Between Conflict and Cooperation:

The Role of Formal Principles in Reconciling the Legal and the Political

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Contents

I. Conflicts and the Law

It is a widespread and longstanding belief that conflict is to some extent inextricably linked to human nature.[1] Although there is no shortage of armed conflict in today's world, one need not look so far to discover manifestations of conflict. In fact, conflict is ubiquitous. The mitigation and regulation of this omnipresent phenomenon is a

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[1] Kant, for instance, proclaimed that "[w]ar itself, however, is in need of no special stimulating cause, but seems engrafted in human nature"; Kant, *Perpetual Peace: A Philosophical Essay* (London, 2016) 151. Russell equally asserted that "war grows out of ordinary human nature"; Russell, *Why Men Fight: A Method of Abolishing International Duel* (New York, 2017) 5.

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central task of the law.[2] Law is capable of governing conflicts that transcend national borders, whether armed or not, as well as social conflicts within a state. But what happens when 'the law' itself becomes party to a conflict? Several constellations of such a situation are conceivable. Legal systems can collide with one another, as is regularly the case in multi-level systems.[3] This type of conflict is characterised by a collision between 'the law' and 'the law'. However, the law can also collide with non-legal entities. The relationship between law on the one hand, and morality on the other, is one of the oldest and most controversial issues of legal philosophy. A similarly complex issue concerns law and politics. What is the appropriate relationship between the Legal and the Political? Who determines this relationship? According to which standards? How can collisions between these entities be reliably resolved? These questions can be addressed from several perspectives: political, philosophical, social, and so on. I address the conflict between the Legal and the Political from a legal-normative, institutionally oriented perspective. My investigation is fundamentally grounded in the legal-philosophical school of Robert Alexy. His norm-theoretical distinction between rules and principles plays a pivotal role in my argument. Based on the examples of cases in which political discourse produces legally reviewable norms, I address the question of how institutional collisions between law and politics ought to be resolved. My focus lies on the concept of formal principles and their role in reconciling the Legal and the Political in an institutional setting.

In the following, I outline the notions of 'the Legal' and 'the Political' and highlight the inherent tension between these two concepts (II.). By analysing the concrete examples of conflicts between the legislature and the judiciary, I demonstrate that collisions between the Legal and the Political can be reconstrued as collisions with a legal nature (III.). These collisions can and must consequently be resolved by legal means. Based on Matthias Klatt's[4] proposal to balance formal principles, I argue that this type of principle plays a pivotal role in the reconciliation of the Legal and the Political (IV.). After elaborating on this claim, I conclude by highlighting the strengths of my approach, as well as outlining further research opportunities (V.).

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[2] Kelsen, *Pure theory of law* (Clark, 2002) 31 ff. See also the brief recount of an "instrumental" conception of law in Capps and Rivers, 'Kant's Concept of Law' (2018) *The American Journal of Jurisprudence* 259 (262 f).

[3] Klatt, 'Balancing competences: How institutional cosmopolitanism can manage jurisdictional conflicts' (2015) *Global Constitutionalism* 195 (196 f).

[4] Klatt, (2015) *Global Constitutionalism* 195 (196 f).

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II. The Legal and the Political: Between Collaboration and Collision

From an observer's standpoint, governance involves a constant back and forth between the Legal and the Political. The two concepts are deeply intertwined,[5] oscillating between collaboration and collision: the Legal strongly relies on the Political while simultaneously determining its limits.[6] In modern states, positive law often results from institutionalised political debates. From this observation, it may be concluded – in accordance with Schmitt[7] – that politics constitute the very basis of law. However, such a presumed primacy of politics can be and is challenged by constitutional design. The rule of law and the separation of powers – which, in part, entail a primacy of law over politics – constitute guiding principles entrenched in many modern constitutions. Under such a constitutional framework, law establishes political institutions and equips them with legal legitimacy, thereby institutionalising and organising the exercise of political authority.[8] Simultaneously, the law contains safeguards which ensure an adequate and continuous separation between the Legal and the Political.[9] On this basis, one may conclude that the law constitutes the limit of politics.[10] This rough sketch of the tense relationship between the Legal and the Political already explicates the issue's complexity. A fundamental question, however, remains open: what exactly *are* 'the Legal' and 'the Political'? Both law and politics

[5] Habermas, *Between facts and norms: Contributions to a discourse theory of law and democracy* (Cambridge, 1996) 50.

[6] Habermas, *Between facts and norms* 169. On the "coupling of law and politics" in Luhmann's political philosophy, see also Sand, 'The Interaction of Society, Politics and Law: The Legal and Communicative Theories of Habermas, Luhmann and Teubner' in Thornhill (ed.), *Luhmann and law* (London, 2017) 249 (257).

[7] See representatively Schmitt, *Constitutional theory* (Durham, 2008) 75 ff, where Schmitt argues that the constitution is based on political decisions. Similar lines of argumentation, according to which law is derived from politics, can be found throughout his works.

[8] Habermas, *Between facts and norms* 141, 143 f, as well as 196.

