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Ustavna prava i proporcionalnost

Dva su osnovna shvatanja odnosa između ustavnih prava i analize proporcionalnosti. Prvo drži da postoji nužna veza između ustavnih prava i proporcionalnosti; drugo tvrdi da pitanje o tome da li su ustavna prava i proporcionalnost povezani zavisi od toga šta su ustavotvorci zapravo odlučili, tj. zavisi od pozitivnog prava. Prva teza se može označiti kao "teza o nužnosti", druga se može označiti kao "teza o kontingentnosti." Prema tezi o nužnosti, legitimnost proporcionalnosti je pitanje prirode ustavnih prava, dok je prema tezi o kontingentnosti legitimnost proporcionalnosti pitanje tumačenja. U članku se zastupa teza o nužnosti. | Prethodna verzija ovog članka je objavljena u *Chinese Yearbook of Constitutional Law* (2010). 221-235.

Ključne reči: teorija principa, analiza proporcionalnosti, ustavna prava, nužna veza, ljudska prava, dualna priroda

1 NUŽNE I KONTINGENTNE VEZE

Odnos između ustavnih prava i proporcionalnosti jeste jedna od osnovnih tema savremene ustavnopravne debate. Sukobljena su dva stanovišta: teza o tome da postoji neka vrsta nužne veze između ustavnih prava i analize proporcionalnosti i teza da ne postoji nužna veza između bilo koje vrste ustavnih prava i proporcionalnosti. Prema drugom gledištu, pitanje o tome da li su ustavna prava i proporcionalnost povezani zavisi od pozitivnog prava, to jeste od onoga šta su ustavotvorci zapravo odlučili. Iz tog razloga, veza između ustavnih prava i proporcionalnosti može biti samo moguća ili kontingentna.[1] Prva teza se može nazvati "teza o nužnosti", druga se može nazvati "teza o kontingentnosti". Zastupaću verziju teze o nužnosti.

2 TEORIJA PRINCIPA I PROPORCIONALNOST: PRVA TEZA O NUŽNOSTI

2.1 Pravila i principi

Teza o nužnosti je u najrazvijenijem obliku sadržana u teoriji principa. Osnov teorije principa jeste teorijska razlika između pravila i principa.[2] Pravila

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1 Lako je zamisliti treću tezu koja tvrdi da je veza između ustavnih prava i proporcionalnosti nemoguća. Ta teza neće biti razmatrana na ovom mjestu.

2 Vidjeti Alexy (2002a: 47-49).

su norme koje zahtjevaju nešto određeno. To su *određene zapovijedi.* Oblik njihove primjene je supsumcija. Ako je pravilo važeće i ako su ispunjeni uslovi za njegovu primjenu, onda se definitivno zahtjeva tačno ono što pravilo traži da bude učinjeno. Učini li se to, postupilo se u skladu s pravilom; ne učinili li se to, postupilo se protivno pravilu. Nasuprot tome, principi su *zahtjevi optimizacije.* Kao takvi, oni zahtjevaju da se nešto ostvari "u najvećoj mogućoj mjeri s obzirom na pravne i faktičke mogućnosti".[3] Ostavimo li pravila po strani, pravne mogućnosti su suštinski određene suprotstavljenim principima. Iz tog razloga, principi, sami po sebi, uvijek predstavljaju samo *prima facie* zahtjeve. Određenje odgovarajućeg stepena zadovoljavanja jednog principa u odnosu prema zahtjevima drugih principa je moguće balansiranjem. Stoga je balansiranje poseban oblik primjene principa.

2.2 Princip proporcionalnosti

a) Optimizacija u odnosu na faktičke i pravne mogućnosti

Definicija principa kao zahtjeva optimizacije vodi direktno nužnoj vezi između principa i proporcionalnosti. Princip proporcionalnosti *(Verhältnismäßigkeitsgrundsatz),* koji je u poslednjim decenijama dobio još više međunarodnog priznanja u teoriji i praksi kontrole ustavnosti,[4] sastoji se od tri podprincipa: principa pogodnosti, principa nužnosti i principa proporcionalnosti u užem smislu. Sva tri podprincipa izražavaju ideju optimizacije. Principi *qua* optimizacija zahtjevaju optimizaciju koja se odnosi kako na faktički moguće tako i na pravno moguće. Principi pogodnosti i nužnosti se odnose na optimizaciju u pogledu faktičkih mogućnosti. Princip proporcionalnosti u užem smislu se odnosi na optimizaciju u pogledu pravnih mogućnosti.

b) Pogodnost

Prvi podprincip, princip pogodnosti, isključuje prihvatanje sredstava koja spriječavaju ostvarivanje bar jednog principa, bez unaprijeđenja bilo kog drugog principa ili cilja zbog kojeg je princip prihvaćen. Ako sredstvo *M,* prihvaćeno u cilju ostvarivanja principa P_1, nije pogodno u ovu svrhu, ali spriječava ostvarivanje P_2, onda nema troškova po P_1 ili po P_2 ako se *M* isključi. Stoga se P_1 i P_2, ako se *M* napusti, mogu ostvariti zajedno u većoj mjeri u odnosu na ono što je faktički moguće. P_1 i P_2, *uzeti zajedno,* kao elementi jednog sistema, zabranjuju korišćenje *M.* To pokazuje da je princip pogodnosti ništa drugo do izraz Pareto efikasnosti. Jedna pozicija može biti unaprijeđena bez pogoršavanja druge pozicije.

3 Alexy (2002a: 47).

4 Vidjeti, na primjer: Beatty (2004); Stone Sweet & Mathews (2008).

Primjer kršenja principa pogodnosti može se pronaći u odluci Njemačkog federalnog ustavnog suda u pogledu zakona koji je zahtjevao ne samo da one osobe koje se prijave za opštu lovnu dozvolu moraju da prođu ispit korišćenja oružja, već i da osobe koje se prijavljuju za dobijanje posebne dozvole za sokolarstvo moraju položiti isti ispit. Sud je tvrdio da ispit korišćenja vatrenog oružja za sokolare nije pogodan za promociju "ispravnog obavljanja ovih aktivnosti u skladu s namjerom zakonodavca".[5] U tom slučaju, dakle, "nema supstantivno jasnog razloga"[6] za kršenje opšte slobode djelovanja sokolara, koju garantuje član 2 (1) Osnovnog zakona. Iz tog razloga, regulativa je proglašena za neproporcionaln[7] i, sljedstveno, za neustavnu.

c) Nužnost

Slučajevi u kojima se zakoni proglašavaju neustavnima iz razloga nepogodnosti su rijetki. Uobičajeno je mjera koja je predviđena od strane zakonodavca pogodna za ostvarenje njegovih ciljeva u određenoj mjeri. Sa stanovišta pogodnosti to jeste dovoljno. Iz tog razloga je praktični značaj podprincipa pogodnosti prilično malen. Stvar stoji potpuno drugačije u pogledu drugog podprincipa principa proporcionalnosti - principa nužnosti. Princip o kojem je riječ zahtjeva da između dva sredstva za unaprjeđenje P_1, koja su, uopšte uzevši, jednako pogodna, moramo odabrati ono koje manje ometa P_2. Ako postoji sredstvo koje je jednako pogodno, a manje ometa, jedna pozicija može biti poboljšana bez troška za drugu poziciju.[8] Pod tim uslovom, P_1 i P_2, *uzeti zajedno*, zahtjevaju da se primjeni sredstvo koje manje ometa. Iznova je, dakle, riječ o slučaju Pareto efikasnosti.

Primjer je odluka Federalnog ustavnog suda, koja se odnosi na slatkiše, a posebno na slatkiše u obliku uskršnjeg zeke i deda mraza, koji se sastoje od nadošlog oriza. U cilju zaštite potrošača od kupovine slatkiša od nadošlog oriza umjesto istih takvih od čokolade, uvedena je zabrana slatkiša od nadošlog oriza. Sud je zauzeo stav da se zaštita potrošača može postići "jednako efikasnim ali manje oštrim načinom - propisivanjem obaveze obilježavanja".[9] Iz tog razloga, presuđeno je da je zabrana prekršaj principa nužnosti, te je stoga i neproporcionalna.

5 Odluke Federalnog ustavnog suda *(Entscheidungen des Bundesverfassungsgerichts;* u daljem tekstu: BVerfGE) 55, 159 (166).

6 BVerfGE 55, 159 (167).

7 BVerfGE 55, 159 (166).

8 Princip nužnosti pretpostavlja indiferentnost prema svim drugim principima ili ciljevima u vezi s kojima se postavlja pitanje o tome da li treba izabrati sredstvo koje intenzivnije ili manje intenzivno vrši interferenciju. Postoji li, ipak, treći princip ili cilj, P_3, na koji se prihvatanje sredstava koja manje interferiraju sa P_2 negativno odražava, onda slučaj ne može biti odlučen na osnovu razmatranja koja se tiču Pareto efikasnosti. Kada su troškovi neizbježni, balansiranje postaje neophodno.

