

# The Dual Nature of Law\*

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*Abstract.* The argument of this article is that the dual-nature thesis is not only capable of solving the problem of legal positivism, but also addresses all fundamental questions of law. Examples are the relation between deliberative democracy and democracy *qua* decision-making procedure along the lines of the majority principle, the connection between human rights as moral rights and constitutional rights as positive rights, the relation between constitutional review *qua* ideal representation of the people and parliamentary legislation, the commitment of legal argumentation to both authoritative and non-authoritative reasons, and the distinction between rules as expressing a real “ought” and principles as expressing its ideal counterpart. All of this underscores the point that the dual nature of law is the single most essential feature of law.

The law has a dual nature, and it is this thesis that I wish to explicate. The dual-nature thesis sets out the claim that law necessarily comprises both a real or factual dimension and an ideal or critical one. In the definition of law, the factual dimension is represented by the elements of authoritative issuance and social efficacy, whereas the ideal dimension finds its expression in the element of moral correctness. Authoritative issuance and social efficacy are social facts. If one claims that social facts alone can determine what is and is not required by law, that amounts to the endorsement of a positivistic concept of law. Once moral correctness is added as a necessary third element, the picture changes fundamentally. A non-positivistic concept of law emerges. Therefore, the dual-nature thesis implies non-positivism.

To be sure, as thus stated the dual-nature thesis remains abstract and formal. In order to arrive at concrete content and a clear structure, the thesis has to be explicated within a system. The overarching idea of this system is the institutionalization of reason. The political form manifested by the system is democratic or discursive constitutionalism. The system

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itself is generated in three steps—the argument on behalf of the ideal dimension of law, the argument on behalf of positivity, that is, the real dimension of law, and the reconciliation of the ideal with the real.

## I. The Ideal

### I.1. *The Claim to Correctness*

At a first step, the ideal dimension of law has to be established. My argument turns on the thesis that law necessarily raises a claim to correctness, and that this claim comprises a claim to moral correctness. This claim to correctness is the source of the necessary relation between law and morality.

#### a) Law is Capable of Making Claims

Against the correctness thesis many objections have been raised. Four are of special significance. The first contests the notion that law is capable of making claims at all. Neil MacCormick puts it this way: “Law claims nothing” (MacCormick 2007, 59). His argument is, first, that law is a “normative order,” secondly, that normative orders are “[s]tates of affairs,” and, thirdly, that states of affairs are, in contrast to persons, incapable of having intentions or making claims (*ibid.*, 60).

MacCormick is, without doubt, right in maintaining that law as such is incapable of raising, in a literal sense, any claim. In a literal or strict sense, claims can be raised only by subjects having the capacity to speak and to act (see Alexy 1999a, 24). Nevertheless, talk about the claim of law to correctness seems to be sensible, for this claim is raised by persons, in particular, though not solely (Alexy 2007b, 334–5), by officials, on behalf of the law. Persons raising the claim to correctness on behalf of the law may be characterized as representatives of the law. The rejection of the first objection, therefore, amounts to the following thesis: Law can and does raise a claim to correctness, for the claim is made by its representatives.

#### b) The Necessity of the Claim to Correctness

The second objection denies that the claim to correctness is necessarily raised in law. Whether law raises any claims, and which claims, if any, it raises, is said to be an empirical question. One might call this the “contingency thesis.” If the contingency thesis were true, the dual-nature thesis, which essentially comprises the concept of necessity, would collapse.

One way of answering this objection is to demonstrate that the claim to correctness is necessarily implicit in law. The best means of demonstration is the method of performative contradiction (see on this Alexy 2002a, 35–9).

An example of a performative contradiction is the fictitious first article of a constitution that reads:

X is a sovereign, federal, and unjust republic

It is scarcely possible to deny that this article is somehow absurd. The idea underlying the method of performative contradiction is to explain the absurdity as stemming from a contradiction between what is implicitly claimed in framing a constitution, namely, that it is just, and what is explicitly declared, namely, that it is unjust. Now, justice counts as a special case of correctness, for justice is nothing other than the correctness of distribution and compensation (Alexy 1997, 105). Thus, our example shows that law and the claim to correctness are not only, as Eugenio Bulygin argues (Bulygin 1993, 23–4), connected by prudential reasons, but also—and this is much more—by reasons conceptual in nature. This connection is by no means confined to such fundamental acts as framing a constitution. It is present everywhere in the legal system. The absurdity of decisions such as the following makes this explicit:

The accused is sentenced to life imprisonment, which is an incorrect interpretation of prevailing law.

