PRINCIPLES: SOFT OR HARD

INTRODUCTION

Should we conceive of principles as hard or soft? This is a question that has been mentioned many times in previous chapters, but not clearly stated and analyzed so far. On the one hand, we regard principles as hard norms that should be strictly implemented, which is a line of thinking expressed in ordinary language. What we mean by saying ‘a man of principle’ is that he strictly follows his moral obligations and seldom betrays them. Principles are the bedrock of that man, hard to shake and change. In this sense, principles are by no means ‘soft,’ but ‘hard’ to be followed in each case. Principles demand consistency in strict application and do not allow for a trade off.

On the other hand, principles can be balanced with other principles and thus are also taken as ‘soft’ in accommodating future changes. For example, a daughter, when encouraged and persuaded by her relatives, may hide the truth from her father about his tumour in order to relieve him from possibly unbearable psychological pain. Here the principle to be honest has to be balanced with her father’s well being. In this sense, the soft side comes from the obligation to balance competing principles in practical reasoning, and leads to some temporary compromise or trade off.

We can observe the two opposing features in legal theory, particularly in a pair of articles, From Principles to Pragmatism and From Principles to Principles, which have been discussed in my last chapter. While Atiyah held a concept based on the hard feature, or a rule model, Stone criticized his view and argued that principles can allow for compromise and balancing and thus are soft. Dworkin’s

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1 Draft for presentation at CRBS, Faculty of Law, RuG. Please do no cite without author’s permission.
2 Julius Stone, "From Principles to Principles," The law quarterly review, Vol. 97,
thesis of legal principles also displayed both features. He revealed the hard side when he strongly argued for legal principles as trumping rights allowing no trade off. But he also used the concept in a soft sense. First, that principles are not applied in a case does not prevent them from being applied in future cases. Second, in his later writings, he indicated that appropriate balance between principles is needed to have a good part of constitutional law.

Even more confusing is that we can observe both features simultaneously in morality and law. Moral principles such as ‘to be honest,’ ‘you shall not kill’ and ‘keep your promise’ bear both a ‘hard’ and a ‘soft’ feature at the same time. Principles like ‘you shall not kill’ are not always applied in war and in self-defence. Yet, it is not possible to deny them the status of principle for that reason. The same applies to legal principles, particularly those of constitutional law, as can be demonstrated in the development of American constitutional adjudication. For instance, even though balancing which entails the soft side of principle is prevailing in current legal theory and legal practice many constitutional cases are still decided simply in non-balancing ways. In other words, balancing and non-balancing, the hard and soft side of principles, co-exist in many fields in American constitutional law. The co-existence of the two opposing features


5 I assume this is why sometimes we call it a principle and sometimes a rule.

explains why some constitutional theorist regards constitution as rule based, while others view it as principle based.\textsuperscript{7}

This co-existence leads to the following two closely related puzzles. The first is how to understand principle’s demand for consistency. As I argued before, principles are normally assumed to maintain consistency and continuity of an agent or an institution,\textsuperscript{8} which provides identity and predictability. Once balancing is introduced, such a concept of consistency would be in danger. But in moral and legal spheres, it seems that balancing has not caused the assumed trouble. We will not say that the above-mentioned woman lying to her father is not honest. And we still think that a constitution is consistent, even if decisions are to be made based on balancing different principles.

Secondly, whether principles are soft or hard also concerns our understanding of the nature of rules, especially their relationship with principles. If principles are taken as both soft and hard, then how can we understand rules, since we used to regard rules as having the all-or-nothing character or hard feature? How can we distinguish rules from principles from a formal perspective? And if principles are both soft and hard, can we say that principles may consequently merge with rules, or there are no such things as principles, as Schauer argued?\textsuperscript{9} Or

\textsuperscript{7} For example, Goldman thought that American Constitutional clauses can be read both as principles and as what he called “genuine rules” as well. He argued that whether law is taken as genuine rules is largely a matter of jurisprudential philosophy and style Goldman, Goldman, Alan H., “Rules in the Law,” \textit{Law and Philosophy}, Vol. 16, No. 6, 1997, p. 589.

\textsuperscript{8} In this chapter, I use ‘an agent’ or ‘an institution’ to refer to an autonomy that governs itself and makes its own decisions by considering the peculiar circumstances it finds itself in. Such an institution is comprised of certain constitutive principles.

rules and principles both have the dual-features but they distinguish from each other in other ways like importance and fundamentality?

