

# Robert Alexy's A Theory of Constitutional Rights critical review: key jurisprudential and political questions

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### **Abstract**

The question of the theoretical foundations of fundamental rights and of the coherence in the application of constitutional rights reasoning in different legal systems is one of the foremost issues of all democratic constitutional states where there is a presence of a Bill of Rights, in continental European jurisprudence as well as in other common law jurisdictions.

The analysis of how constitutional rights reasoning on fundamental rights is structured in the legal process of constitutional states is in fact deeply linked with the very concept of democracy and of a democratic state: a substantive, structural theory of fundamental rights is essential in every contemporary democratic society, being crucial for both its legal and political structure.

Alexy's substantial general theory of fundamental rights constitutes in this respect a major contribution to the development of constitutional law and legal reasoning, one which goes well beyond the interpretation of the German basic law, providing a theory of general application relevant to most, if not all, European as well as non-continental legal orders.

### **Keywords**

Democracy and legal systems, human and fundamental rights, theoretical foundations, constitutional rights reasoning, legal argumentation and legal reasoning, multilevel legal systems, legal pluralism, proportionality and balancing, rational methodology, limit of rights, conflicting rights, European Union's constitutional order.



## INTRODUCTION

As recognized by various scholars and eminent legal philosophers<sup>2</sup>, Alexy's *A Theory of Constitutional Rights*<sup>3</sup> (hereafter *A Theory*), constitutes not only a major classic of German constitutional theory but also, in the words of A.J. Menéndez and E. O. Eriksen a "chief theoretical achievement, which has made a major contribution to the development of a normatively grounded, post-positivistic analysis of constitutional law", "a seminal contribution to the analysis of how legal reasoning on fundamental rights is intimately connected to the very foundation of democracy".<sup>4</sup>

It is thus widely recognized that, notwithstanding the complexity of the issues involved, Alexy's *A Theory* represents a masterpiece in contemporary legal and constitutional theory and provides "an excellent analytical framework to deal with the most difficult constitutional rights issues."<sup>5</sup>

A substantive, structural theory of fundamental rights is in fact essential in every contemporary democratic society, being crucial for its basic legal structure.

Beyond any doubt, the dramatic facts with which we are actually confronted prove that "the very survival of open democratic societies depends on taking fundamental rights seriously."<sup>6</sup>

Striking government's violation of international human rights legal standards have been widely reported by activists and independent NGOs worldwide, and also legally challenged, as for example in the case of US "war on terror", the reported cases of torture in Abu Ghraib, detention and extraordinary rendition in Guantanamo, which gave place also to a debate in favor of the juridification of torture. The defense of such government's actions as a legitimate exercise of state sovereignty in name of public security's concerns is still subject of an intense public debate.

Especially nowadays, when always more countries accede to international human rights treaties and agreements and adopt human rights legislations; a structural, substantial and applied conception of fundamental rights is essential and Alexy's *A Theory* constitutes in this sense, "a building block of every serious discussion on constitutional rights".<sup>7</sup>

The European Union itself, for instance, has recently adopted its own Bill of Rights: the "Charter of Fundamental Rights of the European Union" (hereafter *The Charter*), which shows how European Constitutional law is the result of a progressive integration process, based on the progressive harmonization of core constitutional principles common to all member states of the

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<sup>2</sup> Ronald Dworkin, Jurgen Habermas, Neil MacCormick, Ota Weinberger, H.L.A Hart and Joseph Raz, among others.

<sup>3</sup> Alexy R., *A Theory of Constitutional Rights*, 2002, Oxford: Oxford University Press (Hereafter *TCR*).

<sup>4</sup> Menendez A. J., Eriksen, O. E., (eds.), *Arguing Fundamental Rights*, Springer, 2006, 1, 5.

<sup>5</sup> Cf. International and Comparative Law Quarterly.

<sup>6</sup> Menendez A. J., Eriksen, O. E., (eds.), (2006), 6.

<sup>7</sup> Cf. above note 5.

Union.<sup>8</sup> The Charter stands in fact as *the* catalogue of fundamental rights of the EU, and allows bearing on EU's institutions, providing citizens with effective means of enforcing their rights either in national courts or in the ECJ.<sup>9</sup>

However, the coexistence of different European and international agreements and this plurality of sources of law (legal pluralism), determines in some cases the struggling of judges when it comes to the concrete and consistent implementation of rights, and sometimes the legal reasoning behind those judicial deliberations seems lost.

Judges as well as legislators are also often confronted with the challenge of conflicting rights<sup>10</sup>, which in some cases represent real constitutional and, I would say, "ethical dilemma".<sup>11</sup>

The main problem is therefore how to address these conflicts of rights: if through 'balancing' and proportionality or otherwise, and also to establish whether balancing is a truly rational methodology or if it must be seen as a pure technical method of solving conflicts.

In his book *A Theory*, Alexy makes a great effort in trying to characterize constitutional courts decisions as a rational process, offering a well-developed structure of the concept of balancing, his central thesis being that constitutional rights are principles and not rules, "*optimization requirements*" necessarily open to balancing. Nevertheless, the discussion about the rationality of balancing is still open and at the centre of many theoretical discussions.

Many scholars and philosophers reject such an approach contesting quantitative-like criteria such as those associated with 'proportionality', emphasizing other approaches to fundamental rights, which accentuate the moral foundation of rights.<sup>12</sup>

In any case, Alexy's *A Theory* has managed to build up a substantial general theory of fundamental rights, the importance of which goes well beyond the interpretation of the theory of

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<sup>8</sup> As underlined in the Preamble of the Charter itself: "This Charter reaffirms (...) the rights as they result, in particular, from the constitutional traditions and international obligations common to the member states, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights". It must be furthermore recognized that, in particular, the German constitutional law, which is the Alexy's primary reference is one of the national constitutions that has exerted the most pervasive influence upon the European constitutional asset and especially upon The Charter itself.

<sup>9</sup> The Charter claims even more its legal force since when the Treaty of Lisbon came into force on 1st December 2009 and it became legally binding for the EU and all its member states.

<sup>10</sup> Situations in which two or more distinct human rights enter into conflict, in such a way that no rational solution seems to be possible.

<sup>11</sup> Cf. e.g. Zucca, L., "Conflicts of Fundamental Rights as Constitutional Dilemmas", in: Brems, E., *Conflicts Between Fundamental Rights*, ed., Antwerp/Oxford/Portland, Intersentia, July 2008 and Zucca, L., *Constitutional Dilemmas—Conflicts of Fundamental Legal Rights in Europe and the US*, Oxford: OUP, 2007, calling for a reform towards a more coherent, well-ordered architecture of European fundamental rights.

<sup>12</sup> Cf. Möller, K., "Balancing and the Structure of Constitutional Rights", in: *International Journal of Constitutional Law*, Vol. 5, Issue 3, pp. 453-468, July 2007, and Zucca, L., (2007).

fundamental rights of the German basic law, providing a theory of general application which is relevant to most, if not all, European as well as non-continental legal orders.<sup>13</sup>

## **THEORETICAL FRAMEWORK**

The main issues, which I will tackle in this paper, are jurisprudential and theoretical as well as practical, ethical and political. Following an analysis and a general assessment of the core structural elements of Alexy's *A Theory*, the main aim is to delineate which are the limits of his approach, testing the reasonableness of the proportionality principle in legal decisions and the increasing use of balancing as an essential argumentation technique for solving legal disputes in courts.

The main intention is to establish, through an analysis of the judicial practice of balancing fundamental rights, if the proportionality principle, sustained as a "rational practice" by Alexy in *A Theory*, can be classified as a moral and rational principle or if it must be considered just as a "purely pragmatic method", useful to justify judicial discretion in legal argumentation.

The main jurisprudential and philosophical issues at stake therefore concern: the definition and the concept of constitutional, human and fundamental rights; the attempted definition of the structure and content of constitutional rights, the attempted establishment of the limits and scope of fundamental rights.

In order to determine whether the proportionality test and the judicial practice of balancing actually correspond to a necessary and rational process, it is in fact important to ascertain whether such a right exists which has a purely "deontological value" and cannot be limited in any case, even when in conflict with other fundamental rights.

Beyond purely philosophical and theoretical issues, there are also many practical, ethical and key political questions at stake, which will be tackled in this study: the first political issue involved is the one of how to address problems in case of conflicts of rights, if not through proportionality and balancing. Which alternatives can be found, if at all, to the balancing approach?

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<sup>13</sup> Julian Rivers, for instance, gives an interesting demonstration of how Alexy's *A Theory* can be fruitfully applied to legal systems other than the continental ones, in its contribution "Fundamental Rights in the UK Human Rights Act", in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 141-154, and in his preface to Robert Alexy's *A Theory of Constitutional Rights*: "A Theory of Constitutional Rights and the British Constitution". In those articles Rivers applies the Alexy's theory of rights to the British fundamental rights practice, testing in particular, the impact of the UK Human Rights Act 1998 on the British legal system. Alexy's theory of rights can be also useful in interpreting and applying fundamental rights provisions of the European Union law and especially, the Charter of Fundamental Rights of the European Union (please refer to A.J. Menendez's article "Some Elements of a theory of European Fundamental Rights", in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 155-176.



A second political issue is: if balancing/proportionality is ultimately not a rational procedure, but just a pragmatic method, is it therefore correct to trust judges to review or would it be better to find alternative methods of dispute resolution and rights adjudication? Should we trust democratically elected parliaments instead of judges?

Third, if the discretionality and impartiality of judges is in doubt (the so called “danger of irrational ruling”<sup>14</sup>), a subsequent risk could be the one of a “jurist-made law”, the supreme court becoming the final arbiter of constitutional law, including the potential use of political ideologies and personal beliefs and even prejudices to justify sentences, fundamental rights losing their strict “deontological character” and normative power. Do discourse theory and the proceduralist legal method provide a better solution than constitutionalism, as it seems to be suggested by Eriksen in his article?<sup>15</sup>

An additional related implication would be the one which could lead to a relativistic and utilitarian conception of justice and law, having fundamental rights balanced for example against collective goods, public interests, policies. This represents also a controversial issue, still open for discussion and at the centre of many theoretical debates. Is it in fact correct to balance subjective individual rights against public interests and collective goods?

