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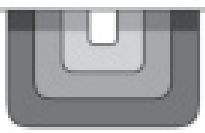

Arguing Fundamental Rights

Edited by
Agustín José Menéndez and
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ARGUING FUNDAMENTAL RIGHTS

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AGUSTÍN JOSÉ MENÉNDEZ AND ERIK ODDVAR ERIKSEN

INTRODUCTION

I do take law very seriously, deeply seriously, because fragile as reason is, and limited as law is as the expression of the institutionalised medium of reason, that's all we have standing between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feeling.
Felix Frankfurter

This book is an exploration of one of the outstanding works in contemporary legal and constitutional theory, Robert Alexy's *A Theory of Constitutional Rights*, (hereinafter *A Theory*).[1] This is done by means of a critical analysis[2] of the structural elements of Alexy's theory, an appraisal of its substantial implications, and an assessment of its applied relevance. For different reasons and on different grounds, the contributors to this volume conclude that *A Theory* is a chief theoretical achievement, which has made a major contribution to the development of a normatively grounded, post-positivistic analysis of constitutional law.[3] It has not only played a major role in the transcendence of the characterisation of legal reasoning (and very especially, constitutional legal reasoning) as a mere exercise in hermeneutics or else in judicial legislation.[4] It also constitutes a superior alternative to black-letter legal dogmatics, critical legal studies, economic analysis of law and originalism, all of which end up disconnecting law and justice.[5]

I. WHY ARGUING FUNDAMENTAL RIGHTS

In addition to numerous book chapters and journal articles (which are listed in the bibliography which closes this volume), Robert Alexy is author of three major works of legal theory. In 1978 he published the first edition of his ground-breaking *Theorie der Juristischen Argumentation*,[6] perhaps the book which has been and keeps on being more influential in the flourishing of studies on legal argumentation and legal reasoning in the last two decades of the twentieth century.[7] Here discourse theory is applied to law and the constitutional state,[8] which leads to the characterisation of legal reasoning as a reason-giving practice which allows for the rational assessments of norms. In 1992 he published *Begriff und Geltung des Rechts*,[9] which has brought clarity in the

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muddled question of the relationship between law and morality, or more precisely, between moral, ethical, prudential and legal reasoning. Law is described as a system of legal norms that claims to be right or just. The correctness of legal norms is thus internally related to justice. Extremely unjust norms are not only dubiously legitimate in *normative terms*, but they are also *legally invalid*.[10] Between these two works, Alexy published *A Theory*, which, as will be considered in more detail in the remaining of this introduction, has been recognised as a major contribution to both structural and substantive theories on fundamental rights, and as a master general exposition of German constitutional law. Given the breadth and depth of his work, it is hard not to conclude that Alexy is one of the major modern legal philosophers, on a par with Hans Kelsen, H.L.A. Hart, Ota Weinberger, Ronald Dworkin, Neil MacCormick and Joseph Raz.

There are four main reasons why this volume focuses on *A Theory*. It seems to us that Alexy has managed to develop a structural and substantial general theory of fundamental rights, the applied relevance of which goes clearly beyond the interpretation of the fundamental rights provision of the 1949 German Constitution (as tested in the fourth part of the book). We are further convinced that the theory and application of fundamental rights is one of the key questions, if not *the key question*, in democratic, constitutional states.

First, *A Theory* is above all a sophisticated and exact structural theory of fundamental rights, which enhances analytical clarity in legal reasoning. Alexy's characterisation of the scope of rights and rights limits, his examination of the question of the inalienable core of fundamental rights, and his three-fold distinction between *rights to something, liberties and powers* are among the many analytical contributions of the book. All of them are closely related to the central insight of *A Theory*, namely, that fundamental rights are mainly and foremostly principles, not rules (the latter being characterised by not allowing exceptions to their application).[11] Principles are depicted as optimisation commands to be weighed and balanced according to the proportionality principle in a particular situation, and not as deontological levers. This is due to the fact that most reasoning on fundamental rights revolves around the solving of conflicts *between* norms that call for balancing and accommodation of different principles, and not the unconditional application of rules. In this regard, his reconstruction of the principle of proportionality has proved a lasting contribution to the literature, regarded as such even by Alexy's critics (the second section of the book is indeed representative of such criticisms).

Second, *A Theory* also contains elements of a *substantive theory* of fundamental rights. This is so on two different (but related) accounts.

