Reflections on How My Thinking about Law Has Changed over the Years

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No one, I think, is less suited to write about the development of an author's ideas than the author himself. Thus, when I accepted the invitation to undertake a comparison of my earlier writings with the more recent ones, I did not do so with the intention of giving an objective account of my intellectual biography. What I hope to accomplish is far less ambitious. I simply want to give expression to some of my more or less subjective impressions about what has changed and what has not changed in my work over the last 30 years. A final judgement on these matters must be left to others.

I. Two Early Books

1. A Theory of Legal Argumentation

A Theory of Legal Argumentation was my first book. It initially appeared, in German, in 1978. The English translation by Ruth Adler and Neil MacCormick was published in 1989.[2] I wrote the dissertation in Göttingen during the period 1973 to 1976. The question of what 'rational legal argumentation' comes to and whether, indeed, it is possible at all served as the leitmotif of the book. The question is, to be sure, quite general, but it has, at the same time, a specific character. It is not a question concerning law or the legal system in general. Rather, the scope of the question concerning the rationality of legal argumentation is confined to the interpretation and application of law. With this point, an initial difference between my earlier works and the more recent ones becomes visible. The earlier writings do not address law as such. They are concerned with specific themes, albeit of a quite general character.

1 I should like to thank Stanley L. Paulson for suggestions and advice on matters of English style.

2 Robert Alexy, A Theory of Legal Argumentation (first publ. 1978), trans. Ruth Adler and Neil MacCormick (Oxford: Clarendon Press, 1989).

This also applies to the book A Theory of Constitutional Rights, which first appeared in 1985.

The relatively specific character of A Theory of Legal Argumentation, however, does not mean that the book contains no general theses. On the contrary, quite general theses are manifest in the book, and they have remained, in principle, constant and have served as the basis of the general theory of the concept and nature of law, which I have elaborated in more recent works. In particular, three elements should be mentioned: (1) discourse theory, (2) the correctness thesis, and (3) the special case thesis.

a) Discourse Theory

Discourse theory is a procedural theory of practical correctness or truth. According to discourse theory a practical proposition is true or correct if it can be the result of a rational discourse. Discourse theory, as developed in A Theory of Legal Argumentation, has been inspired not only by Habermas but also by analytical metaethics, especially by Hare, by the Erlangen School, by the constructivist Lorenzen in particular, and by Chaim Perelman's new rhetorics. I have attempted to make explicit the conditions of discursive rationality by means of a system of twenty-eight rules and forms of general practical discourse. This system comprises rules that demand non-contradiction, clarity of language, reliability of empirical premises, and sincerity, as well as rules and forms that speak to the consequences, to universalizability, and to the analysis of the genesis of normative convictions. The procedural core consists of rules that guarantee freedom and equality in discourse by granting to everyone the right to participate in discourse and the right to question as well as to defend any assertion.

(i) Procedure and Substance

I still think that discourse theory is the best theory of practical rationality and correctness. To that extent, there is continuity. Some aspects, however, have been put in a new light. The first concerns proceduralism. To be sure, I have not ceased to think of discourse theory as a procedural theory. But the substantive side, already present in A Theory of Legal Argumentation (as, for instance, the idea of discursive necessity[3] shows), has gained in importance. Discourse theory qua procedural theory is now complemented in my work by a substantive theory of human rights. It is of the utmost importance that this complementation not be understood as

3 Ibid. 207.

a matter of adding something to discourse theory that does not belong to it. The opposite is the case. The rules of discourse are the result of an attempt to make explicit what is implicit in our practice of asserting, asking, and arguing. The fact that the discourse rules give expression to the principles of freedom and equality underscores the point that our discursive practice necessarily contains these principles. In the article 'Discourse Theory and Human Rights', published in 1996, I tried to establish – after initial considerations in 1992[4] – that this may serve as a basis for the justification of human rights.[5] This, naturally, gave rise to new problems, and these count as themes in some of my more recent work.

