On the Difference of Rule and Principle in Legal Dogmatics

-- A Nonmonotonic Logical Point of View

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Abstract

This article sets out with the discourse between Hart and Dworkin concerning legal positivism; this controversy crystallizes at the problem of how to differentiate rule and principle. Dworkin points towards the weight axis of principles, which is fundamental to Alexy's 'theory of basic rights'; Alexy engages in an analytical and normative analysis as well as in theory construction of basic rights, making use of principles as 'optimization precepts' and showing means to resolve conflicts between different such precepts by weighing (abwägen) principles against each other. In the aftermath, Alexy makes use of algebra in order to express structural features of his weighing model, actually formulating a weight formula. Within this formula, Alexy points out the values of legal adjudication and legislative weighing can be equal, namely the stalemate situation. However, he still regards the power to legislate as a formal principle of lawmaking and uses this as a base for a claim of superiority. This article uses another form of representation for the weight formula and shows its nonmonotonic character.

Apart of that, the article explores the perspective of the fixed point theory in order to describe the discretion within the structural model and to explain situations of stalemate as being characterized by two symmetric occurrences of fixed points within the model. In case of stalemate within the weight formula, Alexy tends towards restricting epistemic discretion on the empirical and normative level via the claim of 'legislative priority' to a rule of selection. However, the article can show that this proposition can not be

derived from Alexy's weight formula.

The article also makes use of representation through modern formal logic in order to show defeasibility of principle structure, nonmonotonic characteristics of argumentation by principles and fringes of representation in an IT environment. At the same time, the author finds a relation between Alexy's weight formula and Bayes's theorem. Finally, the author gives an intuitive assessment of the intimate relationship between game theory, nonmonotonic logic, Bayes's theorem and the weight formula of principles.

Keyword: Rule, exception, principle, prima facie, nonmonotonic logic, defeasible logic, Abwägung, weight formula (Gewichtsformel), fixed point, Bayes's theorem