A CRITICAL ANALYSIS OF ROBERT ALEXY'S DISTINCTION BETWEEN LEGAL RULES AND PRINCIPLES AND ITS RELEVANCE FOR HIS THEORY OF FUNDAMENTAL RIGHTS

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1. Introduction

The distinction between legal principles and legal rules is of relevance to all disciplines of legal science and is of special importance to those scholars who aim at avoiding the false dilemma of natural law or legal positivism. This distinction could furthermore contribute in solving certain problems in the field of fundamental rights e.g. limits, collision and competition of fundamental rights, “Drittwirkung” and the role of fundamental rights in the legal system, etc.

2. The natural law/legal positivism debate and the distinction between rules and principles

The traditional natural law approach is to be rejected because it accepts the existence of a supra positive law (having legal validity per se independent of human forming) founded in a metaphysical order of nature which could be known and discovered in an apriori way by man's natural reason. Traditional legal positivism denies the legal and non-arbitrary character of the material content of legal norms which is determined by the variable moral, political and ideological conceptions dominant in a particular society. This division of law and morality, the so-called “rechtspositivistische Trennungsthese” is unacceptable because it may contribute to the formal acceptance of unjust legal rules. Because it is based on an external linkage of law and morality (i.e. positive morality having bearing on the content of positive law) positivism could only be refuted by a theory that convincingly shows that the content of positive law is dependent on the positivization of legal principles, some of which cannot be ignored if a legal order/system is to be maintained whilst others show an internal linkage between law and morality.

Two of the most important contemporary contributions concerning the distinction between principles and rules are those by Dworkin and Alexy

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2 Bayles (1987) uses Dworkin's distinction in this regard and gives examples of principles in the fields of procedural-, property-, contract-, tort- and criminal law.
5 I.e. universal constitutive legal principles to be discussed and distinguished from other categories of legal principles in section 3 below.
6 I.e. regulative legal principles.
because they believe that it would enable them to overcome legal positivism without falling into the trap of natural law. According to Dworkin (1978: 22ff.) rules differ from principles because they apply in an all-or-nothing fashion whilst principles do not. Principles furthermore have a 'weight' and conflicting principles must be weighed and balanced against one another. Some have more weight than others whilst this is not the case with rules. Conflicting principles could have legal validity but where there is a conflict of rules only one of them could prevail. Although Alexy (1979) has successfully criticized both these notions, Dworkin's attempt to steer clear of legal positivism remains important because he defends the thesis that positive law is not only bound to the formal-legal *rules* but also to material-legal *principles* that display an intrinsic legal structure. Because they form an integral and indispensable part of the legal system, these principles do not possess a supra legal moral character but are legal principles that determine the normative character of valid law. Legal principles "underlie" or are 'imbedded in' the positive rules of law" (Dworkin 1978: 105) i.e. the constitution and statutes, and they "underlie or are embedded in the common law" (Dworkin 1978: 115) i.e. the precedents. Koch (1990: 156, 147) criticizes Dworkin because when there is doubt as to the choice of two principles the one that "comes closer to capturing sound political morality" (Dworkin 1978: 340) should be preferred to the one that is better on the dimension of fit to past material i.e. positive law. Koch's view is that Dworkin's refutation of positivism fails. This criticism is however based on the positivistic idea, criticized by Dworkin (1978: 39, 47), that mistakes part of the domain of the concept of law for the whole by thinking that those legal principles which are not positivized in legal rules are extra-legal moral standards. Koch (1990: 161) strongly criticizes the attempt to refute legal positivism through definition by wrongly calling moral criteria used by judges when positive law offers them no criteria, legal criteria. He thereby underlines the view that a non-positivist approach implies the acceptance of supra-positive legal principles, some of them i.e. the regulative ones containing an internal linkage of law and morality. Dworkin's reference to political morality and moral rights could create the impression that he at least sometimes confuses moral and legal principles. This seems to be supported by his (Dworkin 1978: 344) "refusal" to clearly distinguish between or at least delineate the two categories of principles. In contradistinction to legal rights which are institutional rights, "background moral rights ... enter into the calculation of what legal rights people have when the standard materials provide uncertain guidance, and some positivists' thesis, that legal rights and moral rights are conceptually distinct, is therefore wrong" (Dworkin 1978: 326). Political morality thus contains background "moral" rights which are described by legal principles: "People have legal rights, and principles of political morality figure ... in deciding what legal rights they have. If we mean, by a 'legal principle', a principle that is in principle eligible for this role, then all the principles of political morality that have currency in the community in question, at least, are legal principles" (Dworkin 1978: 344). According to Dreier (1986: 893) Dworkin (1978) distinguishes four "categories" of legal principles: (i) principles explicitly embodied in the constitution or the statutes of a legal system, (ii) principles