(ii) Correctness and Truth

In A Theory of Legal Argumentation the question of whether normative statements might not only be correct or incorrect but also true or false has explicitly been left open.[6] Already in this work there was, however, the idea that one might talk about normative facts. That is, going beyond Habermas and with an allusion to Tarski I argued as follows: 'Just as the sentence "Snow is white" can correspond to the fact that snow is white, so too can the sentence "X ought to be done" correspond to the fact that X ought to be done'.[7] I have pursued this line of thought further.[8] Today I believe that discourse theory ought not to avoid the concept of truth. This position can be defended by turning to three equivalences.[9] The first concerns a semantic conception of practical truth. This can be expressed, following Tarski, by means of the equivalence: (1) The sentence 'Jones ought to tell the truth' is true if and only if Jones ought to tell the truth. Next, the concept of a practical or normative fact is introduced by means of a second equivalence: (2) It is a practical or normative fact that Jones ought to tell the truth if and only if Jones ought to tell the truth. The third equivalence connects the concepts of truth and fact with the concept of justifiability: (3) Jones ought to tell the truth if and only if it is justifiable that Jones ought to tell the truth. This model of practical

4 Robert Alexy, 'A Discourse-Theoretical Conception of Practical Reason', Ratio Juris 5 (1992), 231-51, at 245-7.

5 Robert Alexy, 'Discourse Theory and Human Rights', Ratio Juris 9 (1996), 209-35.

6 Alexy, A Theory of Legal Argumentation (n. 1, above), 177-8, n. 3.

7 Ibid. 104-5.

8 See, for instance, Robert Alexy, 'Problems of Discourse Theory', Crítica 20 (1988), 43-65, at 54-5.

9 See Robert Alexy, 'The Dual Nature of Law', in: IVR 24th World Congress. Papers Plenary Sessions (Beijing, 2009), 275-87, at 263, n. 23.

truth comprises realistic elements, but it is to be distinguished from a strong or intuitionistic realistic model on a central point. In an intuitionistic model the justifiability of a normative proposition depends on the existence of a normative fact, the perception of which is a matter of intuition or something comparable. In a discursive model the existence of a normative fact depends on the justifiability of the corresponding proposition. If one wants to attribute realism to discourse theory, it can, therefore, only be a case of weak realism.

b) The Rudimentary Form of the Correctness Thesis

The second element that is already present in my earliest work is the correctness thesis. This thesis, however, was still quite embryonic in A Theory of Legal Argumentation. The thesis referred only to legal argumentation and legal decision-making, and not to law as such.[10] The necessity of raising this claim is already present,[11] but the justification of this necessity is still underdeveloped.

c) The Special Case Thesis

The third element which dates back to my beginnings is the special case thesis. This thesis says that legal argumentation or discourse can be established as a rational enterprise if one conceives it as a special case of general practical discourse. The special case thesis has received much criticism.[12] I nevertheless think, now as before, that it is true. In my more recent writing I have tried to enhance the plausibility of the special case thesis by incorporating it into a theory of the legal system which is an expression of the idea of the institutionalization of practical reason.

2. A Theory of Constitutional Rights

My second early work, entitled A Theory of Constitutional Rights, was submitted in 1984 to the Law Faculty in Göttingen as my Habilitationsschrift. The book first appeared, in German, in 1985. The English translation by Julian Rivers was published in 2002.[13] The central thesis of this book is that the main problems of the theory of constitutional rights

10 Alexy, A Theory of Legal Argumentation (n. 1, above), 214-7.

11 Ibid. 215-6.

12 See Robert Alexy, 'The Special Case Thesis', Ratio Juris 12 (1999), 374-84.

13 Robert Alexy, A Theory of Constitutional Rights (first publ. 1985), trans. Julian Rivers (Oxford: Oxford University Press, 2002).

can be solved by means of a distinction between rules and principles, a distinction that is based, in turn, on the thesis that principles are optimization requirements. Optimization requirements are norms demanding that something be realized to the greatest extent possible, given the factual and legal possibilities. By contrast, rules are norms requiring something definitely. They are definitive commands.[14]

The elaboration of this distinction yields what might be called 'principles theory'. The significance of principles theory for constitutional rights stems, first of all, from the fact that this theory is the basis of proportionality analysis. Proportionality analysis is not only a theoretically well-founded test of whether or not a constitutional right has been violated by a claimed infringement, it is also gaining international recognition in the practice of constitutional review.[15]

Proportionality analysis consists in the application of the principle of proportionality. Here 'principle' is being used in a general sense and not in the specific sense of principles theory. The principle of proportionality consists of three sub-principles: the principle of suitability, of necessity, and of proportionality in its narrower sense. The principles of suitability and necessity concern optimization relative to what is factually possible. In this respect, they deal not with balancing as such but with avoiding those inferences with constitutional rights that can be avoided without any cost to other principles. These two principles are concerned, in other

