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Does law have an ideal dimension? Or can the concept and the nature of law be completely grasped by considering its real dimension alone? The dual-nature thesis which stands in the centre of my legal philosophy sets out the claim that law necessarily comprises both a real or factual dimension and an ideal or critical one. The factual dimension concerns law as fact, that is, as social facts. The social facts to which it refers are authoritative issuance and social efficacy. The ideal dimension refers to correctness, primarily to moral correctness. If one claims that social facts alone can determine what is and is not required by law, this amounts to the endorsement of a positivistic concept of law. Once moral correctness is added as a necessary third element, everything changes fundamentally. A non-positivist concept of law emerges. Thus, the dual-nature thesis, in setting out the claim that law necessarily comprises both a real and ideal dimension, implies non-positivism.

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1. The Claim to Correctness

The Archimedean point of my thesis that law necessarily has an ideal dimension is the argument from correctness. The argument from correctness states that individual legal norms and individual legal decisions as well as legal systems as a whole necessarily lay claim to correctness. The necessity of raising this claim can be shown by demonstrating that the claim to correctness is necessarily implicit in law. The best means of demonstrating its necessity is the method of performative contradiction.[1] 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, as applied here, 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.[2] Therefore, the contradiction in our example is not only a contradiction with respect to the dichotomy of just and unjust but also a contradiction with respect to the dichotomy of correct and incorrect. What is more, in the aforementioned example of the fictitious first article of a constitution, the contradiction that arises there between what is explicit and what is implicit is necessary. To be sure, it could be avoided if one were to abandon the implicit claim. But to do this would represent a transition from a legal system to a system

[1] R. ALEXY, *The Argument from Injustice. A Reply to Legal Positivism* (first publ. 1992), trans. S. L. Paulson and B. Litschewski Paulson, Clarendon Press, Oxford, 2002, 35–39.

[2] R. ALEXY, *Giustizia come correttezza*, in *Ragion pratica*, 9/1997, 103–113 at 105.

of naked power relations,[3] in other words, to something that is, necessarily, no legal system at all.[4]

2. The Necessity of the Real Dimension of Law

A closer analysis of the ideal dimension of law presupposes an analysis of the real dimension. Here, again, the concept of necessity is the stage centre. The starting point is the idea of pure ideality. A purely ideal system of reasons for action would be a system based on nothing other than moral and prudential reflection, rational practical discourse, and spontaneous compliance with the results of reflection and discourse simply owing to their correctness. Such a system would be deficient for three reasons.[5] The first is the problem of practical knowledge.[6] There are a great many practical questions in which no agreement can be arrived at, not even between reasonable persons. That makes legally regulated procedures necessary, procedures that guarantee the arrival at a decision which determines what the law is. This implies the necessity of authoritative issuance as social fact. The second reason is that spontaneous compliance is not enough. If everyone could violate the rules authoritatively issued without any risk, the rules would lose their social efficacy. Therefore, their enforcement is necessary. This necessity includes coercion, incorporating it into the concept of law alongside correctness.[7] Determination and enforcement are to be completed by means of a third reason. Numerous

[3] R. ALEXY, *Law and Correctness*, in *Current Legal Problems*, 51/1998, 205–221 at 213–214.

[4] R. ALEXY, *The Argument from Injustice*, cit., 32–34.

[5] 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*, Oxford University Press, Oxford, 2003, 3–16 at 8.

[6] R. ALEXY, *The Dual Nature of Law*, in *Ratio Juris*, 23/2010, 167–182 at 172–173.

[7] R. ALEXY, *The Nature of Arguments about the Nature of Law*, cit., 6–9.

needs and purposes cannot be satisfied by spontaneous action alone. Organization is necessary, and organization presupposes law. For these three reasons, the deficiency of the ideal dimension, if conceived as a purely ideal system of reasons for action, leads to the necessity of positive law, that is, to the necessity of the real dimension. This necessity, however, does not stem from positive law. It stems from the moral requirement of avoiding the costs of anarchy and civil war and achieving the advantages of social co-ordination and co-operation.

