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REFLEXIVE JUSTIFICATION AND THE PROBLEM OF ITS RECEPTION IN ROBERT ALEXY'S THEORY

1. INTRODUCTION

On the basis of philosophy of law, one of the main streams are the theories of legal argumentation, which are now traditionally divided into topical-rhetorical and discursive-procedural conceptions. The latter is framing a key question concerning rules, according to which this argumentation shall be shaped. It includes the problem of the catalogue of rules and their content, as well as the matter of their normativity and justification.¹ An image of reflexive justification is appearing within this second area. It may be recognized as one of the contexts of theoretical reflexivity in law. Thus, it should be analysed as such: what in fact is this kind of justification, what are its functions, how is it present in philosophical thought and what critique does it come under. It behoves to adjudicate at once, that the attempts to answer those questions transgress the area of philosophy of law. It requires, at least partially, the presentation of ongoing discussions concerning issues of discursive ethics in general, therefore reaching nothing less than the positions of transcendental pragmatics by Karl-Otto Apel and Wolfgang Kuhlmann, as well as Jürgen Habermas' universal pragmatics. On the grounds of philosophy of law, the most characteristic representative of that way of thinking remains Robert Alexy. The emerging question concerns the issue of whether he presents his own concept, which may be recognized as reflexive justification, or does he use solutions proposed by aforementioned philosophers, on the basis of a specific form of reception. This kind of transition could *per se* be interesting from theoretical point of view.²

¹ See R. Alexy, *Problems of discursive theory*, "Crítica" 1988, Vol. XX, No. 58, p. 43, where the author writes about three of the most important problems of discursive theory: its status, application and its justification.

² For some of those problems see P. Skuczyński, *The Status of Legal Ethics*, Frankfurt am Main 2013, part 3.6.2, also published as P. Skuczyński, *Odpowiedzialność moralna jako podstawa etyki prawniczej. Rozważania w perspektywie transcendentально-pragmatycznej*, (in:) A. Mróz, A. Niewiadomski, M. Pawelec (eds.), *Prawo, język, etyka*, Warsaw 2010, pp. 87–98. For some

It ought to be highlighted, that the discussion concerning reflexive justification was at its the most intense during the 1970s and 1980s. It was a part of great debate concerned with so-called practical turn. Its essence relied mostly on the critique of positivistic approach and the rehabilitation of practical reason. Discursive ethics, which position was shaped during those debates, offers a concept of practical rationality, where reflexive justification is the final foundation. In Polish literature, the discussion concerning this problem, which traditionally is referred to as the dispute about *Letztbegründung*, is in details reconstructed by Beata Sierocka. According to her, authors constructing reflexive justification, most of all K.-O. Apel and W. Kuhlmann, tried to demonstrate the validity of fundamentalist philosophies' claims, concerning both the sphere of knowledge as well as the sphere of ethics, through so-called strict reflection.³ It stands as an opposition to the statement of critical rationalists, *i.e.* Karl Popper and Hans Albert, especially to the formulation of the Münchhausen trilemma by the latter. Controversies regarding both of those positions cannot be presented in this paper, yet it does not seem to be necessary, since it is widely presented in literature.

2. THE TRANSFORMATION OF IMMANUEL KANT'S PHILOSOPHY

Supporters of the reflexive justification have underlined many times that their point of view is rooted in the achievements of Kantian philosophy and in fact is its transformation. Excluding works written by K.-O. Apel, a presentation of that concept might be found in *Reflexive Letztbegründung* by W. Kuhlmann.⁴ The starting point of his considerations is the present situation of philosophy, which essentially means the rise of new fundamental problems to which philosophy must react. At a general level, historical context of philosophy is what forces the transformation of previous philosophical theories⁵. This is what happens most of all in the case of Immanuel Kant, whose questions and answers today often appear to be inadequate. The reason for that is his primal underestimation of the role of language, which, to the philosopher, was only the subject of cognition. Therefore, he concentrated his efforts on establishing subjective conditions of

aspects of R. Alexy's theory see P. Skuczyński, *Are We Facing a Crisis of Law? Reflections in Reference to the So-Called Claim to Correctness Problem*, "Studia Iuridica" 2016, Vol. LXVIII. In this article I tried not to repeat considerations contained in previous works.

³ B. Sierocka, *Krytyka i dyskurs. O transcendentально-pragmatycznym uprawomocnieniu krytyki filozoficznej*, Kraków 2003, p. 64.

⁴ W. Kuhlmann, *Reflexive Letztbegründung. Untersuchung zur Transzendentalpragmatik*, Munich 1985.

⁵ *Ibidem*, pp. 11–13.

knowledge's possibility and concerned himself with the object-subject relations. However, nowadays, reflexion should be focused on conditions of possibilities of intersubjectively valid statements concerning the world.⁶ Therefore, the point is a transformation of Immanuel Kant's philosophy in terms of philosophy of language and, especially, its pragmatics.⁷

The core of transcendental philosophy is rooted most of all in transcendental deduction or transcendental arguments. Today we can present two pleas in regard to this argumentation, concerning both its basis and form. Our first is based in observation; that the notion of experience has significantly changed since Kant as a result of the development of natural sciences. If he justified his critique of cognition by referring to the scientific practice of his times then, today, transcendental reasoning should refer to the contemporary activity of researchers. Our second plea comes down to the matter of the circularity of transcendental deduction. According to him, Kant, by starting from the scientific practice of empirically oriented natural sciences, is establishing claims concerning the provision of a certain knowledge. Then, on this basis, he aims to determine conditions of knowledge's possibility. Which means, that in his first step, Kant establishes what should have been proved.⁸ Wider examination of those pleas' sources, the progress of transcendental philosophy's transformation and the motives of selecting the subject of reflexive justification can be also found in previous work by W. Kuhlmann, concerning the Hegelian critique of Immanuel Kant's philosophy. This critique was concentrated mostly on the reflexivity of transcendental argument. Kant's purpose was to ground the critique of cognition by directing the subject on subjective conditions concerning the possibility of cognition. This procedure then has a reflexive character. However, it was not concerning the subject itself, but rather the relationship occurring between subject and object, which means that it was established right in-between subject and object of cognition, and thanks to what the subject itself is bringing to this relation, it serves its enlightenment.⁹

Hegel objected to this way of thinking just like it has been shown above; namely that the critique of cognition, by making claims to establish conditions of certain knowledge's possibilities, is realizing this intention through examining actual processes of cognition in science. He begins with the statement that cognition, along with conditions of its possibility, is implied in scientific practice. In consequence, it does not fulfil its critical task and instead of giving a certain foun-

⁶ *Ibidem*, pp. 14–16.

⁷ *Ibidem*, pp. 18–19.

⁸ *Ibidem*, p. 21.