Although the most common fundamental right is a subjective, individual and negative right, fundamental rights embrace for Alexy not only subjective fundamental rights, but also collective goods. There is therefore the possibility of a conflict between an individual fundamental right and a public policy for example, aiming at safeguarding some collective interest.<sup>16</sup> This is a case in which, in Alexy’s opinion, we are confronted with a conflict of rights that requires balancing and weighing in order to find a solution: it is not just sufficient for Alexy to affirm that the individual, subjective right should prevail on the collective interest.

It is consequently essential to recognise if also collective goods have a status as fundamental rights and, at the same time, to make a further important distinction not only between principles and rules but also between principles and policies.<sup>17</sup>

It is furthermore essential to deal not only with a problem of constitutional rights adjudication but also with a problem of democratic representation and participation, to better highlight what the *substructure* of balancing is: the importance of legal culture and common values, the positions about the constitution, the role of states and the very concept of justice in a society.

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<sup>14</sup> The danger of “irrational ruling” is one of Habermas’s main objections to Alexy’s theory of constitutional rights. See: Habermas, J., *Between Facts and Norms*, trans. By William Rehg, Cambridge: The MIT Press, 1996, pp.256-259.

<sup>15</sup> E.O. Eriksen, “Democratic or Jurist-made law?”, in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 69-94.

<sup>16</sup> As for example in a case of conflict between right to privacy and public security, or freedom of speech and freedom of religion, just to mention some examples.

<sup>17</sup> Alexy establishes in *A Theory* a clear distinction between rules and principles but fails to establish a further distinction between principles and policies.

## OUTLINE

The material in this essay is divided in two main sections. The first section will give an overview of Alexy's theory. The main intention in this section is to give an outline and a general assessment of the core jurisprudential, theoretical and philosophical issues involved, taking account of both the substantial implications and the relevant appliance of Alexy's theory of fundamental rights.

The core structural arguments of Alexy's *A Theory* will be analysed in a critical way, with the final aim of establishing the rationality (or not) of its law of proportionality (*Law of Balancing*), trying to clarify one of the main philosophical and substantive questions posed by Alexy's theory of rights: is Alexy's *Law of Balancing* and *Weigh Formula* really rational and objective? What are the limits to its rationality and therefore the limits of Alexy's approach?

While in fact Alexy seems to support the thesis that balancing has a rational structure, one of the most important questions remains whether balancing has actually a rational structure and whether can be considered as a rational procedure or if it must be seen as a mere "rhetoric device useful to justify any kind of judicial decisions and judge's discretion".<sup>18</sup>

In the words of A.J. Menéndez and E. O. Eriksen "Alexy might be read as holding justice to be a more important value than democracy", the direct application of law "reducing transactions costs and information problems" as "it establishes the right thing to do in practical contexts".<sup>19</sup> This gives rise, in the words of Eriksen, to a risk of "assimilating law and morality and of overburdening the legal medium itself".<sup>20</sup>

The second section will be related to some of the most important key ethical, social and political issues involved in the analysis of Alexy's work: an important point is whether it is possible or not to determinate which are the limits of fundamental rights and whether certain fundamental rights should or should not be limited, even when in conflict with other rights.

The risk (or possibility) here is an utilitaristic one, the one of balancing fundamental rights against collective goods, public interests, policies, losing fundamental rights their "absolute" rights whatever, their "deontological character". The main issue at stake here is that, beyond the distinction between principles and rules, a further important distinction must be made between principles and policies.<sup>21</sup>

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18 Cf. Bernal Pulido C., "On Alexy's Weight Formula", in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 101.

19 Menendez A. J., Eriksen, O. E., (eds.), (2006), 5.

20 E.O. Eriksen, "Democratic or Jurist-made law?", in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 69-94.

<sup>21</sup>Kaarlo Tuori, among others, makes this further distinction contrasting Alexy's and Dworkin's theory of legal principles. Cf. Tuori, K., "Fundamental rights principles: disciplining the instrumentalism of policies", in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 33-50.

Another main political question which will be tackled in this second section is whether rights adjudication can be subject to rational assessment and whether judge's discretion should be the arbitrate of fundamental rights protection.

In fact, if balancing/proportionality is ultimately a non-rational procedure, is it right to trust judges to review or would be better to leave the discussion to a public debate? Should judges or democratically elected parliaments, be the final arbiters of fundamental rights protection? Can justice be considered as holding a more important value than democracy? Is the principle of liberty/equality in law holding a more important relevance than the democratic principle?

Although this study mainly concentrates on Alexy's *A Theory* and its critiques, some limitations have to be made in this context as this essay tries to connect on a vast map of classic human and constitutional rights theories, an analysis that goes over a vast area of theoretical and normative schools of thought. Any of these areas merits an essay on its own, and comparing them in a brief space has its limitations in terms of scope and depth.

## **PART 1 - ALEXY'S A THEORY OF CONSTITUTIONAL RIGHTS: JURISPRUDENTIAL AND PHILOSOPHICAL ISSUES.**

### **1.1 Human rights: principles or rules? Fundamental Rights as "optimization requirements".**

Central aim of this chapter is to give an account and a general exposition of the basic structural elements of Alexy's *A Theory*, the jurisprudential issues involved as well as its substantial implications.

Beyond *A Theory*, Alexy is the author of two other major books in the field of legal philosophy: *A Theory of Legal Argumentation*<sup>22</sup>, which applies discourse theory to law, describing legal reasoning as a process of "reason-giving practice" and *The Argument from Injustice. A reply to legal positivism*,<sup>23</sup> in which he analyses the relationship between morality and law, ultimately describing law as a system of legal norms which claims to be right or just.

However, *A Theory of Constitutional Rights*, published in 2002, is perhaps the book which is most engaged in the developing of a substantial general theory of fundamental rights which at the same time offers a more widely applicable "theoretically attractive account of the structure of constitutional rights within liberal democracy"<sup>24</sup>, enhancing some clarity on the practice adopted by most contemporary constitutional courts.

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<sup>22</sup> Alexy R., *A Theory of Legal Argumentation*, Oxford: Oxford University Press, 1989.

<sup>23</sup> Alexy R., *The Argument from Injustice. A reply to legal positivism*, Oxford: Oxford University Press, 2002.

<sup>24</sup> Rivers, J., "A Theory of Constitutional Rights and the British Constitution" in Alexy, R., *JCR*, p.XVII.

We could say that all main arguments which are faced by Alexy in *A Theory*, are closely related to the central thesis that “fundamental rights are mainly and foremost principles and not rules”<sup>25</sup> and, as such, “optimization requirements”, naturally subjected to a balancing and proportionality test.

In order to understand the meaning of this assertion it is essential to comprehend which is for Alexy the main difference between a principle and a rule and what does he mean when he is saying that fundamental rights, in particular, can be characterized as principles and therefore as “optimization requirements” or “optimization commands.”<sup>26</sup>

Alexy considers the distinction between principles and rules as fundamental for a theory of constitutional rights and as “a key to the solution of the central problems of constitutional rights doctrine.”<sup>27</sup>

In every modern legal system, there are for Alexy two basic ways of defining “legal norms”: either as “rules” or as “principles”.

However principles and rules are applied by means of two different rational procedures: subsumption and balancing. Rules are applied by means of subsumption; principles are applied by means of balancing.

The subsumption procedure is for Alexy structured in a formal “deductive scheme”, which he calls the “subsumption formula”, while an equivalent scheme exists for the structure of balancing, which Alexy calls the “weight formula.”<sup>28</sup>

Even though subsumption and balancing have a similar structure, constituted by a set of premises leading to a legal result; the relation between those premises and the final legal result is different: while in fact the subsumption formula is represented by “a scheme that works according to the rules of logic, the weight formula works according to the rules of arithmetic.”<sup>29</sup>

As recognised by Alexy himself in his writings, “while subsumption has been clarified to a considerable degree in the last decades, where balancing is concerned there are still more questions than answers. The most important of these questions is whether or not balancing is a rational procedure.”<sup>30</sup>

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<sup>25</sup> Menendez A. J., Eriksen, O. E., (eds.), (2006), 2.

<sup>26</sup> Please refer also to: Alexy, R., “On the Structure of Legal Principles” in: *Ratio Juris*, Vol. 13, No. 3, September 2000; Alexy, R., “On Balancing and Subsumption. A Structural Comparison”, in *Ratio Juris*, 16, pp. 433-449, 2003; Alexy, R., “Discourse Theory and Fundamental Rights”, in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 15-29; Alexy, R., “The Construction of Constitutional Rights”, in: *Law & Ethics of Human Rights*: Vol. 4 : Iss. 1, Article 2, 2010. In these articles Alexy gives some clarification about the concept of legal principles as “optimization requirements”, presenting his thesis as a basis for the principle of proportionality applied in constitutional law and an effort to capture the structure of weighing and balancing. He examines as well some of the main objections moved against his theory.

<sup>27</sup> Alexy, R., *TCR*, 44.

<sup>28</sup> Cf. “On Balancing and Subsumption. A Structural Comparison” in Alexy R., (2003), 433.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

In his recent article "The Construction of Constitutional Rights" (2010), Alexy defines the main differences between principles and rules and between the "subsumption formula" and the "weight formula", in these terms:

"The basis of both the rule and the principles construction is the norm-theoretic distinction between rules and principles. Rules are norms that require something definitively. They are definitive commands. Their form of application is subsumption. If a rule is valid and applicable, it is definitively required that exactly what it demands be done. If this is done, the rule is complied with; if this is not done, the rule is not complied with. By contrast, principles are norms requiring that something be realized to the greatest extent possible, given the factual and legal possibilities at hand. Thus, principles are optimization requirements. As such, they are 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 determination of the appropriate degree of satisfaction of one principle relative to the requirements of another principle is balancing. Thus, balancing is the specific form of the application of principles".<sup>31</sup>

While rules are for Alexy "norms which are always either fulfilled or not", representing "*fixed points* in the field of the factually and legally possible"; principles are "norms which require that something be realized to the greatest extent possible given the legal and factual possibilities"; they are "optimization requirements", which can be satisfied to varying degrees.<sup>32</sup>

What is factually possible is "determined by the principles of suitability and necessity while what is legally possible is determinate by the principle of proportionality in its *stricto sensu*. The scope of the legally possible is determined by opposing principles and rules."<sup>33</sup>

Alexy therefore considers fundamental rights as "naturally" belonging to the category of principles and not rules. As "optimization requirements", they always need to be weighed and balanced according to the principle of proportionality.

This means 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. Fundamental rights are depicted as "optimization requirements" which can be "satisfied according to varying degrees", depending not only on what is legally but also on what is factually possible.

