INSTITUTIONALIZED REASON

The Jurisprudence of Robert Alexy

Edited by

Matthias Klatt

OXFORD

Institutionalized Reason

The Jurisprudence of Robert Alexy

Edited by
MATTHIAS KLATT

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford OX2 6DP
Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in
Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto
With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam
Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries
Published in the United States
by Oxford University Press Inc., New York

First published 2012

British Library Cataloguing in Publication Data
Data available
Library of Congress Control Number: 2012931711
Typeset by Newgen Imaging Systems (P) Ltd, Chennai, India
Printed in Great Britain on acid-free paper by
CPI Group (UK) Ltd, Croydon, CR0 4YY
ISBN 978–0–19–958206–8
1 3 5 7 9 10 8 6 4 2

Preface

This volume explores the complex relations between and among rights, law, and morality as reflected in Robert Alexy's work in the fields of legal philosophy and constitutional law. Alexy's major works enjoy a wide readership, and interest in his thought is growing apace. Various writings of Alexy's have now been translated into more than 20 foreign languages. The contributors to the present volume are internationally recognized authorities in their respective fields, reflecting the burgeoning interest worldwide in Alexy's work.

In particular, the volume focuses on the nature of law, of legal argument, and of constitutional rights. Special attention from various perspectives is given to the concept of law and to Alexy's non-positivism. The section on constitutional rights is particularly timely. Recent developments in the wake of the Human Rights Act of 1998 have sparked renewed interest in constitutional theory and practice. And Alexy's own work, explicating constitutional rights as principles, offers new insights into the issues being debated. The juxtaposition of expert British, Irish, American, and German perspectives in the volume highlights differences alongside the prospect of cross-fertilization between Continental and Anglo-American approaches.

The volume is based on a symposium held at New College, Oxford, in September 2008, and funded by the British Academy, the John Fell Fund, the Law Faculty of the University of Oxford, the Andrew W. Mellon Foundation, and the Warden and Fellows of New College. I wish to express gratitude to all these institutions. Thanks are also due to two anonymous referees whose comments were of help in clarifying a number of issues.

Matthias Klatt
Hamburg, December 2011

List of Contributors

Larry Alexander is Warren Distinguished Professor of Law, University of San Diego, School of Law

Robert Alexy is Professor of Public Law and Legal Philosophy, Christian-Albrechts-Universität zu Kiel, Faculty of Law

T.R.S. Allan is Professor of Jurisprudence and Public Law, University of Cambridge, Faculty of Law

Maeve Cooke is Professor, School of Philosophy, University College Dublin

John Gardner is Professor of Jurisprudence, University of Oxford

Matthias Jestaedt is Professor of Legal Theory, Albert-Ludwigs-Universität Freiburg, Faculty of Law

Matthias Klatt is Associate Professor of Public Law, EU Law, Public International Law and Jurisprudence, Universität Hamburg, Faculty of Law

Jan Henrik Klement is Research Fellow, University of Heidelberg, Faculty of Law

Mattias Kumm is Professor of Law, New York University

Cristina Lafont is Wender-Lewis Research and Teaching Professor of Philosophy, Northwestern University, Evanston, IL

Mark C. Murphy is McDevitt Professor of Religious Philosophy, Georgetown University, Washington, DC

Stanley L. Paulson is Mercator Guest Professor, Christian-Albrechts-Universität zu Kiel, Faculty of Law

Ralf Poscher is Professor of Legal Philosophy, Albert-Ludwigs-Universität Freiburg, Faculty of Law

Julian Rivers is Professor of Jurisprudence, School of Law, University of Bristol

Frederick Schauer is David and Mary Harrison Distinguished Professor of Law, University of Virginia, Charlottesville, VA

Table of Contents

1

Robert Alexy's Philosophy of Law as System

Matthias Klatt

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Alexy's Main Works—Overview

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

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

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

[7] Ibid, 166.
[8] R. Alexy, 'On the Concept and the Nature of Law' (2008) 21 *Ratio Juris* 281, 292.
[9] See Alexy, 'Hauptelemente', 166.
[10] Ibid, 151. [11] Ibid.

