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In **Revue interdisciplinaire d'études juridiques** **2011/1 Volume 66**, pages 109 to 129
Publisher **Presses de l'Université Saint-Louis**

ISSN 0770-2310
DOI 10.3917/riej.066.0109
Uploaded: 09/15/2012

Article available online at
https://droit.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2011-1-page-109?lang=en

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R.I.E.J., 2011.66

Law, Metaphysics and Nature. Alexy's journey into the realm of the eternal verities

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> "In old days truth was absolute, eternal and superhuman (…) In old days it was possible to worship truth; indeed the sincerity of worship was demonstrated by the practice of human sacrifice. But it is difficult to worship a merely human and relative truth"[1].

These words were written by Bertrand Russell who bitterly regarded pragmatism, behaviourism, psychologism and relativity-physics as a "whole host of enemies of truth"[2]. Could this kind of controversy apply to "merely human" cultural objects such as Law? After the fall of Natural Law theories it is hard to deny that Law is human and not divine (*i.e.* "absolute, eternal and superhuman"). Yet it is controversial whether Law still has anything to do with truth.

Recently, Robert Alexy's legal philosophy seems committed to a twofold defence of truth in the domain of Law, if I may say so. On the one hand Alexy thinks that norms have *truth-values*[3] and he thinks moreover that some kind of metaphysical necessity exercises ultimate

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I would like to thank Ms. Bridgit McQue, LL.B. for the revision of my English text. My cordial thanks are also due to professors Jerónimo Betegón, Antonio Peña Freire and Luis Prieto who have read the draft. Their criticisms were of great assistance.

[1] B. RUSSELL, « On Youthful Cynicism », in *In praise of Idleness* (1935), London, 2004, pp. 121-130, p. 126.

[2] *Ibidem.*

[3] See R. ALEXY, « Reflections on How My Thinking about Law Has Changed over the Years », paper presented at *Law, Democracy and Legal Argumentation. A Seminar Dedicated to the Thinking of Professor Robert Alexy*, Tampere, 9.2.2010, p. 4 ; ID., *Recht, Vernunft, Diskurs*, Frankfurt a. M., 1995, pp. 118 f.

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authority over the realm of norms[4]. On the other hand, he assumes that a *true* definition of Law is possible, since he thinks that legal philosophy aims to find out the very *nature* of Law. As a result, Alexy seems increasingly committed to a metaphysical conception of morality and to an essentialist definition of Law. Both controversial tenets look like pieces that fit together into some sort of, say, idealist puzzle. He is seeking to confine legal and moral issues to the Fregean third realm or, broadly speaking, to "the realm of the eternal verities"[5]: the place where God, essences, logic, arithmetic, the Pythagorean theorem and other similar entities live peacefully together. In the following lines I would like to examine briefly Alexy's essentialist approach to the very nature of Law and his recent metaphysical approach to morality. They can both be regarded as parallel paths that lead to the realm of the eternal verities, which is the realm of certainty.

1. Essentialism: from usefulness to essence

In his famous book *The Definition of Law*, the professor from Kiel, Hermann Kantorowicz, wrote: "If (…) there existed something like the 'essence' of law, then indeed it would have to be admitted that among the many senses of the term 'law' the sense indicating this sense and the definition covering this sense, and only this sense and this definition, would be true"[6]. In his opinion, those who hold this essentialism "show that they have not yet freed themselves of the ancient, prehistoric, belief in verbal magic"[7]. Kantorowicz was in favour of accepting the existence of multiple concepts of Law and he suggested usefulness to be the right criterion in order to choose the best concept of law.

In this respect Alexy's position is quite different. He thinks that we should not only ascertain *a concept* of Law, but also find out its very *nature*. For centuries those who had been looking for the nature of law were the same as those who had been looking for natural law. Natural Law authors should presumably be more sagacious in

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[4] R. ALEXY, « Menschenrechte ohne Metaphysik? », in *Deutsche Zeitschrift für Philosophie,* 52 (2004), pp. 15-24.

[5] E. CASSIRER, *The Philosophy of the Enlightenment*, Princeton, 1951, p. 13.

[6] H. KANTOROWICZ, *The Definition of Law*, London, 1958, p. 3.

[7] *Ibidem.*

discovering the nature of Law. After all, they have been used to predicate necessity from an object, Law, usually regarded as extremely contingent. No wonder that the quest for natural law and the quest for the nature of law have been one and the same for a long period of our history. This might lead us to link, on the one hand, essentialism to legal non-positivism and, on the other hand, anti-essentialism to legal positivism. However essentialism is by no means a feature of one single legal theory. Significantly there are positivist and non-positivist authors who give essentialist accounts of Law. In this respect the positivist quest for the nature of Law has not been intrinsically different from the quest for natural Law. This is so notwithstanding that the link between the concept of Law and the essence of Law in positivist theories is the assumption of some kind of universalism of law, *i.e.* the idea that the existence of Law is somehow a universal phenomenon, a "donnée naturelle"[8].

Let us consider as an example of positivist essentialism Kelsen's *Reine Rechtslehre*, which begins with the following words: "The Pure Theory of Law is a theory of positive law. It is a theory of positive law in general, not of a specific legal order. It is a general theory of law, not an interpretation of specific national or international legal norms"[9]. The aim of Kelsen was to ascertain explicitly a general (universal) concept of Law instead of a particular concept of Law. This methodological aim takes for granted that there is such a thing as a universal legal phenomenon. In other words it takes for granted that every past, present and future legal order all over the world (and in every possible world) shares some *necessary* features. Yet the essentialist claim that underlies this methodological approach looks quite bizarre when we try to find precise common features in the normative orders that rule, let us say, the *Lele*, the Romans, the *Mbuti*, European Union Citizens, the *Kaupaku Papua* tribe of New Guinea, the Russians under the Soviet Union or the Eskimos[10] (we can call this heterogeneous set of normative systems 'LRMEKRE'). Faced with this set of normative systems we have two options: we can try to find some common features and built a concept thereof or we can reject the

[8] F. OST and M. van de KERCHOVE, *De la pyramide au réseau. Pour une théorie dialectique du droit*, Brussels, 2002, p. 276.
[9] H. KELSEN, *Pure Theory of Law* (second edition), trans. by M. Knight, Berkeley, 1967, p. 1.
[10] Some of these normative systems are examined by Uwe WESEL, *Frühformen des Rechts in vorstaatlichen Gesellschaften*, Frankfurt a. M., 1985.

