

# Some Problems with Robert Alexy's Account of Legal Validity: The Relevance of the Participant's Perspective

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*Abstract.* This article examines Robert Alexy's account of legal validity. It concludes that Alexy's account of legal validity lacks sufficient support given the author's methodological commitments. To reach that conclusion, it assesses the plausibility of simultaneously maintaining that the participant's perspective has conceptual privilege in the explanation of the nature of law, that legal discourse is a special case of general practical discourse, and that unjust considerations can be legally valid norms.

In this article I will argue that Robert Alexy's account of legal validity lacks sufficient support given the author's methodological commitments. In this task I will assess the plausibility of simultaneously maintaining that the participant's perspective has conceptual privilege in the explanation of the nature of law (Alexy 2007a, 52; Alexy 1994, 56 fn. 35), that legal discourse is a special case of general practical discourse (Alexy 1999b, 374–84), and that unjust considerations can be legally valid norms (Alexy 1994).

According to Alexy, participants in legal practice, in contrast with mere observers,<sup>1</sup> are those who question legal answers and adduce reasons in support of the correct legal answers regardless of whether they are within the institutional framework or not (Alexy 1994, 47; Alexy 1998, 207). For Alexy, asserting the participant's conceptual privilege implies that the

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<sup>1</sup> For Alexy (1994, 47; 1989a, 171), the observers are those who question how legal matters are decided within the context of a particular legal system.

understanding of the nature of law depends on the articulation of the conceptual presuppositions implied in their perspective, and that such articulation must be reflected in the correct concept of law.<sup>2</sup> The analysis of the conceptual presuppositions implied in the participant's perspective is, for Alexy, the way that makes it possible to account for the ideal dimension of law that distinguishes it from naked power (Alexy 2003, 13).<sup>3</sup> He explicitly notes that an explanation of the correct concept of law includes the sense in which law is constituted by valid norms (Alexy 1994, 51, 201). Bearing this in mind, I will assume in the article that, for Alexy, an explanation of the correct concept of law includes an account of legal validity, and that the participant's perspective is crucial for its proper explanation.

### 1. The Participant's Perspective in General Practical Discourse

For Alexy, law is a special case of general practical discourse. It is therefore important to outline the way in which the author understands general practical discourse. In this case the participant's perspective has conceptual privilege as well; that is, to understand general practical discourse it is necessary to take into account the conceptual commitments of those who formulate statements about what should be done. The author maintains that those who argue about what should be done formulate statements necessarily bounded to a claim to correctness.<sup>4</sup> Those who from the

<sup>2</sup> Alexy (2007b, 164; 2007a, 52) states that concepts have two dimensions: a conventional one, linked to the social rules that establish the meaning of words; the other ideal, linked to the claim of adapting concepts to the objects to which they refer. This distinction is present in his analysis of the concept of law. In addition, in his theory of law, when distinguishing between affirmations made by participants and observers, he seeks to highlight the different conceptual presuppositions implicit in the different types of affirmations. Alexy then concludes that the articulation of the conceptual presuppositions implicit in the participant's perspective is the relevant one in the explanation of the nature of law, reflected in the correct concept of law. I analyzed these Alexy's theses in greater detail in Gaido 2010, which is a revision of Gaido 2009.

<sup>3</sup> One could argue that assigning conceptual privilege to participants presupposes that law has an ideal dimension. Given that Alexy considers that law cannot be reduced to the naked exercise of power, he regards the articulation of the conceptual commitments of the participant's affirmations as a central issue. Therefore the participants' conceptual privilege presupposes that law has a normative dimension. If this is so, even admitting that such a normative dimension is apprehensible only from the participant's perspective, it is still possible to question whether an explanation of this dimension is relevant in the explanation of the nature of law. Alexy considers this alternative mistaken, and it is not my purpose here to probe into this issue.

