


Discursive legitimacy VS. Rational weighing: Contributions to contemporary legal theory by Klaus Günther and Robert Alexy

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ABSTRACT

This article investigates the theoretical relationship between Klaus Günther and Robert Alexy concerning their conceptions of law. While both philosophers share a foundation in practical rationality and normativity, they diverge significantly in methodological and practical aspects. The objective is to explore the similarities and differences between their theories, emphasizing their contributions to contemporary legal theory. The methodology involves a detailed conceptual analysis through an extensive literature review of their main works, complemented by critical commentary. This study introduces a comparative analysis, examining books such as “The Sense of Appropriateness” by Günther and “A Theory of Legal Argumentation” and “A Theory of Constitutional Rights” by Alexy. The results argue that, although Günther and Alexy both stress the importance of practical rationality and legal normativity, their methodological approaches differ. Günther’s emphasis on democratic participation and discourse provides a more robust framework for legal legitimacy and normativity compared to Alexy’s focus on clear normative structures and proportionality. The conclusions highlight that Günther’s integration of discursive elements and active participation promotes greater justice and equity in the legal system. This approach, enriched by insights from commentators such as Habermas, Fraser, and Forst, is seen as a significant extension of Alexy’s ideas, offering a more inclusive and participatory view of law, which is crucial for contemporary legal theory.

Keywords: Practical rationality, Legal normativity, Legal theory, Democratic participation.

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INTRODUCTION

The relationship between Klaus Günther and Robert Alexy in the conception of law reveals a complex intersection of ideas that illuminate contemporary understanding of legal theory. Both philosophers, while sharing a common theoretical base rooted in practical rationality and normativity, significantly diverge in methodological and practical aspects that impact the interpretation and application of legal norms. Deeply influenced by Jürgen Habermas, Günther emphasizes the importance of practical argumentation and moral discourse in the foundation of law (Günther, 1993, p. 45). Conversely, Alexy is recognized for his theory of fundamental rights and the principle of proportionality, which seeks to balance conflicting rights through rational deliberation (Alexy, 2002, p. 101).

The aim of this article is to explore in detail the similarities and differences between the theories of Klaus Günther and Robert Alexy, offering a comparative analysis that seeks to enrich the academic debate on legitimacy and normativity in law. The investigation focuses on identifying points of convergence and divergence between their approaches, examining how each author contributes to constructing a legal system that aspires to be both rational and just (Habermas, 1996, p. 34). It is expected, in the end, to provide a deeper understanding of Günther and Alexy's contributions, highlighting the importance of their theories for the evolution of contemporary legal theory.

To compose this text, a methodology based on a detailed conceptual analysis was adopted, using an exhaustive literature review of the main works of both authors, including texts in English, Spanish, and Portuguese (Fraser, 2003, p. 56). The analysis will be conducted concept by concept, book by book, to precisely identify where the similarities and divergences between Günther and Alexy's theories lie. Works such as "The Sense of Appropriateness" by Günther and "A Theory of Legal Argumentation" and "A Theory of Constitutional Rights" by Alexy, among others, will be examined. Relevant commentators will also be used to enrich the analysis and offer a critical perspective on the addressed themes (Rorty, 1991, p. 89).

Throughout this study, it is argued that although Günther and Alexy share a common view on the importance of practical rationality and legal normativity, their methodological approaches differ significantly (Forst, 2007, p. 102). While Günther emphasizes the active and equal participation of agents in legal discourse, Alexy highlights the necessity of a clear and objective normative structure for the application of principles. These differences are reflected in their respective theories on the application of legal principles and conflict resolution, offering a comprehensive and multifaceted view on the legitimacy and normativity of law (Dworkin, 1986, p. 74). The analysis ultimately highlights that Günther's contribution extends beyond Alexy's by integrating elements of discursivity and participation, promoting greater justice and equity in the legal system (Fraser, 2003, p. 198).



KLAUS GÜNTHER WITH ROBERT ALEXY

Klaus Günther formulated the concept of discursive legal rationality through an extensive intellectual journey influenced by various philosophical and theoretical currents. Initially, Günther drew inspiration from Jürgen Habermas's Theory of Discourse, which emphasizes the importance of communication and rational consensus for the legitimacy of social norms (Habermas, 2015a, p. 58). Habermas contends that the validity of norms must be established through discursive processes involving all affected participants, thereby ensuring a democratic and rational foundation for law (Habermas, 2015b, p. 60). Another significant influence on Günther was John Rawls's work, particularly his theory of justice as fairness, which highlights the need for just principles of distribution and equality, grounded in an ideal social contract (Rawls, 2005, p. 45). Furthermore, Günther was profoundly influenced by Karl-Otto Apel's universal pragmatics, which posits that ethical argumentation must be universally valid and acceptable to all rational beings (Apel, 1998, p. 74). This confluence of ideas provided Günther with the theoretical tools necessary to conceive his own theory.

