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BOOK REVIEW: THE CONCEPTUAL JURISPRUDENCE OF THE GERMAN CONSTITUTION: A THEORY OF CONSTITUTIONAL RIGHTS. By Robert Alexy, n1 trans., Julian Rivers. n2

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NAME: William Ewald n3

LEXISNEXIS SUMMARY:

... This welcome work is a scrupulous translation of Robert Alexy's *Theorie der Grundrechte*, a work which first appeared in 1986 and which has been one of the most influential recent contributions to European thinking about the adjudication of constitutional rights. ... Fortunately, the core chapters where Alexy sets forth his own theory of rules and principles are extremely lucid, and stand on their own; but an American reader coming to this subject-matter for the first time would find it helpful to begin with a survey exposition of German constitutional law - such as the excellent treatises by Kommers or Currie - before tackling the more doctrinal portions of Alexy's book. ... Very roughly, his response to the first line of argument is that constitutional principles, and in particular the principles of liberty and equality, do in fact underlie the whole of the legal order, including the system of private law, so that in principle even questions of tort or contract can turn into questions of constitutional law, provided that they raise the issues of constitutional principle in a sufficiently acute form. ...

TEXT:

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This welcome work is a scrupulous translation of Robert Alexy's *Theorie der Grundrechte*, n4 a work which first appeared in 1986 and which has been one of the most influential recent contributions to European thinking about the adjudication of constitutional rights. n5 The English version contains a new Postscript responding to the various criticisms the work has attracted in the past two decades. The theme of the book is the individual rights jurisprudence of the German Constitutional Court. Of the major European legal systems, Germany, with its "higher-law" Constitution, an expansive list of individual constitutional rights, and a special court explicitly charged with their enforcement, has been at the forefront of the development of a European human rights jurisprudence. The European Convention on Human Rights, and such national statutes as the British Human Rights Act 1998, have begun to spread constitutional rights adjudication throughout the rest of Europe. The work of the German Constitutional Court has provided one of the chief intellectual models, especially [*592] for the new constitutions of Eastern Europe. For over fifty years it has been generating constitutional opinions, often of exceptional quality, and has in the process developed the richest body of

constitutional case law outside of the United States; but it is a body of case law with close affinities to continental European styles of adjudication.

It is tempting (and also, with reservations, correct) to describe the spread of human rights constitutionalism as an expansion of the "American model" of judicial review. Certainly the post-war German Constitution was influenced heavily in its conception of judicial review (via Austria) by the American example; and the Constitutional Court has paid careful attention over the years to the work of the United States Supreme Court. But it is worthwhile to recall that the most vigorous period of American human rights adjudication did not begin in earnest until several years after the adoption of the German Basic Law, a document that already reads like a charter for the activism of the Warren Court. In important respects the constitutional developments in the two countries have run in parallel, in the same direction but independently of one another. But more importantly, as the bibliography and the discussions in this book make clear, the intellectual roots of European constitutional rights discourse have roots that go back centuries into the western legal tradition. The debates are rich and complex, the theoretical constructs highly sophisticated; so that what one sees in the wave of new human rights courts is not a simple transplanting of American law, but a highly creative borrowing and re-thinking, from many sources, of fundamental concepts that lie at the heart of the western legal tradition, and of which American law is but one outcropping. All of this means that there is an exceptional interest for American constitutional scholars in following the developments in Europe: even when they converge on the same result, the process of reasoning is often different enough to be theoretically illuminating.