9 BVerfGE 53, 135 (146).

d) Proporcionalnost u užem smislu

Baš kao i princip pogodnosti, princip nužnosti se tiče prilagođavanja u odnosu na faktičke mogućnosti. Prilagođavanje u odnosu na faktičke mogućnosti sastoji se u izbjegavanju troškova koji se mogu izbjeći. Kada se principi sukobe, troškovi su pak neizbježni. Tada je neophodno balansiranje. Balansiranje je predmet trećeg podprincipa proporcionalnosti - principa proporcionalnosti u užem smislu. Taj podprincip izražava šta znači prilagođavanje u pogledu pravnih mogućnosti. Identičan je s pravilom koje se može nazvati "zakon balansiranja",[10] a koje glasi ovako:

> Što je veći stepen nezadovoljavanja jednog principa ili škodjenja jednom principu, značaj zadovoljavanja drugog principa mora biti veći.

Zakon balansiranja isključuje, *inter alia,* intenzivno remećenje principa P_1 koje se može opravdati isključivo malim značajem koji se pripisuje zadovoljavanju kolidirajućeg principa P_2. Takvo rješenje ne bi bila optimizacija *P_1 zajedno s P_2.*

Zakon balansiranja se, formulisan na različite načine, može pronaći skoro svuda u ustavno-sudskom presuđivanju, izražava centralnu karakteristiku uravnoteživanja i od velikog je praktičnog značaja. Želi li se postići precizna i potpuna analiza strukture balansiranja, Zakon balansiranja mora biti detaljnije obrazložen. Rezultat obrazloženja jeste Formula težine.[11] Formula težine određuje težinu principa P_i u konkretnom slučaju, to jeste određuje konkretnu težinu P_i u odnosu prema kolidirajućem principu Pj (W_i, j) kao količnik proizvoda intenziteta interferencije sa P_i *(I)* i apstraktne težine P_i *(W)* i stepena pouzdanosti empirijskih pretpostavki u pogledu toga šta mjera koja je u pitanju znači za neostvarivanje P_i *(R)* s jedne strane, i proizvod odgovarajućih vrijednosti u pogledu Pj koje se odnose na ostvarivanje Pj, s druge strane. Formula izgleda ovako:

$$W_{i,j} = \frac{I_i \cdot W_i \cdot R_j}{I_j \cdot W_j \cdot R_j}$$

Razgovor o količnicima i proizvodima je razuman samo u prisustvu brojeva. To je problem stepenovanja. U *A Theory of Constitutional Rights* razmatrao sam samo kontinuiranu skalu koja prelazi preko neograničenog broja tačaka između 0 i 1 i došao sam do zaključka da je s takvom skalom nemoguće raditi u okviru pravnog rasuđivanja.[12] Još uvijek vjerujem da je taj nalaz tačan. Stvari su ipak

10 Alexy (2002a: 102).

11 Alexy (2003: 433-448); Alexy (2007a: 9-27).

12 Alexy (2002a: 97-99).

različite čim se u obzir uzmu ne samo kontinuirane ili infinitezimalne, već i diskretne skale. Diskretne skale se određuju činjenicom da između njihovih tačaka ne postoje druge tačke. Balansiranje može da počne čim postoji skala s dvije vrijednosti, od kojih se jedna može, recimo, okarakterisati kao laka, dok se druga može okarakterisati kao ozbiljna. U ustavnom pravu se često koristi trijadička skala, koja djeluje s vrijednostima slabo (s), umjereno (u) i ozbiljno (o). Postoje različiti načini da se te vrijednosti predstave brojevima.[13] Odaberemo li geometrijski niz kakav je 2^0, 2^1 i 2^2, postaje moguće da se predstavi činjenica da moć principa raste više nego proporcionalno u odnosu na porast intenziteta interferencije. To je osnov za odgovor na prigovor da teorija principa dovodi do nedopustivog slabljenja ustavnih prava. Ukoliko je konkretna težina (W_i, j) P_i veća od 1, P_i prethodi Pj; ako je manja od 1, Pj prethodi P_i. To povezije Formulu težine, a s njom i Zakon balansiranja, sa Zakonom sukobljenih principa.[14] Ako je pak konkretna težina (W_i, j) 1, riječ je o pat poziciji. U tom slučaju dozvoljeno je kako to da se primjeni mjera u pitanja, tako i da se ona izostavi. To znači da država, a naročito zakonodavac, ima diskreciju.[15] To je od posebnog značaja za odgovor na prigovor da teorija principa vodi hiperkonstitucionalizaciji.[16]

Protiv Formule težine se može istaći prigovor da se pravno rasuđivanje ne može svesti na račun. Prigovor bi počivao na nerazumjevanju uloge Formule težine. Brojevi, koji moraju biti zamjenjeni varijablama, predstavljaju sudove, na primjer, sud: "Narušavanje slobode izražavanja je ozbiljno". Taj sud mora biti opravdan, a može se opravdati isključivo argumentima. Na taj način je Formula težine sama po sebi povezana s pravnim diskursom i izražava osnovni argument iz pravnog diskursa.[17]

Valjalo bi se opet osvrnuti na jedan slučaj, kako bi se ilustrovalo apstraktno objašnjenje principa proporcionalnosti u užem smislu. Odluka Federalnog ustavnog suda, koja se tiče klasičnog konflikta između slobode izražavanja i ličnih prava, jeste takav slučaj. Rasprostranjeni satirični magazin *Titanik* je opisao paraplegičnog rezervnog oficira koji je uspješno obavljao dužnosti nakon povratka u aktivnu službu kao "rođenog ubicu" u jednom izdanju, a u kasnijem izdanju kao "bogalja". Viši regionalni apelacioni sud u Dizeldorfu je presudio na štetu *Titanika* po tužbi oficira i naredio je magazinu da plati odštetu u iz-

13 O tom pitanju vidi Alexy (2007a: 20-23).

14 Alexy (2002a: 53-54).

15 Alexy (2002a: 408, 410-414).

16 O tom pitanju pogledati: Böckenförde (1991: 188-190).

17 U Alexy (1989: 221-230), predstavio sam Formulu supsumcije kao jedinu osnovnu formu argumenta. U Alexy (2003: 443-448), dodao sam mu Formulu težine kao drugu osnovnu formu argumenta. Konačno, u Alexy (2010b: 17-18), pokušao sam da zatvorim sistem dodavanjem trećeg osnovnog argumenta iz analogije ili poređenja slučajeva. Tri osnovna argumenta formiraju svaki za sebe vezu s pojmovima pravila, principa i slučaja.

nosu od 12000 DM. *Titanik* je podnio ustavnu žalbu. Federalni ustavni sud je preduzeo "balansiranje specifično za slučaj"[18] između slobode izražavanja onih koji su povezani s magazinom (P_1: član 5 (1) (1), Osnovni zakon) i oficirovo opšte pravo ličnosti (P_2: član 2 (1) u vezi s članom 1 (1), Osnovni zakon). U tom cilju je utvrđen intenzitet interferencije između tih prava, koja su stavljena u međusobni odnos. Presuda o odšteti je shvaćena kao "trajno"[19] ili *ozbiljno* (o) škođenje *(I_1)* slobodi izražavanja. Zaključak je opravdan, prije svega, argumentom da bi dodjeljivanje odštete moglo da utiče na buduću volju onih koji stvaraju magazin da nastave sa svojim poslom na način na koji su to činili do sada. Opis "rođenog ubice" je stavljen u kontekst satire koju *Titanik* objavljuje. U časopisu je i ranije rođeno prezime određenog broja osoba predstavljeno na "prepoznatljivo humoristićan" način, od "igre riječi do blesavosti".[20] Kontekst je učinio nemogućim da se opis posmatra kao "protivpravna, ozibiljna, nezakonita šteta za pravo ličnosti".[21] Interferencija s pravom ličnosti je tretirana kao interferencija *umjerenog* (u), a možda ili *slabog* ili manjeg (s) intenziteta (I_2). Te procjene intenziteta su sačinjavale prvi dio odluke. Da bi se opravdala dosuđena nadoknada, koja predstavlja *ozbiljnu (o)* interferenciju ustavne slobode izražavanja (P_1), intenzitet interferencije prava na ličnost (P_2), koja bi trebalo da je kompenzovana odštetom, morao bi da bude jednako ozbiljan *(o)*. Prema procjeni Suda to nije bio slučaj. Intenzitet interferencije je u najboljem slučaju bio umjeren (u), a možda čak slab (s). To je značilo da je interferencija sa slobodom izržavanja, prema Zakonu balansiranja, a s njim i prema Formuli težine, neproporcionalna, a stoga i neustavna.