On the one hand, analytical sophistication allows Alexy to draw conclusions which are relevant to a substantive theory of fundamental rights. To put

it differently, one could say that analytical clarity contributes to clear-minded substantive theory. Consider the following two examples:

- *A Theory* makes a clear distinction between fundamental rights positions and subjective fundamental rights. Although the *standard* fundamental rights position is a subjective right, fundamental rights comprise not only subjective individual positions, but also collective goods. This entails that a conflict between a subjective fundamental right (e.g., a civic right), and a public policy aimed at rendering effective some collective good (e.g., one closely attached to socio-economic rights, such as full employment) cannot be sorted out by the simple expedient of affirming that the *subjective fundamental right* should prevail. If the collective good also has a fundamental status, we are confronted with a fundamental rights conflict, which requires weighing and balancing the conflicting fundamental rights positions at stake. Thus, a proper dissection of fundamental rights norms shows that fundamental rights positions comprise not only subjective rights, but also collective goods. And further, if the collective good also has a fundamental status, we are confronted with a fundamental rights collision, which requires weighing and balancing the conflicting fundamental rights positions at stake. This helps us avoiding the *unexplicited* endorsement of a liberist or libertarian substantive conception of fundamental rights, which is a common connotation of fundamental rights (and one contested in the fourth section of the book by Mattias Kumm). This theoretical setup renders possible assessing the merits of fundamental rights in substantive terms, and not simply endorsing them on the basis of their plain appearance as fundamental human principles. Or, to say it with not so many words, a proper structural theory of fundamental rights helps us avoiding unintended or ill grounded substantive choices.
- It is usually claimed that it is pretty unproblematic to grant fundamental status and full justiciability to civic and political rights because they are defensive or negative rights, viz., because they only require the state to *refrain from doing something*, and thus can be judicially enforced without the judiciary exceeding its proper and legitimate role in a democratic legal order. On the contrary, the justiciability of socio-economic rights should be ruled out, given that they are protective or positive rights, entitling right-holders to *positive state action*. Judicial review based on socio-economic rights would come at the price of undermining the proper division of labour between legislature, executive and judiciary, as judges would be forced to *second-guess* what it would be appropriate that the legislature should do. However, Alexy's analytical dissection of fundamental rights shows that this argument is only half true. On the basis of a proper analysis of fundamental rights we can summarise that most fundamental rights,

including civic and political ones, are bundles of both *defensive* and *protective fundamental rights positions*. This implies that the justiciability argument should cut across a much less neat line than that pretending to separate civic and political from socio-economic rights.[12]

On the other hand, *A Theory* contains elements of a substantive theory of fundamental rights proper. This is not surprising, given that in his *Theory of Legal Argumentation*, Alexy had already formulated his *special case thesis* (*die Sonderfallthese*), according to which legal reasoning is a special case of general practical reasoning, viz., a variant of moral reasoning.[13] The special case thesis leads quite naturally to the characterisation of fundamental rights as carriers of the practical morality which underpins the legal system. This invites the exploration of the substantive content of fundamental rights, and more specifically, the principles of liberty, equality and solidarity underscoring the postwar *Rechtsstaat*. It is important to notice that Alexy considers *all three* principles, and not merely the former two. Indeed, chapter 9 of *A Theory* contains a case for the constitutional protection of *rights to entitlements in a narrow sense*, which are generally referred as *socio-economic* in the legal orders of *modern welfare states*.

Third, *A Theory* is not only of relevance for (what practioners might find) narrow theoretical reasons. The book is also one of the most authoritative general expositions of German fundamental rights law. Despite Alexy's modest claim to be writing a theory of fundamental rights of "the [German] Basic Law,"[14] that is, a theory circumscribed to German positive law, it seems to us that *A Theory* can and should be applied to other positive legal orders. In general terms, the book contains elements of a structural and a substantive theory of fundamental rights which should be helpful to practitioners and legal operators dealing with the basic legal structure of any modern society. More concretely, we would argue that German constitutional law has exerted a pervasive influence, directly and indirectly, over the constitutional law of many states, and very particularly, European ones. On the one hand, it may not be exaggerated to claim that German constitutional dogmatics has provided the constitutional grammar according to which many European constitutions have either been written, rewritten or interpreted. The German postwar tradition of constructing fundamental rights is indeed likely to leave its imprint even on the common law, once fundamental rights have been *brought home*, so to say, by the UK Human Rights Act 1998,[15] as Rivers highlights in his contribution to this volume. On the other hand, the constitutional law of the European Union is the result of a process of *progressive constitutional integration*, framed by the core constitutional principles common to the Member States of the Union.[16] One of the national constitutions which has exerted a decisive influence upon the common constitutional assets is, without doubts,