It might be objected that conceptual considerations of this kind do not address the issue. The question of whether the representatives of law raise a claim to correctness is a question of fact, and it is a fact that there are representatives who do not raise it. Ronald Dworkin's argument, brought against Raz's thesis that law claims legitimate authority, runs in exactly this direction. According to Dworkin it is a matter of fact that "many officials do not" make such claims (Dworkin 2006, 200; see also Bulygin 2000, 134). Oliver Wendell Holmes is said to be an example. According to Dworkin, Justice Holmes was not concerned with moral claims but with "making the cost of acting in certain ways more expensive" (Dworkin 2006, 200). The reply to this objection draws, as replies often do, on a distinction. It is the distinction between an objective or official and a subjective or private raising of the claim to correctness (Alexy 1998a, 206). When Dworkin talks about the "actual beliefs or attitudes of officials" (Dworkin 2006, 200) he refers to the subjective or private side. This misses the decisive point. Subjectively or privately officials may believe or feel whatever they wish. But as soon as they act on behalf of the law, that is, as representatives of the law, they cannot avoid making the claim objectively or officially (see on this Gardner forthcoming). To be sure, a legal system can degenerate into a system based exclusively on the exercise of brute force. Such a system, however, would not be a legal system but, rather, its very opposite, a system of naked power relations (Alexy 2002a, 32–4). That the claim to

correctness is not raised in such a system is, therefore, no argument against its necessity in a legal system.

### c) The Content of the Claim to Correctness

One might concede that law is capable of raising claims and that raising claims is necessary for law, and nevertheless insist that this scarcely counts as an argument on behalf of the dual nature of law. One simply has to argue that the content of the claim does not contain anything pointing in an ideal direction.

Two versions of this argument are conceivable. The first declares that the claim to correctness is trivial or formal, or both. The second version maintains that the content of the claim refers exclusively to the real or factual dimension of law. A variant of the first version is to be found in Joseph Raz's work. Raz maintains that the claim to correctness thesis is nothing other than "a general thesis about intentional actions and their products" (Raz 2007, 27). As such, it applies to each and every case of intentional action, even to the actions of bandits. Here, the claim to correctness or, as Raz prefers to say, to "appropriateness" (*ibid.*) may take on such content as, for instance "being self-enriching" (*ibid.*). This example, however, shows that a general claim to appropriateness is essentially different from the claim to correctness. A bandit who claims that his action is self-enriching does not thereby claim that his action, for that reason, has to be accepted by everyone, even by his victims. This is altogether different in case of the claim to correctness. The claim to correctness is a claim that is addressed to all.<sup>1</sup> In this respect, it is similar to the claim to truth. A claim that is addressed to all is, at the same time, a claim to objectivity. As such, both are, indeed, formal. But as a claim that refers to objectivity, the claim to correctness is by no means trivial. Objectivity is not only anything but trivial, it also belongs necessarily to the ideal dimension of law. Thus, the claim to correctness, notwithstanding its formal character, points to the ideal dimension of law.

The second version concerns the question of whether the claim of law to correctness refers exclusively to social facts or also to morals. The objection says that the claim to correctness made by the law concerns only social facts as sources of law, that is, only the real, factual, or authoritative dimension. Now, it is evident that this cannot be true of the claims made by a constitutional convention or by the legislator. But it is also false with

<sup>1</sup> This is true without any qualification as far as universal morality is concerned. In the case of a legal system, matters are more complex. Two aspects are to be distinguished. The first concerns internal universality. Decisions and arguments made in a particular legal system claim to be acceptable to all who take the point of view of the legal system in question. The second aspect concerns external universality. Legal systems as such claim to be acceptable to all, that is, to be universally acceptable as a particular, that is, non-universal system.