Stvari su bile sasvim drugačije u dijelu u kojem je oficir nazvan "bogaljem". Na osnovu ocjene Suda u ovom slučaju je riječ o "ozbiljnoj šteti za njegovo pravo ličnosti".[22] Procjena je opravdana činjenicom da se opisivanje teško onesposobljene osobe u javnosti kao "bogalja" u naše vrijeme uzima kao "ponižavajuće" i da izražava "pomanjkanje uvažavanja".[23] Stoga je ozbiljnoj (o) interferenciji (I_1) slobode izražavanja (P_1) suprotstavljen veliki (o) značaj (I_2) koji je dat zaštiti ličnosti (P_2). To je tipičan slučaj pat pozicije. Sljedstveno, Sud je došao do zaključka da ne može primjetiti "nedostatak balansiranja na štetu slobode izražavanja"[24] u odluci Višeg regionalnog apelacionog suda u Dizeldorfu. Ustavna žalba *Titanika* je, stoga, opravdana u onoj mjeri u kojoj se tiče odštete za opis "rođeni ubica". U pogledu opisa "bogalj" žalba je neopravdana.

18 BVerfGE 86, 1 (11).
19 BVerfGE 86, 1 (10).
20 BVerfGE 86, 1 (11).
21 BVerfGE 86, 1 (12).
22 BVerfGE 86, 1 (13).
23 BVerfGE 86, 1 (13).
24 BVerfGE 86, 1 (13).

2.3 Dvije nužne veze

Razmatranja su se do ove tačke ticala odnosa između teorije principa i proporcionalnosti. Ispostavlja se da je ta veza izuzetno jaka. Na osnovu teorije principa, principi su zahtjevi optimizacije. Princip proporcionalnosti s tri podprincipa logički proizlazi iz prirode principa kao zahtjeva optimizacije, a priroda principa kao zahtjeva optimizacije logički proizlazi iz principa proporcionalnosti.[25] Ta ekvivalencija je nužna.

Upravo na tom mjestu u igru ulazi ključno razlikovanje. Riječ je o razlikovanju između nužne veze između teorije principa i proporcionalnosti s jedne strane, i nužne veze između teorije principa, uključujući i proporcionalnost (koja je ekvivalent teorije principa), i ustavnih prava s druge strane. Teza da postoji nužna veza između teorije principa i proporcionalnosti se može nazvati "prva teza o nužnosti". Teza da postoji nužna veza između ustavnih prava i teorije principa, tj. analize proporcionalnosti, biće nazvana "druga teza o nužnosti". Martin Borovski je tu razliku napravio između teorije principa kao takve, tj. teorije principa kao opšte normo-teorijske teze, i primjene teorije principa na ustavna prava, tj. teorije principa kao interpretacije ustavnih prava.[26] Prva teza o nužnosti je normo-teorijska teza, druga teza o nužnosti je interpretativna teza.

2.4 Dva prigovora prvoj tezi o nužnosti

Prva teza o nužnosti je bila mnogo manje predmet osporavanja nego druga teza, što ne znači da uopšte nije kritikovana. Na ovom mjestu će biti razmotrena dva prigovora. Prvi je uputio Kai Muler (Kai Möller). Muler tvrdi da je teza 'pogrešna' u onoj mjeri u kojoj priroda principa podrazumjeva princip proporcionalnosti.[27] Njegov osnovni argument jeste da se uslov "najveće moguće mjere" u definiciji principa iz knjige *A Theory of Constitutional Rights* (Alexy 2002a: 47), ako ga ispravno protumačimo, ne može shvatiti kao balansiranje već kao korektnost. Riječ je dakle o "korektnoj mjeri".[28] Korektna mjera, sa svoje strane, zavisi od "moralnih argumenata".[29] Prigovor upoređuje balansiranje sa dva koncepta, s konceptom korektnosti i s konceptom moralnosti. Moj odgovor jeste da ova dva koncepta zahtjevaju balansiranje tamo gdje postoji interferencija s ustavnim pravima. Korektnost jedne interferencije s nekim ustavnim pravom zavisi od toga da li je interferencija opravdana. U slučajevima nepogodnosti i odsustva nužnosti, nema razloga koji zahtjeva interferenciju, te je ona neopravdana. To pokazuje da je određenje korektnog dosega prethodno uslovljeno podprin-

25 Alexy (2002a: 66).
26 Borowski (2007: 68-70).
27 Möller (2007: 459).
28 Möller (2007: 459).
29 Möller (2007: 460).

cipima pogodnosti i nužnosti. Na taj način je prilagođavanje koje se odnosi na faktičke mogućnosti povezano s korektnošću. Ključno pitanje u pogledu proporcionalnosi u užem smislu jeste da li određivanje ispravnog dosega prava zavisi od intenziteta interferencije *(I)* s pravom *(P)* i intenziteta interferencije (j) s kolidirajućim pravom ili ciljem (Pj) preko neinterferencije s prvim pravom, uz ostale faktore Formule težine. Smatram da zavisi. Ozbiljna (o) interferencija, opravdana samo niskim *(s)* značajem koji se interferenciji pripisuje radi zadovoljenja kolidirajućeg principa, ne može biti ispravna, ako su sve ostale okolnosti jednake. Ukratko, korektnost zavisi od balansiranja.

Drugi dio Mulerove kritike tiče se nužnosti moralne argumentacije. Određenje intenziteta interferencije s pravom ličnosti paraplegičnog oficira, do koje dolazi njegovim nazivanjem "bogaljem" je, kao što je pomenuto, zasnovano na procjeni tog opisa kao ponižavajućeg i kao izraza nedostatka poštovanja. Ti argumenti su moralni. Bez njih Formula težine ne bi bila primjenjiva na slučaj *Titanik.* To je sasvim dovoljno da bi se pokazalo da su moralni argumenti neophodni za primjenu Formule težine.[30] Formula težine nije alternativa moralnim argumentima, već predstavlja strukturu pravne i moralne argumentacije.[31]

Drugi prigovor protiv prve teze nužnosti, to jeste teze o nužnoj vezi između optimizacije i proporcionalnosti, dao je Ralf Pošer (Ralf Poscher). Pošer tvrdi da "princip proporcionalnosti ne mora biti shvaćen kao zahtjev optimizacije".[32] On tvrdi da postoje alternative optimizaciji kakve su "zabrana velike neproporcionalnosti" i "garancija minimalne pozicije".[33] Zabrana neproporcionalnosti je istovjetna zahtjevu proporcionalnosti, a zahtjev proporcionalnosti je isti kao i zahtjev optimizacije. Pošerova zabrana *velike* neproporcionalnosti, stoga, nije ništa do veza između trećeg podprincipa principa proporcionalnosti, shvaćenog kao zahtjev optimizacije, s diskrecijom u slučajevima u kojima neproporcionalnost nije velika. Na ovom mjestu se ne može razmatrati pitanje o tome da li omogućavanje diskrecije može biti opravdano formalnim principima. Jedina značajna stvar jeste da je veza o kojoj je riječ takva da bi konstrukcija ostala u potpunosti u oblasti teorije principa. Drugačiji je slučaj u pogledu garancije minimalne pozicije. Garancija minimuma, ako nije određena balansiranjem, ne bi odista bila ista kao optimizacija. Bila bi, ipak, ne samo različita od optimizacije

30 Cakirakis (Tsakyrakis) prigovara analizi proporcionalnosti to da je "potpuno strana bilo kakvom moralnom rasuđivanju"; Tsakyrakis (2009: 474). To se ne odnosi na analizu koja je predstavljena ovdje. Naprotiv, slučaj je upravo suprotan.

31 Muler dalje tvrdi da mogu postojati slučajevi u kojima je balansiranje isključeno: Möller (2007: 460-461; 465-467). Iz perspektive teorije principa ti slučajevi mogu biti rekonstruisani ili kao slučajevi u kojima je apstraktna težina principa jednaka nuli, to jeste u slučajevima isključenih razloga, ili kao slučajevi u kojima je apstraktna težina principa beskonačna, što ima efekat kategoričkog ili apsolutnog ograničenja. O tom pitanju vidjeti: Alexy (2007b: 340-344).

32 Poscher (2007: 74).

33 Poscher (2007: 74).

već bi bila različita od proporcionalnosti. Ne bi bila drugačija interpretacija proporcionalnosti, već bi bila alternativa koja nije uskladiva s proporcionalnošću. Ako preporučujemo zamjenu garancije minimuma principom proporcionalnosti u užem smislu, zapravo preporučujemo ukidanje principa. Pitanje o tome da li se taj prijedlog može opravdati, postaje pitanje o tome da li se sljedeći iskaz može braniti: "Kršenje ustavnog prava je ozbiljno, dok su razlozi za kršenje, sa stanovišta ustava, od malog značaja, ali je kršenje svejedno ustavno, jer minimalna pozicija ostaje netaknuta." Smatram da se taj iskaz ne može braniti.

Do ove tačke su se naša razmatranja ticala prve teze o nužnosti, to jest općih normo-teorijskih pitanja. Nužna veza između teorije principa i proporcionalnosti na normo-teorijskom nivou, ipak, ne implicira nužnu vezu između proporcionalnosti ili teorije principa i ustavnih prava na nivou interpretacije ustavnih prava *qua* pozitivnog prava. Neophodno je dakle posebno opravdati drugu tezu o nužnosti.

