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Robert Alexy's Philosophy of Law as System

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It has been frequently remarked that the works of Robert Alexy form a system. Matthias Kumm compares Alexy's work to Dworkin's and claims that 'their works exhibit a holistic or system-based approach to the study of law'.¹ Pavlakos praises Alexy for having developed 'a systematic philosophy covering most of the key areas of legal philosophy'.² With an eye to links between his main works, Robert Alexy himself has remarked that 'the result may well be a system'.³

How this system should be explicated, however, has not been addressed in an effective way. This, essentially, is the main aim of this introduction. As far as the concept 'system' is concerned, I will apply a Kantian concept, which forms a structured unity from several parts according to overarching ideas.⁴

According to Alexy, juridico-philosophical thought revolves around three problems.⁵ In what kind of entities does the law consist and how are they related to one another? This addresses the concept of a norm and a normative system. Second, looking to authoritative issuance and social efficacy, how is the real dimension of the law to be understood? This is the question posed by legal positivism. Third, how is the correctness or legitimacy of the law to be understood? This is the problem of the relation between the law and morality.

Alexy combines his tripartite distinction between the problems of legal philosophy with four theses on its character.⁶ The field has, first, a general nature, for

¹ M. Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on a Theory of Constitutional Rights' (2004) 2 *International Journal for Constitutional Law* 574, 595.

² G. Pavlakos, 'Introduction' in G. Pavlakos (ed), *Law, Rights and Discourse. The Legal Philosophy of Robert Alexy* (2007) 1, 1. See also A.G. Figueroa, *The Distinction between Principles and Rules in Constitutional States. Some Remarks on Alexy's Theory of Law* (2007) 1.

³ R. Alexy, 'Legal Philosophy: 5 Questions' in M.E.J. Nielsen (ed), *Legal Philosophy: 5 Questions* (2007) 1, 2. Recently, Alexy has clarified some structures of this system: see R. Alexy, 'Hauptelemente einer Theorie der Doppelnatur des Rechts' (2009) 95 *Archiv für Rechts- und Sozialphilosophie* 151.

⁴ Kant states: 'I understand by a system, however, the unity of the manifold cognitions under one idea. This is the rational concept of the form of a whole, insofar as through this the domain of the manifold as well as the position of the parts with respect to each other is determined *a priori*.' Immanuel Kant, *Critique of Pure Reason*, P. Guyer and A.W. Wood (trans.), (1997) 860.

⁵ See R. Alexy, 'The Nature of Arguments about the Nature of Law' in L.H. Meyer, S.L. Paulson, and T.W. Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (2003) 3, 4; Alexy, 'Legal Philosophy: 5 Questions', 8.

⁶ R. Alexy, 'The Nature of Legal Philosophy' (2004) 17 *Ratio Juris* 156, 160.

legal philosophy is not confined to special legal problems but encompasses general philosophical problems. Second, legal philosophy has a specific nature, for it is concerned with special, juridico-philosophical problems. Third, legal philosophy has a special relation to other branches of philosophy, in particular to moral and political philosophy. Fourth, legal philosophy can be successful only if it combines these theses. Thus, Alexy's concept of legal philosophy is a comprehensive ideal, requiring that all these questions be brought together in a coherent way.⁷ Alexy's concept of legal philosophy necessarily leads to the concept of a system.

The overarching idea of this system is institutionalized reason, which is found at the very core of Alexy's theory of law. The theory rests on the claim that the law necessarily comprises both a real or factual dimension and an ideal or critical dimension.⁸ The reconciliation of the ideal with the real is possible, if at all, only by means of institutionalized reason.⁹

The connection between the ideal and the real dimensions of the law *qua* institutionalized reason 'comprises the postulate of an outermost limit of law . . . , the ideas of human and constitutional rights, democracy, and constitutional review, the conception of legal argumentation as a special case of general practical argumentation, and the theory of principles'.¹⁰ The political form of the overarching idea of institutionalized reason is discursive constitutionalism.¹¹

I will proceed in three steps. First, I will provide an overview of Alexy's main works. The overview will reflect the three pillars of Alexy's work, along the lines of his three main monographs and the most important articles. I will then identify relations and interconnections between and among the three pillars. These first steps serve to collect and analyse the material and to prepare the way for the last step, which focuses on the system as a whole.

A. Alexy's Main Works—Overview

All of Alexy's work can be ordered along three main lines, addressing the theory of legal argumentation, the theory of constitutional rights, and the concept and the validity of law. He takes up these three lines in his three major treatises.

To be sure, Alexy's main treatises do not represent the fully fledged system of his legal philosophy as he has developed it over the years. On the one hand, his system is in a state of flux, constantly undergoing refinement and further development. On the other, his main treatises are supplemented by a number of journal articles.

Accordingly, my overview of Alexy's main works will begin with the books, but will draw at times on modifications and further developments in articles. I will follow Alexy chronologically. Hence, I will start with Alexy's doctoral thesis, *A Theory of Legal Argumentation*, then turn to his 'Habilitation' thesis, *A Theory of*

⁷ Ibid, 166.

⁸ R. Alexy, 'On the Concept and the Nature of Law' (2008) 21 *Ratio Juris* 281, 292.

⁹ See Alexy, 'Hauptelemente', 166.

¹⁰ Ibid, 151.

¹¹ Ibid.

Constitutional Rights, and conclude with *The Argument from Injustice*. I will then add some remarks on the role of these works as far as their integration into a system is concerned.

(1) *A Theory of Legal Argumentation*

Before going into details, I should like to give a brief overview of the history of the publication of and reception accorded to these works.

(a) *Context of publication*

A Theory of Legal Argumentation, Alexy's doctoral thesis, was first published in German in 1978.¹² The English translation followed eleven years later.¹³ It was also translated into Spanish (1989), Italian (1998), Portuguese (2001 and 2005), Chinese (2002), Lithuanian (2005), and Korean (2007). This first book reflects a very influential and far-reaching international school of thought, namely analytical jurisprudence. Others in this school include H.L.A. Hart, Hans Kelsen, Alf Ross, and Neil MacCormick.¹⁴ One *Leitmotif* of this school of thought is the question of whether and to what extent legal reasoning can be a rational and an objective enterprise.¹⁵ Can propositions addressing a legal problem be rationally justified, and if so, how? Hence, the problems of the function and relevance of objectivity, logic, truth, and correctness in legal reasoning have a significant role in this approach. These questions were very much in vogue in international jurisprudence in those days. The theory of legal argumentation as an area of analytical jurisprudence was influenced by current developments in the general theory of argument and by the rediscovery of a role for argument in moral philosophy, occupying a leading position in international jurisprudence during the 1970s and 1980s.¹⁶ Following a classification by Ulfrid Neumann, we can distinguish three currents within the theory of legal argumentation, namely a logico-analytical, a topical-rhetorical, and a discourse-theoretic approach.¹⁷

Alexy's book stands out as the leading example of the discourse-theoretic current, but also uses instruments from the logical-analytical approach. In the

¹² R. Alexy, *Theorie der juristischen Argumentation: Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung* (1978) 396.

¹³ R. Alexy, *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification* (1989).

¹⁴ See A. Kaufmann, 'Problemgeschichte der Rechtsphilosophie' in A. Kaufmann and W. Hassemer (eds), *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart* (2004) 26, 86; on A. Peczenik's role in this school of thought, see M. Klatt, 'Aleksander Peczenik über die Rationalität der juristischen Argumentation' in A. Brockmöller and E. Hilgendorf (eds), *Rechtsphilosophie im 20. Jahrhundert: 100 Jahre Archiv für Rechts- und Sozialphilosophie* (2009) 187.

¹⁵ See J.E. Herget, *Contemporary German Legal Philosophy* (1996) 14.

¹⁶ M. Klatt, 'Contemporary Legal Philosophy in Germany' (2007) 93 *Archiv für Rechts- und Sozialphilosophie* 519, 521; E. Hilgendorf, *Die Renaissance der Rechtstheorie zwischen 1965 und 1985* (2005) 39–42; U. Neumann, *Juristische Argumentationslehre* (1986) 1–6.

¹⁷ Neumann (ibid), 11ff.

German theory of legal argumentation, or—as it was then called—German legal methodology, Alexy’s book marks a significant change of paradigm. In the 1970s legal methodology had discovered all the weaknesses of the classical ‘interpretation as retrieval’ approach, but the consequences remained unclear. Most scholars had fallen victim to legal indeterminism. They were convinced that, since the text of a norm cannot determine its content and hence its application, and since moral and political pre-judgements by interpreters influence any and all legal reasoning, every methodology was useless. Legal reasoning could not guarantee absolute certainty; thus, it should be abandoned entirely, or so most scholars claimed.¹⁸

Alexy, on the contrary, sought with the help of basic logical instruments to demonstrate that legal reasoning consists of logical inferences (‘internal justification’), but that the main purpose of logic in legal reasoning is to reveal the premises which must be justified further (‘external justification’).¹⁹ Accordingly, he underscored both the importance of logic and its limits. For the first time, it was now possible analytically to distinguish those parts of legal reasoning that derive mainly from authoritative statements from those that stem mainly from the assessments of individual interpreters.

