

The discourse-theoretic necessity of flexibility in the law*

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The containment of flexibility in the law has been a substantial goal of legal theory. Flexibility in the law could be completely contained if judges were able to discern “right answers”¹ to legal questions.² In this essay it will be shown from a discourse-theoretic perspective that no such complete containment is attainable. The cognition of “one-right-answer” in the law is impossible,³ for flexibility in the law is unavoidable. This thesis respecting the necessity of flexibility in the law will be justified in what follows in discourse-

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1 Dworkin claims that there are right or correct answers in law (cf., e.g. R Dworkin, “No right answer?”, in: P M S Hacker and J Raz (eds), *Law, Morality, and Society. Essays in honour of H L A Hart* (Oxford: Clarendon 1977), pp. 58–84; R Dworkin, *Taking Rights Seriously* 2nd edn (Cambridge Mass: Harvard UP, 1978), pp. 291–368 (“A reply to critics”), especially pp. 331–5. But these may only be perceived by an ideal judge, whom Dworkin calls “Hercules”: “I have invented . . . a lawyer of *superhuman* skill, learning, patience, and acumen, whom I shall call Hercules.” (Dworkin, *Taking Rights Seriously*, p. 105, italics added). On Dworkin’s one-right-answer thesis cf., inter alia, D Buchwald, *Der Begriff der rationalen juristischen Begründung. Zur Theorie der juristischen Vernunft* (Baden-Baden: Nomos, 1990) pp. 241–4 (for Buchwald’s arguments see n. 3 below); and U Neumann, *Wahrheit im Recht. Zu Problematik und Legitimität einer fragwürdigen Denkform* (Baden-Baden: Nomos, 2004), pp. 39–41.

2 Cf., e.g. R Christensen and H Kudlich, *Theorie richterlichen Begründens* (Berlin: Duncker & Humblot, 2001), p. 59, who speak of the “project of the classical methodology to show the way to the unique correct cognition”. (NB all translations from quoted German language texts are my own.) Today, just as 25 years ago, Schwerdtner’s assessment may be valid: “The ‘Legal Determinacy’, which portrays the legal system as a complete system in the sense that it offers one and only one answer to every conceivable legal question, is surely dead. The execution of the death certificate is still at stake.” (P Schwerdtner, “Rechtswissenschaft und kritischer Rationalismus (I.)” (1971) 2 *Rechtstheorie* 67–94, p. 68). This essay claims to add a further line to the death certificate.

3 Buchwald holds the thesis of “one-right-answer” to be mistaken for three reasons: “(1) The language of moral norms and legal statutes, precedents and interpretations is vague, ambiguous and evaluatively open, that is, capable of different exegeses and evaluations. None of these evaluations can be justified beyond doubt; especially basic evaluations on what ought to be done or what is good, are not decidable by rational arguments.” (*Der Begriff*, pp. 243ff.); (2) The necessary balancing of principles in complicated legal cases does not lead, in a finite amount of steps, to one definite decision (cf. *Der Begriff*, p. 244); “(3) There may be incommensurable ideologies, so that different interpretations of norms may reflect different controversies that may in any case have more than one solution.” (*Der Begriff*, p. 244). This essay will provide a discourse-theoretic explanation for the thesis underlying these three reasons: practical questions cannot be decided rationally beyond doubt.

theoretic terms. Thus, I shall begin with (1) the declaration of the impossibility of an ideal discourse, and then (2) introduce the concept of discourse principles. Relying on that concept, I will (3) elaborate a three-level model of discourse, which shows, *inter alia*, that practical discourses cannot produce results apart from any authoritative decision. Then, the relevance of the necessity of decisions in law will be examined by taking up (4) Robert Alexy's four-stage procedural model of law. As a result, this essay will conclude with (5) the argument that the law cannot escape the discourse-theoretic weakness of the necessity of decisions either. By this means, the thesis of the discourse-theoretic necessity of flexibility in the law will have been justified.

1 The impossibility of the ideal discourse

Uniquely correct answers to legal questions are found, if at all, in an ideal practical discourse.⁴ Alexy defines the ideal practical discourse as a search “for an answer to a practical question under the conditions of unlimited time, unlimited participation, and complete freedom of constraints”, whereby one is in a position to achieve “complete linguistic-conceptual clearness, complete empirical information, complete ability and willingness to change roles and complete freedom from prejudice”.⁵ The realisation of these ideal conditions by the discourse participants is, in Alexy's words “not actually possible in fact”.⁶ Real or actual participants of discourses have only limited, as opposed to perfect, capacities. We do not have unlimited time for discussion. We cannot communicate with an infinite number of participants. As for practical questions, we are not able to achieve perfect linguistic-conceptual clarity due to our limited capacity for perceiving the world.⁷ We can

4 On the relationship between practical questions and legal questions compare, on the one hand, R Alexy, *A Theory of Legal Argumentation: The theory of rational discourse as theory of legal justification* (Oxford: Clarendon, 1989), who claims, that “there exists legal reasoning orientated to solving practical questions”, and, on the other, U Neumann, *Juristische Argumentationslehre* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1986), p. 86ff., for whom “in any case the discussion of legal doctrines has to be understood as a theoretical, not a practical discourse”. This apparent contradiction may be overcome by means of two arguments: (1) where values are concerned, it is always a matter of a practical question; (2) legal questions are frequently decided by evaluations. It follows, then, from the fact that there are legal questions that there are practical questions.