3 USTAVNA PRAVA I PROPORCIONALNOST: DRUGA TEZA O NUŽNOSTI

3.1 kontingencija i pozitivnost

Pitanje o tome da li postoji nužna veza između ustavnih prava i proporcionalnosti ili teorije principa, to jeste, pitanje o tome da li je druga teza o nužnosti istinita je veoma sporno. Osnovni prigovor jeste da se druga teza o nužnosti ne može posmatrati, kako to Matijas Ješted (Matthias Jestaedt) kaže, kao "univerzalna teorija osnovnih prava".[34] Druga teza o nužnosti je ništa više nego "posebna teorija predmeta /…/ koja analizira postupak sukobljenih principa kao dio strukture osnovnih prava".[35] Kao takva ona nema "potencijalno univerzalnu eksplanatornu vrijednost"[36] i nije "jedina centralna, fundamentalno sveobuhvatna i određujuća teorija analize i primjene osnovnih prava".[37] Iz toga razloga, kako Peter Lerhe (Peter Lerche) tvrdi, samo neka "ostrva zahtjeva optimizacije" postoje u oblasti ustavnih prava.[38] Stoga, ustavna prava, da iskoristimo riječi Jana Henrika Klementa (Jan Henrik Klement) nijesu principi "iz razloga njihove suštine".[39] Ona nijesu "principi zahvaljujući njihovoj prirodi /…/, već samo onda i u onoj mjeri u kojoj im je ta priroda data od strane pozitivno-pravne

34 Jestaedt (2012: ms. 28).
35 Jestaedt (2012: ms. 10).
36 Jestaedt (2012: ms. 10).
37 Jestaedt (2012: ms. 10).
38 Lerche (1997: 207).
39 Klement (2008: 761).

odluke ustavotvorca".[40] Pitanje o tome kako su ustavna prava i proporcionalnost povezani mora, dakle, proći "test pozitivnosti".[41]

Poslednja stavka je ključna za razumjevanje teze o kontingentnosti, koja predstavlja suprotnost tezi o nužnosti. Tezom o kontingentnosti se tvrdi da pitanje o tome da li su ustavna prava povezana s proporcionalnošću zavisi isključivo od odluka koje imaju svoj izraz u pozitivnom pravu, u slučaju ustava, zavisi od odluka ustavotvoraca.[42] Teza o kontingentnosti bi mogla stoga biti nazvana "teza o pozitivnosti". Moj argument protiv teze o kontingentnosti ili teze o pozitivnosti ima dva dijela. Prvi se tiče prirode ustavnih prava, dok se drugi tiče tvrdnje da je korektnost nužno povezana s ustavnim pravima, kao i s pravom uopšte.

3.2 Dualna priroda ustavnih prava

Ustavna prava su zaista dio pozitivnog prava, što će reći, pozitivno pravo na nivou ustava, ali to nije dovoljno da objasni njihovu prirodu. Pozitivnost je samo jedna strana ustavnih prava, naime, njihova realna ili faktička strana. Preko i iznad toga ona posjeduju idealnu dimenziju. Razlog za to jeste da su ustavna prava prava koja su zabilježena u ustavu s namjerom da pretvore ljudska prava u pozitivno pravo, to jeste, s namjerom pozitivizacije ljudskih prava.[43] Namjeru o kojoj je riječ često stvarno ili subjektivno imaju ustavotvorci. Dodatno i iznad toga, to je tvrdnja koju nužno izriču oni koji ustanovljavaju katalog ustavnih prava. U tom smislu je riječ o objektivnoj namjeri. Ljudska su prava prvo - moralna, drugo - univerzalna, treće - osnovna, četvrto - apstratna prava koja, peto - imaju prioritet u odnosu na sve ostale norme.[44] Na ovom mjestu su samo dvije od ovih pet određujućih karakteristika interesantne: moralnost i apstraktni karakter ljudskih prava. Prava postoje ako su važeća. Važenje ljudskih prava *qua* moralnih prava zavisi od mogućnosti njihova opravdanja i samo od toga. Pokušao sam da pokažem da je ljudska prava moguće opravdati na osnovu teorije diskursa. Lajtmotiv tog opravdanja jeste da praksa tvrđenja, pitanja i argumentovanja pretpostavlja slobodu i jednakost.[45] Ništa od toga se ne može obrazložiti u ovom članku. Za trenutne potrebe, jedina tačka interesovanja u toj vezi jeste da ljudska prava *qua* moralna prava pripadaju idealnoj dimenziji prava.

40 Jestaedt (2012: ms. 13).

41 Jestaedt (2012: ms. 13).

42 Primjer pozitivizacije proporcionalnosti jeste član 52 (1) (2) Povelje o osnovnim pravima Evropske unije.

43 O tom pitanju vidjeti: Alexy (2006: 17).

44 Alexy (2006: 18).

45 O tom pitanju vidjeti: Alexy (1996); Alexy (2006: 19-22).

Druga određujuća karakteristika, koja je značajna, jeste apstraktni karakter ljudskih prava. Ona se *simpliciter* odnosi na objekte kakvi su sloboda i jednakost, život i svojina, sloboda govora i zaštita ličnosti. Ljudska prava, kao apstraktna prava, nužno dolaze u koliziju s drugim ljudskim pravima i s kolektivnim dobrima, kakva su zaštita životne sredine i javna bezbjednost. Ljudska prava je, dakle, neophodno balansirati.

Može se prigovoriti da to nije argument za postojanje nužne vezu između balansiranja i proporcionalnosti i ustavnih prava. Nakon njihovog preobražaja u pozitivno pravo, ljudska prava su pozitivna prava i ništa osim toga. To je ipak pogrešno shvatanje dualne prirode ustavnih prava. Idealni karakter ljudskih prava ne nestaje jednom kada se ona preobraze u pozitivno prava. Ljudska prava, naprotiv, ostaju povezana s ustavnim pravima kao razlozi za ili protiv sadržaja koji je ustanovljen pozitivizacijom ili kao razlozi koji su neophodni zbog otvorene teksture ustavnih prava. Stoga je idealna dimenzija ljudskih prava prisutna i nakon njihove pozitivizacije.

Kao odgovor na to može se istaći prigovor da trajno prisustvo idealne dimenzije uništava pozitivni karakter ustavnih prava. To, ipak, nije slučaj. Teza o dualnoj prirodi zahtjeva da shvatimo ozbiljno kako idealnu tako i realnu dimenziju prava. Zahtjeva, preko i iznad toga, da se *prima facie* da prioritet pozitivnoj ili autoritativnoj dimenziji.[46] Kada ustavotvorci odluče pitanje balansiranja ustanovljavanjem pravila, tumač ustava je dužan da ga primjeni.[47] Primjer pravila ustavnog prava u njemačkom ustavu koje je strogo obavezujuće jeste član 102 Osnovnog zakona koji glasi: "Smrtna kazna je zabranjena". Drugi primjeri odluke ustavotvoraca s karakterom pravila su ograničenja slobode okupljanja na pravo "mirnog okupljanja bez oružja" u članu 8 (1) Osnovnog zakona, i detalji složene regulacije prihvatanja tehničkih sredstava za akustičko praćenje lokacije u kojoj osumnjičeni po pretpostavci boravi, koji su sadržani u članu 13 (3)-(6) Osnovnog zakona. Prioritet odredaba koje su ustanovili ustavotvorci ipak nije u potpunosti neupitan u svim slučajevima.[48] Primjer za to je član 12 (1) (1) Osnovnog zakona, po kojem je pravo da se odabere profesija neograničeno. Uzmemo li to kao strogo obavezujuće pravilo, koje nije podložno balansiranju, osobe koje nikada nijesu položile pravosudni ispit mogu postati sudije. Federalni ustavni sud je proglasio to shvatanje "pravno neodrživim"[49] i ispravno je primjenio analizu proporcionalnosti.[50]

Ti primjeri ilustruju smisao u kojem možemo govoriti o nužnoj vezi između ustavnih prava i proporcionalnosti. Principi su povezani sa svim normama o

46 Alexy (2010a: 173-174; 179).
47 Alexy (2002a: 83).
48 Alexy (2002a: 83-84).
49 BVerfGE 7, 377 (401).
50 BVerfGE 7, 377 (404-405).

ustavnim pravima bez obzira na to da li, kao takve, imaju karakter pravila ili principa. Ako su ustavotvorci odlučili o koliziji principa ustanovljavanjem pravila, onda formalni princip autoriteta ustava zahtjeva da se po pravilu postupi. Ako je pravilo pak nejasno, dvosmisleno ili evaluativno otvoreno, supstantivni principi na kojima se pravilo zasniva odmah iznova ulaze u igru. To je slučaj i kada je pravilo nekompatibilno s ustavnim principima, bar u onim slučajevima koji su regulisani pravilom veće težine od formalnog principa autoriteta ustava zajedno sa supstantivnim principima koji podržavaju pravilo. Postojanje tih situacija vodi nužnoj vezi između ustavnih prava i proporcionalnosti, čiji je karakter potencijalan. Suprotnost nužnoj potencijalnoj vezi jeste aktuelna veza između ustavnih prava i principa. Aktuelna veza postoji u svim onim slučajevima u kojima norme o ustavnim pravima, onako kako su ustanovljene ustavom, moraju biti protumačene neposredno kao principi. Kombinacije aktuelnih i potencijalnih veza,[51] koje proizlaze iz dualne prirode ustavnih prava, služe opravdanju druge teze o nužnosti.[52]