⁹ W. Kuhlmann, *Reflexion und kommunikative Erfahrung. Untersuchungen zur Stellung philosophischer Reflexion zwischen Theorie und Kritik*, Frankfurt am Main 1975, pp. 27–28. This critique is very brief, see *ibidem*, p. 36.

dation of knowledge, it builds knowledge's additional "protection".¹⁰ Essential for this plea is that Kant is using a natural image of recognition by directing the subject to object and is establishing this relation as the matter of reflection (subject is, in some measure, forgetting about itself), instead of directing it into recognizing the subject itself.¹¹ Thus, it can be said, that he is engaging in a reconstruction of cognitive processes and, through transcendental reasoning, is positing universal rules of cognition's critique. Hegelian counterproposal relies on rejecting this reconstructive point of view because it demands an objectification of subject's activity and turning the reflection directly into the subject's consciousness. Even nowadays, this remains one of the most important disputing matters in reference to the reflexive justification. W. Kuhlmann himself maintains that the essence of Hegelian's pleas towards Kantianism are not false, but simply a mistake in theoretical selection at a fundamental level. This plea states that the reflection was not to make a subject nor a cognitive relation an object of philosophical cognition, but to examine the phenomenon of consciousness' experience.¹²

W. Kuhlmann analyses are leading him, inter alia, to the conclusion that both critique and reflection have a pragmatic nature and therefore they should be examined from the perspective of philosophy of language. On the basis of the latter, it is plausible to state that the pragmatic condition of possibility of cognition's critique is a communicative community, because critique can only be reasonable within communication between communities that require participation. The critique produces community through common effort, as well as the common aim of mutual persuasion, which at the same time constitutes the development of that community. Without that, critique is only an unfortunate performative, a symptom of a bad mood.¹³ Due to the above observation, it becomes possible to distinguish full transition from philosophy of consciousness to the philosophy of language. It is the essence of the transformation of Kant's philosophy, which no more relies on the simple actualization of its language, but instead on solving problems inherent in its original formulations. Based on a language paradigm, reflection can be understood merely as communicative experience, in which it originates.¹⁴ On the one hand, reflection cannot be identified simply with theoretical experience, because it is not just another type of cognition, which means that it escapes Hegelian plea of being assumed in advance if it was reconstructed along with the criteria of its possibility. On the other hand, it cannot be identified with experiencing one's consciousness, *i.e.* introspection, because the communicative experience has intersubjective character, therefore it also dodges Hegel's

¹⁰ *Ibidem*, pp. 30–31.

¹¹ *Ibidem*, p. 37.

¹² *Ibidem*, p. 38.

¹³ *Ibidem*, pp. 81–83.

¹⁴ *Ibidem*, p. 89.

answer on the problem present in Kant's philosophy.¹⁵ Reflection is something more, it is the whole motion from communication to theoretical experience and back to communicational. The experience and theory are just dependent moments of reflection's process.¹⁶

3. THE REFLEXIVE JUSTIFICATION AS A STRICT REFLECTION

The above, very generally shaped, notion of reflection is not the reflexive justification yet. However, it becomes apparent that it must be connected with communication, and therefore the intersubjective sphere, and not to the mere relation subject-object, nor subject's relation to itself. It also becomes possible to formulate transcendental philosophy's task after its transformation, which is going to examine the reasonable argumentation's conditions of possibility and, especially, philosophical discourse.¹⁷ It appears that strict reflection on a pragmatic ground can be provided in accordance to argumentative discourse, not on the basis of any specific discipline or theory. This distinguishes between theoretical and strict reflection. The former occurs from the outside in accordance to the, action, for example, and has a reconstructive character. In order to examine knowledge like this, one must reconstruct the process of theory's or discipline's development. This is the approach of rational criticism's advocates, so called *fallibilists*, as well as those who combine the problem of justification of knowledge with its history and seek the criteria of knowledge's certainness in its development. As a result, the problematic issue is visible right on the level of Kantian justification of cognition's critique. In contrast, strict reflection is referring to the cognition's actions without the mediation of any theory. Thus from any theoretical point of view it is not possible, which forces the abandonment of those theories. It does not require an inner and reconstructive perspective towards own cognition.¹⁸

Advocates of the reflexive justification have remarked that such procedures were already present in Leibniz and Descartes' philosophy, where the acts of reflection – acts toward self, or behaving reversely directed towards self – had crucial meaning. In particular, the Cartesian reflection becomes a separate argumentative strategy, whence reflexive character has most of all *cogito ergo sum*.¹⁹ An interesting interpretation, as it seems to be familiar to presented approach, is to be found at Hannah Arendt's, who recognizes Descartes as the founder of

¹⁵ *Ibidem*, pp. 143–144.

¹⁶ *Ibidem*, p. 167.

¹⁷ W. Kuhlmann, *Reflexive Letztbegründung...*, p. 21.

¹⁸ *Ibidem*, p. 80.

¹⁹ B. Sierocka, *Krytyka i dyskurs...*, pp. 79–80.

modern philosophy – thanks to putting a spotlight on the problem of doubt instead of philosophical astonishment.²⁰ With this act, he questioned founding the knowledge on self-evidence of senses or mind.²¹ At the same time, “(...) the loss of certainty of truth ended in anew, entirely unprecedented zeal for truthfulness (...)” and therefore “(...) was similar in method and content to the turning away from truth to truthfulness and from reality to reliability”.²² Hannah Arendt also points out that *cogito ergo sum* is based on the generalization of doubt and claims that “in doubt in something I remain aware of a process of doubting in my consciousness”, so the mind can be examined introspectively. Introspection is not understood here as a reflection, but instead as “the sheer cognitive concern of consciousness with its own content”.²³ To summarize: it is not the astonishment typical for classical philosophy, but doubting and examining claims posited within statements are classified as a grounds for strict reflection.

However, as previously mentioned, the Cartesian argument can be doubly criticized. Firstly, it does not differentiate justification through reflection of knowledge and its conditions of possibility, which means that it becomes impossible to differentiate the levels between strict and theoretical reflection. Such a possibility does not appear until we examine the very basis of transcendental philosophy.²⁴ Secondly, Descartes’ reflection does not have a linguistic character but one of consciousness and is understood introspectively.²⁵ Whereas, as Jakko Hintikka claims, even doubting should be understood not as the act of consciousness but as a linguistic act instead. This allows, through disclosed properties, the transition from reflexive doubting to reflexive justification.²⁶ Given properties are visible in the claim, that doubting or questioning as a linguistic act is, at the same time, an action (with performative content), which can be successful or not. Associated with that matter is its validity, which depends on satisfying certain conditions. Moreover, whoever doubts or questions always claims something; for example, that a certain fact did not take place, which also is reasonable according to satisfying conditions (propositional content). The act of doubt always surfaces validity claims (*Geltungsanspruch*).²⁷ It is possible to present the essence of reflexive justification without yet explicating the notion of *Geltungsanspruch*.

²⁰ H. Arendt, *Human Condition*, Chicago 1998, p. 273.

²¹ *Ibidem*, p. 275.

²² *Ibidem*, pp. 277–279.

²³ *Ibidem*, p. 280.

²⁴ B. Sierocka, *Krytyka i dyskurs...*, p. 82.

²⁵ *Ibidem*, p. 81.

²⁶ K.-O. Apel, *Das Problem der philosophischen Letztbegründung im Lichte einer transzendentalen Sprachpragmatik. Versuch einer Kritik des „Kritischen Rationalismus“*, (in:) B. Kanitscheider (ed.), *Sprache und Erkenntnis. Festschrift für Gerhard Frey zum 60. Geburtstag*, Innsbruck 1976, p. 74.

²⁷ W. Kuhlmann, *Reflexive Letztbegründung...*, pp. 72–73.