We need a satisfactory explanation to account for the two opposing features. To my knowledge, there are scholars talking about the two features only separately, but none has purposely related the opposing two together and provided a full explanation. In this regard, this chapter aims to investigate their co-existence and explain how they relate to each other from a philosophical perspective.

**INCOMMENSURABILITY**

First, I will analyze the hard side of principles. In this respect, Raz provides us with two good examples for illustration.\(^\text{10}\) First, one will not trade his spouse’s company for money, even if it is a large sum. It is indeed a matter of principle. If he will do so, it means that he does not understand what love is at all. To have true love, one can never trade the sanctity of love with money in any form; since love, as a kind of human relationship and value, is incommensurable, if one cherishes it as the value he really wants in life. The second example is that some parents hold that there is no way to compare having and breeding children with money, material position, status and prestige. If parents do cherish the mutual love between parents and children, they just cannot sell their children, which is just against our moral principle. The failure of commensurability in this sense denotes a success in the pursuit of true love and parenthood.\(^\text{11}\)

As these two examples reveal, a choice made on principle allows no trade off or compromise with other alternatives, which entails a decision of an all-or-nothing nature, but not a gradual one. The goals are based on different, incommensurable values. In this sense, we can say that the hard side of principle derives its force from the incommensurability of values prescribed by principles. Raz’s thesis casts light on a discussion of incommensurability. Using

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commensurability and comparability interchangeably. Raz defined the concept in the following way: two values are incommensurable, if it is true that one is neither better than nor equal to the other. Incommensurability rejects the possibility to arrive at any judgment by comparing two values in decision making. According to Raz, there are two kinds of incommensurability, namely, marginal or insignificant incommensurability, and significant commensurability. The first type points to the situation in which choices are not vital to an agent, like one whether to have a cup of tea or to go shopping in the afternoon.

By contrast, the second type finds explanation in the far-reaching consequences of different options that may affect an agent’s lifelong project and change his relation with surroundings. When a choice between two incommensurable options has far-reaching consequences, it is a significant one, even if at that moment our reason does not provide us with reasonable guidance. Incommensurability marks the inability of reason in guiding our decision, since reason cannot offer any help in comparing two values. This significant incommensurability we can observe in the above two examples, which do not allow for reason, but seem to imply only an all-or-nothing choice.

Raz indicated that such significant incommensurability derives from the constitutive role of values and relative goals of an agent that is based on preference rather than rational choices. An agent’s choice to pursue relative values, and then to achieve certain goals that serve

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12 One should distinguish incommensurability of values and incomparability of options. They are two different things and the former does not lead to the latter. The truth is that one can make rational choices as constellation of different values, although they are incommensurable. Here we shall also note that incommensurability does not necessarily mean incompatibility although Raz has the opposite view. See: Burg, Edwige, The Model of Principles: the quest for rationality in the implementation of conflicting principles, University van Amsterdam, 2000, p. 117.

13 J. Raz, The Morality of Freedom, p. 322. Raz deployed his argument in an anti-consequentialism setting in chapter 13, because he thought that general commensurability is a common assumption of most consequentialists. (p. 357) In general, this concept is a strong argument to support the pluralism of values.

as reasons in practical reasoning, determines the meaning and well-being of its existence. These goals and values, and their pattern of constellation, constitute and display the existence and the richness of an agent’s life in such a way that their disappearance entails the non-existence of the agent. In this way, these constitutive values have to be kept and secured in order for an agent to be himself, and to distinguish himself from others. That such values and goals constitute a certain identity of an institution consolidates the incommensurability of those constitutive values and goals per se.

This phenomenon has been termed by Raz as constitutive incommensurability. The term expresses the constitutive role of a strong belief in the non-comparability of certain options in social relations like exemplified in the above two cases. First, those who do not believe in the incommensurability of such social relationship, in Raz’s words, are not capable of having the relation. Real friendship and true love only can be enjoyed by those who believe that affection and sympathy involved are incommensurable with money and other values. Although Raz only applies this term to social relations, I think it also can be applied to goals and values prescribed by constitutive principles as well. To realize a principle, one must believe that the values and goals one is pursuing are incommensurable. Secondly, such a belief and attitude serves as a strong barrier against exchange and trade-off and thus plays an important role in their pursuit. It strengthens our loyalty in commitment, which contributes to what we observed as the hard side of principles. In these cases, as Raz noticed, incommensurable values are not just part of the inevitabilities of life, but building blocks of valuable pursuits and relationships.

