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## RATIONALITY WITHOUT IDEALITY

### OUTLINES OF A RELATIVISTIC DISCOURSE THEORY OF LAW\*

#### INTRODUCTION

By contrast to the most significant discourse theory in philosophy, that of Jürgen Habermas, Robert Alexy's discourse theory<sup>1</sup> can lay claim to be of the greatest significance in legal philosophy.<sup>2</sup> A central reason for this significance might well be that Alexy's theory has been conceptualized from the beginning as the basis of a special discourse theory of law, whereas Habermas commenced his work in this field with the development of a general theory of communicative action. To be sure, Alexy developed his discourse theory under the influence of Habermas,<sup>3</sup> whose theory served as a point of departure for Alexy's own.<sup>4</sup> With an eye to this genesis, the relativization of general discourse theory to be presented here begins with Alexy's conceptualization, for the aim is to reconstruct the discourse theory of law.

#### PART ONE: THE TWO-DIMENSIONAL MODEL OF DISCOURSE IN ALEXY'S THEORY

According to the familiar discourse-theoretic point of view, as reflected in Alexy's theory, the distinction between two kinds of discourse is significant: ideal discourse on one hand and real discourse on the other.<sup>5</sup> Ideal discourse is understood as a perfect discourse, whereas real discourse is limited. Ideal discourse serves as something approximating a standard for real discourse. In this way, a two-dimensional

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1 Alexy's variant of discourse theory is independent from Habermas's theory, see Peter Gril, *Die Möglichkeit praktischer Erkenntnis aus Sicht der Diskurstheorie. Eine Untersuchung zu Jürgen Habermas und Robert Alexy*, Berlin 1998, 14, a "self-contained variant of discourse-theory". However, Alexy's theory has been profoundly influenced by Habermas's work; see below, n. 3.

2 This is emphasized in Bernd Rüthers, *Rechtstheorie*, 4th ed. München 2008, 373 n. 586; who remarks here that discourse theory "has been introduced into legal methodology through, above all, the work of R. Alexy".

3 This coinage of the Alexyan theory by Habermas is underscored by Ulfrid Neumann, *Juristische Argumentationslehre*, Darmstadt 1986, 95, n. 6: "Alexy's outline ties [...], above all, to Habermas's theory of practical discourse with its broad scope". Robert Alexy, *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification*, transl. by R. Adler and N. MacCormick, Oxford 1989, 101, holds "Habermas's consensus theory of truth and the theory of practical deliberation of the Erlangen School" to be of the greatest significance for his enquiry, as far as theories "conducted in German" are concerned. For a portrayal of some similarities and differences between Alexy's and Habermas's theories see Gril (n. 1), 129–135.

4 The subtitle reads *The Theory of Rational Discourse as Theory of Legal Justification*, Alexy (n. 3).

5 See Robert Alexy, "Hauptelemente einer Theorie der Doppelnatur des Rechts", in *Archiv für Rechts- und Sozialphilosophie* 95 (2009), 151–166, 157.

model of discourse emerges – the ideal discourse serves as the ideal dimension, the real discourse as the real dimension.

#### A. ALEXY'S CONCEPT OF IDEAL DISCOURSE QUA IDEAL DIMENSION

Alexy defines the ideal practical discourse as follows:<sup>6</sup>

[The ideal discourse] is defined by searching for an answer to a practical question under the conditions of unlimited time, unlimited participation, and complete freedom of constraints by way of achieving complete linguistic-conceptual clearness, complete empirical information, complete ability and willingness to change roles and complete freedom from prejudice.<sup>7</sup>

Ideal discourse performs two essential tasks in the two-dimensional model. First, it serves as the criterion of correctness. Since, however, ideal discourse, as Alexy puts it, “cannot be carried out by definition”<sup>8</sup>, it will serve as “a criterion for correctness” only if one asks “whether a norm N *could* be the result of an ideal discourse”.<sup>9</sup> Thus, ideal discourse becomes a hypothetical criterion of truth. According to the two-dimensional model, what is correct is what would be found to be correct in an ideal discourse.<sup>10</sup>

Second, ideal discourse serves as a standard for real discourses. Real discourse must comport with ideal discourse as far as possible. In this sense, Alexy understands “the regulative idea of absolute procedural correctness and with it the idea of an ideal discourse” as a “necessary condition of any reasonable argumentation” in

6 Whilst Habermas accounts for theoretical as well as practical discourse, Alexy confines himself to developing a theory of practical discourse. Thus, his definitions of the ideal and the real discourse refer solely to practical discourses.