The strict reflection, as its basis, requires one to try doubt in doubting, that being the reflexive reference.²⁸ It will quickly appear that such a reflexive reference is not reasonably possible, since its effectiveness requires rules which are questioned throughout this very act. The proper formula of reflexive justification is built upon recognizing as a starting point that which cannot be questioned in argumentation without falling into contradiction. However, it does not concern singular statements only, but the argumentative situation in general. Therefore, it is not possible to be both in it and question it at the same time. Obviously there is the possibility to decline participation in an argumentative situation, but declining the possibility of argumentation is, in fact, an argumentation. Reasonable argumentation is impassable, since the transgression must be shaped into reasonable argumentation.²⁹ In other words, the doubt cannot take a form of radical scepticism because considering the problem of justification as a starting point, it would recognize everything as unjustified. Not only that but it falls into a *petitio principii*, which means that it is an answer to the problem, but it also cannot be reasonably applied to itself.³⁰

Reflexive justification transfers the problem of justification in the problem of doubt and concerns the idea of whether it is possible to doubt in everything. It understands doubt not only as an act of consciousness but also as a linguistic act, and considers conditions of its possibility. A competent language user can both doubt and recognize this act as doubting. One realizes that doubting is in fact an argumentative act. To make it successful, it must recall the rules of reasonable argumentation, which means that it cannot, without falling into contradiction, state, that “I am not obligated by rules of argumentation”. Such a statement performatively accepts those rules, yet questions them on propositional level.³¹ With a further step, one can explicate such a situation as a performative contradiction. What is more important is that thanks to applying the study of reflection within a communicative experience, it becomes possible to construct a new type of justification – the reflexive justification. This is possible when the reflection is being made on a pragmatic level of language. Limiting ourselves merely to semantics and syntactics would cause a narrowing of justification to deductive procedures – this is the mistake made by argumentation appealing to Münchhausen trilemma.³² This also applies to Kant, whose transcendentalism has a deductive character. He seeks a *ratio* for the cognitive critique outside of knowledge, therefore his argumentation is not fully reflexive, has a regressive character and falls under the

²⁸ *Ibidem*, p. 80.

²⁹ *Ibidem*, pp. 22–25.

³⁰ B. Sierocka, *Krytyka i dyskurs...*, p. 70 et sqq.

³¹ *Ibidem*, pp. 72–75.

³² *Ibidem*, pp. 76–77.

aforementioned trilemma.³³ Instead, the impassability of argumentative situation does not require any content from the outside and thus is strictly reflexive.³⁴

It ought to be noted that in the Münchhausen trilemma, there are the following three statements accepted as axioms, which make it impossible to ground any ethics, including the ethics of discourse: (1) rational justification is a formal deduction of sentences in the semantic-syntactic system, (2) intersubjective validity is an objective validity in terms of evaluation-free fixing facts or logical conclusions, and (3) from above kind of facts, deriving normative statements remains impossible.³⁵ Reflexive justification is not going to fit into such a narrow concept of justification. Simultaneously its formulation at this very level is not based on reconstructing the argumentation's conditions of possibility, understood as certain practice or linguistic game. Its essence lies within a statement: that the argumentative situation is not transgressive, which means that there is no possibility of questioning rules of argumentation without falling into contradiction, and therefore there is no way to reasonably decline their recognition. It is not yet comparable to justifying already given rules.³⁶ Executing this strict reflection mirrors the situation of Cartesian *cogito ergo sum* – it does not give any blueprint of theory. It raises the question of how can it be proved that his is not only original, but also not containing any kind of content gesture. This situation indeed can be called a Cartesian one.³⁷

4. THE THEORY OF ARGUMENTATION AND REFLEXIVE JUSTIFICATION

According to that situation, transcendental pragmatics needs another – apart from strict reflection – pillar, *i.e.* the theory of argumentation. Before discussing its content, W. Kuhlmann points out that following theory applies oneself to the question concerning the final justification. The fundamental problem is whether it can be applied to strict justification or just theoretical justification. The first approach remains under the threat of circularity, since the theory of argumentation is supposed to transgress the restrictions of this procedure. The second approach has a reconstructive character, therefore it results in the conclusion falling into falsification – justified in an insufficient way. Escaping this methodo-

³³ *Ibidem*, p. 86.

³⁴ *Ibidem*, p. 88.

³⁵ K.-O. Apel, *Diskurs und Verantwortung. Das Problem des Übergangs zur postkonventionellen Moral*, Frankfurt am Main 1988, p. 82.

³⁶ B. Sierocka, *Krytyka i dyskurs...*, p. 82.

³⁷ W. Kuhlmann, *Reflexive Letztbegründung...*, pp. 105–106.

logical dilemma relies on building the knowledge about argumentation, which should be established by competent participants of argumentation. Since the argumentative situation is not transgressive, it ought to be established what kind of knowledge is essential for the participants, so they could perform the act of strict reflection. That brings us to the conclusion that the presupposition for participating in argumentation is in the use of notions – even debatable at scope and content – just like, for example, validity of arguments or justification.³⁸ Those notions have specific character, which is revealed during the act of strict reflection. To operate them from the users' perspective, there is more needed than mere linguistic competence (and as reflexive justification states, those notions cannot be reasonably questioned without using their inner point of view).

That missing condition is a presupposition of a communicative community of an ideal and infinite character.³⁹ Within such a community, there is possible consent and that is, in the strictest way, the condition of arguments' validity. The community is a transcendental assumption, so it could be treated as a communicative *a priori*. It is not an actual institution, yet every participant seriously assumes it, while formulating each *ratio*. It is not an actual institution, but *sui generis* meta-institution enabling the legitimizing of actual institutions.⁴⁰ K.-O. Apel illustrates that by analysing the notion of grammatical, syntactic, semantic and linguistic competences and opposing all the above to the communicative competence.⁴¹ This opposition is mirrored in the difference between constitutive rules of particular linguistic game and constitutive rules of speech, *i.e.* communication throughout the acts of speech. Those first rules can be only institutional facts – conventionalities – which is why they are not able to justify the norms of a universal nature. They need to enforce other rules, through which given conventionalities, rules of communication, can be posited. In other words, they are the conditions of possibility of every institution established on the way of a conventionality. The speech, as such, belongs to a different institutional level than particular conventionalities. Therefore, individual languages are realizations of the meta-institution of speech or communication.⁴²

With communicative competence being an element of meta-institution of communication, there is a reflexive competence connection, due to which the lan-

³⁸ *Ibidem*, pp. 108–115.

³⁹ The author openly refers to the concept of the ideal, infinite community of inquiry introduced by Charles Sanders Pierce, for whom it was the basic assumption of scientific practice; establishing rules for debates that concern cognition and semiosis having both procedural character (openness, egalitarianism), as well as their participants' attitude (social altruism). See C. S. Pierce, *O nieskończonej wspólnocie badaczy*, A. Hensoldt (pref. and trans.), Opole 2009, esp. pp. 24–25.

⁴⁰ K.-O. Apel, *Diskurs und Verantwortung...*, pp. 35–37.

⁴¹ K.-O. Apel, *Sprechakttheorie und transzendente Sprachpragmatik zur Frage ethischer Normen*, (in:) K.-O. Apel (ed.), *Sprachpragmatik und Philosophie*, Frankfurt am Main 1976, pp. 85–90.

