Humberto Ávila

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Theory of Legal Principles

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THEORY OF LEGAL PRINCIPLES

By

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THE AUTHOR

HUMBERTO ÁVILA is a specialist in Corporate Finance from the School of Economic Sciences of the Federal University at Rio Grande do Sul (UFRGS), and a Master in Law from the Law School of UFRGS. His thesis "Provisional Measure in the 1988 Constitution" was published by Editora Sérgio Fabris in 1997. With a CNPq-granted scholarship, he went to the University of Munich, Germany in 1996, where he obtained a Certificate of Studies in Methodology of the Science of Law under the instruction of Claus-Wilhelm Canaris, and the degree of Doctor in Law under the instruction of Klaus Vogel. His *summa cum laude* doctorate dissertation was published in 2002 by Baden-Baden's Nomos, under the title "*Materiell verfassungsrechtliche Beschränkungen der Besteuerungsgewalt in der brasilianischen Verfassung und im deutschen Grundgesetz*" (Substantive constitutional limitations to the power to tax in the Brazilian Constitution and German Fundamental Law).

Besides practicing law and writing legal opinions in Porto Alegre, the author is also a Professor of Tax, Finance and Economic Law at the School of Law of UFRGS, where he was admitted through a public contest in which he qualified with the first place. He is a Professor of the LL.M and Ph.D. programs at UFRGS, where he is also a Member of the Graduate Program Coordinating Committee and the Coordinator of the Tax Law Specialization Program.

The author is the President and a Founding Member of the International Institute of Public Law Studies (IIEDE) and a counselor in the Consulting Board of the Brazilian Society of Public Law (SBDP). He is also a member of the Brazilian Institute of Tax Law (IBDT), the Brazilian Association of Finance Law (ABDF), the International Fiscal Association (IFA), the Lawyer Institute of Rio Grande do Sul (IARGS), the Institute of Tax Studies (IET/RS), the Luso-German Association of Jurisprudence and the Brazilian-German Association of Jurisprudence.

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Every work, however short in length or large in ambition, depends on the support and encouragement of several people. So does this study. Thus, I wish and am pleased to thank:

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The original text of this work, initially written in Portuguese, was translated by Jorge Todeschini, whom I thank for the superb translation. A few marginal changes were made by the author and a few others were suggested by Professor Frederick Schauer.

FOREWORD TO THE GERMAN EDITION (THEORIE DER RECHTSPRINZIPIEN)

I.

In the past few decades, the most important forward thrust in the fields of Legal Theory and Philosophy has come mainly from the Anglo-American legal universe. That is especially true of the theme of general principles of Law, in which, following the works of *Ronald Dworkin*, the distinction between rules and principles made its way into the German-speaking legal universe, having found many followers despite some variations and developments in some aspects. The fact that this theme is intensely debated in the Ibero-American legal universe as well has not yet been presented enough in our country.

We are lucky, therefore, that Humberto Bergmann Ávila, with his profound knowledge of the German Legal Science and excellent command of the German language, has presented his "Theory of Legal Principles" also as a dissertation in German. Born in 1970, the author is a Professor of Tax, Finance, Economic and Constitutional Law at the Federal University at Rio Grande do Sul and a lawyer in Porto Alegre, Brazil. He is connected to the German Legal Science above all for his 2002 Doctor degree obtained with his dissertation on "Substantive Constitutional Limitations to the Power to Tax in the Brazilian Constitution and German Fundamental Law," which was presented to the Ludwig-Maximilians-Universität in Munich and published in Baden-Baden in 2002.

II.

Despite his openness to the positions developed heretofore and his willingness to incorporate and preserve fruitful viewpoints of other writers, the author imprints this current work with a clearly independent profile and original conception. An initial thesis of pivotal importance states that the opposition of rule and principle, both understood to the same extent as norms, cannot be seen as an exclusive contradiction. Rather, a legal norm can operate both as a rule and as a principle. Furthermore, the author does not acknowledge the specificity of principles in the fact that they can and ought to be balanced and have a dimension of weight; rather, he proves that this is fundamentally true of rules as well. Consequently he looks for the distinction between rules and principles somewhere else, and finds it

firstly in the fact that rules have a direct description of a behavior or a jurisdiction assignment as its object, aiming only indirectly to the realization of a goal, whereas principles directly aim to the realization of a goal and only indirectly influence the behavior or jurisdiction assignments required to achieve such goals. Against that backdrop, the author furthers additional criteria and develops a different proposal of his own to distinguish between rules and principles.

