

# **A DISCUSSION OF ROBERT ALEXY'S THEORY OF CONSTITUTIONAL RULES AND CONSTITUTIONAL PRINCIPLES AS A MODEL FOR ADJUDICATION**

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## **ABSTRACT**

The paper discusses Robert Alexy's 'Theory of Constitutional Rights' with particular reference to his theory of principles and the distinction he draws between constitutional rules and constitutional principles (fundamental human rights). According to Alexy, fundamental human rights as protected by the German Basic Law are principles which have a distinct character from rules, even though both are norms. This distinction necessarily requires the application of the principle of proportionality (*Verhältnismäßigkeitsgrundsatz*) to constitutional cases dealing with the restriction of a constitutional principle (fundamental right) in favour of another. Alexy argues that there is an intimate connection between the principles theory and the application of the principle of proportionality in the adjudication of constitutional rights cases. However, this affirmation has not been free from criticism: both the theory of principles as well as the proportionality principle have been objected to by various scholars refuting any proximate link between the two and claiming that the application of the proportionality principle may lead to irrationality because it does not offer any solid criteria upon which adjudication is to be effectuated. Despite the various objections to the proportionality principle, it is submitted that they fail to overthrow the proportionality principle as an adjudicative technique.

**KEYWORDS:** CONSTITUTIONAL RIGHTS – CONSTITUTIONAL LAW - THE PROPORTIONALITY PRINCIPLE- THE THEORY OF PRINCIPLES

# A DISCUSSION OF ROBERT ALEXY'S THEORY OF CONSTITUTIONAL RULES AND CONSTITUTIONAL PRINCIPLES AS A MODEL FOR ADJUDICATION

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## 1. Constitutional Rules and Constitutional Principles

Alexy's theory of constitutional rights, which has generated much academic literature, purports to explain his conviction that the application of the doctrine of proportionality is inevitable in cases of competing constitutional principles such as fundamental human rights. This is because of the very nature of principles (fundamental human rights) which he classifies as 'optimisation requirements' and which need to be fulfilled to the greatest extent possible.

Alexy's theory of principles rests on the distinction between constitutional norms as rules and constitutional norms as principles. However, the theory of principles has been perceived to constitute different legal theories including a legal theory which defines the relationship between legal systems and moral, ethical and political discourse, or one which delineates the distinction between adjudication through subsumption and adjudication through balancing, or even a theory of legal argumentation and legal reasoning.<sup>2</sup> The theory of principles has been attributed different functions, depending on the particular mode of perception of the theory.

Alexy's distinction between constitutional rules and constitutional principles is based on his conviction that both rules and principles are norms because both state what should or ought to be done.<sup>3</sup> 'The distinction between rules and principles is thus a distinction between two types of norm.'<sup>4</sup> Alexy believes that fundamental human rights as principles 'are norms which require that

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<sup>2</sup> Ralf Poscher, 'Insights, Errors and Self-Misconceptions of the theory of Principles' [2009] 22(4) *Ratio Juris* 427-8.

<sup>3</sup> Robert Alexy, *A Theory of Constitutional Rights*, (OUP 2004) 45.

<sup>4</sup> *ibid* 45.

something be realised to the greatest extent possible given the legal and factual possibilities'<sup>5</sup> and that they are 'optimisation requirements'.<sup>6</sup>

Rivers describes the main features of this theory:

Key to the entire theory is the argument that constitutional rights are principles, and that principles are qualitatively factually and legally possible. This feature of constitutional rights explains the logical necessity of the principle of proportionality and exposes constitutional reasoning as the process of identifying the conditions under which one of two or more competing principles takes precedence on the facts of specific cases.<sup>7</sup>

Alexy believes that the nature of constitutional rights is that of a principle as contrasted with that of a rule. The difference between them lies in the norm-theoretic distinction underlying constitutional rules and principles. Whereas rules are deontological in nature and must be satisfied completely through subsumption, principles are not because they require 'that something be realised to the greatest extent possible, given the factual and legal possibilities at hand'.<sup>8</sup>

Fundamental human rights as principles do not constitute definitive commands but they are 'optimisation requirements' which may be satisfied in varying degrees. This is where balancing, which is part of the principle of proportionality, comes in. Balancing determines the degree of satisfaction of a principle which is legally and factually possible. 'Thus, balancing is the specific form of the application of principles.'<sup>9</sup> Alexy includes as constitutional rights norms, those norms which are derived from constitutional rules or principles<sup>10</sup> but which are not expressly envisaged by the German Basic Law. These would also be subject to the Law of Balancing if they have the nature of principles.<sup>11</sup>

A problem which arises at this stage is the identification of specific criteria which help the adjudicator determine whether a particular constitutional rights norm is a rule or a principle as distinguished by Alexy and hence whether he is to apply one norm to the exclusion of the other, or if he is to apply the optimisation approach and therefore balancing. Alexy believes that when both fundamental rights as principles are realised to their fullest, the outcome will be that they are

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<sup>5</sup> *ibid* 47.

<sup>6</sup> *ibid*.

<sup>7</sup> *ibid* xviii.

<sup>8</sup> Robert Alexy, 'The Construction of Constitutional Rights' (*Law and Ethics of Human Rights*, 2010) <<http://www.clb.ac.il/workshops/2009/articles/alexey.pdf>> 2, accessed 27 February 2013.