<sup>4</sup> Alexy's words on this matter are: "Whoever drops the claim to correctness generally loses the possibility to state assertions of any kind because only such speech acts which raise a claim to truth or correctness are assertions. The elimination of the possibility to assert something would change our language and the way we understand ourselves and thus our lives completely. Instead of judgments and assertions only feelings and opinions would be left, justification would become persuasion, and manipulation and strong beliefs would take over the place of correctness and truth. Everything would be subjective, nothing objective."

position of the participants deny the claim to correctness incur a performative contradiction; that is, a contradiction between what is said and what is necessarily implicit in the act of speaking.<sup>5</sup>

Indeed, for Alexy, maintaining that something must be done implies asserting its correctness, which therefore involves being disposed to offer reasons that justify such an assertion. In this way, the author links the notion of the claim to correctness to a claim to justifiability. He additionally notes that not any reason can be taken as a justificatory reason, but only those that are the result of a discourse guided by rules that define its rationality (Alexy 1989b, 191–2). The idea of justification that Alexy considers relevant here is linked to the idea that practical discourse is structured by certain rules.<sup>6</sup> In particular, all regulatory practices are bound to the rules that define rational discourse. His thesis is that the rules of rational discourse are necessarily and universally connected to all regulatory practices via the claim to correctness.<sup>7</sup>

Although I am not interested here in a detailed analysis of the constitutive rules of rational discourse, it is possible to point out that they impose upon the user the acceptance of the other person as an equal—that is, as an interlocutor—and the defence of what is asserted before

This clarifies the sense in which the claim to correctness is necessary. It is necessary relative to a practice that is essentially defined by the distinction of true or correct and wrong. Yet, this practice is a practice of a special kind. We can indeed try to dismiss the categories of truth, correctness, and objectivity. But if this should succeed, our talking and acting will be different as it is now. The price would not only be high. To a certain degree it would consist in ourselves" (Alexy 1999c, 27). Challenging this thesis goes beyond the purpose of this article.

<sup>5</sup> Alexy (1994, 67; 2003, 12; 1989a, 178ff.) maintains that, in this case, it is possible to talk of a "conceptual mistake" in a broad sense. This is so if by the notion of "conceptual mistake" we understand a violation of the constitutive rules of speech acts, or in other words, linguistic expressions as actions. Alexy (1992, 231–51) reaches this conclusion by articulating an argument he calls "pragmatic-transcendental." For a general presentation of these types of arguments in the context of Alexy's theory see Gaido, 2010.

<sup>6</sup> That implies that participants in general practical discourse cannot presuppose sceptical meta-ethical positions when they predicate that an action ought to be done. Alexy does not imply that the existence of sceptical individuals in meta-ethical matters is impossible, but rather that their position is inconsistent with the idea of being committed to some type of regulatory activity. In any regulatory activity, according to this presentation, the existence of an objective rationality is presupposed—that is, of an idea of rationality independent of possible subjective components—which leads to the idea that a non-sceptical meta-ethical commitment is inescapable, and that its negation should be understood as a performative contradiction. In this line of thought, he assumes that any regulatory practice presupposes that those involved in it at least *pretend* to maintain a non-sceptical meta-ethical position. For the author, this is compatible with the existence of hypocritical agents (Alexy, 1989b, 214ff.).

<sup>7</sup> Regarding the universal character of the connection between the ideas of claim to correctness, claim to justifiability and the rules of discourse, Alexy maintains: "The rules of discourse do not define a particular form of life, but rather something which has validity or relevance in any form of life whatsoever, albeit to a very variable degree. To this extent discourse theory is an indication of the potential for reason in human reality" (Alexy 1992, 242).

anyone, thus implying a dialogical nature.<sup>8</sup> In particular, it is important to point out the opposite character of the rules of discourse with regard to those that only pursue the maximization of profits based on self-interest (Alexy 1992, 234ff.). Equality and universality form the foundation of a universal procedural morality, which determines how one should act. The theory of discourse presupposes that it is a distinctive feature of human beings that they potentially have the capacity to distinguish correct reasons from those that are not, regardless of the particular cultural contingencies to which each individual is bound. Alexy does not deny the existence of contingent and erroneous normative and empirical convictions as a starting point of the argumentation. However, he also considers that a process of rational argumentation allows—and leads to—its modification. Consequently, he understands that each individual has the capacity to identify good and bad reasons after a rational discussion. This capacity is only potential, whereby success in identifying the good and bad reasons is not a certain issue. On the other hand, pragmatic deficits can lead to a failure to satisfy the correctly identified reasons. Additionally, it is possible to point out that the capacity for distinguishing the correct reasons from those that are not—after a rational discussion—presupposes, for Alexy, the capacity of speech required to take part in such discourse. With regard to this interpretation, a person lacking the speaking skills referred to would be unable to identify the correct reasons (Alexy 1992, 236–7; Alexy 2003, 11; Alexy 1999c, 24).