the German one. This was indeed recently proven again with the solemn proclamation of the Charter of Fundamental Rights of the European Union,[17] whose structure and content is heavily influenced by German fundamental law (from the opening and key role assigned to the right to dignity to the reinforced protection of the right to private property). Menéndez explores this question in chapter 8 by assessing the potential of Alexy's theory when it comes to fundamental rights reasoning in Europe. For these two sets of reasons, Alexy's theory is relevant to most, if not all, European legal orders. Europeanisation through integration into the European Union and through the discipline imposed by the European Convention of Human Rights had an impact upon national fundamental rights norms. Even if the concrete fundamental rights rules which result from the weighing and balancing of fundamental rights norms in specific cases are in some cases divergent, such differences are in most cases so that the solution affirmed in one legal system would have been a plausible alternative in any other legal order (and indeed it is not unconceivable that it may come to be *also the fundamental right rule* in the other legal orders).

Fourth, Alexy's theory constitutes a seminal contribution to the analysis of how legal reasoning on fundamental rights is intimately connected to the very foundations of democracy. On the one hand, democratic legitimacy presupposes the mutual acknowledgment of fundamental rights, a necessary but not sufficient condition for those subject to law also being capable of recognising themselves (at least, that they *could* recognise themselves) as its authors. They must be able to see themselves as rights-bearers as well as subjects – as the ones who give themselves the rights they are to live by, so to say. On the other hand, the subjection of *democratic law* to review on the basis of its compliance with fundamental rights raises complicated institutional questions, which cannot be reduced to technical constitutional engineering. Is fundamental rights proofing better left to public debate? Is it more appropriate to trust judges to review? Who are judges to quash democratically made law? Moreover, what is left of public autonomy, if law is interpreted as the mere concretisation of a thick and wide constitutional program? On the other hand, who are law-makers to disregard constitutionally enshrined fundamental rights? Alexy might be read as holding justice to be a more important value than democracy, which gives rise to problems that Eriksen addresses in chapter 4. Indeed, the centrality of fundamental rights reflects their condition as positive carriers of moral principles, which in their turn contribute to morality by undertaking many coordinative functions.[18] Law reduces transactions costs and information problems as it establishes what is the right thing to do in practical contexts. This explains both the centrality of fundamental rights in democratic debate, and the complexity of the

issues involved. But not all issues, we might be allow to add, are equally complex. Although many tend regularly to characterise fundamental rights as a luxury which can only be afforded by those who need them less, namely rich and democratic Western societies,[19] we are periodically confronted with dramatic facts which prove that the very survival of open democratic societies depends on taking fundamental rights seriously. Indeed, the conception of law which underpins a good deal of the law and practice in the so-called war on terror, not only in the United States, but also in Europe, is a dramatic reminder of the practical implications of going from the characterisation of law as a special case of practical reasoning[20] back to a thick ethical conception of law which renders possible its unilateral instrumentalisation by power. When we are confronted with arguments in favour of the juridification of torture,[21] the repudiation of international human rights law[22] and the constitutionalisation of full-range presidential power,[23] there are plenty of reasons why fundamental rights protection remains a burning issue. Indeed, it is sad that events since this volume was first conceived have dramatically revealed the utmost importance of *structural* and *substantial* conceptions of fundamental rights.

In editing this book, we have homogeneised the English translation of the core concepts of Alexy's constitutional theory, essentially following the standard set by Julian Rivers in the masterful English version of *A Theory*. Having said that, we have departed in two instances from Rivers' usage. All through the book, we have rendered "Grundrechte" as *fundamental rights*, not as *constitutional rights*. It seems to us that such a choice is mandated by the strong connotations which the term has in the post-war constitutional practice of continental nation-states. On different but related grounds, we have rendered "Optimierungsgebote" as *optimisation commands*, and not as *optimization requirements*. In both cases, we followed the standard translation approved by Alexy before 2002.

II. CONTENTS OF THE VOLUME

The *three-fold character* of *A Theory* – as structural, substantial and applied theory of fundamental rights – explains the wide breadth and scope of the contributions to this volume.