<sup>9</sup> *Ibid*.

<sup>10</sup> Alexy (n 3) 56.

<sup>11</sup> *ibid* 61.

mutually exclusive. This will result in conflict and in an inconclusive result indicating that a balancing exercise is required.

An approach which may assist the adjudicator in identifying whether a particular constitutional rights norm is a rule or a principle is to ask whether it is a balancing norm<sup>12</sup> or to apply the theory based on the notion that principles are of a more generic nature than rules. Thus, for example, the prohibition of inhuman or degrading treatment is of a deontological nature because of its strict prescriptive prohibition. It commands a prohibition giving it the nature of a rule, as distinguished from a principle, because it cannot be partially observed. As a prohibitory rule it requires complete observance rather than optimisation to the greatest degree possible. Balancing is not applicable in such a case. The same may be said to apply to the prohibition of subjecting the human person to torture.

It is submitted that rules tend to be more specific and detailed than principles. However, Ávila opines that the classification of a norm as either a rule or principle depends on the interpretative approach of the adjudicator: it all depends on the connections of value that interpreters stress or not with their argumentation, and on the goals they believe should be met.<sup>13</sup> Ávila believes that it is not the hypothetical structure of rules and principles which determines the distinction between them but their argumentative use.<sup>14</sup>

Pace believes that 'fundamental rights represent for Alexy not "deontological levers", namely categorical rules with a strong normative power, but principles which can always be discussed, opposed, counterbalanced and also ruled out if necessary'.<sup>15</sup> Therefore, whereas rules must be observed and applied in the way in which they are expressed, i.e. they are fixed points along the spectrum of what is factually and legally possible, principles are subject to flexibility of legal approach because fundamental rights as principles are subject to 'balancing and adjustment'.<sup>16</sup>

Therefore rules are norms which must be satisfied as prescribed, whereas principles are norms which must be satisfied to the greatest degree possible.

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<sup>12</sup> Kai Möller, 'Balance and the Structure of Constitutional Rights' [2007] 5(3) Int J Constitutional Law 473.

<sup>13</sup> Humberto Ávila, *Theory of Legal Principles* (1<sup>st</sup> edn, Springer, 2007) 13.

<sup>14</sup> *ibid* 14.

<sup>15</sup> Cristina Pace, 'Robert Alexy's A Theory of Constitutional Rights critical review: key jurisprudential and political questions', Working Paper 2012/01, 10 <[http://repositorio.iscte.pt/bitstream/10071/3883/1/DINAMIA\\_WP\\_2012-01.pdf](http://repositorio.iscte.pt/bitstream/10071/3883/1/DINAMIA_WP_2012-01.pdf)> accessed 27 February 2013.

<sup>16</sup> *ibid*.

The degree to which the principle is to be satisfied depends on what is factually possible (necessity and suitability) whereas the extent to which this is legally possible is determined by the proportionality *strictu sensu* test.<sup>17</sup> The latter is determined 'by opposing principles and rules'.<sup>18</sup>

Principles as 'optimisation requirements' always need to be weighed and balanced. Alexy believes that the balancing exercise is a rational exercise. He distinguishes between conflicting rules and competing principles.<sup>19</sup> Conflicting rules concern positive deontological law which require elimination or a tacit exception while competing principles are resolved by weighing. The result will be that one principle will outweigh the other without having recourse to invalidity or to exception.

When two rules conflict, the solution may be either one of the following: (a) that an exception to one of the conflicting rules is read or understood as existing (even though not expressly written) and this will give way to the exercise of the other conflicting rule; or (b) that one of the conflicting rules is declared null and void, thus leaving space for the other to be executed or upheld.<sup>20</sup> The possibility of having 'two mutually incompatible ought-judgments' is completely excluded. 'If the application of two rules results in mutually incompatible outcomes on the facts of any given case, and if an exception cannot be read into one of them, then at least one must be declared invalid.'<sup>21</sup> The problem which arises is this: if there are two incompatible norms, one of which is required to be invalidated in order for the validation of the other, then how is one to go about determining which one of the two norms is invalid? Alexy gives an example of two conflicting rules concerning the prohibition of certain opening times of shops which contradicted each other. The only option which the Federal Court had was to declare one of the rules invalid.<sup>22</sup>

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<sup>17</sup> The principle of proportionality, also referred to as the proportionality doctrine, involves an analysis (proportionality analysis) of the relationship between the aims, usually a public interest aim having constitutional value, and the means used to achieve such aim, with the consequence of restricting a particular fundamental human right or freedom. The aim of the analysis is the determination of the legitimacy of the action and/or the legitimacy of the restriction on the right. The analysis traditionally involves three steps or sub-tests: (i) suitability; (ii) necessity, and (iii) proportionality *strictu sensu*. However, other variations of this analysis purport to include four tests: (i) legitimate ends, (ii) suitability, (iii) necessity, (iv) proportionality *strictu sensu*. The third test, proportionality *strictu sensu* is also referred to as 'balancing' or 'the law of balancing'.

<sup>18</sup> Alexy (n 3) 48.

<sup>19</sup> *ibid* 45 *et seq.*

<sup>20</sup> *ibid* 49.

<sup>21</sup> *ibid.*

<sup>22</sup> A federal law provided that shops could open between 7am and 7pm whereas a regional law provided that on Wednesdays shops could not open after 1pm. The latter, being a regional law and therefore inferior to federal law, was declared invalid.