Next, he expands his concept with an additional plane, adding postulates to the rules and principles. In doing so, he has in mind criteria such as proportionality, reasonableness, and legal efficiency and certainty, which are usually called principles, quite often without much thought. The author faces such use of language and such way of thinking by arguing that postulates, differently from principles in a more strict sense, do not aim to the direct realization of a goal; on the contrary, they perform the distinct function of prescribing and guiding some thought and argumentation processes, thus structuring the way rules and principles are applied. Hence, postulates are not located on the plane of rules and principles, but on a metaplane, which is the reason the author calls them second degree norms or application norms.

Notwithstanding the high level of abstraction and the density of the language and argumentation in a large part of the work, the presentation is enriched very elegantly with practical examples, taken from the Brazilian and German Law and found mostly in Constitutional and Tax Law, in accordance with the focus of the author's scientific work in substantive Law. Such fact also outlines the connection of his interest in legal theory to an ample legal-practical foundation – a combination that once again proves its fecundity in this work.

This is the reason it is my desire that this book be received in the German discussion about the Theory of Law with the interest and relevance it deserves.

Munich, August 2005

Prof. Dr. Dr. h.c. mult. Claus-Wilhelm Canaris
Professor of Civil Law and Science of Law Methodology
at the University of Munich, Germany.
Doctor Honoris Causa at the Universities of Lisbon,
Autonomous of Madrid, Athens and Graz.

FOREWORD TO THE BRAZILIAN EDITION (TEORIA DOS PRINCÍPIOS)

I called HUMBERTO as soon as I finished reading the book originals to tell him about my sincere admiration for the intellectual work it synthesized.

HUMBERTO has developed an extremely important contribution to what I would resort to French to call a *nettoyage* of jurisprudence. A conference I attended quite recently presented the distinction between interpretation methods, whether grammatical, teleological and so on. I suddenly realized that the lecturer was more than two hundred years old, truly an unburied corpse, to the sound of Ravel's *Bolero*...

HUMBERTO, as JOSÉ RÉGIO would say it, loves the distances and the mirages, the cliffs, the rapids, the deserts. When the soul is not small – quoting from RÉGIO to PESSOA – we shout the wonderful "I am not going this way; I am going only where my steps take me." This is it – I told HUMBERTO – "your book is a walk on your own steps." This book is personally his.

This is why this book is essential and truly breaks a trend that makes principles cliché, rocking the ground of the "self-geniuses." This is what they fear: when questioned, they react like one fighting for a life saver of some sort. Their problem is they have a single buoy, anchored to the bibliography of ages past – and poorly understood if more recent. They are common townsfolk, without a bibliography...

Let me tell a story. On the last day of the contest I took to become a Full Professor at Largo de São Francisco, as soon as the results were announced, another Professor, who had come from a different State and happened to be there, greeted me and said "This is great! Now you can sell your books!" To this day I do not know whether he meant it in jest or not. But I have the impression that some of them have traded their books long ago, and the buyers can now enjoy untouched old books never read before...

HUMBERTO's book fascinates me. It confirms my beliefs that interpretation is the interpretation/application of texts and facts and that balancing is a moment within the interpretation/application of the Law.

His guidelines for the analysis of principles – item 2.4.6 – make me see even more clearly that the Law is not interpreted in slices.

The proposition of a heuristic distinction between rule and principle – and postulates – and an "inclusive alternative" is extremely rich. And the tripartite model (rule, principle and applied normative postulate – item 3)

illuminates the terrible darkness in which we know who gets lost. The exam of the postulate of proportionality is simply superb.

The text is multiple and varied, always in a positive way. The expounding of the principle of morality – item 2.4.7 – would have to be the first reading assignment for the half-baked "jurisprudents" who think morality replaces the ethic of statutory legality with another one, opposed to the statutes... What some have said in such matter is regrettable.

This is why I took the initiative to tell HUMBERTO that I would immensely love to write the foreword of this book – because then I would indirectly participate in the substantial contribution it brings up to our legal thinking. Being beside him makes me intellectually noble.

Prof. Dr. Eros Roberto Grau
Full Professor of Economic Law at the University of São Paulo. Justice of the Brazilian Supreme Court.

CONTENTS

CHAPTER 1

FIRST CONSIDERATIONS

The idea of writing this book sprang from the impact that previous articles on legal principles had on the legal environment.[1] One more reason joined: the permanent relevance of the distinction between principles and rules, which has been growing in jurisprudence and case law debates.

Public Law studies, mainly those of Constitutional Law, have significantly advanced concerning the interpretation and application of constitutional norms. Today, more than ever, it matters to construe the meaning and delimit the function of those norms which, setting forth goals to be achieved, work as the foundation for the application of the constitutional order — the legal principles. It is even possible to say that constitutional jurisprudence is currently excited about what has become known as a *State of Principles*. One must point out, however, that remarkable exceptions prove the rule that the excitement for novelty has brought on excesses and theoretical problems that have hindered legal order effectiveness. This is, mostly and paradoxically, about the effectiveness of elements called fundamental — the legal principles. Within that frame, some issues cause perplexity.