It is assumed that different kinds of reasons, ethical-political, pragmatic, and those related to justice, may validly enter into conflict in general practical discourse.<sup>9</sup> In spite of this, Alexy considers that in an ideal

<sup>8</sup> Alexy (1992, 235–6; 1989b, 188ff.) classifies the rules of discourse into two groups. On the one hand, there are those that refer to the structure of arguments, in a monological form (among them those that demand that there is no contradiction, the coherent use of predicates, linguistic-conceptual clarity, the truth of empirical premises, the deductive completeness of arguments, consideration of consequences, weighting, interchanging roles, the analysis of the emergence of moral convictions). On the other hand, there are those whose aim is to ensure that the practical argumentation is impartial, of a non-monological type (among them, those that maintain that: any speaker can take part in the discourse, anyone can question any assertion, anyone can insert any assertion in the discourse, anyone can express their opinions, desires and needs, no speaker can be deprived through coercion within or outside the discourse of a chance to exercise the rights established by the previous rules). For the author (Alexy 1992, 238; Alexy 2010, 172), exercising discourse is a necessary condition of all correct—i.e. rational—practical grounding. Practical correctness, in this sense, necessarily depends on a communicative structure.

<sup>9</sup> As is widely known, Alexy borrows this distinction between reasons from Habermas' theory of discourse (Habermas 1991, esp. 101–7). In this theoretical context, the "ethical-political reasons" refer to the collective self-understanding implied in traditions and the "pragmatic reasons" refer to the adjustment of means towards obtaining certain objectives, and considering interests and commitments. With regard to the notion of "reasons of justice" it is necessary to point out that Alexy uses the notion in at least three different senses: a) as those considerations that meet the criteria determined by the rules of discourse; b) as that which is

rational discussion where different considerations interact, the conclusion that must be reached by any rational agent, that is, one who respects the rules of discourse, is that there exists an order to be respected where considerations of justice have priority.<sup>10</sup> In highlighting the different nature of the reasons that could be part of the general practical discourse as well as its hierarchical nature, I want to stress its complex character. This is relevant to the task of analyzing Alexy's legal discourse thesis as a special case of general practical discourse, and determining the idea of rationality that Alexy assigns to law.

It is timely to note that for Alexy the idea of rationality that is pursued through general practical discourse is not a zero-sum game. This means that he accepts a less than perfect satisfaction of rationality. Indeed, according to Alexy, the idea of rationality admits degrees of execution. As long as in a real discussion the rules of rational discourse can be followed to different degrees, the satisfaction of such an idea will be greater or lesser.<sup>11</sup> For Alexy, this is true because: a) the rules of discourse do not prescribe which normative premises the participants must use as a starting point, and this makes it possible for them to use a variety of normative convictions; b) the steps of the argumentation are not fully established; and c) some rules of discourse can only be approximately fulfilled (Alexy 1992, 244–5). Thus, in regulatory practice, it would be feasible to reach different discursively possible results, some of which would adjust to the idea of rationality more than others.

equally good for all (e.g., elementary human rights, such as the right to life, the right not to be subjected to torture, the right not to be subjected to slavery); c) as the exigency of a correct distribution of goods and burdens, advantages and disadvantages, rights and duties. This last idea of justice does not include, for Alexy, the existence of a single criterion of correctness of distribution. This is compatible with different conceptions of justice (Alexy 2010, 171ff.; Alexy, 1999b, 239; Alexy 1997). In this case, when it is asserted that reasons for justice can intervene in general practical discourse, b) and c) are considered to be the relevant senses.

