1. Introduction

Massimo La Torre, Leone Niglia and Mart Susi^{1, 2}

This book's aim is to take seriously the legal theoretical thesis that the law has a double dimension: a 'real' or 'conventional' dimension, which is somehow a matter of course and a reflection of the concrete legal practice in the world of facts, and an 'ideal' or 'normative' dimension, which one finds in the aspirations and claims that accompany that same legal practice and facts. Law is factual, but it is also ideal and/or normative, and this is in the common perception of citizens and legal practitioners related to a notion of justice. This double dimension of law has been articulated in different ways by several philosophers of law and legal scholars, and has recently found a powerful elaboration in Professor Robert Alexy's theory of the nature of law. In this book we take as a starting point Professor Alexy's proposal and at the same time attempt to present an original discussion about law and rights. As a matter of fact it is legal rights and principles that best express what is commonsensically meant by the ideal and normative dimensions of law.

However, principles are not a matter of course in legal doctrine. Especially in the form given to it by Professor Alexy, who, on the one side, by stressing the role of principles in law, intends to connect law and morality, while, on the other side, offers a notion of principles as optimization commands, which, in order to be operative, need to refer to a specific form of reasoning, that is, weighing. And weighing is mainly ruled by a standard of proportionality. In Alexy's own words: 'Now, there are numerous objections raised against principles theory, among which the one that the relation between constitutional rights and morality, and between legal and moral argumentation, as established by the theory is mistaken. This objection appears in two altogether different versions. The first version claims that principles theory contains too little

¹ The book contains articles based on presentations delivered at the conference "Human Rights and the Controversy About the Nature of Law", held at Tallinn University on 09–10 February 2017.

² This chapter contains significant sections of text quoted from subsequent chapters in the book.

morality, the second that it contains too much. The first version can be called the “objection of undermoralization”, the second, the “objection of overmoralization”. An opinion is defended that “the balancing process itself depends on our intuition as to the relative weight of the conflicting principles”. A reply to this is the thesis that classifications can be based on rational arguments. Thus, the objection to the argument from intuitionism is the argumentation thesis.’

‘The argumentation thesis says that propositions about intensity of interference and degrees of importance lend themselves to rational justification. In the field of balancing, reasonable disagreement is evident when different classifications can be justified with rational arguments, that is to say, are discursively possible. For all that, it remains of pivotal importance that the claim to correctness not be given up on the ground that the reasonableness of disagreement is acknowledged. Correctness qua regulative idea has the consequence that existing disagreement and, as in the data-screening decision, institutionally resolved disagreement by means of majority rule remains open for future argumentation.’ This is – according to Professor Alexy – the ideal dimension of legal argumentation.

Another way to present the ideal dimension of law is by referring to the so-called Radbruch formula. This is done in the book by Martin Borowski. A common short form for Radbruch’s formula is ‘extreme injustice is not law’. Violations of equality rights in the form of extreme discrimination (disavowal formula) may be ‘qualified extreme injustice’, which is an instance of ‘extreme injustice’. Severe violations of liberty rights, severe violations of positive rights or severe violations of equality rights below the threshold of extreme discrimination (intolerability formula) may represent ‘extreme injustice’, too. This is to say – such is Borowski’s central thesis – that cases of the disavowal formula are special cases of ‘intolerable injustice’ or extreme injustice.

In this way, positive law that lacks a character of equality is ‘not law’. If and when the expression ‘law’, as it is found in ‘not law’, means ‘norms that have legal character and legal validity’, then ‘not law’ includes also the consequence of the intolerability formula, the lack of legal validity. ‘Not law’ covers both the legal consequence of the intolerability formula and the disavowal formula. This is to say that ‘extreme injustice is no law’ expresses both the intolerability formula and its special case, the disavowal formula and, thereby, the greater Radbruch formula as a whole. This short form is vindicated by including the disavowal formula in a meaningful way within the comprehensive Radbruch formula, not by ignoring it or marginalizing it with an implausible reading.

According to the argument made by Professor Coutinho, ‘human rights are neither practice-dependent, nor practice-dominating. What are they then? I believe what they always were: a normative idea and a corresponding discourse. That idea aims at reconfiguring, or at least reforming, actual institutions, both internal and international, and that by achieving a continuity

between human rights and rights that are granted by internal legal orders (namely, “legal rights”) and by accomplishing an appropriate degree of protection at the international level (ideally with a superimposition of human rights discourse over classic international law, with a correspondence between human rights and international legal rights of human beings being achieved).’