14 Ibid. 47-8. In my first publication on rules and principles I characterized optimization requirements further as norms that express an ideal 'ought'; see Robert Alexy, 'Zum Begriff des Rechtsprinzips', in Argumentation und Hermeneutik in der Jurisprudenz (Rechtstheorie, suppl. vol. 1), ed. Werner Krawietz, Kazimierz Opatek, Aleksander Peczenik, and Alfred Schramm (Berlin: Duncker & Humblot, 1979), 59-87, at 80 f. Six years later, in A Theory of Constitutional Rights I argued that this concept should 'only be used cautiously'; see Alexy, A Theory of Constitutional Rights (n. 12 above), 82, n. 148. In a recent publication the concept of ideal 'ought' has returned to the centre of principles theory. This is to say that I have withdrawn my old thesis that the ideal and the real 'ought' are issues of the object of the 'ought' and not of the deontic modality itself (Robert Alexy, 'Zum Begriff des Rechtsprinzips', 81, n. 94), and I have replaced it with the thesis that the ideal 'ought' is a question that concerns the deontic modality; see Robert Alexy, 'Ideales Sollen', in: Grundrechte, Prinzipien und Argumentation. Studien zur Rechtstheorie Robert Alexys, ed. Laura Clérico and Jan-Reinard Sieckmann (Baden-Baden: Nomos, 2009), 21-38, at 24-9.

15 See, for instance, David M. Beatty, The Ultimate Rule of Law (Oxford: Oxford University Press, 2004); Alec Stone Sweet and Jud Mathews, 'Proportionality, Balancing and Global Constitutionalism, in: Columbia Journal of Transnational Law 47 (2008), 72-164.

words, with Pareto-optimality. By contrast, the third sub-principle, the principle of proportionality in its narrower sense, refers to optimization relative to the legal possibilities. Rules aside, the legal possibilities are essentially defined by competing principles. This is the proper field of balancing, for balancing consists in nothing other than optimization relative to competing principles. Principles theory, therefore, is in essence a theory of balancing.

b) Balancing and the Rules of Discourse

Seven years after A Theory of Legal Argumentation, my treatise on A Theory of Constitutional Rights was published. This gives rise not only to the question of what has changed since the publication of the latter work but also to the question of what changes it has brought about vis-à-vis the earlier work. Two differences catch the eye.

(i) Relations of Precedence

The first difference is that balancing is not a theme in A Theory of Legal Argumentation. On the contrary, the central point there is subsumption. The concept of balancing (Abwägung) does not even appear in the index of subjects. Still, there are traces of some of the elements of principles theory. The concept of principle is, by contrast with that of balancing, to be found in the index of subjects. Principles, however, are defined in a way that is inconsistent with principles theory, namely, as 'normative statements of a high level of generality'.[16] And there are remarks on such matters as 'the proper weighing and balancing of legal principles in a given case' ('das Zusammenspiel der Prinzipien in einem Einzelfall')[17] and on the necessity 'to weigh up which of the reasons is the better' ('abzuwägen, welcher der Gründe der beste ist').[18] One also finds the thesis that principles are 'usually subject to limitation on account of other principles' (daß Prinzipien 'meistens durch andere Prinzipien Einschränkungen erfahren').[19] Closest to principles theory, in A Theory of Legal Argumentation, is what the treatise says about priority rules. The distinction between unconditional and conditional relations of precedence, which is so important for principles theory,[20] is clearly made, albeit in a different notation:

16 Alexy, A Theory of Legal Argumentation (n. 1, above), 243, n. 81.
17 Ibid. 5 (German, 21).
18 Ibid. 94 (German, 126).
19 Ibid. 260 (German, 319).
20 Alexy, A Theory of Constitutional Rights (n. 12, above), 52.

'(4.5) Ri PRk […]
(4.6) (Ri PRk) C […]'[21]

To be sure, "P" here is not conceived as a relation of precedence between principles but as 'a relation of precedence between two rules'.[22] But the lack of a systematically elaborated distinction between rules and principles in A Theory of Legal Argumentation allows for the representation of principles with 'Ri' and 'Rk'. If one proceeds in this way, (4.5) and (4.6) exactly correspond to

'(1) P1 **P** P2'

and

'(3) (P1 **P** P2) C'

as found in A Theory of Constitutional Rights.[23]

None of this means that I was aware, when I addressed relations of precedence in A Theory of Legal Argumentation, that I had touched upon the field of principles theory. Precisely the opposite is the case. I was able to see the tie only in retrospect.