respect to judicial decision-making. This is especially clear in cases in which the authoritative reasons—that is, the source-based reasons—allow for more than one decision. The decision to be made in such an “open” sphere is the decision of a normative matter that cannot be based on standards of positive law, for if it could be based on such standards, it would not be a decision in an “open” sphere. If it is to be based on any standard at all, that is, if it is not to be an arbitrary decision, which would contradict the claim to correctness, it must be based on other normative standards. Legal decisions regularly concern questions of distribution and compensation. Questions of correct distribution and compensation are questions of justice, for justice is nothing other than correctness in distribution and compensation. Questions of justice, however, are moral questions. In this way, the open texture of law, taken together with the nature of legal questions, implies that the claim to correctness raised in legal decision-making necessarily refers not only to the real or factual but also to the ideal and critical dimension. This applies even in cases in which the authoritative material, say, the wording of a statute, allows for no more than a single decision, a decision that is unjust. In such cases the claim to correctness either amounts to the claim that it is morally justified to adhere to the unjust statute for reasons that address the moral value of legality, or it leads to the claim that it is morally justified to make an exception to it, perhaps even to declare it invalid, on the ground that in this case justice outweighs the moral value of legality. This shows that the claim of law to correctness always has reference not only to social facts but also to morality.<sup>2</sup>

#### d) The Rationality of the Claim to Correctness

At exactly this point a fourth objection against the correctness thesis arises. This objection maintains that the claim to correctness, in so far as it refers to morality, is nothing more than an expression of an illusion or an error. “[O]rdinary moral judgments,” indeed, include claims to objectivity, but, as John Mackie puts it, “these claims are all false” (Mackie 1977, 35). Morality’s claim to objectivity therefore has to be confronted with an “error theory” (ibid.), which says that judgments about what is morally obligatory, forbidden, or allowed, or about what is morally good or bad, or just or unjust, are subjective, relative, or simply reflect the results of mere decisions. For this reason, moral arguments lack rationality and, with it, correctness or truth. The claim of morality to correctness, therefore, is the claim that something is correct that cannot be correct. The claim of law to correctness, the objection continues, must therefore be confined to

<sup>2</sup> This applies even in cases in which the wording of a statute allows for no more than a single decision, which is just. Here the application of the statute includes the implicit negative assertion that it is not unjust.

authoritative or institutional reasons, based exclusively on the real or factual character of law. Otherwise, this claim, in effect, would connect law with irrationality. One might call this the “irrationality objection.”

### *1.2. Discourse Theory*

The reply to the irrationality objection is discourse theory. Discourse theory claims that between provability on the one hand and arbitrariness on the other (see on this Ricoeur 1994, 378), a third thing exists, namely, rationality or—understood here as the same—reasonableness.<sup>3</sup>

Discourse theory is a procedural theory of practical rationality. According to discourse theory, a practical or normative proposition is correct (or true)<sup>4</sup> if and only if it can be the result of a rational practical discourse (see Alexy 1988, 44). The conditions of discursive rationality can be made explicit by means of a system of principles, rules, and forms of general practical discourse (Alexy 1989, 188–206). This system comprises rules that demand non-contradiction, clarity of language, reliability of empirical premises, and sincerity, as well as rules and forms that speak to the consequences, and to balancing, universalizability, and the genesis of normative convictions. The procedural core consists of rules that guarantee freedom and equality in discourse by granting to everyone the right to participate in discourse and the right to question as well as to defend any and all assertions.

Discourse theory is confronted with a number of problems.<sup>5</sup> One of them consists in the fact that discourse is not a procedure that always yields just one right answer. To be sure, certain normative demands are required by discourse theory. The discourse rules give expression to the values of freedom and equality. This serves as a basis for the justification of human rights (Alexy 1996, 221–33). Human rights can therefore be considered as discursively necessary. This implies that the denial of human rights is

<sup>3</sup> On the relation between the concepts of rationality and reasonableness see Alexy 2009a, 5–7.

