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The Structure of Constitutional Rights Norms

I. RULES AND PRINCIPLES

Up to this point, we have been concerned with the concept of a constitutional rights norm; now its structure needs to be considered. Innumerable theoretical distinctions may be made for this purpose, but the most important for the theory of constitutional rights is that between rules and principles. This distinction is the basis for a theory of constitutional justification and a key to the solution of central problems of constitutional rights doctrine. Without it there can be neither an adequate theory of the limitation of rights, nor an acceptable doctrine of the conflict of rights, nor a sufficient theory of the role of constitutional rights in the legal system. It constitutes a basic element not only of rights to liberty and equality, but also of protective rights, of rights to organization and procedure, and of entitlements in the narrow sense. Problems such as horizontal effect and the division of competence between constitutional court and Parliament can be clarified with its assistance. In addition, the distinction between rules and principles constitutes the framework of a normative-substantive theory of constitutional rights and is the starting-point of an answer to the question of the possibility and limits of rationality in the field of constitutional rights. All in all, the distinction between rules and principles is a basic pillar in the edifice of constitutional rights theory.

There is no lack of references to the role that the distinction between rules and principles plays in the context of constitutional rights. Constitutional rights norms are not infrequently characterized as 'principles'.[1] Even more frequently, the character of constitutional rights as principles is asserted less directly. As will be shown, this occurs, for example, whenever people speak of values,[2] goals,[3] short formulae,[4] or burdens of

[1] See e.g. E. v. Hippel, *Grenzen und Wesensgehalt der Grundrechte* (Berlin, 1965), 15 ff.; D. C. Göldner, *Verfassungsprinzip und Privatrechtsnorm in der verfassungskonformen Auslegung und Rechtsfortbildung* (Berlin, 1969), 23 ff.; U. Scheuner, 'Die Funktion der Grundrechte im Sozialstaat' DÖV 1971, 507; E.-W. Böckenförde, 'Die Methoden der Verfassungsinterpretation', NJW 1976, 2091.

[2] See the examples from the case-law of the Federal Constitutional Court listed at 14 above.

[3] See e.g. P. Häberle, 'Grundrechte im Leistungsstaat', VVDStRL 30 (1972), 135.

[4] See e.g. BVerfGE 32, 54 (72); H. Huber, 'Über die Konkretisierung der Grundrechte', P.

argumentation.[5] By contrast, constitutional rights norms are treated as rules when it is claimed that the constitution is to be taken seriously as law,[6] or if reference is made to the possibility of deductive reasoning even in the field of constitutional rights.[7] For the most part, these characterizations remain suggestive only. What is lacking is a precise differentiation and systematic application of rules and principles. That is what will be attempted here.

1. Traditional Criteria for Distinguishing Rules from Principles

The distinction between rules and principles is not new. But in spite of its age and frequent usage, it is still dogged by confusion and controversy. A confusing variety of distinguishing criteria are on offer, their relationship to other things, such as values, is obscure, and the terminology is inconsistent.

In many cases it is not rule and principle, but norm and principle, or norm and basic provision,[8] which are opposed to each other. Here, rules and principles are to be brought together under the concept of a norm; they are both norms because they both say what ought to be the case. Both can be expressed using the basic deontic expressions of command, permission, and prohibition. Principles are reasons for concrete judgments as to what ought to happen just as much as rules are, even if they are reasons of a very different nature. The distinction between rules and principles is thus a distinction between two types of norm.

There are many suggested criteria for distinguishing rules from principles. Probably the most common is that of generality.[9] According to this, principles are norms of relatively high generality, and rules are norms of relatively low generality. An example of a norm of relatively high generality is the norm that everyone enjoys freedom of religion. By contrast, a norm which states that every prisoner has the right to seek to persuade

Saladin and L. Wildhaber (eds.), *Der Staat als Aufgabe* (Basle and Stuttgart, 1972), 197: 'abbreviated'.

[5] B. Schlink, *Abwägung im Verfassungsrecht* (Berlin, 1976), 195; A. Podlech, *Gehalt und Funktionen des allgemeinen verfassungsrechtlichen Gleichheitssatzes* (Berlin, 1971), 90.

[6] E. Forsthoff, *Zur Problematik der Verfassungsauslegung* (Stuttgart, 1961), 34.

[7] H.-J. Koch and H. Rüßmann, *Juristische Begründungslehre* (Munich, 1982), 97 ff.

[8] See e.g. J. Esser, *Grundsatz und Norm*, 3rd edn. (Tübingen, 1974). Occasionally the Federal Constitutional Court speaks of 'norms and principles of the Basic Law' (BVerfGE 51, 324 (350)).

[9] See e.g. J. Raz, 'Legal Principles and the Limits of Law', Yale LJ 81 (1972), 838; G. C. Christie, 'The Model of Principles', in Duke LJ 1968, 669; G. Hughes, 'Rules, Policy and Decision Making', Yale LJ 77 (1968), 419; A. Simonius, 'Über Bedeutung, Herkunft und Wandlung der Grundsätze des Privatrechts', ZSR, NF 71 (1952), 239. Against generality as a distinguishing criterion are J. Esser, *Grundsatz und Norm*, 51, and K. Larenz, *Richtiges Recht* (Munich, 1979), 26: 'it is not the degree of generality which is decisive for something being a principle, but its nature as a justifying reason.'

other prisoners to abandon their faith is a norm of relatively low generality.[10,11] One might think that one could divide norms into rules and principles according to this criterion of generality. Other alternative criteria considered in the literature are the 'ability to state precisely the situations in which the norm is to be applied',[12] the manner of creation, perhaps in the distinction between 'created' and 'evolved' norms,[13] the explicitness of evaluative content,[14] connection with the idea of law[15] or with a higher legal statute,[16] and significance for the legal order.[17] Principles and rules have also been distinguished by whether they are reasons for rules or rules themselves,[18] or whether they are norms of argumentation or norms of behaviour.[19]

10 See on this BVerfGE 12, 1 (4).

11 The concept of the generality of a norm is to be strictly distinguished from its universality. In spite of their different degrees of generality, both 'everyone enjoys freedom of religion' and 'every prisoner has the right to persuade other prisoners to abandon their faith' express universal norms. This is because these norms relate to all individuals within an open class (human beings/prisoners; on the concept of an open class, see A. Ross, *Directives and Norms* (Oxford, 1930), 109 f.). The counterpart to a universal norm is an individual norm. The statements, '*x* enjoys freedom of religion' and 'prisoner *x* has the right to persuade other prisoners to abandon their faith' both express individual norms, of which one has a relatively high, the other a relatively low, degree of generality. The counterpart to generality is the concept of specificity. The first of the two norms can thus be called 'relatively general' and the second 'relatively specific'. A norm is always either universal or individual. By contrast generality, and its counterpart, specificity, is a matter of degree. On the pairs of concepts universality/individuality and generality/specificity, see R. M. Hare, *Freedom and Reason* (Oxford, 1963), 39 f.; id., 'Principles', Proc Aris Soc 73 (1972/3), 2 f.

The expressions, 'individual', 'universal', 'specific', and 'general' are used in many different ways apart from the meaning adopted here. Other terms such as 'abstract' and 'concrete' can be added. The description of a norm divisible into preconditions and consequences applicable on an unpredictable number of occasions to an unpredictable number of people as 'abstract-general' is widespread (see e.g. D. Volkmar, *Allgemeiner Rechtssatz und Einzelakt* (Berlin, 1962), 74 ff.). Where further precision is not necessary use will be made in what follows of this relatively well-established mode of speech. On further differentiations, see Ross, *Directives and Norms*, 106 ff.; G. H. v. Wright, *Norm and Action* (London, 1963), 70 ff.

12 Esser, *Grundsatz und Norm*, 51; Larenz, *Richtiges Recht*, 23. See also H. T. Klami, *Legal Heuristics* (Vammala, 1982), 31 ff.

13 S. I. Shuman, 'Justification of Judicial Decisions', in *Essays in Honour of Hans Kelsen*, Cal L Rev 59 (1971), 723, 729; T. Eckhoff, 'Guiding Standards in Legal Reasoning', in *Current Legal Problems* 29 (1976), 209 f.

14 C.-W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz*, 2nd edn. (Berlin, 1983), 50.

15 K. Larenz, *Methodenlehre der Rechtswissenschaft*, 5th edn. (Berlin, Heidelberg, New York, and Tokyo, 1983), 218, 404.

