

HUMAN DIGNITY AND PROPORTIONALITY ANALYSIS¹

A DIGNIDADE HUMANA E A ANÁLISE DA PROPORCIONALIDADE

Robert Alexy*

1 Absolute and Relative Conceptions of Human Dignity

The relation between proportionality analysis and human dignity is one of the most contested questions in the debate about the normative structure of human dignity. Two conceptions stand in opposition: an absolute and a relative conception. According to the absolute conception, the guarantee of human dignity counts as a norm that takes precedence over all other norms in all cases. Taking precedence over all other norms in all cases implies that balancing is precluded. This, in turn, means that each and every interference with human dignity is a violation of human dignity. Thus, justified interference with human dignity becomes impossible. By contrast, proportionality analysis is intrinsically connected to the distinction between justified and unjustified interferences. A proportional interference is justified and is, therefore, constitutional. The opposite applies in the case of disproportional interference. The absolute conception is incompatible with this conceptual framework. For this reason, it is incompatible with proportionality analysis. According to the relative conception, precisely the opposite is true. The relative conception says that the question of whether human dignity is violated is a question of proportionality. With this, the relative conception is not only compatible with proportionality analysis, it presupposes it.

2 Practical Significance

The question of whether the absolute or the relative conception is right, one might well think, is no more than a highly abstract theoretical question. Just the opposite, however, is the case. This can be illustrated by turning to the adjudication of the German Federal Constitutional Court, which is characterized by a number of inconsistencies. Sometimes the Court points in the direction of the absolute conception, sometimes it follows the relative line. An example of a decision with a strong absolute touch is the decision from 1973 on secret tape-recordings. The Court emphasizes that human dignity requires an “absolutely protected core area of private self-determination”,² and determines the relationship between the concept of absolute protection and the concept of balancing in the following way:

* Professor at Christian-Albrechts-Universität zu Kiel, Germany; alexy@law.uni-kiel.de

¹ This article was first discussed at Autumn 2014 Unesco International Legal Seminar, in Chapecó, Santa Catarina State, Brazil.

² BVerfGE 34, 238 (245).

Even outweighing public interests cannot justify an infringement of the absolutely protected core area of private self-determination; no balancing in accordance with the principle of proportionality takes place.³

In its opinion on the acoustic observation of accommodation, decided more than 30 years later, the Court confirmed this.⁴ Nevertheless, this claim strikes one as puzzling (ALEXY, 2002, p. 63). Is it to be understood that human dignity takes precedence even in those cases where, *from the perspective of constitutional law*, a competing principle has greater weight? This would boil down to a contradiction. Having greater weight from the perspective of constitutional law implies precedence over whatever has lesser weight from the standpoint of constitutional law. In this interpretation, the claim quoted says that the colliding principle takes precedence and does not take precedence. To avoid this contradiction, the phrase “outweighing public interests” must be understood as referring to interests that outweigh from some perspective other than that of constitutional law, say, from a political perspective. But then the thesis of the absolutely protected core area would become superfluous. Reasons that have no constitutional status⁵ cannot outweigh reasons that have constitutional status.

On the level of self-characterization the absolute line dominates. As soon as one turns to the details, however, the relative side emerges more and more clearly. An example is the decision on life imprisonment from 1977. The Court states:

Human dignity is also not violated 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 excluded. “[...] In cases where the danger represented by the criminal offender has to be determined, there is no need for further substantiation that the principle of proportionality has to be observed [...]”⁶

This is a clear case of proportionality analysis. Human dignity is considered as a principle that collides with the principle of public security. The collision has to be resolved by giving adequate weight to both, that is to say, by balancing. This has been corroborated in an opinion concerned with preventive detention, decided in 2004.⁷

Many more examples could be adduced.⁸ Here only one further case shall be considered, a case that is perhaps the judicial opinion in the adjudication of the German Federal Constitutional Court that connects human dignity with proportionality most closely. The case, decided in 1978, concerns the question of whether human dignity is violated when one’s hair and beard, which an accused allowed to grow ever since the time of his imprisonment, are altered under compulsion in order to confront him with witnesses who, if they had seen him earlier, would have seen him looking altogether different. The Court denies that there was a violation of human

³ Ibid.