<sup>4</sup> Discourse theory would have no problem with substituting “true” for “correct.” This can be explained by means of three equivalences. The first concerns a semantic conception of practical truth or correctness. This can be expressed, following Tarski’s lines, by the equivalence: (1) The sentence “Jones ought to tell the truth” is true if and only if Jones ought to tell the truth. Next, the concept of a practical or normative fact is introduced by means of a second equivalence: (2) If and only if Jones ought to tell the truth, it is a practical or normative fact that Jones ought to tell the truth. The third equivalence connects the concepts of truth and fact with the concept of justifiability: (3) Jones ought to tell the truth if and only if it is justifiable that Jones ought to tell the truth. This model of practical truth comprises realistic elements, but it is to be distinguished from a strong or intuitionistic model on a central point. In an intuitionistic model the justifiability of a normative sentence depends on the existence of a normative fact, the perception of which is a matter of intuition. In a discursive model the existence of a normative fact depends on the justifiability of the corresponding sentence. If one wants to attribute realism to discourse theory, it can, therefore, only be a kind of weak realism.

<sup>5</sup> A recent extensive analysis of problems in the discourse theory of law can be found in Bäckér 2008.

discursively impossible. Along with discursive necessity and discursive impossibility, there exists, however, a broad range of what is merely discursively possible.<sup>6</sup> A judgment is merely discursively possible when one person can justify this judgment without violating any rule or principle of discourse, while another person, at the same time, can do the same with respect to the contradictory of this very judgment. In such a case, incompatible judgments are backed by reasons. Therefore, the disagreement is, as John Rawls terms it, a “reasonable disagreement” (Rawls 1993, 55). One might call this the “problem of practical knowledge.”<sup>7</sup>

## II. The Real

The problem of practical knowledge requires that one leave the first stage, defined exclusively by the ideals of correctness and discourse, and proceed to a second stage, where legally regulated procedures, first, guarantee the achievement of a decision and, second, provide for their enforcement.<sup>8</sup> This is the step to positivity as defined by authoritative issuance and social efficacy (Alexy 2002a, 3). The insufficiency of the ideal dimension *qua* decision procedure necessitates as its complement the existence of the real, that is, the positive dimension of law.<sup>9</sup> This necessity stems from the moral requirements of avoiding the costs of anarchy and civil war and achieving the advantages of social co-ordination and co-operation.

## III. The Reconciliation of the Ideal and the Real

One might assume that the necessity of positivity implies positivism. This, however, would be incompatible with the claim to correctness. To be sure, the necessity of positivity implies the correctness of positivity. But the

<sup>6</sup> On the concepts of discursive necessity, impossibility, and possibility see Alexy 1989, 207.

<sup>7</sup> Rawls 1993, 54, speaks in this context of the “burdens of judgment.”

<sup>8</sup> See on this Kant’s “principle” that one “must leave the state of nature, in which each follows its own judgment, unite itself with all others (with whom it cannot avoid interacting), subject oneself to public lawful external coercion, and enter into a condition in which what is to be recognized as belonging to it is determined *by law* and is allotted to it by adequate *power* (not its own but an external power)”; Kant 1996, 456, translation altered.

<sup>9</sup> See Radbruch 1950, 117, translation altered: “If no one is able to determine what is just, then someone must stipulate what is to be legal.” Radbruch adds in a footnote: “That is, one stipulates what *ought to be legal*, one does not stipulate what is *correct*, for that would be self-contradictory”; *ibid.*, n. 6, translation altered. This might be interpreted in either of two ways. On the first interpretation, it is meant to express that stipulating what is legal has nothing to do with what is correct. On this interpretation, the quoted statement would be incorrect. Stipulating what is legal necessarily comprises the claim that what is stipulated is correct. The first interpretation, therefore, fails to take account of the dual nature of law. On the second interpretation, the quotation says that authority despite the facts—first, that it claims that what is issued is correct and, second, that it is correct to abide by it—cannot generate the correctness or truth of what is authoritatively issued. On this interpretation, Radbruch’s statement would be correct. It would be an expression of the dual nature of law.