But one might raise a counter-case that a man may leave his spouse for a month to do a job in order to earn some money. He may argue

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15 Here we can recall Fuller’s first principle of human associations that entails substantive ends or goals for an agent to achieve. He pointed out that when controversies come in later development, parties involved have to resort to the original goals and ends, although they have been out of view for a while. Fuller, Long L., "Two Principles of Human Association," in: Principles of Social Order,(Kenneth I. Winston ed.), 2nd.,Oxford (etc.): Hart Publishing Limited, 2002.

that it seems that he exchanges his wife’s company for money. But the
two examples are in no way similar: the new case still keeps love in
hand, while the first will lose it forever by missing the point of love.
Thus constitutive incommensurability entails a marking point of a
value, or a pointer, warning us that right from this point, there should
be no less of it; or, right from this point, it is a matter of all-or-nothing
business. Trading off one’s spouse for money, as a specific action,
denotes such a warning point.

This is what Raz called a symbolic action or an action with
symbolic significance.\textsuperscript{17} It indicates the nature of a choice that has far-
reaching influences beyond the action itself. Raz thought that in this
case its symbolic significance transcends the action’s real impact in the
world, because the accepted social conventions determine its meaning,
even if the two actions—viewed in themselves—are apparently
similar. He thought that the two actions owe their different meanings
mainly to social convention.

In this respect, I depart from Raz’s thesis and stress an argument he
just passed over. The argument is that a symbolic action stands right at
a point, a marking point, which separates one thing from another
clearly, although this point is determined by social conventions. This
marking point indicates the \textit{minimum} requirement(s) for survival of a
constitutive value of an agent. It tells which should not be traded away
if one does not want to risk loss of a desired value. This is why Raz
thought that in most cases, where there is incommensurability, there is
ultimate truth and there is nothing further behind it, nor is it a sign of
an imperfection.\textsuperscript{18}

Crossing this marking point only means betrayal of the constitutive
value by means of which the nature of an agent is so thoroughly
changed and affected that the agent has to redefine itself. For instance,
a scientist cannot, if he holds the principle that a scientist must study
and reveal nothing but truth, lie to the public about the negative
ecological and environmental influences of constructing a reservoir.
Even under high political pressure, he has to stick to this principle.

\textsuperscript{17} J. Raz, \textit{The Morality of Freedom}, pp. 349-50.
\textsuperscript{18} J. Raz, \textit{The Morality of Freedom}, p. 327.
Otherwise, he is doing something betraying himself and his profession as a scientist. Thus to prevent this from happening, an agent must act in a way keeping all things above that critical point. In practical reasoning, there is the duty to make the right move that will keep all constitutive values in play. The incommensurability reveals that the hard or all-or-nothing feature of a principle in both morality and law resides in the fact that such a principle serves to guard certain bottom line. The incommensurability and a solid bottom line to be secured explain the hard side of a principle.

In this regard, Ayn Rand’s example is a good illustration that there is no compromise between a property owner and a burglar. Offering the burglar a single teaspoon of one’s silverware is actually a total surrender, but not a compromise of reorganisation of his rights to his property. She contended that once the principle of unilateral concession is accepted as the basis of a relationship by both parties, it is only a matter of time before the burglar gets all the rest. This is why she concluded that there “can be no compromise on basic principles or on fundamental issues.” To her, compromises can only be struck when there is a legitimate concession or a trade on a mutually accepted principle.

But the demanded critical point has to be specific and precise in order to construct a departing point, a symbolic point. It has to be represented by certain concrete facts or issues as demonstrated in the above two cases, like the exchange of a lover’s company for money, where one assumes that love is a fundamental, incommensurable to one’s life. This is not a role that could be fulfilled by abstract

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19 David Bodanis, winner of the Aventis Prize, provided some real examples to show that sometimes scientists even sacrifice life to protect their principles against political pressure. One of them is David Kelly, a British scientist who committed suicide after the UK government criticized his research of weapons of mass destruction in Iraq. Bodanis, David, "Scientists Have no Chance against Spin Doctors," Financial Times (Europe), 24/5/2006.