⁴ BVerfGE 109, 279 (313).

⁵ See *ibid.*, 81.

⁶ BVerfGE 45, 187 (242).

⁷ BVerfGE 109, 133 (151).

⁸ See on them NilsTeifke (2011, p. 16-25) and Baldus (2011, p. 536-540).

dignity with three arguments. The first is that the interference is of “relatively low intensity”.⁹ Such an assessment of the intensity of interference is the first step of proportionality analysis. The second argument says that the clearing up of criminal offences and the investigation of offenders is an “outweighing public interest”.¹⁰ With this, human dignity is balanced with public interest. The third argument concludes the justification of the interference by stating that its purpose had nothing to do with “humiliation”¹¹ and that it was not connected with any other “aims that would have to be disapproved by law”.¹² This implies that the question of whether human dignity is violated does not depend on the act performed as such. It depends on the reasons standing behind the act. Under other circumstances the interference might well be disproportional, and would therefore count as a violation of human dignity. This interplay of reasons and counter-reasons is the essence of proportionality.

Up to this point, nothing has been said other than to introduce briefly the distinction between the absolute and the relative conception or construction of human dignity and to demonstrate that the adjudication of the German Federal Constitutional Court is, with respect to this distinction, highly unsatisfactory. The question that arises is whether the absolute or the relative conception is correct. My thesis is that the relative construction is, indeed, the correct one but that there exist some features of human dignity that move in the direction of absoluteness. The basis of my argument is principles theory. Therefore, I shall begin with a presentation of some basic elements of principles theory.

3 Some Basic Elements of Principles Theory

3.1 Rules and Principles

The basis of principles theory is the norm-theoretic distinction between rules and principles (ALEXY, 2002, p. 47-48). Rules are norms that require something determinate. They are *definitive commands*. Their form of application is subsumption. 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.” (ALEXY, 2002, p. 47). Rules aside, the legal possibilities are determined essentially by opposing principles. For this reason, principles, each taken alone, always comprise merely *prima facie* requirements. The determination of the appropriate degree of satisfaction of one principle relative to the requirements of other principles is brought about by means of balancing. Thus, balancing is the specific form of application of principles. If the guarantee of human dignity were absolute, it would have to be

⁹ BVerfGE 47, 239 (247).

¹⁰ BVerfGE 47, 239 (248).

¹¹ BVerfGE 47, 239 (247).

¹² BVerfGE 47, 239 (247-8).

considered as a definitive command, that is, as a rule. As a relative guarantee it has the character of a principle, that is, of a norm that requires balancing.

3.2 Proportionality

The nature of principles as optimization requirements leads straightaway to a necessary connection between principles and proportionality analysis. The principle of proportionality, which in the last decades has received ever greater international recognition in both the practice and the theory of constitutional review,¹³ consists of three sub-principles: the principle of suitability, of necessity, and of proportionality in the narrower sense. All three sub-principles express the idea of optimization. For this reason, the nature of principles implies the principle of proportionality and vice-versa.

The principles of suitability and necessity refer to optimization relative to the factual possibilities. Optimization relative to the factual possibilities consists in avoiding avoidable costs.¹⁴ Costs, however, are unavoidable when principles collide. Balancing then becomes necessary. Balancing is the subject of the third sub-principle of the principle of proportionality, namely, 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 “the law of balancing” (ALEXY, 2002, p. 222-224). It states:

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

3.3 Weight Formula

Nearly everywhere in constitutional adjudication, the law of balancing is found in various different formulations. It expresses the essence of balancing and is of great practical importance. The analysis of complex problems of constitutional rights, like that of human dignity, requires, however, a more precise and complete description of the structure of balancing. In order to achieve this, the law of balancing has to be elaborated further. The result of such a further elaboration is the weight formula (ALEXY, 2007, p. 25). It runs as follows:

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

$W_{i,j}$ represents the concrete weight of the principle P_i relative to the colliding principle P_j . The weight formula defines this concrete weight as the quotient of three factors standing, so to speak, on each side of balancing. I_i and I_j are of special importance. I_i stands

¹³ See, for instance, Beatty (2004), Sweet and Mathews (2008, p. 72-164) and Barak (2012).

