish this without importing substantial reasons of what is right or wrong, good or poor. This tension repeats itself in the discourse theory as only the procedure can tell which argument is a good one, but the speech rules constituting the process reflect substantial elements. So are the Constitutionalists right after all?

The standard for democratic justification that is at work here is not an objective one. It involves actors, their arguments and fallible opinions and it refers to the idea of a justly organised process. Hence a concept of justice is presupposed. This standard is an intrinsic critical standard for assessing existing imperfect democratic procedures: it can be used in assessing every actual institutionalisation of political deliberation and decision-making.

"What it can argue for are improved forms of justification if there are grounds to assume that good reasons have been neglected, but there is no independent way to “find” an objective truth beyond reciprocal and general argumentation."

Regarding this it becomes clear that the alleged problem of infinite regress is only a problem for foundationalists – it may be seen as a “... product of an old providential model of authority that leads us to look for authorization prior to action rather than the other way round.” In discourse theory, which builds on a pragmatic conception of validity there is a departure from induction and deduction as rightness warranting principles. Argumentation replaces propositional inferences as the central area of logic in practical contexts. The theory is based on the connection between a speech act and its pragmatic presuppositions. There are basic rules of argumentation that cannot be opposed, because they are presupposed as valid already when the discussion starts. The constitutive rules of the game can be criticized,

ridiculed, changed, modified but can not be disposed of if the game is to be played at all. It is this idea of procedure that makes criticism and correction of established processes possible. Thus an independent standard – but not a pure procedural justice standard - is given for the evaluation of actual procedures and political decisions. This standard is not objective in a simple scientific sense as it includes normative elements (such as a notion of justice and democracy) and cannot yield correct results as the ideal conditions of discourse can only be approximated. It is only a question of better answers compared to those that can be reached by means of democratic processes, in the sense that an argumentative process will bring about more justified standpoints.

The standard is thus imperfect, but is itself an expression of a normative procedure for justification, which is entrenched in the legal and moral nexus of modern constitutional democracies. Discourse theory reads the fundamental rights as procedural arrangements for substantiating the presumption of popular made law. In this specific meaning procedures overrule correctness theories, but the procedure itself is constituted by substantial claims to freedom and equality. The latter cannot be explained procedurally, because the very procedural claim of equal right to participation itself presupposes the basic substantial claim of everybody’s equality and the right to equal freedom. Such basic moral or human rights have priority over other claims - this is why they are constitutionalised in the first place - and they also must have priority in order for democracy to be acceptable for all. Consequently, in discourse theory there is a substantial rest that leaves room for judicial review and for judges as guardians of the constitution in ensuring correct results.

Generally, discourse theory holds that correctness is more a question of what can be justified in a process, than what is right or fair according to some external (theoretical) standard. It is the citizens’, not the judges or the political philosophers’ moral judgement that is decisive. But the process must be secured by substantial elements, because it is required that the procedure is fair. In contrast to contractarian constitutionalism the task of philosophy is, according to discourse theorists, merely to clarify the moral point of view and the criteria for democratic legitimacy through an analysis of the procedural requirements for a rational debate. It does not include deducing certain norms or criteria for distribution of resources. Neutrality in this context has

to do with ensuring mutual respect and equal conditions for communication, so that everyone can express their opinion and that arguments can be tested.

**Conclusion**

The debate on substance and procedure, is not merely a theoretically one because it has to do with whether there can be a democratic enactment of a constitution. What can people sovereignty mean under the rule of law in modern society? In short, should the legislators or the judges have the upper hand? Should the Supreme Court’s or the politicians be the final arbiter of constitutional law? This article has established that proceduralists cannot do without substance in conceiving of popular rule. For the people to be free to make their own constitution some moral properties are presupposed. Hence, the rights-based perspective of the constitutionists has a case against proceduralists. But what is meant by procedure? If it comes down to solely majority vote, a procedural approach cannot be sustained. If, on the contrary, it designates the procedures for ensuring a fair deliberative process – a fair procedure of reason giving – the case is a bit different. Deliberationists like the discourse theorists plead for a larger concept of democracy than the one depicting it as merely a voting arrangement and hold that substantive and procedural conceptions of justice interchange in justificatory processes.

In this regard one may conceive of politics as a special variant of practical reason. It is specialised on collective goal realisation revolving on common good considerations constrained by the principle of justice. Moral and legal principles are seen merely as the constraints that ensure equal access, autonomy and equality. The constitutive power - le pouvoir constituant - always lies with the people; all law and public authority stems from the citizens. Moreover, it is the deliberative process itself that bear the burden of legitimation in so far it manages to define and mobilize support for collective goals and secure a fair treatment of all actors’ interests and needs. In this model, judging the legitimacy of the arguments is in the last instance left to the participants involved in the discussion. A legitimate decision is not an expression of preconceived ideas of what is just or the common good but the outcome of everybody’s deliberation in a free, open and rational process. Such a procedure is constituted by substantial moral norms that can not themselves be proceduralised. What then from a democratic point of view seems to be the contribution of discourse theory is the way it does not fix substantial conceptions of what should be done in final categories, left over to
the politicians, judges and bureaucrats to implement, but constantly subject
them to argumentative testing and higher-ordered procedural constraints
based on idealized deliberative preconditions.
Chapter 5
On Alexy’s Weight Formula

Carlos Bernal Pulido
Professor, Universidad Externado de Colombia

Introduction
There are two basic kinds of norms in every modern legal system: rules and principles. They are applied by means of two different rational procedures: subsumption and balancing. While rules apply by means of subsumption, balancing is the way to apply principles. For this reason, balancing has become an essential methodological criterion for adjudication, especially for the adjudication of fundamental rights, which have the structure of principles. However, balancing is at the heart of many theoretical discussions. One of the most important questions is whether balancing has a rational structure and is a rational procedure, or if it is a mere rhetoric device useful to justify any kind of judicial decision. In A Theory of Fundamental rights and in other papers, Alexy supports the thesis that balancing has a rational structure, and he offers a well developed conception of the structure of balancing – which in his latest version has three elements: the law of balancing; the weight formula; and the burden of argumentation. The aim of this paper is to analyze the role

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In Agustín José Menéndez and Erik Oddvar Enksen (eds.) Fundamental Rights through Discourse, ARENA, Oslo, 2004, pp. 129-140
and structure of the second element: the weight formula (II), but first it is necessary to clarify the concept and the general structure of balancing (I).\(^1\)

I. The Concept and the Structure of Balancing

A) The Concept of Balancing

Principles are optimization requirements, i.e. norms which do not establish exactly what should be done, but which require “that something be realized to the greatest extent possible given the legal and factual possibilities.’ What is legally possible is determined by opposing principles and rules, and what is factually possible is determined by factual statements about the case.

In establishing this “greatest extent possible” to which a principle should be carried out, it is necessary to confront it with opposing principles or with principles supporting opposing rules. These are then competing principles; they support *prima facie* two incompatible norms (for instance, N1 forbids ø and N2 commands ø), which can be proposed as solutions for the case.

Balancing is the way to resolve this incompatibility between *prima facie* norms. Balancing does not guarantee a systematic articulation of all the legal principles which, taking into account their hierarchy, resolves beforehand all the possible conflicts between them, and all the possible incompatibilities between all the *prima facie* norms they underlie. On the contrary, as a syllogism, balancing is only a structure – composed of three elements – by means of which “a conditional relation of precedence between the principles in the light of the circumstances of the case” is to be established in order to reach the legal decision.

B) The Structure of Balancing

Robert Alexy explains the structure of balancing with great clarity and precision. He claims that in order to establish the conditional relation of precedence between competing principles, it is necessary to consider three elements which form the structure of balancing: the law of balancing, the weight formula and the burden of argumentation.


\(^2\) See Alexy, *supra*, fn 2, op. cit., p. 47.

\(^3\) Ibid., p. 52ff.
a) The Law of Balancing

According to the 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.”

Consistent with this rule, the structure of balancing can be broken down into three different stages, which Alexy clearly identifies:

“The first stage involves establishing the degree of non-satisfaction of, or detriment to, the first principle. This is followed by a second stage in which the importance of satisfying the competing principle is established. Finally, the third stage establishes whether the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first”.

It is important to note that the first and second stages of balancing are rather analogous. Both operations consist of establishing the importance of the principles at stake, so we will refer to both as such. Indeed, in both cases Alexy claims that commensurability can be established by reference to a triadic scale: “light”, “moderate” and “serious”.

The importance of the principles at stake is not the only relevant variable. A second one is the “abstract weight” of the principles. Different abstract weight might derive from the different legal hierarchy of the legal body in which the principle is affirmed or from which it stems, but it might be established by reference to positive social values. Thus, for instance, it could be claimed that the principle of protection of life has a greater abstract weight than that of liberty, as it is pretty obvious that one must be alive in order to be able to exercise one’s liberty. Similarly, several national constitutional courts have assigned a high abstract weight to freedom of speech on account of its close connection with democracy, or to privacy given its close association with human dignity.
A third variable R should be added. This refers to the reliability of the empirical assumptions, concerning what the measure in question means for the non-realization of the first principle and for the realization of the second, under the circumstances of the case. R is based on the recognition that the empirical assumptions relating to the importance of the competing principles can have a different degree of reliability, something which should affect the relative weight of each principle in the balancing exercise.

Now the question is: how should the importance of principles, their abstract weight, and the reliability of the empirical assumptions (concerning the importance of the principles) be assessed in order to come to a concrete balancing outcome? According to Alexy, the answer is provided by the weight formula.

b) The Weight Formula

The weight formula has the following structure:

\[ WP_{i,j}^C = \frac{IP_i^C \cdot WP_i^A \cdot RP_i^C}{SP_j^C \cdot WP_j^A \cdot RP_j^C} \]

This formula states that the concrete weight - in a given case - of principle \( P_i \) in relation to principle \( P_j \) results from the quotient between, on the one hand, the product of the importance of principle \( P_i \), its abstract weight and the reliability of the empirical assumptions regarding its importance and, on the other hand, the product of the importance of principle \( P_j \), its abstract weight, and the reliability of the empirical assumptions regarding its importance. Alexy says that it is possible to give a numerical value to the variables of the importance and abstract weight of the principles with the help of the triadic scale: light 2º, that is 1; moderate 2¹, that is 2; and serious 2², that is 4. In contrast, the reliability of the factual premises must be given a quantitative expression in the following way: reliable, 2º, that is 1;

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maintainable or plausible $2^{-1}$, that is $\frac{1}{2}$; and not evidently false, $2^{-2}$, that is $\frac{1}{4}$.

By applying these numerical values, it is possible to determine the "concrete weight" of principle $P_i$ in relation to principle $P_j$ in the case at hand. If the concrete weight of principle $P_i$ in relation to principle $P_j$ is greater than the concrete weight of principle $P_j$ in relation to principle $P_i$, the case should be decided according to principle $P_i$. And opposite, if the concrete weight of principle $P_j$ in relation to principle $P_i$ is greater than the concrete weight of principle $P_i$ in relation to principle $P_j$, the case should be decided according to principle $P_j$. If $P_i$ supports the norm $N_i$ that forbids $\phi$ and if $P_j$ supports the norm $N_j$ that commands $\phi$, $\phi$ should be forbidden in the first case and $\phi$ should be commanded in the second case.

c) The Burden of Argumentation
The third element of the structure of balancing is the burden of argumentation. This goes into operation when the application of the weight formula results in a stalemate, that is, when the weight of the principles is identical (or to express it formally, $WP_{i,j}C = WP_{j,i}C$). Alexy seems to defend two different ways of breaking the stalemate, one in the final chapter of *A Theory of Fundamental rights*, and another in the *Postscript* to the just referred book, which is written fifteen years after the publication of the first edition. This double solution is problematic to the extent that it could lead to rather different results, as we will see.

In *A Theory of Fundamental rights*, Alexy claims that stalemate cases should be decided in favour of legal liberty and legal equality, or what is the same, his position could be summarized by reference to the principle of *in dubio pro libertate*. Any principle in conflict with the principles of legal liberty or legal equality should not be applied in the case at hand, unless "stronger reasons" are put forward in its favor. In the *Postscript* to *A Theory of Fundamental rights*, Alexy defends a different solution. In stalemate cases, he says, a restriction mandated by an act of Parliament should be considered as proportionate and

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11 See Ibid., p. 789 and f.
13 On the burdens of argumentation, see Bernal Pulido, supra, fn 3, pp. 789ff.
14 Alexy, supra, fn 2, pp. 384ff.
15 Ibid., p. 385.
therefore declared in accordance with the Constitution. In other words, ties would have to be sorted out by fostering the democratic principle, not necessarily legal liberty and equality."

II. The Role and the Structure of the Weight Formula

A) The Role of the Weight Formula

We should now consider the role played by the weight formula in the general structure of balancing. It should be remembered that the weight formula is a rational procedure to determine the concrete weight of principle \( P_i \) in relation to principle \( P_j \) in the light of the circumstances of a case. Alexy thus presents the weight formula as a complement to the law of balancing, rooted in the classical formulation of the third limb of the proportionality principle, or proportionality in the narrow sense.\(^\text{17}\)

However, it seems to me that the weight formula, as described by Alexy, calls for a new law of balancing. The aim of the weight formula is to establish “a conditional relation of precedence between the principles in the light of the circumstances of the case”. The relation of precedence is not determined by means merely comparing the importance of the principles in the case at hand (“the degree of non-satisfaction of, or detriment to, one principle” and “the importance of satisfying the other”), but by a wider operation which includes reference to the abstract weight of the principles, and to the reliability of the empirical assumptions relating to the importance of the principles. That is, the weight formula is a reformulation of the basic insight behind the original law of balancing, one which is more sophisticated in analytical terms, as it renders explicit the need of considering two additional variables, namely the abstract weight and the reliability of the empirical assumptions.

The new formulation of the law of balancing should be as follows:

\[
\text{The greater the concrete weight of principle } P_i \text{ in relation to principle } P_j \text{ in the light of the circumstances of the case, the greater must be the concrete weight of principle } P_j \text{ in relation to principle } P_i \text{ in the light of the circumstances of the case.}
\]

\(^{16}\) Ibid., p. 410 and f.
\(^{17}\) Cf. BVerfGE 30, 296 (316).
This reformulated law of balancing could also be expressed as:

\[ WP_{i,j}^C \leq WP_{j,i}^C \]

Or more explicitly,

\[
\frac{IP_i^C \cdot WP_i^A \cdot RP_i^C}{SP_j^C \cdot WP_j^A \cdot RP_j^C} \leq \frac{SP_j^C \cdot WP_j^A \cdot RP_j^C}{IP_i^C \cdot WP_i^A \cdot RP_i^C}
\]

This could be rendered clearer with the help of a concrete example. Imagine that the life of a child is dependent on a blood transfusion, which her parents refuse in the name of their religious beliefs. This implies a conflict between the right to life and the right to religious freedom. Is it constitutionally sound to mandate the transfusion contrary to the will of the parents? The Court could consider that the degree of non-satisfaction or detriment of principle \( P_i \) (freedom of religion) is serious (4), as is the importance of satisfying principle \( P_j \) (protection of the life of the child) (4). The Court could further consider that the abstract weight of freedom of religion \( P_i \) is moderate (2) and that the abstract weight of the right of life is high (4); finally, that the empirical assumptions concerning the importance of both principles are reliable (1). In this case, the application of the law of balancing leads to the following conclusion:

\[
\frac{4 \cdot 2 \cdot 1}{4 \cdot 4 \cdot 1} \leq \frac{4 \cdot 4 \cdot 1}{4 \cdot 2 \cdot 1}
\]

That is to say:

\[
\frac{8}{16} \leq \frac{16}{8}
\]

\[
\frac{1}{2} < \frac{2}{2}
\]
In this example, the blood transfusion should be undertaken against the will of parents because the right to life of the children meets the requirements of the law of balancing. The infringement of the right to religious freedom should be considered as proportionate and, therefore, as permitted by the Constitution.

B) The Structure of the Weight Formula
The structure of the weight formula sets out many interesting problems. Paramount among them is the search for objective criteria to determine the value of the relevant variables which form the weight formula. Whether such criteria are to be found is what I will explore in this section, by considering each of the variables in detail.

a) The Degree of Importance of the Competing Principles
It is true that sometimes rational judgments about degrees of intensity and importance of competing principles are possible; there are easy cases concerning the degree of importance of principles. For example, if a satirical magazine calls a handicapped officer a “cripple”, this clearly constitutes a serious offence against his honour (4), while at the same time it contributes very slightly to the protection of freedom of speech (1). However, there are also hard cases in which the premises - both factual and normative - to be considered in determining the importance of a principle are uncertain. This is typically the case when freedom of religion is at stake. It can be doubted whether the degree of interference of a given measure with freedom of religion can be determined in abstract terms, without taking into account subjective views on religious experience. Thus, the perceived degree of interference with freedom of religion of a forced blood transfusion is clearly dependent on how the individual lives her religious faith. It might be fully negligible for most believers, and very serious for a Jehova witness. An assessment of the importance of the principle can only be made after taking a concrete stand which cannot be determined by the weight formula in itself. Thus, reference to the weight formula implies a grant of discretion to the judge and to his critical moral views, as well as political ideology. However, even in such cases, the weight formula has a role to play, as it renders clear the margin of discretion left to the judge, and the room made to critical morality and political ideology in the balancing exercise.

Likewise, the judge can exercise discretion when it is not clear if the case is an easy or a hard one with respect to the first variable in the weight formula,
namely the importance of principles. This can be illustrated by a concrete case, the Tobacco Judgment of the German Constitutional Court, which Alexy tends to refer as an example of a clear case. The Tobacco judgment concerned the statutory duty imposed upon tobacco producers to make consumers aware of the health risks associated with smoking on the labels of cigarettes. More precisely, whether this duty was constitutionally sound or not. In principle, the judgment shows that there are easy cases in which “rational judgments are possible about intensity of interference and degrees of importance”, so that “an outcome can be rationally established in way of balancing”. The labeling duty is a “relatively minor interference with freedom of profession”, especially when compared to potential alternative measures, such as the prohibition of the sale of tobacco, or the imposition of restrictions on its sale. Moreover, it is clear that the measure fosters the protection of health. Therefore, Alexy concludes that “The Federal Constitutional Court was not exaggerating when it stated in its decision on health warnings, that ‘according to the current state of medical knowledge, it is certain’, that smoking causes cancer and cardio-vascular disease”. The minor interference with freedom of profession would be balanced against satisfying the protection of health. However, different assessments of the relevant variables are possible. From a factual point of view, it could be said that it is not certain that the duty to advertise the heart risks stemming from tobacco on cigarette labels actually contributes to fostering consumers' health. It could be the case that such a measure is inefficient, perhaps because consumers are already aware of what the labels tell them; or because tobacco addiction persists even if consumers are informed of its consequences, because it is to be traced back to weakness of will, and not to lack of information; or perhaps because providing information on the labels would render smoking more desirable. Thus, the range of variation of the importance of the relevant principles depends on factual and normative premises.

A first normative premise concerns the “meaning” (M) of the relevant positions of the principles, from the standpoint of the concept of person that any legal and political system must presuppose. In a liberal society a la Rawls, rights of liberty closely connected to the moral capacities of the

18 Ibid., p. 402.
19 Ibidem.
20 Ibidem.
person should be given more weight. They have greater meaning, and therefore, if they are interfered by an act of public power, this results in a serious violation of the principle that underlies them. In a Rawlsian society, the more connected with the moral capacities of the person a position of a principle is, the more importance should be attributed to the principle.\textsuperscript{25}

A second normative premise is the importance of the legal position \((LP)\) regarded in a case, from the point of view of the content of the relevant principles. For instance, an act of censorship of the government against the opposition party in time of elections is a more serious detriment of the freedom of speech than a strict regulation of a journal that daily publishes details about the sexual life of Hollywood actors. It could also be said that a restriction of access to basic education for many children is a more serious detriment to the right of education than a strict regulation of post-graduate studies (LLM or PhD).

On what regards the empirical premises, they concern the variation of the importance that the case at hand projects onto the relevant principles. Empirical variation depends on the efficiency \((E)\), speed \((Sp)\), probability \((P)\), reach \((Re)\) and duration \((D)\) of the controversial act in non-satisfying and satisfying the principles at stake.\textsuperscript{24} The more efficient, fast, probable, powerful and long the act under the review is in non-satisfying or satisfying the relevant principles, the greater the importance of these principles will be.

Regarding these normative and empirical premises, it could be said that the variables \(IP_iC\) and \(SP_jC\) in the weight formula could be formulated in a more explicit and extended way as follows:

\[
IP_iC = (MP_iC \cdot LPP_iC) \cdot (EP_iC \cdot SPP_iC \cdot PP_iC \cdot ReP_iC \cdot DP_iC)
\]

\[
SP_jC = (MP_jC \cdot LPP_jC) \cdot (EP_jC \cdot SPP_jC \cdot PP_jC \cdot ReP_jC \cdot DP_jC)
\]

\textit{b) The Abstract Weight of the Competing Principles}

Further scope for judicial discretion is derived from the measurement of the abstract weight of the principles. Abstract weight is a very singular variable,
which always refers back to moral and ideological considerations. Its measurement requires the judge to take a position about the Constitution, the role of the State in the given society, and the very concept of justice. It is clear that the variable of abstract weight loses its importance when the competing principles are of the same nature. When the nature of the competing principles is different, however, abstract weight becomes very relevant in solving the case at hand. Even then, some cases might be relatively easy. It could be assumed, for example that the protection of life, or fundamental rights closely related to the principles of human dignity and democracy should be given a higher abstract weight than others. However, judges have a considerable discretion when determining the abstract weight of principles. Quite obviously, there is no complete pre-established graduation of abstract weights. The protection of life might be said to deserve the highest value (4), but one could discuss whether such a value should not also be granted to the rights closely connected to human dignity and democratic decision-making. Furthermore, should the value be the same for all rights connected to human dignity and democratic decision-making, or should it vary depending on the closeness of the connection? What about other principles like legal equality or the right to factual, and not merely legal, equality? It might be said at this point that the measurement of the abstract weight of principles according to the triadic scale clearly depends on the ideology of the judge. An individualistic judge will give the highest abstract weight to liberty, while a communitarian judge might give the greatest weight to the common good. The judge should solve the case according to the best moral argument, but sometimes it is not easy to know which the best moral argument is. Thus, the right answer is that there is no right answer.

c) The reliability of the premises
Some limits to rationality are also observable on what concerns the determination of the reliability of the empirical assumptions relating to the importance of principles. The importance can be said to depend on its efficiency, speed, probability, reach and duration. The limits of rationality are related to several factors. First, it is difficult to determine the reliability of the empirical assumptions from all these perspectives. The empirical knowledge of the judge is limited. Sometimes he does not know the right value of each

25 Ibid, pp. 760, 770 and 772.
one of these variables. Second, the combination of these variables is a highly complex affair. What should the reliability of an empirical assumption whose low efficiency is plausible (½), its high speed is not evidently false (¼), its high probability is reliable (1), its great reach is plausible (½) and its long duration is reliable (1)? And, correspondingly, will this reliability be greater if the same variables have the same values but in a different order?