Alexy has been criticised on the basis that he regards rules as highly formalistic, and that the distinction he makes between a rule and a principle is overemphasised.<sup>23</sup> It is submitted that in practice the clear-cut distinction that Alexy draws between norms applied by subsumption and those applied by balancing does not exist.<sup>24</sup> It is believed that it is more a question of difference of degree rather than a clear-cut distinction since norms can require clarification, can be vague or incomplete.<sup>25</sup> Alexy disagrees: it is a difference in quality and not only one of degree.<sup>26</sup>

It has been argued that if a principle dictates that it must be decided by balancing, as Alexy maintains, then by its very own nature, a principle is a rule.<sup>27</sup> As a response to such criticism, Alexy further elaborates on the nature of principles arguing that they are 'commands to optimise'.<sup>28</sup> He continues by drawing a distinction between 'commands to optimise' (principles) and 'commands to be optimised'.<sup>29</sup> The latter are the 'objects' of balancing or weighing, that is, the two principles to be weighed. A command to optimise describes the action to be taken with regard to the objects (principles) which are to be optimised, that is, the ultimate result emanating from the balancing exercise. Alexy maintains that '[p]rinciples, therefore, as the subject matter of balancing are not optimisation commands but rather commands to be optimised'.<sup>30</sup>

## **2. Objections to the Proportionality Principle in Human Rights Adjudication**

Alexy believes that there is a fundamental connection between his theory of principles and the principle of proportionality: the very nature of fundamental human rights as principles requires the application of the Law of Balancing therefore involving a weighing process.<sup>31</sup> Möller disagrees.<sup>32</sup> He does not see

<sup>23</sup> Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review* (Europa Law Publishing 2013) 52.

<sup>24</sup> *ibid.*

<sup>25</sup> *ibid.*

<sup>26</sup> Robert Alexy, 'On the Structure of Legal Principles' [2000] 13(3) *Ratio Juris* 295.

<sup>27</sup> Aulisio Aarnio, 'Taking Rules Seriously' in W Maihofer and G Sprenger (eds), *Law and the States in Modern Times* (Franz Steiner Verlag 1990) 181.

<sup>28</sup> Alexy (n 26) 300.

<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.*

<sup>31</sup> The weighing process or the 'law of balancing' involves the interpretation of the limitations placed on the exercise of fundamental rights, such as the limiting clause in Article 2(1) of the European Convention on Human Right envisaging a limitation to the right of life, or Article 2(2) of the German Basic Law which states that the right to life, physical integrity and freedom of the person '[...] may be interfered with only pursuant to a law'. For a brief explanation of the proportionality principle see note 17 above.

any logical or necessary connection between principles and balancing because he believes that it is not possible to optimise fundamental moral rights in the same way that one would optimise a financial profit.<sup>33</sup> In addition, he believes that morality arguments are able to resolve issues of conflicting principles without requiring any balancing exercise.<sup>34</sup> He claims that 'there is no logical, or necessary, connection between principles and balancing'<sup>35</sup> because the resolution of a conflict of constitutional principles lies with the application of 'the correct' extent.<sup>36</sup> This means that in determining whether one principle is to be given priority over another in the given circumstances, a moral argument must take place, that is, resolving the conflict by deciding what is right and legally wrong and 'the outcome of our moral argument then dictates what is possible'.<sup>37</sup> Therefore, Möller claims that Alexy's weighing process is in reality a 'moral' consideration which he calls 'optimisation properly understood'.<sup>38</sup> He specifically criticises Alexy's claim that balancing flows naturally from principles and believes that Alexy's connecting of the principles and balancing does not provide further understanding of constitutional rights and that it does not provide a framework as a matter of structure:

A more nuanced conclusion — namely, that all constitutional rights, as a matter of structure, are necessarily balancing norms — would still have been substantially innovative and challenging. It could have been the culmination of a reconstructive account, and the point of departure into a substantive moral account, of constitutional rights. The questions it poses are: Why are most constitutional rights balancing norms? What about those which are not? To begin answering these questions, however, one must depart from Alexy's structural theory and examine constitutional rights from the perspective of substantive morality.<sup>39</sup>

Poscher, while rejecting the theory of principles as non-existent nonetheless acknowledges the need to apply the principle of proportionality or balancing in certain cases.<sup>40</sup> He does not connect the theory of principles to the method of applying the proportionality principle in the field of fundamental rights. Rather, he sees the principle of proportionality as one of the many methods of adjudication available.<sup>41</sup> He doubts whether proportionality should be

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<sup>32</sup> Möller (n 12) 453.

<sup>33</sup> *ibid.*

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.* 459.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.* 460.

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.* 464.

<sup>40</sup> Poscher (n 2) 438-9.