3. First-Order and Second-Order Correctness

One might assume that the necessity of positivity implies positivism. This, however, would be incompatible with the claim to correctness. To be sure, the moral necessity of positivity implies the correctness of positivity. But the correctness of positivity does not by any means imply that positivity is to be understood as having an exclusive character. To grant positivity an exclusive character would be to fail to take account of the fact that the claim to substantial correctness—first and foremost, the claim to justice—does not vanish once law is institutionalized. It remains alive, standing behind and found in the law, and it is the main task of the theory of the ideal dimension of law to make this explicit. In order to achieve this, 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. Legal certainty, however, can be achieved only by means of positivity, that is, by determination, enforcement, and organization. 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, first and foremost, a material or substantive principle. It requires that the decision be morally correct. Both principles, as principles in general, can collide, and they often do.[8] Neither can ever supplant the other completely, that is, in all cases. On the contrary, the dual nature of law requires that they be seen in correct proportion to each other. 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.

4. The Ideal Dimension Pentagon

Now we are ready to give a closer determination of the relation between the real and the ideal dimension of law. In order to do this, we have to answer five questions. First, is there an outermost border of law? Second, is legal argumentation based exclusively on authoritative reasons or does it also include non-authoritative reasons? Third, what is the relation between human rights and legal systems? Fourth, is democracy to be understood exclusively as a decision procedure or also as a form of discourse? Fifth, do legal systems comprise only rules expressing a real "ought" or also principles expressing an ideal "ought"? These five questions shall be answered with the following five theses, the first with the Radbruch formula, the second with the special case thesis, the third with the thesis that constitutional rights are to be understood as attempts

[8] R. ALEXY, *A Theory of Constitutional Rights* (first publ. 1985), trans. J. Rivers, Oxford University Press, Oxford, 2002, 44–110.

to positivize human rights, the fourth with the deliberative model of democracy, and the fifth with principles theory.

All five theses turn on the same point: the claim to correctness. That is, the claim to correctness is the main reason for all five theses. On could think about drawing a pentagon with one thesis found at each edge and the argument from correctness, like a sun, standing in their midst. This visualization, one might call it the "ideal dimension pentagon," can, however, only be seen as a heuristic model of a system of the institutionalization of reason that is to be elaborated by means of arguments determining the relation between the real and the ideal dimension in five directions.

4.1. The Radbruch Formula

The first direction concerns the idea of an outermost boundary of law. The most renowned version of the thesis, namely, that such an outermost boundary exists, is the Radbruch formula. In its shortest form it runs as follows:

> Extreme injustice is no law.[9]

The Radbruch formula is an expression of second-order correctness. Second-order correctness refers to both the real dimension as well as the ideal dimension of law. The central concern of the real dimension is legal certainty, arrived at by means of positivity, that is to say, by determination, enforcement, and organization. By contrast with this, the central concern of the ideal dimension is substantive justice. In this way, the claim to

[9] R. ALEXY, *A Defence of Radbruch's Formula*, in M. D. A. Freeman (ed.), *Lloyd's Introduction to Jurisprudence*, 8th ed., Sweet & Maxwell and Thomson Reuters, London, 2008, 426–443 at 428.

correctness necessarily connects both the principle of justice and the principle of legal certainty with law.

Second-order correctness requires that the problem of unjust law be resolved by means of balancing The claim to correctness requires that this balancing leads to the result that below the threshold of extreme injustice legal certainty takes precedence over justice, above the threshold of extreme injustice, however, justice takes precedence over legal certainty.

4.2. The Special Case Thesis

The second field in which the real and the ideal dimension of law are connected is legal argumentation. This connection is expressed by the special case thesis. This thesis states that legal argumentation or legal discourse is a special case of general practical argumentation or discourse.[10] 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 dimension of legal discourse or argumentation. The ideal dimension comprises general practical argumentation.

Habermas has argued against the special case thesis that it represents a blanket permission "to move in the unrestricted space of reasons"[11] of general practical discourse. My reply is that the special case thesis includes a *prima facie* priority of authoritative reasons. This *prima facie* priority, which is a necessary element of second order correctness, finds, *inter alia*, its expression in the following rule of legal discourse:

[10] R. ALEXY, *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification* (first publ. 1978), trans. R. Adler and N. MacCormick, Clarendon Press, Oxford, 1989, 211–220.