The *first section* situates and revisits *A Theory*. In the first chapter, *Alexy* revisits *A Theory* and further develops some of its leading themes. He expands on the relation between fundamental rights and human rights, and renders more precise his reply to Habermas' criticisms, more specifically, his well-known firewall and irrationality allegations. In addition, Alexy (1) elucidates the concept of fundamental rights, and distinguishes three different

conceptions of fundamental rights (formal, substantial and procedural); (2) differentiates eight potential foundations of fundamental rights: religious, intuitionist, consensual, socio-biological, instrumental, cultural, explicative and existential. The German legal philosopher further claims that a *deliberative-democratic conception* of fundamental rights domesticates the two latter justifications, as it is based on rendering explicit the pragmatic assumptions we make when we make assertions, and also on the characterisation of *assertion* as the most basic human experience; (3) shows that the *rationality* of balancing is a way of solving conflicts between principles; this is done by means of explicating the *rational insights* which underlies the *Law of Balancing* with the help of the *Weight Formula*.

The *second section* focuses on the structural elements of Alexy's theory of fundamental rights. *Eriksen* claims that Alexy's constitutional theory might be descriptively correct, but is *normatively unacceptable*. In democratic societies, legal procedures are to ensure legally correct and rationally acceptable decisions, that is, decisions that can be defended both in relation to legal statutes and in relation to public criticism. But can the legal system via the discretion of the judges itself really autonomously settle normative questions? The problem is whether the substantial factors are legitimate, and whether the judges' interpretations of the situations are correct. Alexy's conception of the legal discourse as a special variant of general practical reason blurs the distinction between legislation and application. There is a danger of assimilating law and morality and of overburdening the legal medium itself. Moral and legal questions point to different audiences, raise different validity claims and require different procedures for resolving conflicts. Further, by characterising *judicial application* as a combination of justification and application discourses, Alexy is bound to shift the authorship of legal norms from democratic legislatures to judges and courts. His theory leads to a relativistic conception of correctness, as at the end of the day what is correct is to be determined by the judges. The author, who shares Alexy's preference for deliberative democracy, favours a variant of *constitutional proceduralism* hinged on discursive proceduralism which sets the terms for a fair procedure of reason giving. This standard for correctness is imperfect but ensures that the substantial, "pre-political" principles – such as conceptions of justice – entrenched in modern constitutions as basic rights are subjected to discursive testing in a deliberative process. *Tuori* contrasts Alexy's and Dworkin's conception of legal principles. While both offer a rather similar characterisation of the distinction between rules and principles, Alexy fails to establish a further distinction between principles and policies. This is problematic as it implies downplaying the deontological character of principles (as also La Torre and Eriksen claim). This is so because his *analytical approach* to fundamental rights blinds Alexy to the central paradox of the

modern conception of fundamental rights as limits to state power *which are established by state* power and limits to law *that are legal in* themselves. This paradox cannot be tackled merely analytically, but requires deconstructing the very idea of modern law. Tuori proposes to distinguish between the surface level of law, the legal culture and the deep structure of law. Fundamental rights only act as *limits of state* power and of *positive law* if they are sufficiently sedimented in subsurface levels. *La Torre* puts forward nine challenges to Alexy's legal and constitutional theory. First, is not the *purely semantic conception of norm* put forward by Alexy incompatible with a *substantive* idea of a rule of recognition, and therefore, (and second), with the very idea of a legal system? Third, La Torre contends that a proper distinction between rules and principles will be precisely just the reverse of the one put forward by Alexy, because only then the *deontological character* of principles will be properly acknowledged. His fourth and fifth critique pertain to whether fundamental rights are to be considered as a matter of principle, given that this entails their characterisation as optimisation commands, and consequently, their "prescriptivisation." He further wonders whether Alexy's three-stage theory of rights really does do away the difference between interest or will-theories of rights (sixth); whether his rejection of a neat distinction between discourses of justification and application might not be descriptively accepted (seventh), but normatively unpalatable (echoing one of Eriksen's central criticisms), and whether the nature of law should not be immediately derived from the characterisation of legal discourses (eighth). La Torre dwells at some length with one of the recurrent themes of the book, namely, whether *the law of balancing* actually ensures the rationality of judicial decisions, or, whether it is just a mask which hides the *discretionality of judges. Bernal* offers a critical reconstruction of a key element of Alexy's constitutional theory, namely the principle of proportionality in a narrow sense, that is, the balancing between competing principles, in light the recent publications of Alexy. By means of a detailed analysis of the law of balancing, the weight formula, and the allocation of the burden of argumentation, Bernal shows the transformation of Alexy's understanding of the *law of balancing* and of the *burden of argumentation* in the *Postscript* to the English translation of *A Theory*. He claims that the weight formula contributes to the clarification of the structure of argumentation, even if it cannot point to the one right answer in each and every case. If only because there are several steps at which *discretion* is bound to creep in, such as the assessment of the abstract weight of the competing principles, or the empirical facts which determine the graduation of the competing principles.