The first of them is the very distinction between principles and rules. On one hand, their distinctions due to structure and mode of application and collision believe as *necessary* some qualities that are merely *possible* to these normative species. Moreover, such distinctions emphasize the importance of principles, which eventually disparages the role of rules. On the other hand, these distinctions have given principles the status of norms that, being related to values that require subjective, personal analysis, can not be intersubjectively investigated in a controlled way. As a result, the indispensable discovery of which behaviors to adopt in order to realize principles is replaced with an investigation limited to the mere proclamation, at times desperate and inconsequent, of their importance. Principles are revered as the *bases* or *pillars* of the legal order, but no elements are accrued to this veneration that make their understanding and application better.

The second issue to provoke questioning is the lack of clear conceptual distinctions to manipulate the normative species. That happens not only because several different categories are used as synonyms, such as is the case of the indiscriminate references to *principles*, here and there mixed with *rules*, *axioms*, *postulates*, *ideas*, *measures*, *maxims*, and *criteria*, but also because many postulates, though distinct from one another as will be seen, are manipulated as if they required the same analysis from the

interpreter, such as is the case of the uninformed allusion to *proportionality*, often mistaken for *fair proportion*, or *standard of reasonableness*, or the *prohibition of excess*, or the *equivalence relation*, or the *duty of weighing and balancing*, or the *duty of practical accordance*, or even *proportionality in a narrow sense* itself.

True, it is not the correct name of a principle what matters most. What is really decisive is to know the safest way to ensure its application and effectiveness. However, the application of the Law is dependent on those very institutional and speech processes without which it is not realized. The raw material interpreters use — the normative text or provision — is merely a legal possibility. The transformation of normative texts into legal norms depends on the interpreter's construing the meaning of their contents. These meanings, because of the duty of justifying the grounds for decisions, have to be understood by those manipulating them, which is even a condition to allow their addressees to understand them as well. This is exactly the reason why it is increasingly important to make distinctions among the categories judges use. Not only is the excessive use of categories opposed to a scientific requirement of accuracy, without which no science deserving its name can be built, but also it hinders the accuracy and predictability of Law, both of which are vital to keep the Rule of Law.

It is not hard to see, then, that this is not in order to praise a merely analytical requisite of distinction for the sake of separation. The names an interpreter gives to categories is of secondary matter. The need for distinction does not arise out of the existence of several names for numerous categories. It arises, instead, out of the need to give different phenomena different names.[2] This is not, therefore, a mere distinction of names, but a demand of conceptual accuracy: where there are many classes of exams from a practical view, it is advisable that they be classified differently as well.[3] Constitutional jurisprudence ought to seek accuracy as well because it affords better means to control governmental activity.[4]

This book, then, intends to help understand and apply principles and rules better. Its target is clear: to keep the distinction between principles and rules whereas structuring it on different foundations than those jurisprudence ordinarily employs. It will be shown, on one hand, that principles not only explicit values, but also set forth precise species of behaviors, though indirectly; on the other hand, the creation of conducts by rules is also to be weighed, even though the behavior set forth in advance may be overcome, depending on the accomplishment of a few requirements. That will surpass both the mere praise of values, which does not create behaviors, and the automatic application of rules. A model is proposed to explain the normative species, which includes structured weighing on the

application process while encompassing substantive criteria of justice in its argument, through the analytical reconstruction of the concrete use of normative postulates, especially those of reasonableness and proportionality. All of that is done with a focus on the ability of intersubjective control of the argumentation, which often degenerates into capricious decisionism.

Distinguishing principles and rules has become fashionable. Public Law research, granted a few exceptions, deals with the distinction as if it were so obvious as to dispense with further comments. The separation among normative species seems to gain unanimity. And unanimity does not sow the seeds of critical knowledge of normative species, but rather the belief that they are like that, period.

It has become commonplace to state categorical distinctions between principles and rules. Norms are either principles or rules. Rules need not and can not be weighed; principles need and ought to be weighed. Rules set forth definitive commands, regardless of factual and normative possibilities; principles set forth preliminary commands, dependent on the factual and normative possibilities. When two rules collide, one of them is not valid, or else an exception should be made to one of them in order to overcome the conflict. When two principles collide, both overcome the conflict equally valid, and the judge must decide which one prevails.