20 Readers can link this with the difference between policies and principles I have discussed in Section 3.4.

principles themselves, but it has to be carried out by more concrete rules functioning as instantiations of principles. Here we can tell the difference between the principle that one must cherish human life, and the rule that one shall not kill. In this sense, the rule resembles or seems like a principle due to its rigidity and strictness that derives force from the fundamentality of the principle to an agent. This is the reason why we may mistake this kind of rules for principles.

ASPIRATIONAL IDEALS AND INTEGRITY

Though the counter-example that one can leave his spouse to earn a living cannot rebut the incommensurability of values, instead it points out the flexibility of principles: Once above a compulsory bottom line, there is certainly some room for deliberation. One can strike a balance between his lover’s companionship and the need for income on the condition that he is sure of not trespassing the marking point indicated in the symbolic action.

The softness and flexibility indicated by this example can be observed in other constitutive principles as well, and can be captured by the concept of balancing. As to this concept of balancing, I adopt Aleinikoff’s broader view. He regarded balancing as a substantive approach in which underlying interests, values and principles are identified, evaluated and compared. In such a process, either one’s interest outweighs another, or by a ‘proper’ balance, each value or interest survives and is given its due.

22 One may argue that one can be allowed to kill in time of war and in case of mercy killing concerning euthanasia. But I will argue that such cases are just exceptions of the rule.

23 This kind of rules, as direct instantiations of principles, forms the first type of rules which I will call PR rules. Their function is to secure the bottom lines of principles and from the standards they set we can judge what is in accordance with and against principles directly. The other type, by contrast, is PO rules of policy nature that are made to optimize relative principles by means of a balancing and compromise process. The two types of rules indicate accordingly two categories of rule-principle relationships. This will be fully discussed in Chapter 7.
The maintenance of a couple’s life depends on certain income and thus one ‘must exchange’ one’s lover for a certain income.\textsuperscript{24} This reminds us of the fact that to an agent there are \textit{multiple} values to be pursued, which are equally important and have to be balanced with each other. The incommensurability of values does not necessarily mean that they cannot be balanced and compromised with other values on the condition that certain bottom lines are to be secured. Balancing is a necessity to pursue principles that are ideal goals and values,\textsuperscript{25} whose significant role can be demonstrated clearly in pursuit of human ideals. But in order to make the further discussion possible, first I have to comment on the relation between principles, values and ideals.

The concept of ideal is largely based on the concept of value. An ideal is a value that is future-orientated and cannot be grasped by any present formulation.\textsuperscript{26} As Rescher put it, “Ideals envision a condition of affairs in which some sort of value is realized in limitless and thus ‘unrealistic’ degree,” and “there are bound to be as many different kinds of ideals as there are kinds of values.”\textsuperscript{27} In this sense, it is safe to say that ideals represent the optimal or the aspirational perspective of values.

But there is a problem with the relation between principles and ideals. As Van der Burg argued, scholars usually do not distinguish the two. For instance, he noticed that Dworkin shifted from principles to ideals and thus blurred the two in \textit{Law’s Empire}. Alexander Peczenik argued that “Each principle expresses an idea, in other words a value, for instance it stipulates that equality, freedom, and dignity are

\textsuperscript{24} Although it might be silly to understand that love implies constant company, but it is no way to deny that close company is what most lovers want.

\textsuperscript{25} The idea to regard principles as ideal, aspirational and insatiable has been mentioned in section 3.3, 3.4, and 4.3, and will be developed in this section.

\textsuperscript{26} Wibren van der Burg and Sanne Taekema, \textit{The Importance of Ideals: debating their relevance in law, morality, and politics}, Bruxelles [etc.]: P.I.E.-Peter Lang, 2004, p. 25.

\textsuperscript{27} N. Rescher, \textit{Ethical Idealism: an inquiry into the nature and function of ideals}, Berkeley, Calif. [etc.]: University of California Press, 1987, p. 115, p. 116. The main line of my following argument draws on Rescher’s discussion of the limitations of ideals, mainly Chapter 5.
valuable.” To avoid this problem, Van der Burg suggested that we should regard vague and ambiguous values like autonomy as ideals, while “reserve the category of principles for more specific and less ambiguous standards. In his view, such an example is a principle like “A doctor is only allowed to administer medical treatment if she has the free and informed consent of the patient.”