The *third section* is devoted to a structural component of Alexy's theory with manifold substantial implications, namely, his theory of the horizontal effect of fundamental rights, that is, the binding effect of rights in relationships

among individuals. *Kumm* rehearses a critical confrontation between Alexy's fundamental rights theory and Carl Schmitt's characterisation of constitutional states as total states. Kumm starts by challenging the widely expanded characterisation of subjective fundamental rights as claims *exclusively* against public authorities, as shields against public action, but not against private action. He builds upon Alexy's structural theory of fundamental rights, and more precisely, upon the proportionality principle as a frame for legal argumentation, to claim that the *radiating force* of fundamental rights entails the constitutionalisation of all legal norms, including private law norms. And that, consequently, *fundamental rights* do have horizontal effects. Indeed, Kumm affirms that, substantially speaking, the consequences of affirming that fundamental rights have direct *or* merely indirect horizontal effect are not many. To accept one or the other conception has merely an impact upon the way in which constitutional legal reasoning is structured. He finds that Schmitt's characterisation rightly points to the need of transcending the formalistic differentiation between public and private law, quite clearly anchored in a liberal, but not necessarily democratic, political conception. But still, Schmitt's terminology obscures the real implications of the constitutionalisation of law and the affirmation of judicial review on constitutional grounds. Constitutionalised legal orders are, at the end of the day, *complete legal orders*, where the characterisation of legal reasoning as a special case of general practical reasoning reveals a commitment to political justice.

The *fourth section* explores the extent to which Alexy's theory of fundamental rights can be fruitfully applied to constitutional orders other than the German one. *Rivers* aims at a double target; first, testing whether the first 2 years of case law on the UK Human Rights Act 1998 can be reconstructed *rationally*, and if so, whether they tally with Alexy's theory; second, assessing whether Alexy's fundamental rights theory is as *structural* as the German philosopher claims it to be; by means of applying the theory to the British fundamental rights practice, Rivers is able to detect the hidden *institutional assumptions* implicit in many elements of Alexy's fundamental rights theory. The formal recognition of fundamental rights plays a central role in any theory of fundamental rights. While the Human Rights Act 1998 does not introduce a catalogue of fundamental rights proper, but the obligation to interpret British law *in line with (some of) the rights acknowledged in the European Convention of Human Rights*, British courts have derived fundamental rights from the Act in a similar way as the German, Italian or Spanish constitutional courts derive fundamental rights norms from their national constitutional provisions. Similar points are raised on what concerns the horizontal effect of fundamental rights and on the relationship between legislature and courts under the principle of proportionality, and more specifically, the second law

of balancing as defined in the *Postscript* to the English translation. Rivers notices that Alexy's assignment to Courts of the critical decision whether to review or not the knowledge basis on which administrative or state action is based, actually presupposes that the only alternative deciding body is a majoritarian legislature and that the rights at stake are typical individual rights against state action. But both presuppositions might not fit the facts of the case. *Menéndez* aims at testing the extent to which Alexy's theory can bring clarity to fundamental rights reasoning in the European Union. First, it is very helpful in understanding the validity basis of European constitutional law. While the validity of fundamental rights norms in national constitutions tends to be *positive*, that is, based on their enactment by the *pouvoir constituent*, this is not exactly the case in Union law. Fundamental rights norms stem from the constitutional traditions common to the Member States (and as such they have a positive basis); but what is common is something to be determined through a critical comparative approach. On such a basis, the validity basis of fundamental rights norms in Union law is better approached from the standpoint of a theory such as Alexy's. Thus, it is not only the case that the interpretation of fundamental rights norms in Union law renders explicit the connection between law and general practical reasoning, but the very individuation of the fundamental rights norms in the Union points to the *practical reconstruction* of the constitutional traditions of the Member States, and thus, to a connection to *general practical reasoning*. Second, it is claimed that Alexy's distinction between fundamental rights and ordinary rights, and between individual subjective rights and collective goods establish the right angle from which to systematise the fundamental rights provisions of the Charter of Fundamental Rights of the European Union. Third, it also provides an adequate theoretical perspective from which to analyse and adjudicate conflicts between the basic economic freedoms enshrined in the founding Treaties of the Union and the fundamental rights consolidated into the Charter of Fundamental Rights. Fourth, and rather paradoxically, it reveals the *egalitarian potential* of the case law of the Court on the principle of non-discrimination on grounds of nationality.