(ii) Rights

The second obvious difference between A Theory of Legal Argumentation and A Theory of Constitutional Rights is that the former is not concerned with the interpretation and application of rights but, far more generally, with the interpretation and application of laws or rules. The essential role of human and constitutional rights in a rational legal system had not yet come to the fore. But there are two elements that are of crucial importance for the theory of human and constitutional rights. The first element concerns the justification of human rights. The procedural basis of the general practical discourse consists in the rationality rules. They guarantee freedom or autonomy and equality in discourse.[24] One might characterize the rationality rules as the 'basic discursive rights'. As such, they serve as the foundation of human and constitutional rights.

The second element concerns the application of constitutional rights. Balancing without argumentation would not be rational. For that reason, principles theory presupposes discourse theory.

c) The Weight Formula

Up until now, I have considered differences and connections between A Theory of Constitutional Rights and the earlier book, A Theory of

21 Alexy, A Theory of Legal Argumentation (n. 1, above), 201.
22 Ibid.
23 Alexy, A Theory of Constitutional Rights (n. 12, above), 52.
24 Alexy, A Theory of Legal Argumentation (n. 1, above), 193-5.

Legal Argumentation. Now I will turn to a handful of similarities to and differences from my more recent work.

Balancing is a suitable and indispensable method for determining the definitive content of constitutional rights only if it is rational. Whether balancing is rational is, however, a highly contested matter. In A Theory of Constitutional Rights it was my aim to demonstrate that balancing is rational, and this with the help of two laws: the Law of Competing Principles and the Law of Balancing. The Law of Competing Principles describes how it is possible to bridge the gap between a subsumption under competing principles and a determinate decision of the case at hand. The answer here is that one can begin with two competing subsumptions under principles and end up with a subsumption under a concrete case rule if one inserts a conditional relation of precedence between the principles on the one hand and the case rule on the other.[25]

The Law of Competing Principles describes the logical structure of balancing as the resolution of a conflict of norms. One might concede that this structure is rational but nevertheless contest the claim that this suffices to establish the rationality of balancing. The rationality of balancing requires not only that a conditional relation of precedence be determined. It requires, what is far more, that this conditional relation of precedence be justified. Exactly this is the subject of the second law, the Law of Balancing. The Law of Balancing is identical with the third sub-principle of proportionality, the principle of proportionality in its narrower sense. It runs as follows:

> The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.[26]

During the last decade I have attempted to achieve a deeper and more precise analysis of the structure of balancing than that which is expressed by the Law of Balancing. The result is the Weight Formula.[27] The Weight Formula defines the concrete weight of a principle Pi relative to a colliding principle Pj (Wi, j) as the quotient of, first, the product of the intensity of the interference with Pi (Ii) times the abstract weight of Pi (Wi) times the degree of reliability of the empirical assumptions concerning what the measure in question means for the non-realization of Pi (Ri), and,

25 Alexy, A Theory of Constitutional Rights (n. 12, above), 53-4.

26 Ibid. 102.

27 Robert Alexy, 'On Balancing and Subsumption', Ratio Juris 16 (2003), 433-49, at 443-8; Robert Alexy, 'The Weight Formula', in: Frontiers of the Economic Analysis of Law (Studies in the Philosophy of Law 3), ed. Jerzy Stelmach, Bartosz Brożek, and Wojciech Załuski (Krakow: Jagiellonian University Press, 2007), 9-27.

second, the product of the corresponding values with respect to Pj, now related to the realisation of Pj. It runs as follows:

$$W_{i,j} = \frac{I_i \bullet W_i \bullet R_i}{I_j \bullet W_j \bullet R_j}$$

Now to talk about quotients and products is sensible only in the presence of numbers. This is the problem of graduation. In A Theory of Constitutional Rights I considered only a continuous scale that runs over an infinite number of points between 0 and 1, and I arrived at the conclusion that it is impossible to work with such a scale in legal reasoning.[28] I still believe that this result is correct. Things are different, however, once not only continuous or infinitesimal scales but also discrete scales are taken into account. I have done precisely this in the last few years. Balancing can begin as soon as one has a scale with two values, say, light and serious. In constitutional law a triadic scale is often used, which works with the values light, moderate, and serious. There are various possibilities in representing these values by numbers. If one chooses a geometric sequence like 20, 21, and 22, it becomes possible to represent the fact that the power of principles increases overproportionally with an increasing intensity of interference.