⁴² *Ibidem*, pp. 98–102.

guage users can discover valid conditions of possibility, understood as legitimacy of particular institutions in the practical sphere. Institutions should be built upon rational communication. At the other end of the spectrum, meta-institution allows users to criticize them. Due to the communicative competence and a presupposition of the ideal communicative community, it is possible to establish, as well as to undermine, actual institutions through the argumentation. Thanks to that competence, it becomes possible to reflexively examine conditions of possibility of communication, hence finding rules of communication as meta-institutions.⁴³ It is not possible, as previously mentioned, to justify those rules empirically and deductively – as required by reconstructive social sciences. This means that methodical primacy goes to the reflexive justification, which appears to be self-justification of discourse's rules as reflexivity. The argumentative discourse appears to be only a linguistic game, which has a place for strict reflexivity, therefore through the possibility of self-reference, the conditions of the possibility of communication are being discovered. This is not possible in non-argumentative linguistic games. The reason is that only within the discourse, it is possible to participate and present all interests and claims. Therefore, the argumentative discourse institutionalizes unlimited communicative community and is based on the rule of universalization in an intersubjective sphere through the consent of all interested.⁴⁴

Again, the notion of validity and validity claims appear, since their conceptions are elements of understanding the communicative competence. The notion of validity (*Geltung*) itself, comes from the Kantian concept of objective validity of cognition and explains itself as a formal correctness of cognition, independent from its content. This theory was popularized by Rudolf Hermann Lotze. This position remains distant from the theory of truth understood as the correspondence of a performance with its object, yet at the same time it differentiates the actual cognition – in terms of psychological cognition – from the normative cognition (*Erkenntnis*).⁴⁵ On the grounds of transcendental pragmatics, this notion gains communicative character. It is recognized that validity claims are implicitly contained in all acts of speech and they are referring to conventional rules.⁴⁶ For that purpose, the wide analysis of the theory of speech act shows the common

⁴³ *Ibidem*, pp. 117–118.

⁴⁴ *Ibidem*, pp. 121–126.

⁴⁵ J. Woleński, *Epistemologia. Poznanie – prawda – wiedza – realizm*, Warszawa 2005, pp. 89–91. It was used by Baden School of Neo-Kantianism (Wilhelm Windelband, Hans Rickert). It is also present at Gustav Radbruch where, as a background for its usage, a comprehension of the world of culture is the referring to the transcendental world of values. Law belongs to the sphere of culture, it is a cultural fact and therefore it is referring to the values. Throughout this very reference, legal reasoning is justified. The sphere of values is the area of philosophy of law reflection. Cf. R. Dreier, S. L. Paulson (eds.), *Gustav Radbruch, Rechtsphilosophie, Studienausgabe*, Heidelberg 2003, p. 8 *et al.* This is as important as R. Alexy's claim to correctness is an attempt to express similar ideas as G. Radbruch.

⁴⁶ K.-O. Apel, *Sprechaktheorie...*, pp. 105–107.

character of the performative aspect and, consequently, is formulating ideas concerning the double structure of statements (that being both performative and having propositional character). For the latter, all acts of speech are always reflexive, since no matter what is being stated on the propositional layer, has a performative reference as well.⁴⁷

The so-called performative contradiction is a special situation appearing in reference to the performative-propositional character of statement. It rests on questioning the propositional within performative layer of the act of speech. It is significant due to the revealing of the difference between communication and linguistic competence. K.-O. Apel uses the example of the liar, who is formulating statements in such a way so that conventional conditions of effectiveness would have been satisfied and, at the same time, having an awareness of lying. Perceiving this fact is, according to philosopher, possible for the liar because there is a pragmatic difference between linguistic competence, used to speak in regard to conventional rules, and communicative competence understood as reflexive meta-competence, which enables evaluation contained invalidity claim of liar's statement⁴⁸. In other words, the liar understands, that apart from their statement being conventionally proper, he or she could not defend it in the argumentative discourse if the validity claim would have been problematized. If, additionally, the liar would admit that openly, revealing his or her performative attitude, then such a speech act would have been rated as a nonsense. It ought to be underlined that appealing to the performative contradiction plays an important role in the theory of argumentation on the grounds of transcendental pragmatics, though the procedure of reflexive justification of the impassability of an argumentative situation appeals only to the act of strict reflection skipping the issue of performative contradiction⁴⁹.

Since the condition of possibility of reasonable argumentation is an ideal unlimited communicative community, the rules in power are valid in all argumentative discourses. Such a community is based on the principle of cooperation of its participants⁵⁰. Assuming that a serious argumentation is avoiding performative contradiction, as well as that an ideal communicative community is an opposition to the real one, the following rules of ethics of argumentative discourse can be formulated: firstly, the dictation of rational argumentation⁵¹; secondly the necessity of cooperation, understood as aiming for rational consent⁵²; thirdly, the aim to

⁴⁷ W. Kuhlmann, *Reflexive Letztbegründung...*, p. 26. He perceives this common reflexivity as an argument against Bertrand Russell's rigorist statement about reflexivity, which in Kuhlmann's opinion would have been excluding philosophy as a whole.

⁴⁸ K.-O. Apel, *Sprechakttheorie...*, p. 113.

⁴⁹ *Ibidem*, p. 83.

⁵⁰ *Ibidem*, p. 145 et sqq.

⁵¹ *Ibidem*, p. 184 et sqq.

⁵² *Ibidem*, p. 188 et sqq.

obtain the rational consent of all interested (yet not only participating) concerning practical issues⁵³; and fourth, the prescript of upholding the real communication community and realizing its ideal equivalent.⁵⁴ This catalogue is created by certain meta-norms, whose role is not only limited to perform functions of formal criteria of different behaviour principles evaluation, like categorical imperative, but to also dictate a certain way of behaving, tending to elaborate on such rules. Thus, meta-norms have an ethical character and the way of their establishment (the primacy of reflexive justification) gives them categorical features, and consequently the primacy above other norms of behaving.⁵⁵

It ought to be noted that those rules are very general, yet advocates of transcendental pragmatics are not trying to build a more specific catalogue. At the same time, W. Kuhlmann excludes the possibility of other types and forms of argumentation as respectable alternatives, which would reject the above rules.⁵⁶ As mentioned, they are not formulated based on the reconstruction of some linguistic game or institution, but they are rules of rational communication, which are exposed in the way of reflection within argumentative discourse. This recalls an interpretation, according to which within concrete social institutions can be applied different rules establishing criteria of validity of various acts of speech. They would have a conventional character and will not be universally valid. The scope of their validity would mark the range of the real communicative community and the level of implementation of the ideal communicative community's communication rules, thus – ethics of discourse. Due to the meta-institutional character of speech, every conventionality can be always criticized through argumentative discourse. The conclusion is that although some conventional rules of particular institutions can legitimately differ from rules of the ethics of discourse, there is no institution yet that can legitimize itself by attaching its own catalogue of rules to the ethics of discourse. The ethics of discourse cannot be conventionalized, because that would take away its universal character. Assuming this conclusion is correct, it might be of great importance to the legal argumentation.

⁵³ *Ibidem*, p. 199 et sqq.

⁵⁴ *Ibidem*, p. 208 et sqq.