5 R Alexy, “Problems of discourse theory” (1988) 20 *Critica, Revista Hispanoamericana de Filosofía* 58, 43–65. In another paper Alexy lists five, instead of six, conditions of the ideal discourse: “Completely ideal conditions are given, if five idealizations are there: (1) that of unlimited time, (2) that of unlimited participation, (3) that of unlimited linguistic-conceptual clarity, (4) that of unlimited information, and (5) that of unlimited freedom from prejudice.” (R Alexy, “Diskurstheorie und Rechtssystem” (1988) 5 *Synthesis Philosophica* 299–310, p. 304) The condition of the complete ability and willingness to change roles is missing; the condition of unlimited linguistic-conceptual clarity is freed from the element of complete absence of constraints. It has to be left aside, if one may abandon the missing condition and the missing element in a world that can be described as ideal by way of the remaining five conditions. But there are reasons to believe that they are in any case indispensable in the system of discourse principles that is to be elaborated here.

6 Alexy, “Problems”, p. 49.

7 Our limited capacity of recognising and understanding our world leads to the defeasibility of the concepts with which we describe the world. Our concepts are always relative to our knowledge of objects or things. Infinite linguistic-conceptual clarity might be achieved in logic, mathematics or in an isolated linguistic system (e.g. the chess game), in which a linguistic sign achieves its meaning only by definition. For recent works on the defeasibility of legal norms compare, on one hand, P-H Wang, *Defeasibility in der juristischen Begründung* (Baden-Baden: Nomos, 2004), who tries to grasp the defeasibility by means of classical logic and theory-revision, and, on the other, B Brozek, “Law, defeasibility and logical consequence”, in S Eng (ed.), *Proceedings of the 21st IVR World Congress, Part 2: Law and Practice* (Stuttgart: Franz Steiner Verlag, 2005), pp. 69–78, who uses non-monotonic logic with an eye to the same end.

never possess unlimited empirical information, and we are neither willing nor able to change roles, entirely unprejudiced, either.⁸

If these assumptions hold true of the human being, then the realisation of an ideal discourse is impossible. The ideal conditions of an ideal discourse are not only not fulfillable *in toto*, they are not fulfillable separately either. The ideal discourse, qua impossible discourse, therefore cannot provide answers to our existing practical questions at all and a fortiori cannot provide uniquely correct answers either.⁹

2 Principles of discourse

The realisation of an ideal discourse fails, as noted, owing to the insufficiency of the actually existing conditions. Given actual or real conditions, only a real discourse can take place. Real discourses, in contrast to ideal discourses, can be defined as non-ideal discourses. The conditions of real discourses, due to the limiting real conditions, are necessarily non-ideal.¹⁰ This definition, negative in form, stands in need of further clarification concerning the conditions of a real discourse. Alexy's catalogue of rules and forms of the practical discourse in *A Theory of Legal Argumentation* offers several candidates for a positive definition of the conditions of a real discourse. The catalogue comprises 28 rules and forms, which include: "Basic Rules" such as "No speaker may contradict him or herself"; and "Rules for Allocating the Burden of Argument" such as "Whoever proposes to treat a person A differently from a person B is obliged to provide justification for so doing"; and also "Transition Rules" such as: "It is possible for any speaker at any time to make a transition into a linguistic-analytical discourse".¹¹ It is not entirely clear whether Alexy understands this catalogue to comprise the rules of a real or an ideal discourse. If Alexy's catalogue purports to list the rules of a real discourse, and in doing so purports to list the conditions under which a real discourse takes place, then a problem emerges: some of these rules, especially in the group of "Rationality Rules",¹² require ideal conditions. Two examples illustrate the point. One of the rationality rules reads: "Everyone who can speak may take part in discourse."¹³ This, with the exception of those who are unable to speak, is one of Alexy's five conditions of ideal discourse: unlimited participation. Another rationality rule reads: "No speaker may be prevented from exercising . . . rights . . . by any kind of coercion internal or external to the discourse."¹⁴ This, despite the restriction on particular rights, is

8 Alexy leaves open the question of whether the fulfilment of the conditions of the ideal discourse "is conceptually possible at all" ("Problems", p. 49). There are reasons to believe that in any case the fulfilment of all conditions at once is conceptually impossible.

9 Even if all the conditions Alexy lists were fulfillable, uniquely correct answers to practical questions would still not be guaranteed. Alexy maintains that even a discourse which is ideal in all aspects could produce "contradictory norms" as discourse results, for it is not clear "that there are no discourse-resistant anthropological differences of the human being, which even under the conditions of the ideal discourse may exclude consents in practical, meaning evaluative questions" (R Alexy, "Nachwort", in R Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Argumentation* 3rd edn (Frankfurt a M: Suhrkamp, 1996), pp. 399–435, pp. 412ff).

10 This is not to say that the real conditions are necessarily non-ideal. The necessity of the non-ideal character of real discourse is relative to the non-ideal character of real conditions. It cannot be ruled out that we happen to live in a world that is, at least in some discourse-relevant aspects, an ideal world. But so long as this is not the case, the real discourse is necessarily non-ideal.

11 Compare the summarising table in Alexy, *A Theory of Legal Argumentation*, pp. 197–8.

12 Compare Alexy, *A Theory of Legal Argumentation*, pp. 191–2.

13 Alexy, *A Theory of Legal Argumentation*, p. 193.

14 Alexy, *A Theory of Legal Argumentation*, p. 193. Here, Alexy deals with those rights that emerge for the discourse-participants out of the heretofore introduced rationality rules.

another ideal condition: complete freedom from constraints.¹⁵ The problem, however, is that a real discourse, as remarked above, can only be realised under non-ideal conditions. The ideal conditions that are demanded by the rationality rules cannot be realised in our world. Of course, Alexy is aware of this. Thus, he remarks that a realisation of these rules is in “reality . . . quite out of the question”.¹⁶ In “actual discussions” or real discourses these conditions may “only be approximately satisfied”.¹⁷

