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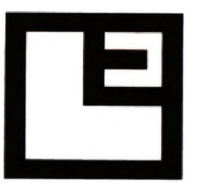

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A Critical Analysis on Robert Alexy's Theory of Legal Principles*

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Abstract: The central objective of this essay is to demonstrate the main problems concerning Robert Alexy's theory of legal principles. The debate on legal principles has achieved one of the most important scientific constructions on Robert Alexy's work. Principles are one of the main important arguments on disputing legal positivism, once jurists have been using them as "tools" that conduct moral justifications throughout legal practice. At least, this is the interpretation of Robert Alexy's legal philosophy. Stating out as one of the finest legal theorists, Robert Alexy conceives legal principles as norms different in their structure from legal rules. That distinction, among others, allows Robert Alexy to understand the concept of Law as a non-positivist concept.
However, my intent is not to analyse all the points with reference to legal principles, but to elucidate why, in my opinion, Robert Alexy's structural definition of legal principles cannot be accepted. Firstly, I shall try to explain, in a few words, the main foundations of Robert Alexy's theory of Law, as a presupposition of his conception of legal principles; secondly, I will try to demonstrate why his primarily version of the theory of legal principles cannot be supported; thirdly, I will try to explain why the second version of his theory of legal principles is, however, incoherent.

keywords: principles; rules; Robert Alexy; norms

Resumo: O objectivo central do presente ensaio é demonstrar os problemas essenciais da teoria dos princípios de Robert Alexy. O debate sobre os princípios jurídicos constitui um dos aspectos mais importantes da obra científica de Robert Alexy. Os princípios são um dos argumentos mais importantes na discussão relativa ao positivismo, na medida em que os juristas os têm utilizado como «instrumentos» que representam justificações morais da prática jurídica. Em última instância, é esta a interpretação que é feita da filosofia jurídica de Robert Alexy. Sendo um dos mais brilhantes teóricos do direito, Robert Alexy concebe os princípios jurídicos

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como normas estruturalmente diferentes das regras. E esta distinção permite a Robert Alexy ter uma compreensão não–positivista do Direito. No entanto, o meu objectivo não é analisar todos os aspectos relativos aos princípios jurídicos, mas elucidar que, na minha opinião, a definição estrutural dos princípios de robert Alexy não pode ser aceite. Primeiro, tentarei explicar, em poucas palavras, as bases da teoria do direito de Robert Alexy, como um pressuposto do sua concepção dos princípios; segundo, tentarei demonstrar a razão pela qual a sua versão original da teoria dos princípios não pode ser defendida; terceiro, tentarei explicar que a sua segunda versão da teoria dos princípios jurídicos é, não obstante, incoerente.

Palavras-chave: princípios; regras; Robert Alexy; normas

1. ROBERT ALEXY'S THEORY OF LAW
(A Non-Positivist concept of Law)

Robert Alexy is unquestionably one of the most sophisticated legal theorists. His philosophy of Law steams from a critical and refutable perspective of legal positivism as a comprehensive theory about the nature and the concept of Law. Robert Alexy sustains that Law is only understandable if one accept its double nature. Therefore, Law has two dimensions – a factual dimension (or institutional dimension) and a critical (or ideal) dimension. Factual dimension can be decomposed into three elements – legality, coercion, and social efficacy. Critical dimension can be decomposed into one element – *a claim for correctness*. (Alexy 2008, 290).

A factual or institutional dimension signifies that Law is a legal order identifiable from the recognition of its three elements – legality (meaning that Law derives from social sources), coercion (meaning that Law is a system of norms that constrain internal participants to conduct themselves by their legal norms), and social efficacy (meaning that, from an empirical point of view, internal participants accept, at least, the majority of their legal norms, that is to say, they do not disregard most of their legal norms. A critical or ideal dimension implies the acknowledgment of a *claim for correctness*, which determines a conceptual connection between Law and moral judgments. As a result, it is a legal theory that refutes legal positivism.

All legal positivists sustain that there is no necessary connection between Law and morality. This is known as the *separation thesis*. Law, as it is, is not affected by the idea of Law as it ought to be. Moral merits or moral demerits do not support

or impede legal validity, respectively.[1] By the contrary, all non-positivists sustain the *connection thesis*, which consists in denying a non-relation between Law and morality, whether it is a strong denial (exclusive non-positivism), or a weak denial (inclusive non-positivism). (Alexy 2008, 286-290).