<sup>10</sup> Alexy's position regarding the priority of reasons in the context of rational practical discourse is set out when he maintains: "The priority of the good over the suitable results from the fact that even the highest degree of suitability of a means for an end does not count anything if the end is of no value at all. Suitability is attractive only if the ends or goals have some attraction. The priority of the just over the good is a much more difficult matter. The good as a subject of ethical discourses expresses non-universal individual and collective values. Something can be good or of value for some people without being good or of value for all people. The just represents the universal point of view. Its priority can be substantiated only by showing that the moral point of view is necessary for all. This can be done by reconstructing necessary presuppositions implicit in elementary speech acts like asserting, asking, and arguing, inevitable or indispensable for all. It shall be assumed here that such a substantiation of the universal validity of the moral point of view is possible. Should this assumption be true, universal validity would imply priority of the just over the good" (Alexy 1999b, 378–9; in this same sense, Alexy 2003, 14).

<sup>11</sup> Alexy 1987, 418–9. In the argumentation, however, it is presupposed that the answer that is given is "the" correct one.

However, there are considerations which Alexy excludes as admissible results in all cases.<sup>12</sup> Alexy considers that rules or judgments of duty violating certain basic human rights can never be the result of any rational discourse, and that those judgments that assert them must necessarily be so, regardless of the normative convictions they start out from.<sup>13</sup> Does this imply that it is possible for unjust considerations, which do not violate human rights, to be the possible result of ideal discourse? It seems to me that Alexy's answer in this regard should be negative. According to the idea of rationality established by the rules of discourse, it must be maintained that any unjust consideration is discursively impossible, not only those violating human rights. Let me try to show why I think this is so.

Considering the interpretation that I believe to be plausible, what Alexy is doing when he refers to norms that violate basic human rights as a discursively impossible result, is exemplifying what he considers there could be no doubt about. However, this cannot lead us to the conclusion that only results violating human rights are discursively impossible. Every result obtained by violating the rules of discourse should be discursively unjustified. The rules of discourse should exclude any unjustified result as possible.<sup>14</sup> It is true that the rules of discourse can lead to a variety of results, all of them admissible. However, this does not allow one to assert that unjust considerations can be taken as discursively possible results in an ideal discourse. This does not imply denying that such unjust results may exist in real discourse, nor that these results vary in their degree of detachment from the idea of rationality.

<sup>12</sup> An "ideal discourse" is, for Alexy (1999c, 30–1), one in which the search for the correct answer is obtained in conditions of unlimited time and participation, complete absence of coercion in the production of complete linguistic and conceptual clarity, full empirical information available, the skill and the desire to interchange roles, and a complete absence of prejudice. A "real discourse," on the contrary, is defined by the restricted character of the conditions mentioned above.

<sup>13</sup> Alexy formulates this idea by saying: "The outcome of ideal discourse is, in principle, purely speculative. Yet, in some elemental cases there is sufficient certainty about what is discursively necessary or impossible. Equality of human rights is one of these elemental cases. Unequal human or basic rights cannot be justified in an ideal discourse because in an argumentation governed by freedom, equality, and rationality arguments for unequal distribution of human rights will not last" (Alexy 1999c, 35–6). In the same line of argumentation, Alexy maintains: "My thesis about a core of fundamental rights which have eternal validity is well-founded, if there are some elementary cases—like groundless killing—in which the extreme injustice and unlawfulness is clear for all rational beings [...] Some answers are discursively necessary, for instance those concerning the core of fundamental rights, some are discursively impossible, for instance those implying a violation of these rights, and some are only discursively possible" (Alexy 1995, 107–8; see also Alexy 2010, 172–3).

<sup>14</sup> In this line of thought Alexy maintains: "A judgment is merely discursively possible when one person can justify this judgment without violating any rule or principle of discourse, while another person, at the same time, can do the same with respect to the contradictory of this very judgment" (Alexy 2010, 173; see also Alexy 1994, 151–2).

