

Constitutionalism and transcendental arguments

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Abstract

In his A Theory of Legal Argumentation, Robert Alexy lists four modes of justification for his rules of practical discourse. Of these, the only one that to him seems to have a true foundationalist capability is Apel's transcendental-pragmatic mode of justification. But there is another strategy, which Alexy calls "definitional", based on the concept of language game, that seems to have been employed by Ronald Dworkin, in his "Objectivity and truth. You'd better believe it", in order to reject moral scepticism. In this paper I will argue that these two modes of justification can be traced back, from a logical and genealogical perspective, to one form of argument, the transcendental argument. But I will also argue that there is a peculiar circularity in the way this kind of argument develops, a circularity possibly ascribable to certain idealising presuppositions.

1 Why moral foundationalism is essential for constitutionalist approaches

As is well-known, in his *Begriff und Geltung des Rechts*, Robert Alexy argues for a necessary connection between law and morality. In a nutshell, his argument is as follows: the very act of enacting a norm, and pronouncing a judicial adjudication, conceived as speech acts, raises a claim to correctness, which can be formulated as a claim to justice. If it were not, it would contradict its pragmatic presuppositions and turn out to be self-defeating.¹

This thesis alone cannot be the grounds for a necessary connection between law and morality: a legal norm which does not claim to be just would perhaps be a flawed one, but not necessarily a norm which for this very reason has lost its juridical status. In order to argue for a necessary connection between law and morality, it is necessary to show that a norm which contradicts some fundamental moral principle would not be a legal norm at all. This is why Alexy builds his "argument from injustice" (*das Unrechtsargument*), which is divided into eight sub-arguments.² Some of these – particularly the argument from legal certainty (*das Rechtssicherheitsargument*) and the argument from relativism (*das Relativismusargument*) – are grounded upon a "strong" conception of morality: a conception by which moral judgments can be shown to be, in a sense, objective and non-relative.³ Further, according to Alexy's argument from principles (*das Prinzipienargument*), the claim to

1 R Alexy, *The Argument from Injustice: A reply to legal positivism* (Oxford: Clarendon, 2002), pp. 35–40.

2 Alexy, *The Argument*, pp. 40ff.

3 Alexy, *The Argument*, pp. 68ff.

correctness is essentially connected with a claim for moral foundation.⁴ Thus, it seems that, from Alexy's point of view, the very possibility of a necessary connection between law and morality rests upon the possibility of some kind of moral foundationalism.

This seems to be the case for Ronald Dworkin, too. In his famous "Constitutionalism and democracy" (of 1995), Dworkin addresses the question of moral foundationalism as a necessary precondition for his conception of a "moral reading" of the American Constitution.⁵ In particular, moral foundationalism proves to be necessary in order to spell out the objection of political inequality: according to this objection, if a moral reading of the constitution were applied, this would mean a great transfer of power to a minority of non-elected (non-representative) technicians, the judges. The objection, Dworkin says, hits the target only if moral foundationalism turns out to be false: in fact, only in this case could the thesis of a moral reading of the constitution be translated as an opportunity for judges to apply the result of their moral arbitrariness.

Thus, moral foundationalism seems to be essential for the constitutionalist approaches of both Dworkin and Alexy: hence, the question is how they intend this foundationalist strategy to be. In his *A Theory of Legal Argumentation* (of 1978), Alexy distinguishes four modes of justification for his rules of practical discourse: technical, empirical, definitional and universal-pragmatic (or transcendental-pragmatic). As empirical justification cannot be of any use for normative arguments, and as technical justification for the means implies an independent moral justification for the ends, the only two genuine ways to moral foundationalism seem to him to be the latter two.⁶ And I think that, even if Alexy is not always coherent and Dworkin not at all explicit, we can attribute the transcendental-pragmatic mode of justification to Alexy and the definitional mode of justification to Dworkin.

In what follows, we will examine these two modes of justification as specific fruits of development from one type of argument, transcendental argument. We will try to show how both modes of justification are variants of this argument and how they are interconnected.

First, we will briefly discuss the development of transcendental arguments from Kant's *Critique of Pure Reason* to Apel's transcendental-pragmatic approach, through Wittgenstein's transformation of the original "theoretical" approach into a "pragmatic" one, and we will show how this discussion is relevant for the kind of moral foundationalism adopted by Ronald Dworkin and Robert Alexy, respectively. Then we will draw our conclusions about this line of development, and, finally, the question will be addressed as to whether the present discussion can make some further contributions to the debate on transcendental arguments.

2 Two classic transcendental arguments

We can start by looking at two examples of the "classic" transcendental argument, one of them quite well known, and the other not often recognised as such.⁷

4 Alexy, *The Argument*, pp. 68ff.

5 R Dworkin, "Constitutionalism and democracy" (1995) 1 *European Journal of Philosophy*, pp. 5–6. See also R Dworkin, *Freedom's Law: The moral reading of the American Constitution* (Cambridge, Mass: Harvard UP, 1996).

6 R Alexy, *A Theory of Legal Argumentation* (Oxford: Clarendon, 1989), pp. 180ff.

7 On transcendental arguments, see, among many others: B Stroud, "Transcendental arguments", (1968) 65 *Journal of Philosophy* 241–56; B Stroud, "The goal of transcendental arguments", in R Stern (ed.), *Transcendental Arguments: Problems and prospects* (Oxford: Clarendon Press, 1999), pp. 155–172; S Paulson, "On the puzzle surrounding Hans Kelsen's basic norm" (2000a) 13 *Ratio Juris* 279–93; S Paulson, "On transcendental arguments, their recasting in terms of belief, and the ensuing transformation of Kelsen's pure theory of law" (2000b) 5 *Notre Dame Law Review* 1775–95; R Stern, *Transcendental Arguments and Skepticism* (Oxford: Clarendon, 2000).

The first example is the “transcendental deduction of pure concepts of understanding” which Kant presents in *Critique of Pure Reason* (§§ 16–20). In this deduction Kant wants to show that any representation of the senses must necessarily be made through certain basic formal concepts called “categories”. He shows that the very possibility of our having a representation comes by way of the synthesis made by apperception on the basis of the categories of understanding.⁸ But, according to Kant, this possibility (of our having a representation) is the same as the possibility of our conceiving of objects, since nothing can be known if not as an object of representation, and any object so conceived must consequently come under the rules of categorial synthesis.⁹ Thus, with this theory of a necessary epistemic medium, a medium without which we can have no knowledge of the world and of reality, Kant can conclude that objects cannot but come under the rules of categorial synthesis.