Regarding the *claim for correctness*, Robert Alexy identifies two important dimensions which constitute the argument from *claim for correctness*. The first one is the factual dimension. This first dimension requires that legal norms ought to be correctly identified. The second dimension is the ideal dimension of the *claim for correctness's argument*. This second dimension requires that legal norms ought to be correctly applied. Stating that legal orders have a *claim for correctness* supposes that "Law" "seeks" an ideal of identification regarding its social sources, and that legal norms are to be created and applied in order to accomplish a just content and a rational justification.

This means, for example, that a certain judicial decision presupposes a correct identification and interpretation of all norms supporting that specific decision. In addition to this, the content of legal norms, and consequently the content of legal decisions, cannot be deemed unjust. If a legal decision is considered unjust or immoral, it will be defectively (or imperfectly) justifiable. This guides us to a weak connection between Law and morality (or to a qualifying moral thesis). However, if the degree of injustice is deemed insupportable, than legal norms or legal decisions lose their own legal validity. This leads us to a strong connection between Law and morality (or to a classifying moral thesis). Robert Alexy (2008, 287-288) is, for that same reason, an inclusive non-positivist. His theory accepts the classical Radbruch's formula – which claims that *extreme unjust or immoral Law is not Law at all.*

Radbruch's classical formula, accepted by Robert Alexy, implies that Law (or at least the nature of Law) allows legal theorists to explain what Law is, under the argument of what Law ought to be. Therefore, the connection between existent Law and ideal Law refutes the central axiom of legal positivism – which sustains that scientific knowledge of a legal order differs from the philosophical knowledge of a just legal order. (Alexy 2008, 296-297).

Another main idea in Robert Alexy's theory of the nature of Law (that presupposes

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1 - Robert Alexy's theoretical edifice is supported by the previous philosophical understanding of legal discourse as a special case of general practical discourse. Legal discourse is a special type of general practical discourse because it implies a practical argumentation on individual's conducts. The main difference is that, whereas in general practical discourse individuals argue about their conducts regardless what legal order determines, in legal discourse individuals argue about their conducts with reference to a specific system of permissions, prohibitions and obligations, that is to say, they argue with reference to a specific legal system.

a previous notion of the concept of Law) concerns to internal and external comprehension of a legal system. In his view, in order to fully understand a legal system, one needs to apprehend two types of perspectives. The external perspective (which implies an external observer's perspective) allows legal scientists to describe a concrete legal application of norms in a concrete legal system. The internal perspective (which implies an internal participant's perspective) enables legal scientists to comprehend how legal norms of a specific system ought to be correctly interpreted and applied.

Finally, his theory of legal principles (a requirement of a constitutional and democratic State of Law) is the ultimate component of his refusal to accept legal positivism. This thesis, in order to make sense, supposes a preceding distinction – the distinction between legal principles and legal rules. The purpose of this paper is to analyse Robert Alexy's distinction between principles and rules.

2. PRINCIPLES AS OPTIMIZATION MANDATES (The First Version of Robert Alexy's Theory)

In the first version of his theory, Robert Alexy conceives legal principles as optimization mandates, or should I say optimization requirements. Legal principles order that something be realized to the greatest extent possible given the legal and factual possibilities. Therefore, legal principles are satisfied in varying degrees, which depend upon factual and legal possibilities. The range of legal possibilities is the result of conflicts between principles and rules.

On the contrary, rules are norms which determine that something be realized in a fulfilled or not fulfilled matter. That is, rules put forward a rigid legal obedience, whereas principles established a "more or less" type of obedience, meaning that the distinction between principles and rules is a qualitative one, and not a mere distinction of degree. A norm is either a principle or a rule.[2] (Alexy 2010, 48).