⁵⁵ *Ibidem*, pp. 28–29. Within the argumentative theory, according to W. Kuhlmann, two parts can be distinguished – (1) a hard core, not subjected to fallibilism and (2) reconstructive – therefore subjected to fallibilism periphery. The latter may be corrected, but if the correction can be done only as a form of argumentation, then finally, it turns out to be a self-correction, which appears to confirm the theory of argumentation. *Ibidem*, pp. 126–131.

⁵⁶ W. Kuhlmann, *Reflexive Letztbegründung...*, p. 231 et sqq.

5. THE RECONSTRUCTIVE TURN AND THE REJECTION OF REFLEXIVE JUSTIFICATION

Although the philosophy of law is undoubtedly important in the concept of discursive ethics proposed by Jürgen Habermas, presenting it at this point would not be possible or useful. The importance seems to be in presenting its attitude towards reflexive justification and some consequences derived from fact that this attitude is different than the one represented by transcendental pragmatics. Firstly, it is important to note, that the programme of this philosopher's social critique was evolving, but the notion of reflexivity always played great role in his views. Specifically, within the concept of social interests constituting cognition as legitimacy of critique appears the auto-reflexive feature of emancipatory social sciences, which was supposed to be something separate from the theoretical reflection. J. Habermas abandons this point of view for the concept called universal pragmatics, wherein he distinguishes practical auto-reflection as an importance to the processes of emancipation from rational reconstruction, crucial for social sciences.⁵⁷ In progress of his philosophy, there is a significant moment – the so-called reconstructive turn. This concept is also of great importance due to the fact that it modifies hypercritical attitude towards such members of Frankfurt School like Max Horkheimer, Theodor W. Adorno or Herbert Marcuse and begins, in the way of reconstructive social theory, examining grounds of normativity in existing institutions, especially the democratic state of law.⁵⁸

Therefore, both universal pragmatics and subsequent, fully developed theory of communication action are reconstructive social theories, not philosophical meta-theories. They are coming under falsification, and thus cannot have a final justification.⁵⁹ From the very beginning of formulating the theory of universal pragmatics, J. Habermas is shaping its task as identification and reconstruction of universal conditions of possibility of an agreement.⁶⁰ In this context, he instantly notices what K.-O. Apel says about normative conditions of possibility of an agreement, starting with problems concerning argumentation, which suggests narrowing the subject field. Habermas, on the other hand, wants to consider conditions of possibility of speech in general, and therefore he formulates the thesis that every person acting communicatively has claims to validity.⁶¹ He differentiates conditions of validity of grammatical sentences from conditions of

⁵⁷ A. M. Kaniowski, *Wstęp. Rehabilitacja i transformacja filozofii praktycznej*, (in:) J. Habermas, *Teoria działania komunikacyjnego*, t. 1, Warsaw 1999, pp. XX–XXI.

⁵⁸ A. Romaniuk, *Czytanie Habermasa*, Warsaw 2013, p. 87 et sqq.

⁵⁹ *Ibidem*, pp. 139–140.

⁶⁰ J. Habermas, *Was heißt Universalpragmatik?*, (in:) K.-O. Apel (ed.), *Sprachpragmatik und Philosophie*, Frankfurt am Main 1976, p. 174.

⁶¹ *Ibidem*, pp. 175–176.

claims, which ought to be recognized in favour of a speaker through the act of speech. The analysis of acts of speech, along with raised validity claims, philosopher precedes with some introducing remarks concerning the relation of universal pragmatics to transcendental theoretical reflection and empirical-analytical studies.⁶² To establish this, he postulates that universal pragmatics should have a reconstructive character, and should concern pre-theoretical knowledge of the competent speaker in his natural language. It will be reflexive, because there is no other way of knowledge's explication than through the natural language. At the same time, it will establish empirical-analytical studies, especially linguistic ones, because they provide conceptualisation of knowledge to the language users concerning ways of its usage.⁶³

A programme shaped like this turns out to be irreconcilable with the transcendentalism of Kantian type represented by K.-O. Apel. This theoretical stream was not concentrating on conditions of possibility of empirical knowledge. If universal pragmatics are to concentrate on conditions of possibility of linguistic agreement, then of course, there are some *a priori* notions to derive, just like the notion of notion itself, intentionality or linguistic competence. But Kant has concluded that due to *a priori* categories we objectivize our experience – we construct subjects. Aforementioned *a priori* notions of linguistic agreement are not it's conditions in that meaning, as *a priori* categories are conditions of experience. It occurs due to the fact that experiences are constituted, unlike statements, which are simply generated. Additionally, the possible conditions of the agreement are not held as clearly *a priori*. They are like this for the uttering, if realized, yet for empirical-analytical sciences, including linguistics, they are *a posteriori* as an object of cognition. Established knowledge and its scientific explication differ so much that the latter is not possible to achieve independently through reflection. Consequently, the term “transcendental” doesn't correspond with universal pragmatics.⁶⁴ Thus it is hard to speak about the final reflexive justification on the very basis of this concept.

In *Theory of Communicative Action*, J. Habermas underlines that philosophical attempts of final justification have been broken down.⁶⁵ This explains his turn towards sociology, which in his words “is most likely to link its basic concepts to the rationality problematic”, therefore it continues the reconstructive turn.⁶⁶ From this point of view, the philosopher examines the processes of communication, which leads him to the assumption that the measurement of a statement's rationality is an inner relationship occurring between semantic content, conditions of legitimacy (validity) and ratios, which can be adduced for given legitimacy. Con-

⁶² *Ibidem*, pp. 178–179.

⁶³ *Ibidem*, pp. 195–196.

⁶⁴ *Ibidem*, pp. 202–204.

⁶⁵ J. Habermas, *Theory of Communicative Action. Vol. 1*, Boston 1984, p. 2.

⁶⁶ *Ibidem*, p. 3.

ditions of legitimacy are referring to the intersubjective knowledge of a communicative community, *ergo* to the common lifeworld (*Lebenswelt*).⁶⁷ For Habermas, rationality resides in everyday communicative practice. Its essence is grounded in referring to argumentation as an instance of appeal. In case of the lack of consent during communication, in order to continue said communication, participants must argue, thus – starting a discourse. J. Habermas attempts to explicate the notion of communication’s rationality through the theory of argumentation. He underlines that “(...) argumentation can be conceived as a *reflective continuation, with different means, of action oriented to reaching understanding*”. Discourse is therefore a special procedure. Its characteristic feature is, that unlike “usual” communication, a specific division of action occurs. It rests on the fact that weight of argumentation is divided according to the division of roles and tasks between proponents and opponents.⁶⁸

The argumentative rationality in this concept is not based in argumentative discourse through strict reflection, as in the K.-O. Apel concept, but through communicative actions, among which discourse is an important linguistic game because it serves the justification and critique (arguments for and against) of problematized validity claims, yet it is not a starting point.⁶⁹ Introducing the notion of communicative action, J. Habermas notes, *inter alia*, that in those actions occurs a reflexive referencing to the world in process of reaching the agreement. It is possible, since by actions in general he understands such expressions which somehow refer to the world, whilst the distinctive feature of communicative actions is the moving towards reaching the agreement. This means that communicative actions are not possible to analyse simply as grammatical sentences, referring to the world directly, but the reference to it is always reflexive, thus they are relativized to the possibility of questioning by other actors. Moreover, the potential of rationality inherent in the very communication and it’s relations to the world may be used only by communicative action, thus coordinating actions through the agreement, *i.e.* a situation, where participants are mutually recognizing each other’s validity claims.⁷⁰ He underlines that it is not allowed to identify communicative actions with mere communication, since this first constitutes social action, and, more precisely, the way of its coordination.⁷¹

⁶⁷ *Ibidem*, pp. 9–14.