¹⁴ See on this Alexy (2010, p. 222-224).

for the intensity of interference with P_i . I_j represents the importance of satisfying the colliding principle P_j . I_j , too, can be understood as intensity of interference, that is, as the intensity of interference with P_j through non-interference with P_i . W_i and W_j stand for the abstract weights of the colliding principles P_i and P_j . When the abstract weights are equal, which is the case in many collisions of constitutional rights, they cancel each other out, that is, they play no role. By contrast, the abstract weight of human dignity plays a pivotal role, for it is regularly¹⁵ deemed to be greater than that of the colliding principle. This is one of the features of human dignity from which a certain tendency toward absoluteness stems.

I_i and I_j , and also W_i and W_j , concern the substantive dimension of balancing. R_i and R_j have a completely different character. They refer to the reliability of the empirical and normative assumptions concerning, first and foremost, the question of how intensive the interference with P_i is, and how intensive the interference with P_j would be if the interference with P_i were omitted. Over and above this, the reliability of empirical and normative assumptions can also relate to the classification of the abstract weights, that is, to W_i and W_j . The decisive point is that reliability is a factor that does not refer to the things – in our case the intensity of interference and the abstract weights. That is, it is not an ontic factor. Rather, it is a factor that refers to one's knowledge of things. That is, it is an epistemic factor. The inclusion of this epistemic factor in the weight formula is required by a second law of balancing, the epistemic law of balancing, which runs as follows: The more heavily an interference in a constitutional right weights, the greater must be the certainty of its underlying premises (ALEXY, 2002, p. 418).

The concept of underlying premises used in this formulation comprises normative premises as well as empirical premises. R_i and R_j must therefore be understood as referring to normative premises as well as to empirical premises. This can be expressed by the following equation:

$$R_i = R_i^e \cdot R_i^n$$

This equation might be called “reliability equation”. In cases in which both empirical and normative reliability are in question, R_i and R_j have to be substituted by the respective products on the right side of the reliability equation. In this way, a refined version of the weight formula¹⁶ enters the stage:

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

¹⁵ If one assumes that human dignity is the highest principle of law, its abstract weight is cancelled out only in collisions in which human dignity stands on both sides.

¹⁶ See on this Alexy (2015).

Here only one point is of interest. In the debate over human dignity extreme or tragic collisions play an important role. Examples are torture in a ticking nuclear bomb scenario and downing an airplane full of passengers, that has been hijacked by terrorists who plan to use it as a weapon to kill as many persons as possible. Torture in the ticking bomb scenario concerns, without any doubt, human dignity. Accepting the death of the passengers is, obviously and profoundly, an interference with their right to life. Whether it is also an interference with their right to human dignity, as the German Federal Constitutional Court assumed, can remain open here. The decisive point is that in both cases the question of whether the interference is justified depends essentially on the reliability of numerous empirical assumptions BOROWSKI (2007, p. 101-104), that is, on R_j^e . To give it expression in the words of the Court:

The uncertainties [...] necessarily have effects on the prognosis of how long persons on board an airplane which has been transformed into an attack weapon still have to live, and whether there is still a chance of saving them. For this reason, it will normally not be possible to make a reliable judgment which says that the lives of these persons are ‘anyway already lost’.¹⁷