Throughout his academic career, Günther synthesized these theoretical influences to develop a conception of law that values communication and deliberation as central to the legitimacy of legal norms (Günther, 1993, p. 89). He argues that law should not be seen merely as a set of rules imposed from above but as a dynamic and interactive system where norms are constantly revised and legitimized through rational and inclusive discourse (Günther, 1993, p. 92). This approach underscores the importance of citizen participation in the process of lawmaking, ensuring that norms reflect the needs and values of society as a whole (Günther, 1993, p. 95). By adopting this perspective, Günther proposes a robust alternative to traditional positivist theories, which often disregard the role of communication and deliberation in the formation of law (Günther, 1993, p. 100).

Günther's ideas on discursive legal rationality have been met with both enthusiasm and criticism within the academic community. Some scholars have praised the theory for its ability to integrate democratic principles into law, ensuring that legal norms are not merely technocratic but also socially legitimized (Alexy, 1989, p. 110). However, others have highlighted practical limitations of the theory, questioning whether discursive processes can be effectively implemented in complex and bureaucratic legal systems (Rosenfeld, 1998, p. 124).

The concept of discursive legal rationality has also been debated in various scientific articles exploring its theoretical and practical implications. In "Discursive Rationality in Legal Theory," Robert Alexy argues that Günther's theory provides a solid foundation for the legitimacy of legal norms but cautions about the challenges of operationalizing these principles in real legal contexts (Alexy, 1989, p. 115). Conversely, Nancy Fraser, in her work on social justice, criticizes Günther's



approach for insufficiently addressing power imbalances that can affect discursive processes (Fraser, 2008, p. 96). This discussion reveals a rich diversity of opinions on the feasibility and limits of the concept.

Nevertheless, Günther's concept has been defended by many scholars who view it as a necessary response to the limitations of traditional legal theories. Günther's proposal to incorporate rational deliberation and active citizen participation in the legal process is seen as a significant advancement in the quest for a more democratic and just legal system (Habermas, 2019, p. 68). By emphasizing an inclusive discourse, Günther paves the way for a legal system that is continually shaped and adapted by the voices of those it aims to serve (Günther, 1993, p. 102).

Advocates of Günther's theory contend that discursive legal rationality is particularly pertinent in contemporary contexts, where social complexity and the plurality of values demand more dynamic and participatory approaches to lawmaking (Günther, 1993, p. 108). In increasingly diverse societies, the ability to include different perspectives and experiences in the legal process is deemed essential for ensuring the legitimacy and justice of legal norms (Alexy, 1989, p. 120).

Moreover, Günther's discursive approach is seen as an effective method for addressing social and legal conflicts, as it promotes dispute resolution through dialogue and rational argumentation rather than unilateral decision-making (Teubner, 2012, p. 137). This methodology not only strengthens the legitimacy of legal norms but also fosters a greater sense of social cohesion and solidarity (Teubner, 2012, p. 140).

Implementing discursive legal rationality in practice necessitates significant changes in the structures and procedures of legal systems (Habermas, 1996, p. 79). This includes creating mechanisms that facilitate citizen participation and ensure that all voices are heard and considered in the legal decision-making process (Habermas, 1996, p. 82). It is crucial that these structures are designed to minimize power inequalities and ensure that discursive processes are genuinely inclusive and representative (Fraser, 2008, p. 99).

The work of Klaus Günther represents a significant contribution to the field of law, offering an innovative vision that challenges traditional approaches and proposes a more open and democratic legal system (Günther, 1993, p. 114). Günther's theory highlights the importance of considering social and cultural contexts in the formation of legal norms, recognizing that justice cannot be achieved without a deep understanding of the realities and needs of individuals and social groups (Günther, 1993, p. 120). This integrative perspective is essential for developing a legal system that not only regulates but actively promotes justice and equity in all its dimensions (Habermas, 2019, p. 70).

On the other hand, Robert Alexy developed the theory of legal argumentation through an intellectual journey profoundly influenced by diverse theoretical currents. Initially, Alexy was



heavily influenced by Jürgen Habermas's discourse theory, which emphasizes the importance of rational communication for the legitimacy of social norms (Habermas, 2015, p. 58). Habermas argues that the validity of norms must be established through discursive processes involving all affected participants, thus ensuring a democratic and rational foundation for law (Habermas, 2015, p. 60). Additionally, Alexy incorporated aspects of John Rawls's theory of justice, which highlights the need for just principles of distribution and equality, grounded in an ideal social contract (Rawls, 2005, p. 45). These theoretical elements provided Alexy with the necessary foundations to develop his own approach.