It is important to keep these distinctions in mind if one takes into account—as already pointed out—that for Alexy, legal discourse is a special case of general practical discourse and what is unjust could be legally valid and, therefore, a reason for a norm.<sup>15</sup> As we shall see below, Alexy considers an unjust legal norm, which would be discursively impossible in an ideal discourse to be legally defective (Alexy 1989a, 172). However, this does not render the norm legally invalid nor does it prevent it from having the power of justifying other norms. My question is whether his argument regarding legal validity is compatible with his initial methodological commitments which give conceptual privilege to participants and imply that legal discourse is a special case of general practical discourse. In the following section I will explore a possible answer.

## 2. The Participant's Perspective in Legal Discourse

In Alexy's theory, participants in legal practices are characterized by their involvement in linguistic practices composed of specific speech acts whose purpose is to determine what is legally forbidden, allowed or obligatory. Alexy maintains that as regulative speech acts, they are necessarily linked to a claim to correctness (Alexy 2008, 290ff.). This makes legal discourse a special case of general practical discourse, and implies that the claim to justifiability linked to correctness can only be interpreted by means of the rules of discourse (Alexy 1989b, 212ff.).

At this point I would like to revisit the issue recently posed. If for Alexy those considerations, that according to the rules of discourse are discursively impossible outcomes, can be legally valid norms (with the power to justify other norms), then to what extent does legal discourse share the idea of rationality of general practical discourse? If according to the participant's perspective law must satisfy the rationality test being constituted by the rules of discourse, it is not possible to conclude—without contradiction—with the existence of a test of legal validity that allows unjust regulatory provisions to be considered law. This is the case because such a test could not be considered anything but a specific test of rationality as part of the general test of rationality. According to the idea of rationality linked to the claim to correctness, unjust considerations are discursively impossible in an ideal discourse, and a test of legal validity that aspires to fulfil this idea of rationality should deny legal validity to such considerations. On the contrary, as I said, Alexy maintains that a consideration about what should be done, though unjust, could be legally valid. However, it will be legally defective by virtue of the idea of rationality linked to general practical discourse being introduced by the claim to correctness. Yet what remains without a satisfactory justification

<sup>15</sup> Alexy (2002) talks of legal rules and principles as reasons for norms.



are the reasons that uphold its legal validity, since, as I already pointed out, from the participant's perspective any unjust consideration is discursively impossible in an ideal discourse. What I want to stress here is that the idea of rationality linked to general practical discourse does not provide us with a justification for the legal validity of unjust considerations; not at least on an ideal level.

It is true that the claim to correctness in the legal domain has specific characteristics. For Alexy, it is connected not only with the value "justice," but also with the value "legal certainty" and this affects the type of reasons that will be considered valid in the legal context.<sup>16</sup> Before elaborating on this argument, it is necessary to establish what Alexy has in mind when referring to the value of "justice" in this context. I am inclined to think that the idea of justice that Alexy is interested in stressing is primarily procedural. Bearing in mind that Alexy uses the term "justice" ambiguously,<sup>17</sup> but explicitly maintains that, given that the law formulates a claim to correctness, it must fulfil the rules of discourse (Alexy 2008, 290ff.), it is possible to conclude that the notion of "justice" *prima facie* implied here is one related to the idea of a procedure aspiring to satisfy the rules of discourse. It is also true that since following the rules of discourse means there are certain impossible and necessary results, then, there is a sense in which also a substantive notion of "justice" is at stake. The value of "legal certainty," on the other hand, is the specific value that the claim to correctness incorporates into the legal domain.

The value "legal certainty" and the value "justice" are not contradictory values in principle. For Alexy, law is an instrument necessary to overcome the unavoidable gaps of rationality found in general practical discourse.<sup>18</sup>

<sup>16</sup> The relationship between the values that define law and the claim to correctness is explained by Alexy in the following terms: "That the claim to correctness, which is necessarily connected with the law, has two dimensions implies that law is necessarily connected with two kinds of values or principles, those of the authoritative dimension of law and those of its ideal dimension. The most abstract value or principle of the authoritative dimension is legal certainty, the most abstract value or principle attached to the ideal dimension is justice. Law would not be law if it did not comprise these principles, which, as principles or values, say what law ought to be. This implies that it is impossible to say what the law is without saying what it ought to be. Indeed, it is true that law is a social institution. Its being a social institution does not, however, preclude its being a moral entity. Law is a part of reality that refers necessarily to the ideal" (Alexy 2007a, 52–3).