[9] Habermas, *Between facts and norms* 169 f.

[10] Habermas, *Between facts and norms* 320 f, 385 f. However, Habermas notably does not conceive law as having automatic primacy over politics. Instead, he considers the Legal and the Political to be co-constituent; see Habermas, *Between facts and norms* 141, 143.

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are complex phenomena often evading precise definitions.[11] Nonetheless, both concepts can be ascribed certain properties which enable a basic conceptualisation.[12]

A phenomenon's nature can be investigated empirically or normatively. The presence of both perspectives is particularly prominent in debates about the nature of law. It is a widely accepted[13] view in contemporary legal philosophy that law comprises empirical and normative aspects alike. Many scholars claim that the law encompasses a distinction between an 'Is', that is, observable empirical facts, and an 'Ought' in the shape of normative prescriptions.[14] Kelsen, for instance, asserted that law as meaning constitutes an Ought which is expressed by an Is, namely an act of norm creation.[15] Like Kelsen, German legal philosopher Robert Alexy has explored the role of the Is-Ought dichotomy in law in depth, construing his 'Dual-Nature-Thesis' as a result.[16] According thereto, law possesses a "real dimension" as well as an "ideal dimension."[17] While the law as a whole is a normative phenomenon, the ideal dimension exhibits a stronger normative component in the sense that it concerns the "correctness"[18] of law.[19] Understood in this way, the law is a set of

[11] Legal realism, for example, thought it impossible to structurally distinguish law from politics. Legal positivism, in contrast, believed that law ought to be conceived independently from politics in order to avoid the interpretation of law as a mere game of power. Non-positivism, in turn, sought to integrate political policies into legal discourse. On the whole issue, see Habermas, *Between facts and norms* 201 f.

[12] My characterisation of politics and particularly the distinction of politics from law is based on Habermas' analytical-normative perspective since I also take such an approach. This is not to downplay the significance of more empirical work like that of Luhmann, though. On the different foci of Habermas and Luhmann, see Sand, 'The Interaction of Society, Politics and Law', 249 (264).

[13] See, for instance, Alexy, 'The Dual Nature of Law' (2010) *Ratio Juris* 167; Habermas, *Between facts and norms*; Klatt, 'Law as Fact and Norm. Georg Jellinek and the Dual Nature of Law' in Bersier Ladavac, Bezemek and Schauer (eds.), *The Normative Force of the Factual: Legal Philosophy Between Is and Ought* (Cham, 2019) 45; von Wright, 'Is and Ought*' in Paulson and Paulson (eds.), *Normativity and norms: Critical perspectives on Kelsenian themes* (Oxford, 1998) 364.

[14] Klatt, 'Law as Fact and Norm', 45 (45 f).

[15] Kelsen, *Pure Theory of Law* 5 f.

[16] See generally Alexy, 'On the Concept and the Nature of Law' (2008) *Ratio Juris* 281.

[17] Alexy, (2008) *Ratio Juris* 281 (292).

[18] Alexy, (2008) *Ratio Juris* 281 (294).

[19] While this claim arguably points toward a non-positivist conception of law, it must be noted that legal positivists nonetheless assert the significance of an 'Ought', though in more morally neutral terms. The difference thus lies in the assumed connection of law and morality, which Alexy, contrary to Kelsen, construes via the 'ought'; Alexy, 'Hans Kelsen's Concept of the 'Ought'' (2013) *Jurisprudence* 235 (236). On the difference between a non-positivist and a positivist, specifically a Kelsenian conception of the ought, see Marmor, 'The Pure Theory of Law' (*Stanford Encyclopedia of Philosophy*, first published 18 November 2002, revised 26 July 2021)

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normative commands. The real dimension, in contrast, has a stronger empirical orientation. It is observable particularly through procedures of law-making and their outcomes, i.e. statutes, as well as procedures of law enforcement. At the real dimension's core, the concepts of authoritative issuance and coerciveness play pivotal roles.[20] The idea of authoritative issuance is of particular interest here, for it constitutes a bridge from the Legal to the Political. Whereas the law can be understood as a set of binding normative commands regulating human behaviour, politics provide, in a sense, the substance for these commands: the content of what is authoritatively issued is often the outcome of political deliberation. Hence, law is the medium in which political authority takes shape.[21] From this perspective, the link between law's real dimension and politics becomes visible. Vice versa, political deliberation also links to law's ideal dimension: political discourse equips the legal decisions it produces with collective legitimacy.[22] Legitimacy, in turn, is a normative concept and a property which can be ascribed to law's ideal dimension.

The notion of legitimacy simultaneously explicates the normative dimension of the Political. It is too narrow to reduce politics to a merely factual activity and thus to constrain it to law's real dimension: politics, too, has a normative component. Contrary to legal normativity, however, political normativity is less finite. Several political ideologies exist that have different perceptions of what is good or bad for the subjects of a political entity, and similarly different ideologies often pursue a different extent of regulation through politics. These ideologies constantly compete with one another. Corresponding to electoral results, a different ideology dominates the discourse every few years. Legal normativity, in contrast, is steadier because it manifests in positive law, which perpetuates a certain normative stance for some time. Moreover, through law's claim to legal correctness, legal normativity has a stronger normative weight than political normativity, which cannot raise the claim to *legal* correctness.