Alexy's work provides a window onto an important corner of these intellectual developments. It deals with, and criticizes, a wide range of theories in German constitutional scholarship; if one reads it with care, one can get an introduction to at least some of the modern debates. But an immediate warning is in order. This is an important book, but it is by no means an easy book, and the reader must be prepared to work and to think in order to get at its meat. There are three reasons for this. First, the book was originally written as a Habilitation thesis - that is, [*593] as the thesis for the second German doctoral degree (in effect, the necessary credential for a tenured professorship). Habilitation theses, especially in law, tend to be long, heavily footnoted, and, above all, comprehensive - designed rather to demonstrate complete mastery of some doctrinal subject-area than originality. Alexy is by disposition and training an analytical legal philosopher, and his work, especially in the core theoretical chapters, is far more original than one typically finds in this scholarly genre. But he was also constrained to follow the model, and his thesis plunges deeply into constitutional doctrine and into the thicket of learned commentary. This is a mixed blessing. The discussions are informative for a reader trying to get a sense of the field as a whole; but often Alexy will spend several paragraphs discussing and then demolishing some theory that, objectively, was not worth the trouble. Moreover, the primary audience was academic specialists in German constitutional law. Even in its original version it was not a book aimed at a general audience, or even at typical law students, but rather at a hard core of experts. It therefore takes for granted a knowledge of the principal decisions and of the procedures of the Constitutional Court, as well as an extensive knowledge of the background scholarly debates. For this reason, one must be prepared to read attentively: it is a bit like overhearing one side of a faint conversation where one is not always entirely sure what is being discussed. The points of reference are subtly different, and one must try to fill in the gaps. Fortunately, the core chapters where Alexy sets forth his own theory of rules and principles are extremely lucid, and stand on their own; but an American reader coming to this subject-matter for the first time would find it helpful to begin with a survey exposition of German constitutional law - such as the excellent treatises by Kommers n6 or Currie n7 - before tackling the more doctrinal portions of Alexy's book.

A third difficulty should be mentioned. The translation, by Julian Rivers, is exceptionally painstaking; and Rivers himself provides an illuminating, lengthy introduction discussing of the relevance of Alexy's theory to the British Constitution. Scholarly translations of this quality are rare and difficult, requiring as they do not only linguistic mastery, but a mastery of the ideas. The job must have taken Rivers many months to complete, and [*594] the care he took is evident on every page. But the reader should be aware that the translation tends to the literal rather than to the elegant. Clearly this was a conscious choice, and one can have a high degree of confidence that Alexy's ideas are being accurately rendered. But there is not much music in the prose, and often one must be prepared to re-formulate the

English in order to bring it closer into line with familiar terminology. (Rivers gives an example of this process himself on p. xlv of his introduction giving his translation of Alexy's principles of equality, and then, three pages later, re-casting them "in more familiar language.") One is grateful for the accuracy of the translation, but it comes at a price in readability; and, once again, the reader will have to expend effort to get the full benefit of Alexy's arguments.

In other words, this is a challenging and difficult book, densely argued and densely written: it is not for beginners, nor for the faint of heart. But it is an important book, in many ways a brilliant book, and it richly repays close study. The intellectual project, the questions raised, the range of reference show a powerful legal mind at work on matters of fundamental importance. Alexy's purpose is to provide a systematic theory of the individual rights provisions of the German Constitution. His concern is thus limited to a single national constitution; he explicitly (p. 5) disavows any intention here to provide a general theory of constitutional government, let alone a general theory of human rights. His work is not intended as a contribution to history, or sociology, or political theory, or even legal philosophy - although it does contain long substantive contributions to legal philosophy, and specifically to the theory of norms and principles. Rather, it is an attempt at a comprehensive, rational reconstruction of the constitutional law of human rights as it has been articulated in the decisions of the German Constitutional Court.

But this is scarcely a narrow or simple enterprise, and perhaps the greatest merit of this book is that it makes clear just what is involved in such a task, and how difficult it is of completion. Alexy does not aim at a mere catalogue of constitutional case law: his demands on his theory are far more stringent, and closely tied to his view of the role of legal scholarship. For if the legal order in general, and the law of constitutional rights in particular, is not to be the arbitrary imposition of rules randomly chosen by the judge and backed by the force of the state, then it must be possible to give a rational, articulated account of how this entire body of law is put together - of its scope, of its processes [*595] of decision, of the unifying principles that hold it together - in such a way as to exhibit it as a rational construction, deserving of the loyalty of the citizen. That is a tall order; and Alexy is here concerned with only one portion of it, namely, the enterprise of logical and conceptual analysis - of revealing clearly just what this body of law amounts to, and how it is structured. This is not, for Alexy, the whole of constitutional theory, but is its indispensable foundation: "Conceptual and analytical clarity is an elementary prerequisite for the rationality of any field of knowledge. In practical disciplines, which are only indirectly controlled by empirical experience, this requirement has even greater significance" (p. 14).