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set because it does not fit our previous concepts. Anthropologists usually undertake the first strategy. However they need concepts in order to structure their knowledge and analyze sets like LRMEKRE. No wonder that the anthropologist Paul J. Bohannan complains about the lack of a clear concept of Law and adds that "efforts to delimit the subject matter of law, like efforts to define it, usually fall into one of several traps that are more easily seen than avoided"[11]. Apparently, they need some *concepts* to engage their *empirical* research. The anthropologist needs to weave his or her epistemic net with concepts and observation.

Conversely, whoever undertakes the second strategy and engages in a conceptual enterprise or in the quest for the nature of Law probably needs (although not explicitly) a *concrete* set of normative orders as the subject matter of the conceptual investigation (which in its turn aims paradoxically to tell us how to identify the elements of the broader set of orders that previously *biased (?)* our research). For the sake of my argumentation, let us overlook this problem and say that our starting set is LRMEKRE. Then it seems natural to investigate the presence of extremely general features in LRMEKRE. Hart, who looked explicitly for a *concept* of Law, would probably not accept that every single normative system of LRMEKRE is Law. In Hart's opinion, normative systems must reach a certain degree of institutional development to be considered as law: "For the introduction into society of rules enabling legislators to change and add to the rules of duty, and judges to determine when the rules of duty have been broken, is a step forward as important to society as the invention of the wheel (…) a step from the pre-legal to the legal world"[12]. When we have such a concept (a sort of historical dividing line), we can *conventionally* distinguish between legal orders and *pre-legal* orders. But should we go further and assume the existence of a universal legal phenomenon? Could we then look for its very nature?

In this universalism, there is no deep difference between Kelsen and Natural Law authors like Aquinas, for example. Obviously, Kelsen reduced legal orders to an expression of will and Aquinas confirms its rationality ("*lex est aliquid rationis"*), but both try alike to establish a *general* concept of Law and both seem to assume the existence of the nature of law at any rate. From this point of view, the

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[11] P. BONHANNAN, « The Differing Realms of the Law », in *American Anthropologist* (December 1965), vol. 67, issue 6, pp. 33-42, p. 33.
[12] H.L.A. HART, *The Concept of Law* (second edition), pp. 41 f.

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positivistic quest for the *nature of law* is not so different from the classical anti-positivist quest for the *law of Nature*. Under some sort of "*illusion universaliste*"[13], positivist authors and Natural Law scholars confine Law to the "realm of the eternal verities" and to some extent are committed to an essentialist approach to Law, before they fiercely dispute the necessity of its moral content. They play somehow the game *against* each other, but in so doing they play the game *with* each other[14].

So far we have seen that essentialism (through universalism) can also be ascribed to some versions of legal positivism. Conversely, many non-positivist authors are not essentialist. Let us take, for instance, three distinguished anti-positivist legal philosophers in the Anglo American, the Ibero-American and the German legal culture such as Ronald Dworkin, Carlos Nino and Robert Alexy. All of them seem to base their own "general attack on legal positivism"[15] on the concrete features they find in the legal systems of Constitutional States. As a matter of fact, their view of the legal system is, say, Constitution-oriented. Luis Prieto is very right in saying that non-positivist authors are now either "legal philosophers who have the vocation to be Constitutional Law specialists or Constitutional Law specialists who have the vocation to be legal philosophers"[16].

Nonetheless, in trying to answer the classical problem of the conceptual relationship between Law and morals, they attribute very different effects to their common sketch of constitutional legal orders, *i.e.* those where morality has been *incorporated* into the legal system. Ronald Dworkin and Carlos Santiago Nino seem to be in favour of particular theories of Law. That means that they do not intend to ascertain a universal concept of Law. They would rather restrict the efficacy of their results to some concrete legal orders. Significantly Dworkin usually focuses exclusively on the United States' and the

[13] F. OST and M. van de KERCHOVE, *De la pyramide au réseau*, *op. cit.*, p. 279.

[14] See A. GARCÍA FIGUEROA, « The Pseudo-problem of Legal Theory and the Rise of Neo-constitutionalism », in J.J. Moreso (ed.), *Legal Theory. Legal Positivism and Conceptual Analysis/ Teoría del derecho. Positivismo jurídico y análisis conceptual,* Proceedings of the 22nd IVR World Congress, Granada 2005, vol. I, Archiv für Rechts- und Sozialphilosophie, Heft 106, Stutgart, 2007, pp. 34-42.

[15] R. DWORKIN, *Taking Rights Seriously*, Cambridge (Mass.), p. 22.

[16] L. PRIETO, « La doctrina del Derecho natural », in J. Betegón & al., *Lecciones de teoría del Derecho*, Madrid, 1997, pp. 31-66, p. 65. Prieto refers to Gustavo Zagrebelsky as well.