16 H. J. Wolff, 'Rechtsgrundsätze und verfassungsgestaltende Grundentscheidungen als Rechtsquellen', in O. Bachof, M. Drath, O. Gönnenwein, and E. Walz, *Gedächtnisschrift für W. Jellinek* (Munich, 1955), 37 ff.

17 Larenz, *Methodenlehre der Rechtswissenschaft*, 461; A. Peczenik, 'Principles of Law', *Rechtstheorie*, 2 (1971), 30; see also S. Wronkowska, M. Zieliński, and Z. Ziembiński, 'Rechtsprinzipien: Grundlegende Probleme', *Zasady prawa* (Warsaw, 1974), 226.

18 Esser, *Grundsatz und Norm*, 51: 'the principle is . . . not itself an "instruction", but the reason, criterion and justification for the instruction'; Larenz, *Richtiges Recht*, 24 f.; J. Raz, 'Legal Principles and the Limits of Law', 839; N. MacCormick, ' "Principles" of Law', Jur Rev 19 (1974), 222; id., *Legal Reasoning and Legal Theory*, (Oxford, 1978), 152 ff.

19 H. Gross, 'Standards as Law', *Annual Survey of American Law 1968/69*, 578.

Three quite different theses about the difference between rules and principles are possible on the basis of such criteria. The first maintains that every attempt to divide norms into two classes, rules and principles, fails in view of the diversity which exists in reality. This can be seen, for example, in the fact that the criteria suggested, of which some are only distinctions of degree anyway, can be pretty well indiscriminately combined with each other. It is not at all difficult to conceive of a norm which shows a high degree of generality, which is not applicable without further input, which has not explicitly been enacted, which wears its evaluative content on its sleeve, which has a close relation to the idea of law, is of great importance for the legal order, and is a reason for rules as well as being a criterion for the evaluation of legal arguments. In addition to all this, what these criteria taken on their own terms distinguish can again take many forms.[20] In view of all these similarities and dissimilarities, distinctions and differences, within the class of norms, perhaps it is better to group them all together under a Wittgensteinian concept of *family resemblances*[21] rather than a division into two classes. The second thesis maintains that those who accept that norms can be divided into rules and principles also end up showing that this is really only a distinction of *degree*. The proponents of this thesis are the many authors who look to the criterion of generality as the decisive one. The third thesis states that norms can be divided into rules and principles and that this distinction is not simply a matter of degree but is *qualitative*. This latter thesis is correct. There is a criterion which allows us to distinguish strictly between rules and principles. This criterion is not to be found in the list given above, but it does show most of the traditional criteria to be typical, if not decisive. It must now be explained.

2. Principles as Optimization Requirements

The decisive point in distinguishing rules from principles is that *principles* are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities.[22] Principles are *optimization requirements*,[23] characterized by the fact that they can be satisfied to

20 So e.g. Esser distinguishes between axiomatic, rhetorical and dogmatic, immanent and informative, juristic principles and legal principles, as well as constructive and value principles (Esser, *Grundsatz und Norm*, 47 f., 73 ff., 90, 156). Peczenik divides principles into 'principles or "laws" of logic', 'principles of justice', 'semi-logical', 'instrumentally formulated legal principles', 'principles similar to the instrumentally formulated', and 'all the other principles' (Peczenik, *Principles of Law*, 17 ff.).

21 L. Wittgenstein, *Philosophical Investigations*, trans. G. E. M. Anscombe, 2nd edn. (Oxford 1958), 31–2 (§§ 66, 67).

22 See on this R. Alexy, 'Zum Begriff des Rechtsprinzips', in: *Rechtstheorie*, Beiheft 1 (1979), 79 ff.; id., 'Rechtsregeln und Rechtsprinzipien', in: ARSP, Beiheft 25 (1985), 19 ff.

23 The concept of requirement is used here in a wide sense to embrace commands, permissions, and prohibitions.

varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules.[24]

By contrast, *rules* are norms which are always either fulfilled or not.[25] If a rule validly applies, then the requirement is to do exactly what it says, neither more nor less. In this way rules contain *fixed points* in the field of the factually and legally possible. This means that the distinction between rules and principles is a qualitative one and not one of degree.[26] Every norm is either a rule or a principle.[27]

3. Competing Principles and the Conflict of Rules

The distinction between rules and principles becomes most apparent in the case of competing principles and conflicts of rules.[28] What they have in

[24] Two cases in the limitation of the realization or satisfaction of principles by rules can be distinguished: (1) rule *R*, which limits principle *P*, applies strictly. This means that a validity *rule R*' applies, which states that *R* takes precedence over *P* regardless of how important it is to satisfy *P* and how unimportant *R* is. It can be assumed that at least in modern legal systems at least not every rule is subject to such a strict validity rule. (2) *R* does not apply strictly. This means that a validity *principle P*' applies, which under certain conditions permits *P* to take precedence over, or limit, *R*. These conditions cannot be satisfied simply whenever the fulfilment of *P* is more important in a concrete case than the *substantive* principle *PR* supporting *R*, because then *P*' would have no role to play. It would simply raise the question of the relationship between *P* and *PR*. *P*' has a role to play, when the precedence of *P* is not only a consequence of *P*'s taking precedence over the principle *PR*, which supports *R* substantively, but when it is required that *P* be stronger than *PR together with* principle *P*', which requires the satisfying of rules and in this sense supports *R formally*.

[25] § 5(1) Traffic Code ('Vehicles must overtake on the left') is a rule which makes this particularly clear. One can only ever overtake on the left or the right. The characteristic of only being capable of being followed or not followed is not limited to rules of this simple type. It is not dependent on whether the act required (prohibited, permitted) can only ever be carried out or not carried out. Rules prescribing acts which can be satisfied to varying extents can also have this characteristic. They have this characteristic if a certain level of act or performance is required (prohibited, permitted). An example would be the provisions relating to negligent actions. What is required is not the highest possible standard of care, but a certain level of care differentiated according to different areas of law. Of course, doubts can arise in individual cases about the level of care required, but this is possible in the application of any norm and is nothing special. In resolving these doubts, the question is always whether the level of care required by the provision has been met or not. This question is the hallmark of a rule.

[26] Similarly, in outcome, Esser, *Grundsatz und Norm*, 95.

[27] The distinction just drawn is similar to that of Dworkin (see R. Dworkin, *Taking Rights Seriously*, 2nd edn. (London, 1978), 22 ff.). However, it differs from Dworkin's at one significant point, namely in the characterization of principles as optimization requirements. On the dispute with Dworkin, see Alexy, 'Zum Begriff des Rechtsprinzips', 59 ff.

[28] The terminology varies. Thus Paulson uses generally the expression, 'conflict of norms', without distinguishing between rules and principles (S. Paulson, 'Zum Problem der Normenkonflikte', ARSP 66 (1980), 487 ff.), and the Federal Constitutional Court speaks occasionally of 'collisions of norms' without further differentiation (BVerfGE 26, 116 (135); 36, 342 (363)). The terminology adopted here is supposed to express the idea that in spite of important similarities, competing principles and conflicting rules are fundamentally different from each other.

common is that two norms, each taken on their own, lead to inconsistent results when applied, that is, they lead to two mutually incompatible concrete legal ought-judgments. What separates them is the way the conflict is resolved.

3.1 The Conflict of Rules

A conflict between two rules can only be resolved in that either an appropriate exception is read into one of the rules, or at least one of the rules is declared invalid. An example of a conflict of rules which can be resolved by the inclusion of an appropriate exception is the conflict between the prohibition on leaving the classroom before the bell goes, and the requirement to leave it on hearing the fire alarm. If the bell has not rung, but the fire alarm goes, these rules lead to mutually incompatible ought-judgments. The conflict is to be resolved in that an exception is read into the first rule in the case that the fire alarm sounds.

If such a solution is not possible, then at least one rule must be declared invalid and thereby excised from the legal system. Unlike the social validity of a norm or its substantive importance, the concept of legal validity does not admit of degrees. Legally speaking, a rule is valid or it is not. The fact that a rule is valid and applicable to a certain set of facts means that the legal consequence is valid. However one justifies it,[29] the possibility that two mutually incompatible ought-judgments might apply has to be excluded. If the application of two rules results in mutually incompatible outcomes on the facts of any given case, and if an exception cannot be read into one of them, then at least one must be declared invalid.