The analysis of such statements, however, presents some doubts. Is it so that all normative species behave as principles or rules? Is it so that rules can not be weighed? Is it so that rules always set forth definitive commands? Is it so that the conflicts of rules are only solved if one of the rules is invalid or if an exception is made to one of them? This book not only answers these and many other questions that arise out of the analysis of the distinction between principles and rules, but it also presents a new paradigm to distinguish and apply normative species.

Truly enough, while scholars in general understand there is interpretation of rules and weighing of principles, this work criticizes that separation and attempts to show it is possible to weigh in rules as well. While scholars sustain that the consequence of a rule ought to be implemented when its condition is met, this study differentiates the incidence of rules from their applicability in order to show that a number of factors are to be weighed in to enable the application of a rule which go beyond merely verifying that facts established previously have happened. While scholars sustain that a given provision is exclusively either a rule or a principle, this research defends inclusive alternatives within species at times generated from a single provision. While scholars refer to proportionality and reasonableness sometimes as principles and sometimes as rules, this work criticizes these conceptions and, deepening a previous study, proposes a new category called

normative applicative postulates. While scholars equal reasonableness and proportionality, this study criticizes such model and explains why it can not be upheld. While scholars understand reasonableness as a field with no structure or normative basis, this investigation retraces decisions to give them a doctrinal standing. While scholars equal the prohibition of excess and proportionality in a narrow sense, this study distinguishes them and explains why they are distinct species of argumentative control. This is all done in as straightforward a way as possible, including examples in the course of the arguments.

By doing so, conditions are created that incorporate justice into the legal debate, without risking the consistency of the arguments.

In order to do that, the first object of investigation is the phenomenon of interpretation in Law. The aim here is to understand that the classification of certain normative species as either *principles* or *rules* depends in the first place on axiological connections that are not ready prior to the interpretation process that unveils them. Then, a definition of *principles* is proposed, aiming to understand what their unique characteristics are when compared to other norms of the legal order. Thirdly, the conditions for the application of principles and rules are examined, which are the normative applicative postulates.

NOTES

1. ÁVILA, Humberto Bergmann. A distinção entre princípios e regras e a redefinição do dever de proporcionalidade. *Revista de Direito Administrativo* (215):151–179, Rio de Janeiro: Renovar, jan./mar. 1999. Idem. Repensando o princípio da supremacia do interesse público sobre o particular. *Revista Trimestral de Direito Público* (24):159–180, São Paulo: Malheiros, 1999.
2. ÁVILA, Humberto Bergmann. A distinção entre princípios e regras e a redefinição do dever de proporcionalidade. *RDA* (215):151–152, Rio de Janeiro: Renovar, jan./mar. 1999.
3. HUSTER, Stefan. *Rechte und Ziele: Zur Dogmatik des allgemeinen Gleichheitssatzes*. Berlin: Duncker und Humblot, 1993. p. 134, 144 and 145.
4. VOGEL, Klaus/WALDHOFF, Christian. *Grundlagen des Finanzverfassungsrechts: Sonderausgabe des Bonner Kommentars zum Grundgesetz (Vorbemerkungen zu Art. 104a bis 115 GG)*. Heidelberg: Müller, 1999. margin number 342, p. 232.

CHAPTER 2

NORMS

Principles And Rules

2.1. FIRST DISTINCTIONS

2.1.1. Text and Norm

Norms are neither text nor a set of texts, but the meanings construed from the systematic interpretation of normative texts. Therefore, one can say that provisions are the object of interpretation and norms are its result.[1] What matters is that there is no correspondence between norm and provision in the sense that where there is a provision there is a norm, or that where there is a norm there is a provision to support it.

In some cases, there is a norm, but no provision. Which provision set forth the principles of legal stability and certainty of decisions? None. So, there are norms even without specific provisions to support them physically.

In other cases, there is a provision, but there is no norm. Which norm can be construed from the constitutionally stated *protection of God*? None. So, there are provisions from which no norm is construed.

In other cases, there is only one provision from which more than one norm is construed. A good example is the prescriptive statement that requires a statute to create or increase taxes, which derives the principle of statutory legality, the principle of legal certainty, the prohibition of independent regulations and the prohibition of normative delegation. Another example that illustrates that is the declaration of partial unconstitutionality without text editing: when STF, the Brazilian Supreme Court, examines the constitutionality of norms, it investigates the various meanings that comprise the definition of a given provision, and declares, without altering the text, the unconstitutionality of those that are incompatible with the Federal Constitution. The provision is kept, but the norms construed upon it which are incompatible with the Federal Constitution are declared void. So, there are provisions from which more than one norm can be construed.

In other cases, there are two or more provisions, but only one norm is construed from them. The examination of the provisions that warrant statutory legality, irretroactivity, and previous enactment derives the principle of legal stability. Hence, there can be more than one provision and a single norm construed.