Principles are consequently *prima facie* commands, instead of definitive commands like rules. A *prima facie* command is a valid normative mandate which permits its own restriction. Some theorists claim that legal *prima facie* commands are not subject to the *normal* legal logic. *Normal* legal logic teaches us that whenever the antecedent of a norm is fulfilled, that same legal norm produces its own normative effect. However, with *prima facie* commands, normative effects are only produced if there are no contradictory reasons (conflicting principles, conflicting rules,

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2 - This thesis is known as the *Exklusionstheorem*, meaning a theory of exclusionary identification. This is a central axiom in Robert Alexy's conception. (Bäcker 2011, 57).

or factual circumstances) that exclude the *prima facie* command's application. (Weinberger 1999, 239-251).

This structural difference leads principles to a specific type of conflict whenever they collide with each other. This specific type of conflict occurs because principles are *prima facie* commands. Therefore, each principle can be excluded whenever reasons for the exclusion emerge. These concrete reasons, that can lead a principle to its own exclusion, are given by the process that solves the conflict. That process is named balancing. Balancing is a legal method that allows legal practitioners to solve conflicts between legal principles. These specific conflicts – that is to say, the specific type of legal conflicts between principles – are subject to Robert Alexy's Law of collision (*Kollisionsgesetz*). Formal Law of collision sets forth that whenever legal principles collide with each other, legal practitioners are led to a specific method of resolution – the balancing method. The balancing method is a necessary consequence of the structure of legal principles. As principles have an optimization nature, none of them can be deemed to be invalid when involved in a collision with other principles. Conflicting legal principles also do not admit any legal exceptions introduced as a method of solving the collision.

Balancing legal principles signifies that all factual conditions or circumstances embraced by conflicting principles must be analysed in order to establish the prior conditions that determine the prevalence of one conflicting principle. Prior conditions are encompassed in the content of the rule's antecedent derived from the balancing process. *For this rule, the prevailing principle consists in its rational justification.* In addition to this, the Law of collision expresses the fact that prior conditions, extracted from conflicts between legal principles, only guide jurists to relative solutions or conditional results. Prior conditions are relative, not absolute, which means that they do not solve legal conflicts between principles in a universal manner. Instead, prior conditions allow jurists to solve conflicts between principles in a particular manner.[3] (Alexy 2000, 297).

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3 - Another central aspect in his theory is the description of his formal Law of balancing (*Abwägungsgesetz*). Once legal theorists recognize a specific optimization structure concerning the nature of legal principles, they will also recognize a technical principle (which, in fact, is a technical rule) that allows solving conflicts between principles. This formal principle, or rule, is the principle of proportionality. The conceptual theory of legal principles, as optimization mandates, implies a theory of the principle of proportionality as a technical rule that enables solving conflicts between legal principles. The recognition of the principle of proportionality is a consequence of the principle's optimization nature. It can be deduced from it (Robert Alexy 2010, 66). The principle of proportionality includes three sub-principles – suitability, necessity, and proportionality in narrow sense. Whenever two principles collide, one must decide which principle prevails. If one of the two principles prevails over the other, that means that the defeated principle will be restricted. The rule

On the other hand, legal rules have a different applying methodology. Whenever two rules conflict, legal practitioners solve such conflict by deeming one rule invalid (using methodological legal norms like *"lex posterior derogat legi priori"* or *"lex superior derogat legi inferiori"*; or by introducing a legal exception to one of the conflicting rules. Therefore, rules are subject to subsumption method, while principles are subjected to balancing method.[4] Whereas subsumption is connected to the notion of legal rules, balancing is connected to the notion of legal principles. (Poscher 2009, 438).

In addition to all of these, it must be said that for Robert Alexy, a theory of principles has an important role in the construction and protection of constitutional rights in a democratic State of Law. Once one accepts that balancing is needed in order to solve conflicts between legal principles, consequently the principle of proportionality shall be applied in order to realize the balancing method.[5] Therefore, the principle of proportionality (with its three elements – suitability,

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that contains the prior conditions, which allow solving the conflict, is a restrictive norm concerning to the excluded principle. Since legal principles have an optimization structure, they ought to be fulfilled to the greatest extent possible. If all principles ought to be fulfilled to the greatest extent possible, given factual and legal possibilities, then, each principle's restriction must not exceed what is necessary to satisfy the prior conditions of the prevailing principle. To achieve this stage of minimum constraint, it is necessary to apply the principle of proportionality. This principle implies, as stated before, three steps. The first one is suitability. Suitability means that restrictions have to be deemed appropriate to fulfil the objective proposed – that is to say, the restrictions shall be apt to realize the priory conditions of the prevailing principle. The second step is necessity. It signifies that the pursuit of the goal shall be accomplished by using the least intrusive means. Finally, the third step is proportionality in *narrow sense*. Proportionality in *narrow sense* means that the more severe is the restriction, the more important must be the interests supported by the prevailing principle.