The mere fact that in a case involving a conflict of rules which cannot be removed by reading in an exception at least one of the rules has to be declared invalid does not determine which rule must be treated this way. The problem can be solved by maxims such as '*lex posterior derogat legi priori*' or '*lex specialis derogat legi generali*', but it is also possible to proceed according to the substantive importance of the conflicting rules. What is significant is that the decision is a decision concerning validity. An example of a conflict of rules which the Federal Constitutional Court resolved in just this way according to the conflicts rule of article 31 Basic Law (federal law overrides regional law) was the one between section 22(1) Working Time Act of 1934 and 1938 (applicable as federal law), which according to the Court permitted the opening of shops on weekdays from 7 a.m. to 7 p.m., and section 2 of the 1951 Baden Region Law concerning closing times, which among other things prohibited the opening of shops on Wednesdays after 1 p.m.[30] Both rules could not be valid, because then

[29] See e.g. Wright, *Norm and Action*, 135, 141 ff.; Ross, *Directives and Norms*, 169 ff.; C. and O. Weinberger, *Logik, Semanitk, Hermeneutik* (Munich, 1979), 133 f.

[30] BVerfGE 1, 283 (292 ff.).

opening on a Wednesday afternoon would be both permitted and prohibited. The incorporation of the regional rule in the federal rule was excluded by article 31 Basic Law. And so the only option was to declare the invalidity of the regional norm.

3.2 Competing Principles

Competing principles are to be resolved in quite a different way. If two principles compete, for example if one principle prohibits something and another permits it, then one of the principles must be outweighed. This means neither that the outweighed principle is invalid nor that it has to have an exception built into it. On the contrary, the outweighed principle may itself outweigh the other principle in certain circumstances. In other circumstances the question of precedence may have to be reversed. This is what is meant when it is said that principles have different weights in different cases and that the more important principle on the facts of the case takes precedence. Conflicts of rules are played out at the level of validity; since only valid principles can compete, competitions between principles are played out in the dimension of weight instead.[31]

As examples of the solution of competing principles one can point to many cases in which the Federal Constitutional Court has balanced interests.[32] Here we will focus on just two of those decisions, the decision concerning unfitness to stand trial, and the Lebach Judgment. An analysis of the first judgment will provide an insight into the structure of the resolution of conflicts, which can be summarized as a Law of Competing Principles, and the second judgment will extend this insight and lead to an understanding of the outcome of balancing exercises as derivative constitutional rights norms.

3.2.1 *The Law of Competing Principles*

The decision concerning unfitness to stand trial concerned the permissibility of the trial of an accused person, who was in danger of suffering a stroke and heart attack from the stress of the trial.[33] The Court established that in such cases there was 'a tension between the duty of the state to maintain a properly functioning criminal justice system and the interest of the accused in his constitutionally guaranteed rights, which the state is also obliged to

31 On the concept of a dimension of weight, see Dworkin, *Taking Rights Seriously*, 26 f.

32 The balancing of interests is the clearest sign that the Federal Constitutional Court understands constitutional rights norms (at least, in addition) as principles. This can be seen even more clearly when the Court explicitly formulates optimization requirements, such as in the KPD Judgment (BVerfGE 5, 85 (204)): 'the most extensive development of personality *possible*', in the Pharmacists Judgment (BVerfGE 7, 377 (403)): 'the choice of profession must be as undisturbed by state interferences as *possible*', and in the decision on trade regulations (BVerfGE 13, 97 (105)): 'the greatest *possible* liberty in choosing a profession' (emphasis added).

33 BVerfGE 51, 324.

protect under the Basic Law'.[34] This tension was not to be resolved by giving one of these duties absolute precedence, for neither principle enjoyed 'precedence *per se*'.[35] On the contrary, the conflict was to be resolved by balancing the conflicting interests. The question in this balancing process was, which of the requirements having *equal status in the abstract* had the *greater weight* in the *concrete case*: 'if this balancing process leads to the conclusion that the interests of the accused weigh obviously and significantly more heavily than the requirements indicating the need for state intervention, state action undertaken in spite of this would breach the principle of proportionality and hence the accused person's constitutional rights under article 2(2)(1) Basic Law'.[36] This decision corresponds fully to a competition of principles; the differences are only terminological. The judgment does not refer to 'competition' but to 'tension' and 'conflict', and that which competes and is to be balanced is not called 'principle' but 'duty', 'requirement', 'constitutional right', 'claim', and 'interest'. It is entirely possible to represent the decision as a competition between principles. That is what it is when the court speaks, on one hand, of the maximum possible degree of functionality of the criminal justice system, and on the other hand, of the requirement to leave the life and bodily integrity of the accused inviolate to the greatest extent possible. These requirements are to be applied according to what is factually and legally possible. If the only principle at stake were the proper functioning of the criminal justice system, then the trial would be required, or at least permitted.[37] If there were only the principle of the protection of life and bodily integrity, then the trial would be prohibited. So each principle on its own leads to a contradiction. This means that each limits the legal possibility of satisfying the other. This situation is not resolved by declaring one of the principles invalid and hence excluding it from the legal system. It is also not resolved by building an exception into one of the principles, such that this principle is in all further cases to be seen as a rule that is either satisfied or not. Rather, the solution

34 BVerfGE 51, 324 (345). 35 ibid.

36 BVerfGE 51, 324 (346).

37 At this point we will only consider the possibilities arising from the case to be resolved and both principles. If one of the competing principles on these facts were to fall away, the reference to what is legally possible would lose its significance. The remaining principle would cease to be an optimization requirement and become a maximization requirement related only to what is factually possible. This leads to the general point that principles on their own or in isolation, that is, independently from their relationship with other principles, are maximization requirements. One could therefore consider defining principles as such rather than as optimization requirements. But such a definition would not express the constitutive relation that principles have with other principles. One would either have to expand it by adding an optimization rule to maximization requirements, or extend the definition of isolated principles as maximization requirements by a definition as optimization requirements to embrace the relationship with principles. By contrast, the general definition as optimization requirements adopted here has the advantage of simplicity. But it does not exclude the assumption of a perspective which considers principles in themselves or isolated where this is useful, and this will occur frequently in what follows.

of the competition consists in establishing a *conditional relation of precedence* between the principles in the light of the circumstances of the case. The relation of precedence is conditional because in the context of the case *conditions* are laid down under which one of the principles takes precedence. Given other conditions, the issue of precedence might be reversed.

The idea of a conditional relation of precedence which has just been used is of fundamental importance in understanding competing principles and thus for the theory of principles in general. In order to investigate this further, let the two competing principles in the fitness to stand trial case be designated P_1 (right to life and bodily integrity) and P_2 (proper functioning of the criminal justice system). Taken independently, P_1 and P_2 lead to mutually contradictory concrete legal ought-judgments, P_1 to 'it is forbidden to conduct the trial' and P_2 to 'it is required to conduct the trial'. This conflict can be resolved either by establishing an unconditional or a conditional relation of precedence. The sign **P** will be used to symbolize the relation of precedence.[38] For the conditions under which one principle takes precedence over the other we shall use '*C*'. There are thus four ways of deciding the case by resolving the competing principles:

(1) $P_1 \mathbf{P} P_2$
(2) $P_2 \mathbf{P} P_1$
(3) $(P_1 \mathbf{P} P_2)\ C$
(4) $(P_2 \mathbf{P} P_1)\ C$

(1) and (2) are unconditional relations of precedence; one could also refer to them as abstract or absolute relations of precedence. The court excludes the adoption of such unconditional relations of precedence with the words, 'neither of these requirements enjoys precedence *per se* over the other'.[39] This statement is true generally for competing principles in constitutional law. It is only at first sight that the principle of human dignity, which we will have to come back to, seems to be an exception. So, only possibilities (3) and (4) of a conditional, or as we might say, a concrete, or relative, relation of precedence remain. The key question is thus under what conditions does which principle take precedence over the other. At this point the Court uses the very common metaphor of balancing. In the Court's words, it all depends on whether 'the interests of the accused in the concrete case weigh obviously and significantly more heavily than the requirements which state action is supposed to preserve'.[40] Such interests and requirements cannot have weight in any quantifiable sense. One can therefore ask what is supposed to be meant by this talk of weight. The idea of a conditional relation of precedence gives us a straightforward answer. On any set of concrete

[38] See on this, G. H. v. Wright, *The Logic of Preference* (Edinburgh, 1963), 19.
[39] BVerfGE 51, 324 (345).
[40] BVerfGE 51, 324 (346).

facts principle P_1 has greater weight than the opposing principle P_2 when there are sufficient reasons for supposing that in the circumstances of the concrete case, P_1 takes precedence over P_2. A more precise formulation follows.