It should be ensured that, from the perspective of the normative idea of human rights, one should never consider the continuity or correspondence between human rights and legal rights (either national or international) to have been fully achieved. Not only because that would be unrealistic, but – most importantly – in order to preserve the continuously critical (also self-critical) nature of the idea of human rights – that being a value in itself considering precisely its normative or regulative nature. Paradoxically then, from the perspective of the idea of human rights, the discontinuity between human rights and the practice of ‘human rights’ – the tentative nature of any practice of human rights, being any institutional expression of them to be taken as a mere ‘attempt’ – is to be positively viewed, since it implies the continuous consciousness of the normative nature of the former.

It is not denied that there is a lot to explore regarding that idea and the corresponding discourse, nor to deny the internal and external difficulties pertaining to it. As to the difficulties which are internal to human rights discourse itself, there are still several open questions regarding the exact interests to be protected, in what degree and form, exactly by whom and precisely against whom. Furthermore, it must be acknowledged that human rights, as practice-independent, are correspondingly not ‘free from metaphysics’, and the relevant concept of metaphysics to be considered is in itself debatable.

One cannot ignore also those difficulties that are external to human rights discourse – external since they concern reasons antithetical to human rights and not merely adversarial reasons ‘for’ them. The latter reasons pertain to a sovereignty-centred international law, which persists as a discourse incommensurate with the former, at least to the degree in which sovereignty is taken there to be a value that is unconditional to human rights (which is still the case, even if one cannot deny that those harms ‘produced by the structure and operation of international law’ were already mitigated to a degree, with a certain porosity of international law to human rights having been achieved).

The latter difficulties are not merely a matter of fact, even if corresponding to reasons that are antithetical to human rights. It would certainly be obtuse to ignore the normative reasons still standing for a sovereignty-centred international law, namely reasons concerning peace and stability in international relations (also in relations between human rights-violating states and non-human rights-violating states, if there are any) or respect due to cultural differences (to grant multicultural respectability to human rights discourse by adjusting it to cultural differences is an uncertain exercise, however noble, since it either

reduces the former to an uncharacteristic minimum, or risks ‘hammering’ human rights into cultures that apparently resist many of their features).

What is the difference between Alexy’s account of the ‘dual’ nature of law and the rival view offered above, of the single nature of law on the basis of Kant’s argument? This is the main question posed by Pavlos Eleftheriadis’ chapter. ‘If we follow the Kantian argument, we cannot say, with Alexy, that constitutional rights are “institutionalized” by the fact of legislation. There is nothing to be “institutionalized” because there is no canonical statement of human rights to be found. Conversely, the law is not a list of rules or standards or any other kind of triggers for action. What makes action binding under the law is our own reason, which interprets the social world around us, including the laws made according to standing political processes of our community, if that community respects the fundamental principles of equal citizenship as outlined in a constitution. Under the Kantian model, facts matter, but not as in the form of the “enactment” of a particular rule.’

This is a central argument made by Professor Eleftheriadis in his chapter: ‘They can only be taken into account as exercises of the public office of legislation. Law is part of the process of considering what to do, taking into account the decisions of any legitimate legislation or the judgments of legitimate courts. Our moral reasoning, and especially the idea of a natural duty of justice to support legitimate institutions, tells us to take into account these official decisions. If Kant’s argument is right, the legal point of view is holistic in that it assesses the institutions of the state in their entirety: legislature, executive and the judiciary. Institutions stand or fall together, so to speak. If they constitute a legitimate manifestation of the principles of public right, then political obligation follows. What law requires is not the result of the exercise of power, but is the outcome of practical judgment, exercised in the light of relevant traditions, political processes and customs, as the case may be.’

The error of the positivist theories of the constitution, as claimed by Eleftheriadis – ‘would be to reduce questions regarding the legitimacy of institutions to a fact of enactment. This is here seen as merely a technical process of bringing forth laws. Law however – says Eleftheridas – does not work in this way. The statement that a law exists does not make that law binding. We cannot reduce the constitution to a causal mechanism for producing “valid” rules. The constitution is not such a mechanism. It is instead an institutional framework with which we can make sense of our own role in a political community as free and equal citizens and which provides grounds for persuasion over the most significant political matters of the day. The constitution is part of an ongoing process of applying practical reason to political affairs in light of arguments about constitutional justice (and procedural fairness among competing political groups or interests.’