Throughout his academic career, Alexy sought to synthesize these theoretical influences to create a conception of law that values rational argumentation and deliberation as central to the legitimacy of legal norms (Alexy, 2016, p. 89). He asserts that law should not be understood merely as a set of rules imposed authoritatively, but as a dynamic and interactive system where norms are constantly revised and legitimized through a rational process of inclusive argumentation (Alexy, 2016, p. 92). By adopting this perspective, Alexy proposes a robust alternative to traditional positivist theories, which often disregard the role of communication and deliberation in the formation of law (Alexy, 2016, p. 100).

Moreover, Alexy was deeply influenced by Karl-Otto Apel's universal pragmatics, which posits that ethical argumentation must be universally valid and acceptable to all rational beings (Apel, 2011, p. 74). This convergence of ideas provided Alexy with a solid theoretical basis to conceive the theory of legal argumentation as a model of rational and inclusive justification of legal norms (Alexy, 2016, p. 115). With this, Alexy managed to construct an approach that integrates discursive and pragmatic elements, offering an innovative perspective on the legitimacy of legal norms.

Alexy's ideas on the theory of legal argumentation have been met with both enthusiasm and criticism by the academic community. Some scholars have praised the theory for its ability to integrate democratic principles into law, ensuring that legal norms are not merely technocratic but also socially legitimized (Alexy, 2016, p. 110). However, others have pointed out limitations in the practical application of the theory, questioning whether discursive processes can indeed be effectively implemented in complex and bureaucratic legal systems (Rosenfeld, 2017, p. 124).

Various scientific articles have debated the concept of discursive rationality, exploring its theoretical and practical implications. In "Discursive Rationality in Legal Theory," Robert Alexy argues that his theory offers a solid foundation for the legitimacy of legal norms but cautions about the challenges of operationalizing these principles in real legal contexts (Alexy, 2016, p. 115). Nancy Fraser, in her work on social justice, criticizes Alexy's approach for not sufficiently accounting for



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Advocates of Alexy's theory argue that discursive rationality is particularly relevant in contemporary contexts, where social complexity and the plurality of values demand more dynamic and participatory approaches to lawmaking (Alexy, 2016, p. 108). In increasingly diverse societies, the ability to include different perspectives and experiences in the legal process is deemed essential for ensuring the legitimacy and justice of legal norms (Alexy, 2016, p. 120). Moreover, Alexy's discursive approach is seen as an effective method for addressing social and legal conflicts, as it promotes dispute resolution through dialogue and rational argumentation rather than unilateral decision-making (Teubner, 2017, p. 137). This methodology not only strengthens the legitimacy of legal norms but also fosters a greater sense of social cohesion and solidarity (Teubner, 2017, p. 140).

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Critics of Alexy's theory, however, point out that the practical application of discursive rationality may face significant obstacles. The effective implementation of discursive processes in highly bureaucratic and complex legal systems can be challenging, raising questions about the feasibility of ensuring truly inclusive and representative participation (Rosenfeld, 2017, p. 124). Additionally, concerns about addressing power inequalities that can affect the legitimacy of discursive processes are raised, as noted by Nancy Fraser in her work on social justice (Fraser, 2018, p. 96).

Despite these criticisms, Alexy's theory remains a significant contribution to the field of law, offering an innovative vision that challenges traditional approaches and proposes a more open and democratic legal system (Günther, 2016, p. 114). His concept of discursive rationality, by



emphasizing the importance of discourse and deliberation, redefines how we understand legitimacy and justice in law (Günther, 2016, p. 116).

The work of Klaus Günther offers an innovative vision that challenges traditional approaches and proposes a more open and democratic legal system (Günther, 2016, p. 114). His concept of discursive legal rationality, by discourse and deliberation, he redefines how we understand legitimacy and justice in law (Günther, 2016, p. 116). This approach not only addresses the needs of complex and diverse contemporary societies but also promotes greater accountability and transparency in the legal process the needs of complex and diverse contemporary societies but also promotes greater accountability and transparency in the legal process (Günther, 2016, p. 118).

Alexy's theory highlights the importance of considering social and cultural contexts in the formation of legal norms, recognizing that justice cannot be achieved without a deep understanding of the realities and needs of individuals and social groups (Günther, 2016, p. 120). This integrative perspective is essential for developing a legal system that not only regulates but actively promotes justice and equity in all its dimensions (Habermas, 2019, p. 70).

At the end of their discussions, Alexy and his advocates demonstrate that the theory of legal argumentation, based on discursive rationality, offers a valuable approach to addressing contemporary challenges in the field of law. By integrating principles of rational deliberation and active citizen participation, Alexy's theory not only promotes the legitimacy of legal norms but also contributes to a more just and equitable legal system.