The principle of proportionality permits the fulfilment of legal principles. Suitability and necessity *realize* principles in a factual dimension (Pareto-optimality) while proportionality in *narrow sense realizes* principles in a legal dimension.

The criterion of Pareto-optimality determines which solutions are best among all solutions that are, in fact, possible. In its original version, Pareto-optimality classifies as optimal solutions those to which there is any alternative better for someone, that does not cause any disadvantage to someone else's. (Sieckmann 2010, 103).

4 - In Robert Alexy's theoretical comprehension, balancing is structurally defined by arithmetic formulas, whereas subsumption is developed by logical and deductive reasoning. Nevertheless, both legal methods of argumentation are dependent upon previous judgements made by legal practitioners. (Alexy 2003, 433-448).

5 - In order to solve conflicts between legal principles, Robert Alexy sustains that legal practitioners use external arguments, that is to say, moral arguments with the purpose of fulfilling collision and balancing Laws. Once these formal and moral arguments are necessary to complete the rational and legal discourse, they consequently establish a connection involving Law and morality. Robert Alexy uses this theoretical construction to refute legal positivism.

necessity, and proportionality in narrow sense) allows legal theorists to detect an expandable (optimization) nature to the content of legal principles – which are the fundamental rights. This allows, on the one hand, to maximize fundamental right's effects; on the other hand, such a theory of principles conducts a legal system to constraint at the greatest level possible all fundamental restrictions, thus maximizing constitutional (fundamental) legal protection.

Now, I shall try to explain the reasons why, in my opinion, this first version of Robert Alexy's theory of legal principles (presupposing a distinction between principles and rules) cannot be accepted.

Robert Alexy's theory of legal principles supposes that principles and rules are structurally different types of legal norms. Therefore, his distinction is a qualitative one. However, if legal principles differ from legal rules, and if the distinction between them is structural, then legal principles must have some specific peculiarity which supports the distinction. Nevertheless, nothing in Robert Alexy's theory explains, or even identifies that supposedly peculiarity of legal principles. The difference is based only upon the behaviour of principles in the legal systems. Robert Alexy's theory of principles, as Ralf Poscher (2009, 440) argues, is merely an attempt to extrapolate a conceptual and structural definition of legal principles, as a specific type of norms, from two of the many methods used by jurists in legal practice – application by subsumption and application by balancing reasons and interests – to create a distinction between norms and not between legal techniques. So, for that reason, his model is rather a behavioural theory about principles than a structural one.

Another assumption made by Robert Alexy is that principle's collisions have a proper mechanism to solve these same collisions. This mechanism is called balancing. Balancing legal principles is a consequence of legal principle's structure, meaning that, once principles are optimization mandates, they constraint legal practitioners to use legal balancing in order to solve conflicts between them. If principles conduct legal practitioners to a specific mechanism, in legal reasoning, then, it would not be possible to identify this mechanism whilst legal practitioners apply legal rules in the process of deciding concrete cases. Balancing could only occur when principles collide, forcing legal practitioners to solve the collision.

However, this idea is a misleading interpretation of legal practice and legal reasoning. Robert Alexy disregards that jurists use the balancing method since mankind started applying legal norms. Balancing could be identified when legal practitioners, for example, use teleological or systematic reasoning within legal interpretations. For instance, legal practitioners may balance legal or factual reasons whenever they try to understand how a legal norm interferes with others, and when they try to understand how the pursuit of goals by such legal

norms determines their interpretation. Robert Alexy's theory of legal balancing does not explain what truly differs balancing from those two elements of legal interpretation. As a result, and using his own example, schoolchildren could *recognize* their right to continue in the room after the ringing of the bell, not because of the introduction of an exception to the rule that imposes leaving the room after the ringing of the bell, supported by the eventual risks for health if such rule is obeyed, but rather as a consequence of a process of balancing that optimizes health and life protection.