This argument has two fundamental features. First, we start from a particular conception of representations as self-evident and show that something is true of such representations because, if it were false, this conception, too, would be false. This is a case of inference by *modus ponens* with its second premise set in contrapositive form: A; if it were that not B, then A would be impossible ($\neg B \rightarrow \neg \Diamond A$); therefore B.¹⁰ This particular use of a *modus ponens* inference recalls a theory of *implicit presuppositions*: if we say that the unification under an apperception is necessary because, if there were no unification, we could not even speak of “my representations”, then we also say that the concept of representation necessarily presupposes the unification under an apperception; but the informative character of this argument can be assured only if the presupposition which it shows was implicit.¹¹ Further, in order to draw conclusions about reality and objects from the conditions of our knowledge, we must presuppose a theory of an epistemic medium, a medium which is considered necessary in order to have knowledge of the world and of reality.

The second example of transcendental argument is the deduction of the simplicity of objects in Wittgenstein’s *Tractatus Logico-Philosophicus*.¹² Just as with Kant we can infer some truths about objects from the condition of possibility of sensibility (where sensibility is conceived as an epistemic medium), with Wittgenstein we can make this inference by reasoning from the features of *language* conceived as an epistemic medium. In brief, this is Wittgenstein’s transcendental argument for the simplicity of objects:

- 1 Any sentence has a definite meaning. Any sentence can be analysed in terms of more elemental sentences.
- 2 If, in this analysis, it were not possible to arrive at some elementary sentences, no sentence could have a definite meaning.

8 I Kant, *Critique of Pure Reason* (Cambridge: CUP, 1998), B 131–32, B 143.

9 Kant, *Critique*, B 137.

10 I am thankful to Carsten Heidemann for having suggested this reconstruction to me.

11 In Kant, this theory of implicit presuppositions is developed along the lines of an entire theory of constitutiveness of the categories. The question of the relation between transcendental arguments and constitutiveness is deep and complex and cannot be addressed here.

12 For an overall Kantian perspective on Wittgenstein’s philosophy, see J Hintikka and M B Hintikka, *Investigating Wittgenstein* (Oxford: Blackwell, 1986) e.g. pp. 4, 7, 16–17. On Wittgenstein’s conception of logic as transcendental in the *Tractatus*, see J Proust, “Formal logic as transcendental in Wittgenstein and Carnap” (1987) 21 *Noûs*, pp. 501–20.

- 3 But the very possibility of there being meaningful elementary sentences is the possibility of simple names designating simple objects.
- 4 Thus, “objects are simple”.¹³

The main features of Kant’s transcendental deduction appear again in this argument: the first is the *modus ponens* inference with its second premise set in contrapositive form. The inference here consists in taking the postulate by which any sentence has a definite meaning (A), and from it inferring that something must be true of objects because, if it were false, the postulate would be false, too ($\neg B \rightarrow \neg \Diamond A$; therefore B): and this means that simple objects are implicitly *presupposed* by meaningful discourse. The second feature is the theory of language conceived as an epistemic medium: according to this theory, we can infer something about objects from the means by which we talk of objects meaningfully – something about the world from the conditions of knowability of the world.

It should be sufficiently clear that, in the final analysis, the foundationalist capacity of a transcendental argument depends on the truth from which it starts: in the case of Kant, the unity of the manifold under the apperception, or *I think*; in the case of Wittgenstein, the determinacy of meaning of any sentence as the result of a perfectly developed analysis. As we have seen, both of these starting points are conceived as necessary, that is, true in any possible world. Furthermore, both arguments proceed to analyse the *implicit* presuppositions of the starting points conceptually considered. This is why we will call transcendental arguments of this kind “*global transcendental-theoretic* arguments”.

It should also be clear that, as we have just seen, the overall structure of these arguments cannot be accepted by anyone who rejects any theory of an epistemic medium, that is, by anyone who thinks that no truth about the world can ever be deduced from the preconditions of our knowledge of the world itself: indeed, one of their distinguishing features is that of deducing a *metaphysical* truth from some necessary *epistemological* presuppositions.

In the following section I will try to show that what Alexy calls “definitional mode of justification” is the result of Wittgenstein’s transformation of this original global transcendental-theoretic argument in terms of a weaker pragmatic perspective, developed in his *Philosophical Investigations* and *On Certainty*, and based on the concept of a language game. This will permit us to show that Dworkin’s foundationalist strategy is of this weak transcendental kind, and possibly to point out what the flaws of this approach are.

3 Wittgenstein’s language game argument

In his *Philosophical Investigations*, Wittgenstein rejects the postulate of the determinacy of meaning of any sentence.¹⁴ The main problem with this postulate is that (a) it was the result of a somewhat idealised conception of language and (b) it was being used as the starting point of a transcendental deduction. This second problem is particularly important: if the starting point of a transcendental deduction can be shown to have a somewhat idealised nature, the overall structure of the argument will simply transfer this idealised nature to the conclusions drawn from it.

We want to say that there can’t be any vagueness in logic. The idea now absorbs us, that the ideal “*must*” be found in reality . . . We have got on to slippery ice where there is no friction and so in a certain sense the conditions are ideal, but

13 See L. Wittgenstein, *Tractatus Logico-Philosophicus* (London: Routledge & Kegan Paul, 1974), §§ 2.0211, 2.0212; see also §§ 2.01, 2.02, 2.0201, 2.15, 3.22, 3.23.

14 L. Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1988), §§ 98, 99.

also, just because of that, we are unable to walk. We want to walk: so we need *friction*. Back to the rough ground!¹⁵

According to Wittgenstein's new conception in the *Philosophical Investigations*, no metaphysical truth can be drawn from language, because language is only the means by which we talk about things, and bears no connection at all to things in themselves. Consequently, the only truths that can be drawn from language are truths about language.¹⁶ Note, however, that, according to Wittgenstein, these truths about language should not be taken to be truisms: As he observes in *On Certainty*, many things can be deduced from the fact that we are playing a language game; and this kind of deduction is, again, transcendental, though extensively modified.