At this point, I will not engage myself in a theoretical discussion about whether principles are really different from ideals and in which way. The point here is that principles, as representing values, have an optimizing, aspirational, or insatiable nature contributing to the above confusion, although the two are different things. It has been regarded by Edwige Burg as “ideal ought statements.” This explains why in Law’s Empire Dworkin could make a shift unconsciously by regarding principles as law’s promise to people.

If my view that principles are relatively fundamental goals to an agent is adopted, even if they are indeed vague and unspecified, we can understand them as ideal goals that run through an agent’s whole life, whose meanings are to be explored gradually in its future development. It is on the ground of the aspirational and optimizing nature that the following argument illustrating the importance of balancing to ideals can help us understand why balancing is a necessity in pursuing principles.

According to Rescher, we could attribute this necessity to the co-existence of different ideals of an agent and the limitations set by their

30 Section 3.6 has distinguished principles from ends, goals and values by means of their normative nature.
32 Our ideals, as Kronman argued, are aspirational goals that define the kind of people we would like to be. Anthony T. Kronman, “Alexander Bickel's Philosophy of Prudence,” Yale Law Journal, Vol. 94, 1984, p. 1577.
interaction with each other in pursuit of these ideals. This is because ideals do not exist in a vacuum and do not operate in isolation. Healthy development of the agent only lies in the integrity of all ideals and depends on balanced pursuit.

“Here, as elsewhere, health is a question of harmony and balance—of giving the diverse elements of a rational economy of values a chance to flourish in their proper place.... The cultivation of ideals is profitable only within the setting of a concern for the overall ‘economy’ of the system of values whose interaction imposes mutual constrains. And the health of such an economy is destroyed when one element is aggrandized by expanding its scope at the cost of the very life of others.”

In reality, the examples that over—and thus likely unbalanced—commitment to an ideal at the costs of others are by no means rare. He took the overemphasis of public order by Robespierre in French Revolution for example and argued that such commitment simply went too far to secure other equally important ideals. Balancing thus could keep every principle in play and provides flexibility without sacrificing legitimacy. Ideals that do not accept compromise will never be fully realized in the long run, because the overemphasis that neglects the practical possibility, will only lead to the collapse of the whole agent.

“Compromise occurs in the cultivation of an ideal when one tempers or limits its further pursuit because its interaction with other values requires some mutual accommodation—to press further with the supposedly ‘compromised’ ideal in the prevailing circumstances would frustrate our other equally valid objectives.”

33 N. Rescher, *Ethical Idealism: an inquiry into the nature and function of ideals*, pp. 123-9, particularly ‘Pathology’. Since Rescher said that ideals are geared to values and people can have inappropriate values as ideals, it would be appropriate to quote his argument here.

34 N. Rescher, *Ethical Idealism: an inquiry into the nature and function of ideals*, p. 125.


Rescher also reminds us to distinguish compromise from betrayal of ideals. Betrayal is the situation that one does not go as far as one ought, as distracted by such unworthy things as greed, convenience and conformity, etc. Compromise means that one does not go further than one ought, in order not to sacrifice other equally important ideals. In my view, not willing to compromise is also another kind of betrayal, because it damages the desired ideal by destroying the whole project in the long run. He reminded us that to realize ideals one has to be realistic by paying attention to the limits of the possible in a complex and imperfect world, and one has to content oneself with sub-ideal achievements attainable in practice.  

In this respect, with Rescher’s idea in view I want to introduce a new concept, factual possibility, which is important for my future discussion of balancing in law. It represents the conditions and limitations that all constitutive principles or ideals (values) of the same agent mutually set to each other. It indicates that in a particular case, the optimal realization of a principle has its practical limit when taking other relative values or principles into consideration. It represents the highest level to optimize a principle practically. This concept will be further illustrated by my next chapter.  

In summary, Rescher demonstrates successfully that balancing is a necessity in pursuit of principles, because all ideals are integral, co-existing but not separated in an agent. The consequence of balancing is either that a principle will not to be applied in the present case, or that it will be compromised and realized partially. Thus the woman who does not tell her father about his illness, the example given in the beginning of this chapter, does not act against a principle of being honest. And a lover who temporarily leaves his spouse to earn some money can compromise love with financial need. Both results display the soft side of principles in our life.