This is what explains that, at the end of the day, Alexy limits himself to consider the reliability of the empirical assumptions as such. However, there could also be an epistemological problem concerning the reliability of the normative premises that determine the variation and abstract weight of a principle. This opens up the “normative epistemic discretion” of the Parliament and other public decision-making power, and requires clarifying whether the relevant normative premises are reliable, plausible or not evidently false. If we distinguish the reliability of the empirical premises ($REIP_iC$ and $RESP_jC$) from the reliability of the normative premises concerning the importance of principles in the case at hand ($RNIP_iC$ and $RNSP_jC$) and their abstract weight ($RNWP_iA$ and $RNWP_jA$), we have an extended definition of reliability as follows:

$$ RP_iC = REIP_iC \cdot (RNIP_iC \cdot RNWP_iA) $$

$$ RP_jC = RESP_jC \cdot (RNSP_jC \cdot RNWP_jA) $$

**V. Conclusion**

I have tried to show that the weight formula should not be regarded as an algorithmic procedure which produces the one right answer in all cases. On the contrary, there are diverse rationality limits that leave a margin of discretion to judges. In that regard, the judge’s ideology matters and plays an important role. However, this does not impair the analytical value of the weight formula. Despite its limits, the weight formula provides a clear argumentative structure that helps clarifying the different relevant variables when balancing conflicting principles. Therefore, it renders explicit all the elements the judge should take into account, and all decisions that need be justified.

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26 See Alexy, supra, fn 2, p. 420.
III.

Applied Perspectives
Chapter 6
Constitutional Rights in the UK Human Rights Act

Julian Rivers
Lecturer in Law, University of Bristol

Introduction
In my introduction to the English edition of A Theory of Constitutional Rights I try to show how the Theory can be used to clarify constitutional rights reasoning in one common law jurisdiction: the English legal system. That argument is controversial, because there are several points at which an orthodox, or traditional, understanding of the British Constitution departs from the picture I paint. The principal purpose of this paper is to give a brief overview of the impact of the Human Rights Act on the British legal systems, and then to see what recent case-law is doing in a number of areas relevant to the Theory. The question here is whether there are signs of convergence, or indeed of divergence. At the same time I want to raise more openly than was appropriate in the book some of the difficulties that still remain. The root of these difficulties lies in the claim of the Theory to be a structural theory, which ought to be neutral (or at least, neutral to a high

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1 This paper was first given at a workshop ‘Constitutional Rights through Discourse: On Alexy’s Theory of Constitutional Rights’ held under the auspices of ARENA (Advanced Research on the Europeanisation of the Nation-State) in Oslo, 24–26 April 2003. I am grateful to participants for their insightful comments and stimulating discussion.

2 Oxford University Press, 2002, hereafter TCR.
degree) on matters of substance, procedure and institutional design. The problem is that the *Theory* may be more implicated in a particular conception of substantive rights, legal procedures and institutional structures than at first sight appears. To put it crudely, it may be more German than it looks. ³ If the argument for transferability to other systems is to succeed, one has to show that this more particular conception of the Constitution is still general enough to apply more widely within liberal democracies.

I. Overview of the Human Rights Act 1998

The United Kingdom was one of the first European states to ratify the European Convention on Human Rights, which came into force in 1953. In 1966 the UK permitted its own citizens to bring actions against the Government for violation of the Convention, but it was not until the late 1970s that this possibility for legal action entered the mainstream legal consciousness. The official position of the Government was always that Convention rights were in substance, if not in legal form, protected under the British legal systems. There was no need to incorporate the Convention as a ‘Bill of Rights’ or ‘Charter of Rights’. But as the UK started to lose cases in Strasbourg, the calls for transformation into domestic law increased, even among the senior judiciary. ⁴

At the same time a process of informal transformation was taking place. The British constitution is dualistic in respect of treaty law, although customary international law is taken to be part of the common law. This means that strictly speaking a treaty which has not been transformed by Act of Parliament into domestic law may only be used as an aid to interpretation if the related legislation is ambiguous. But some judges from the 1980s onwards were willing to make more frequent reference to the Convention, sometimes in developing the common law, sometimes in interpreting statute. Nevertheless, the overall impact remained small. Research carried out in 1997 found that in the 316 reported cases between July 1975 and July 1996 in which the Convention was cited, in only 16 could the Convention be said

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³ It should be noted that Alexy does not claim universal applicability for the *Theory*, but develops it in the light of the German Constitution. See TCR, pp. 5-10.

⁴ Lord Scarman called for incorporation in an essay in 1974, as did Lord Hailsham, Lord Chancellor from 1970-74 and 1979-87, in 1978.
to have affected the judgment, in the sense that the decision might well have been different had it not been taken into account.  

The Human Rights Act 1998, which ‘gives further effect’ to Convention rights in the British legal systems, was part of a set of constitutional measures proposed by the Labour party in its manifesto for the 1997 election. This programme of constitutional reform also included regional government for Scotland and Wales, freedom of information, reform of Parliament and the electoral process. In many ways the Human Rights Act has proved to be the least problematic politically. It was passed very early on, with relatively few changes to the original proposals, and came into force on 2 October 2000. 

From a formalistic perspective, the Human Rights Act should have had no impact at all. It simply provides a more effective remedy for violations of Convention rights. Even allowing for the dynamic nature of the Strasbourg case-law, one might have thought that almost 50 years after ratification, and 30 years after the right of individual petition, a reasonable degree of convergence would have been achieved. But of course this view ignores the inevitable creation of a complex body of domestic human rights law. Again, the statistics, crude though they may be, give some idea of what has happened. In 18 months (from 2 October 2000 to end March 2002) the Human Rights Act was cited in 431 cases in the higher courts and affected the outcome, reasoning or procedure in 318. A claim based on the Act was upheld in 94 of these cases. 

As far as the impact on substantive law is concerned, some effect has been felt in all areas, and in respect of all rights. The right to life, freedom of expression, the right to privacy, property rights have all been given greater effect. But with the possible exception of privacy the impact has been sporadic and peripheral. The one clear exception to this is in the area of legal processes, criminal, private and administrative. Here the Human Rights Act has had a major impact, with most of the reported cases being based on article 6 of the European Convention.

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6 1998, Chapter 42.
8 Klug and O’Brien, supra, fn 5, p. 650.
II. The Constitutional Status of Convention Rights

The doctrine of parliamentary supremacy is traditionally understood to mean that there is no higher law-making body than Parliament, and that the latest expression of the will of Parliament prevails. Even if Parliament states its intention of binding its successors, a future Parliament could ignore those restrictions. On this account, the British Constitution is purely procedural and highly minimal. It makes it impossible to argue that any particular legislation is constitutional in the formal sense of being superior in hierarchy to ordinary law. If human rights were enacted as ordinary law in an Act of Parliament, they would override all previous legislation, but could not be used to restrict any future legislation. Rather, if there were an inconsistency, the future incompatible legislation would override the Human Rights Act under the doctrine of implied repeal.

In the light of this, the Human Rights Act is very clever, because it does not enact Convention rights as ordinary law. Instead it imposes a strong obligation on the courts to interpret all law compatibly with Convention rights, and makes it unlawful for any public body to act incompatibly with Convention rights. The only public body to be treated differently is Parliament itself in its law-making capacity. If it is not possible to interpret primary legislation compatibly with Convention rights, the courts are empowered to issue a formal declaration of incompatibility. This does not affect the validity of the legislation, but it empowers the Government to make amending legislation under delegated legislative authority. In fact, the issuing of a declaration of incompatibility has been rare – courts have made declarations in about a dozen cases, and most have been overturned on appeal.

The effect of this approach is to protect the Act from the doctrine of implied repeal. Put another way, if Parliament wants to depart from Convention rights it must do so expressly, and that is a weak procedural constraint which makes it legitimate to argue that Convention rights are constitutional in a

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10 Sections 3 and 6 respectively.
11 Section 6(3)(b).
12 Section 4.
13 Sections 4(6) and 10.
14 See Klug and O’Brien, *supra*, fn 5.
15 Section 19.
formal sense. It connects the Act to the common law doctrine of constitutional rights, which states that certain rights are so important that legislation which appears to violate or limit them will be interpreted narrowly.\(^6\) It also connects the Act to European law, which will take precedence over an incompatible Act of Parliament, unless the Act expressly departs from European law.\(^7\)

This argument now has some judicial support. In *Thoburn v Sunderland City Council*,\(^8\) the Divisional Court had to consider the legality of the prosecution of traders for using imperial weights and measures rather than metric ones. The use of metric measures was required by European directive, which had been implemented in 1994 using delegated legislative authority under the European Communities Act 1972 to amend primary legislation, namely the Weights and Measures Act 1985. It was argued that the Weights and Measures Act 1985 had impliedly restricted the power to pass delegated legislation in this field under the (earlier) European Communities Act 1972. But Laws LJ held the prosecution lawful, because the European Communities Act 1972 was a constitutional statute which could not be repealed impliedly. Parliament had indeed delegated the power to amend primary legislation to ensure conformity with European law, and had done so in a way which protected the power from subsequent implied limitation or repeal. The judge argued that this ‘protected status’ for certain statutes (and for the powers granted by those statutes) was granted by the common law, and extended to include other constitutional legislation such as the Human Rights Act 1998.

The judgment is not unproblematic, particularly in its failure to take account of the constitutional principle against excessive delegation of legislative power, but the broader question in this context is whether it is necessary for Alexy’s theory that there be formally recognised constitutional rights at all. In order for any adjudication to be rational, the judge is required to reconstruct the reasons underlying the rule to be interpreted and applied. If we take the constitution to be the level of competing principle beyond the express rules, resolutions of which explain and justify those rules, then a constitution (of sorts) is an implicit component of all law. Even if one is

\(^6\) E.g. *R v Home Secretary ex parte Khawaja* [1984] AC 74 and other cases cited in my Introduction to the *Theory* at p. xliii.

\(^7\) *R v Secretary of State for Transport ex parte Factoritame (no. 2)* [1991] 1 AC 603. It is possible that the British judiciary would not even accept an express departure from European Union law in the absence of a politically negotiated agreement to differ, or withdrawal. The point is not likely to arise in practice.

\(^8\) [2002] 3 WLR 247.
prepared to take the further step of asserting an inherent judicial duty to refuse to recognise grossly unjust legislation as law, this still only preserves a minimum core of human rights. But this means that the decision to protect certain concrete rights with a special status and by special procedures – that is, the decision to create positive constitutional rights binding on the legislature – is an institutional choice, not a rationally necessary component of a system of law.

A) Types of Convention Rights
Convention rights are primarily defensive rights, and the European Court has been slow to derive protective, procedural and social rights from the Convention. By contrast, the English courts seem to be going down this path quite happily – one might even say thoughtlessly.

The notion that the state has a protective duty in respect of Convention rights is very well established. For example, in *R (Javed) v SS for the Home Department* a judicial review was granted of the Home Secretary’s designation of Pakistan as a safe country of origin for the purposes of asylum law. There was clear evidence that the Pakistani applicants for asylum had been tortured and would be likely to be tortured again. The Government had a duty under article 3 (freedom from torture) to protect the applicants. To take another example, in *R (A) v Lord Saville of Newdigate*, soldiers who were to give oral evidence at a public inquiry in Londonderry, Northern Ireland, wanted to give their evidence elsewhere, on the grounds that they might be identified and their lives would then be at risk from Irish terrorists. Judicial review was granted on the grounds that the judge chairing the inquiry had failed to take sufficient account of the threat posed to the soldiers’ lives.

*Procedural rights* – in the sense of procedural protection rendered necessary by a substantive right – are not quite so well established. I have already indicated that the specific procedural rights of the Convention are having a big impact. But one of the curiosities of the Human Rights Act is that it

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omits article 13 European Convention, the right to an effective remedy, from
the list of recognised Convention rights. This may in time drive the judiciary
to be more creative in finding procedural aspects of substantive rights.
Fascinating in this respect is the judgment of the Court of Appeal in *R (Amin) v SS Home Department*. This case arose from the deaths in custody of two
prisoners. One had been killed by a fellow prisoner, who had subsequently
been convicted of murder; the other was a suicide. In the case of the former,
there had been an internal prison inquiry, but the family wanted a formal
public inquiry. In the second case, the jury at the inquest wanted to bring in
a verdict of neglect on the part of the prison authorities, but the coroner
refused as this would tend to determine a question of criminal liability
(although the jury’s findings of fact were later published in part by the judge
in judicial review proceedings). The Court of Appeal found that there was a
procedural duty on the state to investigate any death in which there might be
a breach of its (protective) duty under article 2 European Convention. This
duty to investigate would certainly arise whenever a prisoner died in custody.
On the facts, the procedural duty had been satisfied.

The European Court of Human Rights has only recognised *social rights in
the field of legal aid*, although the right to equality may give rise to other
derivative social rights. The English courts are already beginning to be more
adventurous. In *Lee v Leeds City Council*, the Court of Appeal found no
general obligation on public housing authorities under the Human Rights
Act to remedy condensation, mildew and mould caused by design defects in
the houses they let, but the court stated that in a more serious case, there
might well be a breach of article 8. In *R (Bernard) v Enfield LBC*, the judge
held that the failure by a local authority to provide suitable accommodation
for a severely disabled woman and her family was a breach of her rights under
article 8 European Convention (right to respect for private and family life,
home and correspondence) and awarded her damages as a result. So it seems
that in extreme cases, the English courts are going to find social rights under
the Convention as well.

Why do the English courts seem to be having so few problems with
protective, procedural and social rights? The explanation may well lie, firstly,
in the closer relationship between constitutional rights and ordinary law. It is

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22 [2002] 3 WLR 505.
23 *Airey v Ireland* (9 October 1979) 3 EHRR 592.
quite normal for ordinary legislation to grant such rights, so the judiciary have few problems in deriving these rights from human rights. Secondly, since the constitution is ‘decentralised’ the same courts interpret constitutional rights as decide ordinary civil and criminal cases. One suspects that the political and economic difficulties, and the potential impact on legislative discretion, surrounding constitutional entitlements do not even register.

B) Horizontal Effect

Closely related to the notion of protective rights is, of course, the question of horizontal effect. Here there has been much confusion and doctrinal uncertainty. Most lawyers still assume that Convention rights are really directed towards the actions of legislative and executive bodies. The Human Rights Act states that only public authorities or other bodies in the exercise of public functions act unlawfully if they breach Convention rights. But once it is accepted – as the Act does – that courts are public authorities – then the potential for indirect horizontal effect is in place. Since the result of indirect horizontal effect is to create new private law rights and obligations, the only significant absence is a procedural one. There is no cause of action against a private body simply for breach of a constitutional right. Even that point is not as extensive as it sounds. Some lawyers have suggested that where any individual benefits financially from a breach of Convention rights, a claim in unjust enrichment (restitution) might lie. So the only significant constraint is the absence of a tortious action for injunction or damages where one private body violates another’s rights.

One area in which everyone knew that the courts were going to get to work at an early stage was the right to privacy. English law remedies for breaches of privacy by private individuals (most notably newspapers) tend to be property-related, either requiring trespass or breach of confidential information. But breach of confidence has proved a fertile ground for judicial development. In *Venables v News Group Newspapers*, the President of the Family Division issued injunctions against newspapers to prevent them from revealing information tending to establish the identity of the two young men who as boys had murdered the toddler James Bulger. Indeed, in this case it

27 See the argument in *Wilson v First County Trust Ltd. (no. 2)* [2002] QB 74.
28 This is the case in Ireland. See my Introduction, TCR, p. xxxvii and footnote 81.
was not just their privacy that was at threat. Their lives might also be threatened if their identity and whereabouts became known.\textsuperscript{30}

Once one accepts that constitutional rights have horizontal effect, then there will often be a clash of rights. One particular clash of rights (privacy and freedom of expression) is regulated by a detailed provision in the Human Rights Act, which requires the court to have particular regard to the importance of freedom of expression.\textsuperscript{31} This came to have practical significance in \textit{Douglas v Hello! Ltd. (no. 1)}.\textsuperscript{32} The actors Michael Douglas and Catherine Zeta-Jones had sold the picture rights of their wedding to the OK Magazine. In spite of strict security, Hello! managed to obtain pictures which they intended to publish first. Douglas and Zeta-Jones sought injunctions to prevent the breach of their privacy, but these were denied on the grounds that they had consented in principle to having pictures published. Because of the weight to be given to freedom of expression the court held that they were left to their remedy in damages.

However, clear examples of horizontal effect outside of the realm of privacy rights are, as yet, hard to find. A good example of the difficulties can be found in \textit{Wilson v First County Trust Ltd. (no. 2)}.\textsuperscript{33} Wilson had borrowed £5,000 on the security of her BMW car. A provision of the Consumer Credit Act 1974 rendered the agreement unenforceable, because the sum of credit was incorrectly stated on the document as £5,250. If the document had been accurate, the loan and reasonable interest could have been recovered, or the security realised, by court order. The Court of Appeal found the provision of the Act to be contrary to article 6 European Convention, and also a breach of article 1 First Protocol (right to property), because it deprived the pawnbroker of a trial to determine the extent to which the agreement was enforceable and the right to recover his money to that extent. This is a situation in which a private right exists, but it is only enforceable to a limited extent. The judgment thus treats the problem as if it is a violation by the state of the creditor’s (more extensive) rights. But it

\textsuperscript{30} This raises an interesting question which cannot be pursued here about protective duties, horizontal effect and causation. Is it better so say that the newspaper has a horizontal protective duty towards the murderers not to publish information revealing their identity and whereabouts, or to say that the state has a vertical protective duty to the murderers to prevent the papers from revealing information which might risk their lives?

\textsuperscript{31} Section 12.

\textsuperscript{32} [2001] QB 967.

\textsuperscript{33} Note 27 above.
could better be cast as a constitutional right to a reasonable return on one's loan from the private individual to whom one has lent the money.

In another interesting case, the Court of Appeal held that the liability of lay rectors to repair the chancel of the local parish church was an unjustified tax in breach of the Convention's right to property. The case was cast as turning on the lawfulness of the discretionary act of a public authority (the Parochial Church Council of an Anglican church). The court entirely overlooked the fact that the Church of England has a property right in play here as well, and that by depriving it of this particular form of income it had deprived it of a property right as well. Again, in the Wilson case just referred to, the court entirely omitted to consider the property rights of the debtor in the security she had put up.

However, the courts can get all this completely the other way round. In RSPCA v AG the charity sought advice on whether it could amend its membership rules to exclude those who were in favour of hunting with dogs. It was worried that it might be acting in breach of the individual member's freedom of expression. Lightman J held that freedom of expression was not affected, but rather that the society's freedom of association was at stake. This gave it the right to associate with whom it pleased and set membership criteria accordingly. While this part of the judgment is clearly right, the part saying that individual freedom of expression is not relevant is as clearly wrong. There is an unrecognised clash of rights which needs resolving.

Similarly on 26 June 2003 the House of Lords reversed the judgment of the Court of Appeal in Wallbank's case on the grounds that the church body was not a public body but was merely enforcing a private property right (albeit a problematic one).

There is thus a general concern about the direction horizontal effect seems to be taking in the United Kingdom. The courts seem very unwilling to recognise competing rights. In many cases, because the effect of Convention rights is mediated through the actions of a public authority (often, but not always, a court), the rights of the individual bringing the action get privileged over the rights of the person or body whose behaviour is the subject-matter of the action. The risk of this is that private bodies are held to the same

34 Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank 3 WLR 1323.
35 [2002] 1 WLR 448
36 A rule proposing (for example) that members should not use cosmetic products tested on animals makes the potential for clashes of rights more obvious.
standards as public bodies, which can be detrimental to private liberty. On the other hand, where one has a clearly private body in litigation with another private individual, the majority’s right of association does not simply have the effect of trumping the individual’s right (which may be correct on the facts and most of the time). It seems to have the effect of preventing the individual right from arising in the first place. In short, the assumed model of human rights is still that of the individual against the state, and the David-and-Goliath mentality seems to creep in to horizontal situations as well.

The difficulties English courts are having in this area demonstrate another way in which the Theory is substantively laden. If constitutional rights have the horizontal effect that Alexy suggests they do, this presupposes a rich enough content to these rights such that they can capture the morality of interpersonal ‘private’ relationships as well as the classical political morality of protecting the individual from the over-intrusive or discriminating state. I argue that the common law contains the values with which the Convention needs supplementing to do this work. But if that substantive input is ignored, it might seem preferable, as some have suggested, to restrict the horizontal effect of rights. But the response to this is essentially pragmatic: since some degree of horizontal effect has already crept into the English legal system, the only realistic way forward is to expand the doctrine into one capable of doing all the work it needs to.

C) The General Right to Equality
There are two areas of difficulty with the general right to equality: the grounds of equality and its scope. A general right is general in two senses: it covers all possible grounds of discrimination and it applies in respect of every legal interest. By contrast, the legislation of the last 40 years addressing inequality under English law has focused on specific grounds (race and sex) and specific legal interests (principally employment, housing, education, and provision of goods and services). Article 14 European Convention is completely clear that it is general in respect of the grounds of discrimination, but not so in respect of the scope. As regards scope, discrimination must fall ‘within the ambit’ of another Convention right.\footnote{The general approach of the court was set out in the Belgian Linguistic Case (1968) 1 EHRR 252.}

\footnote{See fn 34.}
\footnote{See (e.g.) Race Relations Act 1976.}
\footnote{‘or other status’ (French; ‘sans distinction aucune’).}
\footnote{See fn 34.}
Nevertheless, to remain with the problem of scope, the European Court is reading the ambit test increasingly widely. Social security law is now within the scope of the right to property, whether or not benefits are contributory.\(^{41}\) Housing law and some aspects of employment law (issues of parental leave) are covered on account of article 8.\(^{42}\) All forms of religious discrimination seem to be covered by virtue of article 9.\(^{43}\) With a little bit of judicial willingness, there are few cases where one could not find oneself within the ambit of a right, a point which makes political opposition to the ratification of Protocol no. 12 to the European Convention increasingly irrelevant.

The English courts are struggling with the general right to equality. In *Ghaidan v Godin-Mendoza*,\(^{44}\) the Court of Appeal held that for the purposes of inheriting the protection granted by a statutory tenancy, a homosexual partner was living with the tenant ‘as his or her wife or husband’. The argument was that there was no reason for distinguishing between heterosexual cohabiters and homosexual cohabiters. The reason the court gave was that ‘sexual orientation is now clearly recognised as an impermissible ground of discrimination.’ The charitable way to read this is to say that the court is recognising sexual orientation as a special class in which the drawing of distinctions requires particularly strong justification. But one suspects that the court is not treating article 14 as general. All distinctions require justification, and the mere fact that a distinction is drawn does not necessarily mean that it is impermissibly drawn.

The Court of Appeal got completely confused in *R (S) v Chief Constable of South Yorkshire Police*.\(^{45}\) This was an attempt by two people who had been charged with criminal offences, but who had been subsequently acquitted or had had their case discontinued, to get the police to destroy their fingerprints and DNA samples. The evidence had been lawfully obtained, but the argument was that once the prosecutions had been dropped or failed, there was no reason to keep the personal data in question. In brief, the Court held that retention was a proportionate response to the need to protect the public from crime and that it did not discriminate unlawfully. It is the reasoning in the article 14 issue that is most worrying. Lord Woolf CJ starts off by saying that discrimination is not permitted on any ground specified in article 14. This implies that there are grounds covered by article 14 and grounds not

\(^{41}\) *Wessels-Bergeroet v Netherlands* 4 June 2002.

\(^{42}\) See *Van Raalte v Netherlands* (1997) 24 EHRR 14.