correctness of positivity has by no means an exclusive character. To grant to positivity an exclusive character, as Kant, for instance, is inclined to do (see on this Alexy 2002a, 116–121),<sup>10</sup> would be to underestimate the fact that the claim to substantial correctness—that is, first and foremost, the claim to justice—does not vanish once law is institutionalized. It remains alive behind and in the law. For this reason, one has to distinguish two stages or levels of correctness: first-order correctness and second-order correctness. First-order correctness refers only to the ideal dimension. It concerns justice as such. Second-order correctness is more comprehensive. It refers both to the ideal and to the real dimension. This means that it concerns justice as well as legal certainty (*Rechtssicherheit*). Legal certainty, however, can be achieved only by means of positivity. In this way, the claim to correctness, *qua* second-order claim, necessarily connects both the principle of justice and the principle of legal certainty with law.

The principle of legal certainty is a formal principle. It requires commitment to what is authoritatively issued and socially efficacious. The principle of justice is a material or substantive principle. It requires that the decision be morally correct. Both principles, as principles in general (Alexy 2002b, 44–110), may collide, and they often do. Neither can ever supplant the other completely, that is, in all cases. On the contrary, the dual nature of law demands that they be seen in correct proportion to each other. To the degree this correct proportion is attained, harmony of the legal system is achieved.

Thus, second-order correctness is a matter of balancing. This shows that balancing has a role to play not only in the creation and application of law, that is, in legal practice, but also at the very basis of law. It is a part of the nature of law.

<sup>10</sup> In the appendix to the second edition of his *Metaphysical First Principles of the Doctrine of Right* from 1798, the first part of *The Metaphysics of Morals*, Kant restricts his rule “Obey the authority who has power over you” by means of the following exemption clause: “(in whatever does not conflict with inner morality)”; Kant 1996, 505. Kant does not explain to what he refers as being in conflict with inner morality at this place. In his hand written remains, however, we find the following examples: “e.g., religious coercion. Coercion to unnatural sins: treacherous assassination, etc.”; Kant 1934, 595, my translation. This does not mean, however, that the effect of such conflicts with inner morality is, as in the case of the Radbruch formula, the loss of legal validity or legal character. Kant distinguishes between a moral and a strict (or narrow, or pure) concept of law. The moral concept of law “is related to an obligation corresponding to it”; Kant 1996, 387. This obligation (*Verbindlichkeit*) is a moral obligation: “Obligation is the necessity of a free action under a categorical imperative of reason”; *ibid.*, 377. It seems to be this moral obligation to which Kant’s exemption clause refers. The law in the strict sense is not affected by this: “[S]trict law, namely, that which is not mingled with anything ethical, requires only external grounds for determining choice; for only then is it pure and not mixed with any precepts of virtue. Only a completely external law can therefore be called *strict* (law in the narrow sense)”; *ibid.*, 389, translation altered. One might think that this applies only to the observer’s perspective. Replying to this, however, one can point to Kant’s thesis that the judge has to decide on the basis of “proper (strict) law”; *ibid.*, 390, translation altered. This shows that according to Kant, the concept of strict law is applicable not only from the observer’s perspective but also from the participant’s perspective.



Second-order correctness is the theme of the third step, which concerns the institutionalization of reason. Two aspects of this institutionalization are to be distinguished: One is substantive, the other procedural.

### *III.1. Outermost Border*

The first substantive aspect is the postulate of an outermost border of law. This concerns the rejection of Hans Kelsen's thesis that "any kind of content might be law" (Kelsen 1967, 198). Kelsen illustrates his thesis with the following remark: "According to the law of totalitarian states, the government is empowered to confine in concentration camps persons with unwanted convictions, religion, or race and to force them to do any sort of work whatever, even to kill them" (*ibid.*, 40, translation altered). Replying to this, the Radbruch formula (Radbruch 2006, 7) has to be introduced. In its shortest form, it runs as follows:

Extreme injustice is no law. (Alexy 1999c, 17)

The dispute about an outermost border of law is a central theme of the debate over legal positivism, a debate that cannot be taken up here. In the present context only the relation between the idea of an outermost border and the dual-nature thesis is of interest.

