

# Contents

<i>Introduction</i>	1
---------------------	---

## PART I THE NATURE OF LAW

1. The Nature of Legal Philosophy	7
I. The Nature of Philosophy	7
II. Pre-Understanding and Arguments	9
III. Three Problems	10
IV. Four Theses	11
V. Entities and Concepts	12
VI. Necessary Properties	13
VII. Law and Morality	15
2. On the Concept and the Nature of Law	18
I. The Practical and Theoretical Significance of the Debate	18
A. Statutory Injustice and the Radbruch Formula	18
B. Law's Open Texture and the Self-Understanding of Jurists	19
C. The Concept of Law as a Concept of a Non-Natural Kind	20
II. Positivism and Non-Positivism	21
A. Separation Thesis and Connection Thesis	21
B. Exclusive and Inclusive Positivism	22
C. Exclusive, Inclusive, and Super-Inclusive Non-Positivism	23
III. Concept and Nature	27
A. Nature	27
B. Concept	28
IV. The Dual Nature of Law	29
A. Coercion	30
B. Correctness	31
V. What the Law Is and What It Ought to Be	33
3. The Dual Nature of Law	36
I. The Ideal	36
A. The Claim to Correctness	36
B. Discourse Theory	40
II. The Real	42
III. The Reconciliation of the Ideal and the Real	43
A. Outermost Border	44
B. Democratic Constitutionalism	47



4. Law, Morality, and the Existence of Human Rights	51
I. Positivism, Non-Positivism, and the Existence Problem	51
A. Three Elements and Two Dimensions	52
B. Two Forms of Positivism	52
C. Three Forms of Non-Positivism	53
D. Inclusive Non-Positivism and the Existence Problem	56
II. The Existence of Human Rights	57
A. Human Rights as Moral Elements	58
B. The Concept of Human Rights	59
C. The Justifiability of Human Rights	60
5. An Answer to Joseph Raz	64
I. Separation Thesis	64
A. Kelsen's Statement	66
B. The Idea of a Definition of Law	68
C. Necessary Connections	69
II. Participants and Observers	72
III. The Argument from Correctness	75
IV. The Argument from Injustice	77
V. The Argument from Principles	80
6. The Ideal Dimension of Law	83
I. The Claim to Correctness	83
II. Conceptual Analysis and Conceptual Necessities	86
A. The Argument from Fruitlessness	86
B. The Argument from Deficiency	88
III. The Necessity of the Real Dimension of Law	90
IV. A Conceptual Framework	91
A. First-Order and Second-Order Correctness	91
B. Observer and Participant	92
C. Perspectives and Dimensions	94
D. Classifying and Qualifying Connections	94
V. The Relation between the Real and the Ideal Dimension	97
A. The Radbruch Formula	98
B. The Special Case Thesis	103
C. Human Rights	104
D. Democracy	105
E. Principles Theory	106
7. Gustav Radbruch's Concept of Law	107
I. Gustav Radbruch's System	108
A. The Law Triad	108
B. The Idea Triad	111
C. The Triad of Purpose	113
II. The Radbruch Formula	115



## PART II CONSTITUTIONAL RIGHTS, HUMAN RIGHTS, AND PROPORTIONALITY

8. The Construction of Constitutional Rights	121
I. The Rule Construction	121
A. Rules and Principles	121
B. The Postulate to Avoid Balancing	122
C. Problems of the Rule Construction	123
II. Principles Construction and Proportionality Analysis	124
III. Objections to the Principles Construction	124
IV. The Rationality of Balancing	126
A. The Central Role of the Rationality Problem	126
B. The Irrationality Objection	127
C. Pareto-Optimality	127
D. The Law of Balancing	128
E. The Weight Formula	128
9. Balancing, Constitutional Review, and Representation	133
I. Balancing	133
A. Two Objections	134
B. The Structure of Balancing	135
II. Constitutional Review	138
III. Representation	139
A. Argumentative Representation	139
B. Conditions of True Argumentative Representation	140
10. The Existence of Human Rights	142
I. The Theoretical and Practical Significance of the Existence Question	142
II. The Concept of Human Rights	143
III. The Justification of Human Rights	145
A. The Principles Structure of Human Rights	145
B. Scepticism and Non-Scepticism	146
C. Justification and Thesis	147
D. Eight Justifications	147
11. The Weight Formula	154
I. The Norm-Theoretic Basis: Rules and Principles	154
II. The Principle of Proportionality in the Narrower Sense	155
III. The Triadic Scale	159
IV. The Formula	165
V. The Extended Formula	173
12. Formal Principles: Some Replies to Critics	175
I. The Problem	175