Other rules in Alexy’s catalogue, which are not part of the rationality rules, can also be realised only approximately.¹⁸ This applies to at least some of his “Justification Rules”.¹⁹ One of these rules shall suffice to illustrate this: “The consequences of every rule for the satisfaction of the interests of each and every individual must be acceptable to everyone.” The short version of this rule reads: “Everyone must be able to agree to every rule.”²⁰ This rule presupposes perfect conditions of unlimited time and unlimited participation, and perhaps of perfect linguistic conceptual clarity, too. Speaking of this rule Alexy says that it “shares the *ideal* character of the rationality rules”.²¹

Are Alexy’s rules of practical discourse rules of a real discourse or an ideal discourse? They are neither. The property of the rationality rules, as with other discourse rules in Alexy’s catalogue, to be realised only approximately is owing to their norm-theoretic structure: they are not rules, but principles.²² Principles are “optimization requirements”.²³

15 This ideal condition is no condition of the ideal discourse as Alexy defines it, although Alexy’s definition cited above (p. 126 under subheading 1) may give rise to this impression. It is rather, as Feteris puts it, “a condition of realizing” (E T Feteris, *Fundamentals of Legal Argumentation. A survey of theories on the justification of judicial decisions* (Dordrecht/Boston/London: Kluwer 1999) p. 95) the conditions of the ideal discourse. These conditions of realising the conditions of the ideal discourse gain great significance in the system of discourse principles (compare p. 132 below, paragraph starting “A completely different problem . . .”).

16 Alexy, *A Theory of Legal Argumentation*, p. 193.

17 Alexy, *A Theory of Legal Argumentation*, p. 194.

18 Cf. A Aarnio, R Alexy and A Peczenik, “The foundation of legal reasoning” (1981) 12 *Rechtstheorie* 133–58, 257–79, 422–48, pp. 263–4. Here, he refers to the “Rationality Rules” as the group of “rules of reason” (p. 264). This group “clarifies the ideal character of the practical reason, shown in the fact that it can only be realized in an *approximate* manner” (p. 263, italics added).

19 Alexy, *A Theory of Legal Argumentation*, pp. 202–3.

20 For both quotations, Alexy, *A Theory of Legal Argumentation*, pp. 203ff.

21 Alexy, *A Theory of Legal Argumentation*, p. 204, italics added.

22 Alexy has already remarked that his discourse rules are not only rules in the sense of his differentiation between rules and principles: “The concept of rule is used in a wide sense here, embracing both definite obligations and obligations concerning optimization.” (“Problems”, p. 48, n. 12). On the relationship between Alexy’s discourse theory and the reconstruction presented here, cf. below section 3 (b).

23 R Alexy, *A Theory of Constitutional Rights*, J Rivers (trans.) (Oxford: OUP, 2002), p. 47. A detailed analysis of Alexy’s norm-theoretic differentiation between rules and principles and a corresponding critique have to be left aside. Still, this must be said: according to the correct critique of J R Sieckmann (*Regelmodelle und Prinzipienmodelle des Rechtssystems* (Baden-Baden: Nomos, 1990), pp. 62–75, especially p. 65) and A Aarnio, (“Taking rules seriously”, in W Maihofer and G Sprenger (eds.), *Law and the States in Modern Times. Proceedings of the 14th. IV/R World Congress in Edinburgh, August 1989*, ARSP-Beiheft 42 (Stuttgart: Franz Steiner Verlag 1990), pp. 180–92, p. 187), principles as well as rules impose definite obligations. Therefore, Alexy’s confrontation of rules and principles cannot be based upon the feature of rules, namely, that they impose definite obligations. Principles, however, impose the definite obligation to optimise their object, while rules impose the definite obligation to realise their objects absolutely. Therefore, the differentiation of rules and principles still lies in optimisation. For the purpose of this inquiry, it will suffice to handle the characterisation of principles as optimisation requirements (cf. on the critique of Aarnio and Sieckmann, R Alexy, “On the structure of legal principles” (2000) 13 *Ratio Juris* 294–304, pp. 300–1).

Optimisation requirements, according to Alexy, are “characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends . . . on what is factually possible”.²⁴ Drawing on Sieckmann, principles can be qualified as norms that require the realisation of an ideal.²⁵ The ideal objectives of the principles are not to be realised absolutely or in a perfect manner, but only in an optimal manner.²⁶ Principles mark what Alexy has called “the world of the ideal Ought”.²⁷ Alexy’s concept of the ideal “ought” shows why at least some of his discourse rules may count only as principles: An ideal “ought” does not require that what is postulated be actually realisable in full, but only *approximately*.²⁸ It may thus be concluded: every discourse rule that can only be applied approximately, as in the case of rationality rules, is a principle.