3.3 Ustavna prava i pretenzija na korektnost

Postojanje dovoljnog razloga za tezu ne isključuje postojanje daljih dovoljnih razloga za tu istu tezu. Drugi razlog za drugu tezu o nužnosti je zasnovan na pretenziji na korektnost, koja je nužno povezana s ustavnim pravima kao i s pravom uopšte. Pretenzija na korektnost je izložena i branjena na drugom mjestu.[53] Jedno pitanje je ključno u ovom radu. Pretenzija na korektnost, nužno povezana s kontrolom ustavnosti, zahtjeva da odluka ustavnog suda bude što je moguće racionalnija. Mnogi autori su tvrdili da je balansiranje iracionalno.[54] Prigovor bismo mogli nazvati "prigovorom iracionalnosti". Na taj prigovor nije moguće odgovoriti ovdje.[55] Neke napomene usmjerene na prigovor ipak mogu biti od pomoći. Ključni argument za iracionalnost prigovora jeste da formula težine ne govori "kako se konkretna težina, koju uključujemo u formulu, može identifikovati, izmjeriti i uporediti".[56] Istina je da nam Formula težine ne govori kakva je interferencija s ustavnim pravom (I, *Ij)* kada se koristi skala slabo (s), umjereno (u) i ozbiljno (o). Takođe nam ne govori ni koje su apstraktne težine (W, *Wj)* principa u koliziji. Konačno, ne govori nam ništa o pouzdanosti *(Ri, Rj)* relevantnih empirijskih pretpostavki. Ništa od toga, ipak, nema veze

51 O tom pitanju vidjeti "model pravila i principa" u: Alexy (2002a: 80-86).

52 Argument o dualnoj prirodi se može shvatiti kao rekonstrukcija teze Njemačnog federalnog ustavnog suda u onoj mjeri u kojoj princip proporcionalnosti izvire "u osnovi već iz prirode samih ustavnih prava" *('im Grunde bereits aus dem Wesen der Grundrechte selbst');* BVerfGE 19, 342 (349); 65, 1 (44); 76, 1 (50-1).

53 Alexy (2002b: 35-39); Alexy (2010a: 168-172).

54 Vidjeti, na primjer: Habermas (1996: 259); Schlink (2001: 460).

55 Skoriji odgovor se može pronaći u: Alexy (2010c: 26-32).

56 Jestaedt (2012: ms. 18); vidjeti takođe Poscher (2007: 76); Somek (2006: 135-136).

s iracionalnošću. Upravo je suprotno. Vrijednosti koje moraju biti zamjenjene varijablama Formule težine predstavljaju, kao što je već pomenuto, iskaze; na primjer, iskaz da je prekršaj prava ličnosti ozbiljan. Iskazi o kojima je riječ mogu biti opravdani i, naravno, moraju biti opravdani.[57] To se može uraditi isključivo argumentacijom. Formula težine, stoga, jeste argumentativna forma racionalnog pravnog diskursa.[58] Kao takva, neophodna je da bi se uveo "red u pravnu misao",[59] te čini jasnim koje su tačke odlučujuće i na koji su način one međusobno povezane.[60] Struktura duskursa ustavnih prava koja pretenduje na veću racionalnost nije moguća. To je dovoljno da bi se pokazalo da je analiza proporcionalnosti neophodno potrebna, ne samo po prirodi ustavnih prava, već i po pretenziji na korektnost, koja je nužno prisutna prilikom kontrole ustavnosti.

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57 Opravdanje o kojem je riječ može biti veoma razrađeno; vidjeti, na primjer odluku BVerfGE 115, 320 (347-57), u kojoj je opravdanje procjene intenziteta interferencije napisano na deset strana.

58 Alexy (2010c: 32).

59 Barak (2006: 173).

60 Često se ističe prigovor da su elementi koji su predstavljeni varijablama Formule težine nesamjerljivi. Vidjeti, na primjer: Alder (2006: 717-718). Odgovor na to jeste da je samjerljivost na procjenama s obje strane balansa prepoznata s uobičajenog stanovišta, rječju, sa stanovišta ustava. Iz te perspektive, "nesamjerljivost" nije ništa do nesaglasnost; vidjeti: Alexy (2007a: 18).

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Robert Alexy*

Constitutional Rights and Proportionality

There are two basic views concerning the relationship between constitutional rights and proportionality analysis. The first maintains that there exists a necessary connection between constitutional rights and proportionality, the second argues that the question of whether constitutional rights and proportionality are connected depends on what the framers of the constitution have actually decided, that is, on positive law. The first thesis may be termed 'necessity thesis', the second 'contingency thesis'. According to the necessity thesis, the legitimacy of proportionality analysis is a question of the nature of constitutional rights, according to the contingency thesis, it is a question of interpretation. The article defends the necessity thesis. | A previous version of this article was published in *Chinese Yearbook of Constitutional Law* (2010). 221-235.

Keywords: principles theory, proportionality analysis, constitutional rights, necessary connection, human rights, dual nature

1 NECESSARY AND CONTINGENT CONNECTIONS

The relationship between constitutional rights and proportionality is one of the main themes of the contemporary constitutional debate. Two basic views are in conflict: the thesis that there exists some kind of a necessary connection between constitutional rights and proportionality analysis, and the thesis that there exists no necessary connection of whatever kind between constitutional rights and proportionality. According to the second view, the question of whether constitutional rights and proportionality are connected depends on positive law, that is, on what the framers of the constitution have actually decided. For that reason, a connection between constitutional rights and proportionality can only be a possible or contingent connection.[1] The first thesis may termed the 'necessity thesis', the second, the 'contingency thesis'. I will defend a version of the necessity thesis.

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1 It is easy to conceive of a third thesis, namely, that a connection between constitutional rights and proportionality is impossible. This thesis, however, shall not be considered here.

2 PRINCIPLES THEORY AND PROPORTIONALITY: THE FIRST NECESSITY THESIS

2.1 Rules and Principles

The necessity thesis has found its most elaborated form in principles theory. The basis of principles theory is the norm-theoretic distinction between rules and principles.[2] Rules are norms that require something definitively. They are *definitive commands.* Their form of application is subsumption. If a rule is valid and if its conditions of application are fulfilled, 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 *optimization requirements.* As such, they demand that something be realized 'to the greatest extent possible given the legal and factual possibilities'.[3] Rules aside, the legal possibilities are determined essentially by opposing principles. For this reason, principles, each taken alone, always comprise a merely *prima facie* requirement. The determination of the appropriate degree of satisfaction of one principle relative to the requirements of other principles is brought about by balancing. Thus, balancing is the specific form of application of principles.

2.2 The Principle of Proportionality

a) Optimization Relative to Factual and Legal Possibilities

The definition of principles as optimization requirements leads straightaway to a necessary connection between principles and proportionality. The principle of proportionality *(Verhältnismäßigkeitsgrundsatz),* which in the last decades has received ever more international recognition in the theory and practice of constitutional review,[4] consists of three sub-principles: the principles of suitability, of necessity, and of proportionality in the narrower sense. All three sub-principles express the idea of optimization. Principles *qua* optimization requirements require optimization relative both to what is factually possible and to what is legally possible. The principles of suitability and necessity refer to optimization relative to the factual possibilities. The principle of proportionality in the narrower sense concerns optimization relative to the legal possibilities.

b) Suitability

The first sub-principle, the principle of suitability, precludes the adoption of means that obstruct the realization of at least one principle without promoting any principle or goal for which it has been adopted. If a means *M,* adopted in

2 See Alexy (2002a: 47-49).

3 See Alexy (2002a: 47).

4 See, for instance, Beatty (2004); Stone Sweet & Mathews (2008).

order to promote the principle P_1[5] is not suitable for this purpose, but obstructs the realization of P_2, then there are no costs either to P_1 or P_2 if *M* is omitted, but there are costs to P_2, if *M* is adopted. Thus, P_1 and P_2 taken together may be realized to a higher degree relative to what is factually possible if *M* is abandoned. P_1 and P_2, when *taken together*, that is, as elements of a single system, proscribe the use of M. This shows that the principle of suitability is nothing other than an expression of the idea of Pareto-optimality. One position can be improved without detriment to the other.

An example of the violation of the principle of suitability is found in a decision of the German Federal Constitutional Court concerning a law which required that not only persons who apply for a general hunting licence have to pass a shooting examination but also persons who apply exclusively for a falconry licence. The Court argued that the shooting examination for falconers is not suitable in promoting the 'proper exercise of these activities as intended by the legislator'.[5] Therefore, 'no substantially clear reason'[6] existed for the infringement of the general freedom of action of the falconer, as guaranteed by article 2 (1) Basic Law. For that reason, the regulation was declared unproportional[7] and, consequently, unconstitutional.

c) Necessity

Cases in which laws are declared unconstitutional for reasons of unsuitability are rare. Normally the measure applied by the legislator will at least promote his aims to a certain degree. This suffices for suitability. For this reason, the practical relevance of the sub-principle of suitability is rather low. This is completely different with respect to the second sub-principle of the principle of proportionality, the principle of necessity. This principle requires that of two means promoting P_1 that are, broadly speaking, equally suitable, the one that interferes less intensively with P_2 has to be chosen. If there exists a less intensively interfering and equally suitable means, one position can be improved at no costs to the other.[8] Under this condition, P_1 and P_2, *taken together*, require the less intensively interfering means be applied. This is, again, a case of Pareto-optimality.