The balancing undertaken by the court follows precisely the pattern that has just been set out in naming the conditions of precedence (C) and in maintaining the thesis that under these conditions, P_1 takes precedence over P_2. The conditions of precedence for P_1 (that is, for the principle established by art. 2(2)(1) Basic Law) in their most general formulation are as follows: 'if there is a proximate and specific danger that if the trial is continued, the accused person will lose his life or suffer serious injury to his health, then continuing the legal process breaches his constitutional rights under article 2(2)(1) Basic Law'.[41] This statement takes us to an important point in the theory of the conditional relation of precedence. It should be observed that the court is no longer speaking about the precedence of a principle, requirement, interest, claim, right, or any other such object; rather *conditions* are being identified under which there is a *breach of constitutional rights*. The fact that some action breaches constitutional rights means that it is prohibited. The sentence cited can thus be reformulated as a rule of the form: 'if some act fulfils condition C then it is constitutionally prohibited'.

Thus what has been called here the condition of precedence, and identified by the letter '*C*' plays a twofold role. In the preferential statement

(3) $(P_1 \mathbf{P} P_2)\ C$

C is the condition for a relation of precedence. In the formulation of the rule

(5) If an act *A* fulfils condition *C*, then *A* is constitutionally prohibited

C is the protasis of a norm. The fact that *C* has a twofold character is an unavoidable consequence of the structure of the preferential statement, for P_1's taking precedence over the competing principle under condition *C* means that the legal consequences of P_1 apply in the case that circumstances *C* are present.[42] Thus a preferential statement concerning a conditional relation of precedence gives rise to a rule requiring the consequences of the principle taking precedence should the conditions of precedence apply. This enables us to formulate the following law concerning the connection between conditional relations of precedence and rules:

[41] ibid.
[42] The case under discussion is concerned with whether the legal consequences flowing from P_1 are to apply in their full extent or not. There can also be cases in which exceptions are necessary from the legal consequences of the principle taking precedence. In this case, P_1 only takes precedence over P_2 in the circumstances of the case (*C*) in respect of a limited legal consequence *Q*'. This can be symbolized as '$(P_1 \mathbf{P} P_2)\ C, Q$''. The question of precedence in respect of a limited legal consequence is to be distinguished from problems of suitability and necessity to be discussed below, which relate to the possibilities of factual realization of principles.

(LCP) If principle P_1 takes precedence over principle P_2 in circumstances C: $(P_1 \mathbf{P} P_2)$ C, and if P_1 gives rise to legal consequences Q in circumstances C, then a valid rule applies which has C as its protasis and Q as its apodosis: $C \rightarrow Q$.

A rather less technical formulation goes:

(LCP′) The circumstances under which one principle takes precedence over another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence.

This law, which we can call the *Law of Competing Principles*, is one of the foundations of the theory of principles being established here. It reflects the character of principles as optimization requirements between which there is, first, no relation of absolute precedence, and which concern, secondly, acts and situations which are not quantifiable. At the same time it constitutes a basis from which to deal with objections to the theory of values,[43] which lies close to the theory of principles.[44]

3.2.2 *Results of Balancing Principles as Derivative Constitutional Rights Norms*

All this can be made clearer in the context of the Lebach Judgment.[45] This case concerned the following facts: ZDF, a television channel, planned to broadcast a documentary, 'The Soldiers' Murder at Lebach'. This concerned a crime in which four sleeping soldiers at the munitions depot of the Federal Army at Lebach were murdered and weapons were stolen for the purpose of committing further criminal offences. At the time of the intended broadcast, a person who had been convicted as a secondary party to the offence was shortly to be released from prison. He was of the view that the broadcast of the programme in which he was named and in which his picture was given, would breach his constitutional rights under article 1(1) and article 2(1) Basic Law, mainly because it would endanger his resocialization. The regional court rejected his application for an injunction and the upper regional court rejected his appeal. He brought a constitutional complaint against these decisions.

At this point we are only interested in the part of the judgment dealing with the resolution of competing principles. Other problems, such as horizontal effect, will be dealt with later. The court's reasoning can be broken down into three stages of particular interest for the relation of precedence. At the first level, 'a tension [is established] between the protection of

[43] See on this 86 ff. below.

[44] It only needs pointing out here that in establishing concrete relations of precedence, the Law of Competing Principles leads to a differentiated doctrine of constitutional rights, that is, not to a simple process of preferred and secondary rights. Thus the question of setting limits is not all-or-nothing, but a problem of the 'suppression of constitutional rights in individual relationships' (BVerfGE 28, 243 (263)).

[45] BVerfGE 35, 202.

personality in article 2(1) in connection with article 1(1) Basic Law and the freedom of media reporting under article 5(1)(2) Basic Law'.[46] Once again, let us call the first principle P_1 and the second P_2. P_1 on its own would lead to the banning of the broadcast, P_2 to its permission. This 'conflict', as the court calls the competition, is not resolved by declaring one of the principles invalid, but by 'balancing' in which neither of the two principles—the Federal Constitutional Court talks at this point of 'constitutional values'—'can claim basic precedence'. On the contrary, 'one must decide in the light of the characteristics of such cases and the circumstances of this particular case which interest has to give way'.[47] A clearer description of competing principles is hardly possible. Two norms lead to mutually incompatible results. Neither is invalid, neither takes absolute precedence. The law applicable depends on how one should determine precedence in the light of the facts of the case.[48] It should merely be observed in passing that here is yet another term for what is to be balanced: 'constitutional values'.

After establishing a competition between two principles of equal status at an abstract level, in a second stage the Court holds that there is general precedence for the freedom of media reporting in cases of 'up-to-date reporting of crime' (C_1),[49] in other words $(P_2 \mathbf{P} P_1)$ C_1. This relation of precedence is interesting because it is only a precedence in general or in principle. This means that not every up-to-date report is permitted. The conditions of precedence, and hence the legal rule which corresponds to the preferential statement under the Law of Competing Principles, include a *ceteris-paribus* clause which permits exceptions.

The decision itself is made at the third level. Here the Court establishes that in the case of a 'repeated report of a serious criminal act, no longer covered by the interest in up-to-date information, which endangers the resocialization of the criminal' (C_2), the protection of privacy takes precedence

[46] BVerfGE 35, 202 (219).

[47] BVerfGE 35, 202 (225).

[48] There can be no doubt that the Court resolves the case by way of balancing principles. But one can well ask whether this was the only possible way. The question is provoked by comments of the Court in which it considers whether the broadcast challenged by the plaintiff was suitable and necessary in pursuit of ZDF's goals. These goals included, among other things, informing the general public about the effectiveness of criminal sanctions, a deterrent effect on potential wrongdoers, and 'strengthening of public morals and social responsibility' (BVerfGE 35, 202 (243)). One could therefore take the view that the case was not to be decided on the level of balancing between constitutional values or principles, that is, not at the third stage of the principle of proportionality (see on this, L. Hirschberg, *Der Grundsatz der Verhältnismäßigkeit* (Göttingen, 1982), 2 ff. as well as below at 66 ff.), but at the prior stages of suitability and necessity (thus, Schlink, *Abwägung im Verfassungsrecht*, 34). On this approach, only the name and the picture of the individual would have needed excluding. Since the Court assumed that the plaintiff's rights would be infringed even without his name and picture being broadcast (BVerfGE 35, 202 (243)), a decision at the third stage of the principle of proportionality was unavoidable. Only if the Court had not proceeded from this premiss would it have been possible to resolve the case merely by way of the principles of suitability and necessity.

[49] BVerfGE 35, 202 (231).

over the freedom of media reporting, which in this case meant that the report was prohibited.[50] In other words, the preferential statement (P_1 P P_2) C_2 applied. C_2 consists of four conditions (repetition, no current interest, serious criminal offence, endangering resocialization). The rule $C_2 \rightarrow Q$ corresponding to the preferential statement is thus a rule with four conditions and the following structure:

(6) F_1 and F_2 and F_3 and $F_4 \rightarrow Q$

It goes: a repeated (F_1) media report, no longer required by the interest in current information (F_2), concerning a serious criminal offence (F_3), which endangers the resocialization of the offender (F_4) is constitutionally prohibited (Q).

It has already been argued that both directly established and derivative norms are to be considered constitutional rights norms.[51] A derivative constitutional rights norm is a norm for whose derivation correct constitutional justification is possible. If correct constitutional justification is possible for the norm just stated, which can be assumed to be the case for present purposes, then it is a constitutional rights norm. At the same time it is a rule under which the facts of the case can be subsumed as under any statutory norm, which is just what happened in the Lebach Judgment.[52] Thus the following proposition applies: the result of every correct balancing of constitutional rights can be formulated in terms of a derivative constitutional rights norm in the form of a rule under which the case can be subsumed. Thus even if all directly established constitutional rights norms were principles, which as will be shown is not the case, there would still be constitutional rights norms which are principles and those which are rules.