It is important to observe that Alexy does not pursue logical analysis for its own sake, and that the point of his investigations is ultimately a moral one - that the legitimacy of the constitutional order depends on the possibility of just such a rigorous and principled account, and that it is above all the duty of legal scholarship to provide it: "If there is no clarity in the structure of constitutional rights and constitutional rights norms, then there will be no clarity in constitutional adjudication, either" (p. 15). In particular:

Without a conceptual-systematic exposition of law, legal scholarship is not possible as a rational enterprise. The measure of rationality of legal jurisprudence depends to a large extent on the standard it reaches in the analytical dimension... . To the extent that the study of constitutional rights can distance itself at all from political rhetoric and the vacillating battle of world-views, this is the work of the analytical dimension (p. 18).

In adopting this position, in advocating a turn towards rigorous conceptual analysis, Alexy is very much taking sides in the long-standing debate between "formalists" and "anti-formalists" in German legal theory. Roughly speaking, as in America, the modern tendency has been to denigrate the approach of the "mere formalists" of the nineteenth century. (This is of course no coincidence, since Holmes, Pound, and Llewellyn were all influenced in particular by the anti-formalist arguments of nineteenth-century German legal scholarship, and in particular by the works of Rudolf von Jhering.) Alexy consciously takes his stand against the anti-formalists, and with the analytical tradition represented by Gerber, Windscheid, Jellinek, Laband and Kelsen - a tradition which he seeks to marry to the work of modern analytical moral philosophers like Rawls, Hart, Hare, Dworkin, [*596] and Raz. That such a marriage is now seen as natural and

a rich mine of jurisprudential ideas is in no small measure a consequence of Alexy's book; but in 1986 it was far from a commonplace. He quotes Wesley Hohfeld repeatedly and with relish on the need for conceptual clarity in law, and skillfully deploys an arsenal of technical tools (mostly coming from deontic logic) in his quest for rigor. He also deploys a dry irony to devastating effect. After discussing the protests of the anti-formalists against Jellinek's theory, he remarks, "These comments, which could be increased..., contain the most important headings of a general critique of...Jellinek's status theory. It goes: formalism, abstraction, spatialization, isolated individual, obsolete. The counterparts are: reality, concrete, mediation, common life/society, current" (p. 175). Or again, he remarks:

The criticism of "spatial thought processes" seems to go further than mere formality. According to Rupp, "thinking in spatial categories is the enemy of all legal academic attempts to conceive of law as a social phenomenon." In the context of our discussion of status theory, the idea of a sphere of freedom was explicitly included." A sphere of freedom is none other than a class of specific liberties. So long as one understands the idea of a sphere of freedom in this sense, it is not only harmless, it is indispensable. Relating to classes of objects is an unavoidable element of thought and speech (p. 177).

In a pregnant remark, Alexy describes his work as standing in the tradition of "conceptual jurisprudence" (p. 18). The remark was no doubt intended to startle (the American equivalent would be to claim to be working in the formalist tradition of Langdell), but it also provides a useful historical orientation. Nineteenth century conceptual jurisprudence was in fact an extremely rich and sophisticated movement (far more so than Langdellian legal science) which systematically re-thought and re-organized the conceptual categories of Roman law, and thereby provided the intellectual foundation for the German Civil Code of 1900. It also, in the process, provided the basis for a great deal of subsequent private-law theorizing, not only in Germany and Austria, but also in France, Italy, and Latin America. The core accomplishment was the creation of the celebrated (and controversial) "General Part" of the Civil Code, in which the fundamental concepts of private law, at a high level of abstraction, are gathered together and placed in a systematic arrangement. Alexy's work can be viewed as an ambitious attempt [*597] to provide German constitutional law with its own "General Part"; and it shows just what is required in such an enterprise, and how difficult it is to carry through successfully. In the spirit of conceptual jurisprudence, Alexy does not attempt directly to recount and to analyze the individual decisions of the Constitutional Court, but rather to unpack the basic conceptual apparatus that underlies its work.

The core of Alexy's analysis is found in Chapter Three, which is devoted to the structure of constitutional rights norms. There he presents the arguments for his core thesis, namely, that constitutional rights are principles, and that principles are "optimization requirements." His theory in important respects resembles (and was influenced by) Dworkin's theory in *Taking Rights Seriously*.⁸ Like Dworkin, he takes the distinction between rules and principles to be fundamental to constitutional theory; like Dworkin, he gives principle-based reasoning priority over rule-based; unlike Dworkin, his category of "principles" embraces collective goals as well as individual rights. It is this part of his theory - the theory of principles as optimization requirements - that has given rise to the most discussion and the most controversy. Broadly speaking, the criticisms have come from two directions. On the one hand, defenders of the traditional boundary between public law and private law have charged that the "optimization requirements" would swallow up private law, ultimately turning all of law into constitutional law; on the other, defenders of individual rights have charged that the "optimization requirements" do not place an adequate deontological fire wall around individual rights, but instead place them on the same footing as collective goals.