The main feature of the argument against philosophical scepticism in *On Certainty* is the recognition of the pragmatic nature of sceptical doubts. In fact, Wittgenstein notes, sceptical doubts are uttered in the context of a language game, as any other sentence would be. But the meaning of a sentence in a language game cannot be separated from the means by which we arrive at this meaning in our learning process, and these means include the truth of certain particularly evident sentences. Recognising the truth of the sentence "this is my hand", when looking at my hand, is one of the means by which, according to Wittgenstein, I learnt the meaning of the word "hand", and is therefore, in a sense, *constitutive* of the language games we can play with this word.¹⁷ Accordingly, the very meaning of some words in a language game is inherently intertwined with the truth of some basic sentences in which that word occurs.¹⁸

This has consequences for the possibility of expressing doubts within a language game, because, if the sceptic raises a doubt, the sceptic is presumed to use words meaningfully; but if the sceptic casts doubt on those basic truths failing which such meaningfulness would be impossible, the meaning of the sceptic's doubt will be disputable, and, consequently, the sceptic's assertion of doubt will be self-defeating.¹⁹ We can see two similarities between this argument and the earlier examples of transcendental argument. First, we have, here too, a kind of *modus ponens* inference with its second premise set in contrapositive form: the sceptic's doubt on some basic truths must be meaningful (A), but, if we supposed that those truths were in reality false, we would not be able to ensure that the sceptic's doubt be meaningful ($\neg B \rightarrow \neg \Diamond A$; therefore B); hence, the sceptic's doubt is self-defeating because those truths are implicitly presupposed by the language game the sceptic himself is playing. The second similarity is that we again have a theory framing an epistemic medium, though considerably weakened and modified into a theory stating what the conditions of meaningfulness of a concrete utterance are.

There is room for much more discussion on this point, but I will limit myself to some remarks. In the final analysis, Wittgenstein's language game argument consists in showing the sceptic that the sceptic him or herself is actually breaking the rules of the language game the sceptic is playing. In the exposition of the above argument, I used the term "true" to qualify the conclusion, but it is necessary to ask whether, in Wittgenstein's view, we can actually derive truths in the world from the rules of the language game we play: and the answer is no. According to the later Wittgenstein (and in this sense his approach is very different from Kant's), it is a specific instance of philosophical fallacy to hide the

15 Wittgenstein, *Philosophical Investigations*, §§ 101, 107.

16 Wittgenstein, *Philosophical Investigations*, §§ 50, 104.

17 L Wittgenstein, *On Certainty* (Oxford: Blackwell, 2004), § 32.

18 Wittgenstein, *On Certainty*, §§ 126, 401.

19 Wittgenstein, *On Certainty*, §§ 456, 519.

grammatical nature of metaphysical sentences behind a substantive, empirical appearance.²⁰ No truth can be derived from grammatical rules; grammar is neither true or false, because “true” and “false” are predicates for speaking of correspondence of propositions to reality, and grammar is a precondition for the use of these predicates: “Grammar is not accountable to any reality.”²¹ Therefore, Wittgenstein’s language game argument is very different from classic transcendental arguments in this respect: it does not try to derive substantive *truths* about the world from the pre-conditions of our knowledge; rather, it explains the implications of the language game, it shows grammatical rules. But then, what is the status of these grammatical explanations? Roughly speaking, according to Wittgenstein, grammar has at least three fundamental features. First, as we have seen, it is neither true nor false. Second, it is *arbitrary* in two different senses: on the one hand, many different grammars are conceivable and possible, meaning that there is not a *specific* grammar which is necessary; on the other hand, grammar is arbitrary because no reason can be given to justify it, since it is the very pre-condition of any justification.²² But third, grammar is unavoidable, it is constitutive of our form of life (that is, of the way we act when we use language) and in this sense it is *necessary*. The arbitrary character of grammar, in Wittgenstein, is intertwined with its being necessary: “The only correlate in language to an intrinsic necessity is an arbitrary rule.”²³ Grammar is arbitrary because it cannot be justified, and cannot be justified because it is necessarily presupposed by our use of language, and so even in the process through which we justify; grammar is therefore, properly speaking, the place where any justification ends.

In this sense, Wittgenstein’s grammar is an epistemic medium: it is a precondition of our speaking about the world, and a condition of possibility of truth and falsity. As such, grammar is a necessary condition of knowability.²⁴ Accordingly, language games are particular and contingent mediums, each stating its own conditions for verifying and falsifying propositions, and thus stating the means by which we “appeal” to reality. Hence, the later Wittgenstein’s language game argument can indeed be conceived as a form of transcendental argument, in that it shows some necessary implicit presuppositions of an epistemic medium.

But two features of this argument are new, and they profoundly modify its overall structure. First, for this argument to succeed, the sceptic must express a doubt concretely – in a pragmatic context, within a specific language game – and the truths on which doubt is cast must be among those in the bottom, or fundamental, layer of the language game, that is, they must be an essential part of the process through which the game is learned. Second, this argument effects a kind of *reductio ad absurdum*: it draws a conclusion from a

20 L Wittgenstein, *Preliminary Studies for the “Philosophical Investigations” Generally Known as the Blue and Brown Books* (Oxford: Blackwell, 1958), p. 55.

21 L Wittgenstein, *Philosophical Grammar* (Oxford: Blackwell, 2004), § 133.

22 Wittgenstein, *Philosophical Grammar*, §§ 133, 134. See also M N Forster, *Wittgenstein on the Arbitrariness of Grammar* (Princeton: Princeton UP, 2004), pp. 21ff.