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United Kingdom's legal systems and Carlos Santiago Nino explicitly defends a sort of conceptual relativism[17]. Similarly to Hermann Kantorowicz, Nino thought that several possible concepts of law were possible. The combination of a weaker or relative concept of Law and the choice of constitutional Law as subject-matter of legal theory determine the mainstream of the legal trend called in Italy, Spain and especially non-English speaking America: "neoconstitutionalismo"[18]. Hence neo-constitutionalism should be committed to some kind of conceptual pragmatism. On the one hand, pragmatism declines to engage in essentialist quests. On the other hand, usefulness is the pragmatist criterion to evaluate the validity of concepts[19]. Both elements seem to be present in current non-positivistic essays. They have abandoned the quest for a universal concept of Law and they have abandoned the quest for the nature of Law, perhaps because they have likewise abandoned the quest for Natural Law.

In this respect, the case of Robert Alexy looks somehow eccentric for his theory is becoming increasingly committed to an essentialist approach: "Legal philosophy *qua* enquiry into the nature of law, is (…) an enterprise universalistic in nature"[20]. In assuming essentialism his legal theory is not essentially different either from positivists like Kelsen or from Natural Law authors like Aquinas.

Do the quest for a universal *concept* of Law and the quest for the very *nature* of Law really make sense? Should we seek to grasp

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[17] See C.S. NINO, De*recho, moral y política. Una revisión de la teoría general del Derecho*, Barcelona, 1994, pp. 23 ff.; ID., *Introducción al análisis del Derecho*, Barcelona, 1991, pp. 11 ff.

[18] See e.g. M. CARBONELL (ed.), *Neoconstitucionalismo(s)*, Madrid, 2003; C. BERNAL PULIDO, *El neoconstitucionalismo a debate*, Bogotá 2006; E. O. RAMOS DUARTE and S. POZZOLO, *Neoconstitucionalismo e positivismo jurídico. As faces da teoría do Direito em tempos de interpretação moral da Constituição*, São Paulo, 2006; C. PEREIRA DE SOUZA NETO and Daniel SARMENTO (eds.), *A Constitucionalização do Direito. Fundamentos Teóricos e Aplicações Específicas*, Rio de Janeiro, 2007; E. RIBEIRO MOREIRA, *Neoconstitucionalismo. A Invasão da Constituição*, São Paulo, 2008; L.R. BARROSO, *El neoconstitucionalismo y la constitucionalización del Derecho*, México, 2008; R. QUARESMA & AL. (eds.), *Neoconstitucionalismo*, Rio de Janeiro, 2009.

[19] See A. GARCÍA FIGUEROA, *Criaturas de la moralidad. Una aproximación neoconstitucionalista al Derecho a través de los derechos*, Madrid, 2009, Chap. 6.

[20] R. ALEXY, « On the Concept and the Nature of Law », in *Ratio Juris,* vol. 21, n° 3 (september 2008), pp. 281-299*,* p. 290.

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the very *essence* of Law? It is thanks to Kripke's philosophy[21] that essentialism has been a successful philosophical trend, but it seems reasonable to question whether essentialism applies well to cultural objects such as Law[22]. He regards proper names and natural kinds as rigid designators that denote the same reference in every possible world (transworld identity). Hence they denote essences. He distinguishes powerfully between metaphysical and epistemic questions, between necessary truth and *a priori* truth, and he defends the idea that modal concepts such as *necessary*, *possible* and *contingent* are metaphysical and not merely linguistic[23]. These are extremely complex problems, but here we can take a very simple example to confront essentialist and anti-essentialist positions[24]. Let us consider the following statement[25]:

(1) 9 is an odd number.

An essentialist philosopher would probably say that this is a necessarily true statement, because being an odd number is part of the essence of 9. 9 cannot be even in any possible world. Now let us take the following statement:

(2) 9 is the number of planets.

This statement would merely express a contingent truth. We can imagine a world where the number of planets is not 9 (a good example since the real number of planets is considered to be 8 after some recent research). Hence being the number of the planets is by no means a necessary property of 9.

This kind of framework is criticized by pragmatism. Pragmatic analysis is epistemic and representational. So Quine turns statement (1), presumably necessary, into a contingent statement just by replacing '9' by 'the number of planets":

(3) The number of the planets is an odd number.

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[21] See S. KRIPKE, *Naming and Necessity*, Oxford, 1981.

[22] See e.g. C.S. NINO, *Derecho, moral y política*, *op. cit*., pp. 31 f.

[23] See a precise presentation of Kripke's essentialism in M. PÉREZ OTERO, *Esbozo de la filosofía de Kripke*, Barcelona, 2006.

[24] *Ibidem*, pp. 138 ff.

[25] I have already used this example in A. GARCÍA FIGUEROA, « ¿ Esencias jusfundamentales ? Notas a propósito de un trabajo de Robert Alexy », in *Ideas. Anuario de la Asociación Argentina de Filosofía de Derecho*, n° 8 (2008). A recent Spanish discussion on this sigue is in J.J. MORESO, L. PRIETO and J. FERRER, *Los desacuerdos en el Derecho*, Madrid, 2010.

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By means of the same substitution, he likewise turns the presumably contingent statement (2) into a necessary one:

(4) The number of the planets is the number of the planets.

In trying to show that we are living in a world without either substances or essences Richard Rorty[26] similarly asks himself what would *nineness* be*,* that is to say the essence of 9. 9 can be simply represented and known in very different ways. We can say that 9 is 8 +1 and this is not intrinsically sounder than saying that 9 is the result of 1.678.914 - 1.678.905.

Which approach is more suitable for legal philosophy? It seems to me that an epistemic and representational approach is more fitting than the essentialist one, since legal norms are normative statements; they are the result of some interpretive activity (i.e. we know what norms mean by interpreting legal provisions); they can moreover be interpreted in many ways and their contents can therefore change over the years. In other words, there is an unavoidable *constructive* element in law that makes an essentialist approach to it quite difficult. I must say that this is especially so under a Habermasian epistemology which is committed to a consensual theory of truth[27]. Concerning cultural objects, there is no clear separation between the object and its representation (the way we know it by means of interpretation).

