Alexy on the Connection Between Law and Morality*

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I. Preliminaries

In his new book[1] Robert Alexy revisits the old debate about the sorts of relationships that exist between law and morality. Most of the book is dedicated to defending the view that there are necessary connections between law and morality, but in the course of his discussion of these questions he touches on some of the fundamental questions of legal philosophy, among them the question of identification of the marks of validity of the legal norm and the question of law's normativity. While doing so he brings to the fore and analyses the views of German-speaking legal philosophers, most notably Hans Kelsen and Gustav Radbruch, whose writings are relatively neglected in Anglophone legal philosophy.

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* A review essay on Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Stanley L Paulson and Bonnie Litschewski Paulson trans, 2002) [trans of *Begriff und Geltung des Rechts*]. All parenthetical page references are to this book.

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1 As a matter of fact, the book is not new. It is a translation into English of a book that appeared in German in 1992. Moreover, the main argument of the book, even if in less detailed form, appeared already in several articles already published in English, in some cases even before the publication of the German edition of the book. These are Robert Alexy, 'On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique' (2000) 13 *Ratio Juris* 138; Robert Alexy, 'A Defence of Radbruch's Formula' in David Dyzenhaus (ed), *Recrafting the Rule of Law* (1999) 15; Robert Alexy, 'Law and Correctness' (1998) 51 *Current Legal Problems* 205; Robert Alexy, 'On Necessary Relations between Law and Morality' (1989) 2 *Ratio Juris* 167. There are no differences of substance between the arguments in the book to those in any of these articles. Some criticism of Alexy's views can be found in Eugenio Bulygin, 'Alexy's Thesis of the Necessary Connection between Law and Morality' (2000) 13 *Ratio Juris* 133.

The book contains various interesting discussions, which I can only mention here. Among these it is worth mentioning various relationships between Kelsen's and Kant's thought. The label 'neo-Kantian' is occasionally attached to Kelsen, and Alexy shows in several ways why, despite the many deep differences between the two, this label may be justified (107–13). In particular it is worth mentioning the 'hypothetical imperative' approach to legal obligation that Kelsen advanced (111–13), one for which it is possible to find resonance in the writings of other legal philosophers, in particular in Joseph Raz's 'legal point of view'. A related point is Alexy's interesting discussion of three different points of view from which an explanation of the law can be made, and how these different points of view result in different emphases in explaining the concept of law (or more simply explaining what law is) and the validity of legal norms. He distinguishes among explanations of the law, which focus either on social efficacy, or on correctness of content, or on authoritative issuance, and shows how these correlate to three different conceptions of legal validity (85). The book also contains a comparison between the basic norm in the theories of Kelsen, Hart (his 'rule of recognition') and (albeit briefly) Kant.

However, as the English title of the book makes clear,[2] the main focus of the book is Alexy's defence of a 'non-positivistic' view of the law. He takes positivism, the view that he argues against, to be the claim that 'the concept of law is to be defined such that no moral elements are included' (3). This he calls the 'separation thesis,' according to which 'there is no conceptually necessary connection between law and morality, between what the law commands and what justice requires, or between law as it is and the law as it ought to be' (3). According to his non-positivist view, on the other hand, 'the concept of law is to be defined such that moral elements are included' (4). For convenience I will follow Alexy's use of the terms positivism and non-positivism, even if as we shall presently see some self-identified positivists will not wish to associate themselves with the separation thesis.

Even before beginning to assess Alexy's arguments in support of his view it is worth mentioning three preliminary points about his position as it already emerges from the brief quotations just made. First, there are many sorts of possible relationships between law and morality, and it is open for someone to reject all of Alexy's arguments for certain necessary relations between law and morality and still maintain that different necessary connections between law and morality exist. Second, it is worth keeping in mind that even if someone denies the existence of a necessary connection between law and morality, this does not mean that she is committed to the

2 In the Translators' Note (v), we are informed that the original title of the book is *Begriff und Geltung des Rechts*, literally meaning 'The Concept and Validity of Law'.

stronger claim that necessarily there is no connection between law and morality. The inclusive ('soft') positivists make this distinction the basis for their position. But even exclusive ('hard') positivists, who deny a particular connection between law and morality (indeed, with regard to this connection they believe that what is moral is necessarily not legal), do not deny at least some contingent connections between law and morality, and many of them believe there are necessary connections between law and morality. Thirdly, note that Alexy does not write that the positivists argue that there is no necessary connection between law and morality. Rather he says that the concept of law 'is to be defined' in a way that no moral elements are included in it; likewise, the position he defends is also about how law is to be defined. Does Alexy have something particular in mind when he uses these expressions? It is not entirely clear, because along with these statements he unequivocally asserts that '[t]he debate surrounding the concept of law is a debate about what law is' (5). As we shall see, the ambiguity between these positions will be found in much of the remainder of the book, and with problematic results.