5 Decisions of the Federal Constitutional Court *(Entscheidungen des Bundesverfassungsgerichts;* hereafter: BVerfGE) 55, 159 (166).

6 BVerfGE 55, 159 (167).

7 BVerfGE 55, 159 (166).

8 The principle of necessity presupposes that it is indifferent to all other principles or goals where the question of whether the less or the more intensively interfering means is chosen arises. If, however, there exists a third principle or goal, P_3, that is affected negatively by the adoption of the means interfering less intensively with P_2, than the case cannot be decided by considerations concerning Pareto-optimality. When costs are unavoidable, balancing becomes necessary.

An example is the decision of the Federal Constitutional Court on sweets, especially in form of Easter rabbits and Santa Clauses that consist of puffed rice. In order to protect consumers from mistakenly taking those puffed rice sweets to be chocolate products, a ban on puffed rice sweets was issued. The Court argued that consumer protection could be achieved 'in an equally effective but less incisive way by a duty of marking'.[9] For this reason, the ban was declared to be a violation of the principle of necessity and, therefore, as unproportional.

d) Proportionality in the Narrower Sense

Just as with the principle of suitability, the principle of necessity concerns optimization relative to the factual possibilities. Optimization relative to the factual possibilities consists in avoiding avoidable costs. Costs, however, are unavoidable when principles collide. Then balancing becomes necessary. Balancing is the subject of the third sub-principle of the principle of proportionality, the principle of proportionality in the narrower sense. This principle expresses what optimization relative to the legal possibilities means. It is identical with a rule that can be called 'Law of Balancing'.[10] This rule states:

> The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.

The Law of Balancing excludes, *inter alia,* an intensive interference with principle P_1 that is justified only by a low importance assigned to the satisfaction of the colliding principle P_2. Such a solution would not be an optimization of P_1 *together with* P_2.

The Law of Balancing is to be found, in different formulations, nearly everywhere in constitutional adjudication. It expresses a central feature of balancing and is of great practical importance. If one wishes to achieve a precise and complete analysis of the structure of balancing, the Law of Balancing has, however, to be elaborated further. The result of such a further elaboration is the Weight Formula.[11] The Weight Formula defines the weight of a principle P_i in a concrete case, that is, the concrete weight of P_i relative to a colliding principle Pj ($W_{i,j}$), as the quotient of, first, the product of the intensity of the interference with P_i (I) and the abstract weight of P_i *(Wi)* and the degree of reliability of the empirical assumptions concerning what the measure in question means for the non-realization of P_i (*Ri),* and, second, the product of the corresponding values with respect to *Pj,* now related to the realization of *Pj.* It runs as follows:

9 BVerfGE 53, 135 (146).
10 Alexy (2002a: 102).
11 Alexy (2003: 433-448); Alexy (2007a: 9-27).

$$Wi_{,j} = \frac{I_i \cdot W_i}{I_j \cdot W_j}$$

Now, to talk about quotients and products is sensible only in the presence of numbers. This is the problem of graduation. In *A Theory of Constitutional Rights* I considered only a continuous scale that runs over an infinite number of points between 0 and 1, and I arrived at the conclusion that it is impossible to work with such a scale in legal reasoning.[12] I still believe that this result is correct. Things are different, however, as soon as one takes into account not only continuous or infinitesimal scales but also discrete scales. Discrete scales are defined by the fact that between their points no further points exist. Balancing can begin as soon as one has a scale with two values, say, light and serious. In constitutional law a triadic scale is often used, which works with the values light (l), moderate (m), and serious (s). There are various possibilities in representing these values by numbers.[13] If one chooses a geometric sequence like 2^0, 2^1, and 2^2, it becomes possible to represent the fact that the power of principles increases overproportionally with increasing intensity of interference. This is the basis of an answer to the reproach that principles theory leads to an unacceptable weakening of constitutional rights. If the concrete weight $(W_{i,j})$ of P_i is greater than 1, P_i precedes P_j, if it is smaller than 1, P_j precedes P_i. This connects the Weight Formula - and with it the Law of Balancing - with the Law of Competing Principles.[14] If, however, the concrete weight $(W_{i,j})$ is 1, a stalemate exists. In this case, it is both permitted to perform the measure in question and to omit it. This means that the state, especially the legislator, has discretion.[15] This is of utmost importance for a reply to the reproach that principles theory leads to an overconstitutionalization.[16]

Against the Weight Formula the objection might be put forward that legal reasoning cannot be reduced to calculation. But this would rest on a misconception of the role of the Weight Formula. The numbers that have to be substituted for its variables represent propositions, for instance, the proposition 'The interference with the freedom of expression is serious'. This proposition has to be justified, and this can only be done by argument. In this way, the Weight Formula is intrinsically connected with legal discourse. It expresses a basic argument form of legal discourse.[17]

12 Alexy (2002a: 97-99).

13 On this issue, see Alexy (2007a: 20-23).

14 Alexy (2002a: 53-54).

15 Alexy (2002a: 408, 410-414).

16 On this issue, see Böckenförde (1991: 188-190).

17 In Alexy (1989: 221-230), I presented the Subsumption Formula as the single basic argument form of legal discourse. In Alexy (2003: 443-448), I added to it the Weight Formula as a sec-

Again, it might be useful to turn to a case in order to illustrate the abstract explanation of the principle of proportionality in the narrower sense. It is a decision of the Federal Constitutional Court that concerns the classic conflict between freedom of expression and personality right. A widely published satirical magazine, *Titanic,* described a paraplegic reserve officer who had successfully carried out his responsibilities, having been called to active duty, first as 'born murderer' and in a later edition as a 'cripple'. The Düsseldorf Higher Regional Court of Appeal ruled against *Titanic* in an action brought by the officer and ordered the magazine to pay damages in the amount of DM 12.000. *Titanic* brought a constitutional complaint. The Federal Constitutional Court undertook 'case-specific balancing'[18] between freedom of expression of those associated with the magazine (P_1: article 5 (1) (1), Basic Law) and the officer's general personality right (P_2: article 2 (1) in connection with article 1 (1), Basic Law). To this end the intensity of interference with these rights was determined, and they were placed in relationship to each other. The judgment in damages was treated as representing a 'lasting'[19] or *serious* (s) interference *(I_1)* with freedom of expression. This conclusion was justified, above all, by the argument that awarding damages could affect the future willingness of those producing the magazine to carry out their work in the way they have done heretofore. The description 'born Murderer' was then placed in the context of the satire published by the *Titanic.* Here several persons had been described as having a surname at birth in a 'recognisably humorous' way, from 'puns to silliness'.[20] This context made it impossible to see in the description 'unlawful, serious, illegal harm to personality right'.[21] The interference with the personality right was thus treated as having a *moderate* (m), perhaps even a *light* or minor (l) intensity (I_2). These assessments of intensity completed the first part of the decision. In order to justify an award of damages, which is a serious (s) interference with the constitutional right to freedom of expression (P_1), the interference with the right to personality (P_2), which was supposed to be compensated for by damages, would have had to have been at least as serious *(s).* But according to the assessment of the Court, it was not. It was at best moderate (m), perhaps even merely light (l). This meant that the interference with the freedom of expression was, according to the Law of Balancing and, with it, the Weight Formula, disproportional and, therefore, unconstitutional.

ond basic argument form. Finally, in Alexy (2010b: 17-18), I attempted to close the system by adding a third basic argument form: analogy between or comparison of cases. These three basic argument forms link up with the concepts of rule, principle, and case respectively.

18 BVerfGE 86, 1 (11).

19 BVerfGE 86, 1 (10).

20 BVerfGE 86, 1 (11).

21 BVerfGE 86, 1 (12).

Matters, however, were different in that part of the case where the officer had been called a 'cripple'. According to the assessment of the Court, this counted as 'serious harm to his personality right'.[22] This assessment was justified by the fact that describing a severely disabled person in the public as a 'cripple' is generally taken, these days, to be 'humiliating' and to express a 'lack of respect'.[23] Thus, the serious (s) interference (I_1) with the freedom of expression (P_1) was countered by the great (s) importance (I_2) accorded to the protection of personality (P_2). This is a typical case of a stalemate. Consequently, the Court came to the conclusion that it could see 'no flaw in the balancing to detriment of freedom of expression'[24] in the decision of the Düsseldorf Higher Regional Court of Appeal. *Titanic s* constitutional complaint was thus only justified to the extent that it related to damages for the description 'born Murderer'. As far as the description 'cripple' was concerned, it was unjustified.