Legal reasoning involving fundamental rights issues concerns for Alexy first and foremost cases in which the resolution of conflicts refers not to the categorical application of rules but to an open process of balancing and adjustment, accommodation of different principles.

Nevertheless, Alexy claims that the structure of balancing is rational and that a structural and substantial theory of fundamental rights should universally agree and formally define the question of whether all fundamental rights should be regarded as principles (without any

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<sup>31</sup> Alexy, R., "The Construction of Constitutional Rights", *Law & Ethics of Human Rights*: Vol. 4 : Iss. 1, Article 2, 2010, 21.

<sup>32</sup> Alexy, R. *TCR*, 47- 48.

<sup>33</sup> *Ibid.*

unconditional application *qua rules*), or whether such an inalienable core of fundamental, non-derogable rights exists, to which weighing and balancing should not apply because of their absolute and essential value.

It is in fact possible to find many good reasons why some fundamental rights should be characterized as rules and not as principles and why balancing and proportionality test should not apply to them *qua rules*.<sup>34</sup>

The main issue at stake here is whether such a right exists which has a purely “deontological value” and which cannot be limited in any case, even when in conflict with other fundamental rights.

Particularly relevant in this respect is one of the main objections of J. Habermas to Alexy’s approach: the well-known “firewall” objection.<sup>35</sup>

In Habermas opinion, fundamental rights lose their deontological power through a balancing procedure which is not to be considered as a rational process but mainly as an “irrational and arbitrary ruling”: this is one of the main critics to Alexy’s *A Theory* which will be tackled more specifically in the following chapter.

## 1.2 Alexy’s *A Theory*: critical analysis.

As already pointed out previously in this study, and as remembered by George Pavlakos in his book, Alexy’s *A Theory* “marked a decisive turn in contemporary jurisprudential discussion”, developing a substantial theory of fundamental rights which had the merit of enhancing analytical clarity in legal reasoning.<sup>36</sup>

Alexy’s propositions, however, have also been the subject of many criticisms, which I would like to summarize in this chapter. Many scholars and legal philosophers are in fact contesting Alexy’s approach, especially with regard to the conception of quantitative-like criteria such as those associated with the principle of proportionality and the phenomenon of balancing in constitutional law.

Legal philosophers such as Jurgen Habermas, Ronald Dworkin, Mattias Kumm, among others, tend in fact to circumscribe Alexy’s approach and to emphasize other approaches to fundamental rights, which better highlight the moral foundation and the deontological value of rights.

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<sup>34</sup> As for example in the case of the most basic human rights such as the fundamental right to life and dignity, which includes the prohibition of death penalty and the prohibition of torture. The resolution of conflicts in these cases seems much easier than in other cases, even though resolutions and legal reasoning followed by Courts does not always seem to be illuminating in this respect.

<sup>35</sup> Habermas, J., (1996), 256-259.

<sup>36</sup> Pavlakos, G. (eds.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy*, Oxford: Hart Publishing, 2007, pp. 1-2.

They contest quantitative-like approaches to rights, the hypothetical rational structure of balancing defended by Alexy in his works and the supposed impartiality/discretion of judges in fundamental rights adjudication, trying at the same time to find alternatives criteria to the balancing approach.

Particularly relevant are the two main objections of Jurgen Habermas to Alexy's theory of balancing: the firewall and irrationality allegations.

As recognized by Alexy's himself in his article "Discourse Theory and Fundamental Rights", "according to Habermas there are no rational standards for balancing".<sup>37</sup> Habermas's first objection (the firewall's objection) is that the "balancing approach deprives fundamental rights of their normative power": by means of balancing rights are downgraded to the level of goals, policies and values, losing their deontological character and their "strict priority", their characterization as "normative points of view".<sup>38</sup>

Habermas maintains as a matter of fact that "a deontological understanding of legal norms and principles" is like "a firewall erected in legal discourse"<sup>39</sup> and that, if "in case of collision, all reasons can assume the character of policy arguments, this firewall would collapse"<sup>40</sup>: fundamental rights would be downgraded to the level of policies, would be negotiable, sustained or refused by policy arguments, losing their normative power.

Rights and policies would be therefore considered both as principles, to be balanced against each other on an equal footing. In fact, as affirmed by Habermas in his famous book *Between Facts and Norms*:

'If principles manifest a value that one should optimally realize, and if the norms themselves do not dictate the extent to which one must fulfill this optimizing prescription, then the application of such principles within the limits of what is factually possible makes a goal-oriented weighting necessary. Because no value can claim to have an inherently unconditional priority over other values, this weighting operation transforms the interpretation of established law into the business of realizing values by giving them concrete shape in relation to specific cases'.<sup>41</sup>

On the other hand, according to Habermas, the danger of downgrading fundamental rights comes along with a "danger of irrational rulings": this is the second Habermas's famous objection to Alexy's approach.

The practice of balancing constitutional rights in fact not only endangers the force of rights in general but can also lead to irrational decision-making: "because there are no rational standards

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<sup>37</sup> See: Alexy, R., "Discourse Theory and Fundamental Rights", in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 24.

<sup>38</sup> Ibid.

<sup>39</sup> Habermas, J. (1996), 258.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid. p. 254.

here, weighing takes places either arbitrarily or unreflectively, according to customary standards and hierarchies".<sup>42</sup>

The danger of irrational ruling increases as far as constitutional courts found their decision-making "on a kind of moral realism or moral conventionalism, because functionalist arguments then gain the upper hand over normative ones".<sup>43</sup> This means that the courts, balancing rights against politics, can decide either way:

"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."<sup>44</sup>

Alexy's theory would then imply that constitutional rights after having been "softened into optimization requirements" will therefore "risk disappearing altogether in a maelstrom of irrational balancing"<sup>45</sup> in which policies rather than rights trumps.

Taking into account Habermas assumptions, Alexy himself recognizes in his article "Discourse Theory and Fundamental Rights", that there could be a risk which could lead to take legal rules "out of the realm defined by concepts like right and wrong, correctness and incorrectness, and justification, into a realm defined by concepts like adequate and inadequate, and discretion". 'Weighing of values' would be able to yield a judgment as to its 'result' but not to 'justify' that result."<sup>46</sup>

To acknowledge such an assumption would mean for Alexy to admit that balancing and weighing have no place in law, to declare the intrinsic irrationality of balancing and the "loss of the category of correctness", which is for Alexy inadmissible as law represents for him a system of legal norms "necessarily connected to a claim to correctness", a system of legal norms which claims to be always right or just.

In response to Habermas and other scholar's criticism, Alexy will always defend the legitimacy and correctness of the proportionality principle, referring to the structure of balancing and weighing process as a rational process.

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<sup>42</sup> Ibid. p. 259.

<sup>43</sup> Ibid.

<sup>44</sup> Habermas, J., "Reply to Symposium Participants", in: Michel Rosenfeld and Andrew Arato (eds.), *Habermas on Law and democracy*, Berkeley, Los Angeles, and London: California University Press, 1998, p.430.

<sup>45</sup> Harbo, Tor-Inge, "The Function of the Proportionality Principle in EU Law", in: *European Law Journal*, Vol. 16, Issue 2, pp. 158-185, March 2010, p.168.

<sup>46</sup> Alexy, R., "Discourse Theory and Fundamental Rights", in Menendez A. J., Eriksen, O. E., (eds.), (2006), 24.



As reaffirmed in his recent article, "The Construction of Constitutional Rights", the central accuse of the irrationality of balancing is for Alexy countered by a simple "analysis of the formal structure of balancing". This analysis shows for Alexy that:

"balancing is a case of rational legal argument that is explicated by means of an arithmetic formula: the weight formula. The weight formula provides a demonstration of how and why balancing is possible as a form of rational legal argument. It also makes it possible to show that proportionality analysis endangers neither the power nor the force of constitutional rights".<sup>47</sup>

Nevertheless, Habermas' firewall and irrationality allegations are not the only objections moved against Alexy's theory of constitutional rights.

As underlined for example by Kai Möller in his article "Balancing and the Structure of Constitutional Rights", many liberal philosophers reject the resort to a balancing approach in order to settle disputes in courts, especially when concerning issues of fundamental human rights.

According to Möller, "there are important differences between reasoning with constitutional rights and reasoning with moral fundamental rights"<sup>48</sup>, between the conceptions of rights used by liberal philosophers and the one used by judges in constitutional courts.<sup>49</sup>

All main representatives of the liberal tradition share in fact a common vision of moral fundamental rights seen as "trumps"<sup>50</sup>, "shields" or "firewalls"<sup>51</sup>, something which must be steadily protected as a matter of priority in any case and in spite of any other ordinary consideration of political nature or public authority.

Alexy's conception of constitutional rights seems to diverge from this general trend in liberal philosophy as fundamental rights in Alexy's theory are "naturally" subjected to a proportionality test and balancing approach, which seems to weaken their normative power in a certain way, because they become more negotiable and disputable.

Therefore, Möller argues that Alexy "ultimately fails to demonstrate that balancing holds a rightful place in constitutional rights reasoning".<sup>52</sup>

Following this interpretation, Alexy's conception by which "the nature of principles implies the principle of proportionality and vice versa", will be considered as simply erroneous because,

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<sup>47</sup> Alexy, R., "The Construction of Constitutional Rights," in: *Law & Ethics of Human Rights*: Vol. 4, Iss. 1, Article 2, 2010, p.2.

<sup>48</sup> Möller, K., 2007, 453.

<sup>49</sup> See also: Kumm, M., 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement', in: Pavlakos, G., (eds), 2007.

<sup>50</sup> Rights are defined as "trumps" against the majority by Ronald Dworkin, meaning that fundamental rights have a special normative power that cannot be altered, not even by consensus. Cf: Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, November 1, 1978.

<sup>51</sup> See: Habermas, J., 1996.

<sup>52</sup> Möller, K., 2007, 453.

Möller sustains, “there is no logical, or necessary, connection between principles and balancing”.<sup>53</sup>

Alexy in fact defends the idea that the principle of proportionality derives directly from the very nature of principles, meaning that it can be ‘logically’ deduced from them. He sustains that the resort to the balancing approach in a case of a conflict of rights is “normal”, as it is implicit in the same nature of principles. The balancing strategy is therefore for Alexy not a choice, “a matter of convenience or practicability”, but a feature necessarily connected to the very nature of principles.<sup>54</sup>

In Möller’s opinion however, the claim that a principle is “logically” subjected to balancing is simply not acceptable. In fact, if it is true that, as Alexy claims, principles are norms which require that “something be realized to the greatest extent possible”<sup>55</sup>, it is however not acceptable to “optimize” a moral value in the same way as one optimizes profit”, for example in an economic context.<sup>56</sup> It is not possible, namely, to “optimize” moral values.