Corresponding to its original title the book has two main chapters, one entitled 'The Concept of Law,' the other 'The Validity of Law'. The former is the one in which Alexy's arguments against positivism are found and this is the one that will be the focus of this review. In any case, the cogency of most of what Alexy says in the latter chapter depends heavily on his conclusions in the former, and since, as I will try to show, Alexy's arguments in the former chapter are seriously flawed, the viability of the argument of the latter chapter is undermined by these criticisms.

I will, however, say one thing about the latter chapter in which Alexy outlines a theory of law. Like most legal theorists nowadays Alexy does not reject the claim that valid law is posited. Much of what he writes in this chapter gives the impression that he is in considerable agreement with Kelsen's positivist position, even if in one important respect his conclusions are very different from Kelsen's. Thus, for instance, Alexy, like Kelsen, emphasizes that for law to exist, it must be 'by and large efficacious' (88, italics omitted), and also rejects the claim that law is reducible to individuals' conception of morality, ie to social norms (52) or to morality (92). In this respect Alexy's position not only echoes that of Kelsen but is in agreement with much of the writing that goes under the heading of legal positivism today. Even the necessary connections between law and morality that he argues for are confessedly weak. In this respect this book is yet another example that what was once considered the greatest divide in analytic jurisprudence, the one between positivists and natural lawyers, seems much less significant these days. By saying this I do not mean to deny that debates touching on relationships between law and morality are about to be a thing of the past; the kinds of relationships between law and

morality either at an abstract level or at the level of substantive doctrines of law are numerous and varied, and therefore an end to a debate about them is unlikely. So perhaps ironically, despite the fact that the intended aim of the book is to criticize legal positivism from a vaguely natural law position, one of the strongest impressions one gets from reading this book is that holders of these respective views are much more often than not in agreement.

II. Legal Positivism and Moral Scepticism

It is time to assess Alexy's arguments. The first question to ask is whether there is anyone Alexy is really arguing against or is he attacking a straw man? John Gardner has recently called something like Alexy's separation thesis 'the favorite myth' about legal positivism.[3] If this is the case, then it would seem Alexy is trying to win a battle in which no-one is willing to stand up against him. It is true that for the cogency of Alexy's argument it matters little whether anyone has ever held the view he criticizes, and in philosophical discussion it is always possible to 'stipulate' a position, but obviously there would be much less interest in his argument if that were the case. Moreover, Alexy evidently believes that he is criticizing a view that has been held by various writers, and in particular Hans Kelsen and H L A Hart. I will spend some space here on the history of the idea called legal positivism, because I believe that like many myths this one has some truth to it. I will confine myself only to these two authors, and will try to show why I believe Alexy is right in arguing that they denied a necessary connection between law and morality.

Kelsen's writings span many decades and he is known to have changed his views on some fundamental issues. However, that there is no necessary connection between law and morality appears to be a cornerstone of his Pure Theory of Law. I think his view in its most extreme formulation can be found around the mid-period of his writing, in *General Theory of Law and State*. There he opines that from the legal point of view there is no morality, and from that of morality there is no law. This is because one cannot logically assert the existence of two normative systems at the same time and place, and that it is impossible to conceive a single normative system that accommodates both, unless law incorporates morality, by which morality becomes part of the positive law.[4]

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3 John Gardner, 'Legal Positivism: 5½ Myths' (2002) 46 *American Journal of Jurisprudence* 199, 222. He went on to say that '[t]he thesis is absurd and no legal philosopher of note has ever endorsed it as it stands' at 223.

4 See Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans, 1945) 374–76 [trans of: *Philiosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus*]. He says identical things at 407–10, for example: 'If two different systems of norms are given, only one of them can

Hart's position is less clear. Gardner finds proof of Hart's acceptance of the view that there is a necessary connection between law and morality in his view that a law is a general rule applied similarly to similar cases. This, says Gardner, adds to the law 'a dash of justice that ... clearly forges a necessary connection between law and morality'.[5] This was Hart's view in 1958, as part of his debate with Lon Fuller. By the time of the publication of *The Concept of Law* in 1961, Hart seems already less committed to this conclusion. In assessing Fuller's claim about the connection between law and morality by relying on principles of legality and justice (including one about the general application of law) he writes that 'if this is what the necessary connection of law and morality means, we may accept it. It is unfortunately compatible with very great iniquity'.[6] And by 1965 in a review of Fuller's *The Morality of Law*, he says that '[Fuller's] insistence on classifying these principles of legality as a 'morality' is a source of confusion both for him and his readers'.[7]

I think there is a deeper point here that's worth pointing out. Both Hart and Kelsen were to some extent sceptics about morality. As in other matters, Kelsen's views are asserted with greater vehemence, for instance in his reductive account of morality (or, more accurately of justice), which he defined as 'social happiness'.[8] Hart's views on the matter are less clear, but it is known that he was generally quite sceptical about the possibility of defending our moral positions, and was rather minimalist with regard to that scope of our moral views which can be defended. He did argue for morality as rules that are designed to guarantee survival based on the natural desire of human being to live, but even here he says that this is 'a mere contingent fact which could be otherwise,'[9] and that '[s]uch rules do in fact constitute a

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be assumed to be valid from the point of view of a cognition which is concerned with the validity of norms'.