But we can take one step further and question again the proper terms of the discussion since legal theory has not really been a theory of Law, but a *theory of a relationship*, a reflection on the conceptual relationship between Law and morality. This means that every legal theory assumes the existence of some kind of *dualism*[28] because every legal theory assumes the very existence of Law and morality as *separated* normative spheres. From this point of view the very acceptance of the framework sketched by "legal theory" is misleading for a so-called non-positivistic position, whose aim is precisely to ignore the separation of Law and morality. Before answering a question such as "Is there really a necessary conceptual relationship

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[26] R. RORTY, *¿ Esperanza o conocimiento ? Una introducción al pragmatismo*, México, 1997, chap. II and pp. 58 ff. Rorty's example is about 17 and "seventeenness".

[27] See, e.g., J. HABERMAS, « Wahrheitstheorien », in H. Fahrenbach (ed.), *Wirklichkeit und Reflexion*, Pfullingen, 1973, pp. 211-266.

[28] This is of course not the sense in which Alexy uses the term for his own purposes (« dual nature thesis »). See. e.g. R. ALEXY, « On the Concept and the Nature of Law », in *Ratio Juris*, Vol. 21, n° 3 (September 2008), pp. 281-299 ; p. 292 ff.

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between Law and morality?" we should probably check the appropriateness of the question itself.

When we take this meta-theoretical approach, legal theory discussions look quite different. Then we notice that very often positivist and non-positivist authors exhibit no deep disagreement on what Law is. They may even share a common pre-theoretical view of what Law usually is and very often they just disagree about meta-ethical issues. For example, many positivist authors base their position on (meta)ethical scepticism. This is the case of Eugenio Bulygin[29], whose view of what he calls 'Law' is probably not very different from what non-positivist authors refer to as 'Law'. The question is therefore how to qualify morally those norms with institutional support called 'Law'. At this point many positivist authors usually reject the existence of practical reason which is precisely what should preclude any *relationship* between Law and morality. But this sounds bizarre. It seems just senseless to discuss the *relationship* between Law and morality when one has previously rejected the existence of one of the terms of the relationship. This kind of perplexity arises typically as we are not facing problems but pseudo-problems[30].

To sum up, legal theory has not been properly a theory about Law, but a theory about a relationship between two entities. Hence when we look at the discussions held by legal philosophers, the real discussion focuses finally on the concept and nature of practical reason. The real question is whether practical reason is possible and, if so, how to organize norms and values under that realm. Not by chance does legal philosophy seem very often to be an indirect speech about moral philosophy. Perhaps the genuine name of 'legal theory' should be 'meta-ethics'. In this sense, had we to adhere to one player of the 'legal theory' game, non-positivist theories look *prima facie* sounder. The link between Law and practical reason turns the quest for the concept and the nature of Law into the genuine quest for the concept and nature of practical reason. It is difficult to find something in common in the set of normative systems LRMEKRE. If anything, the very idea of practical reason would be a plausible way to find

[29] See R. ALEXY and E. BULYGIN, *La pretensión de corrección en el derecho. La polémica Alexy/Bulygin sobre la relación de Derecho y moral*, Bogotá, 2001.

[30] See, e.g., A. GARCÍA FIGUEROA « Bemerkungen zu einer dispositionellen Erklärung des Rechts anhand der Diskussion der Verbindungs- und Trennungsthese », in *Archiv für Rechts- und Sozialphilosophie* (Dec. 2006), pp. 363-381.

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something truly in common among them because the discursive moral theory presupposes that there is no "*diskursresistenten anthropologischen Verschiedenheiten der Menschen*"[31].

So, were both mistaken in their dualism, there could be a sort of asymmetry between positivist and non-positivist legal theories, an asymmetry that moves in favour of the latter. Non-positivist theories are sounder, because they do not speak properly about either the improbable common features of some universal law or alternatively the trivial common features of highly institutional normative orders usually called "Law". By confronting a pseudo-problem, non-positivist theories give us a right answer about a genuine problem. They undertake an investigation through legal statements about the possibility of practical reason and the position of norms with institutional support therein. Once we admit Alexy's discourse-based concept of practical reason, we have to conclude that his theory seems somehow to be substantially right though methodologically mistaken (and this applies to all natural Law and non-positivistic legal theories). To put it in a nutshell, he offers a good answer to a bad question[32]. A question though remains open: Does moral theory need a metaphysical ground?

2. Moral theory: From consensus to metaphysics

Shortly after John Rawls' death, Eric Gregory (from the Religion Department at Princeton University) came across a quite amazing text: *A brief inquiry into the meaning of sin and faith*[33]. A very young and brilliant student, John Rawls, had written it at the age of 21. At that time Rawls was a very religious person and he devoted himself to the study of theological issues. Nevertheless, in his insistence on the importance of communitarian and communicative aspects of morality we can now trace back some of the main features of his subsequent "Kantian constructivism". He wrote: "Man's capacity to live in and for community is the Image of God"[34]; "(t)he

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[31] R. ALEXY, *Recht, Vernunft, Diskurs*, *op. cit.*, p. 114.

[32] See A. GARCÍA FIGUEROA, *Bemerkungen zu einer dispositionellen Erklärung des Rechts*, *op. cit.*

[33] J. RAWLS, *A brief inquiry into the meaning of sin and faith: with "On my religion",* edited by T. Nagel, Cambridge (Mass.), 2009.

[34] *Ibidem*, p. 193.

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Imago Dei is communal because God is communal"[35]. No wonder that "sin (…) must be the abuse, the aberration, and the destruction of community"[36]. To sum up: "If a man is a creature made in and for community, and if sin is the destruction of community, it follows that the consequence of sin is aloneness"[37]. "There is no morality in isolation"[38].