It might be objected that legal reasoning cannot be reduced to calculation. But this would rest on a misconception of the role of the Weight Formula. The numbers that have to be substituted for its variables represent propositions, for instance, the proposition 'The infringement with the freedom of expression is serious'. This proposition has to be justified. This can only be done by argument. In this way, the Weight Formula is intrinsically connected to legal discourse. It expresses, alongside the Subsumption Formula, a second basic argument form of legal discourse.[29]

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28 Alexy, A Theory of Constitutional Rights (n. 12, above), 97-9.

29 Robert Alexy, 'On Balancing and Subsumption' (n. 26, above), 448. In the article 'Arthur Kaufmanns Theorie der Rechtsgewinnung', in Verantwortetes Recht. Die Rechtsphilosophie Arthur Kaufmanns (Archives for Philosophy of Law and Social Philosophy, suppl. vol. 100), ed. Ulfrid Neumann, Winfried Hassemer, and Ulrich Schroth (Stuttgart: Franz Steiner Verlag, 2005), 47-66, at 65-6, I made the conjecture that there exists, alongside subsumption and balancing, a third basic operation in the application of law: analogy between or comparison of cases. This has been further elaborated in Robert Alexy 'Two or Three?', in: On the Nature of Legal Principles (Archives for Philosophy of Law and Social Philosophy, suppl. vol.), ed. Martin Borowski (Stuttgart: Franz Steiner Verlag, [forthcoming]).

d) Constitutional Review

The rationality problem is by no means the only problem that principles theory has to resolve. No less important are the problems connected with constitutional review. It has been argued that the optimization thesis leads to an overconstitutionalization of the legal system. The result, institutionally speaking, would be a supplanting of democracy by means of constitutional adjudication.

In my more recent writings I have attempted to reply to this objection by appealing to a theory of legislative discretion. One central argument is that the use of discrete scales of a rather crude character leads in many instances to a stalemate, and that stalemates in balancing imply discretion on the part of the parliament.[30] This might be called structural or substantial discretion. Structural or substantial discretion is not the only kind of discretion on the part of the legislature. There exists, over and above it, a broad range of epistemic discretion.[31] These two kinds of discretion suffice to meet the claimed danger of overconstitutionalization.

II. The Axis: The Argument from Injustice

My third book is The Argument from Injustice. A Reply to Legal Positivism, first published in German in 1992. The English translation, by Bonnie Litschewski Paulson and Stanley L. Paulson, appeared in 2002.[32] This book represents something akin to the axis of my work.

1. Positivism and Non-Positivism

The book is concerned with the concept of law. Its aim is to defend a non-positivistic theory of law. All positivistic theories defend the separation thesis. This thesis maintains that there is no necessary connection between legal validity or legal correctness on the one hand, and moral merits and demerits or moral correctness and incorrectness on the other. By contrast, all non-positivists defend the connection thesis, which says that there is a necessary connection between legal validity or legal correctness on the one hand, and moral merits and demerits or moral correctness and incorrectness on the other.

30 Alexy, A Theory of Constitutional Rights (n. 12, above), 410-4 (Postscript).

31 Ibid. 414-25 (Postscript).

32 Robert Alexy, The Argument from Injustice. A Reply to Legal Positivism (first publ. 1992), trans. Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 2002).

2. Observer and Participant

The mere fact that the debate over the concept of law reaches back over a period of more than two millennia, and without showing any sign of either agreement or exhaustion, gives rise to the conjecture that positivists and non-positivists are discussing different questions. In The Argument from Injustice I argue that the separation thesis is essentially correct from the perspective of an observer but mistaken from the perspective of a participant. From the latter perspective, the connection thesis alone is correct. Now, the participant's perspective is necessary for the existence of a legal system. A legal system without participants is not conceivable. The question of whether, from the participant's perspective, the separation thesis is mistaken and the connection thesis correct, speaks, therefore, to the question of the essence of law.

3. The Developed Form of the Correctness Thesis

My argument for the connection thesis consists in the explication and substantiation of two theses: the correctness thesis and the extreme injustice thesis. The correctness thesis says that law necessarily raises a claim to correctness, and that this claim comprises a claim to moral correctness. This thesis was already evident in a rudimentary form in A Theory of Legal Argumentation. Now it is, first, generalized, second, more thoroughly justified, and, third, incorporated into a theory of legal defects. The last of these is explicated by means of two arguments. The first argument says that legal decisions which fail to fulfil the claim to correctness owing to moral defects are not only morally defective but also legally defective. The second argument maintains that legal defectiveness does not, however, imply the loss of legal validity in all cases.