A formula like the weight formula, which expresses a quotient of two products, is sensible only if all of the factors can be represented by numbers. This is the problem of graduation. Elsewhere (ALEXY, 2002, p. 409-10, 419; ALEXY, 2007, p. 20-26). I have proposed a discrete, that is, a non-continuous triadic scale, in which geometric sequences are implemented. This scale assigns the values “light”, “moderate”, and “serious” to the intensity of interference and to the abstract weights. These values are expressed by the numbers 2^0 , 2^1 , and 2^2 , that is, by 1, 2, and 4. Where the epistemic side is concerned, that is R_i and R_j , or, in the refined version of the weight formula, R_i^e and R_i^n as well as R_j^e and R_j^n , one can work with the stages “reliable” or “certain” (r), “plausible” (p), and “not evidently false” (e), to which the numbers 2^0 , 2^{-1} , and 2^{-2} , that is, 1, $\frac{1}{2}$, and $\frac{1}{4}$, are to be assigned (ALEXY, 2007, p. 25). By means of these triads, most of the decisions of constitutional courts can be grasped. Where they do not suffice, that is, where one has to introduce a still more attenuated graduation, they can be extended to double-triadic scales (ALEXY, 2007, p. 22-23). A good deal more could be said about the weight formula. For a discussion of the relation between human dignity and proportionality, however, what has been said here ought to suffice.

4 The Concept of Human Dignity

4.1 Descriptive and Normative Elements

If the guarantee of human dignity can and should have the structure of a principle, then the relative construction is correct. Principles are optimization requirements.

¹⁷ BVerfGE 115, 118 (158).

The answer to the question of whether the guarantee of human dignity can have the structure of a principle, therefore, boils down to the question of whether human dignity is “something” that can “be realized to the greatest extent possible given the legal and factual possibilities” (ALEXY, 2002, p. 47). This, again, depends on what human dignity is, that is to say, it depends on the concept of human dignity. The concept of human dignity is a highly complex concept that connects descriptive or empirical with evaluative or normative elements. The descriptive element most often mentioned is autonomy, and the most prominent formulation stems from Kant (1964, p. 103): “Autonomy is therefore the ground of the dignity of human nature and of every rational nature” From the point of view of moral theory, Kant is right. From the point of view of legal theory, however, a broader empirical basis seems to be preferable, for the legal protection of human dignity is not confined to the protection of autonomy in the sense of moral self-legislation. It includes, for instance, also the right to exist and the right to take choices of whatever kind (ALEXY, 2002, p. 324-325; ALEXY, 2005, p. 100-102). For this reason the concept of human dignity has to be connected with a broader descriptive basis. Such a broader descriptive or empirical basis is provided by the concept of person, which, as including autonomy, in Kant’s writings also plays a pivotal role (KANT, 1964, p. 96).

4.2 The “Double-Triadic” Concept of Person

My main thesis about the concept of person is that this concept has a double-triadic structure (ALEXY, 2007, p. 94-100). In order to be a person, one has to fulfill three conditions twice around. The first condition of the first triad is intelligence, the second sentiment, and the third consciousness. Intelligence alone does not suffice, for computers have, in a certain sense, intelligence, but they are, at least at the present stage of their development, not persons. The connection of intelligence and sentiment, too, is not enough. Animals can have, at least to a certain degree, intelligence and sentiment, but they are not persons. For this reason, the third condition of the first triad, consciousness or, more precisely, self-consciousness, is the pivotal condition. Self-consciousness is defined by reflexivity. In order to determine what reflexivity is, three kinds of reflexivity have to be distinguished: cognitive, volitive, and normative reflexivity. This is to say that the third element of the concept of person, self-consciousness, again comprises three elements. This is the reason why the concept of person, presented here, can be designated as “double-triadic”.

Cognitive reflexivity consists in making oneself the object of knowledge. One could also speak of “self-knowledge”. The most elementary piece of self-knowledge is knowledge of the fact that we have been born and that we will die. To be a person, cognitive reflexivity is necessary, but it is not sufficient. Volitive and normative reflexivity must be added. Volitive reflexivity consists in the ability to direct one’s behavior and, with this, oneself by acts of will. As far as single acts are concerned, this is self-direction. With respect to the whole of life one can speak of “self-formation”. It is exactly this capacity of self-formation that Pico della Mirandola (1990, p. 6) considers

as the decisive reason for the dignity of human beings when he characterizes man as his “own [...] creative sculptor” (“ipsius [...] plastes et factor”).