The *fifth section* holds the bibliography of Robert Alexy.

NOTES

[1] *A Theory of Constitutional Rights*, Oxford: Oxford University Press, 2002 (hereafter, TCR).

[2] Critical understood in a rather Kantian sense, as reason-giving examination, and thus eluding both scepticism and dogmatism.

[3] Cf. in general Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law, New Approaches to Legal Positivism*, Dordrecht: Kluwer, 1997.

[4] Cf. the path-breaking contribution of Jerzy Wróblewski in this book series, *The Judicial Application of Law*, Dordrecht: Kluwer, 1992.

[5] On critical legal studies and law and economics, see Owen Fiss, "The Death of Law," 72 (1986) *Cornell Law Review*, pp. 1–16. On originalism, Cf. Dennis J. Goldford, *The American Constitution and the Debate on Originalism*, Cambridge: Cambridge University Press, 2005.

[6] *A Theory of Legal Argumentation*, Oxford: Oxford University Press, 1989.

[7] Cf. Massimo La Torre, "Theories of Legal Argumentation and Concepts of Law. An Approximation," 15 (2002) *Ratio Juris*, pp. 377–402.

[8] Alexy and Habermas have mutually influenced each other. *A Theory of Legal Argumentation* draws on Habermas' "Wahrheitstheorien," while *Between Facts and Norms* was in a way heavily influenced by Alexy's theory. This is allowed by Habermas himself in "Reply to symposium participants," 17 (1996b) *Cardozo Law Review,* pp. 1477–1557, at p. 1529. Quite obviously, differences remain, very especially on judicial application of law, where Habermas sides with Klaus Günther's appropriateness thesis for application discourses (as distinct from discourses of justification). Cf. *The sense of appropriateness: application discourses in morality and law*, Albany: State University of New York Press, 1993.

[9] *The Argument from Injustice. A reply to legal positivism*, Oxford: Oxford University Press, 2002b.

[10] This is influenced by the famous Radbruch's formula saying that the legal character of a norm is forfeited when the injustice reaches "intolerable degree."

[11] Alexy claims that a structural theory of fundamental rights must be ecumenical on the question of whether fundamental rights should be depicted as principles and principles only, or whether some fundamental rights positions are properly characterised as rules. He also seems to claim that a substantial theory of fundamental rights would settle the issue normatively. Thus, one could find very good reasons why some fundamental rights positions should be characterised as rules, and thus, weighing and balancing should not apply to them *qua rules*. This could be the case of the prohibition of the death penalty, or the prohibition of torture, part of the *complete fundamental rights to life and dignity*.

[12] This argument is similar to the central thesis of Stephen Holmes and Cass Sunstein, *The Cost of Rights. Why Liberty depends on taxes*, New York: Norton, 1999.

[13] See *Theory of Legal Argumentation,* pp. 211–220 and "The Special Case Thesis," 12 (1999b) *Ratio Juris*, pp. 374–384 and "Law and Correctness," in Michael Freeman (ed.), *Legal Theory at the End of the Millennium*, Oxford: Oxford University Press, 1998a, pp. 205–222.

[14] TCR, pp. 5 and 30.

[15] The official text of the Act is available at http://www.hmso.gov.uk/acts/acts1998/19980042.htm. Among the many monographs and articles, see Connor Gearty, *Principles of Human Rights Adjudication*, Oxford: Oxford University Press, 2003. Although Gearty uses a terminology quite apart from Alexy's, one is tempted to conclude that there are many commonalities in the attempt to distil the main *principles* underlying the Act, and in considering how they provide an interpretative key to leading cases. See also the "canonical" exposition of David Feldamn, *Civil Liberties and Human Rights in England and Wales,* Oxford: Oxford University Press, 2002. For critical approaches, see Noel Whitty, Thérèse Murphy, and Stephen Livingstone, *Civil Liberties Law: The Human Rights Act Era*, Oxford: Oxford University Press, 2001; and Jeffrey Jowell and Jonathan Cooper, *Delivering Rights: How the Human Rights Act is Working and for Whom*, Oxford: Hart Publishers, 2003.