4. The Extreme Injustice Thesis

At precisely this point the second thesis, the extreme injustice thesis, enters the picture. From the fact, it says, that not each and every moral defect reaches to legal invalidity, it hardly follows that legal validity remains untouched by all moral defects. Once the extremity threshold is crossed, legal validity is lost. This is given expression, in its shortest form, as follows:

> Extreme injustice is no law.[33]

This is a summary statement of Gustav Radbruch's well-known formula from 1946.

33 Robert Alexy, 'A Defence of Radbruch's Formula', in: Lloyd's Introduction to Jurisprudence, 7th edn., ed. M. D. A. Freeman (London: Sweet & Maxwell, 2001), 374-91.

III. Recent Writings

1. The Dual Nature Thesis

The central theme of my more recent writings is the dual nature thesis. The dual nature thesis sets out the claim that law necessarily comprises both a real or factual dimension and an ideal or critical one. In the definition of law proposed in The Argument from Injustice the factual dimension is represented by the elements of authoritative issuance and social efficacy, whereas the ideal dimension finds its expression in the element of correctness of content, especially moral correctness.[34] To be sure, the bipartition between the real and the ideal dimension has, in substance, already been present in The Argument from Injustice, namely, by way of the point that with the connection thesis, there are two dimensions that are to be connected.[35] The dual nature thesis adds to this notion of a connection the idea of a dialectic between the real and the ideal, a dialectic that belongs to the nature, that is, to the essence of law. The central question is not whether the positivity or the ideality of law is decisive. Rather, the central question is how the ideal and the real can be reconciled.

As thus stated, however, the dual nature thesis remains abstract and formal. In order to arrive at concrete content and a clear structure, the thesis has to be explicated within a system. The overarching idea of this system is the institutionalization of reason. My first attempt to come to terms with this notion is found in the article 'The Institutionalisation of Reason', which appeared 1999.[36] The dual nature thesis, however, was not explicitly taken up in this article. Here my recent articles – 'Hauptelemente einer Theorie der Doppelnatur des Rechts'[37] and 'The Dual Nature of Law',[38] both published in 2009 – are different.[39] The central argument in these articles is, first, that democratic or discursive consti-

34 Alexy, The Argument from Injustice (n. 31, above), 3-4.

35 Ibid. 4.

36 Robert Alexy, 'My Philosophy of Law: The Institutionalisation of Reason', in: The Law in Philosophical Perspectives, ed. Luc J. Wintgens (Dordrecht: Kluwer, 1999), 23-45.

37 Robert Alexy, 'Hauptelemente einer Theorie der Doppelnatur des Rechts', Archives for Philosophy of Law and Social Philosophy 95 (2009), 151-66.

38 Alexy, 'The Dual Nature of Law' (n. 8, above), 257-74.

39 In an article published in 2000, I had already mentioned the dual nature of law. See Robert Alexy, 'On the Thesis of Necessary Connection between Law and Morality: Bulygin's Critique', Ratio Juris 13 (2000), 138-47, at 138. By contrast with the two recent articles, however, in the older article I had not yet systematically developed the thesis of the dual nature of law.

tutionalism is the political form of the institutionalization of reason and, second, that not only law as such has a dialectic nature but also all crucial elements of discursive constitutionalism. This applies to constitutional rights as well as to democracy and to legal argumentation and also to constitutional review. The analysis of these elements shows that reason needs institutions in order to acquire reality, and institutions need reason in order to acquire legitimacy.

2. Concept and Nature

In my earlier writings I avoided the concept of nature. The subject of my enquiry has been the concept or definition of law, not its nature. This is no doubt owing to views widely held in the approaches to philosophy with which I had become acquainted at this time. It was to analytical philosophy that my philosophy teacher Günther Patzig introduced me. And, going beyond that, I was also interested in critical theory as represented by Jürgen Habermas's discourse theory. Notwithstanding noteworthy differences, both approaches have a distinctly anti-essentialistic cast. However, when I began to think about the problem of legal positivism, it soon became clear to me that this problem cannot be resolved without employing the concept of necessity. Merely contingent relations between law and morality present no problems for positivism and are of no interest for non-positivism. Non-positivism is the thesis that there exists a necessary connection between legal validity or legal correctness on the one hand, and moral merits and demerits or moral correctness and incorrectness on the other.[40] Enquiring into necessary properties of a thing that are specific to it is to enquire into its essential properties, and enquiring into its essential properties is to enquire into its nature.[41] The single most essential feature of law is its dual nature. A central element of its real nature is coercion or force.[42] The central element of its ideal dimension is the claim to correctness. Both belong to the nature of law.