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- 24 Alexy, *A Theory of Constitutional Rights*, pp. 47–8. The quotation from Alexy suggests that the degree of satisfaction of legal principles depends “*not only on what is factually possible but also on what is legally possible*” (italics added). Concerning the pre-legal field of discourse principles, the legal possibilities are irrelevant. The satisfaction of discourse principles depends therefore only on what is factually possible. As far as that goes, discourse principles do not count as optimisation requirements but rather as maximisation requirements. According to Alexy, a principle is a maximisation requirement if it is “related only to what is factually possible” (*A Theory of Constitutional Rights*, p. 51, n. 37). But if there is more than one discourse principle and these are related to another, then there may be a collision between the individual maximisation requirements of the principles. I assume that there is more than one discourse principle, and that these discourse principles form a normative framework which is similar to one of the legal possibilities found in Alexy’s definition of legal principles and which has effects on the satisfaction of each individual discourse principle. Therefore, discourse principles shall also be defined as optimisation requirements. In any case, the concept of discourse principle applied here differs from Alexy’s concept of principles in so far as legal possibilities are concerned. I owe this clarifying thought to discussions with Virgílio Afonso da Silva, Matthias Klatt and Martin Borowski (cf., for the distinction between maximisation and optimisation requirements, Alexy, *A Theory of Constitutional Rights*, p. 51, n. 37; Sieckmann, *Regelmodelle*, pp. 66–7; and M Borowski, *Grundrechte als Prinzipien. Die Unterscheidung von prima facie-Position und definitiver Position als fundamentaler Konstruktionsgrundsatz der Grundrechte* (Baden-Baden: Nomos, 1998), p. 81).
- 25 Compare Sieckmann, *Regelmodelle*, p. 76: “Prinzipien enthalten ein ideales Sollen, d.h. sie sind Normen, die die Realisierung eines Ideals gebieten.”
- 26 One has to distinguish between the objective or aim of an optimisation requirement, namely the optimisation-object or optimisation-aim, and the optimisation requirement itself. This corresponds to Alexy’s differentiation between “*commands to be optimized and commands to optimize*” (“On the structure”, p. 300, italics original). In a slightly simpler terminology, one could distinguish between objects of principles and principles. The object of a principle is the aim or the condition that is to be optimized (Z). The principle is the norm that states the command to optimize (O Opt(Z)). In addition, the formulation of the optimisation requirement or the principle-sentence has to be distinguished from the optimisation requirement or the principle. A principle-sentence marks one possibility of the linguistic expression of a principle. The distinction between principle and principle-sentence corresponds to the common distinction between norm and norm-sentence (cf. on this, Sieckmann, *Regelmodelle*, p. 29).
- 27 Alexy, *A Theory of Constitutional Rights*, p. 82. Alexy had abandoned the distinction between the ideal and real “ought” or the ideal and real world. Already in *A Theory of Constitutional Rights*, he uses this distinction “cautiously . . . on account of the ease with which it can be misunderstood” (p. 82, n. 148). In a more recent paper, however, he uses the term “ideal ought” again (“On the structure”, p. 300), when he deals with the critique concerning the classification of principles as optimisation requirements (cf. above, n. 23).
- 28 Compare R Alexy, “Zum Begriff des Rechtsprinzips”, in R Alexy (ed.), *Recht, Vernunft, Diskurs. Studien zur Rechtsphilosophie* (Frankfurt a M: Suhrkamp, 1995), pp. 177–212, p. 204.

This norm-theoretic background gives rise to the concept of discourse principles. The objective of a principle, as discussed above, is always an ideal. The ideal conditions of the ideal discourse suggest themselves as objectives of discourse principles.²⁹ The discourse principles will then demand the optimal realisation of the ideal conditions relative to the given circumstances and to the other discourse principles.³⁰ All of these discourse principles, by demanding an optimal degree of the realisation of those ideal discourse conditions under non-ideal circumstances, constitute a real, non-ideal discourse.³¹

An example of the formulation of a discourse principle may serve to illustrate this. The discourse principle of unlimited participation may read: "As far as possible, anyone should participate in every discourse." This formulation expresses the required optimisation of participation relatively to the circumstances and to other discourse principles by using the expression "as far as possible".³²

3 A three-level model of discourse

The introduction of discourse principles gives shape to a three-level model of discourse. This model expands the common distinction between ideal discourse and real discourse in several aspects. In particular, it distinguishes among three different levels: (1) that of ideal discourse; (2) that of real discourse; and (3) that of actual discourses. An ideal discourse at the first level is marked by an ideal discourse situation, in which, under ideal conditions, ideal results may be achieved. The weakness reflected at the first level stems from the fact that it is intelligible but not realisable. Our world is not a world in which all discourse-relevant ideal conditions can be met. On the second level, that of real discourse, the weakness stemming from the impossibility of realisation is eliminated. The conditions of the ideal-discourse situation become the objectives of discourse principles. They demand not a perfect realisation of their objects, but only an optimal one. By shifting from the non-realizable ideal conditions at the first level to objectives of discourse principles at the second level, realisability is achieved. Thus, the introduction of principles of discourse provides the missing link between non-existing ideal conditions and real possibilities. To be sure, the price to be paid in order to eliminate the non-

29 This idea can be traced back to Alexy's works. In his discussion on the discourse character of a legal process Alexy says: "It would only be possible to discover which structure of the various forms of process could *best satisfy* the criterion cited above through extensive empirical investigation." (*A Theory of Legal Argumentation*, p. 220, italics added) The considered criterion is the "claim to correctness and accordingly . . . [the] reference to ideal conditions" (p. 220).

30 At this point the model of principles gives rise to many questions. Not only the question of how many discourse principles exist is to be clarified but also to what extent they may be reduced to one another. A further question, prominent in the German discussion on legal doctrine, concerns the procedure for applying principles.

31 This is not to say that the real discourse is entirely described by those principles of discourse that contain the above-mentioned ideal conditions of the ideal discourse as objects. Further conditions, at least those concerning the structure of arguments or the motivation of the participants, need to be addressed. Promising candidates for such further conditions are the six principles of rationality that were introduced by Aarnio et al. ("The Foundation", p. 267): "(1) the principle of consistency, (2) that of efficiency, (3) that of testability, (4) that of coherence, (5) that of generalizability, and (6) that of sincerity." To what extent these principles of rationality overlap with the principles of discourse introduced here, and whether there are not further conditions to add, are questions that will have to be addressed in their own right, apart from the present inquiry (for one approach to these questions, cf. below, n. 48).

32 The discourse principle of unlimited participation does not become a principle by means of the expression "as far as possible". Normative character is not changed through a formulation. The expression serves only to make the character of a principle explicit in the principle sentence (cf. for the distinction between principle objective, principle and principle sentence above, n. 26).

realisability of the ideal discourse is the relativity of the discourse results vis-à-vis the non-ideal discourse circumstances.³³ At the third level, the level of actual discourses, the discourse principles are applied to actual discourse situations in our world. Thus, the ideal-discourse conditions at the first level, mediated by the discourse principles at the second level, are realised under the circumstances given by way of optimisation at the third level. The optimisation of the particular situation with the discourse principles serving as criterion leads to a variety of actual discourses.