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https://plato.stanford.edu/entries/lawphil-theory/>, section 3, accessed 26 March 2025. On Kelsen's concept of the 'ought', see also Kelsen, *Pure Theory of Law* 77. Next to Kelsen, see, for instance, the is-ought distinction in Hart, 'Positivism and the Separation of Law and Morals' (1958) *Harvard Law Review* 593 (612 f).

[20] Alexy, (2008) *Ratio Juris* 281 (292). The idea of law as a coercive phenomenon is shared beyond the borders of the dichotomy between positivism and non-positivism; see Kelsen, *Pure Theory of Law* 33.

[21] Habermas, *Between facts and norms* 134, 137, 167 f, 318. Similarly also Luhmann's belief, see Thornhill, 'Niklas Luhmann, Carl Schmitt and the Modern Form of the Political' (2007) *European Journal of Social Theory* 499 (505).

[22] Habermas, *Between facts and norms* 134 f, 318.

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Even though politics appears inferior to the law from this perspective, the Political notably also exceeds the sphere of pure legal regulation.[23] Politics has a decidedly extra-legal dimension in terms of activities; it involves strategic action, opposition and acceptance, and ideology. From an argumentative perspective, the sphere of reasons is broader for political bodies than for legal authorities.[24] Whereas the former can argue economically, sociologically, morally, and from numerous other perspectives, the latter must constrain their arguments to the legal sphere. But even upon consideration of the above definition of law, it is reductionist to equate politics to activities within law's real dimension. First, political decisions can exceed the law. They may not result in statutes; however they can also assume the form of non-legally binding 'soft law.' Diplomacy, for instance, is a well-established mechanism of extra-legal, political conflict mitigation. Another example is policy decisions which do not take shape as a concrete statute, but rather underpin the law-making process in general. Second, politics precedes the law beyond establishing the substance of authoritatively issued statutes via political discourse. Politics largely involves social planning[25] and design: the allocation of resources according to certain schemes is devised, drafted, and executed. Such activities, in turn, require a constant reconciliation of competing interests at the pre-legal stage. This reconciliation occurs through informal and formal-institutionalised political discourse, especially through negotiations between political parties, interest groups, and private entities as well as general citizens.[26]

It follows from this brief characterisation that despite many links and the common task of governance, the Legal and the Political are analytically separate. While the two players regularly do engage with one another, law and politics are nonetheless different games with distinct rules.[27] However, their continuous interaction is breeding ground for their complicated relationship with collaboration and collision. As indicated, political discourse can generate binding, legitimate law. If this is the case, the law establishes the limits of politics: legal norms can be reviewed according

[23] Habermas, *Between facts and norms* 287; Luhmann, *Politische Planung: Aufsätze zur Soziologie von Politik und Verwaltung* (Wiesbaden, 1971) 48.

[24] Habermas, *Between facts and norms* 192, 287.

[25] In detail on the notion of 'political planning', see Luhmann, *Politische Planung* chapter 5 'Politische Planung'.

[26] Habermas, *Between facts and norms* 134 f.

[27] In this sense also Luhmann, see Sand, 'The Interaction of Society, Politics and Law', 230 (256); Thornhill, (2007) *European Journal of Social Theory* 499 (502).

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to legal standards.[28] In light of this, the relationship between the two concepts may be described as one of mutual co-dependency.[29] It is characterised by a natural tension stemming from the ping-pong game between political regulatory activity taking shape as law and legal control over precisely this activity. In the remainder of this article, I investigate such a constellation.

III. The Legal versus the Political: The Persistent Problem of Judicial Review

The ping-pong game between law and politics is not merely played on the theoretical-philosophical court. One of the most prominent real-life manifestations of the relationship between the Legal and the Political is the institution of judicial review. Judicial review essentially concerns the review of authoritative measures, set by the legislature or an executive agency, by courts.[30] Depending on the institution's concrete design, judicial review can entail the judicial power to declare norms incompatible with other norms,[31] or to strike down authoritative measures entirely.[32] In the following sections, I argue that the case of judicial review proves that conflicts between the Legal and the Political can manifest as legal conflicts (A.). I then address several existing solutions for such conflicts (B.).

A. The Conflict between the Legal and the Political as a Conflict of Competence

The subject of judicial review is generally an authoritative measure. In most cases, this measure is a policy decision, for instance a parliamentary statute. Consequently, the authority which issued the measure can be functionally attributed to the sphere of the Political.[33] The reviewing organ, i.e. the court, in turn, is a decidedly legal

[28] Habermas, *Between facts and norms* 167 f.