Alexy's response to these criticisms is complex, and is contained in the new Postscript to the English edition. Very roughly, his response to the first line of argument is that constitutional principles, and in particular the principles of liberty and equality, do in fact underlie the whole of the legal order, including the system of private law, so that in principle even questions of tort or contract can turn into questions of constitutional law, provided that they raise the issues of constitutional principle in a sufficiently acute form. However, in the great majority of cases the constitutional

principles do not themselves dictate any particular answer to questions of private law, so that they leave open a large field for legislative action. As for the second objection, his [*598] reply (again very roughly) is that his theory allows one to make rational judgments about the relative importance of one "optimization requirement" as compared to another, and also to evaluate the degree of significance of an interference with the requirement; so that, in this way, one can both allow for the greater importance of individual rights over certain collective goals, but without falling into the sort of ontological absolutism that would never permit any balancing of, say, a relatively minor infringement of freedom of travel against the interests of national security.

This theory of principles lies at the conceptual heart of Alexy's theory. Having analyzed norms and rules, principles and rights, and having argued for a complex model that will employ both rules and principles and provide for a "soft ordering" of the basic constitutional principles, he then, in the remaining half of the book, proceeds to an analysis of legal status, the limits on individual rights, and the general rights to liberty and equality. These topics are familiar territory for a classical constitutional theory based on "defensive" rights against the state. Most of German constitutional law fits this classical model; but in the closing chapters Alexy considers the status of positive rights against the state (in particular, the right to a minimum level of social welfare), and also the difficult problem of horizontal or third-party effects - that is, the problem of the extent to which constitutional law affects the private-law obligations of citizens to one another. The discussions are intricate, and the theory of principles is the guiding thread throughout these complex discussions; the arguments are pursued with a great deal of acumen and of attention to architectonic detail.

Despite all his respect for logic and intellectual precision, Alexy is careful not to claim too much for his theory, and he warns both against expecting too much and against expecting too little. Those who expect too little include the "decisionists" and the out-and-out sceptics who think that no objective ranking of constitutional principles is possible, or that abstract theories are incapable of offering guidance in concrete cases, or that judicial decisions are always more or less irrational. Those who expect too much want a legal theory that will provide a single, demonstrably right answer to every legal question (and, as is well known, often the sceptics are just frustrated super-objectivists who have lurched from the conclusion that a legal theory cannot solve every problem to the despairing conclusion that it can [*599] solve none). Alexy steers a middle course between these extremes:

[A] substantive constitutional rights theory which necessarily lays down the resolution of every constitutional rights case is thus not possible. But this gives us a reason for not expecting too much from a substantive constitutional rights theory from the very beginning. One can expect no more from it than that it rationally structure to the greatest extent possible constitutional rights argumentation in a substantively acceptable way. These requirements are satisfied by a principled theory which contains a bundle of constitutional rights principles, and which places these in a soft ordering by granting prima facie precedence to the principles of legal liberty and legal equality (p. 386).

One comes away from this work, not so much persuaded by all of the arguments, as impressed by the range of problems, the subtlety of the distinctions, the range of scholarship, and especially by the sheer intellectual difficulty of constructing an architectonic constitutional theory that will satisfy Alexy's stringent demands.

Legal Topics:

For related research and practice materials, see the following legal topics:
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FOOTNOTES:

n1. Professor of Public Law and Legal Philosophy, Christian Albrechts University, Kiel, Germany.

n2. Lecturer in Law, University of Bristol.

n3. Professor of Law and Philosophy, University of Pennsylvania.

n4. Robert Alexy, *Theorie der Grundrechte* (1986).

n5. Recent discussions of Alexy's theory include Karl-Eberhard Hain, *Die Grundsätze des Grundgesetzes* (1999), and Matthias Jestaedt, *Grundrechtsentfaltung im Gesetz* (1999).

n6. Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed., 1997).

n7. David P. Currie, *The Constitution of the Federal Republic of Germany* (1994).

n8. Ronald Dworkin, *Taking Rights Seriously* (rev. ed., 1978).