2.3 Two Necessary Connections

My considerations up to this point have concerned the relationship between principles theory and proportionality. This connection turns out to be as close as it could possibly be. According to principles theory, principles are optimization requirements. Now the principle of proportionality with its three subprinciples of suitability, necessity, and proportionality in the narrower sense logically follows from the nature of principles as optimization requirements, and the nature of principles as optimization requirements logically follows from the principle of proportionality.[25] This equivalence is necessary.

At exactly this point, a decisive distinction comes into play. It is the distinction between a necessary connection between principles theory and proportionality on the one hand, and a necessary connection between principles theory including proportionality - its equivalent - and constitutional rights on the other. The thesis the there exists a necessary connection between principles theory and proportionality might be called the 'first necessity thesis'. The thesis that there exists a necessary connection between constitutional rights and principles theory, or proportionality analysis, shall be termed the 'second necessity thesis'. Martin Borowski has drawn a distinction between the principles theory as such, that is, the principles theory as a general norm-theoretic thesis, and the application of principles theory to constitutional rights, that is, the principles theory as an interpretation of constitutional rights.[26] The first necessity thesis is a norm-theoretic thesis, the second necessity thesis is, by contrast, an interpretative thesis.

22 BVerfGE 86, 1 (13).
23 BVerfGE 86, 1 (13).
24 BVerfGE 86, 1 (13).
25 Alexy (2002a: 66).
26 Borowski (2007: 68-70).

2.4 Two Objections to the First Necessity Thesis

The first necessity thesis has been far less contested than the second thesis. This, however, is not to say that it has received no criticism. Two objections shall be considered here. The first has been raised by Kai Möller. Möller claims that the thesis to the effect that the nature of principles implies the principle of proportionality is 'mistaken'.[27] His main argument is that the clause 'greatest extent possible' in the definition of principles in *A Theory of Constitutional Rights* (Alexy 2002a: 47), correctly understood, refers not to balancing but to correctness. It means '"the correct" extent.[28] The correct extent, in turn, is said to depend on 'moral argument'.[29] This objection confronts balancing with two concepts, the concept of correctness and the concept of morality. My reply is that these concepts both require balancing where an interference with constitutional rights is concerned. The correctness of an interference with a constitutional right depends on whether this interference is justified. In cases of unsuitability and lack of necessity, no reason exists that would require the interference. The interference, therefore, is not justified. This shows that the determination of the correct extent necessarily presupposes the sub-principles of suitability and necessity. With this, optimization relative to the factual possibilities is connected with correctness. The crucial question with respect to proportionality in the narrower sense is whether the determination of the correct extent of a right depends on the intensity of interference (I) with this right (P) and the intensity of interference (I_j) with the colliding right or goal (P_j) by non-interference with the first right, along with the other factors of the Weight Formula. I think it does. A serious (s) interference justified only by a low (l) importance assigned to this interference for the satisfaction of the colliding principle cannot be correct, all other things being equal. In short, correctness depends on balancing.

Möller's second point is the necessity of moral argument. The determination of the intensity of interference with the paraplegic reserve officer's personality right by calling him a 'cripple' is, as mentioned above, based on the assessment of this description as humiliating and as an expression of lack of respect. These are moral arguments. Without such moral arguments, the Weight Formula would not be applicable in the *Titanic* case. This suffices to show that moral arguments are indispensable for the application of the Weight Formula.[30] The

27 Möller (2007: 459).

28 Möller (2007: 459).

29 Möller (2007: 460).

30 Tsakyrakis reproaches proportionality analysis with its pretence of being 'totally extraneous to any moral reasoning'; Tsakyrakis (2009: 474). This does not apply to the analysis presented here. Indeed, the opposite is true.

Weight Formula is not an alternative to moral argument, but a structure of legal and moral argumentation.[31]

A second objection against the first necessity thesis, that is, the thesis of a necessary connection between optimization and proportionality has been raised by Ralf Poscher. Poscher claims that 'the principle of proportionality need not to be understood as an optimization requirement'.[32] He argues that there are alternatives to optimization as the 'prohibition of gross disproportionality' and the 'guarantee of a minimal position'.[33] The prohibition of disproportionalty is the same as the requirement of proportionality, and the requirement of proportionality, in turn, is the same as the optimization requirement. Poscher's prohibition of *gross* disproportionality, therefore, is nothing other than a connection of the third sub-principle of the principle of proportionality, understood as an optimization requirement, with discretion in cases of disproportionality which is not gross. This is not the place to take up the question of whether granting such a discretion can be justified, for example, by formal principles. The only point of interest in this connection is that such a construction would remain completely within the realm of principles theory. This is different in the case of a guarantee of a minimal position. A guarantee of a minimum, if not determined by balancing, would, indeed, not be the same as optimization. It would, however, not only be different from optimization but also different from proportionality. It would not be an alternative interpretation of proportionality. Rather, it would be an alternative incompatible with proportionality. One who recommends the substitution of a guarantee of a minimum for the principle of proportionality in the narrower sense is recommending the abolishment of this principle. The question of whether such a proposal is justifiable turns on the question of whether a judgment such as the following can be defended: 'The infringement with the constitutional right is serious while the reasons for it are, from the point of view of the constitution, only of low importance, but the infringement is nevertheless constitutional, for a minimal position remains untouched.' I think this judgment cannot be defended.

Up to this point, our deliberations have been concerned with the first necessity thesis, that is, with general norm-theoretic questions. A necessary connection of principles theory and proportionality at the norm-theoretic level does not, however, imply a necessary connection between proportionality or principles theory and constitutional rights at the level of the interpretation of consti-

31 Möller further argues that there may exist cases in which balancing is excluded; Möller (2007: 460-461; 465-467). Form the point of view of principles theory such cases can be reconstructed either as cases in which the abstract weight of a principle is zero, that is, as cases of excluded reasons, or as cases in which the abstract weight of a principle is infinite, which has the effect that it becomes a categorical or absolute constraint. On this issue, see Alexy (2007b: 340-344).

32 Poscher (2007: 74).

33 Poscher (2007: 74).

tutional rights *qua* positive law. The second necessity thesis stands therefore in need of its own justification.

3 CONSTITUTIONAL RIGHTS AND PROPORTIONALITY: THE SECOND NECESSITY THESIS

3.1 Contingency and Positivity

The question of whether there exists a necessary connection between constitutional rights and proportionality or principles theory, that is, the question of whether the second necessity thesis is true, is highly contested. The main objection is that principles theory cannot be seen, as Matthias Jestaedt puts it, as the 'universal theory of fundamental rights'.[34] It is no more than 'a subject-specific theory /…/ which analyses the process of competing principles as part of the structure of fundamental rights'.[35] As such it has no 'potentially universal explanatory value'.[36] It is not the 'single central, fundamentally all-embracing and determining theory of the analysis and application of fundamental rights'.[37] For that reason, as Peter Lerche claims, only some 'islands of optimization requirements' exist in the field of constitutional rights.[38] Thus, constitutional rights, to use Jan Henrik Klement's words, are not 'for reasons of their essence' principles.[39] They are 'not principles on account of their nature /…/, but only when and to the extent that they are given this nature and distinctive character by the positive legal decision of the constitutional legislature'.[40] The question of how constitutional rights and proportionality are related to each other, therefore, has to be submitted to a 'positivity test'.[41]

The last point is of crucial importance for the understanding of the contingency thesis, the counterpart of the necessity thesis. The contingency thesis claims that the question of whether constitutional rights are connected with proportionality depends exclusively on decisions that are given expression in positive law, in the case of a constitution, on the decisions of its framers.[42] The

34 Jestaedt (2012), ms. 28.
35 Jestaedt (2012), ms. 10.
36 Jestaedt (2012), ms. 10.
37 Jestaedt (2012), ms. 10.
38 Lerche (1997: 207).
39 Klement (2008: 761).
40 Jestaedt (2012), ms. 13.
41 Jestaedt (2012), ms. 13.
42 An example of the positivization of proportionality is article 52 (1) (2) Charter of Fundamental Rights of the European Union.

contingency thesis might therefore also be called the 'positivity thesis'. My argument against the contingency or positivity thesis consists of two parts. The first concerns the nature of constitutional rights, the second concerns the claim to correctness as being necessarily connected with constitutional rights as well as with law in general.

3.2 The Dual Nature of Constitutional Rights

Constitutional rights are indeed positive law, that is to say, positive law at the level of the constitution. This does not suffice, however, to explain their nature. Positivity is but one side of constitutional rights, namely, their real or factual side. Over and above this they possess also an ideal dimension. The reason for this is that constitutional rights are rights that have been recorded in a constitution with the intention of transforming human rights into positive law - the intention, in other words, of positivizing human rights.[43] This intention is often an intention actually or subjectively held by the constitutional framers. And, over and above this, it is a claim necessarily raised by those who set down a catalogue of constitutional rights. In this sense, it is an objective intention. Now human rights are, first, moral, second, universal, third, fundamental, and, fourth, abstract rights that, fifth, take priority over all other norms.[44] Here, only two of these five defining properties are of interest: their moral and their abstract character. Rights exist if they are valid. The validity of human rights *qua* moral rights depends on their justifiability and on that alone. I have attempted to show that human rights are justifiable on the basis of discourse theory. The Leitmotiv of this justification is that the practice of asserting, asking, and arguing presupposes freedom and equality.[45] None of this can be elaborated here. For present purposes, the only point of interest in this connection is that human rights *qua* moral rights belong to the ideal dimension of law.