This early work looked at the most sacred values of human beings through constructivist eyes[39]. After World War II, Rawls changed his mind and abandoned his religious faith. It is difficult to determine precisely the extent to which those initial religious beliefs conditioned his theory, but we do know now that as he grew as a great American moral and political philosopher he kept his moral theory clear and isolated from other fields of moral and general philosophy. As a matter of fact, many years later Rawls defended the thesis of the "independence of moral theory":

(…) Moral theory is, in important respects, independent from certain philosophical subjects sometimes regarded as methodologically prior to it. (…) We exaggerate the dependence of moral philosophy, and in particular moral theory, on the rest of philosophy; and we expect too much from the theory of meaning, epistemology, and the philosophy of mind"[40].

The independence thesis is a sort of *actio finium regundorum* that has a concrete consequence in practical matters:

"Thus the aim of justice as fairness as a political conception is practical, and not metaphysical or epistemological. That is, it presents itself not as a conception of justice that is true, but one that can serve as basis of informed and willing political agreement between citizens viewed as free and equal persons. This agreement when securely founded in public political and social attitudes sustains the goods of all persons and associations within a just democratic regime. To secure this agreement we try, so far as we can, to avoid disputed philosophical, as well as disputed moral and religious, questions. We

[35] *Ibidem*, p. 206.
[36] *Ibidem*, p. 193. See also p. 202.
[37] *Ibidem*, p. 206. See also p. 126.
[38] *Ibidem*, p. 122.
[39] See J. COHEN and T. NAGEL, « Introduction » to J. Rawls, *A brief Inquiry into the meaning of sin and faith*, *op. cit.*, pp. 1-23.
[40] J. RAWLS, « The Independence of Moral Theory » (1975), in *Collected Papers* (ed. S. Freeman), Cambridge (Mass.), 1999, pp. 286-302, p. 302.

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do this because we think them too important and recognize that there is no way to resolve them politically. The only alternative to a principle of toleration is the autocratic use of state power. *Thus, justice as fairness deliberately stays on the surface, philosophically speaking*. Given the profound differences in belief and conception of the good at least since the Reformation, we must recognize that, just as on questions of religious and moral doctrine, public agreement on the basic questions of philosophy cannot be obtained without the state's infringement of basic liberties. *Philosophy as the search for truth about an independent metaphysical and moral order cannot, I believe, provide a workable and shared basis for a political conception of justice in a democratic society* "[41] (my italics).

So, in practical matters, as he got older and more mature Rawls preferred (unlike Alexy) to stay "on the surface, philosophically speaking". There are several reasons to recall the evolution of Rawls' thinking as we examine Alexy's. Both no doubt are men of genius who have maintained a very similar moral theory, *i.e.* Kantian constructivism in general terms. But now Alexy's theory branches off as he faces the problem of the foundation of morality. Unlike Rawls, Alexy's first writings do not seem particularly committed to a metaphysical approach[42], although his later writings are explicitly so. Far be it from me to speculate on some sort of religious dimension in Alexy's theory. This would be to misunderstand my argument. What I do mean is that recently he has been confining the objects of his research to "the realm of the eternal verities", (where God is just one distinguished inhabitant) and in so doing he seems to cast aside the constructive and discursive ideas of his youth.

Unlike Rawls' moral theory, Alexy's present legal theory looks quite dependent on the rest of philosophy. The dependence of legal theory is twofold. On the one hand, legal theory is closely connected to moral theory. According to the special case thesis[43], legal reasoning is a special case of moral reasoning. Legal reasoning is always moral reasoning under special limitations. This in Alexy's thinking is by no

[41] J. RAWLS, « Justice as Fairness: Political not Metaphysical » (1985), in *Collected Papers, op. cit.*, pp. 388-414, pp. 394 f.

[42] In this respect, his position looks quite neutral as he examines Habermas' theory on discourse and Schwemmer and Lorenzen constructivism (*Theorie der juristischen Argumentation*, Frankfurt a. M., 1978, part A, §§ II and III).

[43] R. ALEXY, « The Special Case Thesis », in *Ratio Juris*, Vol. 12, n° 4 (December 1999), pp. 374-384.

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means just a thesis about legal reasoning. The special case thesis (*Sonderfallthese*) pervades Robert Alexy's legal thinking as a whole[44]. So the special case theory was the core of his theory of legal argumentation and later it turned out to be the core of his entire non-positivistic theory of Law. This is a logical consequence of his argumentative and interpretive conception of Law, which extends the results of his investigation on legal reasoning to the whole legal system. Accordingly, the nature of legal reasoning determines the nature of Law. Hence, if we were to accept the traditional legal theory framework, then we should admit that legal theory depends on moral theory.

On the other hand, once legal theory and moral theory become closely connected, we should ask if Rawls' independence thesis is right or not. We have just seen that according to Alexy's *Sonderfallthese,* legal reasoning is a special case of moral reasoning. Which moral reasoning? Since his *Theorie der juristischen Argumentation* was mainly inspired by Habermas'[45] programme, Alexy, when young, endorsed a version of Kantian constructivism. The underlying moral theory of the Special Case Thesis is the discourse theory, which is still in Alexy's opinion "the best theory of practical rationality and correctness"[46]. Kantian constructivism presupposes that morality is something that we make. We have to make it rationally, but at the end of the day it is a human invention[47]. The very idea of the Rawlsian 'reflective equilibrium' presupposes time after time that we can even change our moral principles. Rawls does not "claim for the principles of justice proposed [in *A Theory of Justice*] that they are necessary truths or derivable from such truths"[48]. Rather he states, "(m)oral philosophy is Socratic: we may want to change our present considered judgments once their regulative principles are brought to light. And we may want to do this even though these principles are a perfect fit"[49]. It is not by chance that Kantian constructivism conceives the moral realm as a discourse *relative* to participants. In the words of Alexy himself : "(…) (S)o