7 Robert Alexy, “Problems of Discourse Theory”, in *critica* 20 (1988), 43–65, 48. On another occasion, Robert Alexy, “Diskurstheorie und Rechtssystem”, in *Synthesis Philosophica* 5 (1988), 299–310, 304, points only to five ideal conditions of discourse: “Complete ideal conditions are on hand by means of five idealizations: (1) unlimited time, (2) unlimited participation, (3) complete linguistic-conceptual clearness, (4) complete information, and (5) complete freedom from prejudice”. The condition of complete ability and willingness to change roles is missing here, as well as the complete freedom from constraints. Whether these conditions can be dispensed with in a world marked by the other five ideal conditions is impossible to determine, for there is no such world. See for specific doubts on the conceptual possibility of complete freedom from constraints Carsten Bäcker, *Begründen und Entscheiden: Kritik und Rekonstruktion der Alexyschen Diskurstheorie des Rechts*, 2nd ed. Baden-Baden 2012, 129, there n. 448.

8 Alexy, “Problems” (n. 7), 51. This is realized and criticized also by Ota Weinberger, “Basic Puzzles of Discourse Philosophy”, in *Ratio Juris* 9 (1996), 172–181, 174, who, with an eye to the Habermasian discourse theory, holds ideal discourse to be impossible by definition: “Ideal discourse is not defined as the best possible discourse, but as an impossible discourse. It is not a normative ideal of a discourse, but an unreal, by definition impossible discourse”.

9 For both quotations, see Alexy, “Problems” (n. 7), 51.

10 Skeptical of this function of the ideal discourse is Steffen Wesche, “Robert Alexys diskurstheoretische Menschenrechtsbegründung”, in *Rechtstheorie* 30 (1999), 92: “If the ideal discourse is shaped normatively as superior as Alexy does, then it has no counterpart in reality. Real norms necessarily stem from distortions of the ideal discourse. Then, however, it is mistaken to lend its legitimacy force to any norm. [...] At best, the ideal discourse may serve as a criterion for (real) discourses, but not for norms”.

real discourses.<sup>11</sup> Thus, ideal discourse in the two-dimensional model draws on the “character of a goal to be achieved”<sup>12</sup> for real discourses.<sup>13</sup> In short, ideal discourse serves as a regulative idea for real discourses,<sup>14</sup> and, by the same token, as its standard and its justification. This function is reflected in Alexy’s concept of real discourse.

## B. ALEXY’S CONCEPT OF REAL DISCOURSE QUA REAL DIMENSION

Alexy begins with a negative definition of real discourses. It reads: “Real discourses are in no respect ideal discourses”.<sup>15</sup> The positive definition of real practical discourses, according to Alexy, reads as follows:

Real practical discourses are defined in terms of a search for an answer to a practical question under the conditions of limited time, limited participation, and incomplete freedom of constraints in the face of incomplete linguistic-conceptual clarity, incomplete empirical information, incomplete ability to change roles, and a lack of freedom from prejudice.<sup>16</sup>

This definition of real discourses<sup>17</sup> is distinguished from that of the ideal discourse only in that the unlimited conditions are changed to limited conditions.<sup>18</sup>

11 Both quotations are taken from Robert Alexy, “Idee und Struktur eines vernünftigen Rechtssystems”, in *Rechts- und Sozialphilosophie in Deutschland heute*, R. Alexy, R. Dreier, and U. Neumann (eds.), ARSP-Beiheft 44, Stuttgart 1991, 30–44, 35.