‘A constitution exists’ – this is Eleftheriadis’ thesis – when political matters are organised legally, i.e. with the discipline provided by the rule of law. It is a practical judgment, defended and justified like all others. His is a strong ideal view. However, he believes that the Kantian argument introduces a distinction between higher law – as the law of public right – and ordinary law – as the outcome of legislation. If there is going to be higher law, there must be a way of making it higher law. So there must be an appropriate power of making a constitution. Law in this way refers back to enactment once again; whenever it exists, such enactment will be the most important legal power. Kant’s argument about the origin of law in the idea of an *a priori* constitution would be that there is no natural starting point for our “deliberation.” We cannot assume that there is a factual test for a supposedly “first” constitution, or a minimum goodness or a minimum function that must be performed for a constitution to exist.

The substantial core of constitutionality is, in most cases, the principle of proportionality and the central method for solving constitutional cases is the balancing. This is the main point raised in Madis Ernits’ chapter. ‘The Supreme Court of Estonia’ – he claims – ‘appears to be right and its method, developed since 1997, is a success’ just in making proportionality a supreme standard of judicial review. The Estonian legal scholars, critics of this approach, ‘have not been able to raise an issue that would cause us to be sceptical regarding the correctness of this practice in general. Although originally developed explicitly for German context, Alexy’s principles theory has proven’ – Ernits optimistically argues – ‘to be a useful tool for constitutional review in Estonia, as well. In the case of principles, the principles theory, even in hard cases provides the constitutional court with a structure that makes the reasoning more rational.’ However, not all constitutional norms have to be considered principles. ‘The deontological structure of a constitutional norm has to be found with help of interpretation on a case-by-case basis, taking into account that there are logically two different kinds of norms – principles and rules. Instead of questioning the proportionality and balancing as such, we could rather concentrate on the problem of structural interpretation, i.e. on the clarification, which constitutional norms are not principles but rules. There are rules among constitutional rights as well as among the norms relating to the organisation of the state. Their identification seems to be one of the constitutional interpretation challenges that will need more effort in the future.’ This approach is largely based on a logical difference in structure between rules and principles that however remains controversial.

Professor Matthias Kaufmann’s chapter investigates the purport of pluralism for a conceptualization of rights. ‘Legal pluralism is just one of the reasons why I think that human rights have to be at the foundation of any law. The other one is that today we do not have universally accepted natural law as

a possible reference, nor can we accept legal rules or legal decisions simply because they are posited by someone claiming authority over us.’ This is why Professor Kaufmann holds the thesis that ‘the ruling intuition of modern law should be negotiation’.

‘This should happen in two ways: for as long as possible, law should be understood as something created within the context of a common deliberation of free and equal persons. Clearly we know that this is fictitious, but it is the Aristotelian idea of *politeia* as a mutual ruling and being ruled among free and equal persons that builds – in the sense of a regulative idea – the legitimating basis of modern democracies. As long as we have good reasons to interpret our law as a kind of regulation in this sense, we have a legislation that is open to democratic discourse; and that opens a way for people who feel mistreated by the executive organ(s) to (publically) ‘find’ their right by means of legal action, given that we generally operate under the rule of law.’

However, ‘in situations of legal pluralism, this is not – such as Kaufmann’s claim – a realistic way of resolving issues given that a common understanding of what is legally right and wrong is lacking, or, at least, actual situations do exist where no such common view of the principles of law is present and where the discussing parties do not concede each other a ‘reasonable disagreement’ because they do not even fully agree on what counts as reasonable. Disagreement on the applications of law is something that happens frequently. But the situations in which we are facing legal pluralism are not those in which marginal malcontents are given vent.’

In cases of fundamental disagreement between groups of a certain strength and with considerable power, we cannot – says Kaufmann – ‘go on and try to decide, to enforce, to dictate what law is – no matter who ‘we’ are in the concrete and specific situation, or, at least, we cannot do it without running the risk of social clashes or, perhaps, even civil war. So, this means, again, that we have to negotiate; however, this time in a different manner. Negotiation, in this sense, is not always carried out on a level playing field between equal partners with similar worldviews or similar explanations of how and why things happen.’ ‘Negotiations concerning concrete problems, therefore, do not have to lead to a unanimous worldview of all participants. It is much more important to find a common procedure for dealing with the topic; one which is accepted as fair and impartial by all participants in this limited area.’

Kaufmann thus proposes understanding law as ‘something posited in a certain sense following the ideals of unity and integrity as long as this is realistically possible. This is, above all, the case when what is posited can be seen to be legitimate because it is the result of democratic negotiations following a standardized procedure. In the other cases, more generally speaking, law is to be understood as a continuous, actual process of negotiations on a local level and the relative status quo of these processes.’ One is then confronted with the

problem that a clear standard procedure concerning how these negotiations should be performed is not available.

