LAW BETWEEN OPTIMALITY AND NORMATIVITY

LAW'S IDEAL DIMENSION. Robert Alexy.* Oxford: Oxford University Press. 2021. Pp. xiv + 335. $99.00 (Hardcover).

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I.

Professor Robert Alexy's work can be found primarily in his three monographs,[2] which testify to his main areas of interest: philosophy of law, legal reasoning, constitutional rights, and the nature of law. Now we have the fortune to be offered a fourth book, *Law's Ideal Dimension,* published by Oxford University Press in 2021. This book consists of twenty-one articles, some of them previously unpublished, which cover Alexy's main topics of philosophical research. The book is divided into three parts, the first on the nature of law, the second on constitutional rights, human rights and proportionality, and the third on argumentation, correctness, and law. In the present work, I will discuss what I believe to be the core of his theses as presented through this latest publication.

Professor Alexy's first interest was the theory of argumentation. He then went on to investigate constitutional rights, and finally he focused on the nature of law. Such temporal order is reversed in this latest book. Here, the nature of law is the first issue that is dealt with, and the final part is devoted to the theory of legal reasoning. Alexy's legal theory has been a

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2. ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION (1989) [hereinafter, ALEXY, ARGUMENTATION]; ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (1985); ROBERT ALEXY, THE ARGUMENT FROM INJUSTICE: A REPLY TO LEGAL POSITIVISM (1992).

"fortunate" one, in the sense that it has from the beginning, thanks to its quality, attracted attention and provoked discussion. He has especially been well-received among judges, at least judges educated in the continental European tradition, who have been somehow confirmed and reassured in their approach to judicial review by Alexy's theory of constitutional rights. This is still, I would say, the area where Alexy attracts more attention from practicing lawyers and scholars as well. It is especially his view of constitutional rights *as principles*, and of principles as optimization precepts, that has been the object of intense discussion and scrutiny (see chapter 8). This is also due to his refined articulation of the principle of proportionality. In this new book, we find important novel contributions in this area (ch. 15). There is especially an attempt to formalize proportionality through a kind of mathematical algorithm, the *weight formula* (ch. 11). But there is also a sort of revision of the notion of principles, one which I believe to be a most interesting claim (ch. 13). In the final part of the book, dealing with legal reasoning and argumentation, a central part of it is the attempt to pare the blows that Jürgen Habermas directs against Alexy's approach. These are especially two: (i) the objection that a "firewall" against instrumental and utilitarian policies and political power in general would crumble if one conceived constitutional rights as teleological devises, and not as strictly deontological rules,[3] and (ii) the resistance to Alexy's special case thesis, according to which legal reasoning is a case of a more general practical, and thus moral, discourse[4] (ch. 20).

To deal with all the issues handled in Professor Alexy's latest book it would require far more space than I currently have. I will thus focus my comments only on those aspects of the book that I believe to be most topical and relevant.

One of the main points Alexy raises is the rationality of balancing. Balancing is seen as the appropriate way of applying principles of law (chs. 8 and 9). This is taken from Ronald Dworkin's early work, *Taking Rights Seriously*,[5] but it is further developed and radicalized by Alexy. Against such an approach to reasoning—balancing or weighing—the objection of irrationality

3. *See, e.g.*, JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG [JUSTIFICATION AND APPLICATION] (1991).

4. *See* ALEXY, ARGUMENTATION, *supra* note 2, at 211–20.

5. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

has been raised from several quarters and by various distinguished scholars, most prominently, Jürgen Habermas[6] and Bernhard Schlink.[7] Balancing—it is objected—would allow too much discretion to judges, and it might eventually be considered as a form of *ex post facto* reasoning, an exercise of rationalizing results that have been reached through a different sort of thinking and arguing.

Alexy replies to such criticisms by offering a formalization of weighing through a sort of mathematical formula, the "weight formula" (ch. 11). This—on whose particulars I will not indulge here—is interesting and well articulated. Indeed, such formula somehow offers an objective foundation, and some certainty, to the operation of weighing. It is shaped as an arithmetical operation, whose variables, along a triadic scale, should be given specific numerical value.