Even if two principles are in conflict, they will always need to be realized both to the “greatest extent possible”, which can only mean for Möller “the correct extent”.

This implies that a moral argument is needed in order to define which is the “correct extent”, which principle takes priority and, in order to do so, “there are many ways to reason morally about conflicting considerations that are not based on balancing.”<sup>57</sup>

### **1.3 Balancing rights: a moral-rational principle or a pragmatic method?**

Originally derived from the German basic law, the proportionality principle became one of the main fundamental principles developed by the jurisprudence of many European, national and international constitutional courts worldwide, as for example the European Court of Justice (ECJ) and the Inter-American Court of Human Rights (IACHR). The European Court of Human Rights (ECtHR) also regularly applies this principle for the purposes of the margin of appreciation allowed to states in applying the ECHR (European Convention on Human Rights). The principle of proportionality is used as a safeguard against the indiscriminate use of legislative and administrative powers exercised by a state or a public authority: courts have always used it as a procedure aiming at guaranteeing the full respect of human rights by a state or public authority.<sup>58</sup>

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<sup>53</sup> Ibid., p.459. See also: Alexy, R., *TCR*, p. 66.

<sup>54</sup> Ibid., p. 455.

<sup>55</sup> Cf. Alexy’s definition of principles, Chapter 1.1, p.14 of this Paper.

<sup>56</sup> Möller, K., 2007, 462.

<sup>57</sup> Ibid.

<sup>58</sup> Cf. Cianciardo, J., “The Principle of Proportionality: its Dimensions and Limits” *ExpressO*, 2009, p.2. Available at: [http://works.bepress.com/juan\\_cianciardo/1](http://works.bepress.com/juan_cianciardo/1) (consulted on 26 October 2011).

Judges can apply this principle also in order to settle disputes of conflicting constitutional provisions and to develop a hierarchy of fundamental rights and freedoms.

In particular, the principle of proportionality requires that any measure taken by a state or public authority that interferes with a basic human right must be: in accordance with law, pursue a legitimate aim, necessary and proportionate.

The measure should be appropriate/suitable/adequate (principle of suitability), in order to achieve the objective which is intended by the lawmaker, meaning that an eventual interference with one principle should contribute to the realization of another principle of equal importance; necessary (principle of necessity) in order to achieve such objective, meaning that there should be no other less severe means by which to achieve the same result (the measure should be also the least restrictive of human rights); and reasonable/proportionate (principle of Proportionality *stricto sensu*), meaning that it must be reasonable, balancing advantages and disadvantages, i.e. the person concerned can reasonably be expected to accept the measure in question.<sup>59</sup>

The task of the judges therefore will be the one of weighing *pros and cons* of the measure in question. According to M. Medina Guerrero the proportionality *stricto sensu* means that:

“There should be a tendency to reach a balance between the advantages and disadvantages which will inevitably appear when a right is limited, in order to protect another right or good which is constitutionally protected. It is necessary to carry out an evaluation in which particular and collective interest will be confronted, which implies taking into consideration all the relevant circumstances in the case”.<sup>60</sup>

The decision should evaluate costs and benefits of the measure in question. Therefore, “if the hypothetical benefits are high, the way in which human rights may be affected is expected to be high too, and this will be acceptable” according to the principle of proportionality.<sup>61</sup>

As concerning Alexy, we can say that one of the central aims in his *Theory* is to justify the structure of the proportionality principle as a rational/reasonable way of solving conflicts between principles.

In Alexy's *A Theory* in fact, balancing is considered as having a rational structure formed by three elements (laws) which are considered as the core structure of balancing: the “law of balancing”, the “weight formula” and the “burden of argumentation”.<sup>62</sup>

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<sup>59</sup> Council of Europe, *The Margin of Appreciation*, available at: [http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2\\_en.asp](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp), (consulted on 25 October 2011).

<sup>60</sup> Medina Guerrero, M., *La vinculación negativa del legislador a los derechos fundamentales*, Madrid, McGraw-Hill, 1996, pp. 132-134.

<sup>61</sup> Cianciardo, J., 2009, p. 4.

<sup>62</sup> For an overview on the structure of balancing in Alexy's *A Theory*, please refer to the Summary in Annex I of this Paper.

The “law of balancing” represents for Alexy the principle of proportionality in its narrow sense and characterizes what is legally possible, while the “weight formula” and the “burden of argumentation” characterize what is factually possible.

The first principle, the “law of balancing” can be explained for Alexy with the following words:

“The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other”<sup>63</sup>

It is structured in three main stages: the first stage establishing “the degree of non-satisfaction or detriment to the first principle”, the second one establishing “the importance of satisfying the competing principle” and finally, the third stage determining “whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former.”<sup>64</sup>

Alexy sustains that in case of impossibility of making rational judgments through these three stages of the law of balancing (intensity of interference, degree of importance and their relationship to each other), the objections raised by Habermas would be justified.<sup>65</sup>

Consequently he tries to demonstrate, through an analysis of examples of court’s judgments, that justifying court’s decisions through these three stages of balancing in a rational manner is actually possible.

Alexy will finally affirm that rational judgments about the intensity of interference and the degree of importance are possible in a way that can be rationally established.<sup>66</sup>

A rational Triadic Scale of Interference can for Alexy be developed with three different grades, “light”, “moderate” and “serious”, in order to evaluate the competing reasons and reaching rational judgments: if for example the *intensity of interference* is considered as *minor* or *light* compared to the *degree of importance* of the reasons for interfering, then the judgment can be considered as rationally “obvious”.

Values such as “light”, “moderate” and “serious”, can also be translated into numerical values (quotients): in this case for example, *l* (light) will correspond to the value 1, *m* (moderate) to the

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<sup>63</sup> Alexy, R., *TCR*, p. 102.

<sup>64</sup> Alexy, R., “Discourse Theory and Fundamental Rights”, in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 25.

<sup>65</sup> Ibid. Please refer also to Chapter 1.2, pp.16-19 of this Paper, where Habermas objections to Alexy’s theory are explained in details.

<sup>66</sup> Ibid., p.25. Alexy refers in particular to two specific decisions of the German constitutional Court: the *Tobacco* judgment and the *Titanic* judgment (BVerfGE 95, 173), (VerfGE 86,1 (13)). In the *Tobacco* judgment, the reasons justifying the interference with the tobacco’s producers freedom to pursue one’s profession by placing health warnings about the danger of smoking on their products; were considered as *minor* or *light*, compared with the health risks resulting from smoking. In this case then the *intensity of interference* was considered as minor compared to the *degree of importance* of the reasons for interfering. In the same way, in the *Titanic* judgment, the reasons justifying the interference with the magazine’s freedom of expression, were considered as *minor* or *light*, compared with the officer’s general right to personality. *Titanic* was a satirical magazine that described a paraplegic reserve officer first as a “born murderer” and then as a “cripple”.

value 2 and *s* (serious) to the value 4.<sup>67</sup> Such translation is for Alexy important in order to reply to the objection that numbers are not used in the balancing in constitutional law.

If the Triadic Scale of Interference as such is considered as not satisfactory in order to demonstrate the rationality of balancing, the weight formula will be then conceived by Alexy as the “rational structure for establishing the correctness of a legal judgment in a discourse”.<sup>68</sup>

The weight formula represents for Alexy a complement to the law of balancing. It consists of a deductive scheme of “internal justification”: “an inferential system implicit in balancing, intrinsically connected with the concept of correctness”.<sup>69</sup> It determines the concrete weight of a principle in relation to the circumstances of a specific case.

However, Alexy recognizes that three variables must be further analysed in the structure of the weight formula: the importance of the principles at stake, the abstract weight of those principles and the reliability of the empirical assumptions.<sup>70</sup>

Beyond the importance of principles in fact also their abstract weight must be considered. The abstract weight of principles depends of the different legal systems with which we are confronted. It “derives from the different legal hierarchy of the legal body from which stems the principle or might be established by reference to positive social values”.<sup>71</sup> It derives that different legal systems can reflect a different legal hierarchy and different social values.

The third variable is for Alexy related to the reliability of the empirical assumptions, namely the factual premises under the circumstances of a specific case.<sup>72</sup>

It is possible for Alexy to give a quantitative expression to all these variables of the importance and abstract weight and also to the variable of the reliability of empirical assumptions (reliable = 1, plausible = ½, not evidently false = ¼).

By applying these numerical values it is possible for Alexy to determine the concrete weight of a principle in a specific case,<sup>73</sup> and the weight formula represents the formula that allows for an assessment of those variables in order to reach a concrete balancing outcome.

The burden of argumentation is finally the third component of the structure of balancing and it intervenes only in cases in which the weight formula results in a stalemate, the weight of principles being identical.

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<sup>67</sup> Ibid. p. 26.

<sup>68</sup> Ibid. pp. 26-28.

<sup>69</sup> Ibid. p.26.

<sup>70</sup> Ibid. p.27.

<sup>71</sup> Bernal Pulido, C., “On Alexy’s Weight Formula”, in: Menendez A. J., Eriksen, O. E., (eds.), (2006), p. 102. For example it could be claimed in a specific legal system that the principle of protection of life has a greater abstract weight than the principle of liberty or the respect for private life.

<sup>72</sup> Ibid., p.103. This variable determines what are the practical consequences of the application (or not) of a principle in a specific case.

<sup>73</sup> Alexy, R., “On Balancing and Subsumption. A Structural Comparison”, in: *Ratio Juris*, 16, 2003, p 433. Cf. also: Bernal Pulido, C., “On Alexy’s Weight Formula”, in: Menendez A. J., Eriksen, O. E., (eds.), (2006), p.103.

Alexy seems to propose two different solutions for those cases of impasse in balancing procedure: while in *A Theory*, he claims that stalemate cases should be solved in favour of the legal liberty and legal equality principle (*in dubio pro libertate*);<sup>74</sup> in the *Postscript to A Theory*, he seems to sustain that the cases of stalemates could be solved by resorting to the democratic principle instead, affirming that “a restriction mandate by an act of Parliament should be considered as proportionate and declared in accordance with the constitution”.<sup>75</sup>

The two different solutions can lead to totally different results. That is the reason why this “double solution” results problematic and contradictory.