128.

37 N. Rescher, *Ethical Idealism: an inquiry into the nature and function of ideals*, p. 125. Here Rescher indeed indicates that compromise only can happen between ideals or values that belong to the same agent. In other words, compromise is internal instead of external.
But I shall point out that while Rescher only paid attention to the competitive side of ideals, he neglected the fact that the improvement of conflicting values indeed can benefit each other mutually in the long run. For instance, in the political domain, he thought that public order and individual freedom are controversial. But we all know that it depends on what kind of social order one has in mind. To a totalitarian state, suppression of its subjects’ right to free speech in order to secure public order only amounts to more disorder in future. Conversely, it is no doubt that in a democracy where citizens are endowed with right to free speech, public order can be more improved than impeded consequently in the long run.  

The interplay and interaction between different principles within an agent contribute to its integrity. From this perspective, principles of an agent are interdependent. We should understand that mostly the optimization of a principle depends on to what extent other principles of the same agent are realized due to the mutual limitations they put on each other.

A REASSESSMENT OF THE TWO FEATURES

The above two sections intend to explain the two opposing features of principle. Incommensurability explains that certain bottom lines required by principles must not be crossed, which figures in the hard character of principle. With such bottom lines secured, the soft side refers to the necessity of balancing for the healthy development of an institution. The aspirational nature of principle requires that all should be balanced with each other in order to be optimized when taken as a whole. Thus the two features are not contrary to each other actually.

38 “It is perfectly conceivable that the public interest—even in ‘security’ or in national ‘self-preservation’—might be better served by maintaining freedom of speech than by the policies and programs to which the first amendment is asked to yield. It may be that in the long run, freedom of speech is safer than repression.” L. Frantz, "The First Amendment in the Balance," Yale Law Journal, Vol. 71, No. 8, 1961, p. 1439.
Enrico Pattaro raised an alternative view to understand principles’ role in legal reasoning, and he also observed two similar sides.\(^{39}\) The first is a *deliberative* side that principles are not conclusive but indicative and contextual. Their meanings shall be gradually developed, defined and redefined in a progressive process. They play a role of restriction on arbitrariness and discretion by means of an indicative criterion. Contrary to this, the second is a deductive side as premises in legal reasoning. In this sense they should be regarded as fixed and self-evident, because only then inference can be a mechanical intellectual operation. From this perspective, principles are hard and inflexible like rules with a merely “all or nothing” character. As Pattaro indicated, according to whether we look at principle from a deductive or from a progressive point of view, we will have different views.\(^{40}\)

In short, how we perceive them depends on how they are deployed in an agent, which will further our comprehension. The hard characteristic, as a premise in practical reasoning, indicates the mature side of principles that have been well developed. They constitute the maturity parts of an agent that construct its identity, and provide stability and consistency. In this sense, the development of principles, as ideals, is not casual and random, but follows a pattern or a path that is rather predictable by the past. To secure the principle, by securing a marking point and a bottom line, is to maintain an agent’s identity. The future of an institution can, to a large extent, be defined by the pre-established principles.

In contrast, the soft side indicates the potential of development of an agent that is undetermined and under constant construction in forthcoming new circumstances, in which an agent’s past, present and future conjoin. In such a development it requires consistently that each


\(^{40}\) Enrico Pattaro, "Models of Reasoning, Types of Principles and Reasoning. Historical Comments and Theoretical Outlines," p. 119. Normally the deductive role of principles is assumed to provide more legitimation, but lack flexibility.
principle should be optimized and balanced, which allows new developments of the conflicting principles and thus the agent itself at stake. We should understand the requirement of consistency of principle in the way that it flows from the demand of optimization. And an agent’s development is a synonym of the optimal development, or the balanced development of its constitutive principles.

We therefore have to be aware that the bottom line, or the marking point of a principle embedded in certain symbolic actions, will not be fixed permanently. As the optimal or aspirational nature of a principle requires, it will be gradually lifted in progressive development. This can be observed well in the development of human rights in past decades in that the standards of human rights have been extended largely to social, culture and economic rights, rather than limited to political and civil ones. We also observe that such bottom lines have been gradually raised in the development of people’s welfare rights in western states.