II.

Against balancing as the core of legal reasoning, especially once balancing is interpreted as formalizable in mathematical terms, a preliminary objection might be raised. Legal argumentation, one could argue, does not operate with numbers, or not mainly with numbers, and thus it is hardly reducible to a numerical calculation. Alexy opposes this challenge that the syllogism, too, at least as rendered in the vocabulary of logic, is not used in judicial reasoning either. However, it is, as a vocabulary, "the best means available to make explicit the inferential structure of rules" (p. 130). Nonetheless, even if one accepts Alexy's additional argument, and one moreover shares the view that principles are necessarily applied by balancing, a serious objection persists: there is no symmetry between the rationality of rule-application, as encapsulated and formalized in syllogism or formal logic, on the one side, and the application of principles, as implying the introduction of a numerical calculus, on the other.

The use of logic is fully compatible with the deontic character of rules, since it does not affect their normative character. The

6. *See* HABERMAS, *supra* note 3, at 259.

7. Bernhard Schlink, *Der Grundsatz der Verhältnismäßigkeit [The Principle of Proportionality]*, *in* FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT [COMMEMORATIVE PUBLICATION FOR 50 YEARS OF THE FEDERAL CONSTITUTIONAL COURT] 445 (Peter Badura & Horst Dreier eds., 2001).

same could not be said regarding the use of numbers in the application of principles, since the latter leaves principles vulnerable to a reinterpretation in fully teleological, and even economic, terms. In order to demonstrate it, it suffices to say that Alexy refers the rationality standard to Pareto optimality. Moreover, the use of mathematics (numbers) in the application of principles could only be possible, or plausible, if those principles had already been shaped in a way compatible with their treatment in terms of numbers. But this is precisely that which is in controversy. In any case, the attribution of numbers to the variables here, *i.e.*, the intensity of infringement of a principle, is to be balanced against the degree of the opposite principle's compliance, this again to be given a number, with both these operations preliminary to the computation offered by Alexy's weight formula. The ascriptions of a value, a number, to those variables need to be justified by *reasons*, endowed with propositional content (which numbers do not have). We might even claim that such an ascription should be supported by an appropriate *narrative*, and this could, again, not be done through a mathematical operation or computing. Alexy indeed acknowledges such necessity of a prior assessment of value and weight (pp. 158–59). Here there is then a scope for decision, or, if you prefer, deliberation, which could only be reduced or closed by arguments and narratives, not by numbers and computations. In this sense, the weight formula still depends upon arguments and narratives, arguments and narratives that are inevitably controversial. They could, however, be assumed as rational, if backed by good arguments.

By dealing with the infringement of principles and their relevance in terms of numbers, we are actually giving principles the character of mathematical entities, numbers. By doing so, however, reasoning by principles might easily lose its normative and argumentative character. Or at least it would be severely downplayed. In this way, we might be exiting the proper territory of legal argumentation, which is embedded in discourses, not in calculations. Weighing is an operation made through numbers, at least in the shape given to it by Alexy, since the entities to be balanced here are conceived as optimization requirements driven by Pareto optimality (pp. 127–28). Weighing nonetheless might hardly be able to justify its own results. Numbers as such are not reasons: to have the force of reason they, as numbers, would need

a previous argumentation—a point that is not denied by Alexy. Numbers, of course, can be used in discourses, but they should be previously given a *sense*, related to a propositional content. This is especially true where the question of what is just and unjust is at stake, as it is the case of law, a fact that is compellingly underlined in Alexy's concept of law and legal practice.