<sup>41</sup> *ibid.* 440-1.

understood only as an optimisation requirement and believes that it could be understood as a guarantee of a minimal position or a minimum guarantee, or as a prohibition of gross disproportionality.<sup>42</sup> The balancing of principles is simply one argumentative structure among many which serves to develop a certain doctrine.<sup>43</sup> Poscher also refutes Alexy's theory of principles as being a theory of fundamental rights which must be doctrinally shaped as optimisation requirements.<sup>44</sup> He states that in this manner the theory of principles misconceives itself as a doctrine when in reality it is merely part of the legal argumentation process or the process of weighing arguments.<sup>45</sup>

Webber also believes that proportionality inevitably requires the use of moral reasoning even though it attempts to present itself as morally neutral.<sup>46</sup> Klatt & Meister agree that '[m]oral reasoning is a necessary component of all constitutional rights adjudication'<sup>47</sup> and this, they argue, is reflected in Alexy's theory of legal argumentation wherein he sheds light on the relationship between moral and legal argumentation. Klatt & Meister maintain that whereas internal justification concerns the formal structure of balancing and the question of whether or not 'the balancing result can be deduced from the balancing or not', in external justification moral reasoning is applied when giving reasons for the values attached to the weights when applying the balancing formula. They maintain that '[s]ince balancing is dependent upon the evaluation of intensities and weights, it is clear that balancing must entail moral considerations'.<sup>48</sup> According to Klatt and Meister, this disproves Webber's claim that balancing assumes moral neutrality because moral discourse is indispensable in balancing. They explain that proportionality's claim to neutrality relates to its formal structure but not its substantive process which essentially requires moral argumentation and the evaluation of weight and values which varies according to perspective.

Other authors criticise the balancing process on the basis that a right afforded by the Constitution will never be 'stable' because it will always be conditional and subject to balancing'<sup>49</sup> and because such process undermines the development of

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<sup>42</sup> *ibid* 442.

<sup>43</sup> *ibid* 446.

<sup>44</sup> *ibid* 449.

<sup>45</sup> *ibid*.

<sup>46</sup> Gregoire Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' [2010] 23(1) *Can. J. L. & Jurisprudence* 179, 191.

<sup>47</sup> Matthias Klatt & Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2012) 52.

<sup>48</sup> *ibid* 54.

<sup>49</sup> Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' [2009] 7(3) *Int J Constitutional Law* 481.

'knowable principles of law'<sup>50</sup> since in every case a new rule is formulated and different weights are accorded to the same right, depending on the circumstances of the particular case.<sup>51</sup> This means that the element of predictability is missing, making it difficult to establish rules which are to be followed in subsequent cases. Klatt & Meister believe that this is not so because, on the basis of precedent, predictability is possible.<sup>52</sup> They also believe that the flexibility which balancing offers allows the Court to take into account the changes brought with time and to avoid repeated application of jurisprudence which is out of date and not in touch with contemporary reality. They maintain that '[t]his necessary flexibility admittedly relativizes the function of precedence to create a stable and predictable jurisdiction. But it is at the same time the guarantee that every single case is decided within the light of present-day conditions'.<sup>53</sup>

Jürgen Habermas, a major critic of Alexy's theory of constitutional rights, particularly criticises the balancing exercise or proportionality *strictu sensu* application to constitutional norms as principles. He believes that Alexy's theory leads to irrationality of judgment and the deprivation of the normative power of fundamental rights.<sup>54</sup> Habermas argues that balancing constitutional rights gives rise to the danger of putting such rights on an equal footing with policies which would be capable of defeat by other policy arguments<sup>55</sup> thus depriving constitutional rights of their 'strict priority' and their normative power.<sup>56</sup> He also criticises Alexy's balancing theory as this could give rise to irrational judgments on the basis that balancing *per se* does not dictate any form of rational standards which are to be applied when applying the balancing exercise.<sup>57</sup>

'Because there are no rational standards here, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies'.<sup>58</sup> Schauer interprets Habermas's criticism of the balancing process to be irrational as really meaning an 'unconstrained' process.<sup>59</sup> In Alexy's

<sup>50</sup> T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' [1987] 96(5) The Yale Law Journal 948.

<sup>51</sup> Paul W. Kahn, 'The Court, the Community and the Judicial Balance: the Jurisprudence of Justice Powell' [1987] 97(1) The Yale Law Journal

<sup>52</sup> Klatt and Meister (n 47) 49 *et seq.*

<sup>53</sup> *ibid* 51.

<sup>54</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, MIT Press, 1996) 259.

<sup>55</sup> *ibid* 258.

<sup>56</sup> *ibid* 256.

<sup>57</sup> *ibid* 259.

<sup>58</sup> *ibid*.

<sup>59</sup> Frederick Schauer, 'Balancing, Subsumption, and the Constraining Role of Legal Text' (2009) Symposium on Rights, Law and Morality: Themes from the Legal Philosophy of Robert Alexy' Paper 113, 7 <<http://law.bepress.com/cgi/viewcontent.cgi?article=1197&context=ualwps>> accessed 6 March 2013.

defence, Schauer argues that the structure of proportionality inquiry contains 'a degree of constraint' involving the specification of burdens of justification and the allocation of an order of inquiry.<sup>60</sup> This makes Alexy's proportionality inquiry far from being irrational.<sup>61</sup> Schauer argues that decision-making which is open-ended and which involves a degree of variability is not usually regarded as irrational and that 'it is difficult to claim that the basic idea of act-based utilitarian (or any other) calculation is irrational' and that the process of balancing is 'too rational' placing 'demands on real-world decision-makers that are beyond the cognitive and other decision-making capacities of fallible human beings'.<sup>62</sup> He concludes that Alexy's affirmation that balancing is not irrational is 'substantially correct'<sup>63</sup> and convincingly explains that the process of balancing as put forward by Alexy is based on rationality because the process is structured and not open-ended, leaving the decision-maker free to decide on which factors are relevant and how much weight to attach to those factors. He also believes that such a structured process 'reduces the degree of variability' which is often an issue in legal decision-making.