\(^{44}\) [2003] 2 WLR 478.
Constitutional Rights in the UK Human Rights Act

covered. He then quite rightly goes on to argue that there is an objective reason for distinguishing between people who have been charged with a criminal offence (whose samples may be retained) and people who have never been charged (from whom the police have no power to collect samples). He then goes on to ask whether the discrimination is within the categories referred to in article 14, and finds that it is not, and that it would be highly undesirable if it were, because this would mean that the distinction could not be drawn, and that the only way of solving the problem would be to take samples from everybody, which would be disproportionate. So Lord Woolf CJ's twofold mistake is to think that article 14 only covers certain types of distinction (say on grounds of race or sex) and then that it bans those distinctions absolutely. Waller LJ makes a different mistake. He thinks that one has to establish the relevant pool within which there is discrimination. He argues that the relevant pool is all people charged with criminal offences, and that since these are all treated the same way, there is no discrimination. On that basis, there could never be any discrimination at all, because the group being discriminated against are all being treated equally badly as each other. Sedley LJ is a bit better. He recognises that within the group of innocent people, those who have been charged or investigated are being treated differently, but this is acceptable because not all innocent people are the same in respect of potential offending. His only mistake here is to assume that in order to find 'any other status' for the purposes of art. 14, one needs to have an involuntary and stigmatic status (which he thinks being accused but not convicted is). However, Sedley LJ then goes on to give the other two judges a lesson in indirect discrimination. The problem is that he has treated this situation not as one of indirect discrimination but direct discrimination. Indirect discrimination does arise in the case: convicted people and innocent accused people are being treated in the same way as regards the retention of their samples, when arguably they should be treated differently. But as Sedley LJ goes on to state, the real complaint was that innocent accused people were being treated differently from innocent unaccused people as regards future access by the police to their personal data. For either group the police should have no access to fingerprint and DNA data. And that is a complaint of direct discrimination.

This was a strong Court of Appeal and it completely mangled the structure of general equality rights. It has, as yet, failed to escape the broad structure of

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[2002] 1 WLR 3223
traditional English discrimination law, which makes it unlawful to take account of certain fixed characteristics of people in certain contexts.

D) Proportionality

Proportionality contains two threshold requirements (legitimate end and capable means) and two balancing requirements (least intrusive means necessary and benefit of means to outweigh cost to end). There is a tendency in some of the English case-law, as indeed in the judgments of the European Court of Human Rights, to run the two balancing elements together, but thanks to some sound and influential exposition in the leading practitioners’ texts, the courts usually are alive to all relevant questions.

The shift to a proportionality test is significant in English administrative law, which has tended to operate a test of unreasonableness, which leaves considerable discretion as to the choice of means in the hands of the executive. One obvious impact of the Human Rights Act has been to open up to challenge executive acts which are authorised in general. So whereas in the past customs officials might have impounded a car used in illegal smuggling, now they may only do so if that is a proportionate response to the particular offence in question. That at any rate was what the Court of Appeal decided in *Lindsay v Commrs of Customs and Excise*.46

The big problem is of course the relationship between proportionality and legislative and executive discretion. This is generally phrased in the UK as a question about the ‘standard of review’, which is unhelpful. To assert that the standard of review is always ‘correctness’ is to be understood as asserting that the court must always take every decision itself – and that would lead to judicial supremacism. But if we follow Alexy’s theory, there is a sense in which the standard is always correctness, but firstly that there is a range of correct decisions (structural discretion), and secondly that the court may not be best placed to overturn the judgment of another as to what is or is not correct (epistemic discretion).47

*R (Daly) v Home Secretary*48 was about the extent to which prison authorities could look at legally privileged correspondence. The House of Lords gave a strong judgment indicating an abandonment of traditional approaches to judicial review and in favour of proportionality as we understand it. Since then there has been considerable debate about the extent

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47 See the Postscript to TCR, at pp. 388–425.
48 [2001] 2 WLR 1622.
to which the courts are obliged to establish for themselves the ‘primary facts’ on which administrative decisions are reached. The cases reveal a variable and context-dependent deference to the expertise of the initial decision-taking body. Thus in *R (Wilkinson) v Broadmoor Hospital*, where the inmate (a criminal) was resisting necessary medical treatment, the Court of Appeal insisted on hearing the medical evidence itself. Other cases simply require the courts to ask whether the factual conclusion reached by the primary decision-taker was one which could be supported by the evidence available to it: a form of ‘plausibility-review’. 

In his postscript, Alexy suggests that the degree of court involvement turns on the importance of the interest at stake. This is the ‘Second Law of Balancing’ which is proposed as a solution to the problem of epistemic discretion. The Second Law of Balancing presupposes that courts are exemplars of public reason, and that other decision-taking bodies are imperfect substitutes for courts. This is plausible only under two constraints: firstly, that the ‘other decision-taking body’ is a typical majoritarian legislature, and secondly, that constitutional rights are individual legal rights which need protecting from the legislature. Under these conditions, the court is indeed institutionally the better place to determine the dispute. But the more general principle under which competence is assigned within a well-ordered polity must be one which seeks to optimise *institutional correctness*, not necessarily to optimise the involvement of the court. If it is correct that any political value can form the subject-matter of a constitutional principle, it no longer follows that the court is necessarily the best place to determine how competing principles should be weighed. And if a question of fact is best determined by a non-court body, there is no reason for the court to get more involved the more the constitutional right at stake is infringed. On the contrary, if the question of fact really is better decided elsewhere, the courts should be less willing to interfere as the stakes rise. For when they do overturn the decision of the primary fact-finder they will be failing to optimise the principle of institutional correctness.

All this suggests that the problem of epistemic discretion, and its associated problem of the standard of review in the context of proportionality, cannot be resolved without a thorough-going institutional theory of law.

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49 [2002] 1 WLR 419.
50 TCR, p. 418.
Conclusion
I concluded my introduction to *A Theory of Constitutional Rights* by drawing on the well-known distinction in comparative law between centralised and decentralised systems of constitutional review.\(^{51}\) Broadly speaking, Anglo-American legal systems operate de-centralised systems of constitutional review, whereby the constitutionality of law may be raised and determined at any level. Continental systems tend to adopt centralised systems, whereby a special court is established to which such questions may be referred. I must confess to preferring the decentralised model, because it takes the constitution seriously as law, which all courts of law must have regard to. Alexy’s conclusion that all law is ultimately constitutional is precisely the approach of the common law systems.\(^{52}\) The big disadvantage of decentralised review is that – at least in an initial period after major new legislation of constitutional significance – there is great diversity of judicial opinion on a whole range of connected matters. I asked at the start of this paper what evidence there was that Alexy’s model fitted the current developments, or what evidence there was that an alternative model was on offer. What we find, I think, is a mixture of convergence and confusion. But no incompatibility. Over time, English legal doctrine will settle down, and even if at some points one can be a bit gloomy, there is every reason to hope that when it settles down it will have the rational structure that Alexy has so masterfully identified.

\(^{51}\) TCR, pp. 1 – li.
\(^{52}\) Interestingly the Human Rights Act compromises slightly, in that the remedy of a declaration of incompatibility is only available in the High Court and above. See section 4(5).
Chapter 7
Some Elements of a Theory of European Fundamental Rights

Agustín José Menéndez
Ramón y Cajal Researcher, Universidad de León

“I do take law very seriously, deeply seriously, because fragile as reason is and limited as law is as the expression of the institutionalised medium of reason, that’s all we have standing between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feeling”
Felix Frankfurter

Introduction
This chapter aims at testing whether and to what extent Alexy’s structural theory of fundamental rights can be useful in interpreting and applying the fundamental rights provisions of European Union law, and more specifically, the Charter of Fundamental Rights of the European Union. It is claimed that Alexy’s theory is the best analytical tool with which:


In Agustín José Menéndez and Erik Oddvar Enoksen (eds.)
Fundamental Rights through Discourse, ARENA, Oslo, 2004, pp. 159-199
to determine the authoritative sources of European fundamental rights (section II);
• to systematize and categorise European fundamental rights norms (section III);
• to solve conflicts between fundamental rights norms, especially between fundamental rights and economic freedoms (section IV);
• to reveal the rights structure implicit in the case law of the European Court of Justice (section V).

It is concluded that by applying Alexy’s structural theory of fundamental rights to Union law, we can determine some of the basic elements of a much needed structural theory of European fundamental rights. Before dealing with these issues however, a first section is devoted to the preliminary question of whether it is possible to apply Alexy’s structural theory of fundamental rights to European Union law.

I. The Applicability of Alexy’s Theory of Fundamental Rights to Community Law

§1. [The limited scope of application of A Theory of Constitutional Rights]
Robert Alexy affirms quite explicitly that his theory of fundamental rights has a limited scope of application. In A Theory of Constitutional Rights, he states that the aim of the book (and indeed, of all his writings on the matter until now) is the development of “a general theory of the fundamental rights of the [German] Basic Law” (my italics). He adds that such a goal is very different not only from that of historical or comparative theories of fundamental rights, but also from that of “theories of (…) fundamental rights of other states or of the German regions”. Moreover, the different examples provided in the book and in his other writings refer, almost without exception, to the provisions of the German Basic Law and to the case-law of the German Federal Constitutional Court.

1 Robert Alexy, A Theory of Constitutional Rights, Oxford, Oxford University Press, 2002, p. 5. See also p. 30: “Here we are concerned with a theory of the fundamental rights of the Basic Law”.
§2. [Arguing for the application of Alexy's theory beyond Federal German Constitutional Law] However, such a claim can be interpreted as the affirmation that *A Theory of Constitutional Rights* is the best possible theoretical reconstruction, in analytical and substantive terms, of fundamental rights in the German constitution. And not necessarily as the claim that his theory *should not* be applied to legal systems other than the German one. Alexy simply remains *agnostic* on the question whether the theory could be fruitfully applied beyond German law, and more specifically, to European Union law.

§3. [The shape of a European structural theory of fundamental rights à la Alexy] I claim that the scope of Alexy's theory can (§§3–8) and should (§8) be extended to European Union law: a structural theory of European fundamental rights could be based on Alexy's structural theory of fundamental rights:

This is so because any plausible theory of fundamental rights in Community law would have to combine the very three dimensions of Alexy's structural theory of fundamental rights:

- empirical, or what is the same, the analysis and reconstruction of the fundamental rights norms of the Community legal order;
- analytical, the systematic and conceptual elaboration of valid Community law, or what is the same, the bringing forward of conceptual clarity, consistency and coherence;
- normative, that is, the interpretation of the authoritative material and the filling of its gaps.

Such a structural theory will be first and foremost analytical, because it will “investigate structures such as fundamental rights concepts, the influence of fundamental rights on the legal system, and constitutional justification”. The

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1 This has already be done by Julian Rivers in his *Translator's Introduction* to TCR, and also in Rivers’ chapter in this report. Rivers resorts to Alexy's theory of fundamental rights to interpret the European Convention of Human Rights in the British context, that is, as incorporated by the Human Rights Act, and to analyse the case-law of British courts in application of the Human Rights Act.

2 TCR, 9–10.

3 TCR, 13–4. It seems to me correct that one must distinguish these three dimensions in any theory of fundamental rights, but also that the application of the theory to solve specific problems requires combining the three dimensions.
theory will have an empirical-analytical character because its most important subject-matter will be the fundamental rights provisions in Union law. Finally, the theory will have a normative-analytical character because it will be guided by considerations of correct decision-making and rational justification.

§4. [The empirical dimension] The validity of fundamental rights provisions on Community law is based on their being grounded on the common constitutional traditions of the Member States (as is argued in more detail in §§11-18). The commonality of such traditions is ensured by the commonality of values of European constitutions, by the integrative effect of the European Convention of Human Rights, its protocols and the jurisprudence of the European Court of Human Rights, and also by the integrative effect of Community law as a legal order which is both supreme within its sphere of competence and can be directly invoked by European citizens and residents.

This does not entail that fundamental rights norms in the German and in the Community legal order are bound to be exactly the same. However, the two legal systems are strikingly (and one might say, increasingly) similar, at the very least on what concerns fundamental rights protection. There are clear indications that the concrete formulation of fundamental rights rules is different in some (even many) cases. The concrete norms which stem from the weighing and balancing of fundamental rights in specific cases can be, and indeed in some cases are, different. However, such differences are so that the solution affirmed in one legal system could plausibly have been the one

1 TCR, 14.
2 Indirectly, the commonality of constitutional traditions renders plausible the application of Alexy's theory to the analysis of the constitutional provisions in all the legal systems of the Member States. The plausibility of such a move is reinforced in some concrete cases, such as those of Italy or Spain, by the influence of the German Constitution and the case-law of the German Constitutional Court in the interpretation of national constitutional provisions. See also Rivers, Introduction to TCR.
3 Indeed, that constitutes the background of the cases in which the German Constitutional Court challenged the competence of the European Court of Justice to have the last word on the weighing and balancing of fundamental rights. Solange I, of 29 May 1974, BVerfGE 37, 271 and [1974] 2 CMLR 540; Solange II, of 22 October 1986, BVerfGE 73, 339; Brunner v. European Union Treaty, of 12 October 1993, BVerfGE 89, 155 and [1994] 1 CMLR 57.
Some Elements of a Theory of European Fundamental Rights

chosen by the courts of other legal systems. Thus, the balance between two rights might be different in German and in Community law, but the solution authoritatively affirmed by the European Court of Justice could have been the one preferred by the German Constitutional Court, and vice versa. Indeed, the German constitutional tradition is, obviously enough, among the constitutional traditions of the European Union, and consequently, one of the traditions converging in the process of legal integration within the Union. On what concerns the protection of fundamental rights, the German tradition can be said to be one, if not the, most influential constitutional tradition. A good number of the European constitutional traditions have been shaped, both substantially, institutionally and procedurally, by the German model (as is the case with the Spanish and Polish constitutional traditions). German constitutional dogmatics is extremely influential all across Europe, and outstandingly, in Italy, Spain and Eastern Europe. The impact of Alexy’s work, its translation into several European languages, is indeed good evidence of this.

§5. [The analytic dimension] Moreover, the fact that Alexy’s structural theory of fundamental rights is mainly analytical renders very plausible the claim that it can be successfully applied to Union law.

1 For an authoritative formulation, see Juta Limbach, ‘Inter-jurisdictional Cooperation within the future scheme of protection of fundamental rights in Europe’, 21 (2000) Human Rights Law Journal, pp. 333–37. Even those diverging fundamental rights provisions of Community law could become the provisions of German law, and vice versa. As has been argued, a structural theory of fundamental rights has an empirico-analytical dimension, but this does not mean that concrete changes in positive law force a reconsideration of the structural theory as such.

10 As is well-known, one thing is to argue on the assumption that there must be one right answer, and another that we could know the one right answer and each and every case, given the cognitive limitations of human reason. On the right one answer, see Ronald Dworkin, Taking Rights Seriously, London: Duckworth, 1977, chapter 4. A recent reappraisal in Michael Rosenfeld, ‘Dworkin and the one law principle: A Pluralist Critique’, (2004) Revue Internationale de Philosophie, forthcoming.

11 The three major books published by Alexy have been widely translated. The Theory of Legal Argumentation, Oxford: Oxford University Press, 1989 (hereafter, TLA) has been translated into Spanish, English, Italian and Portuguese (even if published in Brazil; it has also been translated into Chinese). TCR has been translated into Spanish and English. An Argument from Injustice, Oxford: Oxford University Press, 2002 (hereafter, AFI) has been translated into Spanish, Italian and English (also into Korean). The argument could be further proved by reference to his articles and book chapters, and also by reference to monographs and articles on Alexy.
The analytical dimension of constitutional theory is not isolated from its two other dimensions (empirical and normative), but it is autonomous. Firstly, changes in the positive contents of positive law do not invalidate the analytical reconstruction of fundamental rights. That is, the same analytical categories can be used in order to tackle different substantive contents of positive law over time. For example, the concept of “limit of a fundamental right” is not dependent on the actual contents of the fundamental rights provisions. Secondly, a revision of our normative standards does not come hand in hand with a change of the analytical tools used to reconstruct fundamental rights. To illustrate with two concrete examples, the differentiation within the general category of norms between rules and principles,\textsuperscript{12} or the characterisation of the resolution of conflicts between fundamental rights as a matter of \textit{weighing} and balancing of the underlying principles,\textsuperscript{13} is rather autonomous from the specific fundamental rights provisions contained in the positive constitution at a given point in time.

Moreover, similar basic problems are confronted in the process of application or implementation of fundamental rights provisions in the German and in the Union legal order. Questions such as the conceptualization of fundamental rights limits,\textsuperscript{14} the extent to which the legislature can proceed to outwork fundamental rights,\textsuperscript{15} or how we establish derivative fundamental rights norms,\textsuperscript{16} might be framed in different terms, and sometimes in different language, in German and European constitutional dogmatics, but they are problems common to judges and legal scholars working in the two legal systems.

§6. [The normative dimension] Finally, the normative dimension of any structural theory of fundamental rights in Community law also reinforces the case for applying Alexy’s theory to Community law. Normative arguments are applied within the authoritative context of positive law, but they refer to general practical reasoning as free, non-institutionalised reasoning.\textsuperscript{17} As such, any normative dimension has a clear universalistic ethos, which cannot but

\textsuperscript{12} TCR, pp. 44ff.
\textsuperscript{13} TCR, pp. 66ff.
\textsuperscript{14} TCR, pp. 181ff.
\textsuperscript{15} TCR, pp. 217ff.
\textsuperscript{16} TCR, pp. 33ff.
support the case for applying Alexy’s structural theory beyond the German legal system.

§7. [The Societal Context] Moreover, as has been already argued, the concrete context to which normative arguments are to be applied (the German and Community legal orders, the German and the Community societal structures) are rather similar. The two legal systems positivise the same basic fundamental values (dignity, equality, freedom, solidarity, democracy, rule of law), and they establish similar institutional structures to ensure the actual observance of fundamental rights (such as some form or another of constitutional judicial review).

§8 [Taking Stock] For all these reasons, it can be argued that the application of *A Theory of Constitutional Rights* to Community law is plausible and promising. It is factually supported by the increasing integration of European national legal orders into a regional legal order. It is normatively supported by the basic commonality of the normative principles positivised in the two legal orders. Furthermore, it has also been shown that it is not only compatible with Alexy’s basic design, but it can be said to be required by some of the most basic assumptions of Alexy’s legal theory.

Thus, the limited scope of application of *A Theory of Constitutional Rights* should be revised, thus opening the way for considering the possibility of reconstructing the constitutional law of the European Communities with the help of Alexy’s theory.

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18 From the standpoint of a non-positivistic conception of law that establishes a necessary conceptual connection between law and morality, and that argues for a normative connection between law and morality, it must be the case that the analysis and reconstruction of fundamental rights in one legal system might not be fully irrelevant to the analysis and reconstruction of fundamental rights in other legal systems. If law is a special case of general practical reasoning, and we assume that both German law and Community law are *special cases of general practical reasoning*, then their being *special cases of general practical reasoning* is a weak but not fully irrelevant indicator that a structural theory of fundamental rights developed by reference to the German fundamental rights provisions might be of relevance to reconstruct the Community fundamental rights provisions.

19 As indicated, it also invites the further testing of the scope of the theory, by means of considering whether it could not provide a further standpoint from which to analyse other legal systems.
9. [Why a structural theory of fundamental rights is highly needed in Union law] It is not only possible, but highly pertinent to apply Alexy’s structural theory of fundamental rights to Union law because Union law is in high need of a structural theory of fundamental rights. This is so on account of the peculiar historical evolution of Union law, and more specifically, of the peculiar validity basis of its constitutional norms. This renders a structural theory of fundamental rights especially needed, in order to tackle the four basic problems which will be considered in the coming sections.

II. The Validity of Fundamental Rights in Union Law: Between the Common Constitutional Traditions and the Charter of Rights

§10. [The three-fold connection between law and morality] Alexy’s legal theory highlights the connection between law and general practical reasoning. First, there is a systemic conceptual connection between the very idea of legal system and general practical reasoning. This is so because "the claim to correctness is anchored in the practice of the governor system", and consequently "the claim to correctness is a necessary element of the concept of law", so that "a system of norms that neither explicitly nor implicitly lays a claim to correctness is not a legal system". Second, there is an individual conceptual connection between law and general practical reasoning. This is so because individual legal norms which cross a certain threshold of injustice are not to be considered as legal. This basic insight is contained in the famous Radbruch’s formula, which Alexy specifies in detail in his Argument from Injustice. Third, there is a substantive connection between law and general practical reasoning. This is so because legal reasoning is a special case of general practical reasoning. Once we expand “the sphere of what belongs to the law” and we include “in the concept of law the process or procedure of law

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21 AFI, p. 34.


23 Ibid, especially pp. 40-62.
application”,\textsuperscript{24} we come to the conclusion that there cannot be a strict separation between law and general practical reasoning. This is so because: (1) legal questions or legal discussions are concerned with practical questions, with what is mandated, what is prohibited or what is permitted; (2) such discussions take place “under the claim to correctness” necessarily raised by any system which aspires to be legal.\textsuperscript{25} This does not mean, obviously enough, that legal reasoning should be reduced to general practical reasoning. In order to properly perform its social integrative function, law complements general practical reasoning in an autonomous way. To provide a sufficient degree of certainty, law must be authoritative, determined, and not permanently open to be discussed. Law is thus bound to statutes and to precedents and has to observe the system of law elaborated by legal dogmatics. This is what makes of law a special case, not merely a case, of general practical reasoning.

This three-fold connection between law and general practical reasoning proves extremely helpful in order:

- to understand the validity basis of constitutional norms in Union law; the fact that the ultimate sources of legal validity in Union law are the constitutional traditions common to the Member States implies an explicit connection between legal validity and critical reconstruction of what is common to the said constitutional traditions (§§11–14 and 18);
- to give an account of the legal validity of a catalogue of rights which has not been positively validated, but which has legal force and legal bite (§§15–17).

A) The Validity of Constitutional Norms in Union Law

§11. [The need of a formal, positive constitution in order to define the object of a structural theory of fundamental rights] The basic object of a structural theory of fundamental rights is constituted by the fundamental rights norms of the relevant legal order. Such norms are determined by reference to the authoritative set of fundamental rights provisions contained

\textsuperscript{24} Ibid, p. 129.

\textsuperscript{25} ALA, p. 15, 19, 212ff
in the formal, written Constitution. 

This is so because the validity of fundamental rights norms stems from the fact that they have been affirmed as such in the written, formal constitution. Their validity is thus, first and foremost, positive. Even the validity of derivate fundamental rights norms, resulting from the interpretation of semantically and structurally open-textured fundamental rights provisions, or from the results of balancing constitutional principles, is indirectly based on the written, formal constitution.

§12. [Uncertainty on the set of European fundamental rights provisions ... due to the lack of a written constitution, and the creation of the Union through international treaties] A first (and not minor) difficulty in building a structural theory of fundamental rights in Community law is to determine the authoritative set of fundamental rights provisions. This is so due to the complex validity basis of European constitutional norms, which has its roots in the lack of a written, formal European Constitution.

Indeed, there is not such a thing as a (complete) formal, (complete) written constitution of the European Union. The European legal order was not brought about by a formal European Constitution which created and structured a new legal order in one stroke (in one constitutional moment), but by the creation of an institutional and procedural structure which was expected to spell

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26 TCR, 30: “Fundamental rights norms are those norms which are expressed by provisions relating to fundamental rights, and fundamental rights provisions are those statements, and only those statements, contained in the text of the Basic Law”.