Another significant aspect of Alexy’s work on this front was his system of 26 rules and forms of legal reasoning that clearly mark an advance over the previous legal methodology, both systematically and in detail.

(b) *Three main points*

Three main points of Alexy’s first book ought to be examined more closely. These points have been singled out by Alexy himself as the parts of the book he considers most important. Also, these three points are most relevant to my project of reconstructing the system.

(i) **Special case thesis**

Alexy’s special case thesis holds that legal discourse is a special case of general practical discourse.²⁰ This thesis underscores two points.²¹ First, legal discourse is an instance of general practical discourse, for it is concerned with practical questions that turn on the obligatory, the prohibited, and the permitted. Second, legal discourse is a special case, since it does not attempt to answer practical questions in an absolute or general sense, but rather within the framework of a specific legal system. The legal framework imposes restrictions on practical discourse through its binding norms, precedents, and doctrines stemming from legal dogmatics. Legal discourse, then, is a special case because, unlike general practical discourse, it has an institutional and authoritative character.

¹⁸ See R. Alexy, ‘Vorstellungsbericht’ (2003) *Jahrbuch der Akademie der Wissenschaften zu Göttingen* 326, 327.

¹⁹ Alexy, *A Theory of Legal Argumentation*, 221ff.

²⁰ *Ibid.*, 212ff.

²¹ Alexy, ‘Legal Philosophy: 5 Questions’, 2.

Still, the restrictions imposed by the legal framework are not so powerful as completely to obliterate the relation of legal argumentation to general practical discourse. This is due to the open texture of law. In certain cases, it is not possible to decide a case on the basis of authoritative material alone. The intentions of the lawmaker may be unclear, the language of the law may be vague, norms may stand in conflict, and precedents may be overruled. Hence, legal reasoning takes refuge in non-authoritative reasons stemming from general practical discourse.

Many objections have been raised against the special case thesis, most notably by Jürgen Habermas in *Between Facts and Norms*. Alexy has defended his thesis in a number of articles.²²

(ii) Claim to correctness

According to Alexy, legal argumentation is decisively influenced by a claim to correctness.²³ Legal judgments and their reasons necessarily claim to be correct. Any legal assertion necessarily contains a discursive commitment in Brandom's sense that the judgment be substantially and procedurally correct.²⁴ This commitment has three elements.²⁵ The first is the assertion of correctness. Since correctness implies justifiability, this assertion is supplemented by a claim to justifiability. Legal argumentation is a game of giving and asking for reasons in the sense of Brandomian normative pragmatics.²⁶ Therefore, as a third element of the claim to correctness, every legal assertion implies the expectation that its correctness will be accepted by others.

These three elements say nothing, however, about the criterion for correctness. This question is decisive, particularly in the present context. Two possibilities are important. The criterion can either be limited to the framework of a legal system, or reach beyond it. The answer to this problem follows from the special case thesis, which establishes a necessary link between legal discourse and general practical discourse. Given this necessary link, one's commitment stemming from a legal

²² The details of this debate are not of interest here. For objections see J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) 204, 206, 33ff; Neumann, *Juristische Argumentationslehre*, 84ff; U. Neumann, 'Zur Interpretation des forensischen Diskurses in der Rechtsphilosophie von Jürgen Habermas' (1996) 27 *Rechtstheorie* 415, 417ff; A. Kaufmann, 'Läßt sich die Hauptverhandlung in Strafsachen als rationaler Diskurs auffassen?' in H. Jung and H. Müller-Dietz (eds), *Dogmatik und Praxis des Strafverfahrens* (1989) 15, 20ff; K. Günther, 'Critical Remarks on Robert Alexy's Special Case Thesis' (1993) 6 *Ratio Juris* 143; C. Braun, 'Diskurstheoretische Normenbegründung in der Rechtswissenschaft' (1988) 19 *Rechtstheorie* 238, 259. For Alexy's replies see R. Alexy, 'The Special Case Thesis' (1999) 12 *Ratio Juris* 374; R. Alexy, 'Justification and Application of Norms' (1993) 6 *Ratio Juris* 157, 157ff; Alexy, *Theorie der juristischen Argumentation* (postscript 1991), 426ff. See also G. Pavlakos, 'The Special Case Thesis. An Assessment of R. Alexy's Discursive Theory of Law' (1998) 11 *Ratio Juris* 126; I. Dwar, 'Application of Discourse and Special Case Thesis' (1992) 5 *Ratio Juris* 67.

²³ Alexy, *A Theory of Legal Argumentation*, 214.

²⁴ R. Alexy, 'Law and Correctness' in M.D.A. Freeman (ed), *Current Legal Problems* (1998) 205, 208; R.B. Brandom, *Making It Explicit. Reasoning, Representing, and Discursive Commitment* (1994) 157; M. Klatt, *Making the Law Explicit. The Normativity of Legal Argumentation* (2008) 127–9.

²⁵ Alexy, 'Law and Correctness', 208.

²⁶ Klatt, *Making the Law Explicit*, 117–22; Brandom, *Making It Explicit*, 20, 46, 54.

assertion cannot be limited to the legal domain. Hence, the claim to correctness comprises both correctness within the legal system and the correctness of the legal system itself.²⁷

(iii) The possibility of rational legal argumentation defended

The third main point from the *Theory of Legal Argumentation* concerns the possibility of rational legal argumentation. Alexy takes an optimistic view, passing favourably on this possibility. He rejects the standpoint that practical argumentation lacks rationality, objectivity, and correctness by anchoring discourse-theoretic correctness between pure objectivity and pure subjectivity.²⁸ Discourse-theoretic correctness is based on a procedural theory of practical discourse according to which a practical proposition is correct if it can be the result of a rational discourse. Alexy constructs the concept of rational discourse by means of a system of 26 rules and forms. These make possible the demonstration of both the conditions and the limits of discursive rationality in law.²⁹ The conditions, on the one hand, are explicated by the form and rules of discourse. They must be followed if the outcome is to be rationally justified. The limits of rationality in law, on the other hand, stem from the fact that legal discourse does not lead to a single correct answer. Rather, one has to distinguish between three possible outcomes of legal discourse.³⁰ Based on the rules and forms of legal discourse, some outcomes may be discursively necessary, while others may be discursively impossible. Still others may be discursively possible, that is, several competing interpretations might be equally rational at the end of the legal discourse.

(c) History of reception

In a postscript to the second edition, in 1991, Alexy replied to criticism of the discourse-theoretic basis of his book.³¹ Out of the 100 papers that Alexy has published, roughly 30 are concerned with questions of the theory of legal argumentation. Of the 27 doctoral theses supervised by Alexy, seven deal with legal argumentation. *A Theory of Legal Argumentation* has been translated into seven languages.³²

In an interview with Manuel Atienza, Alexy refers to two points as weaknesses of his first book.³³ First, the book presupposes a non-positivistic concept of law but

²⁷ Alexy, 'Legal Philosophy: 5 Questions', 3. In his book, Alexy had answered this problem differently and limited the claim to correctness to the legal framework: see Alexy, *A Theory of Legal Argumentation*, 214. This change is due to the fact that after the publication of this book, Alexy developed the claim to correctness further and applied it to the law as a whole; see Alexy, 'Law and Correctness'.

²⁸ R. Alexy, 'Entrevista a Robert Alexy: Antworten auf Fragen von Manuel Atienza' (2001) 24 *Doxa* 671, 672.

²⁹ Alexy, 'Legal Philosophy: 5 Questions', 3ff.

³⁰ M. Klatt, 'Taking Rights Less Seriously: A Structural Analysis of Judicial Discretion' (2007) 20 *Ratio Juris* 506, 520ff; Alexy, *A Theory of Legal Argumentation*, 207.

³¹ This postscript is not part of the earlier English edition.

³² The international recognition of Alexy's book started with the first English paper drawing attention to its importance: N. MacCormick, 'Legal Reasoning and Practical Reason' (1982) 7 *Midwest Studies in Philosophy* 271.

³³ Alexy, 'Entrevista a Robert Alexy', 672.

does not fully develop it. Second, weighing and balancing are not analysed as a distinct legal method.³⁴ Both weaknesses form the basis of the next two books which, in effect, more than compensate for them.

(2) *A Theory of Constitutional Rights*

The second book, Alexy's 'Habilitation' thesis, was published in German in 1985.³⁵ It was translated into Spanish in 1993 and again in 2007, into English in 2002, into Korean in 2007, into Portuguese in 2008, and into Polish in 2010. The role of constitutional rights in many legal systems is characterized by four factors.³⁶ First, they enjoy the highest rank in the hierarchy of norms. Second, their enforcement is governed by a constitutional court. Third, they concern matters of the highest relevance to people and society. Lastly, they have a decidedly open texture.