If Robert Alexy's model were correct, only principle's collisions (and not rule's collisions) could lead legal practitioners to legal balancing. However, it is possible to conceive examples of rule's collisions that lead legal practitioners to legal balancing. For example, when two rules are hierarchically identical, both being general rules, and none of them are considered subsequent in their legal relation (that is to say, in their legal force), once they collide, the only method able to solve the collision is legal balancing. In such scenarios, legal practitioners cannot apply the traditional methodological legal rules like *"lex posterior derogat legi priori"* or *"lex superior derogat legi inferiori"*. How can they solve the conflict? The answer seams to be relatively simple, even though ignored by Robert Alexy: they use legal balancing.[6] And they use it, because in those types of legal conflicts, not always legal practitioners can determine the invalidity of one of the norms, or introduce an exception to one of them.[7]

This permits understanding that, what really lead legal practitioners to legal balancing are not legal norms, in spite of being principles or rules, but the facts regulated by norms and the political reasons supporting legal regulation (meaning, the reasons that explain why something is permitted, prohibited, or imposed). (Poscher 2009, 439; Ferrajoli 2012, 53).[8]

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6 - Some authors plainly accept the possibility of rule's collisions that lead necessarily to legal balancing. With good practical examples, see, f. e., in their recent essays, Duarte (2010, 51-62) and Brożek (2012, 224).

7 - The introduction of an exception to a legal rule or the determination of invalidity of one rule could be a result of a previous balancing operation, which forces us to accept balancing method in solving rule's collisions.

8 - Even the necessity of previous conflicts between norms as a presupposition of legal balancing is dubious. For instance, when legal practitioners have to apply a legal norm, for example, a norm from the Penal Code which imposes a sanction for a specific criminal act, within a minimum five year penalty to a maximum ten year penalty, they often use the balancing method when they try to understand what the most effective and most adequate sanction is, in order to establish a concrete penalty for a convicted criminal. Determining whether a criminal should be punished with a five year incarcerated penalty or a ten year incarcerated penalty involves a balancing reasoning. And yet, there is no conflict with other norms.

Since legal practitioners make use of balancing to solve the collision of rules, balancing itself is not a specific method used by legal practitioners to solve the collision of principles. Once legal balancing is not a specific method used for solving the collision of principles, then legal balancing is not a consequence of the structure of legal principles. Therefore, the argument sustained by Robert Alexy, according to which legal practitioners use moral arguments in order to fulfil collision and balancing Laws, connecting Law and morality, is not a specific argument deduced from the nature of legal principles. Balancing is present in solving the collision of principles as that of rules, which making the idea that principles (by leading legal practitioners to legal balancing, and consequently to external moral arguments) connect Law with morality a fragile argument against legal positivism.

Robert Alexy claims that the possibility of determining the invalidity of rules is a characteristic present only in solving the collision of rules. In order to conceive a collision of norms one must assume that both norms are equally valid. If one argues that a collision of norms is a legal situation where two or more norms asset forth different legal solutions, and consequently one must choose between one of the legal solutions, then we are presupposing that both norms are valid, that is, that both norms have binding force. An invalid norm cannot collide with a valid norm, as in the same sense that a non-norm cannot collide with an existent norm. Assuming that legal existence corresponds to binding force, all legal norms have to be valid, a previous and necessary condition that permits and sustains the identification of a legal conflict. (*The nothing cannot collide with the something*). If so, the concept of legal invalidity used by Robert Alexy is not a theoretical one. It is rather a methodological and political concept. In this sense, legal invalidity means that in some cases, legal practitioners want to exclude a legal norm that collides with others because they considerer that norm to be an unjust or immoral one. These political decisions made primarily by judges are conceivable in principle's collisions. For that reason, Robert Alexy's argument is unacceptable.