In order to determine what this relation comes to, two versions of positivism and three versions of non-positivism have to be distinguished. The two versions of positivism are exclusive and inclusive positivism. Exclusive positivism, as advocated most prominently by Joseph Raz, maintains that morality is necessarily excluded from the concept of law (Raz 1979, 47). This is, with respect to individual norms, acceptable from the point of view of an observer (Alexy 2002a, 27–31); from the point of view of a participant, however, it is wrong. A participant in a legal system is characterized in terms of the questions and arguments on what counts as the correct answer to a legal question in the legal system in which the participant finds himself. Now, arguments on what counts as the correct answer are impossible without raising a claim to correctness. This implies that the participant necessarily refers to both legal certainty and justice. And this, in turn, is to say that exclusive positivism is precluded.<sup>11</sup>

Inclusive positivism, defended, for instance, by Jules Coleman, is less radical. It says that morality is neither necessarily excluded nor necessarily included. The inclusion is declared to be conventional, that is, a contingent matter, turning on what the positive law in fact says (Coleman 1996, 316). With this approach, however, one is unable to grasp the necessity of the dual nature of law.

<sup>11</sup> A more elaborate version of this argument is to be found in Alexy 2007a, 45–8, 50–4.

Non-positivism alone is compatible with the dual nature of law. This, however, is not to say that all versions of non-positivism meet its requirements. Two versions of non-positivism do not, namely, exclusive and super-inclusive non-positivism. A third version alone, inclusive non-positivism, adequately represents the dual nature of law.

Exclusive non-positivism is the most thoroughgoing version of non-positivism. It claims that every injustice, every moral defect, of a norm precludes its being legally valid, its being law. Deryck Beyleveld and Roger Brownsword's thesis "[I]mmoral rules are not legally valid" (Beyleveld and Brownsword 2001, 76) is an example of this view.<sup>12</sup> Resting on an incorrect balance between the principle of legal certainty and the principle of justice, it gives too little weight to the factual or authoritative dimension of law (for more details see Alexy 2008, 287).

Super-inclusive non-positivism goes to the other extreme. It maintains that legal validity is in no way whatever affected by moral defects or moral incorrectness. At first glance, this seems to be a version of positivism, not of non-positivism. This first impression is, however, mistaken, as one sees as soon as one has granted that in addition to a classifying connection between law and morality, there exists a qualifying connection (Alexy 2002a, 26). These two connections are distinguished by the effects of moral defects. The effect of a classifying connection is the loss of legal validity or of legal character. By contrast, the effects of a qualifying connection are restricted to legal defects that do not rise to the level of undermining legal validity or legal character. Aquinas's thesis that a tyrannical law "is not law simpliciter"<sup>13</sup> or, as John Finnis puts it, "not law in the focal sense of the term 'law'" (Finnis 1980, 364), but only law "in a secondary sense of that term" (ibid.), that is, defective law, seems to mark a qualifying connection. Another version of super-inclusive non-positivism that can be explained by means of the distinction between classifying and qualifying connections is to be found in Kant's combination of the postulate of "[u]nconditional submission" (Kant 1996, 506) under positive law with the idea of a necessary subjugation of positive law to non-positive law (see on this Alexy 2008, 288–90).

Super-inclusive non-positivism is exposed to objections quite similar to those raised against exclusive positivism. Just as exclusive positivism fails to recognize the ideal dimension of law, so likewise super-inclusive non-positivism fails to attribute to the principle of justice *qua* expression of the ideal dimension of law a weight that suffices to outweigh the principle of legal certainty in extreme cases. It is the thesis of inclusive non-positivism

<sup>12</sup> This view is by no means new. See Augustinus 2006, 86 (*De libero arbitrio* I, 11): "Nam lex mihi esse non videtur, quae iusta non fuerit" ("For a law that was not just would not seem to me to be a law").