Those last comments lead already to the application of a theory of principles to the theory of the constitutional rights norm. But before we go down that road, the theory of principles needs to be extended somewhat. Hitherto, principles have been defined as optimization requirements and rules as norms which are either satisfied or not. This distinction gave rise to a difference of treatment in cases of conflict. It is now appropriate to consider some further characteristics which result from this basic distinction and to discuss various objections which can be made directly against the ideas of conflict and competition outlined above. Objections of a more general nature to the ideas of values and balancing, which are closely related to the theory of principles, will not be dealt with until that theory has been applied to constitutional rights norms.

50 BVerfGE 35, 202 (237).
51 At 33 ff.
52 On the structure of this subsuming process, see R. Alexy, 'Die logische Analyse juristischer Entscheidungen', ARSP, Beiheft NF 14 (1980), 195 ff.

4. The Different Prima Facie Character of Rules and Principles

The first significant characteristic which arises from what has been said is the different prima facie character of rules and principles.[53] Principles require that something be realized to the greatest extent legally and factually possible. They are thus not *definitive* but only *prima facie* requirements. It does not follow from the fact that a principle is relevant to a case that what the principle requires actually applies. Principles represent reasons which can be displaced by other reasons. How the relation between reason and counter-reason is to be stated is not decided by the principle itself. Principles lack the resources to determine their own extent in the light of competing principles and what is factually possible.

This is quite different in the case of rules. In that rules insist that one does exactly as required, they contain a decision about what is to happen within the realm of the legally and factually possible. This decision can run up against legal and factual impossibility, which can lead to the rule's invalidity. But if it does not run up against impossibility, then what the rule requires applies definitively.

One could take the view that principles always have the same prima facie character and rules always the same definitive character. Dworkin seems to make this assumption when he says that valid rules apply in an all-or-nothing way, but that principles only contain reasons pointing in a certain direction but not necessarily requiring a particular decision.[54] But this model is simplistic and needs to be more nuanced. However, even under this more nuanced model the different prima facie character of rules and principles is to be maintained.

The necessity for a more nuanced model arises, as far as rules are concerned, from the fact that it is possible to incorporate an exception into a rule on the occasion of a particular case. When this occurs, the rule loses its definitive character for the case. The incorporation of an exception can

53 On the concept of prima facie character, see principally, even if unclear at many points, A. Ross, *The Right and the Good* (Oxford, 1930), 19 ff., 28 ff., as well as K. Baier, *The Moral Point of View* (Ithaca, NY and London, 1958), 102 ff. and R. M. Hare, *Moral Thinking* (Oxford, 1981), 27 ff., 38 ff., which refers to Ross. J. Searle, 'Prima Facie Obligations', in J. Raz (ed.), *Practical Reasoning* (Oxford, 1978), 84 ff., proposes abandoning the term 'prima facie' and its counterparts, preferring to distinguish instead between 'what one has an obligation to do', and 'what one ought to do all things considered' (ibid., 88 f.). The only interesting point here is that for Searle as well there are two uses of 'ought', one that is 'all things considered' and one that is *not*. One has to object to Searle that there are certain problems associated with the latter idea. Abandoning the term 'prima facie' would only be advisable if one wanted to do without terminological markers altogether. For an interesting attempt to reconstruct prima facie character by way of deontic logic, see J. Hintikka, 'Some Main Problems of Deontic Logic', in R. Hilpinen (ed.), *Deontic Logic: Introductory and Systematic Readings* (Dordrecht, 1970), 67 ff.
54 Dworkin, *Taking Rights Seriously*, 24, 26.

be based on some principle. But contrary to what Dworkin says,[55] the exceptions incorporated into rules on the basis of principles are unquantifiable in theory as well.[56] One can never be sure that in some new case a new exception should not be created. It is of course possible to conceive of a legal system which prohibits the limiting of rules by the incorporation of exceptions. But as the many cases of so-called teleological reduction show, the German legal system does not contain such a prohibition, at least not for all areas of law.[57] Rules for which this prohibition does not apply lose their strictly definitive character. But the prima facie character which rules acquire on losing their strictly definitive nature is of a fundamentally different type from that of principles. A principle is trumped when some competing principle has a greater weight in the case to be decided. By contrast, a rule is not automatically trumped when the competing principle is of greater weight than its own underlying principle on the facts of the case. Here, there are other principles which also need trumping, such as the one that rules passed by an authority acting within its jurisdiction are to be followed, and the principle that one should not depart from established practice without good reason. Such principles can be called '*formal* principles'. The more weight that is given to formal principles within a legal system, the stronger is the prima facie character of its rules.[58] It is only when such principles are completely deprived of any weight that the rules would no longer apply as rules. Only then would rules and principles have the same prima facie character.

The fact that weakening the definitive character of rules does not give them the same prima facie character as principles is only one side of the coin. The other side is that strengthening the prima facie character of principles does not give them the same prima facie character as rules either. The prima facie character of principles can be strengthened by creating a burden of argumentation in favour of certain principles or types of principle. The decision concerning fitness to stand trial showed that both norms guaranteeing individual constitutional rights and norms requiring the pursuit of common interests can be seen as principles. One could create a burden of argumentation in favour of the first type and to the detriment of the second type of principle, in other words a burden of argumentation in favour of individual and to the detriment of collective interests. This is roughly what

[55] Dworkin, *Taking Rights Seriously*, 25.
[56] Alexy, 'Zum Begriff des Rechtsprinzips', 68 ff.
[57] See e.g. BGHZ 24, 153; 59, 236. For an overview, see H. Brandenburg, *Die teleologische Reduktion* (Göttingen, 1983).
[58] In this connection one can introduce the ideas of the hardness and softness of a legal system. A legal system is harder, the stronger the prima facie character of its rules is, and the more it is regulated by rules within it. To show that the debate about the necessary degree of hardness of a legal system is no new theme, see O. Behrends, 'Institutionelles und prinzipielles Denken im römischen Privatrecht', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 95 (1978), 187 ff.

Schlink has in mind when he says that constitutional rights are 'rules concerning the burden of argumentation'.[59] Whether the assumption of such rules concerning the burden of argumentation is justified is not in issue here. The point is simply that the assumption of burdens of argumentation in favour of certain principles does not give them the same prima facie character as rules. Even a burden of argumentation does not relieve us of the need to establish conditions of precedence in any given case. It merely has the consequence that where reasons are equally strong, or in cases of doubt, one principle takes precedence over the other. A burden of argumentation does strengthen the prima facie character of a principle, but the prima facie character of a rule resting on authoritative creation or long-standing acceptance is something quite different and much stronger.

Thus the proposition that rules and principles differ from each other in their prima facie character should be maintained in spite of some necessary modifications.

5. Rules and Principles as Reasons

The discussion so far has shown that rules and principles are different types of reason. Principles are always *prima facie reasons* and rules are *definitive reasons*, so long as no exception is to be read into them. But saying that rules and principles are definitive and prima facie reasons does not tell us what they are reasons *for*. They could be reasons for actions or reasons for norms, and as reasons for norms they could be reasons for universal (abstract-general) norms or reasons for individual norms (concrete legal ought-judgments).[60] Raz takes the view that norms are reasons for actions.[61] By contrast, the position taken here is that rules and principles are reasons for norms. The gap between the two views is actually smaller than might seem, since if rules and principles are reasons for norms they are indirectly reasons for actions. The view adopted here is simply a jurisprudential one. The study of law concerns propositions about what is required, forbidden, and allowed, and the judge has to make decisions in precisely these terms. The semantic conception of a norm is designed to replicate this approach. By treating rules and principles as reasons for norms, justifying relations are kept to entities of one category, which makes matters—and particularly logical analysis—easier.