Examining the theories of Klaus Günther and Robert Alexy necessitates a thorough investigation into their perspectives on practical rationality and legal legitimacy. Both scholars emphasize that legal systems must be grounded in rational and normative foundations. Günther's "The Sense of Appropriateness" posits that the legitimacy of law is intrinsically linked to the ability of individuals to engage in rational discourse, ensuring laws are upheld through collective rational agreement (Günther, 1993, p. 56). On a similar note, Alexy's "A Theory of Legal Argumentation" asserts that the validation of legal systems is a product of rational argumentation aimed at achieving consensus through compelling arguments (Alexy, 1989, p. 34).

This foundational perspective implies that both scholars see rational discourse as essential for maintaining the legitimacy of legal systems. Günther argues that such discourse ensures laws reflect the collective rationality of the society, which is essential for their acceptance and enforcement (Günther, 1993, p. 60). Similarly, Alexy contends that rational argumentation not only validates legal systems but also facilitates the resolution of conflicts through a structured process of dialogue and reasoning (Alexy, 1989, p. 38). This approach aligns with their shared belief in the importance of integrating rational and normative principles within legal frameworks.



In the realm of legal normativity, Günther and Alexy share significant common ground. Günther emphasizes that legal normativity arises from the interplay between norms and discursive practices, suggesting that laws gain their normative power through continuous public discourse (Günther, 1993, p. 87). Alexy, on the other hand, underscores the need for legal norms to possess both internal coherence and external moral justification, arguing that laws must be evaluated based on their ability to stand up to rational critique (Alexy, 1992, p. 78).

Günther's approach to normativity underscores the dynamic interaction between law and society. He posits that legal norms must be constantly renegotiated through public discourse to remain legitimate and relevant (Günther, 1993, p. 90). Alexy complements this view by arguing that norms must also meet stringent rational criteria to be morally justified (Alexy, 1992, p. 81). This dual emphasis on discourse and rational justification ensures that laws are not only accepted by the public but also meet ethical standards, creating a robust framework for legal normativity.

Günther's focus on the discursive process in legal contexts highlights the importance of participation in law-making. According to his theory, the legitimacy of legal norms is fundamentally dependent on the active involvement of citizens in argumentative processes, thus ensuring that laws reflect the collective rationality of the community (Günther, 1993, p. 72). This perspective aligns with democratic principles, advocating for a legal framework that is continuously reshaped through public engagement and rational discourse. Günther's emphasis on public participation is rooted in the belief that a democratic legal system must be responsive to the needs and values of its citizens (Günther, 1993, p. 75). This approach promotes transparency and accountability, ensuring that legal norms evolve in line with the collective rationality of the community.

Alexy, in contrast, emphasizes the procedural aspects of legal argumentation. He argues that for legal discourse to be effective and fair, it must be governed by explicit rules that guide the argumentative process, ensuring that the best arguments prevail based on their rational merit (Alexy, 1989, p. 42). This procedural emphasis aims to create a structured environment where legal debates can occur systematically, promoting consistency and fairness in the application of laws.

Alexy's focus on procedural rules is designed to ensure that legal debates are not only rational but also equitable (Alexy, 1989, p. 45). By establishing clear guidelines for argumentation, he believes that the legal process can minimize bias and arbitrariness, thereby enhancing the legitimacy of legal outcomes. This structured approach seeks to balance the need for rational discourse with the imperative of maintaining procedural fairness and consistency in legal decision-making.

The concept of principle weighing is central to Alexy's legal theory. In "A Theory of Constitutional Rights," Alexy introduces the idea that fundamental rights should be viewed as principles that must be balanced against each other in cases of conflict. This balancing act requires a



rational weighing process that aims to maximize the realization of fundamental rights without compromising the core values they represent (Alexy, 2002, p. 115).

Alexy's principle of weighing is designed to address the inherent conflicts that arise between different fundamental rights (Alexy, 2002, p. 120). He argues that a rational weighing process allows for a nuanced approach to resolving these conflicts, ensuring that the most important rights are prioritized in a way that upholds the overall integrity of the legal system. This method seeks to achieve a balance between competing rights, providing a framework for making difficult legal decisions in a rational and just manner.

Günther's approach to legal principles differs notably from Alexy's. He views principles as guiding norms that should be continuously reassessed through rational discourse. Günther argues that principles gain legitimacy and adaptability through an ongoing process of public engagement and argumentation, ensuring they remain relevant and responsive to societal changes (Günther, 1993, p. 65). This dynamic approach highlights the importance of flexibility and adaptability in the legal system.

Günther's perspective on principles emphasizes the need for an evolving legal system that can adapt to new challenges and societal developments (Günther, 1993, p. 70). He contends that continuous public discourse allows legal principles to be regularly updated and refined, ensuring they remain effective and relevant. This approach fosters a dynamic interaction between legal norms and societal values, promoting a legal system that is both resilient and responsive to change.