27 TCR, 33-38.

28 TCR, 54-6.

29 The European Communities were established as international organizations through what were formally international treaties. This was so despite the obvious political purposes pursued through the “ever closer union” of the six founding Member States, the so-called Little Europe. A first constitutional draft was elaborated within the context of the negotiation of the Treaties establishing the frustrated Defence and Political Communities in 1953 (cf. Richard T. Griffiths, Europe’s First Constitution, London: Kogan Page, 2001). But such a text was never ratified, and never entered into force. Since its members were first directly elected by European citizens in 1979, the European Parliament has tried (and failed) twice to turn itself into an Assemblée Constituent (in 1984, with the Spinelli project: OJ C 77, of 19.03.84, pp. 53ff; and in 1994, the Hermann project: OJ C 61, of 10.2.1994, p. 155ff). At the time of writing, a Draft Treaty establishing the Constitution of the European Union is being discussed, and might eventually lead to the adoption of a formal constitution. (see Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez, Developing a Constitution for Europe, London: Routledge 2004).
out the implications of the convergence of the national legal orders in the context of economic integration.

The Communities were created by what were, formally speaking, international treaties. However, it was implicit in the Treaties, and explicit in the political agreement which surrounded them, that the process of integration would be facilitated by the forging of a European legal order.

Second, the lack of a written constitution has not been an obstacle to the affirmation, by both European and national courts, of the claim that there is a material constitution of the European legal order. Such a material constitution is usually said to result from a constitutional reading of the Treaties. This would imply that the validity of Union constitutional norms is also positive, but that the authoritative texts in Union law would be the Treaties. By this, reference is mainly made to the Rome Treaties establishing the European Economic Community and the Euroatom and the Treaty on European Union, together with the different amending treaties and the treaties through which accession

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30 By the founding Treaties of the Communities, reference is made to the Treaty of Paris of 1951 (Treaty establish the European Coal and Steel Community) and the Rome Treaties (the Treaty establishing the European Economic Community and the Treaty establishing the European Community of Atomic Energy).

31 This idea of a European legal order which went beyond the Treaties is enshrined in (at least) two key provisions of the Treaties. First, the Treaties assign to the European Court of Justice the power to review the legality of European and national measures within the scope of application of the Treaties (Article 162 TEC, now Article 220 TEC). This implies a clear reference to a European legal order which goes beyond the Treaties themselves, to the extent that the standard of review was legality and not just the provisions of the Treaties. Second, an autonomous law-making procedure is established (Article 189 TEC, now Article 249). It leads to directly applicable and effective legal provisions (characteristics which were clearly proper of regulations, and which would partially be assigned to directives later on) (cf. Case 26/62 Van Gend en Loos, [1963] ECR 1 and Case 41/74, Van Duyn v. Home Office, [1974] ECR 1337). The European Court of Justice could review the legality of both regulations and directives in certain cases (Article 173 TEC, now Article 230 TEC). What is relevant here is that the yardstick of review was again defined by reference to legality, and thus, pointed to a European legal order which went beyond the Treaties.

32 The German Constitutional Court in 22 BVerfGE 293 at 296. The European Court of Justice in Case 294/83, Parti écologiste 'Les Verts' v European Parliament, judgment of 23 April 1986, [1986] ECR 1357, paragraph 23: “the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”. This move have already been advocated back in 1955 by Advocate General Lagrange, who in case 8/55 argued that the Treaty of the European Coal and Steel Community should be regarded as “the Charter of the Community from the material point of view (...) even though concluded in the form of a Treaty”.
of new member states was effected. Constitutional status is affirmed not of all the provisions contained in the Treaties, but only of some.

§13. [The material constitution of the Union: between Treaties and common constitutional traditions] However, such an understanding is not fully adequate. The constitutional traditions common to the Member States, and not the Treaties, are to be considered as the constitutional foundation of the Union. This is so mainly for two reasons.

First, the Treaties do not contain all European constitutional provisions. This is clearly proven by the leading cases of the jurisprudence of the European Court of Justice. Stauder and Internationale, where the principle of protection of fundamental rights was affirmed as one of the leading principles of Union law, were decided at a time when such a principle could neither be found among the provisions of the Treaties, nor derived from them. Indeed, no reference to the protection of fundamental rights was enshrined in the text of the Treaties until the Single Act of 1985 (and in a clearer, less ambiguous manner, until the Treaty of Maastricht of 1991). This is a clear indication that the Treaties might contain a good deal of the constitutional provisions in Union law, but they do not exhaust them. Indeed, the referred judgments point towards the constitutional traditions common to the Member States as the core content of the material constitution of the Union.

Second, the new legal order had to be framed by the national constitutional tradition of each Member State if it aimed at remaining


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34 Case 29/69, Stauder [1969] ECR 419.
36 If we accept the very idea of the common constitutional traditions being the core of the material constitution of the European Union, Stauder and Internationale are not so much an instance of judicial activism in defense of the jurisprudentially formulated principle of supremacy of Union law, as a late acknowledgment of the contents of the material constitution of the Union.
constitutively sound in national constitutional terms. This would further support the characterisation of the constitutional traditions common to the Member States as the core component of the set of European constitutional norms.

Thus, the Treaties are to be considered as a specific (but partial) expression of the said common constitutional traditions.

§14. [The ensuing peculiar validity basis of European constitutional norms] This reveals very clearly that the set of constitutional norms in Union law cannot be determined by exclusive reference to the Treaties, but by a combined reference to the common constitutional traditions and the Treaties. More interestingly, this reveals that the validity basis of Union constitutional norms is a rather complex one, which combines positive elements with critical comparative reconstruction of the constitutional traditions of the Member States.

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38 Maurizio Fioravanti and Stefanno Mannoni, ‘Il modelo costituzionale europeo. Tradizione e prospettive’, in G. Bonacchi (ed.), Una Costituzione senza stato, Bologna: Il Mulino, 2001, pp. 23-70 and Jürgen Habermas, supra, 2000, at pp. 19-20. And what was common among the national legal orders would complement the specific legal provisions contained in the Treaties and in the secondary law of the Union. Indeed, the judges of the European Court of Justice, who were jurists of the six Member States learned in national legal orders (and at most international law), could only put flesh on the bones of the Treaty by means of a constant reference to what was common in the national legal orders of the six, by means of a critical comparative approach of the six national legal orders. See, among others, Koen Lenaerts, ‘Le droit comparé dans le travail du juge communautaire’, 37 (2001) Revue Trimestrielle du Droit Européen, 487-528.

39 The consolidation of the Communities and the thickening of secondary European law (due to the accrual of new competences to the Communities, and due to the growth of the number of regulations and directives in force, of the acquis communitaire) resulted in two parallel processes of constitutionalisation. On the one hand, Community law was increasingly interpreted in a constitutional key, not only by the European Court of Justice, but also by national courts. On the other hand, the process of Treaty amendment was increasingly permeated by a constitution-making logic, even if not framed in constitutional terms. Thus, even if constitutionalisation might have originally been strongly motivated by a coherent reading of the Treaties by the European Court of Justice and national courts, soon it was closely connected to a discussion on the legitimacy basis of the European Union. Paradoxically, the very success of constitutional law without constitutional politics rendered the assessment of Union law by reference to democratic standards an issue, and a pressing one for that matter.
First, European constitutional norms have a positive validity basis **given that, and to the extent that**, they are what is **common** to the constitutional traditions of the Member States. Such a basis of legitimacy is a **positive one**, given that the validity basis of national constitutional norms is also positive.\(^4\)

Second, this positive basis comes hand in hand with a **critical-comparative basis**. When the **constitutional traditions** of the Member States diverge,\(^4\) to determine what **should** be considered as common, or the solution which **should be common**, one needs to **reconstruct** the said traditions through a critical-comparative approach. This requires considering the different norms in force in each of the national constitutional traditions, together with the reasons which underpin each norm and the specific requirements stemming from the **process of integration**. Even if some solutions might be equally acceptable, the **principle of equality before the law**, which can be said to be a structural requirement of any legal order, demands that **only one solution be adopted**.

This is reflected in what could be called the **majoritarian comparative approach of the European Court of Justice**, already enunciated by AG Lagrange in 1962:

> “the case law of the Court, in so far as it invokes national laws (as it does to a large extent) to define the rules of law relating to the application of the Treaty, is not content to draw on more or less arithmetical ‘common denominators’ between the different national solutions, but chooses from each of the Member States those solutions which, having regard to the objects of the Treaty, appear to be the best or, if one may use the expression, the most progressive. This is the spirit (...) which has guided the Court hitherto”.\(^4\)

Third, things get further complicated, given the **dynamic character** of any legal order aimed at facilitating the integration of different national legal systems. As the process of integration advances, the positive cum critical-comparative mode of validity would tend to be replaced by a **positive** mode of validity.

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\(^4\) In this regard, some doubts could arise concerning the **source of validity** of British constitutional law. On this, see Cristoph Möllers, ‘The politics of law and the law of politics: two constitutional traditions in Europe’, in Eriksen, Fossum and Menéndez (eds.), supra, fn 30, pp. 129–39.

\(^4\) Even if the divergence is a rather benign one, assuming that national solutions are basically **equivalent**, the principle of equality before European law would require **Union law to opt for one single solution**, and thus, to choose among solutions which are potentially equally valid.

This mainly happens out of two reasons. One is the reading of Union law in a constitutional key by the Court of Justice; by doing so, the Court determines, in an authoritative way, what the common constitutional traditions imply in a specific context. By proclaiming authoritatively what are the results of critical comparative analysis of the common constitutional traditions, the Court shifts the mode of validity of the proclaimed norms, which becomes fully positive. Indeed, the clearest example of this jurisprudential specification of the common constitutional traditions is the elaboration of a catalogue of fundamental rights in Union law. The other is the process of Treaty amendment, which has resulted in a progressive specification of the common constitutional traditions, and increasingly, into their transformation. This clearly shifts the basis of validity of common constitutional provisions, from positive cum critical-comparative to positive.

B) The Validity of Fundamental Rights Norms in Union Law
§15. [From the silence of the Treaties to the principle of protection of fundamental rights] It has already been indicated that the founding treaties of the European Communities did not contain any specific reference to the protection of fundamental rights.

However, the progressive consolidation of the Communities and of their legal order, together with different political developments (more on this in a moment), rendered unavoidable the question of whether and in which sense Community law could be said to be formed also by fundamental rights norms.

The usual narrative on the matter goes that the thickening of Community secondary law (regulations and directives), together with the explicit affirmation of the supremacy of Community norms, created a serious risk of

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\[44\] This innovation on the common constitutional traditions is in itself an indicator of the constitutionalisations of the process of Treaty amendment. See John Erik Fossun and Agustín José Menéndez, The Constitution’s Gift, Working Paper 1/04, Madrid: Instituto Universitario Ortega y Gasset.

\[45\] Article 6 TEC contained a clause on prohibition of discrimination on the grounds of nationality, and Article 119 TEC stated the principle of equal pay for equal work for men and women.


conflict between Community secondary norms and national fundamental rights provisions. In *Stauder* and *Internationale* the Court would have internalised the said tension by affirming that the principle of fundamental rights protection, even if unwritten, was one of the founding principles of the new legal order. This standard interpretation attributes strategic motivations to the Court of Justice. However, if the common constitutional traditions are taken seriously as the very constitutional foundation of Community law (§13), then the judgment of the Court does not need to be interpreted exclusively as a clever strategic move. Moreover, in purely causal terms, one perhaps should also consider that the Court might have reacted to the diffused will among European leaders to stress the rights identity of the Union in the late 1960s. This closely related to the perspectives of enlargement of the Communities after the departure of De Gaulle, the need of differentiation vis-à-vis the Eastern bloc, especially after the invasion of Czechoslovakia by Soviet troops, and the projection of a positive social image after the crisis of legitimacy scenified in the Paris spring of 1968.

§16. [The shortcomings of the protection of fundamental rights by reference to the common constitutional traditions] The determination of European fundamental rights norms by reference to the common constitutional traditions resulted in a considerable degree of uncertainty and a major leeway of discretion to the benefit of the Court of Justice. This is mainly so because the very determination of which are to be considered as fundamental rights, and the relationship between them, is left to the Court when authoritatively determining the common constitutional traditions. In contrast to what is the case with national constitutional courts operating under a written catalogue of rights, the Court determines not only derivate constitutional rules, but also the very identity of the fundamental rights norms. This opens the way to the exponential growth of what is considered as a

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48 *Supra*, fn 35, at paragraph 7: “Interpreted in this way, the provision at issue contains nothing capable of prejudicing the fundamental rights enshrined in the general principles of Community law protected by the Court” (my italics).
49 *Supra*, fn 36.
50 Thus, fundamental rights argumentation in Community law was not tied down to an authoritative text of fundamental rights provisions. This rendered fundamental rights argumentation in Community law rather peculiar, and implied that one of the three basic constrains of such argumentation (TCR, pp.371ff) was absent.
matter of fundamental rights, something which might devalue the currency of fundamental rights, and actually weaken their protection.¹¹

§17. [The Charter as authoritative restatement of the common constitutional traditions and as fragment of the constitution of the Union] The recent solemn proclamation of the Charter of Fundamental Rights of the European Union has alleviated some of these problems. This is so to the extent that it has resulted in the establishment of an authoritative restatement of the common constitutional traditions of the Member States on what concerns the protection of fundamental rights. Thus, the Charter can be interpreted as the detailed expression of the “principle of fundamental rights protection” affirmed by the Court.¹²

The main objection that can be made to such an assessment is that the Charter has not been formally incorporated into the primary law of the Community.¹³ The masters of the Treaties intentionally limited themselves to solemnly proclaim the Charter, without incorporating it.

The fact that this is the case does not, however, deprive the Charter of legal value and legal bite. This is so for three reasons. First, the Charter consolidates already existing law. The Charter does not bring about fundamental rights, but merely produces an authoritative catalogue of such

¹¹ It is far from obvious that rights are better protected when there are more fundamental rights. See TCR 350-1 and 365ff. The key question is not the “level of protection” of rights, but the balance which is struck between different rights.

¹² On such a basis, the Charter could be said to be a fragment of the (formal) constitution of the European Union. The situation in Community law would therefore not so different from that prevailing in the British legal system at present. The British legal system lacks a formal constitution. However, the Human Rights Act, which incorporates the European Convention of Human Rights, can be interpreted as a piece of a formal constitution (On the constitutional materials of the United Kingdom, see Neil D. MacCormick, ‘Does the United Kingdom have a Constitution? Reflections on MacCormick vs. Lord Advocate’, 29 (1978) Northern Ireland Legal Quarterly, pp. 1-20. See the judgment on John MacDonald MacCormick vs. Lord Advocate, 1953 S.C. 396 [Court of Session]. The background to the case is explained in an extremely entertaining way by John MacCormick, The Flag in the Wind, Wackburg, London, 1950); and at any rate, as the authoritative repository of fundamental rights provisions (Julian Rivers, TCR, Translator’s Introduction).

¹³ If the Draft Treaty establishing the Constitution will be turned into a constitution in a formal sense, the Charter will be formally incorporated into Union law. The Charter, as drafted by the Charter Convention but with some amendments, constitutes Part II of the Draft Treaty. See ‘Draft Treaty establishing a Constitution for the European Union’, OJ C 169, of 18. 7.2003, pp. 1-105.
rights, as comprised in the common constitutional traditions of Member States. Second, the institutions of the Union act as if the Charter was legally binding upon them. Since its proclamation, the Council, the Commission and the Parliament make continuous reference to the Charter in order to ground their decisions and resolutions. This implies that the lack of formal incorporation does not result in a different attitude towards the Charter.

Third, the Court of First Instance of the Union, the Advocates General of the Court of Justice and some national constitutional courts have invoked repeatedly the Charter as a relevant legal source in the justification of their decisions.

To this it must be added that the Charter-making process has had considerable symbolic and political effects. It has acted as one of the major spurs to the process of explicit constitution-making of the Union, within which the Charter might be formally incorporated into the primary law of the Union.

§18. [Positivisation vs Union law as the law of integration] The consolidation of the common constitutional traditions in the Charter does not necessarily imply that the validity basis of the Union would become exclusively positive. As long as Union law remains a law of integration, it is likely that the common constitutional traditions would remain an essential part of the constitutional law of the Union, and thus, its validity basis would remain being the positive cum critical-comparative one. This is established explicitly in the

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56 Menéndez, supra, fn 54, pp. 41ff.

Draft Treaty. Together with the insertion of the Charter in Part II of the text, we can find Article I-7.3, which reads:

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

§19. [Taking Stock] On such a basis, we can come to two main conclusions. First, that the validity basis of Union constitutional norms is a complex one. The central role played by the constitutional traditions common to the Member States implies that the validity of European constitutional norms is positive cum critical-comparative and not purely positive. This can be properly understood if we take into account the openness of legal argumentation to general practical arguments, as established in Alexy’s special case thesis, and also the conceptual connection between law and general practical reasoning characteristic of any law of integration. Second, that the authoritative set of fundamental rights provisions in Union law is the Charter of Fundamental Rights of the European Union. The authoritative interpretation of its provisions corresponds to the European Court of Justice and the Court of First Instance.

III. A Typology of European Fundamental Rights Norms: Fundamental Rights, Ordinary Rights and Collective Goods

§20. [Some basic distinctions in Alexy’s theory of fundamental rights] Any theory of fundamental rights presupposes a distinction between constitutional and non-fundamental rights, if the category of fundamental rights is to be distinctive, and not merely coextensive with the category of legal rights. In its turn, such a distinction presupposes the bifunction of the principle of legality in two: on the one hand, the Constitution; on the other hand, statutes. Such a distinction comes hand in hand with the establishment of a

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58 The democratic principle is not only connected to communicative action and deliberation, but also to concrete mechanisms of decision-making. The role of law as a complement of morality, taking care of the basic shortcomings of the latter, justifies constraining deliberation to fit worldly constraints. However, this renders very real the danger of a legitimacy gap of
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hierarchical relationship between the constitution and ordinary statutes. This is at the very basis of the idea of fundamental rights as binding to the legislature, that is, as norms which frame the action of the legislature in substantive terms to the extent that “they incorporate decisions about the basic normative structure of state and society”. A further necessary distinction to be drawn is that between individual fundamental rights and collective goods. Fundamental rights norms might express both of them. The main difference between the two lies in the non-distributive character of collective goods, which has direct implications over the legal means of enforceability of the respect of the said collective goods.

legislation, as not all those affected would have a real chance of participating in deliberation and decision-making. This partial heteronomous character of ordinary legislation can be mediated by a dual conception of democracy, which distinguishes different modes of legitimacy. Detailed implications vary across different constitutional systems, but in all of those falling upon the model of democratic constitutionalism, some form of constitutional dualism is relevant. This presupposes that the constitution is a differentiated form of law; it is in a relevant sense the higher law of the land. The dual (or even more plural) character of the sources of law is clearly linked to a complex understanding of the democratic principle of legitimacy. One finds legal norms supported by the full mode of legitimacy (the constitution), and ordinary laws which are based on a more viable type of legitimacy, and which are constrained in their contents and impact by the higher law. The archetypical kind of higher law is fundamental rights provisions. Equipped with such rights, the citizen is given claims that, at the same time, protect the values (individualistic and collective) lying behind the rights and that allow her to put in motion institutional mechanisms that alter the balance of power design in the constitution itself. Non-majoritarian institutions step in the way of ordinary statutes and either set it aside or create obstacles for their implementation in the name of the Constitution. Judicial review of legislation based on the infringement of fundamental rights and independent institutions in charge of ensuring the monitoring of rights (of the type of ombudsmen) are characteristic remedies associated to fundamental rights.

59 See, for example, TCR 349. Rivers, Translator’s Introduction, xix.
60 TCR, 350
61 TCR, 65-66, 80-1 and 188. See especially p. 65, fn 79: “That a principle relates to such collective interests means that it requires the creation or maintenance of states of affairs which satisfy certain criteria, broader than the enforcement or satisfaction of individual rights, to the greatest extent legally and factually possible”. See also Robert Alexy, ‘Individual Rights and Collective Goods’, in Carlos Santiago Nino (eds.), Rights, Aldershot: Dortsmouth, pp. 163-181.
62 TCR, 80.
63 Ibid, p. 167-168
§21. [Some basic lessons to be drawn] These basic distinctions established in Alexy’s structural theory of fundamental rights allow us to establish the basis of a systematization of the provisions of the Charter of Fundamental Rights, given that:

- we can distinguish between what are properly speaking fundamental rights, because they mandate certain contents to the legislature (§22), and those rights which are ordinary rights, because their content is left in the hands of the European or the national legislatures (§23);
- we can distinguish between fundamental rights which are formulated as individual rights and fundamental rights which are formulated as collective goods (§24).

§22. [Fundamental rights in the Charter] A good deal of the provisions of the Charter can be reconstructed as containing fundamental rights norms, that is, norms that provide rights of the individuals against the legislature (either European or national). Clear examples are Article 7 (the right to privacy) or Article 39, section 1 (the right to vote in European elections).

As it is also well-established, the characterisation of a right as fundamental does not imply that ordinary legislators cannot outwork or limit such a right. Moreover, there are cases in which the proper way of ensuring a fundamental right is to make it positive. Limitation is best captured by a discursive theory of fundamental rights, which openly acknowledges that “constitutional protection always depends on a relationship between a reason for constitutional protection and some relevant contrary reason.” This is the proper interpretation of the reference, part of the common constitutional traditions of Member States, to the essence of fundamental rights and

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"As it is typical of fundamental rights proper, the rights established by the Charter of Fundamental Rights constitute an institutional embodiment of substantive moral claims, but they are also given the form of normative reasons against the action of the legislature, which give rise to reasons for the enforceability of the right."

"On the concept of fundamental rights limits, see TCR, pp. 181ff. A criticism of the idea of the "inalienable core" in TCR, pp. 192ff.

"This can be affirmed without qualifications about rights to entitlements in the wide sense or to positive state action, within which a distinction can be established between rights to protection, rights to organisation and procedure and rights to entitlements in the narrow sense. TCR, chapter 9, especially 296-7 for the three-fold distinction.

"TCR, 209."
freedoms. Thus, Article 51, section 1, first sentence of the Charter, which provides that “[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms” is to be interpreted consequently.

It is in such a light that we have to interpret references such as the one contained in Article 3, section 2, first sentence (right of the patients to informed consent before being subject to medical or biological treatment). The referred provision acknowledges the right “according to the procedures laid down by law”. Such a reference does not imply full discretion to the ordinary legislator, but must be interpreted as referring to the scope of the fundamental right limit (the “essence” of the right).

§23. [Non-fundamental rights in the Charter?] It is doubtful whether certain provisions of the Charter might be considered as fundamental in that sense. This is the result of the interplay of Article 51 of the Charter and of a series of clauses that habilitate national legislatures to determine the substantive content of some rights mentioned in the Charter. Many provisions contained in the Charter end up in one of the following style clauses: “under the conditions established by national laws and practices”,” in accordance with the national laws governing the exercise of such freedom and right”, “in accordance with the general principles common to the laws of Member States” or “in accordance with Community law and national law and practices”. Such clauses do not seem very different from the usual limiting clauses character of constitutional texts, especially those which habilitate the legislature in general terms to limit fundamental rights. A typical case is that of those limiting clauses which mandate the legislature to respect

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68 Similar implications have other style clauses such as “in accordance with the Treaty establishing the European community”.
69 On ‘laws of infringement’, see TCR 199.
70 Article 35 (health care).
71 Article 9 (right to marry and found a family), Article 10 (right to conscientious objection), Article 14, section 3 (freedom to found educational establishments).
72 Article 41, section 3 (right to good administration; making good damages), article 45, section 2 (free movement of nationals of third countries).
73 Article 16 (freedom to conduct a business), Article 27 (workers’ right to information and consultation with the undertaking), Article 28 (right to collective bargaining), Article 30 (protection in the event of unjustified dismissal), Article 34, sections 1, 2 and 3 (social security and social assistance).
the essence of the right when proceeding to its regulation, to which we have just made mention.\textsuperscript{74} This is complicated by the division of competencies between the Union and its Member States. To the extent that such style clauses reflect a lack of competence of the Union as law stands, they constitute a reiteration of the basic principle contained in Article 51, namely, that the Charter should not be read as expanding the competencies of the Union to the detriment of the Member States. This might be taken to mean that the fundamental legal provisions qualified by such style clauses cannot be read as imposing constraints on national legislators different from those stemming from the respective national constitutional law. But were that so, those legal provisions would not be binding upon national legislatures; in institutional terms, they would not add anything to the arguments which individuals could make before national courts in order to have legislation set aside in the name of fundamental rights.