[29] Habermas, *Between facts and norms* 133 f, 141, 143 f, 169, 320 f. See also Thornhill, (2007) *European Journal of Social Theory* 499 (502, 505). See also Luhmann's description of the interdependency of politics and administration; Luhmann, *Politische Planung* 74 f.

[30] Elliott, *The constitutional foundations of judicial review* (London, 2001) 1 f. Despite its global establishment, several aspects linked to judicial review are continuously debated. These debates, however, exceed the scope of this article, in which the institution of judicial review shall only serve as a practical example of a conflict between law and politics. For criticism of judicial review, see especially Waldron, 'The Core of the Case against Judicial Review' (2006) *The Yale Law Journal* 1346, with further references. See also generally Grimm, *Constitutional courts and judicial review: Between law and politics* (London, 2024) Parts II, III, and VII.

[31] See, for example, the power of UK courts to issue a 'declaration of incompatibility under the Human Rights Act of 1998.

[32] This is the case in Austria, for instance; see Art 140 Sec 1 of the Austrian Constitution.

[33] See briefly Waldron, *Political Political Theory: Essays on Institutions* (Cambridge, 2016) 199.

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institution. Thus understood,[34] judicial review essentially concerns the allocation of power between politics and the law.[35] The institutional core question underlying judicial review cases is the extent of the primary decision maker's discretion and its limits, which are especially demarcated by judicial control competences.[36] Like the court's review competence, discretion is also essentially a competence: where discretion exists, other actors must refrain from taking action.[37] Control organs find themselves subjected to the primary decision-making authority's corresponding competence.

Thus understood, the conflict between the Legal and the Political underlying judicial review manifests itself as a competence conflict. According to a widely acknowledged[38] legal-theoretical understanding, a competence is a "legally established ability to create legal norms"[39] through an institutional act. The concept exhibits a clear legal-normative nature, emphasised by its legal basis on the one hand and its legal effects on the other. The fact that instances of judicial review can be interpreted as conflicts of competence is remarkable because the original conflict between the Legal and the Political is a collision of a legal entity (the law) with a non-legal entity (politics). A competence conflict, in turn, is decidedly a *legal* issue; it arises from a collision between two legal entities, namely two legal competences.[40] Despite not being a legal conflict from the outset, the reconstruction of judicial review's underlying problem

[34] This interpretation of judicial review is only one possible perspective one can take; its specific focus is the underlying institutional conflict. For the purpose of my argument, this interpretation suffices; however, I would like to emphasise that a comprehensive debate on judicial review – which is beyond the scope of this article – would not be captured by the pure focus on the institutional conflict. For a critical discussion, see n 17 above. For an institutionally-oriented approach similar to my own, which focuses on the dialogic aspect of judicial review, see Tremblay, 'The legitimacy of judicial review: The limits of dialogue between courts and legislatures' (2005) *IJCL* 617 (particularly at 634–646).

[35] Grimm, 'Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics' (2011) *NUJS Law Review* 15; Waldron, *Political Political Theory* 196 f.

[36] Klatt, 'Positive rights: Who decides? Judicial review in balance' (2015) *IJCL* 354 (361 ff).

[37] Describing discretion as an instance of competence, Klatt and Schmidt, 'Epistemic discretion in constitutional law' (2012) *IJCL* 69 (70). See also Alexy, *A theory of constitutional rights* (Oxford, 2010) Postscript 392; as well as Hart, 'Discretion' (2013) *Harvard Law Review* 652 (661).

[38] See, *inter alia*, Bulygin, 'On norms of competence' (1992) *Law Philos* 201; Klatt, *Die praktische Konkordanz von Kompetenzen: Entwickelt anhand der Jurisdiktionskonflikte im europäischen Grundrechtsschutz* (Tübingen, 2014); Raz, 'Professor A. Ross and Some Legal Puzzles' (1972) *Mind* 415.

[39] Ross, *Directives and norms* (London, 1968) 130.

[40] Klatt, (2015) *Global Constitutionalism* 195 (196, 199).

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demonstrates that the conflict between the Legal and the Political can indeed manifest itself as a legal conflict in reality.

B. Solving the Conflict between the Legal and the Political?

The institution of judicial review has continuously been criticised precisely in the context of the relationship between the Legal and the Political. While some voices consider the courts to have too little power, others fear a juristocracy.[41] The concerns of either side underline the aforementioned interpretation of judicial review as a conflict about the allocation of power – or, more precisely, the allocation of competence – between the Legal and the Political. But judicial review not only raises the question of what the appropriate relationship between law and politics is, it also raises the pressing question of how collisions between the two spheres ought to be resolved. I argue that a solution mechanism must fulfil three conditions; first, it must be sufficiently abstract in order to be applicable across institutions and even across legal systems.[42] For the conflict between law and politics is not a peculiarity of a particular legal system; on the contrary, it arises in many legal systems across the world. Therefore, the issue would considerably benefit from a universal solution which need not be fundamentally re-adapted for every instance of its application. This, however, does not mean that we need a set-in-stone, one-size-fits-all approach. According to the second condition, the solution must be flexible enough to accommodate the complex and diverse real-life issues raised by conflicts between the Legal and the Political. The combination of the first and second condition allows for a generally universal approach which is nonetheless capable to respond to individual legal systems' socio-cultural backgrounds. Third, the solution must be capable of resolving the problem in a legal-normative manner. When collisions between the Legal and the Political are reconstrued as competence conflicts, this problem has a legal-normative character due to competences being distinctly legal entities. Consequently, the problem requires a legal-normative solution in order to retain methodological congruence between the question and its answer. In other words, the solution must correspond to the problem.