⁶⁸ *Ibidem*, pp. 17–18, 25 (original distinction). In the margins, J. Habermas makes a statement: that he agrees with R. Alexy, that legal discourse contains “relevant elements” of normative argumentation, therefore it is not merely a conventional institution, but an argumentative form. *Ibidem*, pp. 35–36.

⁶⁹ T. Maślanka, *Racjonalność i komunikacja. Filozoficzne podstawy teorii społecznej Jürgena Habermasa*, Warsaw 2011, pp. 114–116. The essence of communication is to reach an agreement, because it is possible to indicate the precedence of illocution, therefore a performative aspect in the acts of speech. Thus, the vast role in J. Habermas’ analysis is indicated by analysing the acts of speech and the notion of performative contradiction. See *ibidem*, pp. 111–114.

⁷⁰ J. Habermas, *Theory...*, pp. 96–99.

⁷¹ *Ibidem*, p. 101.

6. JUSTIFICATION OF LEGAL DISCOURSE'S RULES

R. Alexy, in part B of his fundamental work concerning legal argumentation, attempts to build the theory of rational general practical discourse. It then ought to be used to build a theory of legal discourse as a special case of general legal discourse. The starting point of his considerations is the justification of practical judgements. He recognizes that this justification is connected with the claim to correctness, which allows us to discuss those judgments, *i.e.* requesting to give reasons. Those reasons, on the other hand, are presupposing the validity of certain rules, which also can be problematized and discussed (in terms of giving reasons).⁷² In order to avoid a regress, arbitrariness or vicious circle, *i.e.* a Münchhausen trilemma, a statement's justification should not appeal to another statement, but to a number of justification's conditions, rules of rational discussion – namely the discourse. The latter notion denotes such groups of actions, of which correctness and truth of statements can be analysed. It consists of pragmatic rules, since they do not reach the content of statement. It has a procedural character. Theories of discourse, which are examining what those rules of discourse can do from various perspectives, namely empirically (ways of argumentation and their effectiveness), analytically (logical structures of thinking) and normatively (criteria of discourse's rationality).⁷³

In his next step, R. Alexy concentrates on normative theory of discourse and states that, in many ways, it can justify proposed criteria of rationality. It is possible to justify them as, for example, technical or empirical rules. However, more important are propositions of definitional justification – as rules of certain linguistic game, and transcendental, or universal-pragmatical – as conditions of possibility of linguistic communication.⁷⁴ Those ways, in the author's opinion, are not mutually exclusive, yet the most essential way is the last mode of justification. There is the possibility of a dispute over a range of discourse's rules. A so-called “theory-discursive discourse” (*diskurstheoretischer Diskurs*) can appear consequently.⁷⁵ It seems that on this level, R. Alexy adopts the argumentation of K.-O. Apel and J. Habermas; not delving into the still blurred differences between a reflexive justification of the first philosopher and, being still in progress, the reconstruction project of the latter. The issue of justification of rules of general practical discourse R. Alexy develops later, in few articles concerning the practical rationality, and especially in an article called *Eine diskurstheoretische Konzeption der praktischen Vernunft*. The starting point is a differentiation

⁷² R. Alexy, *Theorie der juristischen Argumentation – Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Frankfurt am Mein 1983, p. 222.

⁷³ *Ibidem*, pp. 223–225.

⁷⁴ *Ibidem*, pp. 225–232.

⁷⁵ *Ibidem*, p. 233.

between justification of discourse's rules content and justification of their overall validity. For this purpose, he constructs his own transcendental pragmatic argument, which arises next to the justification of discourse's rules validity in the way of an argument from efficiency and empirical-anthropological argument.⁷⁶

Alexy's transcendental-pragmatic argument is based on following reasoning: as a first premise he assumes that the act of speech, and therefore assertion, is necessary for human's forms of life. The second premise presupposes that there are certain rules, to which there are the conditions of possibility of speech act of assertion. They are constituted by an inherent claim to truth or correctness in which in every case are implicating the claim to justifiability. This means that every asserting speaker has a duty to justify every given assertion. The notion of justification is always associated with the claim to freedom, equality and universality. Those premises are allowing the reasoning concerning the implication that, since assertions are necessary acts of speech, then rules of their application are also a necessity. As rules of discourse, they are valid if and only if the asserting speaker is already interested in correctness – therefore R. Alexy realizes that the transcendental-pragmatic argument is convincing only from inner perspective. In other words, each and every person who wants to refer to the problem of correctness is bound by the rules of discourse. Apart from discourse, the claim to correctness is pointless, and without the correctness, no speech act of assertion can be taken seriously. Additionally, showing that being interested in correctness is indeed distinctive human being's feature is the domain of both empirical-anthropological argument and argument from efficiency. In this approach, it is possible to see similarities between the reconstructive approach of J. Habermas and reflexive justification of K.-O. Apel and J. W. Kuhlmann.

On the one hand, R. Alexy respects J. Habermas' approach, and both theories have many similar elements. Undoubtedly, amongst them is the issue of cognitive position or procedural character of discourse which cause eventual controversies between them. On the other hand, R. Alexy does not share the views on many essential theories for universal pragmatics and theory on communicative action. Most of all, he does not realise the basic purpose of J. Habermas' project, namely searching of conditions for the possibility of linguistic agreement. He does not understand the potential of rationality inherent in communication as an important starting point, and does not adopt Habermas' consensualism to this matter. Instead, he concentrates on the justifiability of assertions through discourse. Moreover, his argumentation has not, as a rule, a reconstructive character, therefore it is not using the analytical-empirical sciences' achievements as J. Habermas does. Arguments reaching to those disciplines have a complementary character or are confirming thesis elaborated on philosophical ground. He does not build

⁷⁶ R. Alexy, *Eine diskurstheoretische Konzeption der praktischen Vernunft*, „Archiv für Rechts- und Sozialphilosophie“, Beiheft 1993, No. 51, p. 11 et sqq.

a social theory on the pattern of theory of communicative action.⁷⁷ This is why his proposal concerning rules of discourse differs from Habermas' proposal, both because rules of practical discourse vary, have different power and depend on a special form of discourse, as well as because their catalogue is much more extensive – amongst them basic rules, rationality rules, rules of argumentation, forms of argumentation, rules of justification or transition rules.⁷⁸

That could have led to the conclusion that theory closer to R. Alexy's views is a transcendental-pragmatic approach presented by K.-O. Apel and W. Kuhlmann. Since he rejects a reconstructive perspective, and his justification of universal validity of discourse's rules is based on argumentation in terms of weak transcendentalism, then this is similar to the reflexive justification presented by above-mentioned theoreticians. However, it seems that this conclusion also would be incorrect. Mostly because Alexy himself is rejecting the possibility of final justification⁷⁹, what is one of the basic purposes of transcendental-pragmatic argumentation. The procedure of reflexive justification must show the impassability of argumentative situation and, only on this ground, universal conditions of its possibility, in terms of ideal and unlimited communicative community and its valid rules, can be examined. It is hard to find in R. Alexy's works a procedure of strict reflection, although his transcendental argument may look similar. Nevertheless, philosopher appeals here directly to the validity claims and rules of assertion's justification, not to the impassability of argumentative situation nor seeking for conditions of its possibility. All of this cause that speaking about reception of reflexive justification's procedure is very difficult, since the philosopher seems to follow his own path in order to justify rules concerning general practical discourse.