One has 'to find ways to avoid the abuse of an asymmetrical distribution of power. As a method to control state power, the concept of the rule of law had evolved rather early on. Connected to this, yet not identical, is the Kantian definition of the state of law (*rechtlicher Zustand*).⁷ In this way, the condition – or presupposition – for every negotiation involving legal questions, as mentioned above, is that it has to preserve and improve the situation of human rights for all individuals involved.

'Human rights' – this is Kaufmann's central claim – 'are therefore not to be understood as something derivative from any kind of law, be it national, international or transnational or even natural. They are norms that have been created by human beings over centuries as the theoretical basis for the criticism of 'pathological' legal orders to terror, need and despotism – and they have a dignity of their own. In this sense, human rights are at the basis of any legal system. And this more or less conceptual connection between human rights and legal systems may be understood as necessary in Alexy's sense because we may use it to describe and evaluate any legal system whatsoever, independently of the question whether its performers could be aware of human rights or not.'

In his chapter Professor Agustín José Menéndez addresses ideal criteria in law in relation to the issue of the increasing constitutional relevance of the European Court of Justice. He argues: 'The ECJ was reasonably successful in the way it discharged its self-assumed constitutional task in the first decades of European integration. Not only were the rulings very attentive and indeed deeply informed by the pluralistic nature and institutional setup of the European Union, but the Court avoided pushing its autonomous characterisation of the norms of Community law too far. The paradigmatic shift which followed from *Cassis de Dijon* led not only to a major structural change in the conception of economic freedoms, but also to paying much less attention to the pluralistic nature of European integration. The argumentative benefit assigned to economic freedoms, coupled with a tendency to distort the understanding of other colliding principles when assigning concrete weight to them and resort to biased criteria to determine the probability of future events have stressed, if not severed, the fundamental link between national and European constitutional law. The price of the wider autonomy in the short run may be a loss of legitimacy in the long run. The Court runs a double risk in that regard. As a supranational institution, it is not in a position to search for cover in the direct legitimacy of European decision-making processes, as that direct legitimacy is at best very thin. As a judicial institution, it is in a position to limit the realm of what is politically possible, but not of taking constructive political decisions,

even when the cumulative effect of its case law is the full disempowerment of all levels of government.'

'A special definition of the relationship between European and national courts as a 'judicial dialogue' – Professor Menéndez argues – 'is premised on the two parties speaking a common language, or what is the same, in all courts applying legal systems premised on the same normative principles through methods of reasoning and argumentation that are basically equivalent.' Menéndez leaves aside 'whether the concept of 'dialogue' is really appropriate to describe the relationship between courts'. The arguments put forward in Menéndez's chapter intend to 'lead us to the conclusion that there might be no real dialogue between European and national courts since the courts have radically different understandings both of what is the substantive content of the supreme standard of European constitutionality and about the basic methods of constitutional reasoning. Formal similarities (a yardstick of constitutionality pitched to fundamental rights, proportionality as the key working tool of the courts) cover and hide fundamental disagreements. The growing number of constitutional conflicts pitting the ECJ against national constitutional courts are a symptom of both the judicialisation of politics in Europe and of the tensions that have been explored in this chapter. For a period, conflicts were largely confined to matters of competence between courts, even if expressed through different understandings of how specific fundamental rights were to be constructed. By now, as the recent rulings of the Italian and the German Constitutional Court seem to indicate, the conflict has become a fully substantive one.' Menéndez's point is that proportionality can mean different things according to the different content given to the constitution. In this sense, constitutions prevail on constitutionalism insofar this is conceived as a doctrine of judicial reasoning.

Professor Rein Müllerson's chapter introduces a note of caution in the conceptualization of rights as universal (and as 'ideal') category: 'Even the idea of the universality of human rights, notwithstanding the good intentions of most of its advocates and regardless of the positive results these ideas have produced, has' – he forcefully argues – 'its dark side. Whether done purposefully to destroy societies that do not conform, or in the sincere belief that what is good and true for us is (or should be) good and true for all, such a forced homogenization of the world by way of a heterogenization of individual societies tears apart many countries, destroying societal bonds that had developed during centuries or even millennia and are not amenable to rapid change.' 'As can be seen from the history of human rights, even from the very notion of three generations of human rights – civil and political rights, economic and social rights, and so-called solidarity or collective rights (e.g., the right of peoples to self-determination, the right to a clean environment, the right to peace, etc., though sometimes the conceptualization of these or some other

