On the Rationale of Proportionality in Alexy's Theory

Hugo R. Zuleta

Buenos Aires University

According to Professor Robert Alexy, the principle of proportionality is composed of three sub-principles: The sub-principle of suitability or adequacy, the sub-principle of necessity, and the sub-principle of proportionality in the strict sense, which are applied in that order.

The sub-principles of adequacy and necessity derive from the character of the principles as optimization commands in relation to the factual possibilities. The adequacy test excludes those means that are not suitable for the intended purpose while the sub-principle of necessity excludes those that restrict rights to a greater extent than necessary to achieve the purpose.

The sub-principle of proportionality in the strict sense, in turn, derives from the character of principles as optimization commands in relation to legal possibilities, which are determined by the rights that would be restricted by the provision under scrutiny. This sub-principle is the one that specifically concerns weighting or balance, which is the method to resolve conflicts between principles.

My interest in this paper is to make some contribution to the study of the rational justification of decisions based on the first two sub-principles, i.e. those of adequacy and necessity. More precisely, I intend to analyze the limits of rationality of Alexy's model, according to his own arguments, in relation to those sub-principles.

Professor Alexy, among others, claims that the rational basis of both sub-principles is to be found in the Pareto optimality criterion.[1]

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[1] Alexy, Robert: *A Theory of Constitutional Rights*, Oxford Unv. Press., Oxford, 2002, Postscript, III, 3.1.

The Pareto principle is a criterion of comparison of economic theory according to which, if two social situations, for instance, two alternative distributions of resources -say x and y- are such that at least some members of the society are better off at x than at y, and none is worse off, then x is better than y for the whole society. A state of affairs is considered Pareto-optimal when there is no way to improve the situation of any member of the society without worsening the situation of someone else. It must be noted that there are many Pareto-optimal situations, so that usually the Pareto principle is not enough to justify the choice of one among many alternatives, but at least it serves to rule out some of them.

The application of the Pareto criterion to the sub-principles of adequacy and necessity determines that:

a) If a legal provision that restricts a right is not adequate for the purpose pursued, it would make no difference, from the point of view of the purpose, whether it were implemented or not, while those who would be affected in their rights by the provision under examination would be better off if it were not implemented. Therefore, the legal provision should not be implemented.

b) If two possible provisions affect rights equally but one is more appropriate than the other to attain the intended purpose, the less appropriate one should be ruled out.

c) If there is a possible provision that is at least as adequate to achieve the intended purpose as that chosen by the legislator but is less restrictive of rights, the provision chosen by the legislator should be discarded.

The criterion of application of the sub-principles which is currently in practice within the German Federal Constitutional Court, and defended by Alexy and most authors, satisfies points a) and c) but do not satisfy b). That is so because the adequacy test is only used in a negative way, i.e. to rule out legal provisions that are manifestly inadequate for the intended purpose, but not to disqualify a measure just because there is another one more suitable for the same purpose, unless it were also less restrictive of rights.

That is, it only fits the Pareto criterion partially.

To be sure, a clear definition of the adequacy and necessity sub-principles would require further details. For instance, it would be necessary to determine whether the adequacy test should judge on the adequacy of the provision at the time it was issued or at the time of the judicial decision, if the adequacy is to be judged in general or in the specific case, and if the alternative measures potentially less burdensome with which it should be compared are all those that are possible or only those proposed by the interested parties.

Also, the application of the sub-principles in question requires that the purpose be well defined, which is not always the case. It is also necessary to determine, in the first place, if the purpose is constitutionally adequate, i.e. if it can be legitimately pursued from the point of view of the constitution.

But leaving all these caveats aside, I am interested in analyzing the kind of rationality that would guarantee the application of the Pareto principle.

First of all, it should be noted that the Pareto criterion does not solve those cases in which the measure chosen by the legislator -say M1- affects rights more intensely than an alternative provision -say M2- but, at the same time, M1 is more suitable than M2 to promote the purpose in view, or vice versa.

For example, the total prohibition of selling cigarettes would be much more effective in preventing cancer than a mere obligation of putting a warning on the pack of cigarettes, but it would affect liberty of commerce in a much higher degree.

To justify that a less suitable but less burdensome measure is preferable to a more suitable but more burdensome one, it would be necessary to show that the difference between the degrees of suitability of both measures is less than the difference between the degrees to which the more and the less suitable restrict the principle or right affected. But no method has been defined to do such kind of comparisons and, at any rate, they are beyond the reach of the Pareto principle. By the way, let it be said that Alexy's famous weight formula is not applicable for this purpose.

It seems that in those cases the court should be indifferent between the two possible provisions, which in practice means respecting the will of the legislator, provided, of

course, that the measure selected by the legislator passes the third stage of the process, that is, the weight test.

However, it is a very particular indifference, as we shall see.

The standard account of an action's rationality presented by decision theory requires that selection criteria satisfy the formal property of transitivity, i.e. they should determine an order in the set of alternatives so that if x is considered at least as good as y and y is considered at least as good as z, then x is considered at least as good as z. This formal property includes in fact two kinds of transitivity, that of strict preference and that of indifference, and all the combinations between strict preference and indifference. For instance, if x is strictly preferable to y and y is found as good as z, then x is strictly preferable to z.

The requisite of transitivity is related to the fact that decision theory refers to the action's maximizing expected utility, and the selection of the alternative that renders the highest utility requires that the alternatives can be ordered according to their relative utility. As the principles are, in Alexy's view, optimization commands, it seems that their application also requires that the alternative provisions can be ordered.

My point is that a selection criterion that is only based on the Pareto principle does not satisfy this formal condition, as shown in what follows.

Let us consider three possible legal provisions, M1, M2 and M3, such that the intensity of the intervention in principle Pi by M3 is greater than the intensity of the intervention in the same principle by M2, and the intensity of the intervention by M2, in turn, is greater than that of M1. Suppose, in addition, that M2 is equally suitable as M3 to promote the principle Pj, and both are more suitable than M1.

If we compare M1 with M2, we must declare indifference because M2 is more suitable than M1 to promote Pj but, at the same time, it is more burdensome than M1 on Pi.

If we compare M1 with M3 we must also declare indifference, for the same reasons.

Now, if we compare M2 with M3 we must declare that M2 is preferable to M3 under the sub-principle of necessity, since although both are equally suitable to promote Pj, M2 is less burdensome than M3 on Pi.

This consequence violates transitivity: M2 is indifferent to M1, M1 is indifferent to M3, but M2 is not indifferent to M3. As a consequence, the three alternatives cannot be ordered.

Now, following Amartya Sen, we can define two conditions of rationality that could be satisfied by a selection criterion:

Condition α:

If some alternative is the best within a certain set, it is also the best within all the subsets to which it belongs.

Condition β:

If two alternatives are equally good, then, confronted with a third one, either both are better, or both are worse. or all three are equally good.

In order to satisfy the transitivity requirement, a selection criterion must comply with both conditions. If it only complies with the first one, it allows to choose, but it contains a certain amount of unpredictability because two alternatives could be both eligible when confronted with others within a certain set and yet, confronted with a larger set, it could happen that one of them would remain eligible while the other would not.

The application of the sub-principles of adequacy and necessity based on the Pareto criterion satisfies condition α but not condition β.

This is, in my view, the limit of rationality of Alexy's model in relation to the sub-principles of adequacy and necessity.