[44] R. ALEXY, « Reflections on How My Thinking about Law Has Changed over the Years », *op. cit.*, p. 5.
[45] *Ibidem*, p. 2.
[46] *Ibidem.*
[47] J.L. MACKIE, *Ethics. Inventing Right and Wrong*, London, 1977.
[48] J. RAWLS, *A Theory of Justice*, Oxford, 1972, p. 21.
[49] *Ibidem*, p. 49.

kann man sagen, dass das Ergebnis der Diskursprozedur weder nur relativ noch nur objektiv ist. Es ist in dem Maße relativ, in dem es durch Eigenarten der Teilnehmer bedingt ist, und in dem Maße objektiv, in dem es von den Regeln abhängt. Auf diese Weise vermeidet die Diskurstheorie sowohl die Schwächen relativistischer als auch die objektivistischer Moraltheorien"[50].

In other words, Alexy thus defends the concept of "relative correctness" ("Der relative Begriff der Richtigkeit")[51]. Thus right and wrong are consensually *invented* through a rational procedure and in the moral realm there is no such a thing as a kingdom of ends any more, "but a democracy with equality before the law", as Richard M. Hare puts it[52]. For Rawls' Kantian constructivism promotes a model of "pure procedural justice", the result of the discourse is *constitutively* just. As in the well-known example of gambling, the result of the procedure is right if we follow the rules of the game. There is *no independent criterion* to evaluate the result of the game under fair play[53].

Now the point is: Do we really need a metaphysical support in order to endorse the rationality that guides the consensual procedure under Kantian constructivism? Is the foundation of morality necessarily a matter of metaphysics? We have already seen that Rawls' answer is no. And the answer has nothing to do with Rawls' metaphysical ideas. It is quite possible that Patzig, Habermas and Rawls "have had in mind highly speculative forms of metaphysics when they declared that the exclusion of metaphysics was a part of their respective programmes"[54], as Alexy says. Notwithstanding, what the Rawlsian independent thesis affirms is that in any case those metaphysical ideas are not relevant for practical purposes.

The classical framework to deal with the problem of the foundation is the "Münchhausen Trilemma"[55]. According to Hans Albert's well-known scheme, we have three unacceptable answers to the problem of the foundation of morality: a circular justification (A is based on B and B is based on A); a *regressus in infinitum* (A is based

[50] R. ALEXY, *Recht, Vernunft, Diskurs*, *op. cit.*, p. 102.
[51] *Ibidem*, pp. 125 ff.
[52] R.M. HARE, *Sorting out Ethics*, Oxford, 1997, p. 26.
[53] J. RAWLS, *A Theory of Justice*, *op. cit.*, pp. 86 ff.
[54] R. ALEXY, « Reflections on How My Thinking about Law Has Changed over the Years », *op. cit.*, p. 19.
[55] H. ALBERT, *Traktat über kritische Vernunft*, Tübingen, 1991, p. 15.

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on B; B on C; C on D and so on) and the rupture of this infinite chain of justification at an arbitrary point. In his *Theorie der juristischen Argumentation*[56] Alexy assumed this third horn of the Trilemma basically by supporting the famous Habermasian pragmatic and universal foundation of morality[57]. The foundation is pragmatic, because it lies on the pragmatic level of language, where communication is conceived in terms of speech acts. The foundation is universal (or transcendental), since it investigates the conditions that make possible those speech acts, namely, regulative speech acts. It is well known that the *Richtigkeitsanspruch* ("claim to correctness") is considered to be the condition that makes universally possible the very idea of regulative speech acts. Whoever neglects absolutely the claim to correctness in performing a regulative speech act is condemned to fail in communication. He is condemned to leave the community of discourse. Therefore it is possible to assume that whoever accepts some kind of ethical constructivism should also accept that morality's first principles are somehow *constitutive* rules. Unlike utilitarianism, Kantian constructivism outlines that there is no independent criterion to evaluate the results of rational discursive procedure. When Alexy argued that the discourse on the foundation of discourse was discursive as well[58] (the "*diskurstheoretische Diskurs*"[59] which reminds us of Rawlsian *reflective equilibrium*), he seemed to assume implicitly that point of view.

Therefore, if you do not follow these rules then you simply do not play the game any more. In other words, if you do not accept the rules of discourse, then you will be excluded from the more general form of life of human beings. Some authors do not accept that the foundation rules of morality could be merely constitutive, because that would turn morality into a sort of game and we cannot decide not to play this game. For instance, Ernst Tugendhat states that one can decide to play or not to play games, but one cannot decide not to play the *moral game*, because a justification is always a justification that

[56] See R. ALEXY, *Theorie der juristischen Argumentation*, *op. cit.*, pp. 221 ff.

[57] His position in his *Theorie der juristischen Argumentation* (*op. cit.*, pp. 226 ff.) was eclectic. He examined and accepted partially four ways to found the rules of discourse. So we can regard them as technical rules, as factual rules, as definitional (constitutive) rules and as rules based on pragmatic-universal grounds.

[58] *Ibidem*, p. 233.

[59] R. ALEXY, « Eine Theorie des praktischen Diskurses », in W. Oelmüller (ed.), *Normenbegründung Normendurchsetzung*, Padeborn, 1978, pp. 22-58; p. 25.

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ought to make sure that something is valid for *everybody*. So morality can never be regarded as a game in Tugendhat's opinion[60]. In other words, human beings cannot help being moral in this sense because they are "structurally moral". Even when extremely immoral, there is a structural sense in which human beings are invariably moral[61]. Nevertheless, it seems to me that the problem of the foundation can be neutral in this respect and metaphysical problems would not be important in order to set a moral theory. In our "post-metaphysical era"[62] an "Ethics without Metaphysics"[63] is not only possible, but also required. Concerning moral matters we can (and probably ought to) "stay *on the surface"*.