It is precisely the combination of these four factors that gives rise to many crucial problems. The central theme of Alexy's second book is to demonstrate how crucial problems of the theory of constitutional rights can be resolved by distinguishing two kinds of norm, namely rules and principles, and by pursuing the consequences that stem from this norm-theoretic distinction.

(a) *Three main points*

(i) **Rules and principles**

Alexy's theory is based on an analysis of constitutional rights as principles which, he argues, are fundamentally different from rules.³⁷ It is important to note that Alexy's concept of principles differs from the conventional one, which distinguishes principles from rules by pointing to their more general level, their lower status in the canon, or their lower weight.³⁸ In contrast to this conventional route, Alexy maintains that the difference is one not of degree, but of kind. Whereas rules are always either fulfilled or not, principles can be fulfilled to varying degrees. They are optimization requirements, requiring that something be realized to the greatest extent possible given the legal and factual possibilities.³⁹

³⁴ It is worth noticing, though, that *A Theory of Legal Argumentation* already contains priority rules dependent on specific conditions: see Alexy, *A Theory of Legal Argumentation*, 200ff.

³⁵ R. Alexy, *Theorie der Grundrechte* (1994).

³⁶ See R. Alexy, 'Grundrechte im demokratischen Verfassungsstaat' in A. Aarnio, R. Alexy, and G. Bergholtz (eds), *Justice, Morality and Society. Festschrift für Aleksander Peczenik* (1997) 27, 28–32.

³⁷ On the fundamental character of this distinction for constitutional rights theory see R. Alexy, *A Theory of Constitutional Rights* (2002) 44.

³⁸ See F. Schauer, 'Prescriptions in Three Dimensions' (1997) *Iowa Law Review* 911–22; F. Schauer, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991) 12–15; Kumm contrasts Alexy's terminology with different suggestions discussed in Anglo-American jurisprudence in 'Constitutional Rights as Principles', 576–8.

³⁹ Alexy, *A Theory of Constitutional Rights*, 45–47.

(ii) Proportionality analysis and the law of balancing

The norm-theoretic character of constitutional rights as optimization requirements leads to an analysis of proportionality.⁴⁰ This analysis provides a theoretically well-founded test for assessing what a constitutional right requires in a particular case. The proportionality test proceeds in three steps: tests of suitability, of necessity, and a test of proportionality in its narrower sense.⁴¹ The suitability and necessity tests review optimization against what is factually possible. They follow the idea of Pareto-optimality and aim at avoiding those interferences with constitutional rights that can be avoided without costs to other principles.⁴² The third test, that of proportionality in its narrower sense, reviews optimization against what is legally possible. The space of the legally possible is essentially defined by competing principles, so the third test requires balancing. This has been formulated by Alexy in his Law of Balancing: 'The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.'⁴³ This doctrine sheds light on the fact that the principles theory of constitutional rights is, in essence, a theory of balancing.⁴⁴

(iii) The structure of balancing and the weight formula

Many aspects of the principles theory of constitutional rights were developed further and clarified in the years following the publication of the book, both by Alexy himself and by scholars influenced by him. The most significant further development of the theory, however, is concerned with the structure of balancing. Alexy has clarified this in a number of articles,⁴⁵ and in his postscript to the English edition of *A Theory of Constitutional Rights*.⁴⁶ Alexy's weight formula stands at the centre of this new analysis of the structure of balancing. The weight formula defines the concrete weight assigned to a principle relative to a colliding principle in a particular case. It takes into account the abstract weights of both principles, and the intensity of interference with one principle, the degree to which the other principle is not realized, and how reliable the empirical assumptions were.⁴⁷ The weight formula is a mathematical model that employs numbers but is based on a highly intuitive triadic scale. The same scale is used to judge abstract weights, the intensity of interference, and the degrees of reliability, and it distinguishes light, moderate, and serious grades.

⁴⁰ The relation between principles theory and proportionality analysis is conceptually necessary: see R. Alexy, 'Grundrechtsnorm und Grundrecht' (2000) *Rechtstheorie, Beiheft* 13, 101, 106.

⁴¹ See R. Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 *International Journal of Constitutional Law* 572, 572ff.

⁴² Alexy, 'Legal Philosophy: 5 Questions', 5.

⁴³ Alexy, *A Theory of Constitutional Rights*, 102.

⁴⁴ Alexy, 'Legal Philosophy: 5 Questions', 5. On the necessary connection between constitutional rights and balancing see Alexy, *A Theory of Constitutional Rights*, 69–86.

⁴⁵ R. Alexy, 'On Balancing and Subsumption' (2003) 16 *Ratio Juris* 433; Alexy, 'Balancing, Constitutional Review, and Representation', 574–7.

⁴⁶ Alexy, *A Theory of Constitutional Rights*, 401–14.

⁴⁷ Alexy, 'On Balancing and Subsumption', 440–8.

(b) Consequences and main advantages of principles theory

A number of consequences follow from the structure of constitutional rights as analysed by Alexy. Only three of these will be considered here, for these three represent the main advantages of principles theory. Principles theory leads to a wide-scope theory; it characterizes balancing as both rational and indispensable, and it helps the analysis of the relevance, function, and, indeed, limits of constitutional review.

(i) Scope

In constitutional rights theory, there are two opposing approaches to the scope of such rights. The first defines both the scope and the limits narrowly. The second interprets both the scope and the limits of constitutional rights expansively. Alexy's principles theory strongly supports the 'wide' theory.⁴⁸ The 'narrow' theory would be advantageous only if it were possible to draw, without difficulty, the frontiers between cases in which rights protection ought to be granted and cases in which such protection ought to be denied. This condition would be fulfilled only if all constitutional rights cases were clear ones. Owing, however, to the existence of many hard cases in which this line cannot be drawn without difficulty, balancing of some sort or other is unavoidable. According to the 'narrow' theory, this balancing only takes place in the course of defining the actual scope of a right. This theory faces the difficulty of justifying narrow scope without drawing on any sort of purported proof. In contrast, the 'wide' theory insists that every constitutional rights argument must take into account competing arguments and hence, requires balancing. This theory makes better provision for a step-by-step procedure and avoids an *ex ante* denial of the very possibility of balancing in a certain class of cases.⁴⁹

(ii) The rationality and indispensability of balancing

Whether balancing can be rational is a highly contested matter. According to Rawls, for example, a principles theory of constitutional rights might well be beholden to balancing intuitiveness, which has the effect of dissolving the binding force of the law.⁵⁰ Alexy's law of balancing makes it possible to put the question of the rationality of balancing more precisely. This serves to illuminate the point that balancing consists of three steps.⁵¹ The first involves establishing the degree to which a first principle is not satisfied, or suffers detriment. In the second step, the importance of satisfying the competing principle is established. Finally, the third step determines whether the importance of satisfying the latter principle justifies not satisfying the former. Hence, the rationality of balancing as a whole depends upon the possibility of making rational judgements about intensities of interference, degrees of importance, and their relation to each other.

⁴⁸ Alexy, *A Theory of Constitutional Rights*, 210–17; Alexy, 'Grundrechtsnorm und Grundrecht', 112–14.

⁴⁹ 'Grundrechtsnorm und Grundrecht', 112–14.

⁵⁰ J. Rawls, *A Theory of Justice* (1972) 34–40.

⁵¹ See Alexy, 'Balancing, Constitutional Review, and Representation', 574.

By breaking down balancing into its three stages, Alexy not only makes it possible for us to see more clearly what rationality of balancing means, he also prepares the ground for demonstrating that balancing can, indeed, be rational. The law of balancing shows that constitutional rights argumentation has to follow a fixed structure. It makes explicit exactly those premises that have to be justified if the result of the balancing is to be justified. If the definitive contents of constitutional rights are to be determined in as rational a way as possible, the method of balancing is indispensable.⁵²

(iii) Constitutional rights and constitutional review

Principles theory also has consequences for the institutional dimension of constitutional rights.⁵³ This dimension concerns the position of constitutional courts and their role in controlling the legislature and other public authorities. The competence of a constitutional court to review parliamentary legislation is necessary if constitutional rights are to enjoy priority over this legislation. Balancing is concerned with the methodological dimension of constitutional review.

The main problem of the institutional dimension of constitutional rights is how the legal competence of constitutional courts to hold acts of parliament unconstitutional and void is to be justified.⁵⁴ This justification is both difficult and vital, for it necessarily requires the relation between constitutional rights and democracy to be clarified. Among the arguments brought forward against principles theory, one consideration speaks to this relation. Böckenförde has argued that in Alexy's theory the legislature loses all autonomy on the ground that its function is reduced merely to establishing what has already been decided by the constitution. In his postscript to the English edition of *A Theory of Constitutional Rights*, Alexy demonstrates that this objection presupposes that there is only a single correct answer to any constitutional rights issue.⁵⁵ This, however, is not the position represented by Alexy's principles theory. That theory is consistent with substantive discretion on the part of the legislature, and Alexy has developed a whole system of discretionary power over which constitutional review has no control. Hence, principles theory analyses not just the relevance and function of constitutional review but also its limits.