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

(1) *A Theory of Legal Argumentation*

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

(a) Context of publication

A Theory of Legal Argumentation, Alexy's doctoral thesis, was first published in German in 1978.[12] The English translation followed eleven years later.[13] It was also translated into Spanish (1989), Italian (1998), Portuguese (2001 and 2005), Chinese (2002), Lithuanian (2005), and Korean (2007). This first book reflects a very influential and far-reaching international school of thought, namely analytical jurisprudence. Others in this school include H.L.A. Hart, Hans Kelsen, Alf Ross, and Neil MacCormick.[14] One *Leitmotif* of this school of thought is the question of whether and to what extent legal reasoning can be a rational and an objective enterprise.[15] Can propositions addressing a legal problem be rationally justified, and if so, how? Hence, the problems of the function and relevance of objectivity, logic, truth, and correctness in legal reasoning have a significant role in this approach. These questions were very much in vogue in international jurisprudence in those days. The theory of legal argumentation as an area of analytical jurisprudence was influenced by current developments in the general theory of argument and by the rediscovery of a role for argument in moral philosophy, occupying a leading position in international jurisprudence during the 1970s and 1980s.[16] Following a classification by Ulfrid Neumann, we can distinguish three currents within the theory of legal argumentation, namely a logico-analytical, a topical-rhetorical, and a discourse-theoretic approach.[17]

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

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

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

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

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

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

[17] Neumann (ibid), 11ff.

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

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

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

(b) Three main points

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

(i) Special case thesis

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

[18] See R. Alexy, 'Vorstellungsbericht' (2003) *Jahrbuch der Akademie der Wissenschaften zu Göttingen* 326, 327.

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

[20] Ibid, 212ff.

[21] Alexy, 'Legal Philosophy: 5 Questions', 2.

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

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

(ii) Claim to correctness

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

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

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

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

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

[25] Alexy, 'Law and Correctness', 208.

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

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

(iii) The possibility of rational legal argumentation defended

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

(c) History of reception

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

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

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

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

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

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

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

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

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

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

(2) *A Theory of Constitutional Rights*

The second book, Alexy's 'Habilitation' thesis, was published in German in 1985.[35] It was translated into Spanish in 1993 and again in 2007, into English in 2002, into Korean in 2007, into Portuguese in 2008, and into Polish in 2010. The role of constitutional rights in many legal systems is characterized by four factors.[36] First, they enjoy the highest rank in the hierarchy of norms. Second, their enforcement is governed by a constitutional court. Third, they concern matters of the highest relevance to people and society. Lastly, they have a decidedly open texture.

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

(a) Three main points

(i) Rules and principles

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

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

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

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

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

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

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

(ii) Proportionality analysis and the law of balancing

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

(iii) The structure of balancing and the weight formula

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

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

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

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

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

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

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

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

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

(b) Consequences and main advantages of principles theory

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

(i) Scope

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

(ii) The rationality and indispensability of balancing

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

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

[49] 'Grundrechtsnorm und Grundrecht', 112–14.

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

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

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

(iii) Constitutional rights and constitutional review

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

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

(3) *The Argument from Injustice*

Alexy's book on the concept and the validity of law was first published in German in 1992.[56] Its aim is to defend a non-positivistic concept of law. Its major achievement is to bring clarity into the debate between positivism and non-positivism. This is done by distinguishing the various positions by means of five different categories, thus amounting to a complex system of positions in the field.

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

[52] Alexy, 'Legal Philosophy: 5 Questions', 5.
[53] Alexy, 'Balancing, Constitutional Review, and Representation', 577.
[54] Ibid, 578.
[55] See Alexy, *A Theory of Constitutional Rights*, 288ff.
[56] R. Alexy, *Begriff und Geltung des Rechts* (2005).