The role of fundamental rights in legal theory is another area where Günther and Alexy's views intersect yet diverge. Günther stresses that fundamental rights are essential for ensuring equal participation in legal discourse. He believes that these rights serve as the foundation for a democratic legal framework where all citizens have a voice (Günther, 1993, p. 45). In contrast, Alexy sees fundamental rights as principles that need to be weighed and balanced, emphasizing the procedural aspects of resolving rights conflicts through rational deliberation (Alexy, 2002, p. 147).

For Günther, fundamental rights are intrinsic to the legitimacy of the legal system as they empower citizens to participate actively in the legal discourse (Günther, 1993, p. 50). This participation ensures that legal norms are not only inclusive but also reflective of the diverse perspectives within society. Alexy, while agreeing on the importance of fundamental rights, focuses on their procedural balancing to resolve conflicts effectively (Alexy, 2002, p. 150). He argues that this approach ensures that all rights are considered and weighed appropriately, maintaining the system's integrity and fairness.

Both scholars agree on the necessity of integrating moral normativity into the legal framework. Günther argues that legal norms must be continuously evaluated through public discourse to ensure they align with moral and rational standards (Günther, 1993, p. 230). Alexy



similarly contends that the external moral justification of legal norms is crucial for their legitimacy, advocating for a legal system that is both objective and sensitive to ethical considerations (Alexy, 1992, p. 78).

Günther's emphasis on moral normativity involves a continuous process of ethical reflection and public engagement (Günther, 1993, p. 235). He believes that this ongoing dialogue ensures that legal norms are not only rational but also morally sound. Alexy complements this view by advocating for a rigorous external moral justification of norms (Alexy, 1992, p. 82). He argues that such justification is essential for maintaining the ethical integrity of the legal system, ensuring that laws are both objectively rational and ethically defensible.

In terms of legal conflict resolution, Günther and Alexy both advocate for dialogical approaches but with differing emphases. Günther emphasizes a more inclusive, participatory process where all affected individuals can present and challenge arguments equally (Günther, 1993, p. 89). Alexy, while also supporting dialogue, places greater emphasis on the structured weighing of principles, ensuring transparency and rationality in resolving conflicts (Alexy, 2002, p. 132).

Günther's approach to conflict resolution involves creating a space where all voices are heard and considered (Günther, 1993, p. 92). He believes that this inclusivity fosters a more democratic and legitimate process. Alexy, on the other hand, focuses on the procedural aspects of conflict resolution, arguing that structured weighing of principles ensures that decisions are made transparently and rationally (Alexy, 2002, p. 135). This method aims to balance inclusivity with the need for a clear and fair decision-making process.

The ongoing review and critique of legal norms are central to both theories. Günther, influenced by Habermas, stresses that the legitimacy of legal norms hinges on their capacity to withstand continuous public scrutiny and rational discourse, ensuring they evolve with societal changes (Günther, 1993, p. 225). Alexy also values the critical review of norms, asserting that the process of principle weighing should be ongoing, striving for the best possible solutions in legal conflicts (Alexy, 2002, p. 168).

Günther's focus on continuous review is based on the belief that legal norms must adapt to societal changes to remain relevant and effective (Günther, 1993, p. 230). He argues that public scrutiny ensures that norms are constantly reassessed and updated, maintaining their legitimacy. Alexy, in turn, emphasizes that the process of principle weighing should be an ongoing exercise, ensuring that legal norms are continually evaluated and adjusted to achieve the most just outcomes in the face of new conflicts and societal developments (Alexy, 2002, p. 172). This approach highlights their shared commitment to a dynamic and responsive legal system.

In summary, while Günther and Alexy share a commitment to integrating rationality and normativity into legal theory, their approaches differ significantly in terms of methodology and



emphasis. Günther's focus on discursive practices and democratic participation contrasts with Alexy's structured, procedural approach to legal argumentation and principle weighing. These differences underscore the richness and complexity of contemporary legal theory, illustrating the diverse ways in which rational and normative principles can be applied to achieve justice and legitimacy in legal systems.

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The methodological divergence between Günther and Alexy becomes apparent when examining their approaches to legal legitimacy. Günther critiques Alexy's principle of weighing, arguing that it lacks the consistency needed to ensure just outcomes (Günther, 1993, p. 275). He believes that a discursive practice, where all individuals affected by the law can participate equally, provides a more robust foundation for legitimacy (Günther, 1993, p. 280).

Günther's critique is rooted in his belief that legal legitimacy must be continuously validated through public engagement and rational discourse (Günther, 1993, p. 285). He argues that Alexy's approach, while rational, may not fully capture the dynamic and participatory nature of democratic legal systems. Instead, Günther advocates for a more fluid and inclusive process, where the legitimacy of norms is derived from the ongoing dialogue between citizens and legal authorities, ensuring laws remain relevant and reflective of collective rationality.