In short, the three-level model offers a definition of discourse: A discussion is a discourse if and only if the rules³⁴ that underlie the discussion can be seen as the optimal realisation of the discourse principles under the circumstances given. Thus, the discourse principles offer a criterion for the correctness of actual discourses at the third level.

(a) ADVANTAGES AND DISADVANTAGES OF THE MODEL

The introduction of a new model is justified only if it offers advantages over the common model. The question as to whether the three-level model offers advantages and disadvantages over the common distinction between ideal and real discourse is addressed in the following subsections.

(i) Advantages of the model

An initial, technical advantage of the three-level model over the common two-part division is that the approximate character of some of Alexy's fundamental discourse rules can be justified from a norm-theoretic perspective. Second, Alexy's rules, which were only to be realised approximately, become operational in a strict sense only if they are seen as principles in the model of principles of real discourse. Until now, the discourse theory has faced a gap stemming from the distinction between, on the one hand, the ideal conditions of the ideal discourse, and, on the other, the real or factually existing participants of discourse.³⁵ It seemed as if one could overcome this gap only by constructing, from the actual participants, at least partially ideal participants.³⁶ The three-level model introduced here, in implementing discourse principles, pursues the opposite course: the conditions of discourse and, therefore, also the participants are not idealised but are, instead, realised. The criterion for the satisfaction of the discourse principles is no longer an unattainable ideal but an achievable optimum. This criterion alone makes it possible to determine whether a discussion may be perceived as a discourse or not.

(ii) Disadvantages of the model

Important disadvantages arise, however. An obvious one is that the application of the criterion of optimum realisation leads to the question of when, exactly, a given realisation has become optimal. This question, in turn, leads to two further questions: (1) which circumstances are to be taken into consideration in the optimisation?; and (2) which circumstances, where they collide with others, are to be optimised, and at what costs vis-à-vis other circumstances? The answers to these questions must be found in actual

33 The concept of discourse circumstances embraces discourse principles, the limited conditions of the world and the discourse procedure.

34 These rules may well be principles in the sense of the distinction between rules and principles. But these principles would be discourse principles of a second degree, which stem from the application of the discourse principles of the first degree that constitute the real discourse on the second level. To avoid conceptual confusion, the text pertains to rules alone.

35 Compare Alexy, *A Theory of Legal Argumentation*, p. 303.

36 Compare Alexy, *A Theory of Legal Argumentation*, p. 303.

discourses. However, actual discourses represent, at best, an optimal discourse relative to the given circumstances, the procedure of applying principles, and the discourse principles.³⁷ Therefore, the results of actual discourses are also relative to the given circumstances, the procedure of applying principles, and the principles of discourse.³⁸ Thus, actual discourses qua forms of real discourse can only produce relatively correct answers.³⁹ The relativity of the correctness of the results of actual discourses leads to the possibility of different discursively possible answers.⁴⁰ But the questions adumbrated in connection with the procedure of optimising demand a single answer each. Thus, the necessity for authoritative decisions comes into play. One has to decide on one out of the discursively possible answers. The degree of arbitrariness in such decisions may be reduced by institutionalising procedures for decision-making. This is possible, however, only to a certain degree, for the structure of these procedures for decision-making is once again subject to an actual discourse. In short, there is no escape from the necessity of decisions that infect the rationality of the entire optimisation process. The first disadvantage of the three-level model consists, therefore, in the necessarily non-perfect rationality of the procedure of optimisation. This, however, does not count as a particular disadvantage of the model presented here. Rather, necessity of decisions is a problem that accompanies every variant of discourse theory.

A completely different problem is the question as to which conditions ought to be seen as objectives of the discourse principles. As a starting point, Alexy's ideal conditions of the ideal discourse serve as a reliable solution. These conditions are neither completely justified (*letztliebegründet*) nor inclusive of the whole set of possible objectives of discourse principles. It is possible that there are other conditions of a genuine ideal discourse, perhaps unknown until now, and it is possible, too, that the conditions referred to above may have to be reduced to one another. Again, this second disadvantage as to the level of certainty vis-à-vis the main conditions is not a particular disadvantage of the three-level model. It always exists when an ideal discourse is considered. What is new in this model is the necessity of conditions that take up the means of realising the ideal conditions and that, as such, become objects of discourse principles. An example would be the infinite freedom from constraints.⁴¹

37 The procedure of applying principles is the linking element between discourse principles and discourse circumstances. As remarked above, it is necessary to decide which circumstances in which relation are relevant for the satisfaction of discourse principles. In addition, it is only a procedure of application that offers a method making it possible to choose between different "similarly optimal" solutions.

38 According to Alexy, the relativity of the concept of correctness has four aspects: "(1) the discourse rules; (2) the degree of their fulfilment; (3) the participants; and (4) the point in time." ("Problems", p. 61) Aspects (3) and (4) of his relativity scheme correspond in my scheme to the circumstances, aspects (1) and (2) are part of discourse principles and the procedure of application.

39 A uniquely or perfectly correct answer might well be achieved only in a discourse that is in every aspect ideal. Compare Alexy, "Problems", pp. 58–9; and above, n. 9.

40 Compare, for the concepts of discursive possibility and discursive necessity or discursive impossibility respectively, Alexy, *A Theory of Legal Argumentation*, p. 17. Alexy's distinction refers to discourse rules. Discourse rules exclude some discourse results "(as 'discursively impossible' ones) from the class of possible normative propositions, and thereby establish the validity (as 'discursively necessary' ones) of the contradictories of those excluded". All other results are "entirely consistent with the rules of discourse ('discursively possible)". It remains an open question as to whether the distinction of discursive possibility vs discursive impossibility or necessity is categorical, or is to be understood simply according to degree. The discourse rules are themselves the results of higher-ordered meta-discourses (e.g. the discourse-theoretic discourse), and as such they are perhaps only (meta)discursively possible as well. Whether this regress may be brought to a halt cannot be discussed here. In any case, as discursively necessary or impossible results have the same degree of justification as the basing discourse rules, they therefore have a higher degree of justification than that of a merely discursively possible result.