[16] Case 29/69, *Stauder* [1969] ECR 419, paragraph 7: "Interpreted in this way, the provision at issue contains nothing capable of prejudicing the fundamental rights enshrined in the general principles of Community law protected by the Court;" Case 11/70, *Internationale*,

[1970] ECR 1125. The reasoning of the Court may have been influenced by one of his (then) judges. See Pierre Pescatore, "Les droits de l'homme et l'intégration européenne," 4 (1968) *Cahiers du Droit Européen*, pp. 629–670. A shorter English version, which already refers to Stauder, can be found in "Fundamental Rights and Freedoms in the System of the European Communities," 18 (1970) *American Journal of Comparative Law*, pp. 343–351. A classical account of the jurisprudence of the European Court of Justice can be found in Joseph Weiler, "Eurocracy and Distrust: some questions concerning the role of the European Court of Justice in the protection of fundamental human rights within the legal order of the European Communities," 61 (1986) *Washington Law Review*, pp. 1103–1142.

[17] On the Charter, see among others, Erik Oddvar Eriksen, John Erik Fossum and Agustín José Menéndez (eds.), *The Chartering of Europe*, Baden-Baden: Nomos, 2003; Steve Peers and Angela Ward (eds.), *The EU Charter of Fundamental Rights*, Oxford: Hart Publishers, 2004; Tamara Hervey and Jeff Kenner (eds.), *Economic and Social Rights under the EU Charter*, Oxford: Hart Publishers, 2003.

[18] On this, see the key contributions of Tony Honoré, "The Dependence of Morality on Law", 13 (1993) *Oxford Journal of Legal Studies*, pp. 1–17 and "The Necessary Connection between law and morality", 22 (2002) *Oxford Journal of Legal Studies*, pp. 489–495.

[19] Cf. for example, Robert Barro, *Determinants of Economic Growth*, Cambridge: The MIT Press, 1997.

[20] At least if the practical reasoning is understood in a Kantian sense, as the gatekeeper and not the maiden of thick ethical conceptions.

[21] On the academic front, the pioneer is Alan Dershowitz, see his *Why Terrorism Works*, New Haven: Yale University Press, 2002, pp. 131–164, and "The Torture Warrant: A rejoinder to professor Strauss", 48 (2004) *New York School Law Review*, pp. 275–294. His argument is essentially a consequentialist one, but he oscillates between melioristic defense and plain endorsement. Indeed, his case for judicially reviewed torture is not new. Cf. his "Is it necessary to apply physical pressure to terrorists – and to lie about it," 23 (1989) *Israel Law Review*, pp. 192–200. Dershowitz's argument is xeroxed by other authors, such as Andrew Moher, "The Lesser of Two evils. An argument for judicially sanctioned torture in a post-9/11 world," 26 (2004) *Thomas Jefferson Law Review*, pp. 469–489. It is interesting to notice that the latter explicitly resorts to the weighing and balancing language at pp. 485ff. On the official front, see John Yoo, "Letter regarding the 'views of our Office concerning the legality under international law of interrogation methods to be used on captured al Qaeda operatives'," in Karen J. Greenberg and Joshua L. Dratel (eds.), *The Torture Papers*, New York: Cambridge University Press, 2005a, pp. 218–222. Three major (critical) anthologies on the issue are Sanford Levison (ed.), *Torture: A Collection*, Oxford: Oxford University Press, 2004; Karen J. Greenberg (ed.), *The Torture Debate in America*, Cambridge: Cambridge University Press, 2005 and Kenneth Roth. Minky Worden and Amy D. Bernstein (eds.), *Torture. Does it make us safer? Is it ever OK? A Human Rights Perspective*, New York: New Press, 2005.

[22] Cf. John Yoo, "The Status of Soldiers and Terrorists under the Geneva Convention," 3 (2004a) *Chinese Journal of International Law*, pp. 135–150; "Transferring Terrorists," 79 (2004b) *Notre Dame Law Review*, pp. 1183–1236.

[23] Cf. John Yoo, *The Powers of War and Peace*, Chicago: Chicago University Press, 2005b.