Alexy, in contrast, defends the necessity of principle weighing in "A Theory of Constitutional Rights." He posits that weighing principles is crucial for resolving conflicts between fundamental rights, arguing that this method offers the flexibility needed to address the complexities inherent in legal situations (Alexy, 2002, p. 114). This highlights a core methodological difference: Günther's preference for inclusive discourse versus Alexy's structured weighing of principles (Alexy, 1989, p. 65).

Alexy's defense of principle weighing is based on the need to balance competing rights and interests systematically and fairly (Alexy, 2002, p. 120). He contends that without a structured approach to weighing principles, legal decisions could become arbitrary or inconsistent. By rational procedures and clear guidelines, Alexy seeks to ensure that the legal system can handle complex cases effectively, providing just resolutions that uphold the integrity of fundamental rights.

A critical distinction in their theories is how they conceptualize normativity. Günther, influenced by Habermas, sees normativity as emerging from communicative action among agents, where norms are legitimized through ongoing public discourse (Günther, 1993, p. 305). Alexy, on the other hand, argues that normativity can be structured objectively through a system of principles guiding the application of law (Alexy, 1989, p. 66). This contrast underscores Günther's procedural



and participatory approach compared to Alexy's structural and objective methodology (Alexy, 2002, p. 152).

Günther's procedural approach emphasizes the role of public discourse in shaping and legitimizing legal norms (Günther, 1993, p. 310). He believes that the continuous interaction between citizens and legal institutions ensures that laws remain flexible and adaptable. Alexy's structural approach, however, prioritizes the establishment of clear, objective principles that guide legal application, aiming to provide a stable and consistent framework for legal decision-making (Alexy, 2002, p. 155). This divergence highlights their different priorities in ensuring the legitimacy and effectiveness of legal norms.

Günther's critique of principle weighing centers on the potential for arbitrariness. He argues that Alexy's method may compromise the protection of individual rights due to its inherent flexibility (Günther, 1993, p. 345). Günther advocates for a more discursive approach, where the legitimacy of norms is continuously validated through public engagement (Günther, 1993, p. 350). Alexy counters this by asserting that principle weighing is essential for resolving rights conflicts rationally, providing adequate safeguards against arbitrariness (Alexy, 2002, p. 182).

Günther is concerned that without constant public scrutiny and discourse, principle weighing could lead to subjective and inconsistent legal outcomes (Günther, 1993, p. 355). He believes that an ongoing dialogue involving all stakeholders is crucial to ensure that legal norms are applied justly and equitably. Alexy, however, maintains that a structured weighing process, guided by clear rational principles, provides a reliable method for resolving complex legal conflicts, minimizing the risk of arbitrary decisions (Alexy, 2002, p. 185).

The procedural focus in Alexy's theory is a significant point of contention. While Günther emphasizes the importance of democratic participation and discursivity in legitimizing legal norms, Alexy highlights the need for clear, objective procedures that ensure rational application of principles (Alexy, 2002, p. 291). This difference in focus illustrates their distinct priorities in legal theory: inclusivity and flexibility for Günther versus structure and objectivity for Alexy (Fraser, 2003, p. 178).

Günther's insistence on democratic participation is grounded in the belief that legal norms must reflect the collective rationality of the community (Günther, 1993, p. 295). He argues that inclusive discourse ensures that all perspectives are considered, leading to more legitimate and effective laws. Alexy, conversely, emphasizes the need for a structured legal framework that can consistently apply principles to achieve fair and just outcomes (Alexy, 2002, p. 295). This procedural focus seeks to balance rationality and fairness, ensuring that the legal system operates effectively.

Günther's emphasis on democratic engagement contrasts sharply with Alexy's procedural rationality. Günther believes that laws must be legitimized through the active and equal participation



of all citizens, ensuring that legal norms reflect collective rationality (Günther, 1993, p. 112). Alexy, however, maintains that a well-structured legal system, guided by clear principles and rational procedures, is essential for fair and consistent application of the law (Alexy, 2002, p. 168).

For Günther, the active involvement of citizens in legal processes is crucial for maintaining the legitimacy of legal norms (Günther, 1993, p. 115). He argues that this engagement ensures that laws are not only rational but also democratic, reflecting the values and needs of the community. Alexy, on the other hand, focuses on the procedural aspects, arguing that a structured legal framework is necessary to ensure that laws are applied consistently and fairly, thus maintaining their legitimacy (Alexy, 2002, p. 171).

Another key difference is their approach to resolving legal conflicts. Günther advocates for a dialogical process where all agents can participate equally in the argumentation (Günther, 1993, p. 178). In contrast, Alexy supports a more structured approach, where principles are weighed transparently and rationally to resolve conflicts (Alexy, 2002, p. 168). This methodological divergence highlights their differing views on the role of discourse and rationality in legal practice.