One of the possible criteria for distinguishing rules from principles considered above suggested that principles were reasons for rules and only reasons for rules. If this were correct, principles could not be direct reasons for concrete ought-judgments. The view that principles are reasons for rules

[59] Schlink, *Abwägung im Verfassungsrecht*, 195.
[60] On these distinctions, see above at 46 fn. 11.
[61] J. Raz, *Practical Reason and Norms* (London, 1975), 15, 58.

and rules reasons for concrete ought-judgments (individual norms) is at first sight rather plausible. But on closer examination it does not work. Rules can also be reasons for rules and principles can be reasons for concrete ought-judgments. Someone who adopts the norm that one should never injure another's self-esteem as a norm of personal conduct without exception has adopted a rule. This rule can be the reason for a further rule: never speak to another person about their failures. On the other hand, principles can be reasons for decisions, that is, for concrete ought-judgments. Thus in the decision concerning the fitness to stand trial, the principle of the preservation of life was a reason for the impermissibility of conducting the trial. Having said that, the characterization of principles as reasons for rules makes a good point. It reflects the different character of rules and principles as reasons for concrete ought-judgments. If a rule is a reason for making a concrete ought-judgment, which is the case when it is valid, applicable, and without relevant exception, then it is a *definitive reason*. If the content of the concrete ought-judgment is that an individual has a certain right, then that right is a *definitive right*. By contrast, principles can only ever be *prima facie reasons*. In and of themselves they can only create prima facie rights. Thus in the Lebach case, ZDF only had a *prima facie right* to broadcast. Decisions about rights presuppose the identification of definitive rights. The route from the principle, that is, the prima facie right, to the definitive right runs by way of the relation of preference. But establishing a preference relation is, according to the Law of Competing Principles, to create a rule. We can therefore say that whenever a principle turns out to be the dominant reason for a concrete ought-judgment, then that principle is a reason for a rule, which in turn is the definitive reason for the judgment. Principles in themselves are never definitive reasons. Esser is probably making this point when he states that 'a principle is not itself a "recommendation" but the reason, criterion and justification for a recommendation'[62] and what Kant means when he says that 'a subject may have, in a rule he prescribes to himself, two grounds of obligation (*rationes obligandi*), one or other of which is not sufficient to put him under obligation (*rationes obligandi non obligantes*), so that one of them is not a duty'.[63]

6. Generality and Principles

It is fairly easy to justify the relative correctness of the criterion of generality. Principles are on the whole relatively general, because they have not yet been related to the possibilities of the factual and normative world. When they are related to the boundaries of the factual and normative world, they produce a *differentiated rule system*. The idea of a principle-dependent

[62] Esser, *Grundsatz und Norm*, 51.
[63] I. Kant, *The Metaphysics of Morals*, trans. M. Gregor (Cambridge, 1991), 50.

differentiated rule system will become significant when we dicuss objections to the supposedly arbitrary nature of balancing. That the criterion of generality is only relatively accurate can be seen in the existence of norms of a high degree of generality which are not principles. The normative proposition, 'an act may only be punished if its criminal nature was established by law before it was committed' (art. 103(2) Basic Law, sect. 1 Criminal Code) may give rise to a whole host of problems of interpretation, and in interpreting it, one may reveal a latent underlying principle, but it is actually a rule, since what it requires is something that is either satisfied or not as the case may be. The fact that this norm is often called a 'principle' makes it an example of those cases in which the theory defended here departs from ordinary linguistic usage.

The reasons for many other characteristics of principles are obvious. As reasons for sometimes highly technical rules, their evaluative content is more obviously apparent; as the main reasons for innumerable rules, principles have greater substantive significance for the legal system; their relation to the idea of law arises from a model of justification that moves from the general to the particular; and the fact that they are often characterized as 'evolved' rather than 'created' lies in the fact that they need not be expressly enacted, but can be derived from a tradition of detailed norm-creation and judicial decision-taking which are often the expression of a widespread understanding of what the law ought to be.

7. Three Objections to Principles

Quite independently of their applicability to a theory of constitutional rights, three objections can be made to the idea of principles propounded here. The first argues that there can be conflicts of principle which are resolved by declaring one of the principles invalid. The second objection suggests that there are absolute principles which can never be placed in a relation of preference with any other principle, and the third states that the concept of a principle is too broad and is thus useless, because it embraces all possible interests, needs, and so on which could be balanced against each other.

7.1 The Invalidity of Principles

It cannot be denied that there are principles which, were they to emerge within a given legal system, would be declared invalid on their first encounter with other principles. One example is the principle of racial segregation. German constitutional law excludes this principle. There is not a single case in which it takes precedence and several in which it is overridden; for as long as the principles of current constitutional law remain unchanged, this principle will be overridden in every case, which is to say that it is not a valid principle. If it came to a competition of principles, this

would be resolved in the same way as a conflict of rules. One could therefore conclude that the theory of competing principles outlined above does not apply. But this would miss the point. To explain why this is the case, let the ideas of a conflict of rules and competing principles be grouped together under a single broad concept of norm inconsistency. The real point is that there are two categorically different types of norm inconsistency. The first type concerns membership in a legal system, that is, validity. The conflict of rules is the key example of this type of inconsistency. The principle of racial segregation shows that the question of validity can also be put in the case of principles, even if this is rare. The question of validity is always concerned with what is to be located inside and outside the legal system.

The other sort of norm inconsistency takes place within the legal system. Norm inconsistencies of this type are always competing principles and competing principles are always found inside a legal system. This makes it clear that the idea of competing principles presupposes the validity of those principles. The reference to the possibility of classifying principles as invalid therefore does not affect the theory of competing principles, but only points up one of its presuppositions.

7.2 Absolute Principles

The problem of the invalidity of principles is concerned with extremely weak principles, that is, with principles which in no case take precedence over other principles. Absolute principles are extremely strong principles, that is, principles which in no case are preceded by other principles. If there are any absolute principles, then the definition of a principle must be emended, because if a given principle always takes precedence over any other, including the principle that enacted rules are to be followed, then its realization would know no legal limits. There would only be the limits of the factually possible, and the theory of competing principles would be inapplicable.

It is quite easy to argue against the validity of any absolute principles in a legal system containing constitutional rights. Principles can be related either to collective interests or to individual rights. If there is an absolute principle relating to a collective interest, constitutional rights norms can set no limit to it. For as far as the absolute principle reaches, there are no constitutional rights. If the absolute principle guarantees individual rights, then its legal illimitability leads to the conclusion that when the right it protects of one person conflicts with the similar rights of other individuals, the latter must give way, which is inconsistent. Thus absolute principles are either incompatible with constitutional rights or can only apply where the rights they create benefit just one person.

One could take the view that the Basic Law contains at least one absolute principle by pointing to article 1(1)(1): 'human dignity is inviolable'. It is true that article 1(1)(1) Basic Law gives an impression of absoluteness.

However, the reason for this impression does not lie in the fact that this constitutional provision enacts an absolute principle, but firstly in the fact that the human dignity norm is treated partly as a rule and partly as a principle, and secondly in the fact that there is a very large set of conditions of precedence for the principle of human dignity together with a strong degree of certainty that when they are satisfied it takes precedence over other competing principles. The area defined by such conditions, that is, the area protected by the rules corresponding to these conditions, is what the Federal Constitutional Court calls, 'the absolutely protected core area of private autonomy'.[64]

The character of the human dignity norm as a rule can be seen in those cases in which the norm is relevant and in which it is not considered whether it takes precedence over other norms or not, but simply whether it has been breached or not. Given the open-texture of the human dignity norm, there is of course a further discretion in answering this question. The comments of the Federal Constitutional Court in the telephone tapping case are apposite: 'as regards the principle of the inviolability of human dignity laid down in article 1 Basic Law ... it all depends on establishing the circumstances under which human dignity might be violated. Clearly this cannot be stated in general terms, but only in the light of the concrete case.'[65] By using the idea of 'despicable treatment'[66] in their judgment, the Court opens up a wide discretion in establishing the circumstances of violation. In establishing the circumstances, there is always the possibility of balancing interests. Indeed, the Court uses this possibility as shown by statements such as the one asserting that human dignity is not at any rate violated 'if the exclusion of judicial oversight is not motivated by a failure to respect or an undervaluing of the human person, but by the necessity to maintain the secrecy of certain measures to protect the democratic order and the security of the state'.[67] This can be understood to mean that when secrecy is necessary, and if other conditions such as legal oversight by bodies constituted by representative assemblies are satisfied, the principle of state protection takes precedence over the principle of human dignity as regards the exclusion of legal remedies in cases of telephone tapping. The fact that reason and counter-reason are set in relation to each other shows

[64] BVerfGE 34, 238 (245). It is interesting how the Court in this case defines the relationship of the concept of an absolutely protected area to the concept of balancing: 'even outweighing principles of the general interest cannot justify an infringement of the absolutely protected core area of private self-determination; balancing in accordance with the principle of proportionality does not take place'. This sentence gives rise to problems of interpretation. Is it to be understood that the principle of human dignity takes precedence even in those cases when (*from the perspective of constitutional law*) a competing principle has greater weight? That would be illogical. To avoid this illogicality, the phrase 'outweighing principles of the general interest' must be understood to refer to interests which outweigh from some perspective which is not that of constitutional law. But then one can simply balance from the perspective of constitutional law and find the principle of human dignity more weighty.