The result of self-formation can be good or bad. Pico talks about the possibilities both of brutal degeneration (“brutadegenerare”) and of development into a higher dimension (“in superiora”) (PICO DELLA MIRANDOLA, 1990, p. 6). This shows that volitive reflexivity as such does not yet include normativity. Normativity enters the stage with the third kind of reflexivity, normative reflexivity. Normative reflexivity is concerned with self-assessment under the aspect of correctness. Here the question is of whether an action one has performed or wants to perform is right or wrong, and whether the life one leads or has led is, or was, a good life. This is the dimension of Kantian autonomy.

4.3 Human Dignity as A Bridge Concept

One who fulfills the conditions of, first, intelligence, second, sentiment, and, third, reflexivity in the form of cognitive, volitive, and normative reflexivity is a person. This is the descriptive side of human dignity. The step to the normative side begins with a connection between the concept of person and the concept of human dignity. This connection can be expressed in the following way: All persons possess human dignity. This claim is true, but it does not render explicit the normative dimension of human dignity. This can either be done by connecting the concept of human dignity with the concept of value, as Ronald Dworkin does with his “principle of intrinsic value” (DWORKIN, 2006, p. 9), or by connecting the concept of human dignity with the concepts of duties and rights. In law, the latter seems to be preferable. The connection of human dignity with duties as well as rights can be expressed in two ways. The first is the duty-formulation. It says:

- Human dignity requires that all human beings are taken seriously as persons.

The second is the right-formulation. It says:

- All human beings have the right to be taken seriously as persons.

In the first formulation the concept of human dignity appears, in the second it does not. But it is easy to alter this. Human dignity can be deleted in the first formulation by giving it the following form:

- All human beings are to be taken seriously as persons.

And human dignity can be inserted into the second formulation by transforming it as follows:

- Human dignity gives all human beings the right to be taken seriously as persons.

This brings to light a very important formal characteristic of the concept of human dignity, which may well explain many of the difficulties in the analysis of human dignity. Human dignity is what one might call a “bridge concept”. A bridge concept is a concept that connects an empirical or descriptive concept with a normative or evaluative concept. In our case, the descriptive concept is the concept of person. The normative concept is, in the first formulation, the duty to take seriously all human beings as persons, and, in the second formulation, the right of all human beings to be taken seriously as persons. These two formulations express what one might call the operative human dignity norms.

5 Human Dignity as Principle and As Rule

5.1 Human Dignity as Principle

Now we are in a position to answer the question of whether the absolute or the relative conception or construction of human rights is correct. If the content of the guarantee of human dignity can be expressed by the duty norm “All human beings have to be taken seriously as persons” as well as by the rights norm “All human beings have the right to be taken seriously as persons”, then human dignity can participate in balancing. For reasons of simplification only the rights norm shall be considered in what follows. An interference with the right to be taken seriously as a person, P_i , can be more or less intensive. Life imprisonment without a legal regulation concerning the possibility to regain one’s freedom after a certain period of time is a more intensive interference with the right to be taken seriously as a person than life imprisonment with such a regulation,¹⁸ and in cases of continued danger represented by the prisoner the principle of public security, P_j , has a greater weight than in cases without such a danger. Thus, values for the variables concerning the intensity of interference, I_i and I_j , can be inserted into the weight formula. The same applies to the abstract weights. The abstract weight on the side of human dignity, W_i , receives the highest value, that on the side of public security, W_j , a medium one. In such a situation, the values of the reliability variables R_i and R_j are of the greatest importance. All of this fits perfectly with the weight formula, and therefore with balancing, and therefore with proportionality, and, and therefore with the relative construction. Many more examples could be adduced. But this shall suffice here.