Alexy, while acknowledging that with balancing the control of norms and legal method ends, defines the process as requiring judicial subjectivism and decisionism.<sup>64</sup> He argues that this cannot be interpreted as meaning that balancing is a non-rational or irrational procedure.<sup>65</sup> He discusses the implications of the Lüth Case<sup>66</sup> which according to him, connects three ideas which have served fundamentally to shape German Constitutional Law.<sup>67</sup> He

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<sup>60</sup> *ibid* 5.

<sup>61</sup> *ibid* 4.

<sup>62</sup> *ibid* 8.

<sup>63</sup> *ibid*.

<sup>64</sup> Alexy (n 3) 100.

<sup>65</sup> *ibid*.

<sup>66</sup> BVerfGE 7, 198; 1 BvR 400/51 of January 15, 1958. The Senator of the Free and Hanseatic City of Hamburg and Head of the State Press Office gave a speech in which he called for a boycott of the film directed by Veit Harlan, a German film director who had gained fame during Nazi Germany. The two film production companies succeeded in obtaining an injunction against him. He then made a reference to the German Federal Constitutional Court (GFCC) claiming that the injunctions violated his basic right to free expression of opinion. The GFCC upheld his claim.

For a translation of the judgments see, School of Law, University of Texas at Austin, Institute for Transnational Law at:

[http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=1369](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=1369), last accessed 16 March 2015.

<sup>67</sup> Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16(2) *Ratio Juris* 3; Dieter Grimm, states that '*In the Lüth case, a landmark decision that revolutionised the understanding of fundamental rights in Germany, the Court elevated them to the rank of highest values of the legal system, which are not only individual rights, but also objective principles. The conclusion drawn from this assumption was that they permeate the whole legal order; they are not limited to vertical application but also influence private law relations and function as*

claims that the Lüth case reflects the idea that constitutional rights have the character not only of rules but also of principles. Secondly, such principles are not applicable only to cases involving the State and the citizen, but they are applicable beyond this sphere, 'to all areas of law'.<sup>68</sup> 'Constitutional rights become ubiquitous.'<sup>69</sup> Thirdly, Alexy argues that the balancing of interests is a necessary exercise which emanates from the very structure of values and principles, which in their very nature have a tendency to collide (rather than annihilate one another): 'The nature of principles implies the principle of proportionality and vice versa'.<sup>70</sup>

Habermas, on the other hand, does not conceive of fundamental rights as being principles and subject to balancing, but understands such rights to be subject to subsumption.<sup>71</sup> Schauer, who believes that subsumption, being closely linked to the rule of law, has close affinity with the formality of law and affords little discretion to the adjudicator,<sup>72</sup> contrasts the two processes as follows:

The typical proportionality inquiry, as the word 'balancing' suggests, is largely open-ended, and largely non-constraining, even though it is structured, and even though it is not maximally constraining. And the typical subsumption inquiry is largely constrained, largely textually interpretive, and largely characterised by the way in which the constraints of a moderately clear text, when one exists, exclude numerous factors and considerations that would not only otherwise be relevant, but would also typically, be relevant were the methodology to be one of balancing or proportionality rather than subsumption.<sup>73</sup>

Habermas believes that the 'appropriate norm' prevails over the 'inappropriate norm' in constitutional rights based adjudication and not that one value competes against the other: '[t]he legal validity of the judgment has the deontological character of a command, and not the teleological character of a desirable good that we can achieve to a certain degree under the given circumstances and within the horizon of our preferences'.<sup>74</sup>

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*guidelines for the interpretation of ordinary law.*' (Dieter Grimm, 'Proportionality in Canadian and German Law' (2007) 57(2) University of Toronto Law Journal 387.)

<sup>68</sup> Alexy (n 67) 3.

<sup>69</sup> *ibid.*

<sup>70</sup> Alexy (n 3) 66.

<sup>71</sup> Habermas (n 54) 260.

<sup>72</sup> Schauer (n 61) 16.

<sup>73</sup> *ibid* 15.

<sup>74</sup> Habermas (n 54) 261

Alexy analyses both balancing and subsumption.<sup>75</sup> The balancing approach is applicable to constitutional principles, as distinct from deontological constitutional rules. He explains that the three sub-principles of proportionality (suitability, necessity and proportionality *strictu sensu* or balancing) 'are optimisation requirements'<sup>76</sup> which means that they require to be realised to the greatest extent possible, rather than completely. The principle of suitability 'excludes the adoption of means obstructing the realisation of at least one principle without promoting any principle or goal for which they were adopted'<sup>77</sup> because 'interference with one principle must contribute to the realisation of the other'.<sup>78</sup> The principle of necessity requires the choice of the less intensively interfering and equally suitable means.<sup>79</sup> The last stage in this process is the application of the 'Law of Balancing'. This requires equality in cause and effect in that the violation or infringement committed to a particular constitutional right must reflect the advantage or satisfaction of another particular constitutional right which in the circumstances of the case takes priority: the greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other. Alexy believes that a rational process is involved when analysing 'first, the intensity of interference, second, degrees of importance, and, third, their relationship to each other'<sup>80</sup> because it involves a scale which he labels 'light', 'moderate', and 'serious'.