41 Compare above, n. 15.

The sketched disadvantages of the three-level model, which have not been listed exhaustively, present at the same time a further advantage of this model: it brings to light urgent problems that have persisted in discourse theory, problems that require a solution quite apart from whether the discourse principles have been introduced.

(b) THE RELATION TO ALEXY'S DISCOURSE THEORY

A new model does not only face the question of whether it offers advantages or disadvantages when compared to older models, but, more fundamentally, whether it counts as a new model at all. The model presented claims to serve as a starting point for a comprehensive reconstruction of Alexy's discourse theory. Three observations may help to clarify the relation between Alexy's discourse theory and the three-level model presented here: one observation concerns Alexy's discourse rules as principles, a second concerns Alexy's concept of a discourse principle, and, finally, a third observation is addressed to Alexy's own model of principles of discourse. (1) Alexy has already remarked that his discourse rules contain not only rules in the sense of his familiar distinction between rules and principles, but also principles: "The concept of rule is used in a wide sense here, embracing both definite obligations and obligations concerning optimisation."⁴² As far as I know, Alexy never saw this observation as a reason to develop a system of discourse principles. (2) Still, in a probably little-known paper, Alexy presents a discourse principle that is to be applied by way of optimisation, very much in the manner that the discourse principles presented here are to be applied.⁴³ Unfortunately, Alexy does not take up the precise meaning or content of this discourse principle, and he does not say how it is related to the 28 rules and forms of practical discourse summarised in his catalogue either. In any case, these two observations suggest that the concept of discourse principles in the sense of Alexy's differentiation between rules and principles is at any rate not alien to Alexy's discourse theory. (3) In his paper with Aulis Aarnio and Aleksander Peczenik, Alexy presented a model of principles of discourse⁴⁴ that has certain similarities to the three-level model introduced here. His model of principles distinguishes three levels as well, of which the second level, just as in the model presented here, is that of principles. But the similarities fade as soon as one takes a closer look at Alexy's model. At his first level, "the level of ideas", we find the "very vague" "general idea of practical rationality".⁴⁵ Even if there are similarities between the idea of practical rationality and the ideal discourse, the differences between these levels are significant. The second level of his model, the level of principles, purports to describe the "conception of rationality . . . in its entirety by means of six principles".⁴⁶ These six principles are: "(1) the principle of consistency, (2) that of efficiency, (3) that of testability, (4) that of coherence, (5) that of generalizability, and (6) that of sincerity."⁴⁷ These principles are, at the very least, not identical to the discourse principles at the second level of the model presented here.⁴⁸ At the third level, the level of

42 Alexy, "Problems", p. 48, n. 12.

43 Alexy, "Diskurstheorie", pp. 307–8.

44 Aarnio et al., "The foundation", pp. 266–70.

45 Aarnio et al., "The foundation", p. 266.

46 Aarnio et al., "The foundation", p. 267.

47 Aarnio et al., "The foundation", p. 267.

48 It may be the case that two classes of discourse principles have to be distinguished in the presented model. The first class would be a material class, in which the objectives would be the conditions of the ideal discourse together with the conditions for realising these. The second class would be a procedural class, in which the objectives might well be Alexy's six principles of rationality. At the same time, both classes would be linked by the actual discourse: the procedural principles would supply the criterion for the correctness of the procedure of applying the material principles, and the material principles would supply the criterion for the correctness of the procedural principles. The various questions arising out of such a conception cannot be pursued here.

rules, “the relatively vague and frequently colliding principles are defined and coordinated into a system of rules”.⁴⁹ The rules at this third level – and this reveals the differences as well as the ties between the two three-level models – are “expressed via the 22 rules and six forms of argument of practical discourse”⁵⁰ that are summarised in Alexy’s catalogue in his *A Theory of Legal Argumentation*.

4 The four-stage procedural model of law

The relativity of the correctness of those results attainable by actual discourses is the main discourse-theoretic problem that a system of rules for action faces, where it is based on actual general practical discourse alone.⁵¹ Where actual general practical discourse is concerned, there may be found two or more relatively correct answers to a single question. These answers might well contain “two incompatible normative statements”.⁵² Normative statements commanding that one do *p* or that one forbear from doing *p* are not suitable instruments for the control of human behaviour.⁵³ Thus, since it is possible to discern several relatively correct answers in actual discourse, one has to take a decision on behalf of one of these answers in order to control human behaviour. This decision may, in the end, be an arbitrary assessment.⁵⁴ A legal system provides for the possibility of minimising the discourse-theoretic weakness of the necessity of decisions or assessments in the field of