None of this means, however, that concepts have become unimportant. Concepts, too, have a dual nature. They are, on the one hand, socially established rules that concern the meaning of words. To this extent,

40 See on this Robert Alexy, 'On the Concept and the Nature of Law', Ratio Juris 21 (2008), 281-99, at 286, n. 6.

41 Ibid. 290.

42 On two further elements of the real or factual dimension see Robert Alexy, 'The Nature of Arguments about the Nature of Law', in: Rights, Culture, and the Law. Themes from the Legal and Political Philosophy of Joseph Raz, ed. Lukas H. Meyer, Stanley L. Paulson, and Thomas W. Pogge (Oxford: Oxford University Press, 2003), 3-16, at 4-5.

concepts have a conventional character. They are conventional rules of meaning. This is the real or factual side of concepts. But concepts are conventions of a special kind. They claim, as Kant puts it, to be 'adequate to the object'.[43] This claim to adequacy necessarily connects the concept of a thing with its nature. With concepts one strives to grasp the nature of the things to which they refer as perfectly, as correctly, as possible. This is the non-conventional or ideal dimension of concepts.

Talk about the nature of law, however, makes sense only if arguments are at hand. Appeals to intuition are of no help at all. For this reason, the question of the nature of law leads directly to the question of arguments about the nature of law. In the article 'The Nature of Arguments about the Nature of Law' I have attempted to show that arguments establishing necessary properties of law are possible.[44] In the case of the claim to correctness this is the argument of performative contradiction; in the case of coercion it is an argument based on the values or principles of legal certainty and efficiency, which are necessarily connected with law because law's claim to correctness necessarily refers to them.[45]

3. Human and Constitutional Rights

The subject of A Theory of Constitutional Rights was a structural theory of constitutional rights. In this treatise the substantiation or justification of these rights played, however, no role. This has changed in my more recent writings.

In order to explain how both human rights and constitutional rights might be substantiated, their relationship has to be determined. Human rights are rights that are defined by five properties. They are, first, moral, second, universal, third, fundamental, and, fourth, abstract, and they are, fifth, rights established with priority over all other kinds of rights.[46] Here, only the first property, the moral character, is of interest. Human rights as such possess only moral validity. A right is morally valid if its justification applies to everyone who is able and willing to engage in rational argument. The validity of human rights is their

43 Immanuel Kant, Critique of Pure Reason (1st edn. 1781, 2nd edn. 1787), trans. Werner S. Pluhar (Indianapolis and Cambridge: Hacket, 1996), A 728/B 756.

44 Alexy, 'The Nature of Arguments about the Nature of Law' (n. 41, above), 6-13.

45 Alexy, 'On the Concept and the Nature of Law' (n. 39, above), 293.

46 Robert Alexy, 'Discourse Theory and Fundamental Rights', in Arguing Fundamental Rights, ed. Agustín Menéndez and Erik Oddvar Eriksen (Dordrecht: Springer, 2006), 1-29, at 18.

existence. The existence of human rights, therefore, consists in their justifiability and in nothing else.[47]

To be sure, the moral character of human rights by no means precludes their transformation into positive law. International covenants and the incorporation into a constitution are the primary examples of their positivization. Once human rights are included in constitutions, they become constitutional rights. For this reason, it is possible to define constitutional rights as rights that are incorporated into a constitution with the intention of transforming human rights into positive law.[48] This makes explicit the dual nature of constitutional rights as, at one and the same time, positive and non-positive rights.

It is a corollary of the intrinsic relation between human and constitutional rights that the justifiability of constitutional rights depends on the justifiability of human rights. I have attempted to elaborate a discourse-theoretic justification of human rights that proceeds from a transcendental argument.[49] Another characterization of the nature of this argument is 'explicative'.[50] The explicative argument consists of an analysis of the discursive practice, which is a practice of asserting, asking, and arguing. This practice necessarily presupposes rules that express the autonomy and equality of the participants in discourse.[51] Autonomy and equality in discourse, that is, in the realm of speech, does not, however, suffice to imply autonomy and equality in the realm of action. In order to bridge this gap, the discursive capabilities must be connected with an interest in making use of them in real life. This interest might be designated 'an interest in correctness'. This connection of ability and interest implies the recognition of the other as autonomous.[52] To recognize the other as autonomous is to recognize him as a person, and to recognize him as a person is to confer, upon him, dignity. Conferring dignity upon him is, however, to recognize his human rights. At this point, we have arrived at the object of our justification.