However, such is a hasty conclusion. If one takes seriously the idea that any fundamental right limit must come hand in hand with a protected scope of a given right, one is led to proceed in two steps. First, the competence of the Union should be determined. In those areas in which the Union does not have any competence title, it is pretty obvious that the Charter of Fundamental Rights cannot be said to be applicable. Article 51 of the Charter precludes that the Charter is applicable (at the very least, in legal terms)\textsuperscript{75} to purely internal situations. However, it must be kept in mind that the number of those purely internal situations is extremely reduced, to the extent that it can be quite rightly affirmed that there is no area of national competence which is completely free from the influence of Community law, at the very least through the so-called horizontal effect of some of the basic Community principles (in themselves, closely associated to the fundamental principles contained in the Charter).\textsuperscript{76} Second, in those areas where some Community competence title is established, the fundamental rights provisions of the Charter of

\textsuperscript{74} §23.
\textsuperscript{75} I do not consider here the political effect that the existence of two systems of fundamental rights might have in some cases.
\textsuperscript{76} This is a clear conclusion established in the debates of the working group on competencies in the Laeken Convention. This is accepted even by those who are more skeptical of any expansion of the competencies of the Union. See the Conclusions of the Working Group II of the Laeken Convention, on the Charter of Fundamental Rights and the eventual accession of the Union to the European Convention of Human Rights. CONV 354/02, available at http://register.consilium.eu.int/pdf/en/02/cv00/00354en2.pdf.
Fundamental Rights should be applicable both as norms, that is, to the extent that they give rise to concrete rules, but also, and perhaps mainly, as reasons for other norms. In controversial cases, the underlying principles should be taken into account, and weighted and balanced against the other relevant principles. This will be considered in more detail in the next section (§§26ff).

§24. [Fundamental rights or collective goods] Finally, not all fundamental legal provisions give rise to fundamental rights. We can find provisions that require public institutions to achieve a certain objective or goal, but without giving rise to any subjective fundamental position, that is, without assigning individuals rights against the legislature. Such provisions have been referred as ‘policy clauses’, meaning something rather equivalent to what Alexy might term as “collective goods” or as provisions affirming principles supported by collective goods, which do not necessarily give rise to subjective individual rights. This does not rule out, but rather renders more likely, that there would be conflicts between individual fundamental rights and collective goods.

Examples from the Charter are: Article 11, section 2 (“the freedom and pluralism of the media shall be respected”), Article 25 (rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life), Article 26 (protection of the disabled), Article 37 (“a high level of environmental protection and the improvement of the quality of the

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77 CHARTE 4414/00, submitted by the representative of the Spanish government, Mr. Rodríguez-Bereijo, seems to have heavily influenced the drafting of social rights. The three-fold typology between fundamental rights, ordinary rights and policy clauses proposed there. But see also For a Europe of civil and Social Rights, Report by the Comité des sages (Brussels, European Commission, 1996), pp. 51 ff. (“Rights in the form of objectives to be achieved”).

78 Although I am not completely sure that such terminological use if congenial to Alexy’s approach. Cf. TCR 112, dealing with Ihering’s protectionist import duty.

79 Alexy, supra, fn 61, 167 states that collective goods are non-distributive goods. Within the Charter of the European Union, the said provisions make reference to the protection of non-distributive goods in legal terms. See also p. 176: “There might occasionally be good grounds to endow the individual with rights in such a way that he would be able to enforce collective goods either for himself or as an advocate of the community. However, this situation cannot be generalised. As a rule, more persuasive grounds exist in favour of establishing only collective modes of enforcement of collective goods, as we see in the political process of a democratic system”. See also TCR 65: “That a principle relates to such collective interests means that it requires the creation or maintenance of a state of affairs which satisfy certain criteria, broader than the enforcement or satisfaction of individual rights, to the greatest extent legally and factually possible”.

80 See Alexy, supra, fn 61, pp. 174ff.
environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”) or Article 38 ("Union policies shall ensure a high level of consumer protection").

The same argument made in relation to *rights of dubious fundamental nature* (§23) can be repeated here. To the extent that the *collective good provision* is coupled with a style clause that reiterates the division of competencies between the Union and its member states, the bite of the collective good is limited unless some competence claim of the Union can be established.

**IV. Weighing and Balancing Fundamental Rights against Economic Freedoms**

§25. [Rules vs. principles, definitive versus prima facie reasons for action, proportionality] *A Theory of Constitutional Rights* draws a basic distinction between rules and principles. Such a distinction is closely connected to the *special case thesis*, that is, to the idea that law is a special case of practical reasoning (§10). Rules are *definitive reasons for action*, while principles are *prima facie reasons for action*, or optimization requirements. Prima facie reasons for action can only be turned into definitive reasons for action through an argumentative process, in which they are weighted and balanced against other prima facie reasons according to the *principle of proportionality in a large sense*. Principles reflect the *argumentative* character of law, as they are closely connected to the *ideal dimension of law*. To quote Alexy:

> “For a participant, the legal system is not only a system of norms qua results or products, but also a system of procedures or processes, and so, from a participant’s perspective, the reasons taken into account in a procedure—here, the process of making a decision and justifying it—belong to the procedure and thereby to the legal system”

Thus, legal positivism contributes the basic insight that the integrative role of law in modern societies is dependent in its being in consisting in

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81 TCR 47
82 TCR 51, 66ff
83 AFI, p. 73.
uncontroversial action \textit{rules}.” But this is not incompatible with the recognition of the central \textit{argumentative} features of law, of its being a mixture of principles and rules.

The characterization of legal systems as a combination of principles and rules requires distinguishing between \textit{fundamental rights as rules} (as specific substantive reasons for action, which given the institutional character of law, can become reasons for \textit{legal remedies} and \textit{fundamental rights as principles}, thus, \textit{as reasons for other norms}). Such a distinction renders clear that the relevance of fundamental rights is not limited to the rules which might be derived in a rather straightforward way from the literal tenor of the fundamental rights provisions, that fundamental rights have a wider normative impact in the whole legal system.

The characterization of legal systems as a combination of rules and principles, which implies the distinction between \textit{fundamental rights norms and fundamental rights principles}, and the \textit{principle of proportionality in a large sense} as the criterion to weight and balance conflicting \textit{fundamental rights principles} are of much help in interpreting and applying Union fundamental rights provisions, and especially, the provisions of the Charter of Fundamental Rights. This allows us to realize that:

- fundamental rights provisions might give expression to both a fundamental right rule and a fundamental right principle (§25)
- fundamental rights provisions which fell beyond the scope of competence of the Union have a value as \textit{principles} which frame Union law as a whole (§26)
- the most transparent and accountable way of solving a conflict between \textit{fundamental rights} is to adjudicate through a judgment of proportionality (§27)

\begin{flushright}
\textsuperscript{85} TCR, p. 59: “Rules are definitive reasons”.
\textsuperscript{86} Alexy, \textit{supra}, fn 61, at p. 166.
\textsuperscript{87} TCR, 59: [T]he position taken here is that rules and principles are relanzos for norms.AAI, p. 73 and Francisco Laporta, ‘Sobre el concepto de derechos humanos’ 4 \textit{Doxa} (1987), 23–46.
\end{flushright}
§26. [Fundamental right rule or fundamental right principle?] Consider Article 2, Section 2 of the Charter of Fundamental Rights, which states that “No one shall be condemned to the death penalty, or executed”. Its level of specificity allows us to derive a fundamental rights rule of the kind “Death penalty is not allowed”. However, together with some other Charter provisions (such as Article 1) it could be so constructed as to derive from it a fundamental right principle concerning the constitutionally acceptable types of punishment (a principle interdicting dignity-infringing penalties, not far from what other legal systems refer as the interdiction of cruel and unusual punishment). The strength of such an argument could be reinforced by the consideration of similar national constitutional provisions concerning types of punishment.

§27. [The principled value of fundamental rights which fell beyond the scope of competence of the Union] As prima facie reasons for action, fundamental rights can be seen as argumentative cards that habilitate the individual to keep the balance of power between constitutional and ordinary legislator, by means of having resort to the intricacies of the checks and balances imposed upon the ordinary political process. This insight allows us to put in the right perspective the value of some of the provisions of the Charter, specifically those in which reference is made to fundamental rights whose substantive content falls beyond the scope of competence of the European Union.

This is the case of Article 2, just referred, but also and mainly of socio-economic rights (rights to solidarity). The fact that they refer to substantive contents which fall beyond the scope of competence of the Union might incline us to think that the only reason to include them in the Charter is purely rhetorical.

However, they are legally relevant as reasons for other legal norms. In that regard, the explicit affirmation of such rights in the Charter can have an impact on the trend towards a slow but steady reconsideration of the proper balance between the four basic Community economic freedoms and social goals (more on this, in a minute)." In this sense, the said rights can be interpreted as

the canon of exceptions to the full realization of the four economic freedoms which Member States can invoke. In that sense, the affirmation of many of the socio-economic rights in the Charter does not result in the affirmation of individual socio-economic rights, but it widens the political room within which Member States can further the realization of socio-economic rights through national legislation, even if in conflict with the four economic freedoms.

§28. [Weighing and Balancing] There are two quite related implications of the affirmation of socio-economic rights in the Charter: (1) it renders more likely that conflicts between fundamental rights would not be simply decided, but argued explicitly as a matter of weighing and balancing the conflicting rights; (2) it is likely to result in a greater weight being assigned to socio-economic rights vis-à-vis economic freedoms, in line with what has just been argued in §26.

Explicit weighing and balancing. Elements of ‘balancing’ of economic freedoms against social principles can already be found in the judgment of the Court in the famous case Cassis de Dijon. The Court argued that in the absence of common rules, obstacles to free movement of goods within the Community must be accepted ‘in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer’.

Two clear recent examples of ‘unwritten’ exceptions to the economic freedoms can be found in Bachman and Albany. The first case dealt with the right to deduct from the Income Tax base pension fund contributions. Belgian tax law made such a possibility conditional upon the amounts being paid to an undertaking established in Belgium or to the Belgian establishment of a foreign insurance undertaking. Such a measure

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seemed to run against the free movement of workers (and also against the freedom to provide services). The impossibility of deducting pension plan contributions made to non-Belgian financial institutions made it more costly to workers to move in or out of Belgium. It also sheltered Belgian pension plans from the potential higher competitiveness of foreign undertakings. However, the Court of Justice was receptive to the Belgian argument that the ‘cohesion of the tax system’ could be read as a further legitimate exception to the referred economic freedoms.90 A general social goal, such as the safeguard of the ‘cohesion of the tax system’ was given priority to ‘market’ freedoms. Albany concerned the issue of compulsory affiliation to a sectorial fund intended to top up the basic pension under Dutch law. In this case, the plaintiff operated a textile business. Under Dutch law, social agents can agree on the establishment of a compulsory sectorial pension fund, which had been done in the textile industry. The plaintiff was affiliated with the said fund. But following changes in Dutch pension law, the company requested to be allowed to discontinue its affiliation with the Fund. The company had decided to substitute the compulsory pension fund contributions for affiliation with a private insurance company. After being denied such exemption, the company challenged before Dutch courts its compulsory affiliation with the Fund. It argued that the establishment of such kind of compulsory funds by social agents was in breach of the Community’s competition rules because it prevented private companies from offering private pension fund schemes. It also argued that Dutch provisions ran against the freedom of establishment and the freedom to provide services. The Court concluded that, even if a compulsory pension fund should be considered as an undertaking for the purposes of Article TEC 85, this kind of arrangement did not fall within the scope of Treaty provisions on competition law. This finding was based on the argument that the goals of the EC Treaty go beyond ‘a system ensuring that competition in the internal market is not distorted’. They include the laying out of ‘a policy in the social sphere’ and the promotion ‘throughout the Community of a harmonious and balanced

development of economic activities’ and ‘a high level of employment and social protection’.

The Charter of Rights is quite likely to reinforce this trend. The solemn proclamation of the Charter of Fundamental Rights might become a major symbolic act in the development of Community law. The process of debating and drafting a bill of rights of the Community legal order points towards the constitutionalisation of the European legal order. This has major formal and substantial consequences. In formal terms, the ultimate affirmation of fundamental rights as the most fundamental provisions of the legal order, as the provisions which bind all the public institutions of the European legal order and the European citizens. In substantial terms, the Charter affirms the political character of the European Union, and makes it clear that the most basic societal choices concern not so much the shape of the economy, but the shape of societal relationships. Indeed, this seems to be the line of reasoning adopted by AG Jacobs in *Eugen Schmidberger Internationale Transporte Planzüge v Republik Österreich*. The case concerns the balance to be struck between the basic economic freedoms and the freedoms of expression and assembly, as stated in Articles 11 and 12 of the Charter. A legal demonstration in Austria had resulted in a serious distortion of road traffic between Italy and Northern Europe. An Austrian entrepreneur claimed damages to the Austrian authorities. He argued that the authorities were to be held responsible. By granting the permission to demonstrate, they would have infringed on the freedom of movement of goods. With extensive reference to the Charter, the Advocate General claims that there is a need for a proper weighing and balancing of economic freedoms and fundamental rights. The outcome of such a balancing exercise cannot be predetermined once and for all, but must be undertaken with reference to each specific case. In this concrete instance, AG Jacobs argues that preference should be given to the freedoms of expression and assembly.

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92 Eriksen, Fossum, Menéndez, supra, fn 54.
93 TCR, 349
94 TCR, 350.
95 Case C-112/00, Opinion delivered on July 11, 2002.
**Increased weight to socio-economic rights.** The European Court of Justice has, in cases of conflict, become increasingly inclined to give more weight to social principles to the detriment of the four economic freedoms. The Charter is likely to reinforce also this trend. In fact, the most innovative feature of the Charter might not be the series of statements on social rights, but the affirmation of *solidarity* as one of the founding values of the Union. The second paragraph of the Preamble introduces an authoritative statement of the founding values of the Union, which are said to be human freedom, dignity, equality and *solidarity*. *Solidarity* is the title of the referred chapter IV, something which opens up for a systemic interpretation of Community law in the light of such a value. The Charter enumerates several rights to solidarity, although the realisation of some of these is not within the actual field of competence of the Union. The overlapping effect of Article 51 and the Charter clauses that refer to national constitutional law rule out that any competence accrues to the Union. The affirmation of such rights, coupled with the decision not to give ‘fundamental’ status to the four economic freedoms, reinforces the argument that European integration is not only about negative integration or market-making, but also about market-redressing. All these features of the Charter render possible to grant more weight to social values when interpreting the provisions of Community law. Thus, the set of rights included in chapter IV of the Charter, under the heading ‘solidarity’, could be constructed so as to provide support to Member States when claiming exceptions to the four economic freedoms in order to

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97 They are only referred to in the Preamble. Some of such freedoms can be subsumed in some provisions of the Charter. Thus, Article 16 (freedom to conduct a business) can be seen as encompassing the freedom of establishment. However, the right is formulated at a higher level of abstraction.
further goals of a socio-economic character. It is not implausible to claim that this could become the trend.

The Opinion of AG Geelhoed in American Tobacco points in this direction. The AG revisits the relationship between economic freedoms and social goals in Community law. She finds that at its present stage of development, Community law does not aim exclusively at the creation of a single market, but also includes other legitimate goals of Community action, such as the protection of public health. The Union’s competence basis might still be related to the fostering of the basic economic freedoms, but this does not mean that the actual exercise of Community competences is exclusively aimed at market-making. AG Geelhoed adds that some of the social goals


99 The only serious obstacle to such a use of rights to solidarity is the restrictive literal tenor of Article 51, section 1, which states that Member States are bound by the Charter “when they are implementing Union law”. Such a wording is too narrow, as it was well-settled in the jurisprudence of the European Court of Justice that Member States were bound by ‘European’ fundamental rights standards when they invoked an exception to the market freedoms. However, such an objection can be overcome with two further arguments. First, Article 51, section 1 can be read as determining the ‘compulsory’ scope of the Charter. It could not be read as precluding a Member State from invoking it even in an area where it is not bound by it. Even less so from invoking it vis-à-vis Community institutions, which are bound by the Charter in all cases. Second, the literal tenor of the provision should be interpreted as providing a succinct formulation of positive law at the time of codification. Thus, the scope of the Charter should overlap with the scope of fundamental rights protection established by the Court of Justice. Therefore, ‘implementing’ must be interpreted as comprising also those cases in which Member States claim an exception to the economic freedoms. Some authors have pointed to the formulation of Article 49, section 1 as evidence to the contrary. See the critical remarks of Weiler in a discussion which took place at Harvard. Available at http://www.jeanmonnetprogram.org/wwwboard/seminar01/Vitorino_Discussion.rtf. He finds the drafting of the Charter poor as reference is only made to “implementing Union law”.

100 Par. 100: “The issue boils down to the following: if a (potential) barrier to trade arises, the Community must be in a position to act. Such action must, as I construe the biotechnology judgment, consist in the removal of those barriers. Article 95 EC creates the power to do so”.

101 Par 106: “In other words, the realisation of the internal market may mean that a particular public interest – such as here public health – is dealt with at the level of the European Union. In this, the interest of the internal market is not yet the principal objective of a Community measure. The
constitute basic preconditions for a single market. This prompts her to hint at a radical change in legal reasoning. Instead of focusing in a first step on whether a given national provision distorts the common market, and only in a second step on whether such a measure can be justified by reference to some legitimate public goal, some paragraphs of the text invite a direct weighing and balancing of principles. Were this to be later developed by other Advocates General and by the Court, it would advance the constitutionalisation of Community law, in the sense of rendering the framework of legal reasoning closer to what is characteristic of national constitutional laws.

V. The Hidden Egalitarian Potential of Union Law: Factual Equality

§29. [The distinction between legal and factual equality, and its potential] A Theory of Constitutional Rights offers a neat distinction between principles of legal and factual equality, which are usually portrayed as antagonistic even with national constitutional traditions.

On the one hand, legal equality, or equality before the law, is concerned with the evaluation of state action itself, without considering its transformative impact or potentiality upon social reality, so to say. On the other hand, factual equality is concerned with the factual consequences of state action. This distinction has at least a double merit. First, that it is clear and not confusing, as it is not infrequently the case with distinctions between equality before the law and equality through the law. Second, that it might reveal the egalitarian potential of what are usually regarded as arguments of equality before the law.

realisation of the internal market simply determines the level at which another public interest is safeguarded” (my emphasis).

Par. 229: “The value of this public interest [public health] is so great that, in the legislature's assessment other matters of interest, such as the freedom of market participants, must be made subsidiary to it.”

A similar theoretical approach seems to be followed by Moral Soriano, supra, fn 87, at pp. 112-123.

TCR, p. 276.
Indeed, it will be argued in this section:

- that with such a distinction in mind, we can observe that the jurisprudence of the Court of Justice on the principle of non-discrimination on the grounds of nationality might have occasionally undermined the achievement of social equality and contributed to develop the argumentative skills needed in order to further social equality (§29-30);

- that this can be further proved by considering the jurisprudence of the Court on the principle of equal treatment of men and women concerning payment and working conditions (§31).

§30. [The principle of non-discrimination on the grounds of nationality and the achievement of social equality] The principle of non-discrimination on the grounds of nationality, enshrined in Article 7 TEC (now Article 12 TEC) has played a major role in the process of European integration. In economic terms, it has been invoked once and again in order to challenge national laws, regulations or practices which were regarded as obstacles to the forging of a common market of goods, labour, services and capital, as mandated by the Treaties. In legal terms, it has rendered suspicious any differential treatment based on nationality. In practical terms, it can be said to have shifted the burden of proof against norms which discriminate between nationals and non-nationals. The combination of the thickening of Community secondary norms which harmonized or approximated national laws with the jurisprudential reading of the principle of non-discrimination on the grounds of nationality has had the combined effect of placing all European residents under the same laws. Not only all residents in the Union are subject to the same norms within each legal order, but such laws become one under the harmonizing effect of Union law.

Market-making and legal order-making were thus based in the black-listing of the distinction between nationals and non-nationals. This was, according to the preamble of the Treaties, done in the name of achieving the objectives of the Treaties, which were both economic and social, as stems very clearly from

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the Preamble of the Treaties and from the (original text) of Articles 2 and 3 TEC. However, the shifting of the burden of proof against measures which had the effect of discriminating between nationals and non-nationals had the effect of leaving without effect many legal norms which were intended to further factual equality within Member States. Indeed, the differential treatment of nationals and non-nationals could be the unintended effect of a measure which foremostly aimed at the entrenching of a given model of social insurance or of labour relationships which aimed at transforming reality in an egalitarian sense. The almost unconditional way in which the Court of Justice applied the principle of non-discrimination on the grounds of nationality is one of the main bases on which it has been claimed that Union law is inspired by a neoliberal or economic vision of the relationships between politics and markets.

§31. [Law of integration as teleological, and thus concerned with factual equality] This picture is rendered more nuanced if we consider a paradoxical feature of community law. Union law was structured since its very inception as the law of integration, to paraphrase the title of Pescatore’s famous book. This explains the marked teleological character of the Treaties themselves, and also of the jurisprudence of the European Court of Justice.

This teleological character of the Community legal order has made unavoidable that the European Court of Justice has applied the principle of non discrimination on grounds of nationality with a concern not only for legal, but also factual equality. The question in the case law of the Court is whether Europeans are equal before the law, but in doing so the Court checks whether the factual equality of European residents has been infringed.

106 See, for example, in Case C-72/91, Sloman Neptun, [1993] ECR I-887, especially par. 25ff the Court was ready to claim that the decision of a sectorial authority to refuse a German shipping company the right to engage a radio office and five seafarers under conditions which were less protective of the social rights of workers than German legislation was contrary to the Treaties, while at the same time considering that the social objectives proclaimed by the same Treaties were not to be realized through its jurisprudence, but through legislation. See especially par. 25ff of the judgment. See de Schutter, supra, fn 96 and ‘La garanzia dei diritti e principi sociali nella “Carta dei diritti fondamentali”’ in Gustavo Zagrebelsky, Sergio Dellavalle and Jorg Luther (eds.), Diritti e Costituzione nell’Unione Europea, Bari and Roma: Laterza, 2003, pp. 192-220.


by the national statutes. Consequently, community law is one of the legal systems where legal argumentation with reference to factual equality is more frequent, and where this kind of argument has been more perfected.

Consider the following three cases in which the Court went beyond formal equality by means of reviewing the correctness of the legal construction of difference by national legal orders in each concrete case.

The Spirits case. In a series of cases, the Court of Justice developed the concepts of “competing markets” in order to test whether national tax provisions resulted in a discrimination against imported products. In most cases, the national tax provisions were either aimed at one specific product (which happened to be imported) or did make some reference to the national or imported character of the goods. In the Spirits case, the Court was confronted with a piece of French legislation which established different tax liabilities for spirits on the formally neutral criterion of whether they were based on wine or fruit, or whether they were based on grain. It was the case that nationally manufactured liqueurs were in most cases based on wine or fruit, and enjoyed de facto a lower level of taxation. Given that both liquors based on wines and fruits, and liquors based on cereals, could be regarded as, if not similar products, at least competing products, the “protective nature of the tax system” was deemed to be clear.