Alexy's book is also meant to offer a revision of his previous theory of principles as optimization precepts. Such a theory was the doctrine offered by Alexy in his seminal book on constitutional rights, *Theorie der Grundrechte*.[8] Alexy's first view would be soon contrasted by a later revision he would offer. Optimization precepts should—in Alexy's original formulation—justify the specific mode of application given to principles, that is, balancing, since optimization is claimed to be only realized gradually and teleologically. Optimization would not be open to an either/or alternative for compliance. However, so the main objection runs, if we face a precept or a command, this will be either followed or not. The content of a precept, whatever this might be, does not change its imperative character and the logic attached to it. An optimization precept will accordingly be either followed or not. In such a case, there wouldn't be room for balancing. Besides, optimization could also be reached in definitive terms, as it is shown, for instance, in the case of the road traffic rules that prescribe car drivers to optimize the air pressure of car tires. Alexy acknowledges the soundness of such objection, reshaping the structure of principles, as he presents them, as basically no longer optimization commands, but rather commands to be optimized, thus better reconsidered as sort of *meta-precepts*, precepts to optimize precepts (pp. 190–91). This theoretical move tries to solve a gap in the conceptual construction of principles by escalating the appropriate level of discourse. In this way, the principles doctrine is given the status of a meta-theory. Something similar was done by Alexy when theorizing about legal rights. Here, facing the difficulty of accounting for the power-conferring or constitutive feature of rights through the traditional three deontic operators of obligatory, forbidden and permitted, he presented rights as a meta-theoretical construction. In that construction, however, the three deontic operators are still in force, thus rights are conceptualized as "*mögliches Sollen*," a

8. ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS, *supra* note 2.

"permitted ought."[9] A permitted ought, however, can hardly make sense of a constitutive power. In any case, the somewhat baroque character of such strategy, and its somehow *ad hoc* logic, do not lead to its being a particularly convincing proposal.

A command to optimize a command can still be considered a command, and might be accepted as being open to definitive realization. In this way, such commands would not necessarily, conceptually, or logically imply a balancing to be applied for their compliance. In any case, the nature of such meta-commands is not clear. One possibility is that they be conceived as reiterative precepts—a view that is not convincing to Alexy. He, thus, in a third move, redefines principles in terms of an "ideal ought" (pp. 97–98). This would be a sort of *prima facie* ought, a precept to optimize precepts once more, which needs balancing to become a "real" ought. Its logical form is condensed into a prescription that a certain state of affairs should or should not be realized. This would open room for balancing, once the concrete state of affairs to be realized is ascertained. An alternative proposal for reshaping principles would be one of reiterated commands, or "reiterated validity obligations. These, however, oscillate between norms without validity and norms with ultimate validity. But principles—remarks Alexy[10]—are neither norms that are not yet valid nor norms that are definitively valid. Alexy thus rejects that proposal; instead, he focuses on the notion of "ideal ought" (which also allows him to stress the dual nature of law—real and ideal—and the law's being rooted in the ideal dimension). To this notion of "ideal ought," however, one might object that there is too much of both generality and complexity, such that the notion would hardly serve either to clarify or evaluate judicial reasoning. On the contrary, it might seem to render it a much less accountable operation.

One might indeed be nostalgic for Alexy's first formulation of the notion of principles in the law, given in an article prior to the *Theorie der Grundrechte*, "*Zum Begriff des Rechtsprinzips*."[11] In that article, Alexy defined principles as an "ideal ought," but

9. *See id.*

10. *See* Robert Alexy, *On the Structure of Legal Principles*, 13 RATIO JURIS, 294, 301–04 (2000).

11. Robert Alexy, *Zum Begriff des Rechtsprinzips [On the Concept of Legal Principles], in* ARGUMENTATION UND HERMENEUTIK IN DER JURISPRUDENZ [ARGUMENTATION AND HERMENEUTICS IN JURSPRUDENCE] 59–87 (Werner Krawietz et al. eds., 1979).

held that this required for application not only balancing, but a plurality of specification operations, including balancing, but also possibly including the addition of a derogative clause, in a way not that different from the way rules are applied. This would, however, play into the hands of those critics who equate rules and principles, by arguing that rules too are not necessarily applied through an either/or logic. Rules might be as defeasible as principles, such critics argued. In any case, in Alexy's first study on principles, *Zum Begriff des Rechtsprinzips*, rules and principles are not ontologically fully distinct. Their distinction is consigned to doctrine and interpretation, not to the theory or the ontology of norms, as instead has been done since the publication of *Theorie der Grundrechte*, and the thesis there elaborated of principles as "optimization precepts." In *Law's Ideal Dimension*, a revision of this thesis is presented, whereby principles are considered once more as "ideal oughts," but this is now seen as requiring a state of affairs which, at the same time, contains and allows for its contrary. An "ideal ought" would thus possibly consist of the conjunction of two logically contradictory or opposed normative precepts, to be combined into a real ought through an exercise of balancing. Such a solution to the intricate issue of the nature of legal principles is certainly ingenious, but it might not add greater plausibility to the view that principles are logically clearly distinguishable from rules.