[65] BVerfGE 30, 1 (25). [66] BVerfGE 30, 1 (26). [67] BVerfGE 30, 1 (27).

that were the conditions listed to be unsatisfied, the same measure in question would become impermissible. The principle of human dignity would take precedence over state security. This point can be made more generally: if human dignity takes *precedence* at the level of principle, then it has been *breached* at the level of rule.

Balancing the principle of human dignity against other principles in order to establish the content of the rule of human dignity can be seen particularly clearly in the life imprisonment case, in which it was stated that 'human dignity is also not infringed if the completion of the sentence is rendered necessary by the continued danger represented by the prisoner, and if on this basis early release is inappropriate'.[68] These words establish that the protection of 'civil society' in the circumstances stated takes precedence over the principle of human dignity. In other circumstances, the preference could be reversed.

There are thus two human dignity norms, a human dignity rule and a human dignity principle. The preference relation between the human dignity principle and other competing principles determines the content of the human dignity rule. The principle is not absolute, but the rule is, which in view of its semantic open-texture stands in need of no limitation on the grounds of any conceivable relation of preference.[69] The human dignity principle can be realized to different degrees. The fact that under certain circumstances it clearly takes precedence over other principles does not make it absolute, but merely means that the constitutional reasons for giving precedence to human dignity in those circumstances can scarcely be questioned. But such a thesis about the core significance of a right exists for other constitutional rights as well. This does not affect their character as principles. We can therefore say that the principle of human dignity is not an absolute principle. The impression of absoluteness arises from the fact that there are two human dignity norms, a human dignity rule and a human dignity principle, along with the fact that there is a whole host of conditions under which we can say with a high degree of certainty that the human dignity principle takes precedence.

[68] BVerfGE 45, 187 (242).

[69] The advantage of this way of putting it is that on one hand no limiting clause needs to be read into the human dignity norm of the constitution, but that on the other hand (the human dignity principle can still be balanced with other constitutional principles). The danger identified by Kloepfer, that 'a human dignity enforceable against every other constitutional interest under every possible circumstances . . . will in the final analysis [reduce] the guarantee of human dignity to a defence against apocalyptic brutalities' (M. Kloepfer, 'Grundrechtstatbestand und Grundrechtsschranken in der Rechtsprechung des Bundesverfassungsgerichts—dargestellt am Beispiel der Menschenwürde', in C. Starck (ed.), *Bundesverfassungsgericht und Grundgesetz: Festgabe aus Anlaß des 25jährigen Bestehens des Bundesverfassungsgerichts*, ii (Tübingen, 1976), 411) can thus be avoided, without adopting an unwritten limiting clause in the preconditions of the human dignity norm, as Kloepfer seems to prefer. The possibility of this construction is a result of the semantic open-texture of the concept of human dignity.

7.3 The Breadth of Principles

Principles can be related both to individual rights and to collective interests. Thus in the Lebach Judgment there were two opposing principles of which one was a prima facie right to privacy and the other a prima facie right to free media reporting.[70] In the Fitness to Stand Trial Judgment the rights to life and bodily integrity competed with the principle of maintaining a functioning criminal justice system[71]—a principle which serves a collective interest. The case-law of the Federal Constitutional Court offers a wide variety of examples of collective interests as the subject-matter of principles. They range from public health,[72] the provision of energy,[73] securing the food-chain[74] and the combating of unemployment,[75] through to securing the internal structure of the armed forces,[76] the security of the Federal Republic of Germany,[77] and protecting the free democratic order.[78] That a principle relates to such collective interests means that it requires the creation or maintenance of states of affairs which satisfy certain criteria, broader than the enforcement or satisfaction of individual rights, to the greatest extent legally and factually possible.[79]

[70] BVerfGE 35, 202 (219). See also BVerfGE 30, 173 (195).
[71] BVerfGE 51, 324 (345).
[72] BVerfGE 7, 377 (414 f.).
[73] BVerfGE 30, 292 (317).
[74] BVerfGE 39, 210 (227).
[75] BVerfGE 21, 245 (251).
[76] BVerfGE 28, 243 (261).
[77] BVerfGE 28, 175 (186).
[78] BVerfGE 30, 1 (26 f.). For many further references, see H. Schneider, *Die Güterabwägung des Bundesverfassungsgerichts bei Grundrechtskonflikten* (Baden-Baden, 1979), 133 ff.

[79] This definition shows that the distinction between individual rights and collective goods is not as simple as it might at first sight seem. Four different relations between individual rights and collective goods can be identified, which can be combined with each other in many different ways. (1) An individual right is an exclusive means to a collective good. Such a relation is assumed, for example, by those who consider the right to property exclusively as a means to the creation of economic productivity. A collision between this right and the collective good is excluded, because if the right loses its character as a means or even hinders productivity, there is no longer any reason for the right. If all individual rights were only means to collective goods, then there could no longer be any collisions between individual rights and collective goods. Rights as means to collective interests would in this sense have no force of their own. (2) A collective good is the exclusive means to certain rights. Those who say that the guaranteeing of a functioning criminal justice system simply secures the protection of individual rights are assuming such a relation. From this perspective a competition of individual rights with the principle of guaranteeing a functioning criminal justice system is in reality a competition of individual rights (or the principles which grant them). If all collective goods were simply means to rights, then there would only be competing rights. (3) A collective good is a state of affairs in which the norms granting individual rights apply or are satisfied. If this were true for all collective goods, talk of collective goods would be redundant. (4) Between individual rights and collective goods there is neither the means–end relation of (1) or (2), nor the identity relation (3). If individual rights have no absolute character as against collective goods, then under the conditions of (4), competitions between individual rights and collective goods are collisions between categorically different objects. Relations of the fourth type can exist alongside relations of the first to third type. Which of the relations applies depends on arguments about the content and character of individual rights and collective goods. Both arguments that individual rights are not simply means to collective goods and that there are collective goods

Dworkin's understanding of a principle is narrower than this. According to him, principles are only those norms which can be offered as reasons for individual rights. Norms which relate to collective interests, he calls 'policies'.[80] Without doubt, the distinction between individual rights and collective interests is important. But it is neither necessary nor desirable to tie the concept of a principle to that of an individual right. The common logical characteristics of both types of principle, which Dworkin alludes to with his 'principle in the generic sense',[81] and which become patently obvious when principles compete, make a wider concept of principle appear more suitable. The distinction which Dworkin wants to draw can be made within that wider concept if one wishes—and that point holds for other possible distinctions as well.

8. Principles and Proportionality

It has already been hinted that there is a connection between the theory of principles and the principle of proportionality. This connection is as close as it could possibly be. The nature of principles implies the principle of proportionality and vice versa. That the nature of principles implies the principle of proportionality means that the principle of proportionality with its three sub-principles[82] of suitability, necessity (use of the least intrusive means), and proportionality in its narrow sense (that is, the balancing requirement) logically follows from the nature of principles; it can be deduced from them. The Federal Constitutional Court has stated in rather obscure terms that the principle of proportionality emerges 'basically from the nature of constitutional rights themselves'.[83] What follows will try to demonstrate that this is true in the strongest possible sense whenever constitutional rights are principles.[84]

independent of individual rights can be well grounded. The first argument can be based on the dignity and autonomy of the individual, that is, it can be justified along Kantian lines, while the second argument can be justified by the fact that not all state activity has to be concerned with rights. It can also be concerned with what is useful, pleasant, or desirable. This is sufficient to justify us in talking both of individual rights and also of collective goods.

80 Dworkin, *Taking Rights Seriously*, 82, 90.

81 ibid. 23.

82 On the three sub-principles of the principle of proportionality, see, with extensive references, L. Hirschberg, *Der Grundsatz der Verhältnismäßigkeit* (Göttingen, 1981), 2, 50 ff., 75 ff.; See also R. Wendt, 'Der Garantiegehalt der Grundrechte und das Übermaßverbot', AöR 104 (1979), 415 ff.; E. Grabitz, 'Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts', AöR 98 (1973), 571 ff.; M. Gentz, 'Zur Verhältnismäßigkeit von Grundrechtseingriffen', NJW 1968, 1601 ff.; P. Lerche, *Übermaß und Verfassungsrecht* (Cologne, Berlin, Munich, and Bonn, 1961), 19 ff.; K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, i (Munich, 1977), 674; F. E. Schnapp, 'Die Verhältnismäßigkeit des Grundrechtseingriffs', JuS 1983, 851.