5 Gardner, above n 3, 223. This is Gardner's presentation of Hart's view; Gardner himself is careful not to endorse this view.

6 H L A Hart, *The Concept of Law* (first published 1961, 2nd ed, 1994) 207. (For the reference to Fuller see at 303.) The rest of his discussion of the issue, at 202–12, even if sometimes equivocal, is mainly dedicated to refuting claims to stronger connections between law and morality.

7 H L A Hart, 'Lon L. Fuller: *The Morality of Law*' (1965) 78 *Harvard Law Review* 1281, reprinted in *Essays in Jurisprudence and Philosophy* (1983) 343, 349.

8 Hans Kelsen, *An Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L Paulson trans, 1992) 16 [trans of: *Reine Rechtslehre*]. See also Hans Kelsen, *Pure Theory of Law* (Max Knight trans, 2nd ed, 1967) 59–69 [trans of: *Reine Rechtslehre*].

9 Hart, *The Concept of Law,* above n 6, 192. See also at 195, 196, 198 for similar remarks.

common element [but not a necessary connection] in the law and conventional morality of all societies'.[10]

This brief discussion of Hart's and Kelsen's position on the subject is not by any means a comprehensive study of their respective views on morality or on the relationship between law and morality. It was only intended to draw attention to the fact that Alexy's starting point is not entirely misguided and to draw attention to a possible connection between legal positivism and some form of scepticism about morality. Accepting legal positivism does not commit one logically to moral scepticism, but from the other direction the connection between the two positions is much stronger. It is tempting to say, that if you don't believe in the existence of something, it is hard to see how you could find it necessarily (or in fact, even contingently) connected with anything; and this leads immediately to legal positivism (as defined by Alexy). However, most moral sceptics are not moral nihilists, and their scepticism is limited to the nature of moral claims. What is denied by such sceptics is the existence of objective, mind-independent truths about morality. For anti-realists about morality of that kind, morality is the name of some strongly held social conventions or rules. For the holder of such a view, even if there is a sense in which morality has objective existence, there is little reason to believe one set of social norms (law) will be necessarily connected with another (morality). There would be considerable overlap between the two, and changes in one will ordinarily affect the other, but for there to be a necessary connection between the two something much stronger is required, for instance (and these examples are by no means exhaustive) that it is impossible to describe one without the other or that change in one will entail a change in the other.

III. Alexy's Argument for Non-Positivism

(a) Conceptual and Normative Arguments for Positivism

We have finally reached Alexy's argument for the necessary connection between law and morality. I think Alexy is right to begin by addressing the question whether the connection between law and morality is a conceptual

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10 Ibid 193. See also H L A Hart, *Law, Liberty, and Morality* (1963) 81–2. In two book reviews published much later Hart expresses general sympathy, despite occasional disagreement, with the main thrust of three books critical to the idea of moral realism. See H L A Hart, 'Morality and Reality' *New York Review of Books* (New York), 9 March 1978, 35 (reviewing Gilbert Harman, *The Nature of Morality: An Introduction to Ethics* (1977) and J L Mackie, *Ethics: Inventing Right and Wrong* (1977)); H L A Hart, 'Who Can Tell Right from Wrong?' *New York Review of Books* (New York), 17 July 1986, 49 (reviewing Bernard Williams, *Ethics and the Limits of Philosophy* (1985)).

or a normative one. The difference is in the sort of arguments that can be invoked for either possibility. Here are outlines of arguments for each possibility. First, which I will call the Conceptual Argument:

(a) There exists a concept of law the content of which is discoverable by conceptual analysis.
(b) Conceptual analysis of law shows that law is *X*. Hence
(c) The concept of law is (to be defined as) *X*.

The second argument, which I will call the Normative Argument, has the following structure:

(i) The concept of law is at least partly indeterminate.
(ii) *X* falls within the range of possible definitions for the law.
(iii) In the choice between possible definitions, there are reasons for preferring one to the others (or in other words, the choice of a concept of law is not arbitrary).
(iv) There are stronger reasons for preferring law defined as *X* to any other possible concepts of law. Hence
(v) The concept of law should be *X*.

These two routes seem exhaustive and mutually exclusive: if the debate at the conceptual level yields a determinate answer, then the normative discussion is superfluous, and arguments made in its support are false. If the law just happens to be connected with morality, then no discussion of the merits of a non-positivistic concept of law is necessary. It would be like offering an argument for preferring the understanding the concept 'the Sun' as 'conducive for human life on Earth,' rather than 'one of the gods,' not because the first is true and the other is false, but because the former is morally valuable and the latter is morally neutral. If 'the law' is necessarily connected with morality, that is the end of the story. Pondering over whether this fact is good or bad makes as much as sense as talking about whether the gravitational constant is morally good or not, because (say) had it been otherwise, life on Earth would have been better.