There are several approaches to the question of conflict regulation between the Legal and the Political in the context of judicial review. They range from reconciliatory proposals promoting political dialogue and mutual respect to radical pluralist theories

[41] For a mere recount, see Alexy, *A theory of constitutional rights* Postscript 388 ff; Klatt, (2015) *IJCL* 354 (361 f). Particularly critical of judicial review, see Waldron, *Political Political Theory* 212–239.

[42] Ideally, a solution does not only apply within a given (legal) system but is also applicable in multi-level systems such as the EU.

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which concede that some conflicts must simply remain unresolved.[43] I reject these and similar approaches due to their failure to fulfil the third condition. While they may be normative, they are not grounded in the law. They do therefore not constitute adequate solutions to the legal issue at hand. While radical pluralism fails to give an answer entirely,[44] political and dialogical solutions are incapable of addressing the legal question in legal terms. Their failure to establish congruence between the question and its answer constitutes a methodological fallacy. In contrast to such extra-legal approaches, authors like Kumm[45] and Klatt[46] have advocated for legally-grounded solutions. Klatt in particular proposes to balance the primary decision-maker's competence against the judicial control competence.[47] This is particularly promising for two reasons. First, it offers a legal remedy for a decidedly legal issue. This constitutes a significant advantage over theories providing extra-legal solutions, such as the aforementioned dialogical and radical pluralist approaches. In contrast to the latter, legal solutions do not suffer from the aforementioned methodological deficit; they establish congruence between the problem and the proposed solution. Second, balancing is a rational, universally applicable procedure capable of taking into account the peculiarities of individual cases.[48] This combination of universality and case-sensitivity provides the flexibility which is necessary to address the highly complex conflicts between the Legal and the Political. It follows that the approach fulfils the three aforementioned conditions; the proposed solution is legally grounded, sufficiently abstract, and simultaneously capable of addressing case-specific peculiarities.

IV. Finding the Balance

Nonetheless, Klatt's approach is crucially flawed: norm-theoretically, only principles are susceptible to balancing. In order to balance competences, he reconstrues them as formal principles.[49] This misrepresents the nature of competences. I show below that competences have a rule structure; their realisation follows a binary scheme. However, this fault does not render his approach futile; indeed, formal principles play a pivotal role in reconciling the Legal with the Political. I begin by outlining the

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[43] For a brief overview, see Klatt, (2015) *Global Constitutionalism* 195 (204 ff).

[44] Klatt, *Die praktische Konkordanz von Kompetenzen* 12 ff.

[45] See generally Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) *Eur Law J* 262.

[46] See generally Klatt, (2015) *Global Constitutionalism* 195.

[47] Klatt, (2015) *Global Constitutionalism* 195 (213); Klatt, (2015) *IJCL* 354 (364–373).

[48] Klatt, (2015) *Global Constitutionalism* 195 (208).

[49] Klatt, (2015) *Global Constitutionalism* 195 (211 f).

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norm-theoretical distinction between rules and principles. I then analyse the legal-theoretical structure of competences and explicate their relation to formal principles (A.). Based on a revised notion of formal principles, I then outline their crucial role in the reconciliation of the Legal and the Political in the context of judicial review (B.).

A. Rules, Principles, and the Norm-Theoretical Nature of Competences

Any legal norm is, analytically speaking, either a rule or a principle.[50] Their difference is not one of content, but of logical structure. Rules possess a simplistic logical structure. When the conditions for its application are fulfilled and no exception is warranted, the rule must be applied; hence, its fulfilment follows a binary scheme in the shape of an 'if → then' syllogism. Principles, in contrast, are optimisation commands. Instead of prescribing a definitive course of action, they demand that something be realised to the greatest possible extent. This extent is determined by both factual circumstances and countervailing legal norms. The fulfilment of principles is therefore a matter of degree.[51]

Irrespective of their differences in terms of fulfilment, both rules and principles have a *prima facie* content and a definitive content. A norm's *prima facie* content is what the norm ideally dictates irrespective of actual circumstances,[52] whereas the norm receives its definitive content by means of application. Due to the straightforward logical structure of rules, their *prima facie* character is less intense than that of principles.[53] The normative statement *prima facie* expressed by a rule is not altered by its application; if the conditions for its application are met, the rule is applied in full, as expressed by the aforementioned, logically simplistic 'if → then' syllogism. Hence, the rule's *prima facie* content corresponds to its definitive content if applied. For principles, the situation is different. Principles are typically not applied in full, but instead are only realised to a certain degree. Consequently, their *prima facie* content encompasses a much broader scope than its definitive content which the principle receives upon application. This different intensity of the norms' *prima facie* character, as well as the norm-theoretical distinction between rules and principles in general is best explicated in case of a norm conflict. When two rules collide, their definitive content is established. In order to harmonise the conflicting rules, one is disapplied or amended

[50] Alexy, *A theory of constitutional rights* 48.