49 Aarnio et al., “The foundation”, p. 266.

50 Aarnio et al., “The foundation”, p. 271.

51 Altogether, Alexy points to three problems that a system of rules for acting faces if it is to be justified discursively: “the problem of knowledge, the problem of enforcement, and the problem of organization” (R Alexy, “Discourse theory and human rights” (1996) 9 *Ratio Juris* 209–35, p. 220; compare Alexy (“Nachwort”, p. 430), where only two problems are mentioned, the problem of knowledge (*Erkenntnisproblem*), and the problem of compliance (*Befolgungsproblem*); compare, too, Alexy, (“Diskurstheorie”, p. 307), where, in a slightly different terminology, he mentions the argument of knowledge (*Erkenntnisargument*) and the argument from force (*Zwangsargument*); and Alexy (*A Theory of Constitutional Rights*, p. 370, n. 97), where he adds to the “argument . . . based on the limits of practical knowledge” “an additional argument from force”). The problem of knowledge emerges from the relativity of correctness of the discursively possible results. It marks the weakness of the real discourse that “results from the fact that it does not offer a procedure which always allows for just one right answer by means of a finite number of operations” (Alexy, “Discourse theory”, p. 220). The problem of enforcement is prompted by the insight that “the correctness or legitimacy of a norm is something different” from compliance with it. “From the fact that discourses can generate insights but not always their corresponding motivations follows the necessity of rules backed by force.” (“Discourse theory”, p. 221) The problem of organisation results from “the fact that many moral demands and desirable aims cannot be met by individual acting and spontaneous cooperation alone” (“Discourse theory”, p. 221; Alexy gives examples of “the support of unemployed people or the help of a suffering country”). According to Alexy, the solution to these three problems consists in establishing a legal system. A legal system is capable of providing procedures of decision-making that contain the problem of knowledge; it may provide those norms that have been issued with compliance, so that a motivation of following those norms is produced, thereby overcoming the problem of enforcement; and it may solve the problem of organisation by providing forms of organisations that apply to assure the efficacy of certain ends. The problem of knowledge remains the main discourse-theoretic problem, for it emerges, owing to the weakness of discourse, as being only capable of producing relative correctnesses. Both other problems are nearly independent of the capacity of discourse (compare, for the problem of enforcement, Alexy, “Diskurstheorie”, p. 307: “Even if there were only necessary or impossible results, the transformation of these results into legal norms would still be necessary, since a consent to a rule does not imply necessarily that it is being followed by all.”).

52 Alexy, *A Theory of Legal Argumentation*, p. 207.

53 Compare Sieckmann (*Regelmodelle*, p. 84): “Mit der unmittelbar handlungsleitenden Funktion einer durch eine Geltungsaussage ausgedrückten Norm ist es . . . nicht vereinbar, daß zugleich *p* und nicht *p* geboten ist.”

54 The unavoidable arbitrariness of this assessment is mitigated considerably by the fact that all the alternatives from which the decision maker may choose have been shown to be relatively correct answers by discourse. Therefore, even the arbitrary decision maker can make a rational choice only, while all choices remain rational relative to the discourse.

rules for action or practical questions. The legal system is capable of doing this, according to Alexy, by introducing an “institutionalized procedure of law-making”.⁵⁵

The “legislative procedure of a democratic state”⁵⁶ offers such an institutionalised procedure. But a law-making procedure “is not capable of establishing in advance just one solution to every case”.⁵⁷ According to Alexy, there are at least two reasons for this: “the vagueness of the language of law and the possibility that a legal question is not regulated by the legislator”.⁵⁸ This problem in the procedure of legislation justifies the “necessity of . . . legal discourse”.⁵⁹ Those questions that remain open “even in legal discourse” are decided as rationally as possible by “institutionalizing a . . . form of court process”⁶⁰ that is as rational as possible. According to Alexy, these procedures of law-making and law-applying result in the realisation of the “ideal of discursive rationality as far as possible”.⁶¹

By means of this, Alexy has outlined a four-stage procedural model:⁶² “The four stages of the model are: (1) general practical discourse, (2) legislative procedure, (3) legal discourse, (4) court procedure.”⁶³ In the first stage, in actual general practical discourse, practical questions are discussed. For those questions that are not capable of being answered conclusively, the legislator determines a legislative procedure at the second stage. The legislative procedure is an attempt to realise the discourse principles on the level of legislation, which highlights the interplay of the presented three-level model and Alexy’s four-stage procedural model.⁶⁴ The high degree of abstraction of numerous laws, for example, fundamental rights, the finite character of our knowledge, which results *inter alia* in the vagueness of the language of law,⁶⁵ the constantly changing world, and the need for rapid decisions all lead to the fact that the legislator cannot decide on all open questions that arise in the application of laws. This task is relegated to the third and fourth stages. Legal discourse, at the third stage, offers possible solutions for those practical questions that still remain open after legislation. The third stage, that of legal discourse, differs from the first stage, that of general practical discourse, in so far as it reflects the limitations found in a

55 Alexy, *A Theory of Constitutional Rights*, p. 370. Alexy claims that there are good reasons facilitating the introduction of such an institutionalised procedure. “These reasons are not rational out of mere effectiveness, since they demand procedures of law-making, that do realize the ideal of discursive rationality as far as possible.” (“Nachwort”, p. 430) The introduction of such a procedure would then be rational not owing merely to effectiveness but owing to the demands of the discourse principles.

56 Alexy, *A Theory of Constitutional Rights*, p. 370, italics omitted. In another paper it becomes clear that Alexy strives, very much in the sense of the model of principles, towards an optimal realisation of the discourse ideal instead of a perfect or absolute realisation. According to Alexy, procedures of law-making are required that realise the ideal of discursive rationality as *far as possible* (compare Alexy, “Nachwort”, p. 430).

57 Alexy, “Nachwort”, pp. 370–1.

58 Alexy, “Diskurstheorie”, p. 308.

59 Alexy, “Nachwort”, p. 371, italics omitted.

60 Alexy, “Nachwort”, p. 431.

61 Alexy, “Nachwort”, p. 430.

62 With this model, Alexy claims to have combined “moral theory . . . with a theory of law” (*A Theory of Constitutional Rights*, p. 370).

63 Alexy, *A Theory of Constitutional Rights*, p. 370.

64 The formulation is adjusted to that introduced by Alexy (“Diskurstheorie”, p. 307, italics added). It reads: “The institutionalization of the parliamentary procedure of legislation based on the general right to vote is to be understood as an attempt to realize *the discourse principle* on the level of governmental legislation.”