The Conceptual Argument can fail in two ways. If some sort of conceptual analysis shows that law is necessarily not connected with morality, this, again, is the end of the matter, and again no normative argument of the non-positivist could succeed or be relevant. If, on the other hand, the failure of the Conceptual Argument is because conceptual analysis finds the concept of law too indeterminate to answer the question of the connection between law and morality or because there isn't anything interesting that can be discovered by conceptual analysis of law (or perhaps of other concepts), it is open for us to offer normative arguments for a particular definition of what law should be.

Alexy does not reach these conclusions. He argues that there is a conceptual necessity between law and morality, but adds that '[t]he conceptual argument will prove to be limited both in range and in force; and beyond that range, as well as to strengthen the conceptual argument, normative arguments are necessary' (22). At least as far as the 'strengthening' of the conceptual argument, I cannot understand how this is possible: the considerations given above show that the two kinds of argument are mutually exclusive and one cannot support the other. I will however go on from this point disregarding this problem, and will treat these two arguments, as much as possible, separately. I say 'as much as possible' since Alexy, at least on occasions, argues that the two types of argument are connected. I will argue that in saying this he is wrong. Part of the reason for that was already mentioned: a claim of the kind 'the law is such-and-such' cannot include arguments of the kind 'it would be better if the law were such-and-such'. But to see this more clearly, we need to see the actual arguments Alexy makes.

(b) Alexy's Conceptual Argument

The basis of Alexy's argument for a necessary connection between law and morality is law's 'claim to correctness'.[11] Alexy provides two additional arguments, arguments that Alexy dubs 'the argument from injustice' and 'the argument from principles' respectively. The relationship between these three arguments is not entirely clear. At one point Alexy writes that the argument from correctness 'is the basis of the other two arguments' (35). At another occasion he seems to claim that all three arguments are really one large and complex argument (39), and only the three arguments combined entail the conclusion that law is necessarily connected with law and morality. These two positions are inconsistent: if the argument from correctness is the basis of the two other arguments, then the independent validity of the argument from correctness is required for the validity of the two other arguments. The other statement implies that it is the other way around: the validity of the arguments from injustice and principles is required to guarantee the validity of the argument from correctness (or, the one arch-argument). As we shall see, Alexy's book is not free from this confusion. Be Alexy's intention as it may, I believe that neither of these possibilities is true, and actually the argument from correctness together with the argument from principles make up one argument, while the argument from injustice provides a different and logically independent argument. The combined correctness and principles argument is a conceptual claim about what law is, whereas the argument from injustice

[11] It is therefore somewhat surprising that that the English title of the book mentions the argument from injustice as if it were the primary argument. As we shall see Alexy takes the latter (wrongly, I think) to be strengthening of the correctness argument, which is the fundamental one.

consists of a series of normative claims aimed at showing the advantage of law being defined partly in moral terms. The discussion of the argument from injustice then will therefore be relegated to the next section.

As for the conceptual argument, the first one, the argument from correctness, says that all legal systems and all individual legal norms make a claim to correctness. A system of norms that does not make this claim explicitly or implicitly is not a legal system; and a system of norms that makes a claim to correctness but fails to satisfy it, is a legal system even if a defective one (36, 79). All this remains obscure if we do not understand what is meant for a system of norms to make a claim to correctness. Yet surprisingly Alexy says very little directly to this point. He moves to the further questions whether it is true that the law necessarily makes a claim to correctness, and whether the claim to correctness establishes a necessary or only a contingent connection.

Instead of an explanation about what the claim to correctness is, he provides the readers with two examples. Now, obviously two examples cannot on their own prove a necessary connection between law and morality, unless they are supplemented by an additional argument to the effect that what is true in the one case is true of all possible cases. But this is exactly what the book tries to establish and for this there is no argument. However, it worth examining these examples, because I believe that one of them, after some explanation, does reveal a sort of necessity claim about the law, but not of the kind that Alexy would be interested in.

The first example asks us to imagine a society, the constitution of which contains the proposition that 'X is a sovereign, federal, and unjust republic' (36). Alexy says that a constitutional provision with these words would be a contradiction because it would consist in 'framing a constitution that negates the claim to justice' (38), which in turn is 'an essential element in the practice of framing a constitution' (37). But this looks like a *petitio principii*. For something to be law, says Alexy, it must make the claim to correctness, because if it didn't, it would fail to create a valid constitution. And why would this happen? Because the meaning of the concept of a constitution contains moral elements, such that having a constitution that says that it founds unjust laws would entail a contradiction, ie both an implicit claim that the constitution is just (derived from the concept of a constitution) and an explicit claim that it is unjust. But if we agree with Alexy that the word constitution just means that the constitution is just, then no further argument is needed for the non-positivist: every country has a material even if not a formal one,[12] and so it follows from Alexy's claim

[12] Note that Alexy talks about 'the framing of a constitution'. Does this mean he limits the claim to correctness to countries with a formally enacted constitution, and hence does he mean that the law of countries that lack such

that the law of every country makes a claim to correctness. But where is the argument for this implicit claim found in every constitution? It is this exactly what Alexy seeks to prove.