PART I

A THEORY OF CONSTITUTIONAL RIGHTS REVISITED

ROBERT ALEXY

1. DISCOURSE THEORY AND FUNDAMENTAL RIGHTS

The relation between discourse theory and fundamental rights is close, deep, and complex. It comprises three dimensions, which are intrinsically connected.

I. THREE DIMENSIONS

The first dimension concerns the foundation or substantiation of fundamental rights. One might call this the "*philosophical"* dimension of fundamental rights. The second concerns the institutionalization of fundamental rights. In order to distinguish this problem from the first, one might call it "*political*." The third dimension concerns the interpretation of fundamental rights. This problem might be classified as "*juridical*." I will concentrate on the philosophical and juridical problems.

II. THREE CONCEPTS OF FUNDAMENTAL RIGHTS: FORMAL, SUBSTANTIAL AND PROCEDURAL

It is difficult to say how something can be substantiated, institutionalized, and interpreted without having an idea about what it is that is to be buttressed by reasons, transformed into reality, and made vivid by way of an interpretive practice. The question of what fundamental rights are is the question of the concept of fundamental rights. Where fundamental rights are concerned, there are three kinds of concept: formal, substantial, and procedural.

A *formal concept* is employed if fundamental rights are defined as rights contained in a constitution or in a certain part of it, or if the rights in question are classified by a constitution as fundamental rights, or if they are endowed by the constitution with special protection, for example, a constitutional complaint brought before a Constitutional Court. Without any doubt, formal concepts are useful, but they are not enough if one wants to understand the nature of fundamental rights. Such an understanding is necessary not only for reasons theoretical in nature, but also for reasons that concern the practice of applying the law. An example that illustrates this is Article 93(1) (no. 4*a*), Basic Law of the Federal Republic of Germany, which provides that a constitutional

A. J. Menéndez and E. O. Eriksen (eds.), Arguing Fundamental Rights, 15–30.

complaint can be raised by anyone on the ground that his or her fundamental rights *qua* rights, listed in the first part of the Basic Law under the heading "Grundrechte," or rights contained in Articles 20(4), 33, 38, 101, 103, and 104, have been infringed by a public authority. The second group contains, *inter alia*, the classical *habeas corpus* rights. It seems, on the face of it, to be quite natural to conceive of all rights named in Article 93(1) (no. 4*a*) of the Basic Law as fundamental rights. On closer inspection, however, this first impression proves to be mistaken. This decidedly literal reading of Article 93(1) (no. 4*a*) would include too much. One item in the list is Article 38, Basic Law. Article 38 not only grants – in the first sentence of its first paragraph – the right of the citizen to vote, which can without difficulty be conceived of as a fundamental right, but – in the second sentence of its first paragraph – also grants rights that define the basic position of a representative, that is, a member of the *Bundestag*. These rights, however, are fundamentally different from the rights of the citizen against the state. They are rights that determine the status of the representative not *qua* private person but as an element of the organization of public power. The Federal Constitutional Court has therefore decided that these rights cannot be defended by means of a constitutional complaint, but only by an action between state organs, which is regulated in Article 93(1) (no. 1).[1] The reason for this decision, which is a decision against the wording of the constitution, is that the rights of representatives – notwithstanding the fact that they are rights granted by the constitution – are not fundamental rights in the proper sense of the word.

Such a claim, however, is only possible if there also exists a *substantial concept* of a fundamental right, one that serves to revise results stemming from the application of the formal concept. Thus understood, a substantial concept of a fundamental right must include criteria that go above and beyond the fact that a right is mentioned, listed, or guaranteed in a constitution. A classical example of such a substantial concept has been presented by Carl Schmitt and Ernst Forsthoff.[2] They claim that the only genuine fundamental rights are defensive rights of the citizen against the state. To follow Schmitt and Forsthoff here would be to accept an exclusively libertarian understanding of fundamental rights. To be sure, there are good reasons to include libertarian rights in a substantial concept of fundamental rights. There are, however, also good reasons not to restrict this concept to these rights. Protective rights, rights to organization and procedure, and social rights ought not to be excluded from the club of genuine fundamental rights merely because a concept follows the tradition. If one then decides to expand the concept of a fundamental right, only one criterion seems to be adequate to define a substantial concept of fundamental rights. It is the concept of human rights. Again, there is a difference between the initial impression and what