The Feldain case. A special tax on cars, relative to the power of the engine (basically calculated by reference to the amount of energy consumed, cylinder capability) had been established in France. The tax was calculated according to a given formula. What it is interesting for our present purposes is to notice that the formula resulted in a more than proportional increase of the tax due as the power of the car increased.

110 Case 27/67, Fink Frucht GmbH v. Hauptzollamt München-Landsbergerstrasse [1968] ECR 327, which referred to Italian sweet pepper liquor, which was charged a tax at the border. Such tax was not found to be discriminatory because it did not result in a higher tax burden on the said liquor, but was merely charged at the border. And Case 45/75, Rewe-Zentrale v Hauptzollamt Ladau-Pfalz, 1976 [ECR] 181 the Court established the concept of similar products as those which “have similar characteristics and meet the same needs from the point of view of consumers”.
111 §41 of the judgment.
112 Case 433/85, Feldain v. Directeur des Services Fiscaux, [1987] ECR 3536. This case was a more sophisticated version of Case 112/84, Humblot v. Directeur des Services Fiscaux, [1985] ECR 1367. In Humblot, tax liability was calculated according to a two-fold formula, which rendered more obvious the cover discrimination on the basis of nationality.
Such a formula seemed to be completely ecumenical from the standpoint of nationality. The power of the car, and not its nationality, were the relevant variables considered when calculating the tax liability. However, it was called to the attention of the Court that the formula resulted in special heavy tax liabilities for those cars exceeding a certain power. Such power was barely coincidental with the maximum power of cars manufactured in France. Thus, the set of cars upon which a heavy and more than proportional tax liability was imposed were imported cars. It was clear that the measure was not discriminatory towards imported cars with similar power to French manufactured cars, but it discriminated against a set of cars which were all imported. On such a basis, the Court came to the conclusion that this piece of French tax law was in breach of the principle of non-discrimination on the basis of nationality.\(^{113}\)

*The Biehl case.*\(^{114}\) It is well-established that the different treatment of tax purposes of residents and non-residents is justified, provided that such differentiation is based on the different objective nature of the two situations. This is especially relevant on what concerns personal income taxation. It is well-established that the right to a certain set of tax benefits associated with the assessment of the global ability to pay tax should only be granted in the state of residency of the taxpayer, while those tax systems where income accrues without the taxpayer being resident are legitimately entitled to tax the income accrued in their jurisdiction in a more flat manner. The case at hand related to the different treatment of residents and non-residents under an specific provision of Luxembourg income tax law. It was established that withheld tax in excess of the final tax liability could not be restituted to all those who were not resident in the territory of the Grand Duchy of Luxembourg during the entire fiscal year. In formal terms, the provision did not make any reference to nationality. The relevant criterion was residence, as such a non-suspect criterion. In fact, Luxembourgeois citizens shifting their residence to other member states or third countries will be denied the right to claim tax withheld in excess of their final tax liability for the said fiscal year.

\(^{113}\) Par. 20: “A system of road tax in which one tax band comprises more power ratings for tax purposes than the others, with the result that the normal progression of the tax is restricted in such a way as to afford an advantage to top-of-the-range cars of domestic manufacture, and in which the power rating for tax purposes is calculated in a manner which places vehicles imported from other member states at a disadvantage has a discriminatory or protective effect within the meaning of article 95 of the treaty”.

\(^{114}\) C-175/88 *Biehl*, [1990] ECR 1-1779.
However, the Court came to the conclusion that the provision was in breach of Community law. It was an instance of covert discrimination. The apparently neutral formula operated in practice to the discrimination of non nationals, to the extent that they are much more likely to be the ones not able to claim the repayment of the overpaid tax.\footnote{On a side remark, it might be said that this judgments stressed the fact that the Court seemed to have been more concerned about the potential tax penalty deriving from a higher tax liability (a case which will occur in case that the taxpayer will not work during the rest of the year) than with the potential tax benefit which could derive for him.}

§32. [Testing the implications by reference to gender equality] This entails that, whatever the present shape and consequences of the arguments, the concepts and strategies of argumentation developed with reference to economic freedoms could be applied to the furthering of social values.

This can be proved by means of considering the jurisprudence of the Court of Justice on what concerns the Community provisions on gender equality. The original Article 119 of the Treaty of the European Economic Community established the basic principle of equal pay for equal work. Despite such interdiction, strict formal equality would not interdict different pay for work which is formally different, but to which the same value is attached,\footnote{See, for example, case 109/88, Handels og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss, [1989] ECR 3199.} or the establishment of job classification schemes that would isolate men and women, and allow for the application of different pay rates.\footnote{See, for example, case 61/81, Commission v. United Kingdom, [1982] ECR 2601, par. 8.}

*The Rinner-Kühn case.*\footnote{Case 171/88, Rinner-Kühn v. FWW Spezial-Gebäudereinigung GmbH, [1989] ECR 2743.} German legislation established as a general principle that employers should provide workers with up to six weeks of sick pay. Part-time employers working up to 10 hours a week were not granted such a benefit. The plaintiff was a woman working for ten hours a week for a German company. She argued that the proportion of women falling under the excluded category was disproportionately high. Therefore, the exclusion amounted to a de facto discrimination contrary to Article 119 TEC. The Court accepted the line of argument of the plaintiff. Characteristically, it left to the national court to proceed to the definitive weighing and balancing of the principle of non-discrimination against other competing principles (aims...
of social policy; the measure being suitable and requisite for attaining that aim).

*The Dekker case.* The plaintiff was selected as the most suitable candidate for a job, but was finally not offered the job on account of the fact that she was three months pregnant, and the company insurer will not reimburse the benefits the company was liable to during her maternity leave. Even if the decision could be based on a formally non-discriminative rule, the Court found that this was *de facto* a case of discrimination on the basis of sex. The fact that pregnancy affects women only is not a reason not to consider whether the measure is or not discriminatory of women. Resort to a criterion which can only be applied to women in order to justify the refusal of an appointment is to be regarded as an instance of discrimination on the basis of sex.

§33. [Taking stock] In brief, the European Court of Justice has applied what formally are principles of *formal equality*, that is *equality before the law*, in ways which render them close to *principles of factual equality*. The very nature of Union law as the *law of European economic and legal integration* has forced the European Court of Justice to develop the argumentative skills needed in order to contest the criteria of legal differentiation established by national legal orders, something which renders effective the goals of *market-making* and *legal order-making*.

This allows us to conclude that, quite paradoxically, a legal system which has fostered *negative economic integration* and, as such, has created considerable difficulties for national provisions aiming at the protection of very basic social goals and values, has develop argumentative skills which lay the ground for the eventual pursuit of factual equality.

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119 Par. 14 of the judgment.
121 Par. 17 of the judgment.
Conclusions
This paper aimed at testing whether Alexy's *A Theory of Constitutional rights* could be applied beyond German constitutional law, more specifically, to European Community Law.

It was argued that the solemn proclamation of the Charter of Fundamental Rights must be regarded as providing the authoritative standpoint from which to construct a theory of European Fundamental Rights. Such a theory should pay preferential attention to the case law of the European Court of Justice, but also to the jurisprudence of national constitutional courts, as essential elements of the *national constitutional traditions*.

It was claimed that clarity is achieved by distinguishing between provisions establishing fundamental rights and collective goods norms, and that the specific interplay of certain *limiting clauses* and the limitation of the competence of the Union renders dubious the fundamental nature of certain provisions of the Charter. However, it was argued that such clauses do not fully eliminate the *binding* nature of the provisions, to the extent that one can derive from them principles which would apply where some competence basis of the Union can be established. Moreover, the *Theory of Fundamental rights* allows us realising the legal value of some of the provisions of the Charter which establish fundamental rights which fall mainly or fully beyond the sphere of competence of the Union. By means of distinguishing between the value of fundamental rights *as norms* and fundamental rights *as reasons for other norms*, it was argued that provisions such as many of those stating rights to *solidarity* must be considered as establishing principles which should be considered in the sphere of competence of the Union. This was illustrated by considering the impact that the Charter might have in the reconsideration of the weight of some economic freedoms, now to be interpreted as specific formulations of more general fundamental rights.

Finally, the *A Theory of Constitutional Rights* provides the perspective from which to realise that even if the Communities have not been attributed a competence on social issues, and even if the substantive content of Community law provisions, coupled with its *position of supremacy* to national law in its areas of competence, the case-law of the European Court of Justice might provide interesting clues as to how to realize rights to solidarity in the European legal order. The Court of Justice has tended to consider arguments not only of formal but also of factual equality when considering the basic...
economic rights at the heart of the common market. This was illustrated by reference both to the principle of non-discrimination on the basis of nationality and the principle of non-discrimination on the basis of sex.
Chapter 8

Fundamental Rights as Principles: On the Structure and Domain of Constitutional Justice

Mattias Kumm

Associate Professor, Law School, University of New York

Introduction; I. The Theory of Fundamental Rights; A) The distinction between rules and principles; B) Proportionality: The structure of principles as optimization requirements; C) The scope of fundamental rights as principles; a) Negative rights: A general right to liberty and equality; b) Positive rights; II. Fundamental rights as principles: Implications and assessment; A) Fundamental rights and rights-based accounts of justice; B) Fundamental rights and the democratic process; C) Competing accounts of principle and the structure of rights-based justice: Rights as optimization requirements vs. rights as trumps; D) Competing accounts of fundamental rights and the institutional dimension: Rights as optimization requirements vs. rights as shields; III. Conclusion

Introduction

Three features of fundamental rights adjudication distinguish it from ordinary judicial practice and place it at the core of legal and political battles as well as scholarly debate. First, fundamental rights provisions tend to be comparatively indeterminate. Constitutional textual references are likely to include general invocations of liberty, equality, due process, freedom of speech and the like. This makes them more open to judicial interpretation than most statutes,
administrative regulations or ordinances. Second, constitutional provisions generally occupy the highest position in the hierarchy of norms within a domestic legal system. Institutionally this means that courts in the position of the final arbiter of constitutional claims cannot be overruled by means of the ordinary legislative process. Only a constitutional amendment or a new court decision can overrule the decision made by the Court. Third, fundamental rights claims often raise issues that are politically highly controversial and the stakes are high. Making claims based on fundamental rights and litigating them in court can be a viable political strategy for the losers of the political process seeking to turn their loss in the political sphere into a judicially endorsed victory. Taken together these three features of fundamental rights adjudication establish courts as significant political actors in their own right. Given the relative immunization of judges from the electoral political process, attention is justly focused on what exactly it is that judges are and ought to be doing when they set aside legislation to enforce rights on constitutional grounds.

Alexy’s “A Theory of Constitutional Rights” (hereafter: TCR) focuses on just these questions. TCR is characterized by three core features. First, it is firmly grounded within the tradition of political liberalism by implying that the core purpose of the political process is to work out the implications of an ideal of equal liberty. Second, it develops this idea within a structural account of rights. The specific structural account Alexy defends - rights are principles and principles are optimization requirements- is highly original. The few theorists that have made claims relating to the structure of fundamental rights, Fred Schauer and Ronald Dworkin perhaps most prominently endorse competing and, I will argue, less convincing structural accounts. This is Alexy's central contribution. My contribution here will be to point out how such a structural account is compatible with the kind of strong substantive commitments that characterize normative theories of political liberalism. The third idea – central to a positive theory of fundamental rights as guaranteed by the German Basic Law (hereafter Basic Law)- is to connect this account of rights with the actual practice of constitutional courts. The institutional dimension is the most underdeveloped in Alexy's theory. Alexy can afford to say as little as he does about institutions, because the German constitution establishes a strong judiciary and the practice of the Court mirrors, to a significant extent, what the theory prescribes. If TCR aspired to be valid also a prescriptive theory applicable to constitutional democracies generally, rather than a theory that focuses on the reconstruction of an existing practice, more
would need to be said. The final part of this article begins to address some of these issues. For comparative purposes the structural account of rights also provides a useful starting point for the critique and reconstruction of central US constitutional doctrines, such as the three tier analysis in the context of due process or equal protection analysis.

The first part will briefly sketch the core propositions of the theory. The second part will assess its implications for determining the domain of constitutional justice, briefly address challenges related to democratic legitimacy and finally assess its account of fundamental rights in light of two competing accounts. The assessment will be guided by concerns and arguments most likely to confront such a theory in the US constitutional tradition. As such it may provide a test case for assessing whether or not a theory of this kind can make a plausible claim to apply to fundamental rights adjudication in liberal democracies generally.

I. The Theory of Fundamental Rights

The central thesis of Alexy’s book is that the core rights of fundamental rights catalogues are principles and that principles are optimization requirements demanding proportionality analysis on application. This thesis can be broken down into two distinct claims. First, Alexy claims that the distinction between rules and principles is central to the theory of fundamental rights. The second part will examine more closely the claim that principles are optimization requirements requiring proportionality analysis on application and describe how such analysis operates on application. Alexy also

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1 These claims are defended in chapter 3 of TCR. Note that this is a claim about the structure of fundamental rights, not their substance. Alexy is skeptical about the usefulness of any general substantive theory of fundamental rights to guide the practice of constitutional adjudication. Competing general substantive theories of fundamental rights prevalent on the continent include theories according to which fundamental rights exist either to ensure the proper functioning of the democratic process (democratic theories), or the protection of basic civil liberties and the rule of law (liberal theories) or the guarantee of real opportunities and meaningful choices for individuals (social theories). According to Alexy substantive theories of this kind fail to capture the many substantive facets of actual fundamental rights adjudication. Alexy mentions the existence of even more abstract general substantive theories, such as those that claim that fundamental rights are about safeguarding human dignity or equal respect and concern of citizens, that may not suffer from that defect, but then goes on to suggest that a structural theory is the most helpful kind of general fundamental rights theory to illuminate and guide the practice of fundamental rights adjudication. Alexy acknowledges that a fully integrative theory of fundamental rights would include as part of it substantive analysis of specific fundamental rights.
provides a rich and densely argued account of the proper scope of fundamental rights. He makes two strong claims. First, as far as negative rights are concerned, there are good reasons for a constitution to protect a general right to liberty as well as a general right to equality. Second, fundamental rights as principles give rise not only to negative rights against the state, but also certain positive duties of the state.

A) The Distinction between Rules and Principles
Alexy argues that fundamental rights are principles and that principles are fundamentally different from rules. He calls the distinction between rules and principles the “key to the solution of central problems of fundamental rights doctrine” and “a basic pillar in the edifice of fundamental rights theory.” What then distinguishes rules from principles and why is this difference so important? According to Alexy:

“(t)he decisive point in distinguishing rules from principles is that principles are norms which require that something be realized to the greatest extent possible given their legal and factual possibilities. Principles are optimization requirements, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules.

By contrast rules are norms that are always either fulfilled or not. If a rule validly applies, then the requirement is to do exactly what it says, neither more or less. In this way rules contain fixed points in the field of the factually and legally possible. This means that the distinction between rules and principles is a qualitative one and not one of degree. Every norm is either a rule or a principle.”

Alexy provides an expansive and at times technical discussion of these claims. Here it must suffice to make three basic points that help clarify the distinction between rules and principles.

a) First, the distinction between rules and principles according to Alexy is not one of degree, but of kind. Alexy does not take the conventional route of
distinguishing between rules and principles on the basis of criteria such as the
level of generality (principles tend to be general, rules more specific), whether
the norm has been specifically enacted or has evolved over time (rules tend to
be enacted, principles tend not to be canonical in the same way), or a norms
connection to the idea of law or its significance for the legal order as a whole
(principles tend to be of basic significance, rules tend not to be). According to
Alexy these and other suggested criteria are unhelpful to characterize a
distinct norm-type. There is a wide range of dimensions along which norms
differ by degree. Differences along these dimensions can be and tend to be
more or less indiscriminately combined. The distinction between rules and
principles understood in this way does little to illuminate the rich array of
differences between norms.⁵ Note that the argument against distinguishing
between rules and principles on the basis of these conventional criteria has
been used in the Anglo-American literature to question the existence of
principles as a distinct norm-type altogether.⁶ According to Schauer the word
‘principle’ or ‘standard’ is frequently applied to norms that have low
specificity, low canonicity and low weight. But since there is neither logical
identity nor enormous empirical overlap among norms that have low
specificity, low canonicity and low weight it is more helpful to think of
norms varying along many dimensions rather than designating a particular
mix of characteristics a distinct norm-type. But whereas Schauer concludes
that “there is no single norm-type properly designated as a principle”, Alexy
insists that there is.

b) The core distinguishing criteria between rules and principles is that
principles posit what Alexy calls an “ideal-ought”⁹. Rules on the other hand
describe “fixed points in the field of the factually and legally possible”.
Statements of principle are structurally equivalent to statement of value.¹⁰
Statements of value can be reformulated as statements of principle and vice-
versa.¹¹ Saying that something is a value does not yet say anything about the
relative priority of that value over another either abstractly or in a particular
color context. Similarly norms that are principles do not say anything about how

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⁵ TCR, pp. 45-47.
⁷ Ibid, at p. 921.
⁹ TCR, p. 60.
¹⁰ TCR, p. 93.
¹¹ TCR, p. 86.
they relate to competing principles either abstractly or in a particular context.\textsuperscript{12} Statements of principle like statements of value are not yet, as Alexy puts it, “related to the possibilities of the factual and normative world”. They are first order reasons. This what Alexy means when he describes principles as positing an “ideal ought”. Rules on the other hand are norms that express judgments on the way values, interest and principles play out once they engage the world. Rules can be derived from balancing the relevant competing concerns. They reflect judgments on how all the relevant factors play out in the circumstances defined by the conditions of the rule. This is what Alexy means when he says that rules contain fixed points in the field of the factually and legally possible.

c) The difference between principles and rules has consequences for the way they operate in legal reasoning. Rules and principles provide different types of reasons.\textsuperscript{13} First, Alexy takes issue with Dworkin that rules are conclusive reasons whereas principles are reasons pointing in a certain direction but do not require a particular decision.\textsuperscript{14} Alexy disagrees that rules provide conclusive reasons, though he does believe that Dworkin is on to something important. Much like Schauer he claims that an exception can be incorporated into a rule on the occasion of a particular case, without it being possible to conclusively enumerate those occasions in advance. In this sense both rules and principles only apply \textit{prima facie}. The real difference between rules and principles relating to their operation in legal reasoning lies in the \textit{different prima facie character} of rules and principles.\textsuperscript{15} This difference again is one of kind, and not just of degree. A principle is trumped whenever some competing principle has greater weight in the case to be decided. The weight of principles in specific cases is determined by the background justification for that principle as it applies to the context at hand. Principles then are first order reasons. A rule on the other hand is not necessarily set aside just because its background justification does not hold up in the context of a particular case. The setting aside of rules raises a host of issues that do not arise in the case of principles. These issues are all related to the fact that the institution that has legislated has already made a judgment on how the

\textsuperscript{12} Principles and values are only distinguished by their respective deontological and axiological character.


\textsuperscript{15} TCR, p. 38.
relevant background principles apply to the regulatory context specified by the rule. This is why according to Alexy formal principles relating to such things as the authority of the rule-maker, regulatory efficiency and predictability concerns may give the rule greater weight than the substantive background principles that support the rule.\textsuperscript{16} The existence of a rule provides additional reasons for doing as the rule requires. In this way rules are second order reasons. Only when formal considerations have no weight whatsoever, would rules have the same prima facie character as principles.

B) The Proportionality Test: Principles as Optimization Requirements

According to Alexy, principles are optimization requirements. They require that something be realized to the greatest extent possible given their legal and factual possibilities. In order to assess what principles require in particular circumstances a proportionality test needs to be applied.\textsuperscript{17} The proportionality test provides an analytical structure for assessing whether limits imposed on the realization of a principle in a particular context are justified. Whereas the language of proportionality, necessity and balancing abounds in constitutional adjudication across jurisdictions, the specific structure of the proportionality test is not always clear.\textsuperscript{18} According to Alexy, the proportionality test has four prongs. Two prongs - suitability and necessity - focus on empirical concerns. They express the requirement that principles be realized to the greatest possible extent relative to what is factually possible. The other two - legitimate ends and balancing – are normative and express the requirement that principles be realized to the greatest extent possible given countervailing normative concerns.

An example - drawn from the European Court of Human Rights (hereafter: ECHR) illustrates how proportionality analysis operates in the adjudication of rights claims.

\textsuperscript{16} One important issue in this respect is under which circumstances formal principles may require that, except in extreme cases, the decision-maker charged with applying the rule should not assess the comprehensive balance of reasons at all. For a discussion of these issues including a comprehensive discussion of the function of rules generally, see Schauer, \textit{supra}, fn 6 (1991).

\textsuperscript{17} TCR, p. 66. See also the discussion of structural discretion at pp. 394-414.

In *Lustig-Prean and Beckett v. United Kingdom* the applicants complained that the investigations into their homosexuality and their discharge from the Royal Navy on the sole ground that they are homosexual violated Art. 8 of the European Convention of Human Rights (hereafter, ECHR). Art. 8, in so far as is relevant, reads as follows:

> Everyone has the right to respect for his private…life…
> There shall be no interference by a public authority with the exercise of this rights except such as is in accordance with the law and is necessary in a democratic society…in the interest of national security,…for the prevention of disorder

Since the government had accepted that there had been interferences with the applicants’ right to respect for their private life – in Alexy’s parlance: a violation of a *prima facie right* had occurred - the only question was whether the interferences were justified or whether the interference amounted to not merely a prima facie, but – as Alexy would put it - a *definitive* violation of the right. The actions of the government were in compliance with domestic statutes and applicable European Community Law and thus fulfilled the requirement of having been ‘in accordance with the law’. The question was whether the law authorizing the government’s actions qualified as ‘necessary in a democratic society’. The Court has essentially interpreted that requirement as stipulating a proportionality test. The following is a reconstructed and summarized account of the court’s reasoning.

The first question the Court addressed concerns the existence of a *legitimate aim*. This prong is easy to satisfy in cases where the constitutional provision does not specifically restrict the kind of aims that count as legitimate for justifying an interference with a specific right. In this case the constitutional provision limits the kind of aims that count as legitimate for the purpose of justifying an infringement of privacy. Here the UK offered the maintenance of morale, fighting power and operational effectiveness of the armed forces – a purpose clearly related to national security – as its justification to prohibit homosexuals from serving in its armed forces.

The next question is, whether disallowing gays from serving in the armed forces is a *suitable means to further the legitimate policy goal*. This is an empirical question. A means is suitable, if it actually furthers the declared policy goal of the government. In this case a government commissioned study had shown

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that there would be integration problems posed to the military system if declared gays were to serve in the army. Even though the Court remained sceptical with regard to the severity of these problems, it accepted that there would be some integration problems if homosexuals were allowed to serve in the armed forces. Given this state of affairs there was no question that, as an empirical matter, these problems are significantly mitigated if not completely eliminated by excluding homosexuals from the ranks of the armed forces.

A more difficult question was whether the prohibition of homosexuals serving in the armed forces is necessary. A *measure is necessary only if there is no less restrictive but equally effective measure available to achieve the intended policy goal*. This test incorporates but goes beyond the requirement known to U.S. constitutional lawyers that a measure has to be narrowly tailored towards achieving the respective policy goals. The ‘necessary’ requirement incorporates the ‘narrowly tailored’ requirement, because any measure that falls short of the ‘narrowly tailored’ test also falls short of the necessity requirement. It goes beyond the ‘narrowly tailored’ requirement, because it allows the consideration of alternative means, rather than just insisting on tightening up and limiting the chosen means to address the problem. In this case the issue was whether a code of conduct backed by disciplinary measures, certainly a less intrusive measure, could be regarded as equally effective. Ultimately the Court held that even though a code of conduct backed by disciplinary measures would go quite some way to address problems of integration, the government had plausible reasons to believe that it does not go so far as to qualify as an equally effective alternative to the blanket prohibition.