12 Alexy (n. 11), 35.

13 See Robert Alexy, “Thirteen Replies”, in *Law, Rights, and Discourse*, G. Pavlakos (ed.), Oxford 2007, 333–366, 361: “The participants of discourse are real persons in concrete historical situations who attempt to achieve correct moral judgments with respect to ideal rules of argumentation that never can be completely fulfilled. Under these conditions only an approximation to correctness is possible. For that reason, a consensus achieved in a *real* discourse cannot, indeed, be constitutive of correctness or objective validity. Such a consensus can never be more than an attempt to provide an answer to a practical question that meets correctness qua regulative idea to the extent possible”.

14 See Alexy (n. 5), 157. Similarly Axel Tschentscher, “Der Konsensbegriff in Vertrags- und Diskurstheorien”, in *Rechtstheorie* 33 (2002), 43–59, 58.

15 Alexy (n. 11), 35. This definition is accompanied by the following remark: “It is obvious that there are, alongside discourses that are ideal in all respects and discourses that are ideal in no respects, also in some respects ideal discourses”, Alexy (n. 11), 35, there n. 24. – Discourses that are ideal in some respects may well be theoretically possible every bit as much as discourses that are ideal in all respects; actually existing discourses, however, need not be, under the conditions given, ideal in any respect. Thus, the (claimed) existence of discourses that are ideal in some respects is of no relevance to this enquiry.

16 Alexy (n. 11), 35.

17 The characterization of the real discourse by Ernst Zimmermann ought not to be followed, see his “Multideontische Logik, Prozedurale Rechtstheorie, Diskurs”, in *Rechtstheorie* 30 (1999), 311–327, 321: “The real discourse is often carried out under the condition of limited time; it always has only a limited number of participants, and the condition of complete freedom from constraints is not always satisfied”. Zimmermann claims, with this characterization, that a real discourse under the conditions of unlimited time and complete freedom of constraints would be possible. This is unsubstantiated, given the conditions of the world as we know it.

18 If one is prepared to leave out of account the missing element in one’s willingness to change roles in the definition of the real discourse.

The introduction of a real discourse is necessary in the two-dimensional model in order to provide the actually impossible ideal discourse with an actually possible discourse, that is to say, a real discourse. Not unlike the ideal discourse,<sup>19</sup> the real discourse faces a number of problems. The main problem of real discourses arises, according to Alexy, from the “relativity of the concept of correctness”<sup>20</sup>, corresponding to the concept of discursive possibility.<sup>21</sup> The concept of correctness is relative to “(1) the discourse rules, (2) the degree of their fulfillment, (3) the participants and (4) the points of time”.<sup>22</sup>

### C. PROBLEMS OF THE TWO-DIMENSIONAL MODEL

The two-dimensional model faces severe challenges and puzzles; a goodly number of these have already been pointed out by critics<sup>23</sup> and even by Alexy himself. Not all of these problems are of significance; some may well lend themselves to resolution. At least three challenges and puzzles lead, however, to major doubts.

The first and most significant challenge consists in the question of the *Letztbegründbarkeit* of the ideal discourse.<sup>24</sup> The function of the ideal discourse as a crite-

19 On the problems of the concept of an ideal discourse out of the perspective of the two-dimensional model, see Bäcker (n. 7), 117–120; for a solution to these problems from the perspective of the one-dimensional model, see 153–156.

20 Alexy, “Problems” (n. 7), 61.

21 The concept of discursive possibility stems from the observation that, at any rate in real discourses, it will not always be the case that precisely one answer to any practical question is recognized to be correct. Although there are in real discourses discursive necessities as well as discursive impossibilities, it is nevertheless possible that several propositions, even inconsistent, will likewise have to be seen as discursively possible. On Alexy’s categorical use of the concepts of discursive possibility, necessity, and impossibility, see Alexy (n. 3), 17, and Alexy, “Problems” (n. 7), 60. For these concepts as mere discursive modalities, see Bäcker (n. 7), 222–224.