Furthermore, the outcome of balancing and the establishment of the precedence of one principle on another are in Alexy's *Theory* depending not only on the law of balancing in itself and on the simple comparison of two different principles.

As we have seen through the analysis of the weight formula, two further important variables must be essentially considered in balancing: the abstract weight of the principles in question and the reliability of the factual premises (the empirical assumptions) in every specific case.

The balancing operation becomes in this way more difficult as well as it becomes more difficult to establish which are the objectives/rational criteria for balancing. Balancing will finally depend on both normative and factual premises. The normative premises, as for example the abstract weight of principles, depend on many relative factors such as the different concept of person in different legal and political systems, giving further room to judicial discretion.<sup>76</sup>

It may be said that: “the measurement of the abstract weight of principles according to the triadic scale clearly depends on the ideology of the judge” which “solve the case according to what is for him the best moral argument”.<sup>77</sup>

The problem is that “sometimes it is not easy to know which the best moral argument is”.<sup>78</sup>

The factual premises, on the other side, concern the reliability of the premises. However it is sometimes very difficult to establish the reliability of a case considered as from different perspectives: sometimes the knowledge of the judge concerning empirical facts can be very limited.

As pointed out by C. Bernal Pulido in his article, the most critical point in balancing is that it is essential to make a further distinction between relatively easy cases in balancing, in which

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<sup>74</sup> Alexy, R., *TCR*, p. 384-385. In case of conflict with the principle of legal equality and legal liberty, any other principle will not prevail unless “stronger reasons” are put forward in its favour.

<sup>75</sup> Alexy, R., *TCR*, p. 410 ff. Cf. also: Bernal Pulido, C., “On Alexy's Weight Formula”, in: Menendez A. J., Eriksen, O. E., (eds.), (2006), p.104.

<sup>76</sup> Such “concept of person” is not the same in every legal system but can change in different legal systems, rather referring to ideological and moral considerations. In a Rawlsian legal system, for example, liberty rights are absolute rights which cannot be interfered by any act of public authority, while in a communitarian system, on the contrary, an highest value would be given to the common or collective good, which will then prevail over individual freedom.

<sup>77</sup> Bernal Pulido, C., “On Alexy's Weight Formula”, in: Menendez A. J., Eriksen, O. E., (eds.), (2006), p.108.

<sup>78</sup> *Ibid.*

rational judgments are possible and can reasonably established through balancing; and much harder cases which appear to be more complex and in which the premises which should be considered as objectives, are often uncertain.<sup>79</sup>

This is the reason why, in some cases, “the assessment of the importance of a principle can only be made by taking a concrete stand which cannot be determined by the weight formula itself.”<sup>80</sup>

This demonstrates that the reference to the weight formula sometimes implies a grant of discretion to the judge and his critical moral views as well as political ideology.

In reality we can reasonably sustain with Pulido that the balancing procedure “should not be regarded as an algorithmic procedure which produces the right answer in all cases.”<sup>81</sup>

Judges discretion, moral views and political ideologies still play an important role in balancing and there are still many rationality limits that leave a large margin of discretion to the judges in judicial decisions regarding fundamental rights.

It should be nevertheless recognized that Alexy’s law of balancing and weight formula provide a good exemplification and argumentative explanation of the structure of balancing concretely used by judges in courts to balance conflicting rights and reach decisions about specific cases, clarifying the different relevant variables which are taken into account.

This analysis shows that the application of the principle of proportionality is not always sufficient in order to guarantee the supremacy of human rights and does not always prevent the legislator from violating human rights.

At least in some circumstances, the principle of proportionality could represent just a “formal principle”, “a mere rhetoric device, useful to justify any kind of judicial decisions”.<sup>82</sup>

As pointed out by Cianciardo J. in his article: "The Principle of Proportionality: its Dimensions and Limits":

“if the principle of proportionality were just a balance between the “weight” of the right and that of the reasons that have led the legislator to decide to restrict such right, then, ultimately, that human right could lose its characteristic of impassable barrier for the State. Indeed, the invocation of a more or less convincing *raison d'État* could justify the sacrifice of some human rights. (...). At best, the rights will depend on the consensus; in all cases, they will never be called victories in front of the majorities”.<sup>83</sup>

The central question therefore is: should we accept the proportionality of a norm and the balancing exercise even in case it seems to violate a human right instead of protecting it, even when the proportionality exercise seems to be reduced to “a mere rhetoric device”?

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<sup>79</sup> Bernal Pulido, C., “On Alexy’s Weight Formula”, in: Menendez A. J., Eriksen, O. E., (eds.), (2006), p.106.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid. p. 109.

<sup>82</sup> Cf. Bernal Pulido, C., “On Alexy’s Weight Formula”, in: Menendez A. J., Eriksen, O. E., (eds.), (2006), p.101.

<sup>83</sup> Cianciardo, J., 2009, p. 5.

## **PART 2 - KEY POLITICAL QUESTIONS**

In this second section I will try to shed some light on three of the most important political and social aspects raised by the work of Robert Alexy.

A first important point is related to the nature and theoretical foundation of human and fundamental rights: it is meant to clarify whether and if it is possible to determine what fundamental rights are, if they are or should be consequently limited and in which way.

In order to be able to define those limits and scope of rights it is essential first of all to clarify what fundamental rights are and in what way they should be distinguished from “constitutional” and “human rights” in its narrow sense, a differentiation that is very well analysed in Alexy’s work.

The second important question, which will be tackled in this section, is the risk/possibility of balancing fundamental/constitutional rights against policies, collective goods, public interests; a risk which could lead to a relativistic and utilitarian conception of justice and law.

The final key political issue which will be tackled in this section is the proposal made by Alexy himself of two different solutions for stalemate’s cases in balancing: the solution in favour of the legal liberty and legal equality principle (*in dubio pro libertate*), and the one in favour of the adoption of a democratic principle instead.

Is the principle of liberty/equality in law holding a more important relevance than the democratic principle, or vice versa? Is it correct to balance subjective individual rights against public interests and collective goods? What are the theoretical foundations of rights, their limits and how should we address problems in case of conflict?

### **2.1 The limits of rights: theoretical foundations.**

The discourse on the theoretical foundations and definition of “constitutional”, “human” and “fundamental” rights is still open, highly contested and actually at the centre of many theoretical debates. It represents also a central theme in Alexy’s work and especially in *A Theory*, and a precondition for any further analysis concerning the meaning and functioning of constitutional rights and the role of proportionality principle in court-based adjudications.

It is certainly true that there is still “very little agreement about what rights are, about why we use rights in our moral or legal theories, or about what to do when there is a conflict between



rights”.<sup>84</sup> There is consequently a need for clarifying both the institutional, political and legal meaning of “fundamental” rights.

Such an understanding is essential in the application of law for both theoretical and practical reasons: a correct use of these definitions can in fact be useful in order to “clear some theoretical misunderstandings, improve our critical analysis and help in explanation of real processes”.<sup>85</sup>

An attempted definition of the structure and concept of constitutional rights is in fact closely related to an attempted establishment of the limits and scope of fundamental rights. It is essential for an understanding of the concept of “rights” itself as well as for a better comprehension of the functioning of rights and proportionality principle.

In his article “Discourse Theory and Fundamental Rights”, Alexy tries to shed some light on the issue of the origin and philosophical foundations of fundamental and human rights, sustaining that discourse theory can be useful in order to provide for a justification of human rights, contributing to a theory of their foundation.<sup>86</sup>

There is in fact for Alexy a close relationship between discourse theory and fundamental rights, which comprises three dimensions: “philosophical”, “political” and “juridical”. The philosophical dimension concerns “the foundation and the substantiation of fundamental rights”; the political dimension is related to the “institutionalization of fundamental rights”, while the last dimension, the juridical, concerns the “interpretation of fundamental rights”.

Rights in fact must for Alexy “be buttressed by reasons, transformed into reality and made vivid by way of interpretive practice”.<sup>87</sup>

Discourse theory represents for Alexy one of the several attempts to provide a justification of human rights, essentially demanding their incorporation at the highest legal level (in the constitution) and referring to a “deliberative” or “discursive” democratic organization, which expresses the ideal of discourse in reality.

There have been in history many other attempts to provide a justification and a theoretical foundation to fundamental rights (eight of those approaches are mentioned below). However, only the discourse theory approach is for Alexy the one really centred on the concept of

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<sup>84</sup> Rainbolt, W. G., “Rights Theory”, in: *Philosophy Compass* 1 ET 003, 1–11, Blackwell Publishing, 2006, p. 1.

<sup>85</sup> Palombella, G., “From Human Rights to Fundamental Rights. Consequences of a Conceptual Distinction”, in: *EUI Working Paper LAW* No. 2006/34, January 2007, p.5.

<sup>86</sup> Alexy, R., “Discourse Theory and Fundamental Rights”, in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 15-29. For an overview of Alexy's conception of fundamental and human rights, please refer to the Summary in Annex II of this Paper.

<sup>87</sup> *Ibid.*, p. 15.

reasoning, and the universal validity of human rights cannot be explained for Alexy in another way than through reasoning.<sup>88</sup>

Going back to the philosophical dimension of rights, in order to define what fundamental rights are (foundation and substantiation), it is essential for Alexy to elucidate the concept of fundamental rights: in Alexy's words, "the question of what fundamental rights are is the question of the concept of fundamental rights".<sup>89</sup>

On the other side, the problem of the foundation of fundamental rights is the problem of the foundation of human rights. If fundamental rights can be substantiated, human rights can as well: in other words, there is no foundation of fundamental rights without a foundation of human rights.

Alexy therefore distinguishes three different conceptions of fundamental rights: "formal", "substantial" and "procedural" and eight potential foundations of fundamental rights: religious, intuitionist, consensual, socio-biological, instrumental, cultural, explicative and existential.

The three conceptions of fundamental rights are for Alexy closely related and "an adequate theory of fundamental rights should address not only the three concepts but also the relations in which they stand to each other".<sup>90</sup>

The formal conception of rights is employed "if fundamental rights are defined as rights contained in a constitution or in a certain part of it" and if they are "endowed by the constitution with special protection".<sup>91</sup> human rights become part of a positive constitutional order.