An objection often directed against Alexy's thesis of constitutional rights as principles is that, on the one hand, it weakens the normative character of those rights. On the other hand, it makes them too strong, and thus allows judicial review to downplay the validity and even the legitimacy of legislative deliberation and law-making. In this new book, Alexy replies that the objection to his approach is self-defeating, in so far as it claims it to be, at the same time, too strong and too weak (pp. 124–26). It is, he claims, a contradictory objection: either principles strengthen or they weaken constitutional rights; they cannot do both at the same time. However, one might not agree with Alexy's defense. In fact, the alleged weakening and strengthening of rights refer to two different issues, such that the claims are not necessarily contradictory. Rights as principles weaken rights, in so far as the rights in question are *Abwehrrechte*, negative rights—

"trumps," using Ronald Dworkin's jargon[12]—that is, normative entitlements which cannot be derogated by alternative legal considerations, by other rights or by policies. On the other hand, constitutional rights as principles, if considered as principles, and these as optimization precepts, give the judge a power to reassess all the legislative law-making by testing it through a proportionality test. Legislation will thus be in general under suspicion and open to judicial review. There might even be the risk, by this operation, of altering the established hierarchy of sources of law, the separation of powers, and the democratic legitimacy that shapes it. All this does not seem to fit in the traditional democratic separation of powers, whereby not all powers have an equal normative status and an equivalent or fungible legitimacy. Legislation as the power that is constituted by the elected representatives of the people, even in a constitutional state with a robust judicial review, has, and should have, an uncontested primacy. Now, Professor Alexy is aware of this problem (p. 139), and tries to offer a solution that is compatible with the central and powerful role that his theory of principles gives to judicial review.

Alexy tries to reformulate the theory of representation used in constitutional law. According to him, it is possible to confer constitutional courts' and judges' legitimacy, by conceiving of them as sort of representative. But here representation is not an *ex ante* situation, it is not a quality required for a body to issue rules that are accepted as valid in the legal order. Representation is now rather shaped as *ex post*. Alexy claims that a deliberative body is representative if its decisions and deliberations are accepted, or acceptable, by citizens (pp. 140–41). There is no need for such a body to be elected by the citizens themselves or to be institutionally accountable to them. What makes it "representative" will only be the quality of their deliberations, their rationality. This presupposes a special kind of addressees, not just citizens, but "rational persons," or, Alexy adds, "constitutional persons," subjects who are able to understand and appreciate the quality of the judicial deliberations (though, one should stress, they are also *decisions*; a word that Alexy seems to reserve only to legislation). However, representation is part of the institutional asset of law; it is not just a matter of

12. *See* DWORKIN, *supra* note 5, at xi; *see also* Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153–67 (Jeremy Waldron ed., 1985).

argumentation, it is an existential situation.

Suppose the best law schools in Germany pool together and establish a committee consisting of their best scholars in law. Such committee is then asked to deliberate and issue parallel "decisions" for whatever case is brought before the Federal German Constitutional Court. We could assume, given the quality of their members, that such a scholarly committee (let's also assume that Professor Alexy would be appointed as one of its members) would issue very sensible and rational decisions, and that these might even be rationally superior to the ones given by the constitutional court, which perhaps sometimes is too much driven by prudential and political considerations. The scholars' deliberation, possibly more distant from the political arena, might thus be much more acceptable to rational persons than the ones issued by the court. In this way, if we follow Alexy, they might be possibly said to be more "representative" of the citizens' well-founded opinion. Should we then conclude that the scholars' deliberations are the real binding ones for the legal order? "Purely argumentative representation shall have," Alexy writes, "priority over representation based on election and re-election" (p. 141). Is it "no longer difficult," as it is claimed here, to answer the questions raised about such priority within the institutional scheme, and the legitimacy requirements of a constitutional democratic State?

