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Discourse Ethics, Legal Positivism and the Law

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INTRODUCTION

EVER SINCE HIS seminal doctoral dissertation, Professor Robert Alexy has persuasively argued that legal argumentation constitutes a special case of moral argumentation.[1] Its peculiarity lies in the fact that the claim to correctness of legal argumentation can only be fulfilled within the institutional framework of an existing legal order; therefore, given that Alexy is by no means a proponent of a relativist conception of correctness, the fulfilment of that claim depends on the degree of correctness of positive law. If positive law were not correct (and setting aside whether it makes any sense to speak of extremely unjust law[2]), then the claim to correctness that is inherent in legal argumentation (as Alexy also persuasively argues) would remain unsubstantiated. But what does the correctness of propositions of positive law depend on?

Lacking a moral bridge that would take us from moral to legal argumentation (in other words, without a moral justification of the form of law), the discursive conception of legal argumentation cannot but reproduce the positivistic distinction between law and morality, and ends up a mere apology for legal discourse. Alexy rested content with a rather traditional choice of methodology, that of demonstrating (though not offering a moral justification for) the peculiarity of legal argumentation. He first traced the *genus proximum* to which it belongs, namely moral

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[1] R Alexy, *A Theory of Legal Argumentation* (R Adler and N McCormick (trans), Oxford, Oxford University Press, 1989).

[2] See R Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (SL Paulson and B Litschewski Paulson (trans), Oxford, Oxford University Press, 2002) esp 40.

argumentation, and then he identified its *differentia specifica*: the institutional constraints that render legal argumentation a special case of moral argumentation. The inevitable question that arises at this point, however, is whether legal argumentation just happens to be a special case of moral argumentation or whether its peculiarity, that is, the relevant legal constraints, can itself be derived from the discursive conception of legal argumentation, from discourse ethics, by virtue of purely moral reasons; in short, from a moral justification of the form of law.

Alexy justifies the necessity of law by invoking,[3] among others, the need for institutional settlement of the following problem: the process of (moral?) deliberation does not guarantee that only one (right?) answer will come out. The problem therefore arises of the knowledge of the law. This problem, argues Alexy, is solved by the authoritative enactment of the law, by political decisions reached through predetermined (legal?) processes and on the basis of majority rule. Anticipating a bit, one could wonder, following Rousseau's critique of Grotius[4]: doesn't majority rule presuppose unanimity at least once, when we unanimously establish majority rule as a decision-making principle that commands the adherence of the minority to the view of the majority? To avoid circularity, we ought to offer a moral justification for majority rule.

Failure to solve the problem of knowledge of the law leads—where else?—to anarchy. As is obvious, this argument does not establish the moral necessity of the law without further ado. Why wouldn't a legal positivist subscribe to this way of establishing the necessity of the law? It is not my purpose in this contribution to examine in a systematic way Alexy's theory of law.[5] I shall confine myself to arguing that legal positivism can only be anchored in a merely procedural conception of argumentation (as put forward by Habermas, for example), which is its worst version for both epistemological and, more importantly, moral reasons. This is why, in my view, Alexy, ought to have shifted his very interesting conception of the discursive justification of human rights in a more straightforward way toward a moral justification of the law.

One last introductory point: Kant himself and all Kantians are in a sense formalists. Their formalism, however, is based on moral reasons. The notorious unencumbered self, which has so often been criticised by various versions of both right and left communitarianism, is the outcome of a series of reasonable abstractions and, foremost, the manifestation of

[3] See his 'Discourse Theory and Human Rights' (1996) 9 *Ratio Juris* 209 at 220.

[4] JJ Rousseau, 'The Social Contract' in V Gourevitch (ed), *'The Social Contract' and Other Later Political Writings* (Cambridge, Cambridge University Press, 1997) 49.

[5] I have tried to raise some doubts about his theory in my short book review of *Theorie der Grundrechte* on the occasion of its translation into English (*A Theory of Constitutional Rights* (J Rivers (trans), Oxford, Oxford University Press, 2004)), see (2004) *55 Northern Ireland Quarterly* 206.