(3) *The Argument from Injustice*

Alexy's book on the concept and the validity of law was first published in German in 1992.⁵⁶ Its aim is to defend a non-positivistic concept of law. Its major achievement is to bring clarity into the debate between positivism and non-positivism. This is done by distinguishing the various positions by means of five different categories, thus amounting to a complex system of positions in the field.

The English edition, translated by Bonnie Litschewski Paulson and Stanley L. Paulson, appeared as *The Argument from Injustice. A Reply to Legal Positivism* in

⁵² Alexy, 'Legal Philosophy: 5 Questions', 5.

⁵³ Alexy, 'Balancing, Constitutional Review, and Representation', 577.

⁵⁴ *Ibid.*, 578.

⁵⁵ See Alexy, *A Theory of Constitutional Rights*, 288ff.

⁵⁶ R. Alexy, *Begriff und Geltung des Rechts* (2005).

2002. The work has also been translated into Spanish (1994 and 1997), Italian (1997), Korean (2000), Swedish (2005), Arabic (2006), Romanian (2008), Slovak (2009), Portuguese (2009), and Russian (2011). Most importantly, Alexy's book has led to two major debates with legal positivists. The first debate, with Andrei Marmor, took place at the IVR World Conference in Granada in 2005;⁵⁷ the second debate, with Joseph Raz,⁵⁸ followed this event. Alexy has drawn upon the criticism of both Marmor and Raz to develop and clarify his position on the concept and validity of law.⁵⁹ I will present Alexy's view here in its developed form.

(a) *The connection thesis and the dual nature of law*

The core of Alexy's non-positivist theory of law is the connection thesis. It holds that there is a necessary connection between legal validity or legal correctness on the one hand, and moral merits or moral correctness on the other.⁶⁰ The connection thesis and its negation, the separability thesis maintained by legal positivism, are open to different interpretations. Hence, different versions of both theses are possible.⁶¹ Alexy has clarified his own position in the field by systematizing the versions that are possible within non-positivism, thus contributing to the recent debate on inclusive and exclusive legal positivism.

In particular, he distinguishes three different ways in which non-positivism can determine the effect of moral defects on legal validity.⁶² The first position claims that every moral defect leads to legal invalidity. Hence, morally defective norms are excluded from the law. This extreme position can be labelled 'exclusive' non-positivism. The second position holds that moral defects only lead to legal invalidity in some cases. An example for this position is Radbruch's formula, according to which moral defects lead to legal invalidity only if they represent extreme injustice. This position can be termed 'inclusive' non-positivism. Alexy's theory reflects this position. The third position maintains that moral defects never affect legal validity. This position is Kant's. On the one hand Kant bases the validity of positive law on non-positivistic principles and makes defects in the law dependent on non-positivistic principles. Accordingly, Kant's position is a non-positivistic one. On the other hand, however, Kant emphasizes the real—as opposed to ideal—dimension of law in holding valid every norm that has been authoritatively issued and is socially efficacious. Hence, according to Kant, the relation between law and morality is not one of classification, but only of qualification. Alexy labels this position 'super-inclusive' non-positivism.

From Alexy's point of view, exclusive non-positivism gives too much emphasis to the ideal dimension of law, while super-inclusive non-positivism does the same

⁵⁷ R. Alexy, 'Agreements and Disagreements. Some Introductory Remarks' in M. Escamilla and M. Saavedra (eds), *Law and Justice in a Global Society. Plenarvorträge des 22. Weltkongresses der internationalen Vereinigung für Rechts- und Sozialphilosophie* (2005) 737–42.

⁵⁸ J. Raz, 'The Argument from Justice, or How Not to Reply to Legal Positivism' in Pavlakos (ed), *Law, Rights and Discourse*, 17–35; R. Alexy, 'An Answer to Joseph Raz' in *ibid.*, 37–55.

⁵⁹ The most recent article is R. Alexy, 'On the Concept and the Nature of Law' (2008) 21 *Ratio Juris* 281.

⁶⁰ *Ibid.*, 285.

⁶¹ On the basic possibilities, see *ibid.*

⁶² *Ibid.*, 287–90.

for the real dimension of law. Thus, both positions fail to recognize what Alexy calls the dual nature of law. In the dual nature thesis, law contains a factual dimension, defined by authoritative issuance and social efficacy, and an ideal dimension, defined by moral correctness. Thus, legal validity depends on both social facts and moral values.⁶³ Only the second position—inclusive non-positivism—does justice to the dual nature of law, for it claims neither that moral defects always undermine legal validity nor that they never do.

In summary, Alexy maintains a particular version of the connection thesis, based on the dual nature thesis. It can be called ‘inclusive legal non-positivism’.

(b) Two main arguments

Alexy’s dual nature thesis is based on two main arguments, relating to the factual and to the ideal dimensions respectively.⁶⁴ The first argument establishes that the law employs coercion or sanctions as maintained by the factual dimension thesis. The second argument establishes the necessary relation between law and morality as maintained by the ideal dimension thesis.

(i) Coercion

According to Alexy, the law has a necessary relation to coercion, as reflected in two factors.⁶⁵ First, this relation is presupposed in our actual use of language. Second, this relation is necessary if the law is to perform its practical function, that of serving legal certainty and legal efficiency.⁶⁶

(ii) Correctness

Alexy maintains that the main argument for the necessary connection between law and morality and, hence, for the ideal dimension of law as the second part of the dual nature thesis, is the claim of law to correctness. Originally Alexy had analysed this claim in the context of legal argumentation and related it to institutional acts such as judgments.⁶⁷ Subsequently, he has extended this claim to the law in general.⁶⁸ In the context of the concept and validity of law, it is this extended version of the claim to correctness that is relevant.

⁶³ Alexy, ‘Legal Philosophy: 5 Questions’, 6ff.

⁶⁴ Most interestingly, however, the two arguments are not completely separate from one another. Rather, they are necessarily linked, for the claim to correctness serves not only to establish the substantive link between law and morality as maintained by the ideal dimension thesis, but also to justify the necessary connection between law and the principles of legal certainty and efficiency as maintained by the real dimension thesis. In this respect, the correctness argument is the more fundamental of the two. Hence, on the most general level, the dual nature thesis is in essence based on the correctness argument alone. See Alexy, ‘On the Concept and the Nature of Law’, 293.

⁶⁵ *Ibid.*

⁶⁶ To be sure, this argument presupposes a necessary connection between, on one hand, the principles of legal certainty and efficiency and, on the other, the law. This connection is established by the correctness thesis. This thesis, therefore, plays a role not just in the ideal dimension but also in the ideal dimension. See *ibid.* and n 64 above.

⁶⁷ See part A(1)(b)(ii) ‘The claim of law to correctness’ above.

⁶⁸ Alexy, ‘Law and Correctness’, R. Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (2002) 135ff.

Alexy's point that the law necessarily raises a claim to correctness is demonstrated by means of an appeal to performative contradictions.⁶⁹ This claim leads to a necessary connection between law and morality, for a judge who chooses a morally mistaken interpretation of the positive law in a case in which the positive law also provides for a morally correct interpretation would be making not only a morally incorrect but a legally incorrect decision, also.⁷⁰

(c) *Inclusive legal non-positivism and the participant's perspective*

Thus far, the argument has demonstrated a qualifying connection between law and morality by establishing a necessary relation between moral and legal defect. Alexy's inclusive non-positivism also maintains, however, a classifying function. It does so in drawing on Radbruch's formula, which denies legal validity to extremely unjust norms. The connection thesis alone cannot justify this formula, for it is concerned only with legal defect, not with legal validity.

Additional reasons are necessary, therefore, to justify a classifying relation between law and morality. These additional arguments, according to Alexy, are to be found in fundamental rights. From a moral standpoint their protection creates a need to establish the classifying relation between law and morality maintained by the Radbruch formula.⁷¹

With this line of argument, Alexy integrates normative arguments into the debate on what the law is. Such arguments could readily be adduced in debates on what the law ought to be. However, the issue at hand is the debate between positivism and non-positivism over the nature of the law. Thus, the use of normative arguments on what the law ought to be is not immediately clear. What on first glance might be seen as a category mistake turns out, however, to be essential lest the dual nature of law not be correctly understood.⁷² For this dual nature is correctly reflected in a theory of law only if one takes account of both the observer's and the participant's perspectives. While the observer asks how legal decisions are actually made, thus referring to the real dimension of law, the participant asks what the correct legal answer is, thereby referring to the ideal dimension of the law. Combining these two perspectives, Alexy has an answer to legal positivism. He integrates the 'ought to be' of the law with the 'is' of the law. At the methodological or philosophical level, then, the dual nature thesis rests on this integration of two categories of discourse often seen as separate and, indeed, irreconcilable. They are certainly seen as separate by legal positivism.⁷³ Alexy, however, insists on their integration, which, he argues, provides for a richer, more complex account of the concept of law than does legal positivism. In essence, then, Alexy's answer to legal positivism is that it fails to integrate the participant's perspective into the

⁶⁹ *The Argument from Injustice*, 35–9.