Finally the court had to assess whether the measure was proportional in the narrow sense, applying the so-called balancing test. The balancing test involves applying what Alexy calls the ‘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.”

To further guide the exercise of balancing Alexy suggests a three-level scale distinguishing between serious, moderate and relatively minor infringements on the one hand and very important, moderately important and relatively unimportant gains on the

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20 TCR, p. 102. Alexy illustrates the Law of Balancing using indifference curves, a device used by economists as a means of representing a relation of substitution between interests. Such a device is useful to illustrate the analogy between the Law of Balancing and the law of diminishing marginal utility.
This framework is used to suggest that there are clear cases that illustrate how balancing as a rationally guided exercise is possible. When the infringement is serious and the gains are relatively minor, a measure is clearly disproportionate. Alexy dismisses blanket claims regarding the lack of rational standards and incommensurability as exaggerated. At the same time the three-level scale suggests that there are many cases – when the competing concerns are roughly of equal weight – in which there is a stalemate and the result of balancing will not be to prescribe one right answer. In these cases the decision-maker enjoys what Alexy calls structural discretion. Alexy realizes that the degree of structural discretion thus defined depends on the refinement of the scales. Structural discretion is significant within the three-level model. But why not refine the scales infinitely, thereby infinitely decreasing the degree of structural discretion? Alexy responds by pointing to the limits of ordinary language. Even, say, a nine-step scale would lead to incomprehensible classifications. Classifications of importance or intensity of infringements using labels such as ‘seriously slightly moderate’, for example, would make little sense.

The decisive question in the case of the gay soldiers discharged from the British armed forces is whether on balance the increase in the morale, fighting force and operational effectiveness achieved by prohibiting homosexuals from serving in the armed forces justifies the degree of interference in the applicant’s privacy or whether it is disproportionate. On the one hand the court invoked the seriousness of the infringement of the soldiers’ privacy, given that sexual orientation concerns the most intimate aspect of the individual’s private life. On the other hand the degree of disruption to the armed forces without such policies was predicted to be relatively minor. The Court pointed to the experiences in other European armies that had recently opened the armed forces to homosexuals, the successful cooperation of the UK army with allied NATO units which included gays, the availability of codes of conduct and disciplinary measures to prevent inappropriate conduct, as well as the experience with the

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21 TCR, pp. 401-414.
22 This argument against the possibility of a significantly greater refinement of scales - guaranteeing a meaningful domain of structural discretion - is not persuasive. It does not follow from the fact that ordinary language is unable to make a more finely grained distinction, that there are no more finely grained distinctions to be made. In particular the possibility and desirability to replace ordinary language using cardinal scales to numerically express intensities of realization would need further exploration. (Alexy discusses some related issues when he criticizes the idea of a ranked order of values at pp. 96-100.)
successful admission of women and racial minorities into the armed forces causing only modest disruptions. On balance the UK measures were held to be sufficiently disproportionate to fall outside the government's margin of appreciation and held the United Kingdom to have violated Art. 8 ECHR.

The example illustrates two characteristic features of rights reasoning under Alexy’s conception of rights (hereafter: ‘rights as principles’) and practiced by the German Federal Constitutional Court (hereafter, FCC) and the ECHR. First, a rights-holder does not have very much in virtue of his having a right. More specifically, the fact that a rights holder has a prima facie right does not imply that he holds a position that gives him any kind of priority over countervailing considerations of policy. An infringement of the scope of a right merely serves as a trigger to initiate an assessment of whether the infringement is justified. But the fact that rights are not trumps in this sense does not mean that they provide no effective protection. The example demonstrates that in practice, even without such priority, rights can be formidable weapons. The second characteristic feature of rights reasoning is the flip side of the first. Since comparatively little is decided by acknowledging that a measure infringes a right, the focus of rights adjudication is generally on the reasons that justify the infringement. Furthermore, the four-prong structure of proportionality analysis provides little more than a structure which functions as a checklist for the individually necessary and collectively sufficient conditions that determine whether the reasons that can be marshalled to justify an infringement of a right are good reasons under the circumstances. Assessing the justification for rights infringements is, at least in the many cases where the constitution provides no specific further guidance, largely an exercise of general practical reasoning without many of the constraining features that otherwise characterizes legal reasoning. Rights reasoning under this model, then, shares important structural features with rational policy assessment.23

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23 That does not mean that the two are identical. There are at least four differences between substantive rights analysis and general policy assessments. First, courts are not faced with generating and evaluating competing policy proposals, but merely to assess whether the choices made by other institutional actors is justified. Second, they only assess the merit of these policy decisions in so far they affect the scope of a right. Third, specific constitutional rules concerning limits to fundamental rights or judicial precedence establishing rules that fix conditional relations of preference frequently exist. Fourth, proportionality analysis leaves space for deference to be accorded to other institutional actors. The ECHR refers to this as the ‘margin of appreciation’.
C) The Scope of Fundamental Rights
Having established the basic distinction between rules and principles and the basic structure of fundamental rights as optimization requirements, a further set of questions Alexy addresses is the scope of fundamental rights. Is there a general right to liberty or a general right to equality? Are fundamental rights only negative rights of citizens against the state, or are there fundamental rights that provide entitlements against the state and if so, what do they consist in? Do fundamental rights have horizontal effect?

a) The Scope of Negative Rights: A General Right to Liberty and a General Right to Equality
The German constitution as interpreted by the FCC not only guarantees rights to specific liberties, such as freedom of expression and freedom of religion, along with rights against certain forms of discrimination, such as that on grounds of sex or race. It also grants a general right to liberty and a general right to equality. This has radical implications for the understanding of fundamental rights and the role of constitutional courts in reviewing acts of public authorities. Every act of legislation that restricts an individual from doing what she pleases as well as any legislative classification requires constitutional justification of the sort described above. The domain of constitutional justice and, institutionally, the domain of judicial control of public authorities, are thus radically expanded. In the following I will briefly describe the choices the FCC has made focusing on the general right to liberty.24

Art. 2 Sect. 1 of the Basic Law states that:

“Every person has the right to the free development of their personality, to the extent that they do not infringe on the rights of others or offend against the constitutional order or public morals.”

Compare this to the text of the 5th and 14th Amendment of the U.S. Constitution which in the relevant passage states:

“No person…shall be deprived of liberty…without due process of law.”

24 TCR, Chapter 7, pp. 223-259. Alexy deals with a general right to equality in Chapter 8, pp. 260-287.
When confronted with texts of this kind two questions present themselves. The first focuses on the scope of the right. How narrowly or how broadly should it be conceived? What is meant by the free development of personality? What is meant by liberty? The second focuses on the broad or narrow understanding of the constitutional limitations of such a right. The texts mention ‘the rights of others, offences against the constitutional order or public morals’ and ‘due process of law’ respectively. What does this mean for the purposes of articulating a judicially administrable test for acts by public authorities that is subject to constitutional litigation?

In constitutional practice there are two competing approaches to choices of this kind. The first is to define both the scope of the right and the limitations narrowly. This is generally the approach taken by the U.S. Supreme Court (hereafter, Supreme Court). The Supreme Court insists that only particularly qualified liberty interests, liberty interests that are deemed to be sufficiently fundamental, enjoy meaningful protection under the Due Process Clause. When an interest is deemed to be sufficiently fundamental, the limitations that apply are narrow too. They are narrow in the sense that the requirements that must be fulfilled to infringe a protected interest are demanding. Only “compelling interests” are sufficient to justify infringements of the right. The “compelling interest” test loads the dice in favor of the protected right and raises the bar for justifying infringements when compared to the requirements of proportionality. A measure may be proportional, but not meet the “compelling interest” test.25

The FCC has taken a different approach. First, the court was quick to dismiss narrow conceptions of the “free development of personality” that limited the scope of the right to “expressions of true human nature as understood in western culture” as was suggested by influential commentaries.26 Instead the FCC opted for an interpretation that the right guaranteeing the free development of the personality should be read as guaranteeing general freedom of action understood as the right to do or not to do as one pleases.27 This means that the scope of a general right to liberty encompasses such mundane things as the prima facie right to ride horses in

25 This approach will be described more closely in Part III and referred to as ‘rights as shields’.
26 For further references see TCR, p. 224 fn.5.
27 BVerfGE 6, 32 (Elfes). [BVerfGE refers to the official collection of judgments of the Federal Constitutional Court. The first number refers to the Volume, the second to the page number on which the judgment begins. A further bracketed number refers to the exact page of a particular quotation. Bracketed names refer to names used to refer to cases, typically invoking either the name of the complainant or the core subject matter of the dispute].
If public authorities prohibit such actions they would infringe the general right to liberty. As a corollary to the wide scope of the right, the court has opted for a broad interpretation of the limits of the right. Any infringement of the right is justified if it follows appropriate legal procedures and is not disproportionate.

The triad of requirements stipulated by Art. 2 Sect. 1 (rights of others, constitutional order, public morals) in the jurisprudence of the court translate into the requirements of legality and proportionality. Here again it is important to point out that even though the substantive limit of proportionality is broad, it does have bite. It is not adequately compared to the analysis - or lack of it - that generally characterizes the application of the “rational basis” test in cases involving liberty interests that are not deemed fundamental by the Supreme Court. 30

Alexy strongly supports both the courts general approach to broadly interpret the scope and limitations of rights and the specific idea of a general right to liberty. Against the historical argument that fundamental rights are narrowly tailored responses to specific historical situations he invokes art. 4 of the Déclaration des droits de l’homme et du citoyen of 1789 stating that “liberty is the power to do anything which does not harm another” as well as Kant’s maxim that “freedom...insofar as it can coexist with the freedom of every other in accordance with a universal law is the only original right belonging to every man by virtue of his humanity.” 31 He challenges the moral argument that negative liberty is of no value, citing Isaiah Berlin’s dictum that “to be free to choose, and not to be chosen for, is an inalienable ingredient in what makes human beings human.” 32 Even treating prohibitions on murder and rape as infringing on the right to liberty presents no problems, because these infringements are easily justified. According to Alexy, the advantage of the expansive approach to scope and limitations of fundamental rights generally is that it opens up constitutional courts as a forum of principled justification. Where the issue is one of delimiting the respective spheres of liberty between equally ranked legal persons a constitutional requirement on public authorities to act only on good reasons has its rightful place.

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28 BVerfGE 39, 1, BVerfGE 88, 203.
29 BVerfGE 54, 143 (147).
31 TCR, p. 244 with references.
32 TCR, p. 235 with references.
b) The Scope of Positive Rights

The discussion so far has focused on fundamental rights in their classic liberal understanding as defensive rights against the state. An important question is whether and to what extent fundamental rights also establish rights to positive state action. In terms of text and legislative history the Basic Law is primarily oriented towards defensive rights. Except for the right of mothers to the protection and support of society, the text of the Constitution does not contain references to any entitlements. There is a reference to the duty of all state power to protect human dignity, as well as a clause postulating that the Federal Republic of Germany is a social state, but that is the extent of it. Yet there is a rich jurisprudence on various entitlements ranging from duties of the state to protect the individual from third parties, entitlements concerning the provision of certain procedures and organizations as well as social rights. How is that possible?

The key lies in an early judgment of the court concerning a private law dispute between individuals. In Lueth the central issue was whether fundamental rights merely apply as defensive rights against the state or whether they also have horizontal effect and apply to the relationship between individuals. In that judgment the court held for the first time what would become a standard mantra, namely that:

“fundamental rights are not just defensive rights of the individual against the state, but embody an objective order of values, which applies to all areas of the law ... and which provides guidelines and impulses for the legislature, administration and judiciary.”

Fundamental rights norms “radiate” into all areas of the legal system. Freedom of expression, for example, is not just a right of an individual against the state, but a value or, as Alexy would say, a principle that gives impulses and provides guidelines to all areas of the law to which it is relevant. As such it has implications for such questions as whether an individual can recover civil damages against another for having been subjected to derogatory

33 TCR, Chapter 9.
34 Art. 6 Sect. 4 of the Basic Law.
35 Art. 1 of the Basic Law.
36 Art. 20 Sect. 1 of the Basic Law.
37 BVerfGE 7, 198 (Lueth).
38 For Alexy’s discussion of horizontal effect, see TCR, pp. 351-365.
39 BVerfGE 39, 1 (41).
remarks and other private law norms. The idea that constitutional principles radiate to affect the rights and duties of all actors within the jurisdiction is the basis not just for an expansion of the court’s rights jurisprudence to private law cases. It is also the basis for establishing individual rights to positive actions by the state.

As far as the scope of fundamental rights is concerned, the consequences of the “radiation thesis” have been enormous. First, the court insisted that fundamental rights required the institutionalization of certain procedures and forms of organization. These ranged from specific court and administrative procedures to complex statutory intervention to secure freedom of broadcasting and establish a television broadcasting system that is free from state control and pluralistic. Second, the door was opened to claims that the state is required to take specific action to protect individuals adequately from acts of third parties. Cases the court has had to address range from claims that the state is required to tighten up the standards of nuclear reactor safety to adequately protect the rights holder from dangers of a nuclear power plant to claims that the state is under a constitutional duty to comply with terrorist kidnappers demands and free certain prisoners in order to protect the life of the kidnapped victim threatened by the terrorist kidnappers. But the best-known and most consequential case concerning protective rights involves the issue of abortion. Under the Basic Law the issue did not come to the court as a challenge to criminal sanctions by a woman invoking a right to choose. Instead the minority faction brought the case after the parliamentary majority enacted a law that decriminalized certain kinds of abortions. The partly successful claim made by the minority faction was that the state was under a constitutional duty to criminalize abortion to a greater extent in order to effectively protect the right to life of the unborn. Finally the radiation thesis also provided the grounds for the development of a jurisprudence concerning social rights. According to Alexy there are good grounds for recognizing a definitive right to basic accommodation, school education, training for a job and basic level of healthcare. These rights are all

40 BVerfGE 86, 1.
41 TCR, pp. 300-314.
42 BVerfGE 30, 59 and BVerfGE 49, 89.
43 BVerfGE 46, 160.
44 BVerfGE.
45 TCR, pp. 334-348.
46 TCR, p. 344.
linked to help sustain the necessary preconditions for the meaningful realization of liberties. The court has in fact recognized a right to minimal subsistence. It has even come close to recognizing the right to choose a profession as a basis for the duty of the state to create a sufficient number of university spaces at universities for anyone qualified to study her subject of choice.\footnote{TCR, p. 292.}

According to Alexy, many of the arguments against positive rights generally are misguided.\footnote{For a similar conclusion see also Frank I. Michelman, ‘The constitution, social rights and liberal political justification’, 1 (2003) International Journal of Constitutional Law, pp. 13-34.} It is true that judicial enforcement of such rights would limit the choices of the parliamentary legislator. It is also true that such rights have costs and budgetary implications. But these are features that positive rights share with negative rights and as such not good arguments for insisting on an asymmetry between negative and positive rights. There is a feature of positive rights, however, that explains and justifies the more limited role that courts play in this domain. Positive rights and negative rights differ structurally in a way that suggests a greater degree of discretion in favor of the primary decision-maker. As Alexy explains with regard to protective rights:

“When there is a prohibition on destroying or adversely affecting something, then every act which represents or brings about destruction or an adverse effect is prohibited. The prohibition of killing implies, at least prima facie, the prohibition of every act of killing. By contrast, if there is a command to protect or support something then not every act that represents or brings about protection or support is required. If it is possible to save a drowning man by swimming to him, or by throwing him a life ring or by sending out a boat, then in no way are all three acts simultaneously required. … [T]his means that the addressee of the command to rescue the drowning man has discretion as to which method he will choose to satisfy the command.”\footnote{TCR, p. 308.}

The judicial enforcement of positive rights is limited by the greater discretion to be accorded to the political branches in determining the specific act that is to be performed.
II. Fundamental Rights as Principles: Implications and Assessment

Seen as a whole the jurisprudence of the FCC interpreting the Basic Law adopts a remarkably expansive model of fundamental rights. Alexy presents this model in three steps. He first determines that fundamental rights are principles that establish an ‘ideal ought’ requiring proportionality analysis on application (rights as principles). He supportively discusses the jurisprudence of the FCC according to which fundamental rights include a general right to liberty and equality. Finally he suggests that fundamental rights as principles are not just negative rights against the state but also positive rights. In what follows the comprehensive model encompassing all three claims will be referred to as ‘the rights model of TCR’ or simply ‘TCR’.

The assessment of TCR will proceed in four steps. In the first the implications of this model for the relationship between fundamental rights and political justice will be established. Second, the relationship between fundamental rights and the democratic process posited by the model will be scrutinized. Then the model of rights as principles will be assessed in light of two competing models of fundamental rights. According to the first rights are principles, but principles are not optimization requirements demanding the application of the proportionality test. Instead they are trumps of a special kind (rights as trumps). The second competing model suggests that fundamental rights are better conceived as exhibiting a rule-like structure and not as principles (rights as shields).

A) Fundamental Rights and Political Justice

The radical nature of TCR becomes apparent when comparing the domain of constitutional justice as defined by this model with the domain of political justice generally. The domain of constitutional justice is conventionally construed as a reasonably limited part of the significantly larger domain of political justice. In the Anglo-American world, at least, fundamental rights are conventionally thought to define only specific and limited guarantees which, for a variety of reasons, including but not limited to guaranteeing basic precepts of political justice, function as gag-rules to constrain and enable the political process to determine what justice more broadly understood
that the domain of constitutional justice is prima facie coextensive with the domain of political justice means that the truth of rights claims made in the name of political justice and the truth of rights claims made in the name of positive fundamental rights must be assessed in light of the same reasons. If a member of a political community makes a claim that she has a right to \( \Phi \) as a matter of fundamental right, the reasons in virtue of which the claim is true or false are prima facie identical to the reasons that would either confirm or deny the existence of a right to \( \Phi \) as a matter of political justice. This could be called “the identity thesis.” Alexy does not himself specifically embrace this thesis. This is not the place to argue that the model he proposes commits him to the identity thesis in any depth. Here it must suffice to point out why such a claim is at least plausible.

According to the model Alexy describes liberty and equality are constitutional principles that establish an ‘ideal ought’. Put in a less technical way fundamental rights require the appropriate interpretation of the ideas of liberty and equality in a democratic society. Yet coming up with such an interpretation is exactly what political philosophers working out a rights-based liberal conception of political justice - from Kant to Rawls and Habermas - have tried to do. Liberty and equality are widely believed to be the constructive foundations of a liberal conception of political justice.

All this may support the claim that there is a strong affinity between the model of fundamental rights that Alexy suggests and modern liberal ideas of political justice. But does it not also suggest that a conception of fundamental rights that makes the institutionalization of political justice a matter of fundamental right is audacious enough to border on the preposterous? Wouldn’t such a conception inaugurate judges as philosopher kings, more so...

then even Dworkin’s account of the Herculean task of judging suggests\textsuperscript{51} (there seem to be no constraints related to to “integrity” under Alexy’s model)? Wouldn’t such a conception in effect abolish democracy in favor of a government of judges?

To begin with the claim that under TCR requirements of fundamental rights are identical to requirements of political justice needs to be qualified in one important respect. Perfect identity between the requirements of fundamental rights and the requirements of political justice exists only if constitutional reasoning consisted exclusively in the application of principles and not of rules. This is because the existence of rules changes the reasons applicable to the circumstances defined by the rule. Once rules come into the picture formal considerations relating to the authority of the rule-giver, predictability and reliance interests etc. come into play. Such formal considerations may have sufficient weight to be outcome determinative. In such cases there is a discrepancy between what constitutional justice and political justice respectively require. Alexy rightly emphasizes that constitutional reasoning exhibits a mixed normative structure, consisting not only of the application of principles, but also of the application of rules.\textsuperscript{52} This is why the identity thesis establishes only a prima facie identity between the reasons that establish a claim as a matter of political justice and the reasons that establish a claim as a matter of fundamental right. Yet, at least as far as German constitutional practice is concerned, the following illustrates why this does little to undermine the strength of the original identity claim.

The most important rules relevant to constitutional adjudication in Germany\textsuperscript{53} are rules created by the constitutional power. Assume the German Parliament enacted a law requiring the death penalty to be applied to persons duly convicted for terrorist acts involving weapons of mass destruction. Assume further that a duly convicted terrorist ultimately filed a constitutional complaint claiming that his right to life is constitutionally violated. If the issue were to be resolved by assessing the legislation applying a proportionality test,


\textsuperscript{52} TCR, p. 80.

\textsuperscript{53} Other constitutional rules are precedents. Contrary to doctrines of constitutional precedent in the U.S. (the leading case is \textit{Planned Parenthood v. Casey} 505 U.S. 833 (1992)) in Germany these rules are not treated as having weight of their own. They are subject to revision whenever shown to be mistaken in light of substantive principles. Alexy plausibly and in accordance with constitutional practice argues that precedent has the function to establish which side bears the burden of argumentation and nothing more (cf. TCR, p. 375). Rules of precedent do not provide reasons to depart from the outcomes a pure model of substantive principles would prescribe.
this would not be an easy case. There would be space for reasonable
disagreement even in a legal culture that is generally committed not to
eexecute criminals about whether, all things considered, there are good
grounds for executing terrorists guilty of some of the worst imaginable
atrocities. But the Basic Law specifically prohibits the death penalty.\(^{54}\) The
existence of such a rule could be thought to influence the reasons applicable
to adjudicating the rights-claim of the terrorist in two ways. On the one hand
the constitutional enactment could be taken to settle the issue conclusively,
supplanting all considerations that would otherwise apply.\(^{55}\) Alternatively -
and that seems to be an interpretation more closely aligned to Alexy’s
account of how rules operate - the rule too would have prima facie character.
The rule’s specific weight would be determined by both the substantive
reasons that support it, supplemented by the formal reasons relating to the
authority of the constitutional power that provide it further support. Such a
rule would be susceptible to override by sufficiently weighty substantive
principles as assessed by the constitutional court. If the court held the
considerations in support of the death penalty to be important enough, it
could hold that the rule did not apply to such a case. But whatever model of
constitutional rules is more convincing under neither models would the the
reasons applicable to establishing (positive) constitutional justice be identical
to those applicable to establishing substantive political justice. Instead
constitutional justice as mediated by constitutional rules can lead to under- or
overprotection of fundamental rights compared to what political justice
requires, depending on the content of the specific constitutional rules. The
requirement of constitutional justice would no longer simply mirror the
requirement of political justice and the identity thesis would be undermined.
In Germany, however, the Court has tended to interpret whatever rule-like
language the constitutional power has used in the description of the
constitutional limits to fundamental rights to be compatible with the
substantive principled analysis and the proportionality analysis it requires.\(^{56}\) In

\(^{54}\) Art. 102 of the Basic Law.

\(^{55}\) Rules that operate in this way are what Raz calls exclusionary reasons; see Joseph Raz,

\(^{56}\) See Matthias Jestaedt, ‘Verfassungsgerichtspositivismus. Die Ohnmacht des
Verfassungsgesetzgebers im verfassungsgerichtlichen Jurisdiktionsstaat’ in Otto Depenheuer,
Markus Heintzen, Matthias Jestaedt and Peter Axer (eds), \textit{Nomos und Ethos}, Berlin: Duncker
this respect the qualification is one that affects the original claim only marginally.