23 Wittgenstein, *Philosophical Grammar*, § 133.

24 The twofold character of Wittgenstein’s grammar has recently been discussed by Forster, where can also be found some important insights into the intimate relationship between Wittgenstein’s and Kant’s philosophies. According to Forster, Kant’s concept of “synthetic a priori” propositions can fruitfully be related to Wittgenstein’s grammatical rules (see Forster, *Wittgenstein*, p. 13). For another assessment of the relations between Kant and the later Wittgenstein’s conception of “grammar”, see also P M S Hacker, *Insight and Illusion: Themes in the philosophy of Wittgenstein* (Oxford: Clarendon, 1986), pp. 206ff.

contradiction, a particular kind of pragmatic contradiction brought about by doubting something that is senseless to doubt.²⁵

Thus, Wittgenstein's language game argument is a modified transcendental argument.²⁶ But it is a weak one, because it concludes something only with reference to a specific language game (conceived as a "contingent" epistemic medium). The only thing this argument shows is that you cannot cast doubt on everything within a language game: there are some truths that are preconditions for the very assertion of doubt in that language game. This is not in itself a foundation: it is simply a clarification of the means of our representation and speaking, that is, the language game we play; but, again, this clarification is made through an analysis of the implicit presuppositions of an epistemic medium. This is why we will call transcendental arguments of this kind *local transcendental-pragmatic* arguments. The weak character of Wittgenstein's language game argument is well represented by Alexy's presentation of the definitional mode of justification:

Another path which often cuts across other modes of justification is taken by those who analyse the system of rules defining a language game and propose the adoption of the system of rules worked out in this way . . . The definitional mode of justification suffers from one weakness which makes it a matter of some doubt whether it is to count as a mode of justification at all. No further reasons are adduced in favour of the system of rules to be justified; it is simply elucidated and presented. This is meant to suffice as a motive or a reason.²⁷

4 Dworkin's moral foundationalism

Even if the language game argument is a weak one, it is not totally lacking in foundationalist capability. In fact, if it is possible to show that moral scepticism can be expressed only within the language game of morality, then we could use the language game argument in order to show moral scepticism to be self-defeating. This is, I believe, Dworkin's strategy in his "Objectivity and truth. You'd better believe it", in which he tries to employ the language game argument in order to reject moral scepticism.²⁸ In this paper, Dworkin distinguishes two kinds of moral scepticism: the one internal and the other external, or "Archimedean". Internal scepticism is that adopted by those who doubt moral assertions for moral reasons: for example, those who object to the point of view of the Catholic Church on abortion

25 It is perhaps worth noting that Kant would have rejected a transcendental argument based on a *reductio ad absurdum*: "The third special rule of pure reason, if it is subjected to a discipline in regard to transcendental proofs, is that its proofs must never be apagogic but always ostensive. The direct or ostensive proof is, in all kinds of cognition, that which is combined with the conviction of truth and simultaneously with insight into its sources; the apagogic proof, on the contrary, can produce certainty, to be sure, but never comprehensibility of the truth in regard to its connection with the grounds of its possibility." (Kant, *Critique*, B 817).

26 According to Habermas, the passage from Kant's original transcendental perspective to the later Wittgenstein's pragmatism can be characterised as a process of "de-transcendentalization": see J Habermas, *Wahrheit und Rechtfertigung. Philosophische Aufsätze* (Frankfurt am Main: Suhrkamp, 1999), pp. 26ff. On Wittgenstein's later approach conceived as a kind of Kantian pragmatism, see M Sacks, "Transcendental constraints and transcendental features" (1997) 5 *International Journal of Philosophical Studies* 164–86.

27 Alexy, *A Theory*, p. 184. As can be seen, according to Alexy, the language game argument can work only if the rules of the language game are explicitly, or conventionally, accepted. This is not the case with language games according to the later Wittgenstein: although language games are, in the *Philosophical Investigations*, a matter of fact, they are not a matter of explicit convention or acceptance; rather, they are implicit or presupposed in the way someone speaks at a given moment. Language games, according to Wittgenstein, are something we do, not something we accept: consequently, we must be certain of some things, even if we raise doubt about these things. The impossibility of the sceptic's doubt is shown in the language game we play, and is not in any sense the consequence of our explicit acceptance. On this, see Wittgenstein, *Philosophical Investigations*, § 241; *On Certainty*, § 344.

28 R Dworkin, "Objectivity and truth. You'd better believe it" (1996) 25 *Philosophy and Public Affairs* 87–139.

because they believe it to be morally wrong are, in Dworkin's view, internal sceptics. External scepticism is that adopted by those who do so for non-moral, and hence "external", reasons: those who question the point of view of the Catholic Church on abortion because they believe that no moral assertion can be objectively true are, according to Dworkin, external, or "Archimedean", sceptics.²⁹

In order to set up his moral foundationalism, Dworkin presents a main point and then an auxiliary one. The main point is that while external scepticism might be coherent, internal scepticism is self-defeating: this is so for exactly the same reasons that we found in Wittgenstein's observations about expressing doubts within a language game.

The internal skeptic can't be skeptical all the way down . . . because he builds his skepticism on some positive moral positions. If he claimed that no moral judgement or conviction or instinct of any kind could be true, he would condemn his own theory.³⁰

The second, and auxiliary, point of Dworkin's foundationalism is that external scepticism is really internal scepticism concealed under a guise of neutrality and objectivity, which is tantamount to say that no language game external to the moral game can be morally relevant. The assumption, in more general terms, is that no higher-order game exists within which to discuss the criteria of validity of subordinate language games.³¹

This is a distinctively Wittgensteinian point, to be sure – the idea that no language game is subordinate to another, and so that we are operating within a non-hierarchical epistemology.³² But the idea comes up against at least one objection: that the theory of the language games is itself advanced within a language game, so it is difficult to see how this language game (in which the theory is framed) might stand on the same level as the language games the theory speaks of. The point, then, is that there is at least one privileged language game behind the argument that no language game should be seen as superior to any other, and this is the language game within which the argument is advanced. Dworkin fails to notice the difference between at least two language games: (a) the language games the theory is speaking of, language games as *objects*, on the one hand, and (b) the language game within which the theory is asserted, a language game as a *precondition*, on the other. Now, if Dworkin argues that some language games are internally coherent and should not be discussed from the outside, he fails to notice that what he is doing in (b) is in fact *discussing them from the outside*.

Hence, the thesis of a non-hierarchical epistemology seems to be paradoxical, and the weak character of the language game argument may be strengthened accordingly. This is the content of the fourth of the foundationalist strategies that Alexy introduces in *A Theory of Legal Argumentation*, that is, Apel's transcendental-pragmatic approach.