Matters are perhaps clearer with the second example Alexy offers. Here, we are asked to imagine a judicial decision with the statement '[t]he accused is sentenced to life imprisonment, which is an incorrect interpretation of prevailing law' (38). Alexy explains that there is a special problem here, and not merely a violation of social norms but a 'conceptual defect' (39). What makes this case defective is that '[w]ith a judicial decision, the claim is always made that the law is being correctly applied' (39), and when the judge includes in her judicial decision a statement that is inconsistent with this claim, what results is a contradiction.

I am not sure whether this example is supposed to reveal a different argument, and possibly the same charge of question begging can be made with regard to it. But perhaps what Alexy has in mind here is that the law is (conceptually) not arbitrary, and therefore a judge who argues to the contrary contradicts herself. Where a legal question arises, says Alexy, there is a correct answer (or some range of correct answers) and a range of incorrect answers. I believe, despite the fact this claim is not universally acknowledged, that this is plausible enough. But there is more to Alexy's claim. He seems to say here that the law claims to give and actually gives reasons for action and that the statement of the judge in his example denies this. Here is the contradiction: the judge is akin to saying 'I know what the law is, and the law says that I should φ, but the law does not give reasons for action, so I will not φ'. This is implicit in the judge's statement, and this contradicts what law really is.

However, there are two difficulties with this claim. First, how could a system of norms explicitly or implicitly fail to make this claim to correctness? Under this interpretation the claim amounts to nothing more than the claim that law consists of norms, that norms are normative, and normativity implies correctness and incorrectness.[13] So while Alexy's claim is indeed necessarily true, it is necessarily true in virtue of being a

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a constitution (like the United Kingdom) make no such claim to correctness? If so, then there is no necessary connection between law and morality.

13 There have indeed been those who denied this claim According to one version of the view called moral externalism the fact that an agent should φ (ie, that it is morally right for her to φ) does not entail that she has reason to φ. I cannot discuss this view here, but for a good discussion and convincing argument against this view see Michael Smith, *The Moral Problem* (1995) 77–91. It must be noted that Smith seems to make a move similar to Alexy's, at 206 n 2 where he argues that positivists cannot explain the normativity of law without resort to morality. For a partial answer see the following sentences in the text.

tautology. But the law being normative does not entail that it is necessarily or even contingently connected with morality. There are many normative structures that have nothing to do with morality; language is one obvious example. Even if Alexy refers to normativity in a narrower (moral) sense, he would have to argue against existing explanations of the normativity of law that do not rely on morality. Second, if indeed this is what Alexy means, then this claim does not seem to fit well with some other things he says about the claim to correctness, but for the opposite reasons, namely that the claim to correctness is an empirical claim, and therefore not a tautology, but also not necessarily true. In two places Alexy says that the claim to correctness 'has few practical consequences, for actually existing legal systems regularly lay claim to correctness, however feebly justified the claim may be' (92, 127). And this sounds like an empirical claim: it would not make sense to say that legal systems regularly make it, if it were a conceptual claim.

Alexy apparently realizes at least the first point of the two just made, since he says that a positivist could accept the claim to correctness in its current form, first, because it does not establish a claim to moral correctness, and thus fails to be an argument for a necessary connection between law and morality, and second because even if moral correctness is established, it is still open for the positivist to argue that immoral laws are bad laws, not non-laws. The argument from principles and the argument from injustice, respectively, come to answer these two objections.

I will start with the argument from principles, which is supposed to show that the correctness that law claims is moral. Alexy claims that the law of many countries incorporates moral principles, which in virtue of that incorporation become part of the law. To the positivist's answer that the principles being mentioned in the law do not make them part of the law, he seems to answer that only by understanding them as part of the law we can understand the legal obligation to rely on them. Otherwise, reliance on them would be discretionary ('it is legally required ... to take principles into account', 74). He also says that the 'claim [to correctness], because it is necessarily attached to the judicial decision, is a legal claim and not simply a moral one' (73), and therefore that a 'judge who appeals to [principles] for support is making his decision on the basis of legal standards' (76). But the problems here are many: first, it is open for positivists, both exclusive and inclusive, to say that judges are required to take into consideration all reasons that pertain to their decision, whether they are legal or not. One obvious example is the rules of logic, which are not necessarily part of the law and yet are being used by judges on a daily basis even in the many jurisdictions in which they are not made part of the law. Inclusive positivists are at an even easier position, since they can quite easily accept everything Alexy says, ie that the incorporation of moral principles turns

them into legal principles, but they will also endorse Alexy's own concession, that his claim is actually not necessarily true, because it is limited 'to legal systems that are at least minimally developed' (74), and will therefore deny that the argument in this form can establish a necessary connection between law and morality. That the law can but need not incorporate moral principles is perhaps the most fundamental tenet of inclusive legal positivism. Once this is accepted, whether the legal systems that do not incorporate moral principles are 'minimally developed' or not is a verbal question. But even if we limit the claim to necessary connection between law and morality in this way, it is clear that Alexy's claim that the claim to correctness is a legal claim and that the incorporated moral principles become legal principles rests at least in part on substantive arguments about, among others things, the separation of powers, the nature of reasons, the kinds of reasons judges are allowed to rely upon etc. Without argument for these points his claims here remain mere assertions, which beg the exact question which is under scrutiny.