The objection raised against a notion of representation defined in terms of an "entity" belonging only to the domain of justification, might also be directed against Alexy's elaboration of human rights. Such rights, we are told, do exist, if they can be justified (ch. 10). Moreover, Alexy argues, these rights can indeed be objectively justified. This is a good antidote against the many forms of skepticism and nihilism now quite widespread in society and academia. One should welcome this objectivist, argumentative foundation for human rights, but such an approach might nonetheless make more plausible Hannah Arendt's suspicion that human rights might have a more-or-less trivial status, when not backed by institutional guarantees and coupled with citizens' rights.[13] Arendt's point might remind us that human rights need stronger roots than just argumentative justification. They need two further requirements for their "existence": a

13. *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 372–88 (2004).

horizon of sense, where they mean something, and can be used for a narrative about the human condition, and an appropriate institutional or societal setting where they, beyond being seen as making sense, may have effective relevance for human lives. In any case, sense precedes justification. One could only justify something that has previously been given a meaning. Alexy is aware of this priority of sense and thus, in order to conceptualize human rights, in addition to his normative argument, he offers an "explicative" strategy that is meant to render explicit what is implicit in our moral and political practices (pp. 149–50).

III.

In *Law's Ideal Dimension*, Professor Alexy further refines his non-positivist account of law, while reaffirming his earlier view that law necessarily has a "dual nature." The dual-nature thesis claims that "law necessarily comprises both a real or factual dimension and an ideal or critical one" (p. 36). The factual dimension consists of authoritative issuance and social efficacy, the ideal refers to moral correctness. While the real dimension could be seen as the "institutional dimension," on the ideal side moral correctness would be intrinsically connected with practical reasonableness. What is morally correct is, *ceteris paribus*, reasonable, and what is practically reasonable is, at least in this respect, morally correct. In this way (and this appears to be a crucial step in understanding Alexy's account of law), the dual nature thesis leads to the idea of law as the institutionalization of reason.

This would mean that, from the internal, participant standpoint, some kind of extreme moral defectiveness could lead to legal invalidity. Alexy clarifies this argument by claiming that the connection between moral defectiveness and legal defectiveness could be conceived and expressed in three possibilities: (i) *exclusive non-positivism*—which holds that moral defectiveness makes law invalid in all cases; (ii) *inclusive non-positivism*—according to which moral defect leads to legal invalidity only in some cases (extreme moral defectiveness, echoing Radbruch's Formula[14]); and (iii) *super-inclusive positivism*—which claims that validity is never affected by moral

14. *See* Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law*, 26 OXFORD J. L. STUD., I–II (Bonnie Litschewski Paulson & Stanley L. Paulson, trans., 2006).

defectiveness. Alexy argues for the inclusive non-positivism, since it is the only form of non-positivism, he argues, that allows that "both sides of the dual nature of law are given their due weight" (p. 46), that is, the only alternative that gives adequate weight to both the real and ideal dimensions of law.

At the very core of non-positivism lies the idea that law necessarily implies an ideal dimension (correctness), an idea that is not given room by either version of positivism, exclusive or inclusive (p. 45). The participant's perspective plays a key role in such account of law: in substance, we couldn't have law without the participant's point of view, and such a claim challenges the neo-essentialist turn in jurisprudence, according to which law is a purely conceptual affair, independent from legal practice and participants' interpretation. Existence here seems to have the upper hand over essence, though this pragmatist turn might sometimes be put in doubt by Alexy's stretching the role of "necessity" in his concept of law.