5 Apel's transcendental-pragmatic argument

The first point of Apel's foundationalist strategy is connected with the objection we have seen with regard to (Wittgenstein's and) Dworkin's non-hierarchical epistemology. The overall idea of a plurality of different language games, with no hierarchy among them,

29 Dworkin, "Objectivity", pp. 89ff.

30 Dworkin, "Objectivity", p. 94.

31 Dworkin, "Objectivity", pp. 117ff.

32 See Wittgenstein, *Preliminary Studies*, p. 81: "We are not . . . regarding the language games which we describe as incomplete parts of a language, but as language complete in themselves, as complete systems of human communication." See also Wittgenstein, *On Certainty*, §§ 608, 609.

seems not to take into account that there is at least one privileged language game at work: the game in which the theory itself is put forward.³³

If – as Wittgenstein, in fact, suggested – the innumerable diverse language games or forms of life as “given” (pre-)facts are also to be the ultimate quasi-transcendental rule-horizons for the understanding of meaning, then one cannot understand how these different rule-horizons themselves can be understood and hence “given” as language games. One language-game at least is excluded and presupposed as a transcendental language game when one speaks of given language games as quasi-transcendental facts (in the sense of a language game relativism).³⁴

In consequence of this observation, Apel’s epistemology is strongly hierarchical. According to Apel, the question of foundationalism must be solved within a specific language game – the language game of philosophy – which presupposes the language game of assertion and communication and which is superior to all other language games, because it is where their criteria of validity can be discussed, criticised or possibly justified.³⁵ Now, Apel observes, this question and those, closely related, of scepticism and relativism, in virtue of their universalistic character, are discussed by means of assertions which have the characteristic of self-reference: assertions such as “there is no truth”, or “the truth of any statement is relative” which clearly include themselves in their domain of validity. But if these philosophical assertions, which are relevant for the question of foundationalism, on the one hand, must presuppose a transcendental language game and, on the other, must also refer to themselves, then they cannot contradict the constitution of this very language game which makes them possible.

I believe that – within the framework of a transcendental-philosophical radicalization of the later Wittgenstein’s work – one must point out that everyone, even if he merely *acts* in a *meaningful* manner . . . already implicitly presupposes the logical and moral preconditions for critical communication.³⁶

Up to this point, apart from the thesis of a strongly hierarchical epistemology, Apel’s approach does not differ substantially from Wittgenstein’s. But there is a new and original element that Apel adds to the transcendental-pragmatic perspective, that is, the *performative* aspect of assertion as treated in Austin and Searle’s speech-acts theory. We might say that, according to Apel, the speech act of assertion can be subsumed under what Austin calls *verdictives*.³⁷ But Apel believes that the verdictive component is not the only one relevant for an analysis of assertion. As Austin, too, explicitly admits, verdictives are often inherently linked with *commissives*: an assertion’s claim to truth entails a commitment of the utterer to give reasons for justifying the assertion itself: indeed, asserting something is always equivalent to undertaking the obligation to justify it on request.³⁸

33 K O Apel, *Towards a Transformation of Philosophy* (London: Routledge, 1980), p. 165.

34 Apel, *Towards a Transformation*, p. 165.

35 K O Apel, “Fallibilismo, teoria della verità come consenso e fondazione ultima”, in K O Apel, *Discorso, verità, responsabilità* (Milan: Guerini, 1997), pp. 132–3. This work is an Italian translation based on a revised version of K O Apel, “Fallibilismus, Konsenstheorie der Wahrheit und Letztbegründung”, in *Philosophie und Begründung*, Ed. Forum für Philosophie Bad Homburg (Frankfurt: Suhrkamp, 1987).

36 Apel, *Towards a Transformation*, p. 269.

37 See J L Austin, *How to Do Things with Words* (Oxford: OUP, 1976), pp. 151–3. To be sure, according to Austin the speech act of assertion can be considered either as a “verdictive” or as an “expositive”. This is one of the reasons why J R Searle criticised Austin’s original taxonomy of performatives: see J R Searle, “A taxonomy for illocutionary acts”, in J R Searle, *Expression and Meaning. Studies in the theory of speech acts* (Cambridge: CUP, 1979), pp. 10–11. Indeed, according to Searle, many verdictives and expositives can be subsumed under the class of “assertives”.

38 Austin, *How to Do Things*, p. 154.

On this basis, we can introduce Apel's concept of performative contradiction. A performative contradiction is what happens when the locutionary content of a speech act contradicts what is implied by its illocutionary force. According to Apel's argument against moral scepticism, the assertion of the sceptic, in virtue of its intrinsically commissive character, is a performative contradiction. The performative contradiction can be shown by the following assertion: "I am morally obligated to justify that no objective morality could exist." But, as the assertion about the impossibility of moral objectivity entails a performative contradiction, moral scepticism is contradictory, and is therefore false.

Certain moral norms or imperative requirements cannot be placed in question with regard to a possible justification or non-justification so long as the validity of moral requirements in general is placed in question. Even here a transcendental critique of meaning is able to demonstrate that the *presuppositions of the validity of moral norms in general is a "paradigmatic" precondition for the possibility of the language-game associated with the justification of norms.*³⁹

Now, the features common to Wittgenstein's language-game argument and Apel's transcendental-pragmatic argument should be clear. Apel borrows the pragmatic approach that Wittgenstein takes in *On Certainty* to confute philosophical scepticism. And Apel's performative contradiction is clearly a development of Wittgenstein's supposed emptiness of meaning of the sceptic's doubt, a development which replaces Wittgenstein's conditions for meaningful discourse with Austin and Searle's conditions for the happiness of speech acts. But, unlike Wittgenstein, Apel finds that from the impossibility of making certain statements can be derived some kinds of substantive truth; accordingly, he assumes that theory of an epistemic medium which allows us to derive a truth from a pragmatic or conceptual confusion.

Thus, the main features of a transcendental argument are still here. First, it is possible to observe the theory of presuppositions underlying it, namely a theory stating the pragmatic presuppositions of assertion conceived as a verdictive-and-commissive speech act. Second, we can express this theory in the form of a *modus ponens* inference with its second premise set in contrapositive form: the sceptic's assertion is meant to be a happy performance by the sceptic (who performs it) (A); but if the assertion did not entail a moral obligation to justify its claim to truth with respect to anyone who could object to it, then that would not be a happy performance of an assertion ($\neg B \rightarrow \neg \Diamond A$); then even the sceptic's assertion entails a moral obligation (B). Third, we have the usual implication which derives a truth from the conditions of meaningful discourse (here the conditions for the happiness of a speech act), that is, the implication which needs an underlying theory of an epistemic medium. Furthermore, the two distinctive features of the language game argument – and so of *local* transcendental-pragmatic arguments – can be found here as well: (a) the pragmatic condition, by which the sceptic must make an assertion in order to be refuted; (b) the *reductio ad absurdum* structure: in fact, from performative contradiction we derive falsity, and therefore the truth of what the sceptic denies. But, as we have seen, in this case the pragmatic condition is connected with a strongly hierarchical epistemology: the sceptic makes their utterance not in a particular and contingent language game, but in one

39 Apel, *Towards a Transformation*, p. 255. We have introduced the concept of performative contradiction on the basis of the verdictive and commissive character of assertion. Actually, Apel's strategy goes in the opposite direction: he argues for the commissive and verdictive character of assertion on the basis of the evidence of performative contradiction. Thus, Apel takes performative contradiction to be the primitive concept. In fact, if we tried to put a transcendental-pragmatic argument into deductive form, the result would be that it would clearly seem a *petitio principii*. On this, see Apel, "Fallibilismo", pp. 141–55.

superior to any other, namely, a language game considered to be universal. This is why we will call transcendental arguments of this kind *global* transcendental-pragmatic arguments.