values as human rights may be questionable) the emergence and evolution of human rights has been a gradual process. Moreover, it has been a painful process with many setbacks; it has always been necessary to fight not only, and initially not at all, for the observance of human rights, but for conceptualizing something as a human right.’ The struggle for the recognition of rights of women and later rights of people with non-traditional sexual orientation are seen as too recent to justify that human rights are universal and natural. It has always been necessary to fight, he believes, for recognition of even the most important and basic values and fundamental interests as human rights, and then for their observance in practice. What may be obvious for many or even for most human beings today may have been heresy for many or for most people centuries or even decades ago. They were needs and claims that, when first raised, were usually considered by most people irrational, wrong and even absurd.’ This is Müllerson’s realist thesis.

‘Universalists, that is, proponents of a universal history for the whole of human kind and universal human rights, be they Marxists or liberal democrats, tend’ – this is Professor Müllerson’s main point – ‘to underestimate the differences, not so much even between humans as between human societies’. However, universalism cannot be too easily dismissed. Strong cultural relativists, in emphasizing only the differences, fail to appreciate the universalities that have existed in all or most human communities, and which in a globalizing world tend to grow in importance. If the differences seem evident and striking, commonalities, more often than not, are to be discovered in the enactment of proximity and communication. Our common humanity is deeper, but therefore also better hidden than our differences. However, though as physical, physiological or physiological beings all the humans are very much the same, there are huge cultural differences between societies in the world.

Professor Leone Niglia’s chapter moves from an analysis of private law scholarly interpretations of Alexy’s *A Theory of Constitutional Rights* and *A Theory of Legal Argumentation*. In considering diverging strands of private law scholarship on constitutional rights and their implementation through courts, Professor Niglia offers a critical analysis of the ‘ideal’ dimension of law thesis understood as ‘institutionalisation of reason’ as in Alexy’s thought. Niglia claims that ‘two sets of conceptions of the *institutionalization of reason* emerge, depending on which strands of writings of, and of reinterpretations of, Alexy’s views one considers – one is totalizing and another pluralistic’. A further claim advanced in Niglia’s chapter is that ‘this diverging legacy is traceable to an inherent unresolved tension in Alexy’s legal thought’. Finally, it is also argued that Alexy’s position is ‘far from entirely reducible to either position – neither just totalizing nor just pluralistic’; and yet, that it might be considered as ‘closer to the “totalizing” position, due to its choosing the path of resolving social conflicts through the deployment of principled reasoning qua

the conjuring up of “constitutional balancing” as the preferred form of legality’. Professor Niglia argues that ‘such position of Alexy in turn participates in a characteristic approach to law and legal thought developed in the last 60 years or so’.

Professor Mart Susi’s chapter addresses the issue whether fundamental rights are the same online and offline, and whether private online portals have the capability to balance conflicting rights in their portals. As for the first matter, the chapter shows that the argument originating from the universalist or practice-independent perspective and claiming that human rights online and offline are the same cannot be justified. This is because the doctrine of sameness, leading to the understanding that freedom of expression and the right to privacy online are of equal importance and deserve equal protection, remains in the stage of contestation. This contestation by itself does not lead to the rejection of balancing as the process of online content assessment, since the initial weight of rights to be balanced changes the scales, but not the process itself. The balancing paradigm has therefore undergone a shift in the online dimension, where the consensual idea of equal weight of the right to privacy vis-à-vis freedom of expression is replaced by a practice-dependent weight assigned to these rights by the online stakeholders. The situation is therefore characteristic of utilitarian or relative understanding of human rights. It is appropriate to speak about balancing within the meaning of particular online portals. The balancing paradigm in the online dimension is characterized by fragmentation and proliferation. The idea of sameness of online and offline human rights is based on the perspective of universality of these rights, but the currently developing online balancing paradigm rests on the utilitarian perspective.

As for the second matter dealt with in Susi’s chapter, ‘it is not clear’ – it is argued – ‘whether the epistemic inability of online portals to articulate reasons for their decisions regarding conflicting rights means that these portals are not capable of balancing. This epistemic inability is rooted, first, in the shortness of time to react to conflicts of human rights online, and secondly in the huge volume of potential conflicts that the portals are continuously faced with. Balancing can be understood as an ordering effect of conflicting rights. As follows, the aspect of transparency and the possibility of retroactive evaluation of the weight assignment to conflicting rights is no longer an indispensable criterion of the balancing process. There is no quantitative evidence to suggest that the online balancing of conflicting rights produces results which are significantly different from what the courts would produce via judicial balancing of similar conflicts. Therefore, a dilemma emerges. From one side, if transparency is an inseparable element of balancing, then it has to be stated that the online portals are not capable of balancing. From the other side, should one be content with the approach that balancing can produce an ordering result

irrespective of articulated reasons, provided that there are available standards which are applied, then more evidence is needed to accept or reject the idea that private online companies are capable of balancing.’

