

BOOK REVIEW

***A THEORY OF CONSTITUTIONAL RIGHTS. By Robert Alexy
(translated by Julian Rivers) [Oxford, OUP, 2002]***

This is an excellent translation in English of Robert Alexy's *Theorie der Grundrechte*. The original, published in 1985, contains what in the German-speaking world is one of the most important theories of constitutional rights in general, and not merely regarding the German constitution (Grundgesetz), considering that any legal document entitled "Constitution of X", but not establishing the rights that are more or less instituted by the Grundgesetz, would suffer a relative conceptual loss.

The author frames his theory as a theory of the rights of the Grundgesetz, a theory that beyond an empirical dimension has also a normative one, is general and primarily structural, for it investigates the concepts, conceptions, and forms of the process of constitutional law reasoning.

The main argument of the book is that constitutional rights have a double character, namely they are both rules and principles, but foremost principles. The author reformulates the familiar distinction of Ronald Dworkin between rules and principles and defines principles as optimisation requirements relative to what is factually and legally possible, in contradiction to rules, which are defined as definitive requirements. In contrast to Dworkin's moral conception of principles, however, Alexy asserts that principles are not reasons for rights only, but also reasons for collective interests. It is this conception that justifies the competition between principles, which, let it be noted, are in Alexy's opinion reducible to equivalent values. The author, however, does not explain why rights as principles may not simply be incompatible with one another or with collective interests as principles; nor does he explain, whether, how, and to what extent the competition in question is a conceptual or a contingent feature thereof. In any event, principles, according to Alexy, stand constantly in a relation of mutual competition - perhaps more accurately of opposition. It is precisely for that reason that the non-satisfaction of one principle must, according to the author's regulative Law of Balancing, be counterbalanced by the significance of an opposite principle.

Now, the conception of constitutional rights, without any further qualification, as principles under constant balancing, conflicting with one another or with collective goods, raises the question of the soundness of the theory's analytical statements. In the context of such a conception of constitutional rights, the supremacy of these rights over collective aims depends on the result of the balancing in question. This latter statement is easily derived from consequentialist theories, but not from non-consequentialist ones, *e.g.* from a conception of rights as anti-utilitarian trumps. Therefore, the theory is open to substantive disagreement and its characterization as structural seems doubtful.

It is certainly intelligible and perhaps may be true of some rights (be it constitutional or non-constitutional) or of some aspects of these rights that

they are susceptible to balancing against public interest, as are for example some institutional forms of economic freedom. However, the question whether the same or something of the kind is true of the rights of the Grundgesetz, as a semantic characteristic thereof, should be addressed within the subject matter of each right. Pending the relevant substantive reasons, Alexy's theory may fail to qualify as general.

To the above Law of Balancing we should, following a suggestion of the author in his postscript to this edition, add an epistemic Law of Balancing, latent in the main body of the book, according to which, the more intensive an interference in a constitutional right is, the greater must be the certainty of its underlying premises. In the light of the two Laws of Balancing and the distinction between rules and principles, Alexy achieves a remarkably lucid and consistent reading of the Grundgesetz, the case-law of the German Federal Constitutional Court (Bundesverfassungsgericht), as well as the doctrinal controversies with respect to the principle of proportionality, the limits and/or the extent of rights, the general rights to liberty and equality and, in general, the constitutional rights, as being rules for the burden of argumentation. From an empirical point of view, this theory is indeed the best reconstruction of German constitutional law. Yet, what happens from a normative point of view?

Article 1(1)(1) of the Grundgesetz provides that "[h]uman dignity [Menschenwürde] is inviolable". It is certainly a considered judgment that human dignity *per definitionem* cannot be balanced against any collective aim; nor may it be denied satisfaction so that other claims are satisfied, even constitutional ones. (Besides, there is no opposite provision in the Grundgesetz.) How is it then possible to perceive the constitutional principle of human dignity as competing with anything? Alexy takes into account this objection, but does not avoid committing a conceptual fallacy. He asserts that this principle has a dual aspect like all other constitutional rights. The norm: "human dignity may not be subjected to balancing" is the human dignity rule (here "rule" stands for a definitive as opposed to *prima facie* requirement). However, given the open-endedness of the rule, in order to determine what it definitively prescribes, we must balance human dignity against other principles. Of course, there is no objection to assuming that the human dignity norm is a principle, and to that extent an optimisation requirement. The conception of principles as optimisation requirements does not, however, mean that these stand in a relation of mutual competition. For, given the absoluteness of the principle, the question of under which circumstances human dignity may be violated is a matter of the principle itself (of intrinsic reasons), not of its balancing with other competing principles (of extrinsic reasons). Since most of the rights of the Grundgesetz are subjective aspects of the human dignity principle (lest any positivist objections be raised, this is explicitly stated in the International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights), an important question is raised: are these rights also susceptible to balancing against collective interests? What is more, this reasonable thought seems to call in question the idea that it is possible to have genuine conflicts between these rights for most of them derive from the same principle. For, if constitutional rights derive (normatively, not logically) from the human dignity principle and at the same time are in conflict, then we are applying double standards to the content of human dignity. It follows that the respect

of rights, to the extent we take them seriously, is a matter of dignity (that is why we speak of an inalienable core of rights [Wesengehaltsgarantie]). Along these lines, when claims based on these rights intersect, we must interpret each right in the terms of the other rights, treating them as integrated values, in order to find the proper principle applicable to the specific circumstances. For all these reasons, it follows that we have to query the normative limits of the theory as regards the crucial matter of the protection of human dignity, and, in particular, we have to consider whether this theory is capable of being critical of the legal practice.

The reasons for my reservations with respect to what otherwise is one of the most sophisticated theories of constitutional rights available, are best illustrated when Alexy, somewhat paradoxically, disputes the rightness of a (right) decision of the Bundesverfassungsgericht about the absoluteness of the human dignity principle, in accepting that it is intelligible from the standpoint of constitutional law that a competing principle may have a greater weight than (that of) human dignity.

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