6 Alexy's moral foundationalism

We can turn now to Alexy's moral foundationalism. This is an application of Apel's global transcendental-pragmatic argument,⁴⁰ although it should be said that Alexy has his doubts about Apel's arguments as a sufficient foundation for moral truths. These are explained in his *A Theory of Legal Argumentation* as follows:

The mode of justification just described [i.e. transcendental-pragmatic mode of justification] gives rise to many problems. Not only are these concerned with the questions of which rules can be rightfully characterized as "general and unavoidable presuppositions of possible processes of understanding," which are constitutive of speech acts, and which speech acts are necessary for peculiarly human forms of behaviour; over and above that it is a question of importance from the standpoint of theory of science namely whether or not such justification is in the end possible at all.⁴¹

Nevertheless, Apel's transcendental-pragmatic approach and Habermas's discourse ethics constitute the core of Alexy's moral foundationalism: none of the other three modes of justification are presented by Alexy as having real foundationalist capacity.⁴² Indeed, in his view, the empirical mode of justification is fruitful but ultimately based on a kind of naturalistic fallacy; the technical mode of justification (as we have seen) requires an independent justification of the ends by which we are justifying the means; the definitional mode of justification (which, as we have seen, may be interpreted as the result of a strongly conventionalist reading of the later Wittgenstein) is, in the final analysis, a matter of explicit and conventional acceptance. By contrast, on the transcendental-pragmatic mode of justification Alexy says:

It can nevertheless be stated that where certain rules can be shown to be generally and necessarily presupposed in linguistic communication, or are constitutive of peculiarly human ways of behaviour, it is quite possible to speak of a justification of these rules.⁴³

Alexy tries to give a justification of discourse rules on the basis of what he calls a "weakened transcendental-pragmatic argument".⁴⁴ His argument is intended to show that any sincere assertion implies the validity of discourse rules, and particularly of what he calls "rationality rules", that is, the rules which "express the universalistic character of the

40 An attempt to build a transcendental-theoretic argument (and not a transcendental-pragmatic one) for a necessary connection between law and morality has been made in G Pavlakos, "On the necessity of the interconnection between law and morality" (2005) 18 *Ratio Juris* 1, 64–83.

41 Alexy, *A Theory*, p. 186.

42 I will not treat here the many differences that can be found between Apel's and Habermas's approaches, nor will I enter into the details of Habermas's theory. Habermas himself has suggested that his approach to foundationalism can be seen in terms of Wittgenstein's language game argument of a weak transcendental kind. On this, see Habermas, *Wahrheit und Rechtfertigung*, pp. 27ff. and J Habermas, "From Kant's 'ideas' of pure reason to the 'idealizing' presuppositions of communicative action: reflections on the detranscendentalized 'use of reason'", in W Rehg and J Bohman (eds), *Pluralism and the Pragmatic Turn. The transformation of critical theory* (Cambridge, Mass: MIT Press, 2001), pp. 13ff.

43 Alexy, *A Theory*, p. 186.

44 R Alexy, "A discourse-theoretical conception of practical reason" (1992) 5 *Ratio Juris* 3, 231–51; R Alexy, "Discourse theory and human rights" (1996) 9 *Ratio Juris* 3, 217.

discourse-theoretical conception of practical reason in the cloak of a theory of argumentation".⁴⁵ These rules are:

1. Everyone who can speak may take part in the discourse.
2. (a) Everyone may question any assertion. (b) Everyone may introduce any assertion into the discourse. (c) Everyone may express his or her attitudes, wishes, and needs.
3. No speaker may be prevented from exercising the rights laid down in (1) and (2) by any kind of coercion internal or external to the discourse.⁴⁶

Contrary to what Alexy explicitly says, his argument for the justification of discourse rules is not a transcendental-pragmatic but a transcendental-theoretic argument, which can be summarised as follows: (1) the language game of assertion and communication constitutes the "most general form of life of human beings"; (2) the speech act of assertion presupposes the validity of rationality rules; (3) hence, the validity of rationality rules is "highly general".⁴⁷ As usual with transcendental arguments, the justification of the second premise is crucial. In order to demonstrate thesis (2), Alexy builds a deductive argument in which any passage is (or is meant to be) the conclusion of a transcendental-pragmatic argument.⁴⁸ The overall deductive argument can be summarised as follows: (a) "Anyone who asserts something raises a claim to truth or correctness"; (b) "the claim to truth and correctness implies a claim to justifiability"; (c) "the claim to justifiability implies a prima facie obligation to justify what one has asserted, if asked to do so"; (d) "whoever gives justifying reasons for something raises claims to equality, freedom from force, and universality, at least as far as the justification is concerned".⁴⁹

If Alexy's argument, as presented above, is to be considered foundationalist, then, as its starting point, the language game of assertion must be shown to be universal, or at least "highly general": as we have seen, this is one of the main points of global transcendental arguments. Hence, Alexy's approach, like Apel's, is based on a strongly hierarchical epistemology: only if we are able to show that the game of assertion and communication is universal, can we argue for a foundation of the discourse rules, and hence for the Kantian principles of universality and autonomy. As we have seen, Apel argues for the superiority of the language game of assertion on the basis of pure transcendental reflection: given that the very questions of scepticism, relativism and foundationalism presuppose it, the language game of assertion cannot be called into question. Alexy's approach to this question is very much weaker than Apel's, and it is more in line with that of Habermas; according to Alexy, the language game of assertion and communication corresponds to the *most general form of life of human beings*.⁵⁰

Now, it is certainly possible to find many empirical situations in which the commissive character of assertion (and, in particular, the specific normative declination of this commissive character made according to rationality rules of discourse) does not hold. Two simple examples could be a game of soccer, in which a referee can decide without justifying his or her decisions, and a tribe, with reference to the decisions of a shaman. While the latter case can indeed be reduced to a form of taboo, the former cannot: in this case some limitations to rationality rules of discourse hold for perfectly rational reasons, that is, in

45 Alexy, "A discourse-theoretical conception", p. 236.

46 Alexy, "Discourse theory", p. 211. See also Alexy, *A Theory*, p. 193.

47 The fact that the starting point of this argument is a language game does *not* render it a transcendental-pragmatic argument. This argument shows the preconditions of a language game conceptually considered, and not the preconditions of a concrete utterance *within* a language game.