On the other hand, the subsumption approach is applicable in cases of rules which naturally have deontological content. Alexy argues that there is a certain similarity between the structure of subsumption and balancing because each present a formal rationality and both are completely formal.<sup>81</sup> However, the similarity ends here: whereas subsumption works according to the rules of logic, balancing works according to the rules of arithmetic,<sup>82</sup> with the ascription of value to each principle being translated into a mathematical value.

Shauer objects to this reasoning arguing that subsumption and balancing cannot be regarded as equivalently constraining on the adjudicator on the basis that both possess formal rationality.<sup>83</sup> The point of Shauer's disagreement is Alexy's claim that both subsumption and balancing 'have a formal argumentative structure that enables balancing as much as subsumption to avoid the charge of

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<sup>75</sup> Robert Alexy, 'On Balancing and Subsumption: A Structural Comparison' (2003) 16(4) *Ratio Juris* 433-49.

<sup>76</sup> Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16(2) *Ratio Juris* 135.

<sup>77</sup> *ibid.*

<sup>78</sup> Möller (n 12) 455.

<sup>79</sup> Alexy (n 76) 135.

<sup>80</sup> *ibid* 136.

<sup>81</sup> *ibid* 448.

<sup>82</sup> *ibid.*

<sup>83</sup> Schauer (n 59) 5.

irrationality'.<sup>84</sup> Schauer believes that Alexy's argument that the argumentative forms of balancing and subsumption share a lot in common, may give rise to encouraging the belief that the legally admissible premises of a subsumption argument are similar to the legally admissible premises of a balancing argument.<sup>85</sup> He maintains that this quasi-conflation of the two forms of arguments ignores the constrained process in which subsumption must be made when compared to the balancing approach which although constrained, is less so.<sup>86</sup> Subsumption is constrained by the textual language used in a given provision of law making it impossible to extend legal arguments which go beyond the given provision because they cannot be subsumed under such provision. On the other hand, under the proportionality inquiry, it is typical to take into consideration all relevant factors to the case which are legally admissible.<sup>87</sup> This is very different from subsumption, because only the legal arguments which can be slotted under a given provision may be admissible.

Accordingly, when courts apply the principle of proportionality 'the set of generally legally permissible considerations and the set of considerations theoretically available' are one and the same<sup>88</sup> but in subsumption this is not so because subsumption requires legal argumentation which is confined to the dictates of a particular legal provision applicable to the particular case. However, Schauer still asserts that 'Alexy has served a valuable purpose in showing that the non-formal side of law is not the irrational side of law as Habermas seems to believe. The formal side of law has its purposes as well, purposes that it typically serves with written rules and a process of reasoning by subsumption'.<sup>89</sup>

Alexy's main premises rest on the intimate connection which exists between his theory of principles and the principle of proportionality ultimately requiring a balancing exercise between two fundamental rights which are allegedly competing against each other and which rank equally on the constitutional scale. The theory of principles dictates that one principle will outweigh the other depending on the circumstances of the case. This means that the outweighed principle might itself be outweighed by the same principle in another case involving different circumstances. That is why, Alexy explains, 'principles have different weights in different cases and that the more important principle on the facts of the case takes precedence'.<sup>90</sup> This also explains the difference which exists between a constitutional provision which is deontological and which

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<sup>84</sup> *ibid* 10.

<sup>85</sup> *ibid*.

<sup>86</sup> *ibid* 11.

<sup>87</sup> *ibid* 10.

<sup>88</sup> *ibid* 14.

<sup>89</sup> *ibid* 17.

<sup>90</sup> Alexy (n 3) 50.

dictates specifically what ought to be done and constitutional provisions which declare protection of a fundamental right envisaging legitimate limitations to such rights. The latter are principles requiring maximum optimisation in the particular case. Therefore while in a conflict of two rules situation, the question which arises is one of validity (or exception), in a competing of two principles situation, weighting is what determines the outcome. The latter situation does not involve invalidity because it could well be that it is given priority over the same conflicting principle in a different situation.

Thus, according to Alexy, in cases of two conflicting principles, the solution lies in establishing a conditional relation of precedence between the two conflicting principles on the basis of the circumstances which surround them. This means that it is the circumstances of the case which determine the conditions on the basis of which one fundamental rights is given precedence over the other competing right. The conditions constitute the rules which determine which principle will take precedence over the other. And this is where balancing comes in.

It is submitted that not all fundamental human rights are capable of this exercise because some rights are deontological and will never be subject to proportionality due to their absoluteness. Such rights, which include for example the inviolability of human dignity,<sup>91</sup> and the right not to be subjected to inhuman and degrading treatment, will always take precedence over other rights. It is argued that in cases where such absolute rights were to conflict there would be a state of illegality in the very fact of considering them as competing with one another.<sup>92</sup> Thus, a situation where the right to human dignity of one person is being contemplated against the right to human dignity of another would be an illegal situation. However, Alexy does not believe that there are absolute principles. He believes that 'absolute' principles are rather a mixed breed of rule, principle and certainty due to precedence.