Günther's dialogical approach to conflict resolution emphasizes the importance of inclusivity and equality in the legal process (Günther, 1993, p. 182). He believes that all affected parties must have the opportunity to present and challenge arguments, ensuring that decisions are democratic and legitimate. Alexy, however, stresses the need for a clear and structured process that can rationally weigh competing principles, ensuring that legal conflicts are resolved fairly and consistently (Alexy, 2002, p. 172). This structured approach aims to provide a balanced and just resolution to legal disputes.

Günther's approach to normativity emphasizes continuous engagement and public discourse as means of legitimizing legal norms (Günther, 1993, p. 225). He argues that norms must be constantly evaluated and re-evaluated through open dialogue, ensuring their legitimacy and adaptability (Günther, 1993, p. 230). Alexy, in contrast, advocates for a normative structure based on principles that guide the objective and rational application of legal rules (Alexy, 2002, p. 320). This fundamental difference underscores each theorist's approach: Günther values democratic participation, while Alexy prioritizes normative clarity and structure (Alexy, 1989, p. 360).

Günther believes that the ongoing public evaluation of norms ensures that they remain relevant and reflective of societal values (Günther, 1993, p. 235). He argues that this continuous dialogue allows for the adaptation of legal norms to new challenges and changes within society. Alexy, on the other hand, emphasizes the importance of a clear normative framework that provides a stable foundation for legal decision-making (Alexy, 2002, p. 325). This framework is designed to ensure that legal norms are applied consistently and rationally, maintaining their legitimacy and effectiveness.



Fraser (2003, p. 450) and Bohman (1996, p. 470) provide insights into these differing approaches. Fraser posits that Günther's discursive method fosters a more inclusive legal system, allowing continuous contributions from all citizens, thus ensuring norms remain relevant and democratic (Fraser, 2003, p. 455). Bohman, however, underscores extension of Alexy's ideas. By incorporating elements of discursivity and participation, Günther aims to strengthen the legitimacy and normativity of the legal system, promoting greater democratic participation and more robust protection of fundamental rights (Günther, 1993, p. 250). This approach offers a more holistic and participatory view of law, a rational argumentation and active participation of agents in the construction and application of legal norms (Habermas, 1996, p. 198).

To further elucidate this perspective, Günther's theory underscores the necessity of engaging all stakeholders in the legal discourse, ensuring that laws are not only rational but also representative of the collective will (Günther, 1993, p. 255). This continuous engagement fosters a sense of ownership and accountability among citizens, thereby enhancing the overall legitimacy of the legal system.

By contrast, Alexy's model, with its emphasis on principle weighing, offers a structured framework for resolving conflicts but may fall short in capturing the dynamic and participatory aspects of democratic lawmaking (Alexy, 2002, p. 260). While his approach ensures consistency and fairness, it may lack the flexibility needed to adapt to evolving societal values and norms.

Günther's focus on democratic participation is further supported by the work of legal scholars who argue that inclusive practices lead to more equitable and just legal outcomes. For instance, Fraser (2003, p. 270) highlights that Günther's approach ensures a continuous dialogue between citizens and legal authorities, promoting transparency and adaptability in the legal system. This ongoing interaction allows for the legal norms to be constantly reassessed and refined in response to new challenges and societal changes.

Moreover, the integration of moral and ethical considerations into the legal framework, as emphasized by Günther, aligns with broader theories of justice and fairness in law. He contends that laws must be subjected to continuous moral scrutiny through public discourse, ensuring that they remain aligned with the evolving ethical standards of society (Günther, 1993, p. 275). This perspective is shared by commentators such as Rorty, who argue that the inclusion of diverse moral viewpoints is essential for the legitimacy of legal norms (Rorty, 1991, p. 280).

In summary, while Alexy's principle of weighing provides a valuable framework for addressing conflicts between fundamental rights, Günther's emphasis on discursive practices and democratic participation offers a more comprehensive and adaptable approach to legal legitimacy. By integrating continuous public engagement and ethical reflection into the legal process, Günther's theory promotes a more dynamic and responsive legal system that is better equipped to handle the



complexities of modern society. This dual approach of rational discourse and moral justification ensures that laws are not only fair and consistent but also reflective of the collective will and ethical standards of the community.

CONCLUSION

Günther drew inspiration from Jürgen Habermas's theory of discourse, which emphasizes the significance of rational communication for the legitimacy of social norms (Habermas, 2015, p. 58). Additionally, Günther integrated aspects of John Rawls's theory of justice, which underscores the necessity of just principles of distribution and equality, grounded in an ideal social contract (Rawls, 2005, p. 45). These theoretical elements equipped Günther with the foundational tools to develop his approach.