48 Alexy, "A discourse-theoretical conception", p. 240.

49 Alexy, "Discourse theory", p. 214–16.

50 Alexy, "Discourse theory", p. 217.

order to guarantee the concrete possibility of the game. Another, and perhaps more interesting, example could be scientific paradigms, as discussed for example by Thomas S Kuhn: according to Kuhn, taking for granted some theories and evidence, and temporarily ignoring possible confutations of them, is the condition of possibility of “normal” scientific discussion.⁵¹ Consider this case, taken from Bertolt Brecht’s *Life of Galileo*:

PHILOSOPHER: . . . Mr. Galileo, before turning to your famous tube, I wonder if we might have the pleasure of a disputation? . . .

GALILEO: I was thinking you could just look through the telescope and convince yourselves? . . .

MATHEMATICIAN: One might be tempted to answer that, if your tube shows something which cannot be there, it cannot be an entirely reliable tube, wouldn’t you say?

GALILEO: What d’you mean by that?

MATHEMATICIAN: It would be rather more appropriate, Mr. Galileo, if you were to name your reasons for assuming that there could be free-floating stars moving about in the highest sphere of the unalterable heavens.

PHILOSOPHER: Your reasons, Mr. Galileo, your reasons.

GALILEO: My reasons! When a single glance at the stars themselves and my own notes makes the phenomenon evident? Sir, your disputation is becoming absurd.⁵²

In this context, Galileo might make the following assertion, apparently without falling into any contradiction: “Jupiter has some satellites, and I will accept any objection made by someone who accepts the evidence of the *cannocchiale* (Galileo’s telescope), while completely ignoring any objection made by someone who does not accept it.” But this assertion, as is clear, contradicts rationality rules of discourse, particularly rules 2(a) and 2(b).

This observation is meant to suggest that there may also be truth-oriented games in which the reference to some kind of evidence is not disputable, as it is on the contrary the intended starting point of the dispute. Hence, in these cases the discussion proceeds *against* the discourse rule of equality, because any reference to evidence taken as undisputable discriminates against those who do not accept it.

It seems that, in order to meet this objection, a generalised version of Alexy’s special case thesis is necessary: according to it, all the language games in which some limitations to the discourse rules hold *for rational reasons* should be conceived as special cases of the more general game of assertion, argumentation and communication. Alexy explicitly defends such a position with regard to the transition from moral rules to legal rules.⁵³ Now, it seems that his theory of the language game of assertion and argumentation as the most general of human forms of life is closely connected with a generalised version of this special case thesis.

7 Conclusion: transcendental approach and idealised presuppositions

By pointing out that there are empirical situations in which rationality rules of discourse do not hold, we mean to stress the *ideal, counter-factual* nature of discourse rules. The point is very much discussed by discourse theorists. Apel notes that the situation in which these rules are effective is an example of what Kant calls a regulative idea, something which cannot exist in the empirical realm but which we should strive for in empirical situations all

51 T S Kuhn, *The Structure of Scientific Revolutions* (Chicago, Ill: University of Chicago Press, 1962).

52 B Brecht, *Life of Galileo* (London: Methuen, 1994), scene 4.

53 See, e.g. Alexy, *A Theory*, pp. 207–8; R Alexy, “The special case thesis” (1999) 12 *Ratio Juris* 4, 374–84.

the same. Although Kant, for his part, would probably have criticised the transcendental use of a regulative idea, Apel believes it is possible to modify Kant's transcendental philosophy in this way, following C S Peirce: "[Peirce] has put Kant's *regulative principles* of experience in the place of Kant's *constitutive principles* of experience, on the assumption that the regulative principles on the long run turn out to be constitutive."⁵⁴

Habermas explicates the meaning of this modification of Kant's approach as follows:

Giving up the background assumptions of Kant's transcendental philosophy turns ideas of reason into idealizations that orient subjects capable of speech and action. The rigid "ideal" that was elevated to an otherworldly realm is set afloat in this-worldly operations; it is transposed from a transcendent state into a process of "immanent transcendence."⁵⁵

But then we should also observe here that this appeal to a counterfactual situation is risky. The risk would be that of returning to what the later Wittgenstein metaphorically called the "slippery ice where there is no friction", on which "the conditions are ideal", but on which "also, just because of that, we are unable to walk".⁵⁶ And if this is true, the transcendental strategy as a basis for moral foundationalism ends up in a circular, or looping, dialectic. Which is precisely what seems to have happened: we started out with classic transcendental arguments and their "strong" foundationalism, grounded on somewhat "idealised" conceptions. Then we arrived, through Wittgenstein, at a pragmatic and "weak" interpretation of transcendental arguments based on a non-hierarchical epistemology, but we found this epistemology to be somewhat paradoxical. And then, finally, we came to Apel and Alexy's strong transcendental-pragmatic argument: again a strong argument which deposits us once more in an idealised situation, a counterfactual situation serving a regulative function. The question, then, is: can the transcendental strategy escape what appears to be a circular dialectic?

8 Final remarks on transcendental arguments

By way of conclusion, we will summarise here some of the theses about transcendental arguments we have been arguing for.