However, the formal concept is considered for Alexy as "important but not enough if we want to understand the nature of fundamental rights".<sup>92</sup>

If we want to understand the real nature of fundamental rights in fact we have to refer to a substantial conception of rights, which must include "criteria that go above and beyond the fact that a right is mentioned, listed or guaranteed in a constitution".<sup>93</sup>

The substantial concept of fundamental rights is for Alexy finally corresponding with the concept of human rights: human rights in fact do not need to be enshrined in a formal constitution to actually exist and be "substantive".

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<sup>88</sup>Generally speaking we can say that theories of justifiability of human rights can be distinguished for Alexy in two main approaches: one which "denies the possibility of any justification", such is the case of emotivism, subjectivism, relativism, naturalism or deconstructivism theories; and one which claims that "some kind of justification is possible", through reasons that can assert objectivity, correctness or truth. Discourse theory's view, which is for Alexy naturally and necessarily connected with reasoning, belongs to this last category and it is the only one which can provide a justification for rights which is based on their rationality and universal validity. Based on "reasoning", discourse theory adopts an explicative approach by "making explicit what is necessarily implicit in human practice". Cf: Alexy, R., "Discourse Theory and Fundamental Rights", in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 18-21.

<sup>89</sup> Ibid. p.17.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid. p. 15.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid. p. 16.

In other words “it is not possible to raise the question of the substantiation or foundation of fundamental rights without raising the question of the foundation of human rights”:<sup>94</sup> the foundation of fundamental rights implies the foundation of human rights.

It seems then that the main difference between “fundamental” and “human” rights consists therefore in the fact that fundamental rights represent human rights transformed into positive law. We can also add here that the above-mentioned theory is based on a distinction between moral and legal rights, which consider fundamental rights as constitutional legal rights belonging to a determinate political system. Following this theory, while human rights are considered as moral universal rights grounded on the notion of person and transcending any particular context, fundamental rights are considered as fundamental legal norms within a particular judicial and political system.<sup>95</sup>

Catalogues of rights in different constitutions can thus be considered for Alexy as different attempts, more or less successful, to transform human rights into positive law. The existence of different constitutions and different legal rights is then the result of a selection of values to which a society should give priority.

However there could be the case of human rights that are not included in a certain constitutions as well as constitutions containing rights that cannot be really classified as human rights.<sup>96</sup>

This shows for Alexy that “there is an intrinsic connection between the philosophical and the juridical problems”: if a constitution does not contain human rights that should be constitutionally protected “a critique can lead to a constitutional reform or to a change in the constitution through constitutional review”.<sup>97</sup>

The third concept of fundamental rights is in fact for Alexy procedural and it is related to the “institutional problem of transforming human rights into positive law”.<sup>98</sup>

It is interesting to notice in this framework the affirmation made by Alexy, which says that “fundamental rights are an expression of distrust in the democratic process”.<sup>99</sup>

Alexy is here referring to the fact that incorporating or changing rights in a constitution is generally a power attributed to specific courts with judicial review power, which are able, as a matter of fact, to revoke any act of a state which they find incompatible with a higher authority, as is the case of a written constitution.

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<sup>94</sup> Ibid. p. 17.

<sup>95</sup> Cf: Raz, Joseph, *Value, Respect and Attachment*, Cambridge: Cambridge University Press, 2001 and Raz, Joseph, *The Practice of Value*, Oxford University Press, Oxford, 2003.

<sup>96</sup> Alexy, R., “Discourse Theory and Fundamental Rights”, in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 17.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

In this way the judicial power is actually limiting the democratic power of national elected parliaments by subjecting both legislative and executive powers to review (and potential invalidation) by the judiciary.

Fundamental rights represent then for Alexy both “the basis and the boundary of democracy” because the procedural concept “holds that fundamental rights are rights which are so important that the decision to protect them cannot be left to simple parliamentary majorities”.<sup>100</sup>

An analysis of the consequences of such an affirmation will be tackled more specifically in the last chapter of this section.

## **2.2 Principles and policies: bargaining rights against collective goods?**

Although Alexy recognises that the most typical fundamental right is a subjective, negative and individual right, he sustains in *A Theory* that fundamental rights must embrace not only individual, negative rights, but also positive rights and collective goods.<sup>101</sup>

Historically, the traditional liberal or libertarian conception of rights holds the most common connotation of fundamental rights.<sup>102</sup> Following this conception, the only authentic rights are the ones that are capable of immediate enforcement and full justiciability. Those rights should have the value of rules: they should be guaranteed at any time without limitations and without any exception.

This idea is usually associated with civil and political rights (CPR) which are considered as negative, defensive rights, rights of the “first generation”, because they were the first to be historically expressed in the French Declaration of the Rights of Man and the Citizen as well as in the American Bill of Rights of 1789.

This class of rights is bound to protect individual freedom from unwanted interference by the states, private organizations or other individuals, ensuring individual’s personal freedom and the opportunity of freely participating to the civil and political life of their country.<sup>103</sup>

Negative rights such as civil and political rights are also the most easily enforceable as they only require the state to refrain from action, to refrain from interfering with individual liberties.

On the other side, the term ‘principles’ could traditionally more properly be used to define economic, social and cultural rights (ESR). These rights have been called also ‘second generation’ rights because even though they may have an influence on the law and decision-

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<sup>100</sup> Ibid.

<sup>101</sup> Alexy, R., *TCR*, p. 62 ff.

<sup>102</sup> In modern philosophy the analysis of Immanuel Kant was of primary importance and it is fundamental for the speculation of many contemporary prominent philosophers. (Among others: Jeremy Bentham, Robert Nozick, Joseph Raz, Ronald Dworkin, John Rawls and Thomas Pogge).

<sup>103</sup> Negative civil and political rights include rights such as freedom of speech and freedom of assembly, freedom of thought and conscience, private propriety right, right to privacy, freedom of religion, right to a fair trial and due process.

making process; they do not create any directly enforceable right: they are considered as not capable of specific legal determination before a court. They can just provide a basis upon which to found more specific rights which could then become directly enforceable.

Socio-economic rights should be considered as protective, positive rights (differing from civil and political rights which are considered defensive and negative rights). They require in fact a positive action from the state, and are also depending on the resources of the state in question, because guaranteeing them to everyone involves a consistent expenditure of resources.

Rights such as the right to housing, to education, health, to an adequate standard of living must be respected, protected and fulfilled by the states which should take “progressive, gradual action” towards their fulfilment, but they are in practice not easily and not always enforceable everywhere. They depend on the adoption of social and political policies adopted by the states to ensure their implementation.

The distinction between positive and negative rights is then a distinction between ‘programmatic’ (ESR) and ‘justiciable’ rights (CPR).

This is the reason why many national constitutions or Bill of Rights do not even include economic and social rights, containing instead only civil and political rights, considered the only capable of specific legal determination before the courts.

Liberals have therefore been “traditionally anxious to protect individuals from the tyranny of democratic authority by granting rights that can be used as “moral trumps” against the process of majority rule” while democratic theorists always defended the application of rights in view of the realization of some common good and social objective.<sup>104</sup>

To summarize in a few words the polemic of democratic theorists against liberal theories of rights, without entering into further details, we can assume that the main criticism moved against liberal rights is that they “cannot be rationally defended”. Many democratic theorists are in fact “skeptical about the possibility of articulating and rationally supporting a theory of fundamental rights”.<sup>105</sup>

Going back to Alexy’s theory of rights, the legal philosopher considers essential to recognise as fundamental rights not only individual rights but also collective goods: both socio-economic rights and civil-political rights need in fact for Alexy protective and defensive actions, a conception which reunites the two categories of rights under an equal footing.

Assuming that civil and political rights and socio-economic rights have to be considered on the same footing, means also assuming the possibility of a conflict between an individual fundamental right and a public policy aiming at safeguarding some collective interest.

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<sup>104</sup> McGregor J., “Liberalism and Democracy”, in: *Philosophy East and West*, Vol. 38, No. 3, Fiftieth Anniversary, Department of Philosophy, University of Hawaii, Jul., 1988, p. 334.

<sup>105</sup> Ibid.

This could be the case for example in a conflict between the right to privacy and the protection of public security, or the right to privacy and the freedom of expression, just to mention some examples. It generally entails a conflict between classical individual rights and some collective interests, an opposition between individual rights and what is defined as a common good or public policy.

If also collective goods have a fundamental status we are then confronted with a conflict of rights that requires balancing and weighing the conflicting positions at stake: it is in fact not possible anymore for Alexy to affirm, as the liberal tradition does, that the individual subjective right should prevail on the collective interest in any case.

This is however a controversial issue, still open for discussion. The main risk here, as previously stated in this study, would be the one of fundamental rights losing their “absolute”, rational and “deontological character”, their priority as “moral trumps” against the process of majority rule.<sup>106</sup>

I am referring here to the Dworkin’s famous metaphor of rights as “political trumps held by individuals” which cannot be altered, not even by consensus. Rights have for Dworkin a special normative power: “the reasons which they provide are particularly powerful or weighty reasons, which override reasons of other sorts: rights give reasons to treat their holders in certain ways or permit their holders to act in certain ways, even if some social aim would be served by doing otherwise”.<sup>107</sup> Dworkin considers in fact that there can be only very few cases of exemption which can ‘trump’ rights.

The main concern is therefore to establish whether and how would be possible to overcome this conflict, typical of the liberal tradition, between human rights and common good, this conception by which individual fundamental rights should always have priority over any other social concern or political objective. In order to overcome this conflict it is important to understand the two different concepts. However this is in itself problematic because the general consensus on their meaning differs in different ideologies and cultures.

A possible solution, suggested for example by Joseph Raz, could be the adoption of a so-called interest-based theory of right as opposed to a classic will-theory of rights.<sup>108</sup>

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<sup>106</sup> Please refer to Chapter 1.2, p.15 ff of this Paper.

<sup>107</sup> Cf. Wenar, Leif, “Rights”, *The Stanford Encyclopedia of Philosophy (Fall 2011 Edition)*, Edward N. Zalta (ed.), available at: URL=<<http://plato.stanford.edu/archives/fall2011/entries/rights/>>. (Consulted on 28 October 2011). See also: Dworkin, R., *Taking Rights Seriously*, 1978, and Dworkin, R. ‘Rights as trumps’ in Waldron, J. (ed.) *Theories of Rights*, Oxford, Oxford University Press, 1984.