His theory of legal principles also sustains that principles are considered to be reasons for legal rules. If legal principles are optimization mandates which determine that something ought to be realized to the greatest extent possible (both factually and legally possible), then legal systems are comprised only by principles. A rule is, in fact, a simple and concrete decision about the prevalence of a principle, which contains reasons that legal practitioners considered more important in comparison to the ones contained by the pretermitted colliding principle. Therefore, principles would be, truly, the only normative standards of a legal order. However, this assumption leads us to an absurd conclusion – if principles are the only legal standards, there is no point in distinguishing principles from rules.

Finally, Robert Alexy's theory disregards an important fact. In some cases, for example, when legal practitioners need to fill legal gaps, they often use a well known legal method – the analogy method. When legal practitioners use analogy, they apply a legal norm to a case that was not included in that norm's antecedent. Since one cannot previously determine whenever a norm will be applied under the analogy method, one must accept the fact that all legal norms – including rules – can potentially be applied by such method. Once we assume that statement as a valid one, we recognize that all norms can be a *prima facie* ought, because the possibility of being applied under the analogy method prevents legal norms from having a definitive regulation. Therefore, this supposition allows us to refute the contraposition between *prima facie* ought and definitive ought, that supports Robert Alexy's distinction between principles and rules.

3. PRINCIPLES AS MANDATES TO BE OPTIMIZED (The Second Version of Robert Alexy's Theory of Legal Principles)

The second version of Robert Alexy's theory of principles was a consequence of several critical considerations made by a few authors. Aulis Aarnio was one of them. In his opinion, legal principles cannot be considered as optimization mandates. Legal principles determine an ideal state of affairs to be realized. A statement about the optimization nature of principles corresponds to a description of a rule of optimization. This so called rule of optimization establishes that legal principles ought to be optimized in order to accomplished principle's ideal of a specific state of affairs.[9] This signifies that optimization rules can be obeyed or

9 - This leaded some literature to sustain that legal principles are norms which impose the achievement of a specific state of affairs, while rules prescribe a means to an end, that is to say, a conduct in order to accomplish a specific state of affairs.
If a legal norm imposes that X ought to be, and if X contains necessarily the effect Y, then prescribing X is equivalent to prescribing the realization of the effect contained in X – that is, the effect Y. If the effect Y signifies the achievement of a state of affairs, then the effect Y is the goal set forth by the imposition of X. When a legal norm imposes a specific end – the end Y –, that legal norm seeks the realization of a specific state of affairs. If many conducts are able to accomplish that same state of affairs, then every one of those same conducts are considered to be permitted by that same legal norm. Therefore, the effect X, stipulated by a legal norm as a specific state of affairs, is equivalent to all conducts which allow the accomplishment of that same state of affairs. This means that the distinction based on the idea that some legal norms prescribe objectives while other legal norms prescribe means to an end is a misunderstanding theory of the real norm's material content. While in a legal norm which prescribes an end, all the conducts that allow the realization of the norm are permitted, in a legal norm which does not prescribes a goal are some conducts only permitted, *i. e.*,

disobeyed. Therefore, principles can either be optimised or not. For this same reason, legal principles are not optimization mandates, but rather norms to be optimized. This aspect is very important because it leaded Aulis Aarnio to claim that optimization commands are, in fact, rules –, that is, technical norms which discipline the use of legal principles. The notion of optimization command is, in this conception, something external concerning to the idea of legal principles. (Aarnio 1997, 63-64).

Robert Alexy has reformulated his own theory with the purpose of responding to his critics. This reformulation edified the second version of Robert Alexy's theory of legal principles. Instead of being optimization mandates, principles, in this second version, are commands to be optimized. Therefore, they are included in an object's level of optimization. Principles are the object of optimization. How principles ought to be applied is determined by the meta-level rules – the rules of optimization. Legal principles, as an object of optimization, may be or not optimized, making the realization of principles a gradual realization. By the contrary, meta-level rules of optimization are observed in an all-or-nothing fashion. (Alexy 2000, 300).

However, Robert Alexy concludes that his theoretical reformulation does not refute his previous conceptualization of legal principles. On the contrary, it only confirms that legal principles are subjected to an idea of optimization, as they consist in ideal oughts to be realized to the greatest extent possible. Whereas in Robert Alexy's first version of the theory of legal principles, the notion of optimization command consisted in a statement about the structure of legal principles, in this second version the notion of optimization command is a structural statement about the nature of legal principles. (Alexy 2000, 301).