[51] Alexy, 'Constitutional Rights and Proportionality' (2014) *Revus* 51 (52).

[52] Weinberger, 'Prima Facie Ought. A Logical and Methodological Enquiry' (1999) *Ratio Juris* 239 (243).

[53] Alexy, *A theory of constitutional rights* 57 f.

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by introducing an exception clause into it. Hence, rules have a weak *prima facie* character. When principles collide, in turn, a conditional preference relation between them must be determined. According thereto, one principle must recede to the necessary extent to enable the realisation of the – *in casu* more important – countervailing principle. Principles thus have a much stronger *prima facie* character, as they make strong normative claims *prima facie*, that is, before being actually applied. Once applied, the *prima facie* demands are not fulfilled entirely, but gradually. Moreover, rule conflicts concern the dimension of validity – or, more appropriately, applicability – whereas principle collisions concern the dimension of weight.[54] For the former are solved by disapplication of one rule, whereas the latter are solved by assigning each principle a weight and subsequently balancing the colliding principles against one another.

Legal principles can be further divided into two categories, namely material or substantive principles on the one hand and formal principles on the other. While both types share the logical structure of optimisation commands, they differ in terms of their content and function. Material principles have a concrete substantive content which constitutes their object of optimisation. In contrast thereto, formal principles concern the exercise of legal authority. Their object of optimisation is the authoritative force of legal norms.[55] In light of this focus, it has been suggested that formal principles determine "*how* and *by whom* the substantial content [of law] is to be established."[56] This formulation, albeit correct, is potentially misleading. Formal principles themselves do not directly *establish* competence in the sense that they are competence-conferring norms. Instead, they are justificatory reasons for *allocating* competence to different authorities. Different formal principles pull toward different authorities; in that sense, they are antithetical.

In contrast to (formal) principles, competences are, norm-theoretically speaking, rules. Their logical structure runs as follows: if the conditions for the competence's exercise are fulfilled, then the actor may change the normative situation. Consider Art 73 of the German Basic Law, for instance. Sec 1 No 2 of this constitutional provision lays down the Federal State's competence to legislate in matters concerning citizenship. This competence norm has the aforementioned structure: if the conditions set forth in the Constitution are fulfilled, the Federal Parliament is entitled

[54] Alexy, *A theory of constitutional rights* 49 f.

[55] Alexy, 'Formal principles: Some replies to critics' (2014) *IJCL* 511 (516); Klatt and Schmidt, (2012) *IJCL* 69 (94).

[56] Alexy, *A theory of constitutional rights* Postscript 416; Klatt and Schmidt, (2012) *IJCL* 69 (94) (original emphasis).

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to issue legislation. Suppose, for instance, that Parliament decides to change the period of time after which foreign citizens can acquire German citizenship. This matter clearly falls under Art 73 Sec 1 No 2 of the German Basic Law; hence, the substantive constitutional condition for the enactment of legislation is fulfilled. If the procedural conditions (such as presence and consensus *quora*) are fulfilled as well, the competence can be legitimately exercised, and the normative situation changes as a result thereof. The content of the aforementioned provision corresponds to a conditional syllogism in the form of an 'if → then' statement. In the same way, any given competence norm can be reconstrued to explicate this precise logical structure.

Formal principles come into play when a competence has only *prima facie* character and competes with another competence, which initially also has only *prima facie* character. Whereas a rule is definitive in the sense that, if the conditions for its application are met, the rule is entirely applied, this definiteness is not set in stone. Initially, a rule sets forth a course of action that is merely *prima facie*, meaning that it can be "overrid[den] by specific considerations"[57]. These considerations are reasons for introducing an exception to the rule.[58] *Prima facie*, competences command that a given actor can bring about normative change. Article 73 Sec 1 No 2 of the German Basic Law, for instance, commands that matters concerning German citizenship ought to be regulated by a specific actor, namely the German Federal Parliament. In most cases, this command is also *definitive* in nature, meaning that the rule is applied as it is written. However, certain constellations may require the introduction of an exception. This is the case when a competence norm *prima facie* competes with another competence norm. Consider, for instance, Art 73 Sec 1 No 4 of the German Basic Law. This provision establishes the Federal Parliament's competence to issue legislation concerning currency. However, this competence norm competes with Art 3 Sec 1 (c) TFEU, according to which the EU has the exclusive competence to regulate the "monetary policy for Member States whose currency is the euro." This provision *inter alia* establishes the EU institutions' *prima facie* competence to legislate in matters concerning "monetary policy." When contrasting this with the German Federal Parliament's *prima facie* competence to legislate in matters concerning "currency," it becomes clear that the two norms – Art 73 Sec 1 No 4 of the German Basic Law and Art 3 Sec 1 (c) TFEU – overlap in terms of regulatory scope. In such a case, neither rule can initially be applied. It must first be determined which authority is ultimately competent; in the exemplary case, it must

[57] Weinberger, (1999) *Ratio Juris* 239 (243). See also Alexy's acknowledgement of *prima facie* validity as opposed to definitive validity; Alexy, 'On the Structure of Legal Principles' (2000) *Ratio Juris* 294 (302).