B) Fundamental Rights and the Democratic Process
But if the conception of fundamental rights championed by Alexy comes at least close to requiring the establishment of political justice, what is the space such a conception leaves for the disagreements and give and take characteristic of a vibrant democratic process? If fundamental rights require the establishment of political justice and constitutional courts are required to enforce fundamental rights, what are the responsibilities of the democratic process? Is the task of the legislature not reduced to making suggestions as to what political justice requires subject to override or ultimate confirmation by the constitutional court?

Alexy insists that nothing in his account suggests that courts replace the democratic legislature as the primary locus of political decision-making. His argument has two prongs.

First, he insists that there is a gap between what is constitutionally required and what is judicially enforced. The domain of judicially enforced constitutional justice is not coextensive with the domain of constitutional justice. This gap is due to the weight of formal principles that justify attributing epistemic discretion to decisions made by the democratic legislature in the face of disagreement over factual and normative claims. The FCC has worked out a reasonably differentiated set of considerations that determine the degree of discretion appropriately accorded to the legislature in different kinds of cases. Alexy himself develops a formal model of epistemic discretion. A central part of this model is what he calls the ‘Epistemic Law of Balancing’ that reads as follows: “The more intense an interference in a fundamental right, the greater must be the certainty of the underlying premise”. This provides some guidance, but not much. If a model of fundamental rights requires the establishment of

and Humblot, 2002. He suggests that the actions of the constitutional power are largely irrelevant for the adjudication of rights.

57 TCR, pp. 414-425.
58 See for example BVerfGE 50, 290 (333) (Co-Determination).
59 TCR, p. 419. It is not clear why the required degree of certainty of the underlying premise is only a function of the intensity of the interference and not also of the importance of the countervailing concern. Surely the following also holds true: The greater the importance of the countervailing concern, the lesser the degree of required certainty. Both the level of
political justice as a matter of right, a great deal turns on exactly how wide or narrow the domain of legislative discretion will be. Yet Alexy does not go on to provide an account of the degree of discretion that should be accorded to the legislature in different contexts based on an empirically grounded account of comparative institutional advantage.\textsuperscript{60} It would nonetheless be unfair to criticize the theory in this respect. Alexy self-consciously sets out to provide only a general \textit{structural} theory, not a fully integrative theory of fundamental rights.\textsuperscript{61} A fully integrated theory would have to include as part of it not only more substantive theories of rights but also a rich institutional account that connects the idea of comparative institutional advantage to the design of specific doctrines that establish the appropriate levels of judicial scrutiny.

Second, Alexy suggests that there are many political questions related to fundamental rights in which there is more than just one right answer. Where that is the case the political branches enjoy what Alexy calls \textit{structural discretion}. TCR, as comprehensive as it may be, does not make the constitution a kind of juridical genome\textsuperscript{62} that provides the normative program for any political decision to be made. In many cases neither constitutional justice nor political justice imposes any requirement on the political branches to decide a particular political question one way or another. The domain of structural discretion is the domain in which reasons are inconclusive. Taken together, epistemic and structural discretion assure ample space for a vibrant democratic politics and reasonable disagreement.

Alexy’s construction of the relationship of judicially enforced fundamental rights and the democratic process is ultimately guided by the idea of realizing substantive justice as defined by the model of fundamental rights as principles. The question is not so much what justifies the “counter-majoritarian” imposition of outcomes by non-elected judges.\textsuperscript{63} The question becomes what justifies the authority of a legislative decision, when it can be established with sufficient certainty by way of principled reasoning that the decision clearly falls short of what constitutional justice requires. Constructively, like Kantian


\textsuperscript{61} TCR, pp. 13-19.

\textsuperscript{62} See TCR, pp. 389-414 for a discussion of the idea of structural discretion.

\textsuperscript{63} For an account of the “counter-majoritarian difficulty” as an academic obsession see Barry Friedman, “The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship”, 95 (2001) \textit{Northwestern University Law Review}, pp. 933-954.
political philosophy, the argument in TCR proceeds from the idea of institutionalizing a system of rights. In the American tradition, on the other hand, constitutional theory and tends to proceed from the idea of structuring an adequate democratic process. 

There are many reasons for these differences in sensibilities. No doubt the historical background is a key factor. The widespread and enthusiastic popular support for oppressive regimes in much of Western Europe in the 20th century has undermined any naive faith in political majorities, whereas the experience with judicial review in particular in the *Lochner* era has undermined any naive faith in the judicial enforcement of rights in the U.S. Furthermore there are important differences in constitutional text and the institutional structure of courts charged with constitutional adjudication. The chapter on basic fundamental rights is the first chapter of the Basic Law, whereas in the U.S. Constitution the political process is featured front and center, with the Bill of Rights as a set of contested amendments to the constitution. Furthermore, the position of the constitutional court and its role in adjudication is explicitly anchored in Continental European constitutional texts enacted after the World War II. Constitutional courts in the Kelsenian tradition such as the FCC have no other function but to adjudicate constitutional claims and have an explicit monopoly to set aside legislation on constitutional grounds. In the U.S there is no comparable explicit commitment to the Supreme Court or any other federal court as an institutional charged with reviewing legislation on constitutional grounds, leaving it open to debate whether C.J. Marshall in the renowned case of *Marbury v. Madison* established judicial review.

C) Competing Accounts of Principle and the Structure of Rights-based Justice: Rights as Optimization Requirements vs. Rights as Trumps

But even if fundamental rights are principles and incorporate basic requirements of liberal political morality into positive law, the question arises whether liberal political morality exhibits an optimization structure of the sort that Alexy’s linkage between principles and proportionality analysis suggests. Here there seems to be cause for serious doubt. Liberal political rights are widely perceived as having special weight when competing with policy goals.

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The idea is expressed, for example, by Ronald Dworkin’s conception of rights as trumps and the corollary distinction between principles and policies or by what Rawls calls the ‘priority of the right over the good’ or by Habermas’ description of rights as fire-walls. Ultimately these ideas can be traced back to a theory perhaps most fully developed by Immanuel Kant, grounded in the twin ideas of dignity and autonomy as side constraints to the collective imposition of ‘the good’. Yet nothing in Alexy’s account of principles prioritizes rights. Principles are norms that can prescribe the optimal realization not only of individual rights, but also of collective goods. Both rights and collective goods are fair game as the subject matter of principles. Moreover rights and policies compete on the same plane. The question is whether a conception of fundamental rights that does not capture this priority of rights over collective goods is deficient.

The following argument suggests it is not. It has two parts. First, the optimization structure that Alexy proposes is not deficient as a structural account of rights, but merely incomplete. Second, there is no morally plausible alternative account of the structure of a rights-based conception of justice available.

a) Principles as Optimisation Requirements and the Priority of Rights over Collective Goods

The optimization structure that Alexy proposes is incomplete compared to a fully integrative account of fundamental rights in that it does not provide a Theory of Constitutional Rights that articulates the substantive content of a conception of liberal political justice. As a structural account it does, however, provide the resources to adequately express the range of substantive commitments that characterizes liberal political justice. Important moral

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Notes:


69 One argument, of course, would be to defend TCR by arguing that core ideas of liberal political morality endorsed by such thinkers as Dworkin, Rawls or Habermas are confused and some version of a utilitarian account is correct instead. The following proceeds on the assumption that there is a defensible substantive account of the core Kantian ideas.
claims linked to the priority of rights can be restated within the model of principles as optimization requirements.

There are two distinct ideas that underlie the “priority of rights” thesis. The first concerns the relationship between justice and perfectionist ideals. Here the basic liberal idea is that rights protect the individual from strong paternalist impositions relating to how they should live their lives, in particular with regard to dominant religious practices. This idea captures well the idea of the priority of the right over the good. One interpretation of this claim is that in this respect rights provide categorical protection and are not subject to balancing. Whether or not the claims of a certain religious tradition are in fact true or not simply does not matter as a matter of political justice. Similarly in the domain of free speech the fact that a speech act is critical of the government or mistaken as far as its substantive content is concerned widely believed not to count as a reason to limit free speech at all. Being critical of the government or substantively wrong is simply not a consideration relevant to justifying restrictions of speech.70 Assuming these propositions are correct, can they be given adequate expression within the framework of rights as optimization requirements?

The way to operationalize constitutionally categorical commitments of this kind is to exclude certain reasons from the class of reasons that justify infringements of liberty interests.71 Within proportionality analysis such an exclusion of reasons operates on two levels. First, if the very purpose of the particular measure (say the introduction of school prayers) is to further specific religious practices, such a purpose would qualify as an illegitimate end under the first prong of the proportionality test. If the purpose of prohibiting a speech act is to ensure that certain political views are excluded from the debate because they are mistaken content-wise, it too pursues an illegitimate

70 Note that it may be disputed as a matter of substantive political justice whether or not a particular moral consideration is best understood to be subject to an exclusionary rule. An alternative way to conceptualize liberal constraints on the good makes do without exclusionary rules. Weak liberalism would allow the considerations completely excluded by the strong conception to be given some weight. It would still be liberal, because it insists that freedom of speech has some value even if it is clearly mistaken, or that individual choices to fritter away a life have some value as a matter of political justice simply in virtue of having been freely chosen. The value of freedom as a political value would not simply be a function of the extent to which it is an effective means to achieve a perfectionist individual or collective good.

end and is therefore unconstitutional for failing the first prong of the test. Second, if a measure enacted for a legitimate end infringes a liberty interest, and the measure happens to further certain religious practices or has the tendency to keep political views deemed to be mistaken outside of public debate, this effect, even if deemed desirable by the political majority, may not count in favor of the measure when balancing. It is excluded as a reason to put on the scales as part of the mix of reasons that justifies such a measure. Here exclusionary rules operate to exclude reasons when loading the scales in the context of balancing. The proportionality framework has no problems in accommodating categorical prohibitions in act on certain reasons.

The second way rights are believed to enjoy priority is in relationship to collective goods or “the general interest”. Here the priority is clearly not of a categorical nature. If a collective good (public safety) is invoked as a justification for an infringement of a liberty interest (the over the counter sale and purchase of land to air missiles is prohibited), it is clear that under any plausible account of rights the liberty interest will have to yield at some point. Here the priority of rights can only mean that individual rights should not be treated lightly but be given the weight they deserve a general conception of political justice grounded in the basic ideas of dignity and autonomy. This is an understanding of the priority of rights that proportionality analysis can easily incorporate. Alexy’s ‘Law of Balancing’ states that the greater the intensity of the infringement, the greater the importance of the reasons supporting the infringement must be. Such a test provides a formal structure for the reasoned assessment of the competing concerns at stake. Whether or not a particular infringement is serious, requires an understanding of what it is about the particular interest at stake that matters morally and what is lost when it is infringed. The same is true for assessing the importance of reasons that support a contested measure. The metaphor of ‘balancing’ should not obscure the fact that the last prong of the proportionality test will in many cases require the decision-maker to engage in theoretically informed practical reasoning and not just in intuition-based classificatory labeling. At the level of evaluating the relative importance of the general interest in relation to the liberty interest at stake the weights can be assigned and priorities established as required by the correct substantive theory of justice. The last prong of the proportionality test then provides a space for the reasoned incorporation of an understanding of liberties that expresses whatever priority over collective goods is substantively justified.
The fact that an account of principles as optimization requirements does not prioritize individual rights over collective goods on the structural level, then, does not mean that such a priority cannot be given adequate expression within that structure.

b) Are There Better Alternative Structural Theories of Fundamental Rights?  
Rights as Trumps and Rights as Shields

It is not only the case that the structure of principles as optimization requirements is adequate to give expression to commitments of liberal political justice. There is also no attractive competing structural account available that better captures a liberal idea of rights-based justice. There are two structural alternatives to conceiving rights as optimization requirements, both of which are unattractive as a matter of political justice.

According to the first rights are absolute trumps over whatever competing considerations there may be (call this conception ‘rights as trumps’). Under a conception of rights as trumps, once the scope of a right is infringed, it trumps all countervailing concerns. By violating the scope of the right an act ipse facto qualifies as unjustifiable. Rights such as these are very strong. But what is it that plausibly deserves this kind of protection?

(a) The class of absolute rights would most probably be empty. They would certainly exclude the whole panoply of rights widely guaranteed by constitutions. There would not even be a right to life, since there clearly are circumstances under which it is justified as a matter of political justice to kill someone (self-defence being the most obvious one).

(b) The only way to establish any plausible candidates for absolute rights is to define the scope of an absolute right to include the reasons that justify an infringement of the protected interest. There is an absolute right relating to life, after all: ‘Every person has an absolute right to life unless taking such a life is justified by good reasons.’ But defining rights in this way presents no advantages over the conception of rights as principles. In fact it is identical to it, with the label of absoluteness misleadingly attached to it.

(c) A more ingenious variant would include in the definition of the right only the reasons against which the right-holder enjoys categorical protection. Freedom of speech could be conceived, for example, as an absolute right not to be constrained to speak on the grounds that the propositional content of the speech act is false. Privacy could be defined as an absolute right not to be limited by measures that can only be justified on strong paternalist grounds. The scope of rights conceived in this way would be coextensive with the
scope of excluded reasons discussed above. But as a conception of moral right such a conception is clearly inadequate. It is underinclusive in a way that is central to the prevalent understanding of what it is that rights protect against. If an individual were sentenced to life imprisonment after having been duly convicted for running a traffic light without endangering anyone this would not constitute a violation of rights, because concerns for public order and deterrence based justifications are not categorically excluded as reasons for imprisoning someone. Yet conceptually robbing the imprisoned individual of the moral claim that his rights have been violated seems clearly inadequate. The problem is that rights, appropriately conceived, need to be responsive to situations where the infringements of an individual’s interest is massively disproportionate to the policy concerns that are invoked to justify it. This aspect is not captured by a conception of rights that is focused only on the reasons that are categorically excluded. The idea of rights as trumps or absolute rights then fails as an adequate structural account of moral rights.

There is a competing structural account of rights that does not suffer from these deficiencies. According to this account you have less than a trump, but more than what is required by the proportionality test, in virtue of having a right. According to such an intermediate conception of rights, only reasons that have a special kind of force are sufficient to override the position protected by the right. It suggests a structure of rights that finds its expression in U.S. fundamental rights doctrine. Once an interest has been identified to enjoy protection as a right, acts that infringe the right are only justified by ‘compelling interests’.

It is not obvious how to understand the “compelling interest” test. On one interpretation the test translates into nothing more than a proportionality requirement. In the U.S. only interests that are deemed fundamental enjoy protection as rights. Given the initial determination of the importance of the interests at stake the “compelling interest” requirement can be understood as merely pointing to the fact that the only reasons that are proportional under the circumstances are reasons so weighty to be appropriately classified as ‘compelling’. The conception of rights as shields would amount to little more than the application of a conception of ‘rights as principles’ to interests deemed sufficiently fundamental.  

73 This seems to be Fallon’s understanding of the test, supra, fn 68. See also Implementing the Constitution, Cambridge, Mass.: Harvard University Press, 2001.
A different interpretation of the ‘compelling interest’ test is structurally more interesting, but problematic from the point of view of substantive political justice. The test could suggest that a right really does provide protection against infringement beyond what proportionality requires. Rights could be thought of exhibiting a rule-like structure. They would only be overridden and not applied to cases where it is immediately apparent that countervailing concerns have significantly greater importance than the protected interest under the circumstances. Such a conception would clearly be distinct from rights as principles. It is this conception that I will refer to when I refer to a conception of ‘rights as shields’. But is such a conception morally attractive? If proportionality analysis taken seriously means that all relevant considerations must be taken into account and attributed the weight they deserve, then what could justify protecting an interest beyond what proportionality requires? If fundamental rights overprotect certain interests relative to what political justice requires, then there can be no justification for such a conception of rights on the level of political justice. As a matter of political justice, then, neither a conception of ‘rights as trumps’ or ‘rights as shields’ provide a more attractive account of the structure of a rights than ‘rights as principles’.


But even if a conception of rights as principles is the most plausible conception of rights for the purposes of a rights-based account of political justice, it may not be the best account of fundamental rights. It is by no means obvious that the best structural understanding of fundamental rights simply mirrors the structure of rights-based political justice. Institutional considerations may suggest that rights-based political justice is likely to be realized politically to a greater extent, all things considered, if fundamental rights are conceived as exhibiting a rule-like structure as described by a conception of rights as shields.

There are two concerns with the conception of rights as principles that do not exist with regard to a conception of rights as shields. One concern relates to courts engaging in balancing. Skepticism prevails about the existence of rational criteria available for courts to apply when they engage in balancing.

74 The term ‘rights as shields’ is taken from Frederick Schauer, supra, fn 72.
And even if there are such criteria, they are likely to be seriously disputed in practice and more appropriately applied by other institutions. In either case it is not clear what the comparative institutional advantage of courts should be in this respect and why the task to make authoritative determinations should not best be left to politically more accountable actors. A conception of fundamental rights that does not include balancing would avoid this problem. The second concern relates to the extremely broad scope of constitutional questions under a model of fundamental rights as principles. Once a court is charged with monitoring practically everything it may well end up not doing a good job at monitoring anything. In this way the model of fundamental rights as principles provides both too much and too little protection. The weaknesses of the conception of rights as principles are the strengths of the conception of rights as shields. Only infringements of interests deemed fundamental are identified as worthy of serious attention by the court. The court’s attention, then, is focused on a limited domain of political life. Furthermore, courts are not required to engage in complicated assessments as to which party has the better arguments on its side, all things considered. Instead the compelling interest test is more easily and predictably applied.

These are serious concerns. Instead of addressing them directly here it must suffice to briefly point out two countervailing considerations that highlight potential advantages of rights as principles over rights as shields.75

First, a court that adopted the model of fundamental rights as principles may plausibly produce better outcomes. When a court strikes down a piece of legislation it is not implausible that most of the time it will do so for good reasons. There are institutional features of constitutional courts that make them uniquely suitable to fulfill the function of reviewing actions taken by other actors in light of constitutional principles. Such features include the requirement to give reasons for having decided an issue one way rather than another, following a procedure that itself focuses on the practice of reason-giving and in an institutional environment uniquely suited to immunize the decision-makers from incentives to act on reasons other than reasons of constitutional principle. At the very least it is by no means clear that an approach that is based on fundamental rights as shields is likely to fare any better. Committed right from the start to a structure that underenforces rights

outside of the domain deemed fundamental and over-enforces rights in the
domain deemed fundamental relative to what ideal political justice requires,
while burdened with the contentious task to decide what is to count as
fundamental or compelling (presumably without balancing), it is by no means
obvious that courts are likely to do a better job implementing a conception of
rights as shields. Both the *Lochner* jurisprudence of the past, inappropriately
overprotecting the rights of freedom of contract, and perhaps contemporary
aspects of freedom of speech doctrine highlight the danger of harmful over-
enforcement of rights deemed fundamental. In conjunction with the
complete contemporary neglect of social and economic laws, the structural
advantages of a conception of rights as principles are suggestive.

But even if it turned out that with regard to outcomes the empirical case is
too complicated to assess or too close to call, the conception of rights as
principles may be superior to rights as shields because of a possible connection
between the reasoning of constitutional courts and political culture generally.
Having courts engage in principled reasoning may have positive spill-over
effects. Judicial opinions using principled analysis get absorbed by the media
and permeate public debate, thereby encouraging meaningful public
deliberation. Such deliberation enhancing effects are not likely to occur when
a court speaks not in the voice of public reason, but employs the
professionalized legalistic rhetoric associated with an arcane conceptual rule-
based craft. When intricate details of history and complicated discussion of
precedent determine whether an interest is sufficiently fundamental or
countervailing interest sufficiently compelling, this may reinforce a public
deliberative discourse that is shrill, dogmatic and categorical.\(^76\)

III. Conclusion

Constitutional Courts in TCR are cast both as guardians and instantiations of
political deliberative rationality. The political process is cast as a means of
spelling out the implications of a constitutionally prescribed liberal ideal of
political justice. But has the practice of the FCC in fact furthered the
realization of political justice? Has the Court actually enhanced deliberative
democracy? At the very least the German experience suggests that there are
propitious environments for the model of rights as principles to persistently
find widespread support. The FCC is believed to be an institutional success

story across political divides. It remains one of the most popular public institutions in the country, notwithstanding the criticism it is routinely subjected to, both in specific cases and with regard to more general features of its jurisprudence. What is more, constitutional courts all over the world have in fact adopted many features of the model of fundamental rights as principles. Not just judicial review - predominantly by a Kelsenian type court - but also proportionality analysis as the heart of fundamental rights adjudication - are perhaps the most successful legal transplants in the second half of the 20th century. In this sense there seems to be at least a widespread belief so far not undermined by practical experience, that establishing judicial review of the kind that TCR suggests furthers rather than undermines the successful establishment of political justice.  

77 Alexy’s theory exhibits three core features that participants in Anglo-American debates will be familiar with from the legal philosophy of Ronald Dworkin. Both Alexy and Dworkin agree on the centrality of the distinction between rules and principles both for adjudicating fundamental rights and establishing a strong link between law and justice. Furthermore both employ a methodology that takes seriously the actual judicial practice of reason-giving and connects that practice to central themes of political philosophy. Finally their work exhibits a holistic or system-based approach to the study of law. There are important differences in the way these features are worked out by Alexy and Dworkin. But both accounts have in common that they pose a serious challenge not only to narrow understandings of fundamental rights adjudication. Their account of rights as principles also provides a basis for more general jurisprudential theories that are the main contemporary competitors to Kelsen and Hart’s positivist accounts of law as a system of rules.
IV.

Appendix
Appendix
The Work of Robert Alexy

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Electronic Publications

1. ‘Data und die Menschenrechte - Positronisches Gehirn und 
   doppelttriadischer Personenbegriff’, contribution to “Ringvorlesung des 
   Instituts für Neuere Deutsche Literatur und Medien zur Erforschung 
   von Populärkultur am Beispiel von STAR TREK”, 8 February 2000, 
   University of Kiel.
Robert Alexy’s *A Theory of Constitutional Rights* (Oxford University Press, 2002) is one of the major contributions to contemporary legal and constitutional theory. It establishes Alexy as one of the major modern legal philosophers, on a par with Hans Kelsen, H.L.A. Hart, Ota Weinberger, Ronald Dworkin, Neil MacCormick or Joseph Raz. Moreover, *A Theory of Constitutional Rights* is one of the most authoritative expositions of German fundamental rights provisions. The solemn proclamation of the Charter of Fundamental Rights of the European Union in December 2000, and the eventual debate and ratification of a European Constitution render the constitutional analysis of fundamental rights in Union law a major practical and theoretical question, and therefore, increase the salience of Alexy’s work.

This report aims at offering an analysis of *A Theory of Constitutional Rights* from two different but complementary perspectives. On the one hand, Alexy’s work is critically analysed from the point of view of consistency between normative and empirical claims, paying special attention to the double root of his theory on analytical philosophy and discourse theory. On the other hand, the application of the Theory to legal systems other than the German one is explored with regard to the reconstruction and interpretation of fundamental rights provisions in British, US and European Union legal orders.

This report gathers the contributions to a workshop jointly organised by ARENA and the Centre for Professional Studies in March 2003. The contributors to this volume are Robert Alexy, Carlos Bernal, Erik Oddvar Eriksen, Mattias Kumm, Massimo La Torre, Agustín José Menéndez, Julian Rivers and Karlo Tuori.

ARENA – Centre for European Studies at the University of Oslo is a multi-disciplinary research centre studying the dynamics of the evolving European systems of governance.