5.2 Human Dignity as A Rule

In *A Theory of Constitutional Rights*, I have argued that there exists, alongside the human dignity norm as a principle, a human dignity norm as a rule. Article 1 (1) (1) German Basic Law, just as article 1 (1) European Charter of Fundamental Ri-

¹⁸ See BVerfGE 45, 187 (242-52).

ghts, says: “Human dignity is inviolable”. One can understand this as an expression of a rule that is violated if and only if the human dignity principle takes precedence over the colliding principle (ALEXY, 2002), say, over public security, as in the life imprisonment case. This construction is possible owing to the semantic open-texture of the concept of human dignity. This semantic open-texture allows one to use balancing as a means of interpreting this concept.

Against this dual construction, Teifke (2011, p. 119) has objected that the human dignity rule has “no independent significance”. This is true. The content at the level of rule depends completely on the content at the level of principle. One might call this the “theorem of domination”. But the domination theorem is the point of the dual construction. It shows that a rule construction of the human dignity norm is possible, but empty. The rule construction implies the absolute conception of human dignity, whereas the principle construction implies the relative conception. The domination theorem shows that the essential feature of the normative structure of human dignity is its status as a principle. For this reason, only the relative conception can be correct.

6 Devaluation of Human Dignity?

A critic of the relative conception might object that all this only shows that one *can* conceive the human dignity norm as a principle which has to be applied by way of balancing. It does, however, not show that one *should* do so. On the contrary, there are normative reasons for the absolute conception. These normative reasons focus on the thesis that the relative construction leads to a devaluation of human dignity. A fixed border ceases to exist, for everything or nearly everything becomes possible. The guarantee of human dignity would no longer be a real guarantee. It would be degraded to a mere point of consideration. One might call this objection the “devaluation objection”. The devaluation objection, however, does not apply for four reasons.

6.1 Clear cases

The first reason is that there exist a considerable number of cases in which it is quite clear that human dignity is violated. Examples are persecution for racial or religious reasons, degrading prison conditions, failure to provide protection against sexual assault, exclusion from the system of education system, and a life below the existential minimum. These are conditions in which there exists a strong degree of normative certainty that human dignity will take precedence over colliding principles (ALEXY, 2002). According to the law of competing principles, (ALEXY, 2002, p. 63) this precedence implies that there exist concrete rules that have these conditions as their *protases* and the requirements of human dignity as their *apodoses*. In cases of these concrete rules subsumption is possible. Balancing will enter the stage only in borderline cases. This shows that the relative construction by no means implies that everything or nearly everything becomes possible.

6.2 Object formula

The second argument against the devaluation objection concerns the object formula. The object formula, which plays a considerable role in the adjudication of the German Federal Constitutional Court, says that it is not compatible with human dignity that a human being be made into a mere object.¹⁹

This does not preclude the treatment of human beings as objects to a certain degree. But it precludes that “the quality as a subject [...] be fundamentally challenged”.²⁰ Now the quality as a subject is fundamentally challenged when the quality as a person is fundamentally challenged. In this case the principle of human dignity takes precedence over principles that collide with it.

The precedence in the clear cases mentioned above counts as a concrete precedence. By contrast, “turning human beings into mere objects” expresses an abstract concept, and it is, therefore, an abstract condition of precedence (TEIFKE, 2011, p. 31). To be sure, the law of colliding principles is not compatible with abstract relations of precedence (ALEXY, 2002, p. 52), but it is altogether compatible with abstract conditions of preference. That concrete and abstract conditions both establish a conditional and not an unconditional relation of precedence is something they have in common. For this reason, the law of colliding principles is applicable in cases of abstract conditions as well as in cases of concrete conditions. This implies that the object formula is an abstract rule resulting from balancing, which makes it possible to resolve a certain number of cases by means of subsumption. This contributes, in turn, to the stability of the guarantee of human dignity. As soon as it becomes unclear, however, whether someone is being treated as a mere object, balancing becomes indispensable.