[58] Alexy, *A theory of constitutional rights* 59.

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be determined whether the German Parliament or the EU legislature can enact a law. Determining the ultimate competence is nothing more than determining the competing competence rules' respective definitive content.

The transition from the realm of *prima facie* to the definitive realm is precisely where formal principles come into play. The "specific considerations"[59] capable of overturning the course of action *prima facie* dictated by a competence are, broadly speaking, formal principles. In particular, antithetical formal principles pull the decision-making competence towards different authorities. In the case of judicial review, for instance, one group of formal principles underpins the allocation of decision-making competence towards the legislator, while another group simultaneously pulls the competence towards the judiciary. The definitive content of the competing competences is established by bringing the colliding formal principles into a proportionate relationship.[60]

B. The Role of Formal Principles in reconciling the Legal and the Political

Understood in this way, formal principles can assume a reconciliatory function in the tense relationship between the Legal and the Political. In this penultimate section, I apply my findings of the previous sections to a fictional example. Consider the hypothetical state of Phantasia, a parliamentary democracy in which parliament is directly elected by the people. Phantasia also has a Supreme Court, whose judges are nominated by the government and subsequently appointed by Phantasia's head of state. As a result of Phantasia's efforts to reduce CO_2 emissions, the following case takes place. It begins by parliament issuing a new law, the Clean Air Act. Article 1 of Phantasia's Clean Air Act provides as follows:

> **Article 1 Clean Air Act**
>
> (1) Parliament may impose an emissions tax on businesses by statute to reduce CO_2 emissions.
>
> (2) Statutes according to section 1 must strike an appropriate balance between the interest of a sustainable environment and the interest of a functioning economy. Legislation must give due consideration to current scientific data.

[59] Weinberger, (1999) *Ratio Juris* 239 (243).

[60] Despite ample research on proportionality, very little has been said on the applicability of the proportionality test's individual sub-tests to formal principles. Even less has been said on the pre-balancing stages specifically. While this provides excellent grounds for further research, the conceivability and particularly the operational details of an institutionally oriented proportionality test exceed the scope of this paper and are therefore not discussed further.

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(3) The Supreme Court of Phantasia monitors compliance with section 2 of this Article. In particular, the Court can strike down a statute adopted in accordance with section 1 if it
   a. is unlikely to increase environmental protection based on scientific evidence or
   b. threatens economic competition by significantly disadvantaging a certain class of businesses.

Article 1(1) of Phantasia's Clean Air Act lays down a legislative competence to regulate CO_2 emissions with an emissions tax. The word 'may' indicates discretion; the choice whether or not to enact a statute is left to parliament. Section 2 of the provision, in turn, contains substantive conditions which must be complied with in case the competence in section 1 is exercised. Hence, parliament can make two policy decisions: the first concerning whether to legislate at all, and the second concerning the substantive design of an emissions tax in accordance with the conditions laid down in Article 1(2) of the Clean Air Act. Section 3 of the provision, in turn, establishes a review competence of Phantasia's Supreme Court. This competence specifically concerns the substantive review of adopted legislation.

Based on Article 1(1) of the Clean Air Act, Phantasia's parliament introduces a new Article X into its tax code:

Article X: Emission Tax on CO_2 Emitters

(1) This provision applies to businesses in Phantasia that emit more than 100 tons of CO_2 annually.
(2) A tax rate of 1,000 Phantasia Dollars per ton of CO_2 emitted above the 100-ton threshold shall be imposed on all applicable entities.

Subsequently, Article X is challenged before Phantasia's Supreme Court by the Association of Business Owners. The Association argues that the statute poses an unfair disadvantage for small business owners, which cannot afford such high taxes. Moreover, the Association submits that according to recent scientific data, the threshold of 100 tons of CO_2 barely impacts the level of air pollution. Phantasia's Supreme Court is consequently tasked with assessing the legality of Article X. The question is whether the provision complies with Article 1(2) of the Clean Air Act.

The conflict in this example can be interpreted as a conflict between the Legal and the Political. Article 1 of the Clean Air Act codifies a political competence. The exercise of this competence requires a reconciliation of multiple societal interests via political deliberation. Consequently, Phantasia's parliament can be attributed to the Political in this constellation. The Supreme Court, conversely, represents the Legal.