However, in R. Alexy's theory, justification of general practical discourse is necessary, yet not sufficient to build a theory of legal discourse condition. An important addendum in this matter is the so-called special case thesis, the widely discussed *Sonderfallthese*. According to this thesis, legal discourse is a variation of general practical discourse, and legal statements, for example judicial decisions, do not differ from other normative statements. It means that they contain a claim to correctness and there is a possibility of demanding their justification using the rules of practical discourse. Yet this legal discourse connects with many institutional constraints, like binding by statutory law, the adjuration of precedence's consideration or achievements of legal dogmatics, as well as the necessity of argumentation framed by the procedural law.⁸⁰ As a consequence, applying the rules of general practical discourse is not fully possible and the claim

⁷⁷ P. Gril, *Die Möglichkeit praktischer Erkenntnis aus Sicht der Diskurstheorie: Eine Untersuchung zu Jürgen Habermas und Robert Alexy*, Berlin 1998, pp. 129–131.

⁷⁸ R. Alexy, *Theorie...*, p. 234 et sqq.

⁷⁹ P. Gril, *Die Möglichkeit...*, p. 137.

⁸⁰ R. Alexy, *Theorie...*, p. 34.

to correctness of judicial decisions is narrower than in case of the first one, since they can be rationally justified only within a legal system.⁸¹ Conversely, legal discourse must take place accordingly to the institutional rules, for example procedural law, which although are not valid *erga omnes*, still must be respected. It seems that *Sonderfallthese* introduces a reconstructive element to the theory of legal discourse, but does not include its starting point, namely rules of general practical discourse.

7. THE CRITIQUE OF LEGAL DISCOURSE RULES' JUSTIFICATION FROM ROBERT ALEXY'S PERSPECTIVE

R. Alexy's theory induced a widespread discussion. The issue of justification for the rules of legal discourse turned out to be particularly controversial. It seems that there are two streams of criticism for this matter. The first refers to the justification of general practical discourse's rules, therefore it mainly concerns itself with K.-O. Apel's and J. Habermas' argumentation, and the second stream is directed towards the possibility of implementing those rules in legal discourse, therefore concerning *Sonderfallthese*. Of course, both of those streams are not mutually exclusive and it is possible to state that R. Alexy failed both in justifying rules of general practical discourse and in demonstrating that legal discourse is its own special case. However, it seems that the possibility of distinguishing those issues reveal a tension hidden in this theory. In general, it is a result of the attempt of reconciliation between the general theory of argumentation, which is a theory of general practical discourse, with the particular nature of the legal argumentation. A philosopher's attitude towards presented above discussion concerning reflexive justification might be a test of that tension, especially considering the point, whether it appeals more to the procedure of strict reflection in terms of transcendental pragmatics, or the reconstruction in terms universal pragmatics. As predicted, the relationship remains ambiguous. Presenting the critique of discussed theory may clarify the matter.

An example of a critique belonging to the first stream may be a severe judgment of R. Alexy's transcendental argumentation formulated by Andrzej Grabowski. He states that the philosopher uses the argument in formally correct manner, therefore it has a proper logical structure⁸². These doubts arise because of the following statement regarding the premises of an argument: that statements are necessary, that rules of stating are necessary to make these statements pos-

⁸¹ *Ibidem*, pp. 264–271.

⁸² A. Grabowski, *Juristic Concept of the Validity of Statutory Law. A Critique of Contemporary Legal Nonpositivism*, Heidelberg–New York–Dordrecht–London 2013, pp. 94–99.

sible and that the necessity of rules is equal to their validity. The first statement does not seem to come under a naturalistic fallacy yet, but to be widely based on empirical reconstruction of practice instead, which is not enough to demonstrate the necessity. The second statement is grounded in categories of the claim to correctness and implicated by the latter claim to justifiability and performative contradiction. Reservations concerning those constructions will be discussed below. Furthermore, an arbitrarily established catalogue of discourse's rules can also be the source of doubts.⁸³ In consequence: "The analysis leads to an irresistible conclusion that the question of universal validity of discourse rules constitutes only a rhetorical- persuasive attempt because the universality of the necessity and validity of these rules is limited to such an extent that the application of this term seems to be entirely unauthorised, at least from the semantic point of view".⁸⁴ The third statement concerns drawing deontological validity of rules from a modal necessity, which is unjustified, since the necessity cannot be a matter of an obligation, but only a subject of permission.⁸⁵ In his conclusion, A. Grabowski asserts that this argumentation can prove only the instrumental (technical) validity of discourse's rules and that they are bidding only to those who decide to join the discourse, therefore it is dependent on will.⁸⁶

As previously mentioned, he also criticizes the concept of the claim to the correctness. According to him, reasoning based on category of performative contradiction does not help to avoid the circularity of justification. He also analyses in detail the transition from Cartesian *cogito ergo sum* interpreted by J. Hintikka based on existential contradiction to the performative contradiction. He maintains that this transition distorts the original philosopher's thought, since he interpreted Descartes' thesis existentially, not inferentially. Besides, he claims that K.-O. Apel in his reasoning mistakenly substituted Cartesian thinking with arguing, which is unacceptable, because of the possibility of substituting any other action as well.⁸⁷ The notion of performative contradiction itself is unacceptable, because it concerns two different categories – actions and sentences, therefore there cannot be a logical contradiction between them. Furthermore, this contradiction can justify every sentence and conviction, that it can justify knowledge about communication "is logically unjustifiable and – from the epistemological point of view – puzzling"⁸⁸. This is not exhausting all of the objections which may be formulated in this stream of criticism towards the theory of general practical discourse. Many doubts can arise concerning the possibility of conciliating procedural character of rationality with some of its material conditions, and whether is it not in conse-

⁸³ *Ibidem*, pp. 99–103.

⁸⁴ A. Grabowski, *Juristic Concept...* p. 104.

⁸⁵ *Ibidem*, pp. 104–110.

⁸⁶ *Ibidem*, pp. 111, 115.

⁸⁷ *Ibidem*, pp. 141–146.

⁸⁸ *Ibidem*, pp. 153–155.

quence a hidden substantive (anthropological) and though undemocratic point of view.⁸⁹ Further development of those issues is not possible here.