6.3 Abstract Weight and Epistemic Reliability

The third argument refers to the abstract weight of the principle of human dignity, W_i , and the values of epistemic reliability, that is, R_i or $R_i^e \times R_i^n$ on the side of human dignity, and R_j or $R_j^e \times R_j^n$ on the side of the colliding principle, say, public security. I presented, above, the weight formula in its two forms, the not refined and the refined form. I already mentioned there the high abstract value of human dignity and the importance of epistemic reliability on the side of the colliding principle. One point has to be added here. The epistemic reliability on the side of human dignity is, normally, rather high. In extreme or tragic collisions as in the cases of torture in a ticking nuclear bomb scenario or downing an airplane hijacked by terrorists who plan to use it as a weapon in order to kill as many persons as possible, the values of empirical and normative reliability on the side of human dignity are both unusually

¹⁹ BVerfGE 109, 279 (312).

²⁰ BVerfGE 109, 279 (313).

high. If one assumes that in such tragic cases all the variables on the side of human dignity have the highest value, then an interference with human dignity will only be allowed when all the variables on the side of the opposing principle also have the highest value. This is the most extreme of all 6561 constellations - that is, of all 3^8 constellations (ALEXY, 2015) – possible on the basis of the refined weight formula. This number stems from the fact that 81 constellations – that is, 3^4 constellations – are on each side possible and that each of these 81 constellations can be combined with 81 constellations on the other side, say, on the side of public security. This implies that in extreme or tragic cases, in which the highest values have to be substituted on the side of human dignity, the interference with human dignity is only in 1 of 81 constellations proportional. In all the other constellations, namely, the 80 that remain, the interference with human dignity is disproportional and therefore forbidden. It would seem to be difficult to describe this as a “devaluation of human dignity”.

6.4 Rationality

The fourth argument is that there exists no alternative to balancing, where the application of the guarantee of human dignity in an equally rational way is concerned. The most promising candidate for such an alternative has one turning to the classical canons of interpretation. It is, however, easy to see that they are of low value if they do not comprise balancing. Here only the four main canons of interpretation shall be considered: the semantic, the genetic, the teleological, and the systematic argument. The semantic argument (ALEXY, 1989, p. 235-236), owing to the open-texture of the concept of human dignity, is of low significance in hard cases. The genetic argument (ALEXY, 1989, p. 236-269), which refers to the original intent of the framers of the constitution, can sometimes be helpful. But the broadness, the complexity, and the moral content of the concept of human dignity rule out the possibility that a significant number of hard cases in the field of human dignity can be resolved by mere reference to original intent. The teleological argument (ALEXY, 1989, p. 240-244) is without any import in cases of human dignity. Human dignity is, as the highest value of the legal system, its highest purpose. What should be the purpose of the highest purpose, if not just this purpose? Where this applies, then where it is unclear what the highest purpose requires, it makes no sense to answer the question what it requires with a mere hint as to what it requires. This would beg the question. The systematic argument (ALEXY, 1989, p. 240) is of special interest. It refers to the relation of the norm to be interpreted to other norms of the legal system. If the guarantee of human dignity were to be conceived as a rule, not as a principle, the systematic argument would be of no value for the interpretation of this guarantee. To be sure, the guarantee of human dignity as the highest substantive norm of the legal system (ALEXY, 2002, p. 232, 299) can play a considerable role in the interpretation of lower-level norms, and this is a form of systematic interpretation. But when the question is that of whether the highest-level norm is violated by a lower-level norm, the lower-level norm cannot be adduced as an argument for a violation or lack of

violation, if both, the highest-level norm and the lower-level norm are considered as rules. The picture changes completely when the guarantee of human dignity is understood as a principle. Then balancing with all other principles becomes possible. This, too, is a systematic argument (ALEXY, 1995, p. 87). But as soon as the canons of interpretation include this form of systematic argument, which finds its most precise expression in the weight formula, they cease to be an alternative to balancing.