<sup>17</sup> See footnote 9.

<sup>18</sup> Alexy considers that law is required by reason on account of three basic problems: the problem of knowledge, the problem of execution and the problem of organization. He characterizes these problems as follows: "For discourse theory, the problem of knowledge 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. This leads to the necessity of decisions in a legally organized procedure, for example, on the basis of the principle of majority. The problem of enforcement comes into existence because the insight into the correctness or legitimacy of a norm is something different from its observance. Consequently, the unanimous judgement of a norm in a discourse as just and therefore correct does not necessarily occasion its observance by all. But if some are without consequences allowed to violate a norm, its



Alexy maintains a strong thesis which states that without law practical reason is unattainable (Alexy 1992, 244ff.; Alexy 2010, 173). In the face of the different discursive outcomes of rational discourse, and the actual need to decide, it is rational (that is to say, it can be based on practical discourse) to come to an agreement regarding a procedure that will limit the field of what is discursively possible in the most rational way possible (Alexy 1989b, 287ff.). According to this presentation, law is needed to: a) ensure the presuppositions that make rational discourse factually possible; b) make solutions possible where there is no discursive agreement; c) make it possible to achieve obtainable results exclusively by means of coordination; d) ensure the observance of practical solutions. Along with the value of "legal certainty" law puts an end to practical controversy. We thus see why the claim to correctness formulated in the legal domain does not imply, for this author, that what is asserted is itself rationally justifiable, but only with reference to a particular legal order (Alexy 1989b, 212). The claim to correctness in the legal domain is a reduced claim.

According to this reading, on an ideal legal level, the values "justice" and "legal certainty" can be satisfied without conflict. On this level, characterized—as readers will recall—by conditions of unlimited time and participation, complete absence of coercion in the production of complete linguistic and conceptual clarity, full empirical information available, skills and desires to interchange roles, and the complete absence of prejudice, conflicts between the values could not occur, since the legal field would only make a choice between the different discursively possible options. In real legal discourse, however, conflict between the values of "justice" and "legal certainty" is feasible. One can think of cases where such values come into conflict in real legal discourse. For example, it is possible for general or individual regulative dispositions to be unjust, that is, discursively impossible, even though they have satisfied the legally prescribed procedure for their creation or application. It seems reasonable to me to sustain this.

What I find problematic is an account of legal validity that simultaneously gives conceptual privilege to the participants and admits as legally valid unjust considerations.<sup>19</sup> And Alexy subscribes to this position. In the case of possible tension between the values "justice" and "legal certainty" Alexy maintains that there are reasons to grant privilege to the value of "legal

observance can no longer be demanded of anyone. From the fact that discourses can generate insights but not always their corresponding motivations follows the necessity of rules backed by force, and with that the necessity of law. The problem of organization is caused by the fact that many moral demands and desirable aims cannot be met by individual acting and spontaneous cooperation alone" (Alexy 1996, 220–1; see also Alexy 1999c, 32–3).

<sup>19</sup> For further arguments related to the problems that arise when Alexy's thesis of the claim to correctness and his account of legal validity are simultaneously maintained, see Heidemann 2005, esp. 145–6. Heidemann's arguments rest on considerations in the philosophy of language but make points that are complementary to those of this article.

certainty" over the value "justice,"<sup>20</sup> except when the threshold of extreme injustice is overstepped (Alexy 1999a). Alexy reaches this conclusion through his argument—borrowing from Radbruch—that only extreme injustice excludes what is extremely unjust from the domain of what is legally valid. According to this test of validity, it is possible to think of a legal system made up of regulatory provisions all of which are more or less unjust.