[11] J. HABERMAS, *A Short Reply*, in *Ratio Juris*, 12/1999, 445–453 at 447.

> 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.[12]

The structure of this rule is quite different from that of the Radbruch formula. But its function is the same. Both serve to determine the relation between the real and the ideal dimension of law.

4.3. Human Rights

The third area in which the relation between the real and the ideal dimension is of pivotal importance is the field of human and constitutional rights. Human rights are characterized by five properties. They are, first, moral, second, universal, third, fundamental, and, forth, abstract rights, that, fifth, take priority over all other norms with respect to their moral validity.[13] Here only the first of these five properties is of interest: the moral character of human rights.

The moral character of human rights consists in their having, *qua* moral rights, only moral validity. This means that human rights as such belong exclusively to the ideal dimension of law. Now, a right is morally valid if it can be justified. Rights exist, as norms in general,[14] if they are valid. Thus, the existence of human rights depends on their justifiability, and on nothing else. And they are justifiable on the basis of discourse theory.[15]

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[12] R. ALEXY, *A Theory of Legal Argumentation*, cit., 248.

[13] R. ALEXY, *Law, Morality, and the Existence of Human Rights*, in *Ratio Juris*, 25/2012, 2–14 at 10–12.

[14] H. KELSEN, *Pure Theory of Law*, 2nd ed. (first publ. 1960), trans. M. Knight, University of California Press, Berkeley and Los Angeles, 1967, 10.

[15] R. ALEXY, *Law, Morality, and the Existence of Human Rights*, cit., 11–13.

In contrast to this, constitutional rights are part of positive law, namely positive law at the level of the constitution. As such, they belong to the real dimension of law. The relation between constitutional rights and human rights, however, belongs to the relations between the real and the ideal dimension of law because the claim to correctness establishes a necessary connection between human rights and constitutional rights. Constitutional rights interpretation depends on the understanding of human rights, and catalogues of constitutional rights may even be corrected on the basis of human rights.[16]

4.4. Democracy

Democracy, at one and the same time, can be conceived, as a decision procedure and as an argumentation procedure. Taking decisions, in the manner familiar from the majority principle, is the real side of democracy. Argumentation, as public discourse, is necessarily connected with the claim to substantive correctness. For this reason, it is the ideal side of democracy. The only possibility for the realization of second-order correctness in political life, especially in public law-making, is the institutionalization of a democracy that unites both sides. The name given to this unity is "deliberative democracy."

There exists a tension between democracy on the one hand and constitutional rights and the special case thesis on the other hand. This tension can be resolved if judicial decision-making, especially constitutional review, is conceived as essentially argumentative representation of the people.[17]

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[16] R. ALEXY, *The Absolute and the Relative Dimension of Constitutional Rights*, in *Oxford Journal of Legal Studies*, 36/2016, 1–17 at 5.

[17] R. ALEXY, *Constitutional Rights, Democracy, and Representation*, in *Rivista di filosofia del diritto. Journal of Legal Philosophy*, 4/2015, 23–35 at 31–34.

4.5. Principles Theory

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." The principles of a legal system, taken together, constitute what might be called a "world of the ideal Ought."[18] The theory of principles attempts to develop on this basis a theory of proportionality that connects balancing with correctness. The nucleus of this theory are the two laws of principles theory, the law of competing principles[19] and the law of balancing,[20] explicated by the weight formula,[21] as well as the rules connecting these two laws.[22] This, however, cannot be elaborated here. In our context, the only point of interest is that principles theory completes the system of the five directions of the ideal dimension of law.

[18] R. ALEXY, *A Theory of Constitutional Rights*, cit., 82.

[19] Ibid., 54.

[20] Ibid., 102.

[21] R. ALEXY, *The Weight Formula*, in J. STELMACH, B. BRO□EK, and W. ZA□USKI (eds.), *Studies in the Philosophy of Law. Frontiers of the Economic Analysis of Law*, Jagiellonian University Press, Krakow, 2007, 9–27 at 25.

[22] R. ALEXY, *Proportionality and Rationality*, in V. C. JACKSON and M. TUSHNET (eds.), *Proportionality. New Frontiers, New Challenges*, Cambridge University Press, Cambridge, 2017, 13–29 at 26.