Nevertheless, I shall try to explain the reasons why this second version is also unacceptable. First of all, if legal principles are optimized because the existence of a rule of optimization, then either optimization characteristic is a structural feature of principles, or it is a consequence of the existence of an optimizing meta-level rule. If we follow the first assumption, we will conclude that a principle is the composition of two norms – a principle (the object of optimization) and a rule (the optimizing standard). If so, nothing permits us to distinguish between principles and rules. This first assumption, clearly excludes the possibility of extracting any logical sense from Robert Alexy's theory.

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those conducts specifically identified within that norm's normative sense.

This signifies that this distinction is a quantitative one, and not a qualitative one. Principles would be norms which permitted more conducts comparatively to rules. Therefore, a legal principle cannot be defined as a norm seeking an ideal ought, because this concept is a qualitative notion on the nature of principles.

Nonetheless, the author sustains that the optimization command is a structural idea concerning legal principles. He seems to choose the second assumption – that is, a principle is a command to be optimized by a meta-level rule. If a legal principle is a norm to be optimized because the existence of a meta-level rule, then nothing distinguishes the norm object of optimization from all the norms of the legal system, at least at the first level. If it is the meta-level rule that provides principles with their optimization force, then what really should be analysed are these meta-level rules. Principles would not be any specific type of legal norms, but instead, they would be a simple projection of meta-level rule's effects.

If we accept that meta-level rules determine principle's optimization, and if we accept that principles are a distinctive type of norms (distinctive from rules), for these suppositions to be true, we necessarily have to consider the possibility of the existence of meta-level rules that determine non-optimization mandates, that is to say, meta-level rules establishing that some legal norms ought to be applied in a definitive and non-optimizing manner. If we assume that two objects are different, we necessarily need to suppose that they have dissimilar characteristics. In order to argue that meta-level rules optimize principles, that principles differ from rules, and that this distinction is based upon the non-optimizing feature of legal rules, it is essential that we suppose that rules are, therefore, the object of a non-optimizing type of meta-level rules. If so, there is, consequently only a possible norm's distinction – the distinction between optimizing meta-level rules and non-optimizing meta-level rules.

The legal content of a norm derives from its formal structure. Robert Alexy's theory, which sustains that legal principles are optimized because they are the object of an optimization meta-level rule, removes the legal sense of the optimizing ought from the meta-level rule, and not from the principle itself. That is to say: *"something ought to be realized to the greatest extent, factually and legally possible, because something determines that something ought to be realized to the greatest extent, factually and legally possible"*. Therefore, principles are just the material content of the optimizing meta-level rules. Principles are not autonomous legal norms, but the object of other legal norms. If legal principles are the material content of the optimization's meta-level rules, then the meta-level rules lose their own object – that is, principles cease to be the object of the meta-level rules, because they form the material content of those same meta-level rules in an internal way, and not in an external way, as it is presupposed by Robert Alexy. If the meta-level rules lose their own normative object, they are either norms without content or simply non-norms at all. Once a norm needs an object to be considered a norm, the optimization meta-level rule necessarily has to have some kind of material content. If we accept that principles are the material content of these meta-level rules, what meta-level

rules of optimization determine is the legal effects contained in principles. If these norms project the effects of principles, they do not establish anything beyond what legal principles have already established. For that same reason, meta-level rules of optimization cease to have their supposedly specific characteristic – that is, the optimization sense. If meta-level rules of optimization cease to have their optimization sense, they establish something in the same manner that of the remaining legal norms. Therefore, they cannot be considered a different type of legal norms, which invalidates Robert Alexy's conception.

Another mistake made by Robert Alexy is his supposition that an optimization mandate requires a command to be optimized. An optimization command requires that something be optimized, but that something does not need necessarily to be a command, that is to say, a normative object. (Poscher 2009, 436). Everything can be optimized, health, safety, happiness, etc. Nothing in Robert Alexy's theory supports that the object of the optimization command have to be a normative object, like the supposed command to be optimized. The object of optimization could simply be the object of the command to be optimized, and not the command itself. (Poscher 2009, 437).