<sup>108</sup> Will-based and interest-based theories are the two main theories of the function of rights. Each one of them presents itself as capturing the understanding of *what rights do for those who hold them*. Which theory offers the better account of the functions of rights has been the subject of spirited dispute, literally for ages (...). Influential will theorists include Kant, Savigny, Hart, Kelsen, Wellman, and Steiner. Important interest theorists include Bentham, Ihering, Austin, Lyons, McCormick, Raz, and Kramer. Each theory has stronger and weaker aspects as an account of what rights do for rightholders. Cf: Wenar, L. 2011.

Will-theorists, like for example H.L.A.Hart believe that a right makes the right holder “a small scale sovereign”<sup>109</sup>, considering that “the function of a right is to give its holder control over another's duty” to act in a particular way. To have a right is for a will theorist to have the normative power “to determine what others may and may not do, and so to exercise authority over a certain domain of affairs”.<sup>110</sup>

However, the will theory of right seems to be unable to give an explanation of some rights that nevertheless exist such as the rights of “incompetents” like animals, children, or handicapped people which possess rights (for example the right not to be tortured) even though they do not exercise power over them because incapable of exerting their will and sovereignty.

An interest-based theory, on the other side, seems to be more capacious than the will theory, considering instead that “the function of a right is to further the right-holder's interests”. It can therefore accept as rights “both unwaivable rights (the possession of which may be good for their holders) and the rights of incompetents (who have interests that rights can protect).”<sup>111</sup>

In the specific case of a conflict between fundamental individual rights and common goods, interest-based theories can shed some light by giving a different definition of rights. Following this conception, rights are based on the interest and wellbeing of single individuals even though they are not limited to the interest of individuals alone but extend their interest to the general wellbeing of the community. Rights will be then characterized as common decisions regarding fundamental interests of individuals, which however will not be separate from concerns of collective interests and goals in a society.

As illustrated by J. Raz in his article “Rights and Politics”:

"the weight given to the interests of the right-holder in determining whether his interest is protected by a right, and how extensive that protection is, reflects not only our concern for the individual, but also our concern for the public interest that will be served by protecting the interest of the right holder (...), the right's holder's interests are only part of the justifying reason for many rights. The interests of others matter too. They matter; however, only when they are served by serving the right holder's interests, only when helping the right-holder is the proper way to help others.”<sup>112</sup>

In Raz's opinion, collective interests and individual rights should exist in harmony and cooperate with each other: there is no tension or conflict between them. In order to achieve a comprehensive conception of human rights it is in fact essential not to underestimate the importance of common good and its influence on values such as social justice, equality and freedom. Both individual human rights and collective interests are in fact an essential part of the

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<sup>109</sup> See: Hart, H., *Essays on Bentham: Studies in Jurisprudence and Political Theory*, Oxford: Clarendon Press, 1982, p.183.

<sup>110</sup> Cf. Wenar, L., 2011.

<sup>111</sup> Ibid.

<sup>112</sup> Raz, J., “Rights and Politics”, in: J. Tasioulas (ed.), *Law, Values and Social Practices*, Aldershot: Dartmouth, 1997, p.89.

human dimension and the right held by an individual always entails a duty on others. What is important for an individual cannot be considered independently of the consequences upon other individuals in a society and the individual autonomy should promote the wellbeing of the entire society. Individuals have not only rights but also responsibilities *vis á vis* the society in which they live.

Raz concludes by affirming that human rights are political and that human right theory should only focus on constitutional rights in specific political contexts.

Going back to Alexy's *Theory*, we should eventually notice, together with Kaarlo Tuori in his article, "Fundamental rights principles: disciplining the instrumentalism of policies" that Alexy fails to establish a further important distinction between principles and policies, collective interests.<sup>113</sup>

### 2.3 Liberty equality in law or democratic principle?

The last political issue, which will be tackled in this second section, concerns the question of whether in human rights adjudication the legal liberty and legal equality principle (*in dubio pro libertate*)<sup>114</sup> should prevail over the democratic principle or vice versa. Should judicial activism and judge's discretion become the final arbiter of fundamental rights adjudication at constitutional level, or should the democratic principle prevail?

It seems in fact important to deal not only with a problem of constitutional rights adjudication in courts but also with a problem of democratic representation and participation, better underlining what the *sub-structure* of balancing is, the importance of legal culture and common values, the positions about the constitution, the role of states and the very concept of justice in a given society.

In his article "Balancing, Constitutional Review and Representation" (2005), Robert Alexy affirms:

"balancing is one of the main issues in current debates on the interpretation of constitutional rights. Numerous authors have raised the objection that balancing is both irrational and subjective. Here it is argued that this objection is unjustified. To show this, balancing is grounded in a theory of discursive constitutionalism that connects the concept of balancing with the concepts of constitutional rights, of discourse, of constitutional review, and of representation. The main theses are these: first, balancing is based on a rational form of argument that can be made explicit by means of a "weight formula" and second, constitutional review complies with the requirements of democratic legitimation to the extent that it succeeds in becoming an argumentative representation of the people in supplying this formula with arguments".<sup>115</sup>

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<sup>113</sup> See: Tuori, K., "Fundamental rights principles: disciplining the instrumentalism of policies", in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 33-50.

<sup>114</sup> "Where there is doubt, liberty should prevail". According to this principle no principle opposite to legal liberty should prevail unless stronger reasons are put forward.

<sup>115</sup> Alexy, R., "Balancing, Constitutional Review and Representation", in: *International Journal of Constitutional Law*, October 2005, 3(4), p. 572.



It appears from the above that in Alexy's opinion there is not necessarily a conflict between the rationality of balancing (and its concretization through the "weight formula" adopted by judges) and the "democratic legitimization" principle: namely there is not conflict in Alexy's opinion between the rational method used by judges in court adjudications and the democratic principle, which foresees a public argumentation and democratic representation of people.

Judges are using for Alexy a rational method of adjudication through the balancing process and the recourse to the weight formula and, at the same time, an argumentative and democratic method of discussion and argumentation when supplying this formula with arguments.

Such an understanding would also apparently contradict O.E. Eriksen's affirmation, which in his article "Democratic or Jurist-made law?" defines Alexy's theory as "descriptively correct but normatively unacceptable".<sup>116</sup>

Eriksen distinguishes between a "jurist-made law" in which the Supreme Court become the final arbiter of constitutional law and a "democratic-made law", of which "substantial factors can be tested democratically".<sup>117</sup> He sustains that through his *Theory* Alexy is obliged to transfer the authorship of legal norms from democratic legislatures to judges and courts, with the consequent danger of "assimilating law and morality overburdening the legal medium itself".<sup>118</sup>

Eriksen's critique is therefore based on the assumption that "in democratic societies legal procedures are to ensure legally correct and rationally acceptable decisions that can be defended both in relation to legal statutes and in relation to public criticism".<sup>119</sup> Eriksen doubts about the efficiency of a legal system in which normative questions are solved only by reference to the discretion of judges. The real problem is in fact to ascertain "whether the judge's interpretations of situations are correct".<sup>120</sup>

The main concern at stake here is that if both the rationality of balancing and the impartiality of judges are put in doubt, implicitly acknowledging the objection that balancing is both irrational and subjective, a subsequent danger could be, beyond fundamental rights losing their strict normative power, the potential use of political ideologies, personal beliefs and even prejudices in order to justify sentences in courts.

Such a criticism could in my opinion be connected also with another substantial perplexity put forward by Kaarlo Tuori in his article "Fundamental rights principles: disciplining the instrumentalism of policies". In Tuori's view Alexy's *Theory* results in a blind approach to the

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<sup>116</sup> Eriksen, O. E., "Democratic or Jurist-made law?", in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 69-99.

<sup>117</sup> Ibid. p.70.

<sup>118</sup> Ibid. p.83

<sup>119</sup> Menendez A. J., Eriksen, O. E., (eds.), (2006), 7.

<sup>120</sup> Ibid.

“central paradox of the modern conception of fundamental rights as limits to state power which are established by State power and limits to law there are legal in themselves”.<sup>121</sup>

This “paradox of fundamental rights” is linked to the essential positivism of modern law, which is “based on conscious human actions and which is continuously amendable”.<sup>122</sup> It should be therefore recognized for Tuori at least “an implicit danger of totalitarianism entailed by the positivisation of law”.<sup>123</sup>

What, according to Tuori, “engenders this threat is not illegal or extra-illegal power, but power exercised through positive law: power in a legal guise”.<sup>124</sup>

Therefore, protecting fundamental rights in our modern positive era also means “protecting the limits of law”, and such a protection system still lies mainly at the level of nation-states while international monitoring mechanisms still play only a complementary role.

Tuori considers possible to solve this central paradox of fundamental rights through a “deconstruction of the concept of law”. He distinguishes then three levels of law: the surface level, the legal culture, and the deep structure of law and sustains that fundamental rights can only act as limits of state power if they are sufficiently sedimented in the deep sub-surface of law.<sup>125</sup>

Going back to Alexy’s *Theory*, as it has been previously underlined in this study, Alexy himself seems to recognize two different principles in balancing: the principle of legal liberty and legal equality (*in dubio pro libertate*) and the democratic principle (*in dubio pro legislatore*).<sup>126</sup>

In fact, talking about “burdens of argumentation”<sup>127</sup>, while in *A Theory* Alexy seems to support the principle of legal liberty and legal equality, in the *Postscript to A Theory* he align himself with the democratic principle affirming that an act of interference by the Parliament would not be considered as disproportionate or contrary to the constitution.

Even though this “double solution” seems to be contradictory, Alexy does not think that this entails necessarily a conflict between the two principles, because there is not conflict in Alexy’s opinion between the legal liberty of judges in courts and the democratic principle, which foresees a public argumentation and democratic representation of people.

Nevertheless, elsewhere Alexy affirms that “fundamental rights are an expression of distrust in the democratic process”, that they represent both “the basis and the boundary of democracy”

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<sup>121</sup> Ibid, pp.7, 8.

<sup>122</sup> Tuori, K., “Fundamental rights principles: disciplining the instrumentalism of policies”, in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 40.

<sup>123</sup> Ibid. Please refer also to: Hayek, F., *Law, Legislation and Liberty*, One volume edition, London: Routledge & Kegan Paul, 1982.

<sup>124</sup> Ibid. p.42.

<sup>125</sup> Ibid.

<sup>126</sup> Please refer to Chapter 1.3, p.26 of this Paper.