⁷⁰ Alexy, 'On the Concept and the Nature of Law', 295ff.

⁷¹ *Ibid.*, 296; Alexy, *The Argument from Injustice*, 58.

⁷² Alexy, 'On the Concept and the Nature of Law', 297.

⁷³ J. Raz, 'On the Nature of Law' (1996) 82 *Archive for Social Philosophy and Philosophy of Law* 1, 7; A. Marmor, 'Debate' (2005) 39 *Anales de la Cátedra Francisco Suárez* 769, 778.

theory. And it is the participant's perspective that gives rise to a necessary connection between what the law is and what the law ought to be.⁷⁴

B. Relations and Interconnections

Among the remarkable things about Alexy's work is the fact that, despite the breadth of the fields covered, the different pillars remain tightly linked to one another. Generally speaking, the broader the substance, the greater the risk of losing these links. In this section, by analysing relations and interconnections between and among the three main works, I will show that Alexy's theory is not vulnerable here.

(1) The concept of law and legal argumentation

The relation between legal argumentation and the concept of law plays an important role in *A Theory of Legal Argumentation*. In fact, this relation forms no less than the basis of the theory. This fundamental relation can be further elaborated by looking at the law's claim to correctness.

(a) *The special case thesis*

A Theory of Legal Argumentation is based on the special case thesis. According to this thesis, legal discourse is a special case of general practical discourse.⁷⁵ The special case thesis shows that legal argumentation has a twofold quality. On the one hand, it is rooted in the authoritative, institutional, or real side of law. Legal argumentation is set in a specific institutional context and is bound by statutes, precedents, and legal doctrine. Hence, authoritative reasons enjoy a special role in legal argumentation. On the other hand, legal argumentation is also connected with the ideal side of law. In hard cases, in which the open texture of law can provide for no clear decision based on authority alone, legal argumentation must encompass general practical argumentation. The special case thesis aims at integrating these two sides of the law in a theory of legal argumentation.⁷⁶

The decisive point here is this: it is the combination of these two sides that brings about a necessary connection between law and morals. Hence, the special case thesis leads necessarily to a non-positivistic concept of law.⁷⁷ In this respect, the special case thesis represents the argumentation-theoretic or methodological dimension of the dual nature thesis. The special case thesis makes the argumentation-theoretic consequences of the dual nature of law explicit. Thus, it establishes an intrinsic connection between legal argumentation and the concept of law.

⁷⁴ The connection thesis is further justified by a particular version of the correctness thesis, namely, the extreme injustice thesis; see Alexy, 'Legal Philosophy: 5 Questions', 7.

⁷⁵ Alexy, *A Theory of Legal Argumentation*, 212–20.

⁷⁶ *Ibid.*, 375.

⁷⁷ Alexy, 'Entrevista a Robert Alexy', 672; see also 'Legal Philosophy: 5 Questions', 3.

(b) The claim of law to correctness

The intrinsic connection between legal argumentation and the non-positivist concept of law as demonstrated with the help of the special case thesis can be analysed further by looking at the claim of the law to correctness. The thesis says that individual legal norms, individual legal decisions, and the legal system as a whole necessarily claim to be correct.⁷⁸ This claim—in the form of the argument from correctness—plays a decisive role in Alexy's work on the concept and nature of law.⁷⁹ It is also fundamental to the theory of legal argumentation, for correctness implies justifiability. Thus, the claim to correctness is necessarily supplemented by a claim to justifiability.⁸⁰ Justifiability, however, is the central issue of the theory of legal argumentation.

The claim to correctness yields a connection between legal discourse and general practical discourse, for this claim includes moral correctness and, hence, moral argument.⁸¹ When a judge claims that the decision handed down is correct, he claims, first, that the decision interprets the positive law correctly and, second, that the positive law itself is correct from the standpoint of critical morality.⁸² The argumentation-theoretic consequence is that the claim to correctness and justifiability does not allow the judge to forbear from adducing arguments to fill gaps in the law. Notwithstanding the fact that the authoritative arguments of the positive law may run out, the claim of justifiability persists. Hence, the judge needs to resort to general practical argument.

This argumentation-theoretic connection between law and morality would not lead, however, to any theoretical connection between law and morality, conceptual in nature, if legal positivism were right. It is possible for a legal positivist to agree up to this point with Alexy and still deny any necessary conceptual connection between law and morality. So, for example, Joseph Raz agrees that 'judges are subject to morality anyway'.⁸³ He agrees further that courts must apply arguments from both the executive stage with its authoritatively binding, positive law considerations *and* the deliberative stage, which includes reasons that are moral in character.⁸⁴ These considerations of Raz's are, in essence, perfectly in accordance with Alexy's special case thesis and his claim to correctness. But, unlike Alexy, Raz limits the law to the executive stage whereas Alexy builds the deliberative stage into the concept of law.

From all this it follows that, if Raz were right, the claim to correctness would not lead to a necessary connection between the theory of legal argumentation and the non-positivistic concept of law. Hence, further argument is necessary. Alexy

⁷⁸ Alexy, *The Argument from Injustice*, 35ff.

⁷⁹ In fact, the argument from correctness is the basis of the two other main arguments against legal positivism; see *ibid.*, 35.

⁸⁰ Alexy, 'Law and Correctness', 208; Alexy, *The Argument from Injustice*, 78.

⁸¹ Alexy, 'Vorstellungsbericht', 327.

⁸² Alexy, 'Legal Philosophy: 5 Questions', 2; Alexy, 'On the Concept and the Nature of Law', 295.

⁸³ J. Raz, 'Incorporation by Law' (2004) 10 *Legal Theory* 1, 12.

⁸⁴ J. Raz, *Ethics in the Public Domain. Essays in the Morality of Law and Politics* (2001) 207ff.

draws his arguments here from the example already mentioned above. In a case where authoritative arguments leave open two different interpretations, while a single moral argument favours one and rejects the other, the judge must follow the favoured interpretation.⁸⁵ Conversely, if the judge chooses to follow the other, morally defective, interpretation this decision, according to Alexy, is a legal decision but it is legally defective, for the moral argument is included in the claim to correctness raised by the decision. From Raz's point of view, this decision, however morally defective, would be legally correct.

The point here is not to settle the question on the merits in the debate between Alexy and Raz. Rather, the remarks on their dispute should suffice to demonstrate how—according to Alexy—the claim to correctness produces, on grounds of argumentation theory, a necessary connection between law and morality, thereby bringing together the concept of law and the theory of legal argumentation.⁸⁶

(2) The concept of law and constitutional rights theory

Although the relation between the concept of law and legal argumentation may be clear, the connection between the concept of law and constitutional rights theory is less so.⁸⁷ The latter tie, however, is as close as the former. Four aspects of the latter relation will be considered here. The first two reveal a relation of mutual justification between constitutional rights and a non-positivistic concept of law. The third aspect focuses on a methodological connection. The fourth draws on the use of constitutional rights to justify a classifying relation between law and morality.

(a) *Constitutional rights as an argument against legal positivism*

Alexy uses constitutional rights to justify his non-positivistic concept of law. In his view, constitutional rights are principles, that is, optimization requirements, and as such should be distinguished from rules. This norm-theoretic distinction leads to a necessary connection between law and morality by way of three theses: the incorporation thesis, the morality thesis, and the correctness thesis.⁸⁸ The incorporation thesis states that every legal system necessarily comprises legal principles. The morality thesis holds that the necessary incorporation of principles leads to a necessary connection between law and critical morality. The correctness argument establishes a necessary connection between law and correct morality. The details of this argument are not of interest here. It suffices here to note that the norm-theoretic distinction between rules and principles is used as the basis of one main argument against legal positivism.

⁸⁵ Alexy, 'On the Concept and the Nature of Law', 295. The example presupposes that only one additional argument is available.

⁸⁶ See Alexy, 'Law and Correctness', 216; Alexy, 'Legal Philosophy: 5 Questions', 2ff.

⁸⁷ For a critical view, see H. Koch, 'Zur Methodenlehre des Rechtspositivismus' in R. Dreier (ed), *Rechtspositivismus und Wertbezug des Rechts* (1988) 152, 157, 160; R. Poscher, 'Einsichten, Irrtümer und Selbstmissverständnis der Prinzipientheorie' in J.R. Sieckmann (ed), *Prinzipientheorie* (2007) 59, 64.

⁸⁸ Alexy, *The Argument from Injustice*, 70–81.

(b) Legal non-positivism and fundamental rights justification

The questions about the justification of fundamental rights can be understood in at least two different ways. The first concerns a justification of fundamental rights by establishing that they are part of a legal system, that is, are legally valid. The second way is more elementary. It questions whether fundamental rights exist per se, that is, independently of any particular legal system.

Legal non-positivism plays a role *vis-à-vis* the second manner of justification, according to Alexy. To justify the existence of fundamental rights per se, he argues, a moral discourse is necessary.⁸⁹ It is impossible to justify the existence of fundamental rights per se without employing arguments from morality, as distinguished from mere legal arguments. Hence, fundamental rights can be understood as elementary moral postulates. The justification of constitutional rights per se, as a species of moral discourse, establishes a necessary connection between law and morality.⁹⁰ Thus, legal non-positivism and constitutional rights theory are linked in Alexy's theory.

