

ROBERT ALEXY

# A Theory of Constitutional Rights



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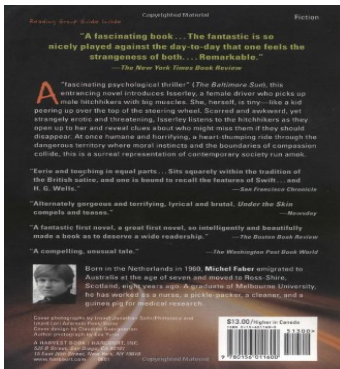
In any country where there is a Bill of Rights, constitutional rights reasoning is an important part of the legal process. As more and more countries adopt Human Rights legislation and accede to international human rights agreements, and as the European Union introduces its own Bill of Rights, judges struggle to implement these rights consistently and sometimes the reasoning behind them is lost. Examining the practice in other jurisdictions can be a valuable guide. Robert Alexy's classic work reconstructs the reasoning behind the jurisprudence of the German Basic Law and in doing so provides a theory of general application to all jurisdictions where judges wrestle with rights adjudication.

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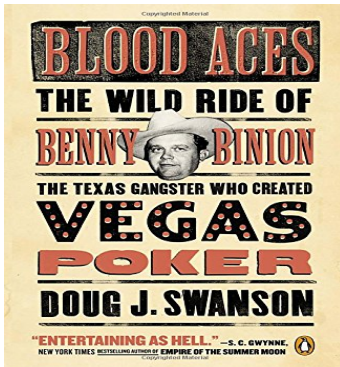
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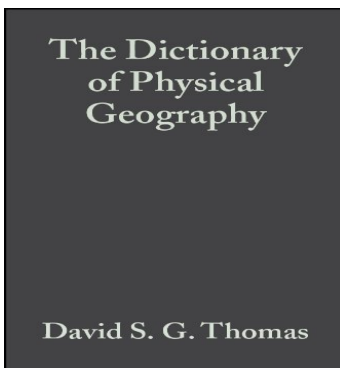
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**Review 1:**

Robert Alexy develops a theory of fundamental rights whose most important aspects are the theory of principles and the structure of the subjective rights. It is the treatise about fundamental rights most influential in the last 50 years. Desafortunately, several interesting works concerning the fundamental rights debate in Germany are awaiting a translation into English. It would be very interesting to have English translations of Martin Borowski, ("Grundrechte als Prinzipien"); Jan Sieckmann ("Recht als normatives System: Die Prinzipientheorie des Rechts"); Carsten Bäcker ("Begründen und Entscheiden: Kritik und Rekonstruktion der Alexyschen Diskurstheorie des Rechts"); Ralph Poscher ("Grundrechte als Abwehrrechte: Reflexive Regelung rechtlich geordneter Freiheit"); Matthias Jestaedt ("Grundrechtsentfaltung im Gesetz: Studien zur Interdependenz von Grundrechtsdogmatik und Rechtsgewinnungstheorie"); Karl-Eberhard Hain ("Die Grundsätze des Grundgesetzes"); Christian Bumke ("Die Ausgestaltung der Grundrechte: Grundzüge einer Dogmatik der Grundrechtsgestaltung unter besonderer Berücksichtigung der Vertragsfreiheit") and Jeong Hoon Park ("Rechtsfindung im Verwaltungsrecht: Grundlegung einer Prinzipientheorie des Verwaltungsrechts als Methode der Verwaltungsrechtsdogmatik"). There is a enormous international public of students of law and lawyers awaiting more audacity in the editorial policies of American and English publishers in this field of fundamental rights theory.

**Review 2:**

Robert Alexy is professor at Kiel University and this is perhaps his most important book. It's actually one of the basic books written in the world-wide legal theory about the fundamental rights. But it's not a book only for legal philosophers, but it's a fundamental book for the lawyer, the judge or the jurists concerned about Constitutional Law.

The book has ten chapters. In the first one, Alexy studies the concept of a general legal theory about the fundamental rights of the Basic Law (1949), and he does distinguish between the theory and the theories of fundamental rights and he defines his theory as a structural theory. In the second chapter, the author talks about the concept of rule and fundamental right's rule and then, in the third chapter, analyze the structure of these rules and here he builds a particular theory about the rules and principles (starting from Dworkin). The chapter 4 is about the fundamental rights as subjective rights and he proposes a complex system of fundamental legal positions (rights to something, liberties and competences; and the fundamental right as a whole). Alexy examines in the chapter 5 the status' theory (Jellinek) and then he gives the chapter 6 over to the study on the fundamental right and its restrictions and he refers to the narrow (Müller and others) and extensive theories about the supposition of fact of the fundamental rights and he defends vigorously the extensive theory with a specially convincing explanation. In the chapter 7, he examines the general right to liberty, its formal/material conception and its basic problems; the general right to equality is studied in chapter 8; the chapter 9 deals with the fundamental rights to positive action from the state (benefits lato sensu) and its types. The chapter 10 is on the fundamental rights and the fundamental rights' rules in the legal system, and Alexy analyzes the "inter privatos" effect, the effect against private individuals (Drittwirkung der Grundrechte) and the fundamental rights' argumentation.

Some of the more basic aspects of this fundamental work of the nowadays legal theory and of the constitutional law's dogmatic are the particular distinction between rules and principles, the wide conception of the fundamental rights' supposition of fact and it can be said without hyperbole that today it's not possible to argue about all these themes without considering this book of Prof. Alexy in which the author "reconstructs the reasoning behind the jurisprudence of the German Basic Law and in doing so provides a theory of general application to all

jurisdictions where judges wrestle with rights adjudication" (Oxford University Press). The book is translated to spanish (a very good translation in Centro de Estudios Constitucionales, 1993) as well. If you can read german, the best is reading this original version, but if not, you can read this very good english translation.

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