The argument that there can be valid and unjust legal norms presupposes that the value "legal certainty" prevails over the value "justice," and relies, for Alexy, on a balance of these two values. What balance does Alexy have in mind? In an ideal balance, that is, a balance where the rules of discourse are followed without any constraint, reasons of justice always prevail. In a real balance if the value of "legal certainty" prevails, what must be concluded is that the rules of discourse were broken, and that it is not possible to talk about the considerations reached through this discourse as legally valid, that is, as reasons that justify norms. To be able to talk about unjust considerations as valid legal norms at an ideal level, further arguments are required—arguments that are not embedded in the idea of rationality incorporated through the claim to correctness to legal discourse. So what is needed is an argument that supports the particular idea of rationality that Alexy seems to think rules law. It has been argued that the norms of discourse can be better understood as principles, rather than rules; hence, they are subject to balancing. Were it true, in cases where legal certainty prevails over justice, there would be no violation of the norms of discourse, but a temporary resignation of justice in favour to legal certainty (Bäcker 2008, 117ff.). But it is not possible to go that far with this strategy, since in an ideal unrestrained discourse considerations of justice would always prevail in the balancing.

Incidentally, I would like to note that I find curious Alexy's incorporation of Radbruch's formula in his account of legal validity. In order to justify the prevalence of the value of "justice" over the value of "legal certainty" in certain cases, as I pointed out, Alexy employs Radbruch's argument of extreme injustice, which seeks to safeguard certain human rights. Alexy considers that without a normative argument of this sort, it would not be possible to resolve such a conflict, and that a concept of law which excludes extreme injustice is preferable to one which admits it (Alexy 2008, 296ff.). The reason why Alexy resorts to Radbruch's formula is that he does not consider that the argument of extreme injustice can be extrapolated from the argument stating that the law formulates a claim to correctness.<sup>21</sup>

<sup>20</sup> According to some of Alexy's writings (Alexy 1994, 152), it is possible to assert that for Alexy the basis of maintaining that considerations of justice do not always have priority is linked to the idea that the instrumental value of law cannot be assessed norm by norm, but rather taking the legal system as a whole.

<sup>21</sup> This seems clear when Alexy maintains: "The question remains of whether there also exists a classifying connection as defined by the Radbruch formula, which says that extreme

However, I think there are reasons to believe that such a conclusion is not accurate. As far as from the thesis of the claim to correctness is possible to conclude that unjust considerations could not be valid legal norms, it is obvious that from this same thesis it is possible to conclude that extremely unjust considerations could not be valid legal norms, either. If from the participant's perspective extreme unjust considerations are discursively impossible, we can verify why the incorporation of Radbruch's formula in the context of Alexy's account of legal validity is superfluous. It is not that the formula fails to do the job that Alexy wants it to do. Rather, it is a mere instance of the claim to correctness that participants incorporate into law.

If one recognizes with Alexy that outcomes that are discursively impossible certainly involve those dispositions that violate basic human rights, it is possible to see its coincidence with what he attempts to ensure by means of Radbruch's formula. What is extremely unjust, such as provisions that violate human rights, could never be incorporated into the law according to the participant's perspective, because it is an impossible outcome in the context of any possible rational discourse. If this interpretation is followed, Radbruch's formula would be regarded as providing additional support to the consequences of giving participants conceptual privilege and therefore connecting law to a claim to correctness and to the rules of rational discourse. It is giving conceptual privilege to participants that what is extremely unjust cannot be considered law.

The main point of this article was to point out that what Alexy owes us is a normative argument that justifies taking unjust provisions as valid legal norms, and an explanation of how with this further argument he is not abandoning the participant's conceptual privilege as methodological commitment. Therefore, what Alexy needs to show, given his initial methodological commitment, is the reason that justifies the claim that considerations of justice do not always prevail in determining legal validity.

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injustice is not law. To be sure, Radbruch formula cannot be deduced from the correctness thesis. The correctness thesis, taken alone, refers only to legal defectiveness [. . .] It is exactly at this point that one of the main problems of non-positivism comes to light. It can be cast in terms of the following question: 'Is it possible to apply normative arguments in order to determine the nature and the concept of law?' My answer is affirmative" (Alexy 2008, 296).

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