It might be objected, however, that this is no justification at all. It has lost its character as justification, so the objection runs, once the premise concerning the interest was introduced. This objection, indeed, is not

47 Robert Alexy, 'Menschenrechte ohne Metaphysik?', Deutsche Zeitschrift für Philosophie 52 (2004), 15-24, at 16.

48 Alexy, 'Discourse Theory and Fundamental Rights' (n. 45, above), 17.

49 Alexy, 'A Discourse-Theoretical Conception of Practical Reason' (n. 3, above), 211-33.

50 Alexy, 'Menschenrechte ohne Metaphysik?' (n. 46, above), 19-21.

51 Alexy, 'Discourse Theory and Human Rights' (n. 4, above), 213-7.

52 Ibid. 222-4.

without merits. It must, however, be qualified. As with any interest, the interest in correctness is connected with decisions. These decisions concern the fundamental question of whether we accept our discursive possibilities. This is the question of whether we want to see ourselves, to use a term of Brandom's, as 'discursive creatures'.[53] That is a decision about who we are. One can call this step of the justification 'existential'.[54] Nevertheless, talking about justification or substantiation seems to be justified, for this decision is not based on groundless or arbitrary preferences, drawn, so to speak, from nowhere. Rather, the decision has the character of an endorsement of something that has proven, by means of explication, to be a necessary possibility.[55]

When I discussed the concept of nature, I remarked that with this concept a certain essentialistic element was introduced into the system, which had not been present in my early writings. Now I have to add that with the existential premise in the justification of human rights, another element has been incorporated that is not to be found in the early work. But this is not all. A third new element is necessary in order to render the system complete, and this is metaphysics. It is impossible to justify human rights without using concepts such as autonomy and person. With these concepts, our world is inhabited by entities that cannot be produced by means of the resources available to us in the physical and psychical worlds.[56] This implies that the idea of human rights qua moral rights is incompatible with naturalism. To be sure, there are approaches to metaphysics with respect to which a sceptical posture is more than justified. I believe that authors like John Rawls,[57] Günther Patzig,[58] and Jürgen Habermas[59] have had in mind highly speculative forms of metaphysics when they declared that the exclusion of metaphysics was a part of their respective programmes. Kant, arguably, did so too, when he wrote his Dreams of a Spirit-Seer Elucidated by Dreams of Metaphysics, published

53 Robert B. Brandom, Articulating Reasons (Cambridge, Mass.: Harvard University Press, 2000), 26.

54 Alexy, 'Menschenrechte ohne Metaphysik?' (n. 46, above), 21.

55 Ibid.

56 Ibid. 24.

57 John Rawls, 'Justice as Fairness: Political not Metaphysical', Philosophy and Public Affairs 14 (1985), 223-251.

58 Günther Patzig, Ethik ohne Metaphysik (Göttingen: Vandenhoeck & Ruprecht, 1971).

59 Jürgen Habermas, Postmetaphysical Thinking, trans. William Mark Hohengarten (Cambridge, Mass.: MIT Press, 1992).

in 1766.[60] This, however, did not keep him from later writings about metaphysics, for example, his Groundwork of the Metaphysic of Morals.[61] The decisive question is this: Is rational or analytical metaphysics possible? The analysis of human rights lends support to the thesis that it is indeed possible.

If legal philosophy cannot avoid addressing metaphysical questions, it is confronted not only with the special problems connected with law but also with the great problems of general philosophy or metaphysica generalis sive ontologia.[62] For that reason, even legal philosophy as such has a dual nature. It finds its expression in the two words we use to characterize it. It is, one the one hand, legal, and, on the other, philosophical. It is only when both sides are taken seriously that legal philosophy can succeed.

60 Immanuel Kant, Dreams of a Spirit-Seer Elucidated by Dreams of Metaphysics (first publ. 1766), in: Immanuel Kant. Theoretical philosophy, 1755-1770, trans. and ed. David Walford in collaboration with Ralf Meerbote (Cambridge: Cambridge University Press, 1992), 301-59.

61 Immanuel Kant, Groundwork of the Metaphysic of Morals (first publ. 1785), trans. H. J. Paton (New York: Harper, 1964).

62 Robert Alexy, 'The Nature of Legal Philosophy', Ratio Juris 17 (2004), 156-67, at 160.