But let us assume these problems can be overcome. At this stage Alexy takes it as established that the law of minimally advanced legal systems necessarily includes some principles, and with the correctness thesis Alexy purports to show that those principles that are incorporated into law are the principles of morality and not some other principles.[14] He says that this is indeed the case in many countries that incorporate principles of human dignity, liberty, equality etc. We will leave to one side the question how we can know that these are really the principles of morality and not some delusion that all people (or all liberal academics) believe in. Yet Alexy has to explain about countries that incorporate into their constitution principles that are racist, totalitarian etc. If these are not moral principles but can be incorporated into law and form the basis for evaluating law's correctness, then the necessary connection between law and (true) morality is false. Alexy responds thus:

> [E]ven the judge who applies the principles of race and the *Führer*-principles lays claim to correctness with his decision. The claim to correctness implies a *claim to justifiability*. This claim is not limited to the justifiability of the decision in terms of some kind of morality leading to the correctness of the decision; rather, it refers to the correctness of the decision in terms of a justifiable and therefore correct morality. The necessary connection between law and correct morality is established in that the claim to correctness includes a claim to moral correctness that also applies to the principles on

[14] Alexy divides his argument here into two steps, in the first he only shows that law incorporates principles of *a* morality, and then principles of the correct morality. I don't find this distinction very illuminating. If there is one correct morality, other 'moralities' are not morality, but only, at best, social conventions.

which the decision is based. (78, italics in original).

It is not entirely clear what Alexy is saying here. The problem is not just in understanding the argument, but first in finding the place of this specific argument within the larger structure of Alexy's enterprise. Recall that the argument from principles was presented as an addition to the argument from correctness, and that it was supposed to block some loopholes in it. But if this is the case, it means that Alexy's argument here is circular. If indeed the correctness thesis is an 'appl[ication of] the argument from correctness within the framework of the argument from principles' (77), it means that the argument from principles, the argument that was adduced to complete the argument from correctness, must rely on the not-yet-established latter argument for its validity. Alexy might respond that the claim to correctness is already established without the argument from principles, and that what the argument from principles adds to it is the conclusion that the law claims moral correctness, and not any other kind of correctness. So he will say that he can rely on the claim to correctness (assuming there are no other faults in it). But this answer will not do, because it is exactly the content of the claim to correctness, ie that it claims moral correctness and not any other correctness, which is relied upon by the invocation of the claim to correctness here.

Maybe we need to interpret the correctness thesis differently. Perhaps it is not an argument that comes to supplement the claim to correctness, but is simply an *explanation* of it. But if this is the correct interpretation of the quoted passage then the argument here establishes a necessary connection between law and morality that is entirely independent of the argument from principles. In a sense, it is an argument for a necessary connection between law and morality that exists *despite* the (morally bad) principles that some legal systems contain. Indeed, if establishing a necessary connection between law and morality is what we are after, why should it matter whether the moral principles are incorporated into law? As long as they make up a standard of assessment of the law, then a necessary connection between law and morality is established.

But if this is the correct interpretation, we see that the claim to correctness as presented here is very different from the one discussed before. I said before that the only way the claim to correctness can be plausible is by interpreting it as saying that the law is a normative system, otherwise the claim is question begging. Here, suddenly, the claim to correctness means something else — that all legal decisions lay 'a claim to justifiability'. And this, I think, means that law has a benchmark of success, which is (necessarily) morality. There are two elements that need to be shown: first, that law's claim to correctness implies a claim to justifiability, and second that this claim to justifiability is a claim to a justification by morality. But no argument for these two claims is ever provided. After all,

judicial decisions can be assessed by the beauty of their prose, so why don't we say that judicial decisions lay a claim to aesthetic correctness as well as to moral correctness?

(c) Alexy's Normative Argument

I hope it is clear by now why the argument from correctness and the argument from principles are actually part of one, conceptual, argument: they were both offered as claims about what law is and must be. I hope I have also succeeded in showing that these arguments, whichever way they are formulated, are laden with various serious problems, and therefore they do not succeed in establishing a necessary connection between law and morality. It is time to move on to Alexy's normative argument. There is one preliminary issue that needs to be addressed before I discuss Alexy's normative argument on its merits. It regards the place of the claim in the book. As I said, even though it seems that Alexy argues that the normative argument is needed for establishing the claim to correctness, I believe the two arguments are independent. I want to explain here why.