The book's most challenging part indeed is the first one, which consists of seven chapters (chs. 1–7) dealing with the nature of law and the philosophy of law. What is here emphasized is the concept of law and what the search for law implies. In these first chapters, we are confronted with Alexy's efforts to escape the traditional opposition between positivism and a natural law. Positivism has recently taken three paths to reaffirm its merits. There is an exclusivist strategy, which downplays the internal point of view, bringing the concept of law back in a pre-Hartian way to a kind of ultra-external point of view. There is a second strategy to defend positivism, and this is to contingently connect law and morality. Morality can—might—be connected to law, provided however it does so through a piece of positive law. Finally, a third strategy within positivism is to give positive law the character of a normative decision that is appropriate to close down all possible ethical controversy within a community whenever common rules to be enforced are at stake. This coincides with what Alexy calls *super-inclusive non-positivism*; he is bravely opposing all three approaches.

To the exclusivist approach, the objection raised is the claim of the conceptual necessity of the internal point of view (p. 34). We might have law even if it lacks an external perspective, that of a neutral observer. We cannot, however, have law without the internal standpoint, the one taken by the participant. This is so

because law operates through a claim to correctness that can only be triggered, as it were, from inside out, within a practice and through participation. Norms are not descriptions, nor can they be rendered and understood in terms of cognitive statements. To understand them, one should in principle be able to use them. To the inclusive positivist approach, Alexy objects that law and morality are not separable, even if they are in fact separated. Inclusive positivism does not allow for grasping the ideal dimension of law (p. 45). The practice always operates through a claim to correctness, that is immediately transformed and made stronger in terms of a claim to justice. This is proven, Alexy argued, by the performative contradiction that would affect a constitution which proclaimed in one of its articles that the corresponding legal order is unjust, or by a judicial decision which declared the law for a case while declaring it to be unjust. "The idea underlying the method of performative contradiction is to explain this absurdity as resulting from a contradiction between what is implicitly claimed in acting to frame a constitution—namely, that it is just—and what is explicitly declared—namely, that it is unjust" (p. 15). It would be somehow equivalent to the contradiction that afflicts claiming at the same time that "a cat is on the mat" and that "this is not true."

Alexy believes that a performative contradiction can be reconstructed as a logical contradiction, once the implicit conditions of an act with a specifical prepositional content have been made explicit, that is, have been given a *propositional* content (pp. 316–17). Claiming that something is factually the case implies a claim of correctness (here, truth) that is similar to the claim to correctness (here, justice) claiming that something is legally the case. Adding an injustice clause to the legal statement, a judicial decision, a statute, or a constitution, would make evident, first, the performative contradiction, and then, after reflection, a logical contradiction. A claim of correctness and justice in the law, however, does not imply a claim to compliance with justice requirements. "That the law claims to be just does not mean that it is actually just" (p. 324). What is necessary to give a system its legal character is only the claim of correctness and justice implicit in its operations. This will also establish a connection between law and morality. Compliance with justice is not required, provided a threshold of *extreme* injustice is not overcome. Under this approach, it is possible for a legal rule to be

seen as defective and nonetheless legally valid. This shows the internal point of view, that of a participant to the practice of law, as implicitly a strongly normative, that is, moral, commitment. The ideal dimension of law is rooted in the claim to correctness. If there is such claim and it is really operative in legal practice, then law is more than just facticity—more than just power, coercion, and habits.

To the third strategy, the one pursued by ethical or normative positivism, one Alexy once (in a personal conversation) defined as the strongest positivist position, the objection is that it might deceptively seem to fill the ever-possible gap between a law that is legally defective and one that is legally valid. The same description is sometimes made of natural law approaches. Natural law is proposed in different versions, harder or softer. There is one, harder, version, whereby the gap between validity and moral defectiveness is never possible, since the moral deficiency would in all cases certify the invalidity of the legal statement (this is also true of Alexy's "inclusive non-positivism"). But there is a second, softer, approach, which allows for that gap, by not necessarily or conceptually deducing from moral defectiveness the invalidity of rules. Alexy now seems very close to this second natural law approach, which he calls "inclusive non-positivism." However, Alexy's natural law, or, better, "inclusive non-positivism," is somehow softer than the usual "soft" natural law doctrine. The possibility of defectiveness is opened up in Alexy's work, not so much by the necessity of factuality, or of authority, as the capacity to implement more or less coercively its own precepts, but rather by the discursive character of legal practices. To be transformed into law, morality does not depend on whatever facticity provides (as it is claimed by John Finnis' perhaps too stark thesis[15]); it rather depends on a specifically qualified kind of authority, involving public deliberation by the same people who are bound to follow the corresponding rules. This is so because morality here gets its binding force by being discussed through an intersubjective discourse, that is in principle shaped as a democratic forum. Authority will be able to issue valid law only if it is appropriately, internally built as possibly deserving general approval and acknowledgment in the community of citizens. In this sense, Alexy's theory, in the same way as Habermas' theory,

15. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 250 (1980).

might be labeled as a version of an "inclusive natural law," since morality, to penetrate the law, in both theories refers to the practice of discourse and of mutual recognition.[16] Morality in this perspective, is only indirectly or pragmatically related to law. The fundamental implication is that, within law, a contrast between legal certainty and justice will be solved by giving the upper hand to the former, however, with a proviso. Legal certainty will prevail, provided a special, intolerable threshold of injustice is not crossed. Beyond such threshold, justice will reassert its due merits and defeat the requirement of certainty. This is, of course, the view of "Radbruch Formula," which in *Law's Ideal Dimension* Alexy offers as a bridge substantively and directly connecting law and morality (pp. 115–17). Some perplexity might be caused by an addition made by Alexy, when further explaining the Radbruch formula: "This formula is the result of balancing the substantive principle of justice against the formal principle of legal certainty" (p. 181). Since this formula operates as a balance between the value of legal certainty and substantive justice, we might conclude that balancing is the overarching ground rule of a system of law. This, however, would give to what seems a formal standard of reasoning, indeed, a sort of computation, the material relevance of the very sense of law, its "*Witz*" (to adopt a term used by the later Wittgenstein).[17]

The most important novelty introduced in the jurisprudential debate after World War II was the idea, proposed by Herbert Hart in his great work, *The Concept of Law*, of taking an internal point of view in order to understand and define the nature of law.[18] Law is here seen as a practice, and this is open to understanding mostly from the perspective of an insider who takes part in the practice and shares its rules and somehow also its values. Hart believed that the internal point of view and a legal positivist doctrine could go hand in hand without too much tension. This has been shown to be not entirely correct. A few recent legal positivist approaches to the nature of law give up the Hartian centrality of the internal point of view. There are two main strategies to downplay the relevance of the internal point of

16. *See* Massimo La Torre, *On Two Distinct and Opposing Versions of Natural Law: 'Exclusive' versus 'Inclusive,'* 19 RATIO JURIS., 197 (2006).

17. LUDWIG WITTGENSTEIN, PHILOSOPHISCHE UNTERSUCHUNGEN [PHILOSOPHICAL INVESTIGATIONS] §§ 564, 567 (1977).

18. *See* H. L. A. HART, THE CONCEPT OF LAW (1961).

view. The first is to equate the internal with the external point of view, that is to say, taking the position that they are not really distinct perspectives, especially if the legal system in question prescribes principles as part of its contents.[19] The second is to reject the internal point of view entirely, and to substitute for it a fully moral approach.[20] In both cases, the implication is that the study of the nature of law is just an external one, sometimes treating it as a pure philosophical enterprise.[21] The internal point of view is rejected, either because there is no such alternative to an external perspective, or because it is biased, prejudiced, and possibly mistaken. Alexy opposes both of these strategies, paradoxically by offering a way of salvaging a legal positivism that is compromised by both. Alexy understands that the legal correctness of arguments brought before a court of law can never be verified through a purely factual perspective, one adopted by an external observer. The conclusion then is: "[i]t is impossible to say what the law is without saying what [the law] ought to be" (p. 79). Alexy thus rejects both exclusive and inclusive legal positivism.

IV.