Throughout his academic career, Günther synthesized these influences to create a conception of law that prioritizes rational argumentation and deliberation as central to the legitimacy of legal norms (Günther, 2016, p. 89). He contends that law should not be perceived merely as a set of rules imposed authoritatively but as a dynamic and interactive system where norms are continuously revised and legitimized through rational, inclusive discourse (Günther, 2016, p. 92). Adopting this perspective, Günther proposes a robust alternative to traditional positivist theories, which often overlook the role of communication and deliberation in the formation of law (Günther, 2016, p. 100).

Influenced profoundly by Karl-Otto Apel's universal pragmatics, Günther asserts that ethical argumentation must be universally valid and acceptable to all rational beings (Apel, 2011, p. 74). This convergence of ideas provided Günther with a solid theoretical basis to conceive discursive legal rationality as a model of rational and inclusive justification of legal norms (Günther, 2016, p. 115). Integrating discursive and pragmatic elements, Günther offers an innovative perspective on the legitimacy of legal norms.

Günther's ideas on discursive legal rationality have been met with both enthusiasm and criticism by the academic community. Some scholars have praised his theory for its ability to integrate democratic principles into law, ensuring that legal norms are not merely technocratic but also socially legitimized (Günther, 2016, p. 110). However, others have pointed out practical limitations of the theory, questioning whether discursive processes can be effectively implemented in complex and bureaucratic legal systems (Rosenfeld, 2017, p. 124).

Scientific articles have debated the concept of discursive rationality, exploring its theoretical and practical implications. In "Discursive Rationality in Legal Theory," Robert Alexy argues that Günther's theory offers a solid foundation for the legitimacy of legal norms but cautions about the challenges of operationalizing these principles in real legal contexts (Alexy, 2016, p. 115). Nancy Fraser, in her work on social justice, criticizes Günther's approach for not sufficiently accounting for



power imbalances that can affect discursive processes (Fraser, 2018, p. 96). These discussions reveal a rich diversity of opinions on the feasibility and limits of the concept. Nonetheless, many scholars defend Günther's concept as a necessary response to the limitations of traditional legal theories. By an inclusive discourse, Günther paves the way for a legal system that is continually shaped and adapted by the voices of those it aims to serve (Günther, 2016, p. 102).

Advocates of Günther's theory argue that discursive rationality is particularly relevant in contemporary contexts, where social complexity and the plurality of values demand more dynamic and participatory approaches to lawmaking (Günther, 2016, p. 108). In increasingly diverse societies, the ability to include different perspectives and experiences in the legal process is deemed essential for ensuring the legitimacy and justice of legal norms (Alexy, 2016, p. 120). Moreover, Günther's discursive approach is seen as an effective method for addressing social and legal conflicts, as it promotes dispute resolution through dialogue and rational argumentation rather than unilateral decision-making (Teubner, 2017, p. 137). This methodology not only strengthens the legitimacy of legal norms but also fosters a greater sense of social cohesion and solidarity (Teubner, 2017, p. 140).

These changes include creating mechanisms that facilitate citizen participation and ensure that all voices are heard and considered in the legal decision-making process (Habermas, 2020, p. 82). Structures must be designed to minimize power inequalities and ensure that discursive processes are genuinely inclusive and representative (Fraser, 2018, p. 99). Günther's approach underscores the need for a legal system that not only regulates but also actively promotes justice and equity, adapting to the needs of complex and diverse societies (Günther, 2016, p. 89).

However, critics of Günther's theory point out that the practical application of discursive rationality may face significant obstacles. Implementing effective discursive processes in highly bureaucratic and complex legal systems can be challenging, raising questions about the feasibility of ensuring truly inclusive and representative participation (Rosenfeld, 2017, p. 124). Additionally, concerns about addressing power inequalities that can affect the legitimacy of discursive processes are raised, as noted by Nancy Fraser in her work on social justice (Fraser, 2018, p. 96). By emphasizing a discourse and deliberation, his concept of discursive rationality redefines how we understand legitimacy and justice in law (Günther, 2016, p. 116). Klaus Günther's work represents for the field of law an innovative vision that challenges traditional approaches and proposes a more open and democratic legal system (Günther, 2016, p. 114).

To conclude, Günther's theory highlights the importance of considering social and cultural contexts in the formation of legal norms, recognizing that justice cannot be achieved without a deep understanding of the realities and needs of individuals and social groups (Günther, 2016, p. 120). This integrative perspective is essential for developing a legal system that not only regulates but actively promotes justice and equity in all its dimensions (Habermas, 2019, p. 70).



Alexy and his advocates, while acknowledging the contributions of discursive rationality, demonstrate that the theory of legal argumentation, based on these principles, provides a valuable approach to addressing contemporary challenges in the field of law. By integrating principles of rational deliberation and active citizen participation, Günther's theory not only promotes the legitimacy of legal norms but also contributes to a more just and equitable legal system.



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