I already said earlier that an argument about what something conceptually is cannot be based on what should be, but this conclusion is reinforced by actually examining the content of the two arguments and what they are trying to establish. Even if they are both successful, they succeed in showing two very different sorts of necessary connections between law and morality, and hence that the two claims are logically distinct. The claim to correctness was provided to establish that each legal system, each legal norm, and each legal decision can be assessed by its agreement with moral norms: legal norms found to be in agreement with moral norms are in virtue of that fact at least in some sense correct. If this is true, it does not affect in any sense the workings of legal officials. The fact that there is an external standard of assessment for the law does not imply that judges should act in a way that increases compliance with that standard in the same way that the fact we can assess the beauty of natural landscapes does not imply that nature ought to beautify itself. And closer to our concerns, the fact that judicial decisions can be assessed according to their style, does not imply that judges ought to write their decisions in a certain way.

What Alexy tries to provide in his argument from injustice is an argument for the so-called 'Radbruch formula', namely that a grossly immoral norm, is not law.[15] Note that the argument from correctness makes

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15 Radbruch's Formula translated into English reads as follows:
> The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and inexpedient, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'lawless law' must yield to justice. (28)

the claim that all norms, in order to be legal norms make a claim to justifiable (and hence, moral) correctness. The necessary connection suggested in the argument from correctness is therefore a positive one. The conclusion of this argument from injustice on the other hand is that extremely immoral norms are not (or cannot be) legal norms. Thus, the necessary connection between law and morality based on the argument from injustice is that every real legal norm (and not just putative legal norms) is a legal norm in virtue of *not* being immoral in the extreme. Thus it asserts a negative sort of necessary connection. This argument does not establish any connection between legal norms that 'pass' this test and morality: they are not necessarily morally praiseworthy norms, indeed one cannot even say that these norms are morally neutral, for these legal norms may be immoral. The necessary connection thus established is that all valid legal norms are not-extremely-immoral. Now since the argument from correctness and the argument from injustice are distinct, in order for them to cover the entire legal domain Alexy must argue that the two arguments complete each other, that each argument shows a necessary relation between some of the legal norms and morality, and the two arguments together cover all possible legal norms. Because of the very narrow scope of the argument from injustice this seems very unlikely.

And what about Alexy's claim that the argument from injustice is what guarantees that the legal norms that do not raise the claim to correctness are not merely considered bad-law, rather they are considered non-law? There are several ways of showing why Alexy would not need this as a supplement to the claim to correctness, if it were a good argument. To begin with, according to Alexy any legal norm that violates morality is for that reason a defective norm, but it will retain its legal status so long as its violation of morality is not extreme. Yet this is enough for Alexy to maintain that the claim to correctness is raised by any legal norm, and that in cases of relatively minor infringements of morality, the necessary connection established is what he calls a 'qualifying connection', because it is morality that says that that norm is defective (79). I am not sure that the argument is cogent, but if it is, it renders the argument from injustice superfluous for the task of establishing a necessary connection between law and morality. If indeed this qualifying connection between law and morality is enough to establish a necessary connection between law and morality, then *a fortiori* there exists a necessary connection between law and morality in cases of extreme violation. The argument from injustice, then, while not redundant, is not needed to show a necessary connection between law and morality: all it shows is that there are different outcomes to minor and gross violations of morality by law. But for Alexy's argument to succeed this is

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Page 28 of *The Argument from Injustice* also contains reference to the original German article in which this statement originally appeared.

unnecessary: a positivist (according to Alexy's definition) who conceded the claim to correctness has lost the battle.

I hope these points give ample reason to accept my claim that the argument from injustice is an independent argument. It is time now to examine its merits. Recall that if Alexy is to succeed in his argument he must make an argument along the lines of the Normative Argument outlined in Section III(a) above. Unfortunately, Alexy does not provide an argument for premises (i)–(iii), and argues at length only for (iv). Yet the steps that are left without argument are so vital, that without them, it is very easy for an opponent of Alexy to deflect his argument. I will say something about premises (i)–(iii) of the Normative Argument, and will try to show that these steps are highly contestable and the possible objections to them are sometimes not easy to overcome.

The first step concerns a general matter, ie how can the question whether law is related to morality be an open question to be decided based upon normative considerations? The claim here is that since there is a concept of law, it is simply not open for us to decide upon the matter. Alexy does not address the question at length, and in the only discussion he does make of this question, his somewhat uncertain position seems to reject this argument (21). But the possibility of providing normative arguments for positivism has been raised more than once in recent years. Perhaps we could find there an argument for this view.

Frederick Schauer argued that because theorizing involves choosing between more and less important factors, it is a normative process.[16] This may be true, but to conclude from this that we can therefore choose among possible concepts of law based on the moral outcomes of the proposal is a *non sequitur*. Choosing among different explanations is something that is part of theorizing also in the natural sciences (diamonds are just carbon molecules organized in a particular pattern and not carbon molecules organized in a particular pattern and a girl's best friend) but Schauer himself says it is impossible for a physicist to base her definition of natural kinds on the moral consequences of her choice. And this is true not only in the natural sciences: an explanation of what capitalism is cannot be made on the basis of moral considerations. To be sure, one can change capitalism to make it more moral, but this is not what the theorist who aims to understand what capitalism is is doing, even if in her definition she has to resort to normative considerations. The source of the mistake here, I think, is in the erroneous identification of what is normative with what is moral or political, despite the fact the former is a much broader concept.