If the *Sonderfallthese* is right, then we can apply this conclusion to legal matters. Since Alexy's legal theory is non-positivist, the foundation of morality has far-reaching consequences for the validity of law. Even if metaphysics were not relevant for the foundation of morality, it would be so for the foundation of validity of law. In this respect, I think that a coherent interpretation of Alexy's theory might implicitly support this point of view. To explain why, let us take a very concrete aspect of his legal theory that I find somewhat intriguing[64]: the Alexyan determination of the "threshold of extreme injustice" (*Unrechtsschwälle*) under his "argument from injustice". Alexy's "argument from injustice" (*Unrechtsargument*)[65] holds the non-positivist connection thesis (*Verbindungsthese*) that affirms that there is a necessary conceptual relationship between Law and morality. In doing so, Alexy recovers the Radbruch formula (*Radbruchsche Formel*): "Extreme injustice is not law"[66] or *lex*

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[60] See E. TUGENDHAT, *Dialog in Leticia*, Frankfurt, 1997.

[61] See J.L.L. ARANGUREN, *Ética de la felicidad y otros lenguajes*, Madrid, 1992, p. 110. Aranguren follows at this point some ideas from Zubiri.

[62] See, e.g., J. HABERMAS, *Zwischen Naturalismus und Religion*, Frankfurt a. M., 2005.

[63] G. PATZIG, *Ethik ohne Metaphysik*, Göttingen, 1983.

[64] See the whole argument in my book *Principios y positivismo jurídico. El no positivismo principialista en las teorías de Ronald Dworkin y Robert Alexy*, Madrid, 1998, pp. 354 ff.

[65] See *e.g.* R. ALEXY, *Mauerschützen. Zum Verhältnis von Recht, Moral und Strafbarkeit*, Hamburg, 1993 ; ID., « A Defence of Radbruch's Formula », in D. Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order*, Oxford/Portland (Oregon), 1999, pp.15-39.

[66] R. ALEXY, « On the Concept and the Nature of Law », *op. cit.*, p. 282.

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iniustissima non est lex[67]. This formula is sounder than the classical one[68] (*lex iniusta non es lex*) because it restricts the lack of legal validity exclusively to those unjust norms that are extremely[69] unjust. Since Positivists used to adduce as a reason against non-positivism that it legitimates law blindly by stipulating that every legal norm is *ex definitione* just, the *lex iniustissima* formula allows non-positivism to face that criticism successfully.

However, here a new problem arises: If only extremely unjust (intolerable, *unerträglichen*) norms lack validity according to the argument from injustice, then how can we determine the threshold of injustice that allows us to distinguish between extremely unjust and merely unjust norms? At this point Alexy answers that injustice is extreme in as much as it is evident. In other words: we do not need to demonstrate that something is extremely unjust, because extreme injustice is defined as that which does not need to be demonstrated. After all, a legal provision has gone beyond the threshold of extreme injustice when one can feel it. At first glance this strategy involves an intuitionist metaethics *à la G.E. Moore*[70] quite at odds with Alexy's Metaethics. Significantly the young Alexy criticized Viehweg's *Topik* in his *Theorie der juristischen Argumentation* because, he wrote, there is nothing we can do with *topoi* such as "the intolerable is not Law" ("Unerträgliches ist nicht rechtens"), at least when we ask what is the meaning of 'intolerable' ("wenn ein Streit darüber entsteht, was unerträglich ist")[71].

Nevertheless, Alexy's theory holds up when interpreted *in bonam partem* (which is a non-metaphysical interpretation). Then the evidence thesis could be interpreted as a consequence of the very essence of the discursive ethics. If all participants in the discourse regard as evident that a legal provision is extremely unjust, then there would be no point in trying to go further and look for a justification of

[67] A. PECZENIK, « Dimensiones morales del derecho », Spanish trans. by Juan Antonio Pérez Lledó, in *Doxa*, nº 8 (1990), pp. 89-109.

[68] The « exclusive non-positivist » that Alexy attributes to Deryck Beyleveld and Roger Brownsword: « [I]nmoral rules are not legally valid » (R. ALEXY, « On the Concept and Nature of Law », *op. cit.*, p. 287).

[69] In Alexy's opinion, the term « extreme » is « more suitable » to designate (the borderline) than either « intolerable » or « horrible » (R. ALEXY, *ibidem,* p. 282).

[70] G.E. MOORE, *Principia Ethica* (1903), New York, 2005.

[71] R. ALEXY, *Theorie der juristischen Argumentation*, *op. cit.*, p. 42.

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its being extremely unjust. Alexy's "algemeine Begründungsregel"[72] requires that the speaker provides a justification *just in case he is asked* to do so: "Jeder Sprecher muß das, was er behauptet, *auf Verlangen* begründen, es sei denn, er kann Gründe anführen, die es rechtfertigen, eine Begründung zu verweigern"[73] (my italics). At this point it seems to me that Alexy's argument from evidence is more than compatible with Rawls' thesis on the independence of moral theory and on the irrelevance of metaphysics.

To sum up, Alexy's quest for a metaphysical ground as the foundation for his discursive ethics does not seem to be necessary to maintain the idea of morality. Secondly, it seems somehow to be at odds with the very idea of discourse and Kantian constructivism and with the idea of pure procedural justice. Thirdly, it can even cause some undesired results, since (overlapping two previous quotations) "given the profound differences in belief and conception of the good (…) public agreement on the basic questions of philosophy cannot be obtained without the state's infringement of basic liberties"[74]. As Russell points out, it is not by chance, "In old days (…) the sincerity of worship (of the truth) was demonstrated by the practice of human sacrifice"[75].