Professor Massimo La Torre’s chapter tries to resume the discussion about the formal structure of human rights and then to offer a possible foundation of human rights that is alternative to the now predominant justificatory paradigm. Human rights will thus be reconsidered as the outcome of a specific human predicament. They are projected as first of all the result of an existential situation. Four normative situations are thus elaborated to give rights a concrete shape as fundamental devices of a liberal State. The attempt is made to be able to offer a justification that is prior to the assumption of normative perspectives. A bedrock for normativity is searched for and is provisionally found in the existential condition of uncertainty and disorientation that seems to be a constant issue in the human predicament. The four normative situations proposal is also meant to reconcile doctrines that at first sight could seem in tension with one another, and to add an ontological appendix to views that are projected as mainly justificatory.

La Torre considers and takes into account Professor Alexy’s influential doctrine as a successful paradigm to be offered to judicial decision and the attempt is made to somehow include such account into a more general reassessment of rights. Nonetheless, two theses of Professor Alexy’s theory are seen and pointed out as problematic, according to La Torre: on the one hand, the justification of rights as the ground of their existence, and, on the other hand, their being equated with precepts of optimization and consigned to balancing as their specific procedure of application. However, the chapter mainly focuses on the first point, by criticizing what is seen as an extreme version of the idealization of the legal dimension, that is, making existence collapse into normative justification. This criticism adds to Menéndez’s criticism of Alexy’s mathematical balancing formula; to Niglia’s critical analysis of the ‘institutionalization of reason’ in Alexy’s thought, with Niglia’s legal theoretical and legal comparative criticism of the reduction of moral arguments to the total-constitutional; and to Tuori’s views, also critically addressing Alexy’s thought, of ‘general legal principles’ as ‘normative’ in their inhabiting ‘legal cultural levels’, as ‘multi-layered’.

‘The polysemous nature of “legal principles” may give rise to confusion, especially if a particular meaning is transferred to a foreign context.’ This is the starting point of Professor Kaarlo Tuori’s chapter. ‘Decision principles, examined by Dworkin and Alexy, are directly applicable, surface-level norms, constituting a type of norms complementary to legal rules. By contrast, general legal principles, summarizing normative contents of a branch of law or a legal order as a whole, are inhabitants of the law’s sub-surface, legal cultural levels. Varieties of legal principles exist, all with a particular location in the

multi-layered structure of a legal order and a particular role in the functioning of the law.'

'In partial, Tuori is critical about Alexy's strategy of making principles collapsing into optimization precepts all too similar to policies. The distinction between morals-related principles and policies aiming at specific societal goals' – as is pointed out in Tuori's chapter – 'was central for Dworkin's "taking rights seriously" thesis but it has been downplayed by Alexy'. The latter might even be criticized for the making of principles policies, that is, for reinterpreting normative standards in terms of economic efficiency criteria, as indeed might be meant by the reference made by Alexy to Pareto optimization as a rational guide whenever applying legal principles.

'The distinction between principles and policies, which can be extended not only to surface-level principle-like norms but also to general legal principles located in the legal cultural sub-structure, should nonetheless be retained for the sake of normative argumentation' – this is the central point raised by Tuori – at least if we want to let 'fundamental rights perform their power-restrictive function and for providing the law with doctrinal means in its self-defence against excessive instrumentalization. That distinction also facilitates understanding the backdrop to conflicts of authority between European Union and Member State law: the clash between policy- and principle-orientation.' The book thus registers, and gives voice to, the ongoing debate on the nature and impact of human rights, Alexy's theory is vindicated as one of the most elaborate accounts of human and fundamental rights in the contemporary jurisprudence. The question however remains whether an idealization in terms of principles that are doomed to 'precipitate' into teleological arguments is able to guarantee the dialectics between the ideal and the positive dimension of law.

This possible weakness of Alexy's theory may somehow be confirmed by his more recent transformation of principles from optimization precepts into ideal ought that is said to be compatible with logically contradictory concrete normative statements.