It is worth noting that this tie is not so close as to render law and morality identical. On the contrary, fundamental rights often prevent moral considerations from playing too great a role within a legal system.⁹¹ In this respect, the relation of legal non-positivism with fundamental rights has two faces. While moral considerations are necessary to justify fundamental rights, these rights at the same time prevent morality from a wholesale invasion of the law. It is precisely this point that reveals how fundamental rights function as an important gateway between law and morality and, indeed, as a means of balancing the problematic tensions between them.

(c) Balancing and the claim to correctness

There is also a methodological connection between Alexy's non-positivistic concept of law and constitutional rights. This connection can be explained by referring to a debate between Alexy and Habermas.

Constitutional rights are given effect by means of the method of balancing. Habermas has objected to Alexy that it is impossible to combine the claim to correctness and the balancing method in a single theory, since balancing does not follow correct-false polarity. This argument is based on the assumption that there are no rational standards for deciding whether a particular outcome of balancing is correct.⁹²

If Habermas were right, then either the balancing method or the claim to correctness would have to be abandoned.⁹³ Alexy shows in his analysis of the structure of

⁸⁹ R. Alexy, 'Menschenrechte ohne Metaphysik?' (2004) 52 *Deutsche Zeitschrift für Philosophie* 15.

⁹⁰ Alexy, 'Entrevista a Robert Alexy', 673. Strictly speaking, legal positivism could include moral principles like constitutional rights in the legal system and still maintain the separability thesis (for example, Coleman's or Kramer's inclusive legal positivism). This position, however, represents an adjustment of legal positivism to match the reality of modern constitutional legal systems. Rather than being a mere adjustment, a non-positivist theory is able to give these legal systems a real basis.

⁹¹ *Ibid.*

⁹² J. Habermas (1996) 17 *Cardozo Law Review* 1477, 1531ff; Habermas, *Between Facts and Norms*, 259.

⁹³ See R. Alexy, 'Grundrechte, Abwägung und Rationalität' (2002) 7 *Ars Interpretandi. Yearbook of Legal Hermeneutics* 113, 118; R. Alexy, 'Zur Struktur der Rechtsprinzipien' in B.

balancing that rational standards for balancing do exist. This demonstrates the possibility of combining the claim of the law to correctness with the balancing method. It does not suffice, however, to establish a necessary connection between the two. Accordingly, Alexy goes a step further, claiming that the balancing method is not just compatible with the claim to correctness, but, indeed, is required by it.⁹⁴

(d) *Constitutional rights and Radbruch's formula*

In its shortest form, the Radbruch formula states that extreme injustice is not law.⁹⁵ The formula plays an important part in Alexy's justification of a non-positivistic concept of law. Constitutional rights play a role in justifying the formula itself and thus, indirectly, a role in justifying the non-positivistic concept of law. Two aspects have to be distinguished here. The first goes back to an objection raised by H.L.A. Hart, who argued that the formula was dispensable since statutory injustice could be accounted for in other ways than by revoking legal character. For example, a legislature could abrogate an unjust older statute by means of a retroactive act.⁹⁶ Alexy shows that the mere possibility of a retroactive statute is not enough to demonstrate that the Radbruch formula may be dispensed with.⁹⁷ When the legislature fails to exercise this power, the Radbruch formula is required in order to declare the unjust statute inapplicable in a court of law. The judge cannot decide on the basis of the unjust statute, for this would be irreconcilable with the protection of constitutional rights. Thus, constitutional rights are used by Alexy to demonstrate the indispensability of Radbruch's formula, thereby replying to Hart's argument.

The second aspect of the relation between Alexy's inclusive non-positivistic concept of law and constitutional rights has already been mentioned. It stems from the fact that the core message of the formula is one of classification. The formula strikes down the validity of certain norms and excludes them from the domain of law. Precisely this classifying character is essential to support Alexy's inclusive non-positivistic concept of law. According to Alexy, the protection of fundamental rights gives rise to the necessity to establish the classifying relation between law and morality, as maintained by the Radbruch formula.⁹⁸

(3) **Legal argumentation and constitutional rights**

In his book on legal argumentation Alexy is concerned with the transition from legal norm to decision. Here, Alexy did not analyse the concept 'norm' itself. This, however,

Schilcher, P. Koller, and B.C. Funk (eds), *Regeln, Prinzipien und Elemente im System des Rechts* (2000) 31, 47ff.

⁹⁴ Alexy, 'Zur Struktur der Rechtsprinzipien', 48.

⁹⁵ See R. Alexy, 'A Defense of Radbruch's Formula' in M.D.A. Freeman (ed), *Lloyd's Introduction to Jurisprudence* (2001) 374, 375.

⁹⁶ See H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, 619.

⁹⁷ Alexy, *The Argument from Injustice*, 58.

⁹⁸ Alexy, 'On the Concept and the Nature of Law', 296; Alexy, *The Argument from Injustice*, 58.

was one of the tasks of his book on constitutional rights.⁹⁹ Alexy's analysis of the structure of constitutional rights naturally led to the institutional practice of balancing and, hence, back to the theory of legal argumentation. It is worth noting that one important element of the theory of constitutional rights was already contained, at least substantially, in *A Theory of Legal Argumentation*, namely the rules that prescribe which rules are to take priority over others under certain circumstances.¹⁰⁰

Since constitutional rights need to be interpreted by means of legal argument, they are necessarily related to legal argumentation.¹⁰¹ Alexy's theory of legal argumentation is essentially discourse-theoretic. According to him, the relation between discourse theory and constitutional rights is 'close, deep, and complex'.¹⁰² Three dimensions of this relation can be distinguished: a philosophical dimension which concerns the foundation or justification, a juridical dimension which concerns the interpretation and application, and an institutional dimension which concerns the institutionalizing of constitutional rights, and also of constitutional review.

(a) The philosophical dimension: the discourse-theoretic justification of basic rights

As far as the philosophical dimension is concerned, Alexy offers a discourse-theoretic justification of basic rights. As Alexy puts it, the justification is both explicative and existential. It is explicative in so far as it attempts to make explicit the necessary, albeit implicit conditions of human practice following Kant's transcendental philosophy;¹⁰³ and existential in so far as it is based on the discursive nature of human beings.¹⁰⁴ Alexy's rules of discourse render the values of freedom and equality explicit. They illuminate the fact that discursive practices, the games of giving and asking for reasons in Brandom's terminology, contain values. The details of this argument are not of interest here.¹⁰⁵ Rather, it is enough to record that, in the philosophical dimension, Alexy uses discourse theory to justify basic rights, thus establishing an 'intrinsic substantive connection' between discourse theory and constitutional rights.¹⁰⁶

(b) The juridical dimension: subsumption and balancing

The juridical dimension is concerned with the interpretation and application of constitutional rights. Here, too, we find a close connection between Alexy's theory of legal argumentation and his theory of constitutional rights.

Alexy's analysis of constitutional rights is based on the distinction between rules and principles. This distinction is norm-theoretic. But principles theory has

⁹⁹ Alexy, 'Vorstellungsbericht', 328.

¹⁰⁰ Alexy, *A Theory of Legal Argumentation*, 200ff.

¹⁰¹ See Alexy, 'The Special Case Thesis', 374ff.

¹⁰² R. Alexy, 'Discourse Theory and Fundamental Rights' in A.J. Menendez and E.O. Eriksen (eds), *Arguing Fundamental Rights* (2006) 15, 15.

¹⁰³ *Ibid.*, 21.

¹⁰⁴ *Ibid.*, 22.

¹⁰⁵ Klatt, *Making the Law Explicit*; R. Alexy, 'Discourse Theory and Human Rights' (1996) 9 *Ratio Juris* 209.

¹⁰⁶ Alexy, 'Legal Philosophy: 5 Questions', 4.

also a methodological side, which is intrinsically connected to its norm-theoretic side.¹⁰⁷ Balancing presupposes that the norms being balanced have the structure of principles, and to categorize norms as principles necessarily invokes the method of balancing.

From an argumentation-theoretic perspective, principles theory is required in order to arrive at an elaborate theory of balancing as a rational form of argumentation.¹⁰⁸ Hence, principles theory is an important aspect of the overall project of the theory of legal argumentation: in particular, where analysis of the conditions of rational legal argumentation is concerned.

At the most general level, Alexy distinguishes two forms of legal reasoning. Rules are applied by means of subsumption, principles by means of balancing. The formal structure of the two forms is different. While subsumption follows a deductive scheme, unfolding according to the rules of logic, balancing follows the weight formula, which should be understood in accordance with the rules of arithmetic.¹⁰⁹ As far as the juridical dimension is concerned, *A Theory of Constitutional Rights* is a kind of sequel to *A Theory of Legal Argumentation* focused on a different kind of norm, principles.