- (a) The first thesis is that there are some essential features of transcendental arguments, among which: (1) an inference similar to a *modus ponens* (with its second premise set in contrapositive form) based on a starting point taken as (necessarily or simply empirically) true; (2) an underlying theory of implicit presuppositions expressed by this inference; and (3) the use of a specific theory of an epistemic medium. In this regard, transcendental arguments are essentially connected with a kind of idealist or non-realist philosophy and with at least one truth, be it necessary or contingent.⁵⁷

54 Apel, *Towards a Transformation*, p. 88; see Kant, *Critique*, B 679.

55 Habermas, "From Kant", p. 20.

56 Wittgenstein, *Philosophical Investigations*, § 107.

57 Obviously, the kind of idealist philosophy that lies behind a transcendental approach may be given different labels. Compare, in this respect, Habermas's suggestion by which, from the point of view of "de-transcendentalisation", and so in the context of a (very Wittgensteinian) reconstruction of the pragmatic presuppositions of our linguistic practices, transcendental idealism can be replaced by internal realism: on this, see Habermas, *Wahrheit und Rechtfertigung*, pp. 40ff; Habermas, "From Kant", p. 17. I agree with Carsten Heidemann (2004) that Putnam's internal realism has a distinctively Neokantian stance: see C Heidemann, "Hans Kelsen and the transcendental method" (2004) 55 NILQ 4, 358–77.

- (b) The second thesis is that transcendental arguments can be divided into “global” and “local”, depending on the assumed universality of their starting point and of the conclusion they draw.⁵⁸
- (c) The third thesis is that transcendental arguments can also be divided into “theoretic” and “pragmatic”. In general, transcendental-theoretic arguments effect an analysis of the implicit presuppositions of a given starting point, considered conceptually, or in the *abstract*: hence, they answer questions like: what are the implicit presuppositions of empirical knowledge? or what are those of meaningful language? Further, transcendental-theoretic arguments demonstrate *directly*, that is, their conclusion is a true proposition about the necessity of those preconditions the analysis has uncovered. By contrast, transcendental-pragmatic arguments effect an analysis of the implicit presuppositions of a *concrete* utterance of doubt in a pragmatic context and, as such, they work only if someone utters something within a language game. Furthermore, the conclusion of a transcendental-pragmatic argument is a performative contradiction, hence these arguments are *reductiones ad absurdum* and demonstrate only *indirectly*.

We need to discuss briefly two criticisms that can be addressed at these theses.

The first criticism is addressed at thesis (a). According to this criticism, as thesis (a) identifies the distinctive logical traits of transcendental arguments in a *modus ponens* inference, it reduces them to a special kind of logical deduction. This point is valid. But we said that the *modus ponens* inference is but *one* of the necessary features of a transcendental argument. On many occasions, Apel himself insisted that the potential of a transcendental argument cannot be explained through logical reduction.⁵⁹ As we have tried to argue, the characteristic features of transcendental arguments cannot be reduced to a simple matter of presupposition analysis; something more is needed. Transcendental arguments require an entire philosophical theory of an epistemic medium (hence, a non-realist philosophy), and the possibility of uncovering implicit presuppositions of this medium. Hence, they are not simply presupposition-analyses, but *analyses of the implicit presuppositions of an epistemic medium*.

This leads us to the second criticism, which is addressed to thesis (b). According to this criticism, a possible objection to the concept of *local* transcendental arguments may be that they are self-contradictory. In fact, unless we assume the necessary character of the starting point (hence, unless we assume that all transcendental arguments are global by definition), arguments of this kind become mere presupposition-analyses; but there are many presupposition-analyses which cannot properly be called “transcendental”. The answer to this criticism is that, if the necessity of the starting point had been the main feature of transcendental philosophy, then probably transcendental philosophy would have died with Kant’s first *Critique*. The concept of a local transcendental argument explains why, for example, Neokantianism is a kind of transcendental philosophy, and why, as we have seen,

58 The distinction between global and local transcendental arguments is different from Stroud’s distinction between a strong and a weak transcendental approach, qualified by Hookway as a distinction between “immodest” and “modest” transcendental arguments: on this, see Stroud, “The goal”; C Hookway, “Modest transcendental arguments and skeptical doubts: a reply to Stroud” in R Stern (ed.) *Transcendental Arguments* (Oxford: OUP, 1999), pp. 173–87. In fact, according to Stroud, “immodest” transcendental arguments are those based on a kind of non-realistic philosophy: thus, in our view, all transcendental arguments are “immodest” in Stroud’s sense. Indeed, “transcendental arguments might need an additional argument for the truth of non-realism (if they do not contain such an argument from the beginning)” (Heidemann, “Hans Kelsen”, p. 266).

59 Apel, “Fallibilismo”, pp. 142ff., 151–4.

the later Wittgenstein’s conception of grammar leads to a sort of “Kantian pragmatism” which retains many transcendental features. As Carsten Heidemann notes, Kant himself distinguished between synthetic (or progressive) and analytic (or regressive) transcendental arguments, and Neokantian transcendental arguments can be seen as analytic (or regressive), in that “they are less ambitious, relying completely on a first premise that is not necessarily valid”.⁶⁰ According to Paulson, Kelsen’s transcendental argument for the category of normative imputation can also be identified as a Neokantian regressive transcendental argument.⁶¹ Identifying the core meaning of a transcendental argument not in the assumption of a necessary starting point, but in the analysis of the implicit presuppositions of an epistemic medium, offers an explanation of all these different kinds of transcendental philosophy.

In conclusion, I present a taxonomy for transcendental arguments based on the above discussion and on the distinctions made. These distinctions create four possible kinds of transcendental argument: global theoretic, global pragmatic, local theoretic, local pragmatic. Two examples, drawn from the foregoing discussion, are given for each of these kinds, with the exception of local transcendental-theoretic arguments. I will not discuss here the possibility of these last arguments: let me say, however, that there are some candidates for this category, and Kelsen’s Neokantian (regressive) transcendental argument is probably among them.

A taxonomy for transcendental arguments	THEORETICAL	PRAGMATIC
LOCAL	Kelsen’s Neokantian transcendental argument?	Wittgenstein’s language-game argument in <i>On Certainty</i> Dworkin’s confutation of moral scepticism (“Objectivity and truth”)
GLOBAL	Kant’s transcendental deduction of categories in <i>Critique of Pure Reason</i> Wittgenstein’s transcendental deduction of the simplicity of objects in <i>Tractatus Logico-Philosophicus</i>	Apel’s transcendental-pragmatic argument for moral foundationalism Alexy’s foundation of discourse rules (“A discourse-theoretical conception”) and of human rights (“Discourse theory”)

60 Heidemann, “Hans Kelsen”, pp. 359–60, 368.

61 Paulson, “On the puzzle”, pp. 287ff.