Alexy has been criticised for failing to explain the German Passengers Judgment<sup>93</sup> according to his theory of principles.<sup>94</sup> The German Passengers case placed the

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<sup>91</sup> The inviolability of human dignity is found in the German Basic Law, Article 1, and in the Charter of Fundamental Rights of the European Union, Article 1. For a discussion of human dignity as a supreme principle of the German Constitution see Christoph Enders, 'The Right to have Rights: The concept of human dignity' (2010) RECHTD 2(1).

<sup>92</sup> Can the right to life of one person be in conflict with that of another in a normal situation (i.e. excluding emergency situations) or can the right not to be tortured be in conflict with the right to life? It is submitted that the situation is an illegality in and of itself.

<sup>93</sup> BVerfGE 17, 306; for a discussion of the judgment in English see Oliver Lepsius, 'Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-transport Security Act' (2007) German Law Journal 7(9) 761-776.

German Federal Constitutional Court (GFCC) (Bundesverfassungsgericht) face to face with deciding whether or not a provision of German law authorising the shooting down of a hijacked aircraft full of innocent passengers was to be struck down.<sup>95</sup> The provision was directed at preventing a greater human tragedy by eliminating the airplane before reaching its target, as had happened in the 11 September attacks in New York City. The GFCC was asked to determine whether public security prevailed over the life of people in the light of the German Basic Law. It decided that such a provision was unconstitutional and struck it down on the basis that it violated the right to life and the inviolability of human dignity. The sacrificing of lives to save the lives of others was declared by the GFCC to be unconstitutional, violating human dignity. The GFCC held that in such a case human dignity was being strapped from the passengers treating them on the same footing as the aircraft. However, the GFCC also declared that the State would be acting legitimately if it shot down the airplane which only held the hijackers because they were acting intentionally. Article 2(2) of the German Basic Law allows a violation of the right to life if such violation observes the principle of proportionality.<sup>96</sup> The question which arises at this stage is: In the light of the inviolability of human dignity, how is one to reconcile the two arguments made by the GFCC, i.e. that it is illegal and unconstitutional to kill innocent passengers while it is not illegal to only kill the hijackers?

Enders explains that the GFCC [...] characterises human dignity as the supreme principle of the constitution and every now and then also as a fundamental right.<sup>97</sup> He explains that as a supreme principle, the inviolability of human dignity is not in itself a legal guarantee but rather a constitutional *a priori* quality that belongs to the human person and that 'cannot be subject to legal regulation'.<sup>98</sup> This is because the inviolability of human dignity embodies the original human right to have rights. Enders emphasises that 'No overall and absolute "super-basic-right" can be derived from Article 1 of the German Basic Law. Normally, human dignity is sufficiently protected by the special fundamental rights'.<sup>99</sup> The function of the inviolability of human dignity serves as

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<sup>94</sup> Möller (n 12) 466, and Juliano Zaiden Benvindo, *On the Limits of Constitutional Adjudication* (Springer, 2010) 211.

<sup>95</sup> Article 14(3) of the Air Transport Security Act, which entered into effect on 15 June 2005.

<sup>96</sup> Article 2(2) of the German Basic Law states: Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law; translated in English by Professor Christian Tomuschat and Professor David P. Currie, found at [http://www.gesetze-im-internet.de/englisch\\_gg/](http://www.gesetze-im-internet.de/englisch_gg/), accessed on 17 March 2015.

<sup>97</sup> Christoph Enders, 'The Right to have Rights: The concept of human dignity in German Basic Law' (2010) RECHTD 2(1) 3.

<sup>98</sup> *ibid.*

<sup>99</sup> *ibid.*

the highest form of 'barrier' or threshold beyond which the legislator or the executive cannot normally go.

Under German constitutional law the principle of human dignity seems to embrace all core human rights, ranging from the right to life and physical integrity (personal development) to the right to the inviolability of the home, to the right to a legal remedy for infringement of privacy, to the right of the unborn child.<sup>100</sup> This spectrum of rights incorporated under the inviolability of human dignity may be restricted or limited. For example, in strict circumstances life can be legitimately taken away (as in the case of war)<sup>101</sup> and in those circumstances human dignity is set aside for a greater good (self-defence/defence of the country). The same argument applies to the abortion of the unborn child in strict circumstances envisaged by the law. It could therefore be argued that when the inviolability of human dignity is embodied in the protection of life, it may be subject to balancing, taking into consideration the circumstances of the case. If, on the other hand, the inviolability of human dignity embodies the right to the inviolability of the home,<sup>102</sup> it too will be subject to balancing, in relation to the aim sought relative to public security.

Alexy explains that '....the principle of human dignity is not an absolute principle. The impression of absoluteness arises from the fact that there are two human dignity norms, a human dignity rule and a human dignity principle, along with the fact that there is a whole host of conditions under which we can say with a high degree of certainty that the human dignity principle takes precedence'.<sup>103</sup> He refers to the Life Imprisonment judgment<sup>104</sup> where a German District Court made a reference to the GFCC on the basis that the provisions on life imprisonment for homicide were incompatible with the German Basic Law because it destroys human beings thus violating human dignity. The GFCC applied a balancing exercise to this case, reviewing on the one hand the alleged violation of human dignity when sentencing a criminal to life imprisonment, and the public security threat which the prisoner presented, and arrived at the conclusion that human dignity would not be infringed in such circumstances.

Alexy refutes the proposition that the difference between certain fundamental rights and others is only a question of degree asserting that it is also a question

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<sup>100</sup>ibid 5.