It may seem that, since both forms of legal reasoning are related to different kinds of norm, they should be completely separated. This is not the case. It can be shown by taking up the double character of constitutional rights norms.¹¹⁰ This double character stems from the fact that, even though constitutional rights norms are initially understood as principles, these principles have to be integrated into a norm that has the form of a rule. The most general form of this rule is as follows: whenever a state intervention renders a protected action impossible, and this is not justified, the intervention on the part of the state is constitutionally prohibited. This rule is a rule in the sense of Alexy's norm-theoretic distinction: if its condition obtains, the legal consequence must be applied. At the same time, balancing is built into this rule, since the antecedent of the hypothetically formulated rule comprises the principle of proportionality. This double character reveals that any subsumption within a constitutional rights norm presupposes balancing.¹¹¹ This counts as the most fundamental relation between legal argumentation and constitutional rights theory.

A second, more technical relation stems from the fact that, as such, balancing is based on propositions respecting the degree of interference, the importance of abstract weights, and degrees of reliability. These propositions need to be justified by argument; such argument, per se, is no longer specific to balancing. Rather, all legal argument can be used to justify these propositions.¹¹² Hence, any balancing of principles requires ordinary legal argumentation, as analysed in Alexy's

¹⁰⁷ R. Alexy, 'Kollision und Abwägung als Grundprobleme der Grundrechtsdogmatik' (2001) 6 *World Constitutional Law Review* 181, 197.

¹⁰⁸ Alexy, 'Legal Philosophy: 5 Questions', 4ff.

¹⁰⁹ Alexy, 'On Balancing and Subsumption', 433; critical, B. Brozek, 'The Weight Formula and Argumentation' in Pavlakos (ed), *Law, Rights and Discourse*, 319, 326.

¹¹⁰ See Alexy, 'Grundrechtsnorm und Grundrecht', 110ff.

¹¹¹ *Ibid.*, 111.

¹¹² *Ibid.*, 114ff.

theory of legal argumentation. 'The law of balancing tells us what it is that has to be rationally justified'.¹¹³ Again, discourse turns out to be the basis of the application of constitutional rights, thereby establishing a necessary connection between the theory of legal argumentation and constitutional rights theory.¹¹⁴

(c) The institutional dimension: discursive democracy and constitutional review

The institutional dimension concerns the institutionalizing of fundamental rights within a specific legal system. Here, discourse theory requires a specific organizational form of democracy, which might be labelled 'discursive democracy'.¹¹⁵ The values of freedom and equality are fundamental to discourse theory, and they must be incorporated into a legal system if legal argumentation is to be as rational as possible. Second, to avoid violations of fundamental rights as far as possible, discourse theory requires constitutional review to be institutionalized, and this must in itself have a discursive character.¹¹⁶ Alexy elaborates this aspect in the final chapter of *A Theory of Constitutional Rights*.¹¹⁷ Constitutional rights argumentation is to some extent determined by the rules and forms of discourse. Still, a significant rationality gap remains. This makes it necessary for authoritative decisions on constitutional rights to be made and also, therefore, some form of constitutional court to be set up. Alexy goes one step further when he proposes, in general, that 'practical reason can only be realized on the context of a legal system which combines argumentation and decision in a rational way'.¹¹⁸ The details of this argument will not be considered here. It is important to note only that discourse theory plays a role in the institutionalizing of constitutional rights and constitutional review.

C. The System as a Whole

In order to construct the system of Alexy's philosophy of law as a whole, I will first analyse some key elements and their relevance to the complete system. Then, I will briefly reflect on some ways of characterizing the system and on Alexy's overall approach.

¹¹³ Alexy, *A Theory of Constitutional Rights*, 107.

¹¹⁴ Alexy, 'Legal Philosophy: 5 Questions', 6: '[t]he model of balancing based on a theory of principles... ties the formal structure of balancing to a theory of legal reasoning, which includes a general theory of practical reasoning'; Alexy, *A Theory of Constitutional Rights*, 109: '[t]he Subsumption Formula and the Weight Formula are... on the same footing, as judgments remain in both cases the basis'; Alexy, 'On Balancing and Subsumption', 448.

¹¹⁵ Alexy, 'Discourse Theory and Human Rights', 22.

¹¹⁶ *Ibid.*, 22ff.

¹¹⁷ Alexy, *A Theory of Constitutional Rights*, 386ff.; see Alexy, 'Balancing, Constitutional Review, and Representation', 580ff.

¹¹⁸ Alexy, *A Theory of Constitutional Rights*, 387.

(1) Key elements

The attempt to identify key elements of a system presupposes a clear conception of 'key element'. I shall consider as key precisely those elements in Alexy's system that have had a decisive effect on all three pillars. Key elements must form an overall basis from which the details of all three pillars can be spelled out.

The candidates for key elements of Alexy's system are six in number: the idea of discursive rationality in law, the special case thesis, the correctness thesis, the principles thesis, the extreme injustice thesis, and the dual nature thesis. It is possible to reduce this list further, for the special case thesis and the correctness thesis can be seen as supplementing the discourse thesis, while the extreme injustice thesis can be understood as supplementing the double nature thesis. Hence, at the most general level our list contains three key elements: the discourse thesis, the principles thesis, and the dual nature thesis. It comes as no surprise that these three elements originate in the three pillars of Alexy's philosophy of law. The question of proper categorizing will not be considered further here. Rather, my main point is that all three elements play a decisive role in each of the three pillars. In what follows, I will demonstrate this for each of the three key elements.

(a) *The dual nature thesis and its relevance to the system*

The dual nature thesis combines an institutional, authoritative, or real dimension of law with a free or ideal dimension. It originates in the pillar of the concept and nature of law. It is the crucial expression of the connection thesis in inclusive non-positivism. However, the dual nature thesis has consequences for the other two pillars as well. Alexy applies the dual nature thesis to the law in general, but he also applies it to legal argumentation. As he puts it, legal argumentation has a two-sided face.¹¹⁹ It is connected to the authoritative, institutional, or real character of law, for legal reasoning per se takes place in an institutional setting that brings about judicial decisions that are enforced, where necessary, by power. At the same time, legal argumentation is connected to the ideal character of law. This can be seen from the fact that legal argumentation implies moral reasoning. This is nothing other than the dual nature thesis in its argumentation-theoretic dimension, which is clearly expressed by the discourse-theoretic special case thesis. The special case thesis, in Alexy's words, is the attempt to arrive at an adequate theory of legal argumentation, one that covers both dimensions of the dual nature thesis.¹²⁰

The relation between discourse theory and the dual nature thesis can also be demonstrated in a different way. Discourse theory analyses the conditions of rational practical argumentation by reference to 28 rules and forms of discourse. However, it also makes it possible for us to see the limits of rationality in law, for these rules and forms do not always lead to a single correct answer. On the contrary, they leave open a realm of the merely possible (in discursive terms), competing decisions in many instances. This realm of discursively possible, and hence rational, disagreement forces us to introduce positive, formal, legal rules on how

¹¹⁹ Alexy, 'The Special Case Thesis', 375.

¹²⁰ Ibid.

to reach and enforce a decision. Hence, the limits of discourse theory explain the need for positivity in the law. In this respect, interestingly, the double nature thesis begins with the ideal dimension in the shape of correctness and discourse and leads, only at a second stage, to the factual dimension in the shape of positiveness and efficacy.¹²¹

While the relevance of the dual nature thesis to legal argumentation and to the concept of law is clear, its role *vis-à-vis* constitutional rights theory is more complex. According to Alexy, the dual nature thesis requires reason to be institutionalized. The institutionalizing of reason provides the dual nature of law with a substantial political form.¹²² The political form that best accords with the dual nature thesis is a liberal democracy. The reason for this stems from the legal-argumentational dimension of the double nature thesis. The conditions of legal discourse demand that democracy and constitutional rights become a part of the legal system.¹²³ Then, the political form of a liberal democracy is fully developed by principles theory of constitutional rights. Principles theory makes possible rational balancing and an understanding of the discretion of public officials. It also makes it possible to establish a line of demarcation between the competences of the legislature and those of the constitutional court. The overall aim of this institutionalizing of reason *qua* liberal democracy is to reconcile the real and the ideal dimension of law.¹²⁴ Hence, the details of principles theory and constitutional rights analysis are closely linked to the dual nature thesis.

(b) The discourse thesis and its relevance to the system

The idea of discursive rationality in law is essentially connected to the claim to correctness. This claim bridges the discourse thesis and the dual nature of law. A second bridge between the two is the special case thesis, which originates in discourse theory but leads to a necessary connection between law and morality. Both bridges have already been analyzed in this function above. The same is true for the link between the discourse thesis and constitutional rights analysis: This link can be demonstrated in all three dimensions, the philosophical, the political, and the juridical. In the philosophical dimension, basic rights are justified with the help of the discourse thesis. In the political dimension, discourse theory specifies a particular political form for the institutionalization of basic rights. In the juridical dimension, the theory of balancing as a part of the principles thesis contributes to the theory of legal argumentation as a whole.