The second defining property that is important here is the abstract character of human rights. They refer *simpliciter* to objects like freedom and equality, life and property, and free speech and protection of personality. As abstract rights, human rights inevitably collide with other human rights and with collective goods like protection of the environment and public safety. Human rights, therefore, stand in need of balancing.

It might be objected that this is no argument at all for a necessary connection between balancing or proportionality and constitutional rights. After their transformation into positive law, human rights are positive rights and are nothing but positive rights. This, however, would be a misconception of the dual nature of constitutional rights. The ideal character of human rights does not

43 On this issue, see Alexy (2006: 17).

44 Alexy (2006: 18).

45 On this issue, see Alexy (1996); Alexy (2006: 19-22).

vanish once they have been transformed into positive law. Rather, human rights remain connected with constitutional rights as reasons for or against the content that has been established by positivization and as reasons required by the open texture of constitutional rights. Thus, the ideal dimension of human rights lives on, notwithstanding their positivization.

In reply to this, the objection might be raised that the enduring presence of the ideal dimension destroys the positive character of constitutional rights. But this is not the case. The dual nature thesis requires that one take seriously both the ideal and the real dimension of law. It requires, over and above this, that *prima facie* be given priority to the positive or authoritative dimension.[46] When the constitutional framers have decided a question of balancing by establishing a rule, the interpreter of the constitution is bound to apply it.[47] An example of a constitutional rights rule in the German Constitution that is strictly binding is article 102 Basic Law, which says: 'The death penalty is abolished'. Other examples of decisions of the constitutional framers with the character of a rule are the restriction of freedom of assembly to the right 'to assemble peaceably and without weapons', this in article 8 (1) Basic Law, and the details of the highly complex regulation of the adoption of technical means for the acoustic observation of accommodation in which the suspect is supposed to reside, found in article 13 (3)-(6) Basic Law. The priority of the provisions issued by the constitutional framers is, however, not totally beyond question in all cases.[48] An example is article 12 (1) (1) Basic Law, according to which the freedom to choose a profession is, in contrast to the freedom to exercise a profession, subject to no limitations. If one were to take this as a strictly binding rule, not open to any balancing whatever, persons who never have passed law examination would have a constitutional right to be admitted to the bar. The Federal Constitutional Court declared such a result as 'legally implausible'[49] and it correctly applied proportionality analysis.[50]

These examples illustrate the sense in which one can speak of a necessary connection between constitutional rights and proportionality. Principles are connected with all constitutional-rights norms regardless of whether, as such, they have the character of rules or principles. If the constitutional framers have passed on a collision of principles by issuing a rule, than the formal principle of the authority of the constitution requires that this rule be observed. If, however, this rule is ambiguous, vague, or evaluatively open, the substantive principles standing behind it immediately come back into play. This is also the

46 Alexy (2010a: 173-174; 179).
47 Alexy (2002a: 83).
48 Alexy (2002a: 83-84).
49 BVerfGE 7, 377 (401).
50 BVerfGE 7, 377 (404-405).

case where the rule is incompatible with constitutional principles that are at least in some instances regulated by this rule of greater weight than the formal principle of the authority of the constitution together with the substantive principles backing the rule. The existence of these constellations leads to a necessary connection between constitutional rights and proportionality, whose character is potential. The counterpart of the necessary potential connection is the actual connection between constitutional rights and principles. An actual connection exists in all those cases in which constitutional-rights norms, as set down in the constitution, have to be interpreted directly as principles. This combination of actual and potential connections,[51] which stems from the dual nature of constitutional rights, serves to justify the second necessity thesis.[52]

3.3 constitutional Rights and the claim to correctness

The existence of a sufficient reason for a thesis does not exclude the existence of further sufficient reasons for this thesis. A second reason for the second necessity thesis is based on the claim to correctness, which is necessarily connected with constitutional rights as well as with law in general. The claim to correctness has been explicated and defended elsewhere.[53] Here a single point is of interest. The claim to correctness, necessarily connected with constitutional review, requires that the decision of the constitutional court be as rational as possible. Many authors have argued that balancing is irrational.[54] One may term this reproach the 'irrationality objection'. It is not possible to reply to this objection here.[55] Some remarks directed to the objection may, however, be helpful. A main argument for the irrationality objection is that the Weight Formula does not say 'how the concrete weights to be inserted into the formula are identified, measured and compared'.[56] Now it is true that the Weight Formula does not tell us what an interference with a constitutional right (4 *Ij)* comes to, when the scale light *(l),* moderate *(m),* and serious *(s)* is used. It also does not tell us what the abstract weights (W_i, Wj) of the colliding principles are. Finally, it says nothing about the reliability (R_i, Rj) of the relevant empirical assumptions. None of this, however, has anything to do with irrationality. Precisely the opposite is the case. The values that have to be substituted for the variables of the Weight Formula represent, as already mentioned, propositions, for example,

51 On this issue, see the 'model of rules and principles' in Alexy (2002a: 80-86).

52 The dual nature argument might be conceived as reconstruction of the thesis of the German Federal Constitutional Court to the effect that the principle of proportionality emerges 'basically already from the nature of constitutional rights themselves' ('im *Grunde bereits aus dem Wesen der Grundrechte selbst');* BVerfGE 19, 342 (349); 65, 1 (44); 76, 1 (50-51).

53 Alexy (2002b: 35-39); Alexy (2010a: 168-172).

54 See, for example, Habermas (1996: 259); Schlink (2001: 460).

55 A recent reply is found in Alexy (2010c: 26-32).

56 Jestaedt (2012: 18); see also Poscher (2007: 76); Somek (2006: 135-136).

the proposition that the infringement with the personality right is serious. Such propositions can be justified, and, of course, they have to be justified.[57] This can only be done by argument. Thus, the Weight Formula turns out to be an argument form of rational legal discourse.[58] As such, it is indispensable in order to introduce 'order into legal thought'.[59] It makes clear which points are decisive and how these points are related to one another.[60] A structure of constitutional rights-discourse that lays claim to still greater rationality is not possible. This suffices to demonstrate that proportionality analysis is necessarily required not only by the nature of constitutional rights but also by the claim to correctness, necessarily raised in constitutional review.

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57 Such a justification may be highly elaborated; see, for example, BVerfGE 115, 320 (347-357), where the justification of the assessment of the intensity of interference comprises ten pages.

58 Alexy (2010c: 32).

59 Barak (2006: 173).

60 Often the objection is raised that the elements represented by the variables of the Weight Formula are incommensurable. See, for example, Alder (2006: 717-718). The reply to this is that the commensurability of the assessments on both sides of the balance is recognized from a common point of view, namely the point of view of the constitution. From this point of view, 'incommensurability' is nothing other than disagreement; see Alexy (2007a: 18).

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Synopsis

Robert Alexy

Constitutional Rights and Proportionality

SLOV. | *Ustavne pravice in sorazmernost.* Glede odnosa med ustavnimi pravicami in presojo sorazmernosti obstajata dva temeljna pogleda. Po prvem je med ustavnimi pravicami in sorazmernostjo nujna zveza, medtem ko je po drugem vprašanje povezanosti ustavnih pravic in sorazmernosti odvisno od dejanske odločitve ustavodajalca, tj. od pozitivnega prava. Prvi pogled lahko poimenujemo tudi kot »trditev o nujni zvezanosti«, drugega pa kot »trditev o nenujni zvezanosti«. Skladno s trditvijo o nujni zvezanosti je legitimnost presoje sorazmernostni vprašanje narave ustavnih pravic, medtem ko je skladno s trditvijo o slučajni zvezanosti to vprašanje razlage. Avtor v tem prispevku zagovarja trditev o nujni zvezanosti ustavnih pravic in sorazmernosti. | Starejša različica te razprave je objavljena v *Chinese Yearbook of Constitutional Law,* Vol. 2010, 221-235.

Ključne besede: teorija načel, presoja sorazmernosti, ustavne pravice, nujna zveza, človekove pravice, dvojna narava

ENG. | There are two basic views concerning the relationship between constitutional rights and proportionality analysis. The first maintains that there exists a necessary connection between constitutional rights and proportionality, the second argues that the question of whether constitutional rights and proportionality are connected depends on what the framers of the constitution have actually decided, that is, on positive law. The first thesis may be termed 'necessity thesis', the second 'contingency thesis'. According to the necessity thesis, the legitimacy of proportionality analysis is a question of the nature of constitutional rights, according to the contingency thesis, it is a question of interpretation. The article defends the necessity thesis. | A previous version of this article has been published in *Chinese Yearbook of Constitutional Law,* Vol. 2010, 221-235.

Keywords: principles theory, proportionality analysis, constitutional rights, necessary connection, human rights, dual nature

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