<sup>101</sup>Limitations to the right to life are envisaged both by the European Convention of Fundamental Rights (Article 2) and the German Basic Law which envisages interference pursuant to a law.

<sup>102</sup>Article 13 of the German Basic Law.

<sup>103</sup>Alexy (n 3) 64.

<sup>104</sup>BverfGE 45, 187; a translation of this judgment may be found at <<http://www.hrcr.org/safrica/dignity/45bverfge187.html>>, accessed 16 March 2015.

of quality.<sup>105</sup> It is submitted that if it were only a question of degree then even rules having a deontological character would be capable of optimisation but as has been demonstrated by the theory of principles, this cannot be said to be true. An example in this case is the prohibition of torture and degrading treatment. In this case, the right exists by virtue of the deontological nature of the provision since it is a command prohibiting the subjecting of the human person to torture or degrading treatment. In such a situation, proportionality and balancing do not apply because the prohibition of torture is a rule rather than a principle and as such cannot be optimised.

### 3. The Principle of Proportionality as a Constitutional Adjudicative Tool

In his 'Theory of Constitutional Rights' Alexy claims that his aim is to develop a legal theory of the constitutional rights contained in the German Basic Law but Möller points out that this theory 'presumably wants to make more general claims'.<sup>106</sup> This seems to be confirmed, to a certain extent, by Rivers who translated Alexy's Theory of Constitutional Rights as well as other academic writing on Alexy's theory.<sup>107</sup> In the Translator's Introduction, Rivers claims that 'from the Perspective of the *Theorie der Grundrechte* (Theory of Fundamental Rights) many of the distinguishing features of different constitutions are contingent, and transferability between systems is at least plausible'.<sup>108</sup> Rivers continues that transferability and applicability of Alexy's theory depends 'on a detailed conceptual reconstruction of the constitution along these lines'. This is in fact what Rivers attempts to do in relation to the British Constitution.<sup>109</sup>

Alexy's theoretical distinction between the nature of rules and principles also seems to suggest that his theory is not exclusively applicable to the German Basic Law but, being of a highly theoretical nature, it seems that such distinction could apply in all cases concerning constitutional rules and constitutional principles, irrespective from which constitutional document they emanate. As Möller suggests, 'his theory must have the potential to be applied fruitfully to different substantive theories of constitutional rights'.<sup>110</sup>

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<sup>105</sup>Alexy (n 26) 295.

<sup>106</sup>Möller (n 12) 457.

<sup>107</sup>See Mathias Kumm, 'Political Liberalism and the Structure of Rights: On the Place of Limits of the Proportionality Requirement', in George Pavlakos (ed) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing, 2007) 136.

<sup>108</sup>Alexy (n 3) xviii.

<sup>109</sup>*ibid* xix *et seq.*

<sup>110</sup>Möller (n 12) 458.

Alexy's principles theory and the corresponding application of the principle of proportionality may serve as a model for human rights adjudication. The law of balancing as expounded by Alexy rests on one fundamental presumption: that the attainment of a 'balanced situation' between two constitutional principles of equal value, is commended and required by justice. Therefore, the attainment of a legally balanced situation is a form of rationalising decision-making which stems from the need to find an objective standard or neutral means which may be used as a measuring tape in adjudication.

It is submitted that the principle of proportionality is a neutral mode of adjudication because it looks for balance: the degree of satisfaction of one principle must be equal to the degree of dissatisfaction or limitation of the competing principle. This produces a state of neutrality or a state of perfect balance. It is submitted that neutrality is also achieved through the method of approach because it necessarily requires an equal degree of adjudicative application to competing principles. The principle of proportionality does exactly this by means of its three stages. Suitability is a neutral principle and determines whether the means adopted to achieve the aim is legal and legitimate. Therefore, even at this first stage there is an objective comparison between the potential of realisation of one principle and the same potential, in terms of equal measures, of non-realisation of the competing principle. This exercise must not be confused with balancing as at this stage it is the potential of realisation which is being determined. The second stage may also be labelled as a neutral principle because the evaluation of the available means and the least burdensome may be determined objectively on the basis of which means would procure the least burden but would achieve the aim in view. The third stage which is the balancing exercise referred to by Alexy requires the attribution of weights by means of the triadic scale which ranges from 'light' to 'serious serious'.

The attribution of weight in proportionality *strictu sensu* depends, to a certain extent, on the personal evaluation of the adjudicator. However, this does not mean that the personal evaluation of the adjudicator is tainted by bias because even in his or her adjudicating exercise personal opinions must be set aside and replaced by values which society upholds together with the application of the law. Moral argumentation is inevitable. However, it is submitted that moral argumentation is applied even in modes of adjudication not applying the principle of proportionality. The principle of proportionality may be said to be a neutral mode of adjudication because it essentially combines factual and legal reasoning with moral argumentation. Whereas suitability and necessity depend on factual appreciation, proportionality depends on what Alexy calls 'judicial subjectivism' in the light of what is legally permissible. Although constitutional principles are balancing norms, it does not mean that they are devoid of their

normative power simply because a moral discourse is going on - a discourse of what constitutes right from wrong is in reality a normative exercise involving the precedence of a protected right over another in specifically defined circumstances. Thus, the principle of proportionality may claim to be an effective means of adjudication because it is a structured and normative adjudicative approach with an axiological substructure.