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Its task is to review and enforce the legal limits set for political activity, specifically the limits laid down in Article 1(2) and (3) of the Clean Air Act. Hence, whereas Article 1(1) of the Clean Air Act establishes a political decision-making competence, section 3 of the provision establishes a legal review competence. Both competences concern the same substantive issue, namely the substantive design of an emissions tax regulation. Hence, both competences are initially only *prima facie* in nature; they cannot be exercised simultaneously. It is therefore necessary to establish the definitive content of both competences in order to determine which authority has the last word. The conflict between the Political and the Legal thus manifests as a competence conflict. As argued above, its resolution is governed by formal principles.

Formal principles allocate competences to different authorities. These principles can be identified for each competence respectively. The parliament's *prima facie* policy making competence, for instance, is supported by the democratic principle; since Phantasia is a parliamentary democracy, parliament enjoys a higher degree of democratic legitimacy than the Supreme Court. Moreover, the legislative competence is underpinned by the principle of qualitative decision-making. Legislative procedures have the capacity to take into account a large quantity of scientific data, for example through expert hearings. In contrast thereto, courts are often notoriously limited in their factual expertise, as well as in their capacity to refer to external resources allowing the gathering and processing of scientific data. Additionally, legislative decisions are often supplemented with extensive justifications due to their being the product of political discourse. Both of these factors increase a decision's overall quality. However, the judiciary's *prima facie* review competence is, for instance, underpinned by the principle of effective rights protection. The case at hand affects, at the very least, the right to property in the wider sense. Parliament arguably strikes a balance between a plethora of interests during the legislative process. This, however, can unduly compromise rights. Courts are, *inter alia*, specifically designed to protect rights.

Following this pattern, several formal principles can be identified which either underpin the political competence or the judicial competence. These principles must be brought into a proportionate relationship with one another. The preference relation resulting from this exercise establishes the definitive content of the colliding competences. Hence, in the context of judicial review, the Legal and the Political can be reconciled via formal principles.

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V. Conclusion

As set out in this paper, formal principles bear great potential for the undertaking of reconciling the Legal and the Political. I have characterised the Legal as a dual-natured entity possessing an ideal and a real dimension. The Political is closely linked to the latter dimension, for political deliberation often determines the substance of legally binding norms. Based on these definitions, I have analysed a real-life manifestation of the conflict between the Legal and the Political, namely the case of judicial review. When the legality of a policy decision is questioned in court, the underlying question is essentially one of competence: where do judicial competences draw the limits of legislative discretion? By reconstructing the problem behind judicial review as a conflict of competence, I have demonstrated that the clash between the Legal and the Political can assume a decidedly legal nature. There is value in this finding; since the conflict is legal in nature, it must consequently be solved by legal means. In this context, the notion of a formal principle plays a decisive role: the competences underpinned by the Legal and the Political are rules with a *prima facie* character. Their definitive content is determined by underlying formal principles, which do not grant competence but allocate it. Hence, competences can norm-theoretically be conceived as *prima facie* rules whose definitive content is governed by formal principles.

Understanding collisions between the Legal and the Political as competence conflicts has considerable advantages. First and foremost, this conception makes the collisions susceptible to legal solution instruments. This ensures legal-normative justifiability, but also rationality, transparency, and reliability. While dialogical approaches, which advocate for solutions outside of the courtroom, may work in practice; they are, however, often opaque from an outsider's perspective. Moreover, their dependence on the goodwill of the dialogue partners makes dialogical approaches less reliable than legal solutions. In addition to these benefits, conceptualising collisions between the Legal and the Political as decidedly legal conflicts also dissolves the paralysis brought about by radical pluralist approaches, which assert that these collisions are simply incapable of being solved.

Of course, a solution via the route of law requires that certain institutional structures like judicial review and its procedures, and the legislative scope of action are respected by the conflicting parties. Law must respect politics; in the context of judicial review, this means that political decision-makers must be granted spheres of

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discretion which are not reviewable in substantive terms.[61] Simultaneously, politics must respect the law as its source of legitimacy and its medium of expression.[62] It must also respect the legal safeguards[63] aimed at preserving a balanced relationship between the two. Practices like court packing and other techniques of abusive constitutionalism arguably undermine law's capacity to harmonise law and politics; this, however, is an entirely different problem. While such practical challenges are indeed problematic, a discussion thereof exceeds the scope of this legal-theoretical investigation of conceivable solution instruments. Indeed, the practical implementation of my theoretical considerations provides an opportunity for further research. To conclude this investigation, I note that under the premise that the Political and the Legal genuinely respect each other's spheres of discretion and play by the commonly established rules – namely those of the constitution – legal instruments carry great potential to repair the strained relationship between the two entities. For the fact alone that the tension between the Legal and the Political is inherent to their very nature does not preclude a harmonious relationship between the two. Quite the contrary; reconciling the Legal and the Political is, indeed, a matter of principle.

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[61] A formal review concerning the existence and scope of such discretion, however, must remain possible in order to uphold the separation of powers.

[62] Habermas, *Between facts and norms* 137, 144, 167 f.

[63] Habermas, *Between facts and norms* 169 f.

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