22 Alexy, “Problems” (n. 7), 61. These four relativizations sum up the concept of relative procedural correctness, which Alexy distinguishes from the concept of absolute procedural correctness that is to be achieved in ideal discourses. With this comparison, Alexy suggests that the hypothetical correctness of the ideal discourse as provided by the two-dimensional model would not be relative. Thus, the problem of relative correctness would only affect real discourses. In fact, in the ideal discourse in Alexy’s model, correctness is already relativized, for even an absolute procedural correctness is a correctness relative to the procedure, see Bäcker (n. 7), 124 f. Therefore, there is also in the two-dimensional model no absolute correctness but only relative correctness.

23 The most determined critics of the common discourse theory as the basis of a discourse theory of law are Gril (n. 1) and Armin Engländer, *Diskurs als Rechtsquelle? Zur Kritik der Diskurstheorie des Rechts*, Tübingen 2002. Both works take up primarily the discourse theories of Habermas and Alexy. The more rewarding critics include, furthermore, Hain, Hilgendorf, Neumann, and Weinberger.

24 The familiar discourse theories attempt to arrive at a definitive justification (*Letztbegründetheit*) of the concept of an ideal discourse by appeal to transcendental philosophy. Apel chooses a transcendental-pragmatic approach, followed by Habermas with his universal-pragmatism. Alexy undertakes a weak transcendental-pragmatism. – All of these approaches share a common ground: they rely on a meta-theoretic argumentative existence of the human-being, a kind of “discursive life form” that is significant for the human being and from which he cannot escape. According to Jürgen Habermas, “Diskursethik – Notizen zu einem Begründungsprogramm”, in *Moralbewußtsein und kommunikatives Handeln*, Frankfurt a.M. 1983, 53–125, 112, taking a decision against discourse must end in “schizophrenia and suicide”, and for Karl-Otto Apel,

tion of truth shows that the concept of the ideal discourse is taken to be absolutely correct and, in this sense, definitively justified. It remains less than clear, however, how an absolutely correct concept of an ideal discourse can be ascertained by means of the merely performable and, thus, actual possible real discourses.

The second challenge – rather, a puzzle – emerges as soon as one examines more closely the function of the ideal discourse as a standard of real discourses. The question arises as to how an inaccessible ideal can ever serve as a manageable tool for measuring actual performed discourses. To speak of a regulative ideal does not answer this question.

The third challenge stems from the fact that the two-dimensional conception turns on the concept of an absolute correctness, at least as a regulative ideal, although even in Alexy's discourse theory, only relative correctness can prevail.<sup>25</sup> The alternative that comes immediately to mind is to dispense with the concept of absolute correctness, be it merely a regulative ideal, and to recognize and accept relative correctness as all that can be achieved.<sup>26</sup> With this move, however, the function of the ideal discourse as the, albeit merely hypothetical, criterion of the correctness of propositions will also have to be abandoned.

The one-dimensional model to be presented is in a position to respond to these problems. The strategy consists in dispensing altogether with every absolutely correct ideal dimension of discourse, and in introducing discourse principles.

## PART TWO: THE ONE-DIMENSIONAL THREE-STAGED MODEL OF DISCOURSE

The adumbrated strategy hints at the differences between the one-dimensional and two-dimensional models. First, it dispenses with the ideal dimension that is connected to the claim to absolute correctness or a definitive justification of the concept of an ideal discourse. This difference is categorical, it changes the theory to a one-dimensional model. By dispensing with any ideal dimension, both the first and the third challenges are met. For the claim to a definitive justification, implied in the

“Das Apriori der Kommunikationsgemeinschaft und die Grundlagen der Ethik. Zum Problem einer rationalen Begründung der Ethik im Zeitalter der Wissenschaft”, in *Transformationen der Philosophie: Das Apriori der Kommunikationsgemeinschaft*, Frankfurt a.M. 1973, 358–435, 414, it leads to the loss of “any possibility of self-understanding and of self-identification”, resulting in “self-destruction”. Robert Alexy, “Discourse Theory and Human Rights”, in *Ratio Juris* 9 (1996), 209–235, 217, terms discursive *performance* “the most general form of life of human beings”; and the human-being, referring to Brandom, as “discursive creature” that undergoes “a kind of self-destruction” should it decide to act against its nature, Robert Alexy, “Discourse Theory and Fundamental Rights”, in *Fundamental Rights through Discourse*, A.J. Menéndez, E.O. Erikson (eds.), Oslo 2004, 35–51, 43. For doubts about these approaches, especially Alexy's, see Bäcker (n. 7), 44–53.