<sup>13</sup> Aquinas 1962, 947 (I–II, question 92, art. 1, 4): "lex tyrannica [...] non est simpliciter lex."

that such weight must be attributed to justice.<sup>14</sup> Inclusive non-positivism claims neither that moral defects always undermine legal validity nor that they never do. Following the Radbruch formula (see on this Alexy 2002a, 40–62), inclusive non-positivism maintains that moral defects undermine legal validity if and only if the threshold of extreme injustice is transgressed. Injustice below this threshold is included in the concept of law as defective but valid law (Alexy 2008, 287–8). In this way, both sides of the dual nature of law are given there due weight.

### III.2. Democratic Constitutionalism

An outermost border is a necessary but by no means sufficient condition of the institutionalization of reason. In order to bring about the institutionalization of reason, not only does the problem of the confrontation of positivity and correctness at the border have to be resolved, but also positivity and correctness have to be connected inside the legal system. This is only possible in the political form of democratic or discursive constitutionalism.

Democracy and constitutional rights are the main elements of democratic constitutionalism. Both are required by discourse theory, and both have a dual nature.

#### a) Democracy

Democracy is the most important element on the procedural side of the institutionalization of reason. Democracy can be conceived, at the same time, as a decision procedure and as an argumentation procedure. Decision, along the lines of the majority principle, is the real side of democracy. Argumentation, as public discourse, is its ideal side. The only possibility

<sup>14</sup> This can be reconstructed by means of the Law of Competing Principles (see Alexy 2002b, 50–4). The principle of legal certainty shall be represented by  $P_1$ , the principle of justice by  $P_2$ .  $P$  symbolizes the relation of precedence,  $C_i$  different conditions of precedence.  $C_1$  stands for “injustice below the threshold of extreme injustice,”  $C_2$  for “extreme injustice.” According to inclusive non-positivism, the following two conditional relations of precedence are valid:

(1)  $(P_1PP_2) C_1$   
and

(2)  $(P_2PP_1) C_2$ .

$P_2$  requires, taken alone, the legal consequence that the norm in question is not valid or no law ( $Q$ ). This, together with (2), implies, according to the Law of Competing Principles, the rule  $C_2 \rightarrow Q$ . Transformed in words, this rule is the shortest version of Radbruch’s formula: Extreme injustice is no law. In contrast to this, super-inclusive non-positivism and also, in its result, exclusive positivism can be represented by

(3)  $(P_1PP_2)$ ,

whereas exclusive non-positivism finds its representation in

(4)  $(P_2PP_1)$ .

(3) and (4), as unconditional relations of precedence, may both be read as expressions of a rejection of balancing in questions concerning the concept and the nature of law. See also Bäckér 2008, 248–51.

for the political realization of the ideals of discourse theory is the institutionalization of a democracy that unites both sides. The name of this unity is “deliberative democracy.”

### b) Constitutional Rights

Constitutional Rights are rights that have been recorded in a constitution with the intention of transforming human rights into positive law—the intention, in other words, of positivizing human rights. Human rights are, first, moral, second, universal, third, fundamental, and fourth, abstract rights, that, fifth, take priority over all other norms (Alexy 1998b, 246–54). Rights exist if they are valid. The validity of human rights *qua* moral rights depends on their justifiability and on that alone. Thus, human rights exist if they are justifiable. Now, human rights are justifiable on the basis of discourse theory, for the practice of asserting, asking, and arguing presupposes freedom and equality, and the ideas of freedom and equality imply, together with further premises that can be well established, human rights. Human rights, therefore, are discursively necessary.<sup>15</sup> None of this can be elaborated here (see on this Alexy 1992, 243–47). The only point of interest in this context is that human rights as moral rights belong exclusively to the ideal dimension of law. Their transformation into constitutional rights, that is, into positive rights, represents the effort to connect the ideal with the real dimension.

In an ideal democracy, the democratic process would always show sufficient respect for constitutional rights. There would be, in principle, no conflict between democracy and constitutional rights. In a real democracy, however, there is conflict. The reality of political life together with the idea of human and constitutional rights, therefore, requires constitutional review. Constitutional review claims to be closer than the parliament to the ideal dimension of law. This claim is justified if constitutional review can be understood as an argumentative or a discursive representation of the people (Alexy 2005, 578–81). In this way the dialectic of the real and the ideal, that is, the dual nature of law, is present even in the relationship of constitutional review and parliamentary legislation.