Instead of conceiving optimization mandates as principles, some theorists conceive them as norms about the usage of legal principles. This is Aulis Aarnio's position. Nonetheless, this position is unacceptable. If optimization commands are norms about the usage of legal principles, they are mere propositions about principles, that is to say, scientific propositions about principles. A normative (scientific) proposition is a statement that describes a legal norm. Therefore, norms are the object of normative statements. So, for that same reason, a norm cannot be a norm and, simultaneously, a statement about itself. If optimization commands are mere descriptions about the usage of legal principles, they limit themselves to explaining what principles are, and how principles should (scientifically) be applied, and not how principles ought to be (legally) applied.

Another problem regarding Robert Alexy's theory concerns to optimization mandate's own logical sense. Robert Alexy characterizes an optimization mandate (whether it is a principle, in his first version of the theory of legal principles, or a meta-level rule, in his second version of the theory of legal principles) as a command that ought to be fulfilled to the greatest extent factually and legally possible. This statement is, in my opinion, by itself, a mere tautology. Whenever a norm is applied, it is always applied to the greatest extent possible, regardless it is a principle or a rule. I will try to clarify my point with a simple example:

Let us imagine that we are interviewing a football's fan. We ask him what his expectations are for this year's Champions League season, concerning his football

club's performance. He, like many other football's fans, will tells us that he wants his team to go as far as possible in the competition.

What does his answer really mean? The truth is that his answer is meaningless. And why? Because, apart from his team winning the competition, or not going through the first phase (the group stage), it is possible to say that his team has gone as far as it could go. If his team loses the competition, it does so because the empirical conditions that allowed winning were not fulfilled. On the contrary, if his team wins the completion, it does so because the empirical conditions that allowed winning were fulfilled. Those empirical conditions could be the players' quality, players' honesty, or referees' competence to judge complex and decisive moments, for example, judging an offside.

In order to accept that his answer makes any logical sense, we need to remove from it an implicit ought, for example, going as far as possible could signify a moral obligation of his team to win all games played against less quality adversaries. Since an obligation is always subjected to the empirical conditions that allow its obedience, we can always claim that an obligation was obeyed to the greatest extent possible.

This happens, in the same sense, with legal norms. Claiming that a norm, for instance a principle, ought to be applied to the greatest extent possible is meaningless. A norm can only be applied if the empirical conditions permit the norm's applicability. One of these conditions is the "willable element", that is to say, the dependency upon judges' will to obey and apply legal norms. This particular element is an essential condition in Law's application. Once the will of judges is decisive on applying legal norms, all norms of the system are subjected to this previous "will" condition. As a result, all legal norms are applied to the greatest extent possible, as the will of judges is the most important condition that makes possible the application of Law. When a legal norm, whether it is a principle or a rule, is applied, it is so because it was possible to apply that same legal norm, possible in the sense that judges' will permitted that same application. In this sense, the concept of optimization command is an empty concept, or a tautological one.

It is an empty concept, if we try to understand it from a scientific (legal) point of view. Only if we adopt a political analysis, we are able to fulfil the concept of optimization command. In this political sense, optimization command signifies that a legal norm has an important content which should be applied in all concrete cases, for example, the principle of human dignity, or the principle of human freedom.

When legal practitioners discuss about legal possibilities concerning Law's application, they argue on the empirical (factual) conditions that allow Law to be applied. A legal possibility does not belong to the normative dimension. It belongs to the factual dimension, that is to say, the dimension that makes possible Law's application.[10]

CONCLUSION

For all the reasons I have tried to demonstrate, Robert Alexy's theory of legal principles presents itself as an incoherent theory. My purpose was not to analyse all his conception of the theory of legal principles, as one of his strongest arguments against legal positivism. As a legal positivist, I refute his theoretical conception. However, in this article, my intent was only to put forward an explanation on the reasons why his distinction between principles and rules is unacceptable. This distinction is a previous conception from which Robert Alexy sustains the connection between Law and morality. Nevertheless, once his theoretical distinction is refuted, *all his legal theory results less defensible.*

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10 - For that same reason, legal principles like legal rules project their effects in a closed or definitive way, because, once the empirical conditions are fulfilled, the projection of legal effects is made in an absolute manner, not gradual. (Aarnio 1997, 33).