25 See above, n. 22.

26 This has been stressed by Ota Weinberger, “Der Streit um die praktische Vernunft. Gegen Scheinargumente in der praktischen Philosophie”, in *Rechtssystem und praktische Vernunft*, R. Alexy and R. Dreier (eds.), ARSP Beiheft 51, Stuttgart 1993, 30–46, 43: “The absolute character of correctness serves as the author's justification by constituting the end as a regulative idea that, in turn, makes it possible to determine the one right answer to practical questions”. Such “a claim does not [help], if we know that it is not realizable”.

presentation of an ideal discourse, vanishes along with the assumption of absolute correctness as a criterion of truth, be it merely hypothetical.

Second, the model to be presented here ascribes to discourse principles the measure of discourses. This is the answer to the second challenge, for the concept of discourse principles provides a measure for actual discourse that is retained in the real dimension.

These two major differences mark the three stages of the one-dimensional discourse model. These are: (I) the discourse ideal, (II) discourse principles, and (III) actual discourses.

#### A. THE STAGE OF THE DISCOURSE IDEAL

The design of the first stage takes its departure from the most significant puzzle of the function of the ideal discourse in the two-dimensional model. This puzzle, found in the common model of discourse, consists in understanding the ideal discourse as a criterion for correctness or truth, although this is only intelligible, not realizable.

The ideal discourse, according to Alexy, is characterized by an ideal situation of discourse, in which ideal results under ideal conditions are to be achieved. Thus, the ideal discourse takes place by definition under, as Alexy himself puts it, “not-real conditions”<sup>27</sup>. It stems from the world of thought.

The reason for this is no mystery. Plainly, our world is not a world, in which all discourse-relevant conditions are perfectly given.<sup>28</sup> A glimpse into the situation adds clarity to this report. The actual participants can only be, at present, we human beings.<sup>29</sup> We do not, however, have unlimited time for our discussions. We are not able to communicate with an unlimited number of participants, let alone to communicate with them simultaneously.<sup>30</sup> Complete freedom from constraints must remain a utopia, for the satisfaction of our basic needs is to be guaranteed.<sup>31</sup> What is more, where practical questions relevant here are concerned, there will never exist complete linguistic-conceptual clarity, due to our limited capacity to perceive the

27 Robert Alexy, “Ota Weinbergers Kritik der diskurstheoretischen Deutung juristischer Rationalität”, in *Institution und Recht. Grazer Symposium zu Ehren von Ota Weinberger*, P. Koller, W. Krawietz, and P. Strasser (eds.), *Rechtstheorie Beiheft 14*, Berlin 1994, 143–157, 149.

28 Alexy, “Problems” (n. 7), 49, leaves the question unanswered as to “whether or not the described state [the fulfillment of the ideal conditions] is conceptually possible at all”. There are reasons to assume that at least the satisfaction of all conditions at one and the same time is conceptually impossible.

29 This virtual impossibility of any realization of the ideal conditions of discourse could well be what prompted Ota Weinberger, “Grundlagenprobleme des Institutionalistischen Rechtspositivismus”, in *Institution und Recht. Grazer Symposium zu Ehren von Ota Weinberger*, P. Koller, W. Krawietz, and P. Strasser (eds.), *Rechtstheorie Beiheft 14*, Berlin 1994, 173–284, 259f., to term the ideal discourse a non-human discourse, a “discourse of angels”.

30 On the limitation of time and the number of participants likewise Robert Alexy, “A Theory of Practical Discourse”, transl. by D. Frisby, in *The Communicative Ethics Controversy*, S. Benhabib and F. Dallmayr (eds.), Cambridge, Mass. 1990, 151–190: “On factual grounds, it is impossible that everyone discuss everything without restriction; time is short”.

31 Robert Spaemann, “Die Utopie der Herrschaftsfreiheit”, in *Merkur* 26 (1972), 735–752, accounts in a similar way for the “utopia of reignlessness”, with an eye to Habermas.