The second stream of criticism may be presented using the example of J. Habermas' views. His pleas concern the reception of discursive ethics in legal argumentation. He seems to accept including to this argumentation such conditions of rational discourse as a prescription of rational arguing, participation in argumentation's equality and excluding the violence as a whole. It is not surprising, since all of these rules were excerpted from J. Habermas himself.⁹⁰ However, as he points out, building the theory of legal argumentation does not necessarily have to use the theory of discursive ethics, because it is not required by priority of the latter, nor a postulate of compatibility between moral and legal norms. As the most important point of his critique concerns R. Alexy's concept, Habermas articulates the equalization of a judicial decisions correctness' problem and the validity of moral judgments. Though both cases concern the application of norms, the problem of legislative rationality is the matter of different theory concentrated on democratic procedure⁹¹ – the application of law takes place within procedures and by methods of legal tradition. The critique concerns most of all *Sonderfallthese*, because it does not include the fact that law and morality are different systems of social norms, both shaped on the basis of universal rule of discourse. The application of law is not then a special case of applying morals. Law is institutionalized, whilst morality is not, and that institutionalization, just like the democratic procedure, should cover deficits in realization of rational discourse's rules, which may be fulfilled only approximately. It is visible in the temporal (terms), social (courthouse parts) and material (issue in the main proceedings) limitations of legal argumentation.⁹²

⁸⁹ M. Dybowski, *Wybrane nurty współczesnej krytyki koncepcji praw podstawowych Roberta Alexy'ego*, (in:) J. Zajadło (ed.), *Dziedzictwo i przyszłość. Problemy współczesnej niemieckiej filozofii prawa*, Gdańsk 2010, pp. 202–203.

⁹⁰ J. Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, Cambridge 1995, pp. 229–231.

⁹¹ This particular stream of a critique of R. Alexy's theory was developed especially by Klaus Günther, for whom a key distinction in this matter is a separation the discourse of justification from the discourse of application. A type of the first is general practical discourse, and the second is legal discourse. It undermines the legitimacy of *Sonderfallthese*. See K. Günther, *Ein normativer Begriff der Kohärenz für eine Theorie der juristischen Argumentation*, „Rechtstheorie” 1989, No. 20, p. 184 et sqq. The defense of *Sonderfallthese* through establishing legal discourse as an applicational discourse, see G. Pavlakos, *The Special Case Thesis. An Assessment of R. Alexy's Discursive Theory of Law*, „Ratio Juris” 1998, No. 2, p. 126 et sqq.

⁹² J. Habermas, *Between Facts...*, pp. 230–235. It seems that, because of similar considerations, Bartosz Brożek raised an economic argument in favour of existence of the law, where justification of norms occurs within a different concept of rationality than communicative, rejecting the claim to correctness, while maintaining the practical and legal character of legal argumentation. See B. Brożek, *Rationality and Discourse. Towards a normative Model of Applying Law*, Warsaw 2007, pp. 246–247.

Similar doubts are raised by Ulfrid Neumann, for the whom central question concerning *Sonderfallthese* is: can trial be at all understood as discourse? The main obstacle seems to be what the thesis concerning special case takes into account, *i.e.* the occurrence of institutional coercion and engaging interests of its participants within the trial. In other words, it frames strategic actions in terms of J. Habermas concept, and as a consequence, discourse's rules are instrumentalized. The defence of R. Alexy concerns the aforementioned limitations of claims to the justifiability of ruling to being rationally justifiable only within a legal system. According to U. Neumann, the misunderstanding – namely, confusion between rules of language and social roles – does not vanish. For example, a ruling contradicting its own correctness, therefore falling into performative contradiction in terms of R. Alexy, ought to be interpreted not as infringement of discourse's rules, but as an infringement of social rules concerning performing a specific role instead. As a consequence, it appears that *Sonderfallthese* is an over-interpretation of the fact that legal disputes and judicature use extra-legal arguments belonging to the general practical discourse, because their application does not necessarily mean this discourse's rules extend over the whole legal discourse.⁹³ Perhaps the thesis concerning a special case should be understood narrowly, as a sort of transition rule, which allows extra-legal argumentation and the possibility of its problematization consistent with general discourse's rules, and not a thesis concerning application of those rules to the arguments appealing to statutes.⁹⁴ It is important to note that in R. Alexy's theory, it's wide understanding is crucial for the justification of legal discourse's rules.

8. CONCLUSIONS

Concluding these earlier considerations, it should be remarked that despite the many similarities connecting the above theories⁹⁵, there are some fundamental differences, which mainly concern an attitude towards the procedure of reflexive justification. In particular, the critique of R. Alexy's theory of legal discourse might be interpreted as a hard to accept attempt of seeking the third way between strict reflection and reconstruction. Rules of legal argumentation cannot, after all, have a universal character, because they are only conventional rules of concrete institutions' functioning, underpinned by legal tradition. They can be only reconstructed from practice. However, not every linguistic game can have a foundation

⁹³ U. Neumann, *Juristische Argumentationslehre*, Darmstadt 1986, pp. 84–90.

⁹⁴ See K. Kukuryk, *Kilka uwag o sposobie rozstrzygania dyskursu prawnego*, „Annales Universitatis Mariae Curie-Skłodowska Lublin–Polonia” 2012, No. 1, p. 24.

⁹⁵ See M. M. Bieczyński, *Teorie dyskursu prawniczego w niemieckiej filozofii prawa na przykładzie koncepcji Jürgena Habermasa, Karla-Otto Apla oraz Roberta Alexego*, Poznań–Opole 2010, p. 76 et sqq., which shows their idealizing, optimizing and postulative character.

of such analysis, if its purpose is to lead towards indicating universally valid rules as it's conditions of possibility. Not coincidentally, the grounding of discursive ethic in the discussed above theories takes place through reflexive analysis of argumentation and reconstruction of communication's conditions. It seems that it is impossible to repeat such an approach in the case of other particularly specialized discourses. At least, not in a form leading to statements concerning universal validity of rules of such specialized discourses like legal discourse. In other words, the R. Alexy theory of legal argumentation seems to be an attempt of reconciliation of two sorts of rules: universal rules justified by the transcendental argument, and special rules of legal argumentation justified reconstructively – the differences in justification must lead to the difference in claims of those rules.

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REFLEXIVE JUSTIFICATION AND THE PROBLEM OF ITS RECEPTION IN ROBERT ALEXY’S THEORY

Summary

The aim of following paper is to reconstruct the discussion concerning reflexive justification on the basis of philosophy and philosophy of law. At first, the presented proposition is a project of Immanuel Kant’s philosophy transformation, framed within the

study of the philosophy of language and realized by K.-O. Apel and W. Kuhlmann. This analysis concerns both its construction and its relation to the theory of argumentation, using the concept of an ideal and unlimited communicative community. The next discussed issue is the pleas concerning this approach, formulated by J. Habermas from reconstructive perspective, which rejects the reflexive justification and, instead of the conditions of argumentation's possibility, it examines conditions of possibility of communication as such. The analysis also concerns R. Alexy's transcendental-pragmatic argument, which shows similarities between the reconstructive approach of J. Habermas and the reflexive justification theories of K.-O. Apel and W. Kuhlmann. In this paper, there are two streams of critique presented regarding this approach – the first concerning justification of general practical discourse's rules, and the second concerning reception of discursive ethics in legal argumentation, a so-called *Sonderfallthese*. The critique of R. Alexy's legal discourse may be interpreted as a theory searching for the difficult to accept third way between reflection and reconstruction.

KEYWORDS

reflexive justification, discourse theory, transcendental argument, legal argumentation

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uzasadnienie refleksyjne, teoria dyskursu, argument transcendentalny, argumentacja prawnicza

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