(c) The principles thesis and its relevance to the system

The principles thesis has at least four significant links to Alexy's position on the concept of law. Constitutional rights *qua* principles defeat the positivist concept of law. Second, legal non-positivism is essential to the justification of constitutional rights. Third, the claim to correctness requires balancing as the method appropriate

¹²¹ See Alexy, 'Legal Philosophy: 5 Questions', 3.

¹²³ Ibid, 4.

¹²⁴ Ibid, 5.

¹²² Ibid, 1.

for applying legal principles. Last, legal principles are employed to justify the qualifying character of the connection thesis, as maintained by Radbruch's formula.

The relevance of the principles thesis in the field of legal argumentation can be seen in all three dimensions analysed above.

(2) Approach and character

The task, here, is to conceptualize the system as a whole by identifying its underlying character. The earliest statement by Alexy on the character of his system of legal philosophy can be found in his introduction to a collection of papers published in 1994. There he states:

The eleven articles published together here vary in both their objects and their presentation. They are, however, held together by the analytical method and the liberal ideas of autonomy and universality. If my assumption is correct that the aforementioned method and ideas are closely related to each other, then we could speak of an 'analytical liberalism'.¹²⁵

Analytical liberalism gives the lie to the claim that Alexy's work is purely formal and lacks substantial ideas. According to Alexy, any minimally elaborated legal system implies *eo ipso* fundamental moral values in the form of basic rights. At the same time, these basic rights preclude a too rigid identification of the law with moral convictions. Thus, analytical liberalism can be interpreted as an attempt to resolve the tensions existing between law and morality. At any rate, it shows clearly that Alexy's philosophy is by no means purely formal.

Later Alexy identifies the relation between law and reason as lying at the very core of his work.¹²⁶ This relation is deep and complex. It culminates in what can be labelled the 'institutionalization of reason'.¹²⁷ Several aspects of the relation between law and reason can be distinguished. The first is a conceptual aspect. Reason plays an important role in determining the concept of law: it demands the transformation of human rights into positive law. Furthermore, it serves to establish the Radbruch formula, namely that extreme injustice cannot be valid law. Hence, reason excludes Kelsen's famous statement that any content whatever can be law.¹²⁸ The second aspect is a methodological one: reason is interpreted as argumentation. Hence, the rules and forms of legal discourse are established *qua* reason.¹²⁹ They do not achieve definiteness in every single case, however. Therefore, it is necessary to complement the rules of argumentation by means of structures for making decisions. At this point the third aspect of the relation between law and reason comes into play, namely the political aspect. The political form of the institutionalization of reason is 'discursive constitutionalism'.¹³⁰ Alexy describes it as 'an enterprise of

¹²⁵ R. Alexy, 'Vorwort' in R. Alexy (ed), *Recht, Vernunft, Diskurs* (1994) 7, 10, trans. M. Klatt.

¹²⁶ Alexy, 'Entrevista a Robert Alexy', 684.

¹²⁷ *Ibid.*, 16.

¹²⁸ See Alexy, 'Legal Philosophy: 5 Questions', 3.

¹²⁹ Alexy, 'Entrevista a Robert Alexy', 686.

¹³⁰ Alexy, 'Legal Philosophy: 5 Questions', 1; Alexy, 'Balancing, Constitutional Review, and Representation', 572, 581.

institutionalizing reason and correctness'.¹³¹ Discursive constitutionalism provides exactly those decision making structures that, from a methodological point of view, are necessary to transform mere discursively possible outcomes into clear decisions. Discursive constitutionalism stems from Alexy's discourse theory, for this theory calls for basic rights and democracy.¹³² It calls for basic rights, since discourse theory is based on freedom and equality; and it calls for democracy, as the very idea of a discourse can only be realized to the greatest degree in a deliberative democracy.

In his most recent elaboration of the systematic aspect of his work, Alexy has placed the dual nature thesis at the centre of his legal philosophy.¹³³ The relevance of the dual nature thesis for Alexy's system has been examined in detail above. It suffices here to state that the dual nature thesis is arguably the fundamental feature of Alexy's system.

In sum, the fundamental approach of Alexy's system can be described by three characteristics: analytical liberalism, institutionalization of reason, and the dual nature thesis. Each of these characteristics stresses important features of Alexy's work. They are closely connected with each other. Two aspects of this interconnectedness might be mentioned here as a means of demonstrating this point: the analytical method is in itself an instance of the institutionalization of reason, as it focuses on the method of legal argumentation. The incorporation of fundamental liberal values reflects the dual nature of law.

The character of a system of legal philosophy can be distinguished in several different ways. I will employ two categorizations developed by Ralf Dreier in order to underscore the main character of Alexy's legal philosophy. First, according to Dreier, theories have an analytical, a normative, or an empirical character.¹³⁴ Analytical theories focus on structures and general concepts of the law. Empirical theories describe and explain the structures and functional relations of the law from an empirical standpoint. Normative theories take up questions of obligation or of the evaluation of legal acts and conditions. In this nomenclature, Alexy's theory is normative and analytical.¹³⁵

Second, Dreier distinguishes integral from segmental theories.¹³⁶ Segmental theories explain only single aspects of a certain object and employ only a single viewpoint. Integral theories, on the other hand, try to include as many aspects and viewpoints as possible in order to acquire an all-round, holistic view of the object. Alexy's theory is an integral theory in so far as it combines the three pillars of his work, looking towards a system of legal theory.

¹³¹ Alexy, 'Balancing, Constitutional Review, and Representation', 581.

¹³² Alexy, 'Legal Philosophy: 5 Questions', 3ff.

¹³³ *Ibid.*, 1.

¹³⁴ See R. Dreier, 'Zur Theoriebildung in der Jurisprudenz' in R. Dreier, *Recht, Moral, Ideologie* (1981) 70, 84.

¹³⁵ Quine has challenged the possibility of these distinctions: see W. Quine, 'Two Dogmas of Empiricism' in W. Quine, *From a Logical Point of View. Nine Logico-Philosophical Essays* (1999) 20–46; for a defence, see H.P. Grice and P.F. Strawson, 'In Defense of a Dogma' (1956) *The Philosophical Review* 141.

¹³⁶ Dreier, 'Zur Theoriebildung in der Jurisprudenz'.

To illustrate this, we can instance Alexy's discourse theory. Alexy distinguishes an ideal from the real dimension. The ideal discourse is connected with the ideas of rationality and absolute procedural correctness. This, however, turns out to be a weakness as far as real discourses are concerned. Hence, discourse theory can flower fully only if it is supplemented by a theory of the state and of the legal system that reflects the institutional and real dimension of law. The relation between the ideal discourse and the institutional aspects of real discourse is one of mutual dependency. The fully fledged theory of practical legal rationality therefore comprises both a theory of a system of norms and a theory of a system of procedures.¹³⁷ The important point here is that discourse theory is set in an overarching system of practical rationality and, hence, in an integral theory in Dreier's sense.

D. Conclusion

In my analysis of Alexy's philosophy of law, I have invited attention to certain relations between and among all three pillars. The most fundamental connection between all three pillars can be found in Alexy's definition of the concept of law at the end of *The Argument from Injustice*:

The law is a system of norms that . . . (3) comprises the principles and other normative argument on which the process or procedure of law application is and/or must be based in order to satisfy the claim to correctness.¹³⁸

Alexy's definition of law comprises principles as well as the process of law application.¹³⁹ The connection between the three pillars could not be stronger.

The question remains: is Alexy's philosophy of law a system? According to the meaning of the term 'system' employed here, the answer to this question is clear. Alexy's philosophy covers a broad range of fundamental questions. It has a three-fold character, for it combines structural analyses with substantive elements and a use-oriented theory of law's application.¹⁴⁰ There are strong indicators that, indeed, the whole is more than the sum of the parts. If this does not count as a system of legal philosophy, it would be hard to figure out what does.

¹³⁷ See R. Alexy, 'Idee und Struktur eines vernünftigen Rechtssystems' (1991) *Archiv für Rechts- und Sozialphilosophie*, Beiheft 44, 30. This point has been described as an 'integral theory' by W. Brugger in 'Gemeinwohl als Ziel von Staat und Recht' in D. Murswiek, U. Storost, and H.A. Wolff (eds), *Staat-Souveränität-Verfassung. Festschrift für Helmut Quaritsch zum 70. Geburtstag* (2000) 45, 62.

¹³⁸ Alexy, *The Argument from Injustice*, 127.

¹³⁹ See *ibid.*, 127–30. This all-embracing definition of the concept of law marks an important difference from Raz's theory. According to Raz, the arguments and principles on which the process of applying law is or must be based are not part of the law (the executive stage) but only part of the deliberative stage.

¹⁴⁰ See A.J. Menendez and E.O. Eriksen, 'Introduction' in A.J. Menendez and E.O. Eriksen (eds), *Arguing Fundamental Rights* (2006) 1, 2, 6. The authors limit their statement to *A Theory of Constitutional Rights*; however, it is true in a broader sense, relating to the system of Alexy's works as a whole.