65 Compare H L A Hart, *The Concept of Law* 2nd edn (Oxford: Clarendon 1994), pp. 124–36, especially pp. 127–8.

legal system in which legislation is prominent.⁶⁶ In legal discourse, one is not to ask “what is the absolutely most rational solution, but instead, what is the most rational solution in the legal system”.⁶⁷ Legal discourse can be nothing more than an actual discourse; therefore, conflicting discourse results might well be justified even at the third stage. The necessary decision⁶⁸ for one of these solutions is relegated to the courts at the fourth stage.⁶⁹

With this model, Alexy is in the position to contain the weakness of discourse-theoretic conceptions. Even more, he understands law as a “necessary medium of realizing practical reason in reality”.⁷⁰ This means that legal discourse “in its whole structure” would be “a necessary element of realized discursive rationality”.⁷¹ Thus, legal discourse had to be understood as the realization of general practical discourse.

5 Legal discourse as actual discourse

Despite the question of whether legal discourse is truly the realisation of general practical discourse, legal discourse, like every factually realised discourse, can only be an actual discourse. Thus, since legal discourses are actual discourses, they are only capable of producing relatively correct answers. This is to say that it is always possible to give more than one relatively correct answer to a practical question in legal discourses. If it is always possible to give more than one relatively correct answers to a single practical legal question, this precludes a single uniquely correct answer to a single practical legal question. This impossibility of uniquely correct answers follows from the non-ideal nature of actual discourses, allowing as they do only for relative correctness. Flexibility in the law as negation of the “one-right-answer” thesis is thereby discourse-theoretically necessary.

In any case, the necessity of flexibility in the law does not mean the end of objectivity in the law.⁷² Despite flexibility in the law there remains objectivity. The mistake is to suppose objectivity could be understood as obtaining absolutely, rather than relatively. The degree of objectivity to be reached in law depends on the circumstances of discourse, the

66 Compare Alexy (*A Theory of Constitutional Rights*, p. 371): “Just like the first procedure, this one is not institutionalized in any strict sense, but unlike the first it has obligations to respect statute, precedent, and legal doctrine.” These obligations are the reason for the characterisation of legal discourse as a special case of general practical discourse, as claimed by Alexy’s well-known and much-discussed special case thesis (compare *A Theory of Legal Argumentation*, p. 15).

67 Alexy, “Diskurstheorie”, p. 307.

68 Here the open result is the main discourse-theoretic problem, and it is, therefore, the main argument for the necessity of the fourth stage. In addition, however, the problem of enforcement and the problem of organisation arise vis-à-vis the justification of the necessity of the second stage, the legislative procedure.

69 The four-stage procedural model is, of course, merely the scheme of a far more complex process. The four stages affect each other to varying degrees, with effects that may not be contained, so to speak, within the stage. Knowledge gained in legal discourse may have an impact on legislative procedure, and the general practical discourse may be of immediate significance for legal discourse and, thus, for the judicial process with respect to questions that have not yet been resolved in legislation. Further breakthroughs in this linear development can be found in the limiting obligations of legal discourse (cf. above, n. 66). While the obligation to respect statutes follows the linear development, the obligation to respect precedents represents a breakthrough. In spite of these and numerous further breakthroughs in the linear structure of this model, it retains its justification for presenting the basic relations of general practical discourse, legal discourse, legislation, and the judicial process.

70 Alexy, “Nachwort”, p. 431.

71 Alexy, “Nachwort”, p. 431.

72 The end of objectivity seems to be what Neumann fears when he states that the possibility of several relatively correct answers would render the judge’s search for the right answer superfluous: “If the judge assumes that several alternative decisions are justifiable in the same way (!), then the search for the right answer is superfluous” (for this and all other following quotes cf. Neumann (*Wahrheit im Recht*, pp. 39–41). Neumann holds that it may be “an insight of legal theory that in at any rate numerous cases different

degree of satisfaction of the discourse principles, and the discourse principles themselves. As long as discourse participants have not become perfect agents, absolute objectivity is beyond reach. In so far as legal discourse can claim to offer the optimal form of legal discussion according to the discourse principles, however, law will be as objective as the circumstances permit.

72 [continued] decisions can be justified with good reasons”, but this does not apply “as a maxim of judicial acting”. Instead, the judge ought to “act in his praxis of decision *as if* only one single decision were correct in every case” (italics original). Although this does not correspond “to the ‘objective results’ of legal theory”, it does correspond “to the perspective of the judge, who has to search for the right answer, not to throw dice with the eye to arriving at one of several justifiable results”. In the justification of decisions, an “orientation aiming at a ‘uniquely correct decision’” is indispensable, for a “‘justification’, according to which the judgment might have been different, would not only be strange but would indeed be *wrongful*” (italics added). Therefore, “the idea of the uniquely correct decision” had to be implemented “as a regulative idea” both “in legal science and in legal practice” (compare for the one-right-answer as regulative idea Alexy, “Problems”, p. 58). The alternative to this “switch from a legal-theoretic to a legal-practical argumentation” consists in taking seriously the necessity of the flexibility in law. If it is accepted that always – or in Neumann’s words at least in numerous cases – several alternative decisions are relatively correct – or in Neumann’s terminology are justifiable – then it has to be accepted that in the end authoritative decisions are not only unavoidable but necessary for any legal system. He who, like Neumann, flirts with a legal-practical argumentation, shrinks back from this consequence. It is not wrongful to take the authority of the judge seriously as a consequence of the discourse-theoretic weakness of the necessity of decisions. It is wrongful, as Neumann proposes, to hide the authority of the judge behind the not realisable claim of being able to find, in every case, the right decision on the basis of juridico-practical considerations. Legal science, including legal theory, ought rather to concentrate on the limitation of the unavoidable, in the end arbitrary, area of the judicial decision as far as possible, instead of shrouding this area from view.