### 3. *Legal Argumentation*

The establishment of a democratic constitutional state creates an institutional framework for the solution of legal problems. Democratically legitimized legislation, together with constitutional review, is the main instrument. This framework, however, needs to be filled out. The device for

<sup>15</sup> That human rights *qua* abstract rights are discursively necessary does not imply that their application in concrete cases is always a matter of discursive necessity. There can be reasonable disagreement about what human rights require in a concrete case.

doing so is legal argumentation or discourse. The dual nature of legal argumentation is expressed by the special case thesis. This thesis says that legal discourse is a special case of general practical discourse (see Alexy 1989, 211–20). General practical discourse is a non-institutionalized discourse about practical questions. As a general practical discourse it comprises all kinds of non-authoritative practical arguments, that is, moral arguments concerning justice and rights as well as ethical arguments concerning individual and collective identity and pragmatic arguments that give expression to means-end rationality. The moral arguments have priority, for they represent the universal point of view. This does not, however, mean that their content cannot depend on the other arguments (for some details see Alexy 1999b, 378–9). Legal discourse is a special case of general practical discourse because it is committed to statute, precedent, and legal dogmatics. These commitments represent the real or authoritative side of legal discourse.

Habermas has raised a series of arguments against the special case thesis (Habermas 1996, 229–37). His central concern is that the special case thesis gives the judiciary so much power that democratic legitimacy is endangered:

Once the judge is allowed to move in the unrestrained space of reasons that such a “general practical discourse” offers, a “red line” that marks the division of powers between courts and legislation becomes blurred. In view of the application of the particular statute, the legal discourse of the judge should be confined to the set of reasons that legislators either in fact [have] put forward or at least could have mobilized for the parliamentary justification of that norm. The judge, and the judiciary in general, would otherwise gain or appropriate a problematic independence from those bodies and procedures that provide the only guarantee for democratic legitimacy. (Habermas 1999, 447)

The reply to this rests on two points. The first is that the special case thesis by no means represents a blanket permission “to move in the unrestricted space of reasons” of general practical discourse. On the contrary, it includes a *prima facie* priority of authoritative reasons.<sup>16</sup> The second point concerns Habermas’s proposal that the judge “should be confined to the set of reasons that legislators either in fact [have] put forward or at least could have mobilized for the parliamentary justification.” The actual intention of the legislator is indeed a highly relevant reason bearing on the interpretation of a statute. But often there are difficulties in recognizing it, or it is vague or inconsistent (see Dworkin 1986, 34–57). The hypothetical intention of the legislator, on the other hand, is a highly problematic

<sup>16</sup> See Alexy 1989, 248: “Arguments which give expression to a link with the actual words of the law, or the will of the historical legislator, take precedence over other arguments, unless rational grounds can be cited for granting precedence to the other arguments.”

construction. It comes close to an invitation to mask the judge's intention as the hypothetical intention of the legislator. Here undisguised general practical argument seems to be preferable. Habermas tries to enhance the impact of the authoritative dimension of law in order to strengthen democracy. The two points just made show, however, first, that the special case thesis offers no reason for such an attempt, and, second, that the alternative Habermas proposes is not really an alternative at all. The special case thesis alone makes it possible to strike an adequate balance between the ideal and the real dimension of law in the area of legal argumentation and, what is the same, interpretation.

#### 4. Real and Ideal "Ought"

In the application of law, rules as well as principles play an essential role. Rules express a definitive or real "ought," principles a *prima facie* or ideal "ought" (Alexy 2009b, 21–33). The theory of principles attempts to develop on this basis a theory of proportionality that essentially includes a theory of balancing. This, again, cannot be elaborated here. In our context, the only point of interest is that principles theory completes the variety of considerations we have made on our journey through the different fields of the dual nature of law by a norm-theoretic argument, one that has already been present in much of what has been said.

Now the system is closed. The dual nature of law has shown itself to be present—explicitly or implicitly—in all fundamental questions of law. For this reason it is the single most essential feature of law, and it shows why legal positivism is an inadequate theory of the nature of law.

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