II. Some Basic Elements of Principles Theory	176
A. Rules and Principles	176
B. Proportionality	176
C. Weight Formula	177
III. The Concept of Formal Principle	179
IV. Principles and Balancing in General	180
V. The Wrong Way	182
VI. Two Kinds of Discretion	184
VII. Second-Order Epistemic Optimization	184
VIII. Formal Principles and Discretion	188
13. Ideal 'Ought' and Optimization	190
I. The Index Model of the Ideal 'Ought'	191
II. The Law of Competing Principles	193
III. The Weight Formula	196
IV. Law of Competing Principles and Law of Balancing	197
V. A Fundamental Equivalence	198
VI. Poscher's Argument from Identity	199
VII. Sieckmann's Reiterated Validity Obligations	200
14. Human Dignity and Proportionality	205
I. Absolute and Relative Conceptions of Human Dignity	205
II. Practical Significance	205
III. Some Basic Elements of Principles Theory	207
A. Rules and Principles	207
B. Proportionality	208
C. Weight Formula	209
IV. The Concept of Human Dignity	211
A. Descriptive and Normative Elements	211
B. The 'Double-Triadic' Concept of Person	212
C. Human Dignity as a Bridge Concept	213
V. Human Dignity as Principle and as Rule	214
A. Human Dignity as Principle	214
B. Human Dignity as a Rule	215
VI. Devaluation of Human Dignity?	216
A. Clear Cases	216
B. Object Formula	217
C. Abstract Weight and Epistemic Reliability	217
D. Rationality	218
15. Proportionality and Rationality	220
I. Empirical and Analytical Approaches	220
II. Proportionality and Principles Theory	220
A. Rules and Principles	220
B. Proportionality	221



III. Balancing and Argumentation	226
A. The Formal and the Substantive Dimension of Rationality	226
B. Numbers, Classification Propositions, and their Justification	228
C. Disagreement, Discourse, and Rationality	229
IV. Balancing, Universalizability, and Legal Certainty	231
A. The ad hoc Problem	231
B. The Law of Competing Principles	232
C. Rules and Conditions	234
16. The Absolute and the Relative Dimension of Constitutional Rights	235
I. The Absolute and the Relative	235
II. Constitutional Rights	236
A. Constitutional and Human Rights	236
B. The Degree of the Absolute Dimension of Constitutional Rights	238
III. Proportionality	240
A. The Absoluteness of the Principle of Proportionality	240
B. The Relativity and Absoluteness of the Application of the Principle of Proportionality	247

### PART III. ARGUMENTATION, CORRECTNESS, AND LAW

17. A Discourse-Theoretical Conception of Practical Reason	255
I. Introduction	255
II. In Defence of the Concept of Practical Reason	256
III. A Kantian Conception of Practical Rationality: Discourse Theory	258
A. The Basic Idea of Discourse Theory	259
B. The Status of Discourse Theory as a Theory of Practical Correctness and Rationality	261
C. Towards the Justification of the Rules of Discourse	263
D. The Application of Discourse Theory	269
18. Problems of Discourse Theory	275
I. Discourse Theory as a Procedural Theory	275
II. Rules of Discourse	277
III. The Ideal Discourse	278
A. The Problem of Construction	278
B. The Problem of Consensus	279
C. The Problem of the Criterion	280
D. The Problem of Correctness	281
IV. The Real Discourse	285
A. The Discursive Modalities	285
B. The Relative Concept of Correctness	286



19. Legal Argumentation as Rational Discourse	288
I. Models	288
A. The Model of Deduction	288
B. The Model of Decision	289
C. The Hermeneutic Model	290
D. The Model of Coherence	291
II. A Discourse Theory of the Law	292
A. General Practical Discourse	293
B. Institutionalization	295
III. Legal Argumentation	296
A. The Different Kinds of Legal Arguments	296
B. The Strength of the Arguments	297
20. Jürgen Habermas's Theory of the Indeterminacy of Law and the Rationality of Adjudication	299
I. The Problem of Rationality in Adjudication	299
II. Three Insufficient Answers	300
III. Ronald Dworkin's Theory of Rights	301
IV. Law as an Ideally Coherent System of Norms	304
V. Theory of Legal Argumentation	306
VI. The Special Case Thesis	307
A. Moral, General Practical, and Legal Discourse	307
B. The Rules and Forms of Legal Discourse	309
C. Unjust Law	310
D. Specific Legal Nature?	311
21. Law and Correctness	312
I. The Concept of the Claim to Correctness	312
A. The Subjects	312
B. The Addressees	313
C. Raising a Claim	314
II. The Necessity of Connecting Law and Correctness	315
A. An Absurd Constitutional Article	316
B. An Absurd Judgment	318
C. The Alternative	319
III. Legal and Moral Correctness	320
A. Law's Open Texture	320
B. The Autonomy Objection	321
C. The Objection of Impossibility	322
D. Reality and Ideal	323
<i>Index of Names</i>	327
<i>Index of Subjects</i>	329