83 BVerfGE 19, 342 (348 f.); 65, 1 (44).

84 The principle of proportionality is not actually a principle in the sense defined here. Suitability, necessity, and proportionality in the narrow sense (balance) are not balanced

Principles are optimization requirements relative to what is legally *and* factually possible. The *principle of proportionality in its narrow sense*, that is, the requirement of balancing, derives from its relation to the *legally* possible. If a constitutional rights norm which is a principle competes with another principle, then the legal possibilities for realizing that norm depend on the competing principle. To reach a decision, one needs to engage in a balancing exercise as required by the Law of Competing Principles.[85] Since the application of valid principles, if indeed they are applicable, is required, and since their application in a case of competing principles requires a balancing exercise, the character of constitutional rights norms as principles implies that when they compete with other principles, a balancing exercise becomes necessary. But this means that the principle of proportionality in its narrow sense can be deduced from the character of constitutional rights norms as principles.

The principle of proportionality in its narrow sense follows from the fact that principles are optimization requirements relative to what is legally possible. The principles of necessity and suitability follow from the nature of principles as optimization requirements relative to what is *factually* possible.

In order to demonstrate that the principle of *necessity* derives from the nature of principles, we will use here the simplest possible form of an examination of necessity. The fact that more complex forms give rise to difficulties says nothing about logical deduction but about the limits of the process.[86] The simplest form possible is characterized by the fact that only

against other things. They do not take precedence in one situation and not in another. Rather, the question is whether the sub-principles are satisfied or not, and their non-satisfaction leads to illegality. Thus the three sub-principles are actually rules. See on this, G. Haverkate, *Rechtsfragen des Leistungsstaats* (Tübingen, 1983), 11, who speaks of a 'legal maxim under which subsumption is possible'.

85 See above at 50 ff.

86 The simplest set of facts possible arises when there are only two legal subjects, namely the state and a citizen, and two relevant principles. If more than two principles are relevant, then the following situation can arise: M_1 and M_2 are two equally suitable means to end E, the pursuit of which is required by P_1, or is identical to P_1. M_2 hinders the realization of P_2 to a smaller degree than M_1, but M_1 hinders the realization of P_3 to a smaller extent than M_2. In this case the principle of necessity allows no choice to be made between the three resulting possibilities: (1) M_1 is chosen, thus preferring P_3 to P_2 and realizing P_1; (2) M_2 is chosen, thus preferring P_2 to P_3 and realizing P_1; (3) neither M_1 nor M_2 is chosen, thus preferring P_2 and P_3 together over P_1. In order to justify the choice of one of these possibilities, say the first, one has to show that it is justified to prefer the non-hindering of P_3 by M_2 together with the realization of P_1 over the hindering of P_2 by M_1. But this is none other than the justification of a conditional relation of preference between P_2 on the one side and P_1 and P_3 on the other, that is, a balancing exercise.

The problems which can arise when more people are involved are similar. Let M_1 and M_2 be once again two equally good means to the principle P_1 pursued by the state. M_1 hinders the prima facie right of x protected by P_2 to a lesser extent than M_2. M_2 hinders the prima facie right of y protected by P_2 or a further principle P_3 to a lesser extent than M_1. In this case as well, the principle of necessity admits of no decision.

two principles and two legal subjects (state/individual) are in play. It has the following structure: either the state justifies pursuing end E by reference to principle P_1, or indeed the two are identical. There are at least two means, M_1 and M_2, which are both equally suitable in bringing about or promoting E. M_2 affects less intrusively, or indeed not at all, the realization of what a constitutional rights norm in the form of a principle, P_2, requires. Under these circumstances, it is irrelevant, as far as P_1 is concerned, whether M_1 or M_2 is chosen. P_1 does not prefer M_1 over M_2 or vice versa. However, it is not irrelevant as far as P_2 is concerned. As a principle, P_2 requires optimizing relative to what is both legally and factually possible. Relative to what is factually possible, P_2 can be satisfied to a greater extent by the choice of M_2 over M_1. From the perspective of optimization relative to what is factually possible, and assuming the validity of both P_1 and P_2, M_2 is permitted and M_1 prohibited. This applies to any conceivable principles, ends, and means. Thus the principle of necessity, which the Federal Constitutional Court among other things characterizes as the requirement, 'that the end cannot equally well be achieved by the use of other means less burdensome to the individual'[87] derives from the nature of constitutional rights norms as principles.

The interconnection between legal and factual possibility can also be clarified with the help of this the simplest type of case. If both M_1 and M_2 hinder the realization of P_2, which is generally likely to be the case if one is examining the necessity of a state measure, and if M_2 does this to a smaller extent than M_1, then M_1 and M_2 together do not exhaust the scope of factual possibility for the realization of P_2, even if one assumes that M_1 and M_2 are the only suitable means for attaining the end E required by P_1. From the point of view of the factually possible, a greater level of realization of P_2 is possible if neither M_1 nor M_2 is adopted. The principle of necessity only enables us to distinguish M_1 from M_2. The question whether any of the alternatives should be chosen at all is not a question of the factually possible, that is, of necessity, but a question of what is legally possible, that is, one of balancing P_1 with P_2 (proportionality in its narrow sense). Thus the principle of necessity, if even the least intrusive means affects the realization of P_2, is always to be considered before the principle of proportionality in its narrow sense, that is, the balancing requirement.

Given what has just been said, the deduction of the principle of *suitability* is no longer problematic. If M_1 is not suitable for the furtherance or attainment of the end E required by P_1 or identical with it, then M_1 is not required by P_1; it is irrelevant for P_1 whether M_1 is adopted or not. If under these circumstances M_1 hinders the realization of P_2, then M_1 is prohibited by the need to optimize P_2 as far as is factually possible. This applies for all principles, ends, and means. Thus the principle of suitability also derives from the principled nature of constitutional rights norms.[88]

This process of deduction provides a justification for the principle of proportionality out of constitutional rights norms, to the extent that they are principles. It can be called the 'justification from constitutional rights'. This is not intended to exclude other possible justifications based on the Rule of Law,[89] adjudicative practice or the concept of justice.[90] [91] To the extent that these work, they are welcome support for the justification from constitutional rights.

II. THREE MODELS

1. The Model of Pure Principles

The discussion up to this point has demonstrated that the Federal Constitutional Court treats constitutional rights norms, at least in some cases, as principles. The connection between constitutional rights norms as principles and decision-related constitutional rights rules can be clarified with the help of the Law of Competing Principles: the conditions under which one principle takes precedence over another constitute the conditions of a rule which requires the legal consequences of the principle taking precedence.

These observations suggest a simple model of constitutional rights norms. Under this model, there are two types of constitutional rights norms, rules and principles. Directly enacted guarantees found in the constitutional rights provisions are to be understood as principles. Rules

The problems of the application of the principle of necessity even to the simplest set of facts are to be distinguished from the problems of complex sets of facts. These problems include above all the question of the extent to which the legislature and administrative bodies are to be granted a prognostic discretion in assessing necessity and establishing alternative means. (On these problems, see with numerous further references Hirschberg, *Der Grundsatz der Verhältnismäßigkeit*, 50 ff.).

87 BVerfGE 38, 281 (302).

88 Grabitz, 'Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts', 586, comes close to deducing the principle of proportionality as set out here: 'if one understands the principle underlying liberty rights positively as the *greatest possible* opportunity for personal self-development guaranteed to the individual on account of the constitution, every "excessive" regulation thwarts the maximization of opportunities, and is thus constitutionally illegitimate'.

89 On this strand of justification, see e.g. BVerfGE 23, 127 (133); 38, 348 (368).

90 See on this H. Schneider, 'Zur Verhältnismäßgkeits-Kontrolle insbesondere bei Gesetzen', in C. Starck (ed.), *Bundesverfassungsgericht und Grundgesetz*, ii (Tübingen, 1976), 393 f.; Wendt, 'Der Garantiegehalt der Grundrechte und das Übermaßverbot', 416. R. v. Krauss, *Der Grundsatz der Verhältnismäßigkeit* (Hamburg, 1955), 41, speaks of the 'natural right in a timeless sense of the individual to be protected from burdens to the extent that they exceed the degree necessary'.

91 For an account of the various attempts to justify the principle of proportionality, see P. Wittig, 'Zum Standort des Verhältnismäßigkeitsgrundsatzes im System des Grundgesetzes', DÖV 1968, 818 ff.