Conclusion

Norberto Bobbio used to maintain that legal philosophy has been elaborated either by lawyers or by philosophers[76]. The former may have eventually had philosophical skills (e.g. in philosophy of language) but they have usually taken a more rigorous approach to Law thanks to their legal knowledge. On the other hand, the latter are primarily philosophers who attempt to fit law into some kind of broad philosophical system or *Weltanschauung*. Bobbio was very much in favour of lawyers, since they have usually given us a much better account of law than philosophers. For instance, he preferred Santi

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[72] *Ibidem*, p. 168.
[73] *Ibidem*, p. 361.
[74] J. RAWLS, « Justice as Fairness: Political not Metaphysical », *op. cit.*, pp. 395.
[75] B. RUSSELL, « On Youthful Cynicism », *op. cit.*, p. 126.
[76] N. BOBBIO, « Naturaleza y función de la filosofía del Derecho », in *Contribución a la teoría del Derecho* (Spanish trans. by Alfonso Ruiz Miguel), Madrid, 1990, pp. 91-101.

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Romano to Giovanni Gentile. Bobbio's opinion was surely biased by his legal positivism, for his attempt to keep legal theory isolated (independent) from general philosophy seems to be a natural consequence of his positivistic view on Law as a normative system separated from morality[77]. On the other hand, Robert Alexy seems to be increasingly in favour of the philosopher model: "If legal philosophy cannot avoid addressing metaphysical questions, it is confronted not only with the special problems connected with law but also with the great problems of general philosophy or *metaphysica generalis sive ontologia*"[78]. Now should legal philosophers be, philosophically speaking, as modest as Bobbio or as ambitious as Alexy?

Bobbio's position seems incompatible with a non-positivist view on Law. If we accept (as I do) that legal reasoning is a special case of moral reasoning, then it makes no sense to isolate legal theory from moral theory. Whoever applies law engages in a moral reasoning. Therefore, even judges should be more *philosophical* than they are now. They should be, philosophically speaking, more ambitious. This opinion is by no means the most popular nowadays. In his essay "In praise of theory", Ronald Dworkin explains why with subtle irony: "Intellectual modesty seems the opposite of a variety of vices: of racism and sexism, which presuppose superiority, of the ambitions of metaphysicians and system-builders, which seem hubristic, and above all of the elitism of mandarin intellectuals, which seems undemocratic."[79] In spite of that, it seems to me clear that our judges should have, as Dworkin suggests, philosophical skills in moral theory in order to apply, for instance, the moral contents of the Constitution and in order to balance interests and rights. Legal theory should therefore be connected to moral theory.

Does this mean that legal theory necessarily involves a metaphysical approach? At this point, Rawls' attitude ("staying on the surface, philosophically speaking") looks very persuasive and Alexy's position seems therefore too ambitious. We have seen that the

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[77] That is why Riccardo Guastini links positivism and analytical legal philosophy to a *"filosofia 'giuristica' del diritto"* (R. GUASTINI, « Tre domande a Francesco Viola », in M. Jori (comp.), *Ermeneutica e filosofia analitica. Due concezioni del diritto a confronto,* Torino, 1993, pp. 219-240).

[78] R. ALEXY, « Reflections on How My Thinking about Law Has Changed over the Years », *op. cit*., p. 19.

[79] R. DWORKIN, *Justice in Robes*, Cambridge (Mass.), 2006, p. 73.

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assumption of a constructivist, constitutive and discursive approach enables moral theory to be independent from metaphysics. It is additionally a good thing (normatively speaking) to keep moral theory free from metaphysics. To sum up, it seems to me that legal philosophy should be more ambitious than Bobbio thinks but more modest than Alexy suggests.

The other Alexyan path that leads to the "realm of the eternal verities" is essentialism. In his assumption of law as a universal and natural phenomenon, Alexy's quest for the nature of law is similar to the classical quest for natural law. However law and morality are cultural objects. Morality and law are, let us say, discursive inventions and a discursive (non-metaphysical) approach looks strong enough to encompass our normative practices. This means that they are "language-dependent" and their content and structure are deeply rooted in the human condition. This makes it extremely difficult to undertake an essentialist approach to law and morality.

Does legal philosophy become too superficial when deprived of metaphysics and essentialism? I do not think so and this could lead us to think that "legal philosophy" is probably a misnomer. Many years ago, a Spanish legal philosopher, Felipe González Vicén held that legal philosophy is merely a *historical concept*[80]. Unlike *formal concepts* such as "community" or "social cohesion" which apply to human aspects at any moment of history, historical concepts are born at a particular moment and it is senseless to use them to designate previous realities. For example 'revolution' is a historical concept. Not every past '*rebellio'* or '*seditio'* is a *revolution*, for the concept of revolution involves certain especial purposes in order to transform the bases of society. This is the paradigmatic case of the French revolution. González Vicén thought that 'legal philosophy' is a historical concept because this theoretical reflection arose as a result of the substitution of the traditional Natural law framework by the investigation of positive law in the nineteenth century. The German *historische Rechtsschule*, the English Analytical Jurisprudence and the French *École de l'Exégèse* focussed on positive law and not on ideal law. This new reflection on positive law and on the dialectic with previous natural law thinking was called 'legal *philosophy'*, but it could have been named otherwise. Legal philosophy without metaphysics and essentialism is possible and desirable. Certainly this

[80] F. GONZÁLEZ VICÉN, « La filosofía del Derecho como concepto histórico », in *Estudios de Filosofía del Derecho,* La Laguna, 1979, pp. 207-257.

methodological criticism cannot and does not aim to devalue the inspiring and stimulating theory of Robert Alexy. Although I think that a non-metaphysical and non-essentialist legal philosophy is not necessarily a mutilated legal philosophy, it is evident that legal philosophy without Alexy's contribution would be much less worthy and profound.

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