<sup>127</sup> The burden of argumentation represents for Alexy the third stage of the Law of balancing and operates “only in cases in which the weight formula results in a stalemate, the weight of principles being identical”. Please refer to Chapter 1.3, p.26 and Annex I of this Paper.

and that they are “so important that the decision to protect them cannot be left to simple parliamentary majorities”.<sup>128</sup>

Such affirmations do not seem to solve the contradictory character of his propositions. As underlined by Judge Robert Bork in his book “Coercing Virtue: The Worldwide Rule of Judges”, if judicial power can lead to the abolition of majorities decisions of the people’s representatives, the question arise if judicial discretion does not entails a corrosion of democratic governance.<sup>129</sup>

Nevertheless, the importance of the judicial control in protecting citizens against unjustified interventions of the legislative power should also be recognized: constitutional courts can in fact exercise an important role in protecting citizens against unjust laws which are not excluded even in democratic parliaments.

## CONCLUSIONS

The key issues tackled in this paper were theoretical as well as practical and political. The essay tried to shed some light over a vast area of theoretical and normative schools of thought. Any of these areas deserved an essay on its own, and comparing them in a limited space and time had some restrictions in terms of scope and depth.

Important questions have however been dealt with such as the issue of addressing and solving human rights conflicts in courts. An attempted appraisal, evaluation and critique of the principle of proportionality analysed by Robert Alexy in his *Theory of Constitutional Rights*, has been put forward. Particular efforts have been made in order to establish if the balancing method should be recognized as a “truly rational method”, as defended by Alexy in his *Theory*, or just as “a pure practical and rhetorical method of solving conflicts”, as sustained by some of his main critics.

The possibility of taking into account other approaches that accentuate the moral foundation of rights and sustain a more democratic principle have been taken into consideration while contextualizing “quantitative-like” criteria such as those associated with proportionality and the positivisation of law.

The importance of Alexy’s *A Theory* has been recognized as relevant to most, if not all, European and international legal orders; first of all the European Union Constitutional order. Establishing whether and to what extent Alexy’s theory can be useful in interpreting and applying fundamental rights provisions of the European Union law and especially, the now

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<sup>128</sup> Alexy, R., “Discourse Theory and Fundamental Rights”, in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 17.

<sup>129</sup> Cf. Bork, R. H., *Coercing Virtue: The Worldwide Rule of Judges*, Aei Press, September 2003.

legally binding “Charter of Fundamental Rights of the European Union”, is in my opinion of primary importance and deserves further investigations.

Main aim of this paper was however testing the limits of Alexy’s approach, the reasonableness of the proportionality principle in legal decisions and the effective use of balancing in courts as an essential methodological tool for adjudication. More general philosophical considerations concerned a clarification of the concepts of “constitutional rights”, “human rights” and “fundamental rights”, trying at the same time to shed some light on the structure and content of rights and therefore on what can define their limits and scope.

That means to ascertain the “deontological and normative value” of rights, establishing whether such an inalienable core of fundamental, “non-derogable” rights exists, to which weighing and balancing should not apply because of their absolute and universal value (i.e. principles that are not subject to proportionality review). Contrary to most philosophical conceptions of moral rights, one central characteristic of most constitutional rights nowadays seems in fact to be the possibility of being “normally” and usually subjected to a balancing approach.

On the other side, important political questions have been raised such as the legitimization and the extent of Court’s judicial power in applying the proportionality principle, balancing rights and constitutional review. Is this power limited or unlimited? Courts can in fact use the principle of proportionality in order to reach important public interest decisions interfering with the legislative functions and enhancing their discretionary power.

The main issue at stake lies in a political resolution: whether to trust judges to review, leave adjudication to democratically elected parliaments or find alternative ways of rights adjudication.

It was then considered necessary to better highlight the *substructure* of balancing: the importance of legal culture and common values, the positions about the constitution, the role of states and of international monitoring bodies, the very concept of justice in a given society. Different legal systems can in fact reflect a different legal hierarchy and different social values.

One primary conclusion that has been reached is that even when a measure respects all proportionality’s criteria (necessary in a democratic society, in accordance with law and pursuing a legitimate aim), it should be nevertheless declared unacceptable and unconstitutional in case it is found in violation of a basic human right, which means violating the essential value and content of a human right. It is in fact not possible to accept the proportionality of a norm in every case, even when it is in violation of a basic human right. It follows that a norm can be considered as proportional if and only if it does not influence or change the essential content of a human right. In no case the evaluation of costs and benefits can be done without taking into consideration the essential content of rights. A norm should be considered as disproportionate and unconstitutional in case it alters the essential content of a human right or in case it lacks the

sufficient justification for an eventual restriction of this right. This is the reason why it becomes fundamental to be aware of the limits, content and characteristics of human rights, analysing first of all the degree of alteration of a right in every single case.

Another important political issue that has been raised in this analysis is the risk associated with a relativistic conception of justice and law, of having fundamental individual rights balanced against collective goods, public interests and policies. It has been shown as this fundamental rights conception of public good goes against all fundamental principles of a traditional liberal theory of rights. It has been therefore recognized that Alexy's *Theory* lacks a further important distinction, which must be made, between principles and policies. It is in fact necessary to analyse and clarify not only the content and characteristics of each fundamental right, but also their relationship towards each other and towards fundamental rights "of the others", meaning also the relationship between human rights and the "common good" of a community, considering also the degree of public interest involved in every case. The evaluation of such public interest should however be done always by referring first of all to the essential content of rights, in order to avoid the utilitarian risk. In a few words, the most important action that has to be taken in order to evaluate a norm is to determinate which the "inalienable" content of a right is. Only once determined this, would be it possible to proceed with further analysis and consideration of collective good, public interest or policy objectives, determining the level of interference of the measure taken into account. Judges with constitutional competence should be the ones performing this task through a faithful interpretation of the constitution and an understanding of each human right in relation to his concept and essential content.

It is therefore suggested in this paper a possible solution to overcome the conflict, typical of the liberal tradition, between human rights and common goods, by adopting a so-called interest-based theory of right, as suggested by Joseph Raz in his works, and as opposed to a classic will-theory of rights. Such a theory is based on the recognition, on the one side, of core fundamental rights which should preserve their deontological and normative power and, on the other side, the exigency of recognizing and preserving cultural and collective rights and social policies aiming at safeguard collective interests and goods.

Following this conception, rights are based on the interest and wellbeing of single individuals but are not limited to the interest of those individuals, extending instead their relevance to the general wellbeing of the community.

Rights will be then characterized as common decisions regarding fundamental interests of individuals, which however will not be separate from concerns of collective interests and goals in a society. Following this theory, collective interests and individual rights should coexist in harmony and cooperate with each other avoiding conflicts (what is good for the single individuals is good also for the society as a whole).

Both individual human rights and collective interests should in fact be considered as an essential part of the human dimension and the right held by an individual always entails a duty and a responsibility on *others*.<sup>130</sup>

Lastly, I agree with what recognized by Bernal Pulido in his above-mentioned article:

“The weight formula should not be regarded as an algorithmic procedure which produces the right answer in all cases. On the contrary there are diverse rationality limits that leave a margin of discretion to judges. In this regard, his ideology matters and plays an important role. 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 to be justified”.<sup>131</sup>

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<sup>130</sup> Please refer to Chapter 2.2, p.36 of this Paper.

<sup>131</sup> Bernal Pulido C., “On Alexy’s Weight Formula”, in: Menendez A. J., Eriksen, O. E., (eds.), (2006), 109.

## Annex I

### THE STRUCTURE OF BALANCING

**1. 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”.

It is divided in 3 stages:

1.1 Intensity of interference of the 1st principle (degree of non-satisfaction or detriment to the first principle).

1.2 Degree of importance of the 2nd principle (importance of satisfying the competing principle).

1.3 Their relationship to each other (whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former).

**2. Weight Formula:** Rational procedure to determine the concrete weight of principle Pi in relation to principle Pj in the light of the circumstances of a specific case. WF is a complement to the law of balancing.

It contains 3 variables:

2.1 Importance of the principles at stake.

2.2 Abstract weight of the principles (derives from the different legal hierarchy of the legal body from which stems the principle or might be established by reference to positive social values).

2.3 Reliability of the empirical assumptions (factual premises under the circumstances of the specific case).

**3. Burden of Argumentation:** it “operates only in cases in which the weight formula results in a stalemate, the weight of principles being identical”.

Two different solutions:

3.1 Stalemate cases to be solved in favour of the legal liberty and legal equality principle (*in dubio pro libertate*), (in *A Theory*).

3.2 Stalemate cases to be solved by resorting to the democratic principle (in the *Postscript to A Theory*).

### **Triadic Scale of interference**

**1. Light = 1**

**2. Moderate = 2**

**3. Serious = 4**

### **Triadic Scale of Reliability of Empirical Assumptions**

**Reliable = 1**

**Plausible =  $\frac{1}{2}$**

**Not evidently/false =  $\frac{1}{4}$ .**



## Annex II

### DISCOURSE THEORY AND FUNDAMENTAL RIGHTS

#### Comprise three dimensions:

1. **“Philosophical”**: the foundation and the substantiation of fundamental rights.
2. **“Political”**: the institutionalization of fundamental rights.
3. **“Juridical”**: the interpretation of fundamental rights.

#### Three different conceptions of fundamental rights:

1. **“Formal”**: if fundamental rights are defined as rights contained in a Constitution or in a certain part of it.
2. **“Substantial”**: include criteria that go above and beyond the fact that a right is mentioned, listed or guaranteed in a Constitution. The substantial concept of fundamental rights corresponds with the concept of Human Rights. Human Rights are substantive even when not included in a formal Constitution. Fundamental rights represent human rights transformed into positive law.
3. **“Procedural”**: institutional problem of transforming human rights into positive law.

**Fundamental rights = Human rights transformed into positive law.**

#### Eight potential foundations of fundamental rights:

1. **Religious**: God creates Human Rights in his own image.
2. **Intuitionist**: Human Rights are self-evident.
3. **Consensual**: congruence of beliefs, collective intuitionism.
4. **Socio-biological**: human rights derive from altruism, altruistic behaviour for the survival of the genetic pool of individuals.
5. **Instrumental**: acceptance of Human Rights is indispensable to the maximization of individual utility.
6. **Cultural**: Human Rights as an achievement of the history of human culture, the work of centuries has established a solid core of human rights.
7. **Explicative**: discourse-theoretical approach makes explicit what is necessarily implicit in human practice.
8. **Existential**: necessity of discursive practice: human beings are “discursive creatures”.

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