With this conclusion, we come to the end. Every attempt to present the classical canons of interpretation as an alternative to balancing where human dignity is concerned is condemned to failure. Balancing, a point I cannot elaborate here, is a form of rational legal argumentation (ALEXY, 2010, p. 28-32). By contrast, the non-balancing alternatives are relegated to something like “human dignity intuitionism” (ALEXY, 2000, p. 108). Argumentation is an expression of rationality, intuitionism is a confession of irrationality. Ultimately, it is this reason that shows us why the relative construction alone can be considered as correct.

REFERENCES

ALEXY, Robert. *A Theory of Constitutional Rights*. Translation Julian Rivers. Oxford: Oxford University Press, 2002.

ALEXY, Robert. *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification*. Translation Ruth Adler and Neil MacCormick. Oxford: Clarendon Press, 1989.

ALEXY, Robert. Constitutional Rights and Proportionality. *Chinese Yearbook of Constitutional Law*, 2010.

ALEXY, Robert. Data y los derechos humanos. Mentepositrónica y concepto doble-triádico de persona. In: ALEXY, Robert; FIGUEROA, Alfonso Garcia. *Star Trek y los derechos humanos*. Valencia: tirant lo blanch, 2007.

ALEXY, Robert. Formal principles: Some replies to critics. *International Journal of Constitutional Law*, v. 13, i. 3 2015. Available at: <<http://icon.oxfordjournals.org/content/current>>. Access in: 10 Dec. 2015.

ALEXY, Robert. Grundrechtsnorm und Grundrecht. *Rechtstheorie*, v. 13, 2000.

ALEXY, Robert. Ralf Dreiers Interpretation der Kantischen Rechts definition. In: ALEXY, Robert (Ed.). *Integratives Verstehen. Zur Rechtsphilosophie Ralf Dreiers*. Tübingen: Mohr Siebeck, 2005.

ALEXY, Robert. *Recht, Vernunft, Diskurs*. Frankfurt: Suhrkamp, 1995.

ALEXY, Robert et al. *Studien zur Rechtsphilosophie*. Frankfurt: Suhrkamp, 1995.

ALEXY, Robert. The Construction of Constitutional Rights. *Law & Ethics of Human Rights*, v. 4, p. 28-32, 2010.

ALEXY, Robert. The Weight Formula. In: STELMACH, Jerzy; BROŻEK, Bartos; ZAŁUSKI, Wojciech (Ed.). *Frontiers of the Economic Analysis of Law*. Krakow: Jagiellonian University Press, 2007.

BALDUS, Manfred. Menschenwürdegarantie und Absolutheitsthese. Zwischenbericht zu einer zukunftsweisenden Debatte. *Archiv des öffentlichen Rechts*, v. 136, p. 536-540, 2011.

BARAK, Aharon. *Proportionality, Constitutional Rights and their Limitation*. Cambridge: Cambridge University Press, 2012.

BEATTY, David M. *The Ultimate Rule of Law*. Oxford: Oxford University Press, 2004.

BOROWSKI, Martin. Abwehrrechte als grundrechtliche Prinzipien. In: SIECKMANN, Jan-R. (Ed.). *Die Prinzipientheorie der Grundrechte. Studien zur Grundrechtstheorie Robert Alexys*. Baden-Baden: Nomos, 2007.

DWORKIN, Ronald. *Is Democracy Possible Here? Principles for a New Political Debate*. Princeton: Princeton University Press, 2006.

KANT, Immanuel. *Groundwork of the Metaphysic of Morals*. Translation H. J. Paton New York: Harper & Row, 1964.

PICO DELLA MIRANDOLA, Giovanni. *De hominis dignitate*. Über die Würde des Menschen. Translation Norbert Baumgarten. Hamburg: Felix Meiner, 1990.

SWEET, Alec Stone; MATHEWS, Jud. Proportionality Balancing and Global Constitutionalism. *Columbia Journal of Transnational Law*, v. 47, p. 72-164, 2008.

TEIFKE, Nils. *Das Prinzip Menschenwürde. Zur Abwägungsfähigkeit des Höchststrangigen*. Tübingen: Mohr Siebeck, 2011.

Data da submissão: 08 de dezembro de 2015

Aceito em: 08 de dezembro de 2015