I hope I have been able to address and outline the richness and the complexity of Professor Alexy's latest book. There is, of course, much more to say about it. However, what should be clear, even from my quick overview, is how much and how intelligently this book contributes to the contemporary debates in constitutional law and the philosophy of law. This is not an ivory tower discussion on the gender of angels, but a reflective articulation of a never-ending search for law, which is embedded in the ordinary and daily practice of judges, lawyers, and citizens, all endeavoring to give sense, order, and justice to communal life. However, philosophy of law here is considered as much more than just a commentary on case law or a doctrine of legal reasoning, though Alexy would share Ronald Dworkin's description of it as

19. *See, e.g.*, Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, *in* HART'S POSTSCRIPT 103 (Jules Coleman ed., 2001).

20. *See*, *e.g.*, JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 90–106 (2009).

21. *See*, *e.g.*, *id.*, at 97; *see also* Joseph Raz, *Can There be a Theory of Law*?, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 324–342 (M. P. Golding & W. E. Edmundson eds., 2005).

the silent prologue to judicial adjudication.[22] In Alexy's work, there is an explicit vindication of philosophy of law as being a comprehensive theoretical enterprise. This means that it is able and committed to dealing with all genuinely philosophical problems, that it has not only to concentrate on the authoritative or institutional issues of law, and, finally, that it can cope with critical normative questions without delegating to political or moral philosophy (pp. 11–12). According to Alexy, legal philosophy is not just a juridical theory of law, but rather a general and foundational effort to interrogate and understand the world and its essentials.[23]

Such vindication might, however, cause some perplexity, especially once the concept of law is too strictly related to a nature of law made of "necessary properties" (pp. 13–14). Is this not a way of referring concepts to "essences," a road to essentialism, an ultra–external point of view about the world? Does it not mean denying that law is rooted in history and in the controversies about what the law is? Law indeed has a history; it is not an immutable mode of being. One might even claim that its passage through time is progressive, or evolutionary, which would imply that it is ever changing. Now, what is in "history," one might observe, does not have an "essence"; it has only an "existence." Or else we might prefer to repeat Herbert Marcuse's words: "*das Wesen hat Geschichte*" (the "essence has *history*").[24] Too much foundational character given to philosophy might lead us to neglect or forget the existential and pragmatic mode of law's being in our world made of action and imagination. "The question of what is necessary, when connected with the question of what is specific, turns into the question of what is essential" (p. 13). But law eventually is what the practice of law is. Its "nature" can only be grasped from an internal point of view. An ultra-external perspective, some sort of "view from nowhere," one that is addressing "necessity," "analyticity," or even "*a priori*," would conflict with the evidence of law as a collective enterprise of social

22. *See* RONALD DWORKIN, LAW'S EMPIRE 90 (1986).

23. *See also* Robert Alexy, *The Nature of Arguments about the Nature of Law*, *in* RIGHTS, CULTURE AND THE LAW 3–16 (L. H. Meyer, S. L. Paulson & T. W. Pogge eds., 2003).

24. Herbert Marcuse, *Zum Begriff des Wesens [On the Concept of Being]*, *in* 3 SCHRIFTEN [IN 3 WRITINGS], AUFSÄTZE AUS DER 'ZEITSCHRIFT FÜR SOZIALFORSCHUNG' [ARTICLES FROM THE 'JOURNAL FOR SOCIAL RESEARCH'] 67 (1979) (emphasis in original).

acts. Moreover, such strong essentialism might have as a result the blurring of a fundamental distinction, between two modes of connecting law and morality, "classificatory" and "qualificatory," as this is deployed in Alexy's previous book on the concept and validity of law, *The Argument from Injustice*.[25]

Alexy writes: "[t]o define the concept of law, or to determine its nature is to say what law is" (p. 18). We may agree on this. But we should add, I believe, that law is saying what law is. The practice of law consists mostly in disputes and definitions on what the law is, since what the law is also determines what it has to be or needs to be. If this is true, and our experience of practicing lawyers seems to confirm it, then whatever ultra-external or philosophical perspective we might use to understand and define law would more or less immediately collapse into a more modest, and pragmatic, internal point of view. The endeavor to know the law will irremediably be a way from the inside out.

25. ROBERT ALEXY, THE ARGUMENT FROM INJUSTICE (2002).