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16 See Frederick Schauer, 'Positivism as Pariah' in Robert P George (ed), *The Autonomy of Law* (1996) 31, 33–4.

Liam Murphy argued that providing political arguments for positivism is a tenable position, because unlike concepts like knowledge, in the case of law 'there is no initial agreement about the data for the analysis.'[17] This view, which echoes Dworkin's views, seems peculiar because the fact that there is deep disagreement about what counts as law does not mean that some people are not deeply mistaken about what law is. The argument here would work only if there were no reason to believe that. Moreover, if there is no agreement on what counts as law (and on what grounds), and there is also no agreement on what the contents of law are, then it seems that there can be no sort of successful argument for the concept of law. All we are left with is the name by which Murphy has decided to call an arbitrarily delineated phenomenon. It surely will not settle any dispute, because those who disagree with him about whether particular instances are law will simply say that they are using the word law differently or that they have a different concept of law. Dworkin can perhaps avoid this problem because he seems to reject the notion of a (or 'the') concept of law, but for Murphy or Alexy who want to maintain such notion, recourse to this argument seems self-defeating.

It may be that there are other, stronger arguments for (i); and perhaps I have been too dismissive of Schauer's and Murphy's argument and they can provide good answers to my objections. All I wanted to show here is that this is not an obvious claim and it requires argument.

Premise (ii) assumes that even if conceptual analysis does not result in a determinate concept of law, it also does not end with nothing. In other words, conceptual analysis can limit the range of possible valid concepts of law. Some may argue that the attempt to provide a conceptual analysis of law is doomed from the outset, and that consequently (ii) does not raise any limitation on valid concepts of law. However, if Raz's argument from authority[18] is sound, then (ii) (when X stands for a non-positivist concept of

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17 Liam Murphy, 'The Political Question of the Concept of Law', in Jules L Coleman (ed), *Hart's Postscript: Essays on the Postscript to the* Concept of Law (2001) 371, 381. See also the sources he cites at 373 n 6. Murphy argues that this position is not novel, but actually the one that best represents the views of Bentham, Kelsen and Hart, at 387–8. I am not sure Murphy is right on this issue, but cannot pursue this issue here.

18 Raz made this argument in various places, but probably the best place to find it is Joseph Raz, 'Authority, Law, and Morality' (1985) 68 *Monist* 295, reprinted in *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 210. Since this argument is well known for some time, Alexy's failure to mention it (as well as much other literature on the issue) is somewhat surprising. Note by the way that the argument presented in the text is consistent with the existence of other necessary connections between law and morality, indeed Raz himself believes that such necessary connections exist.

law) is false. Roughly Raz's argument is as follows: law is an authoritative system of norms. (Alexy seems to accept that (22, 111.)) As such law must provide exclusionary reasons that exclude and replace one's first order reasons for action. Therefore, when the judge relies on morality, she necessarily does not rely on law, because she relies on non-authoritative, first-order, non-excluded reasons. I believe this is a very strong argument, but whether it is sound or not isn't the question I am concerned with here. Again, my mentioning it here was meant merely to show that because Alexy does not provide a full argument for his position, his argument remains open to many objections without even having to discuss the arguments he does make.

Let us assume that the problems in premises (i) and (ii) can be overcome. We then move to premise (iii), which is tacitly answered affirmatively by Alexy when he gives his arguments for non-positivism, arguments that all belong to step (iv). I will say nothing about (iii), because I agree that if it can be shown that a particular choice for the concept of law can have meritorious ethical results, this provides reason to adopt that particular choice.

We now arrive at Alexy's own arguments, which all fall within premise (iv), for a non-positivist concept of law, and assuming he overcomes all objections to premises (i)–(iii), we need to examine whether these arguments are convincing. Alexy mentions eight criteria in which he claims a non-positivist concept of law is better or at least on a par with the positivist concept of law; he therefore concludes that the former should be adopted. Some of Alexy's points here are merely answers to arguments made against non-positivist accounts of law and they do not show the moral superiority of the non-positivist account. I will mention only those arguments I thought were particularly worth a comment.

Alexy argues that from a linguistic point of view, one gains by a non-positivistic concept of law, because when a judge says about a particular norm that it is not law she avoids a contradiction — one that the positivist faces, because according to the positivist, the judge has to say that an immoral norm is law, which should not be followed (41–3). But there is no contradiction in the latter position: it is simply an affirmation of the fact that having a legal reason for action does not imply having a reason for that action all things considered. Alexy also argues against relativistic challenges to non-positivism, ie the claim that a non-positivist account of law will let into the law not only enlightened morality, but also 'Nazi morality'. Alexy answers that non-positivism relies on recognition of some objective values, which can be rationally defended, and even if they cannot, he argues that Nazi morality will become part of the law only when the majority already supports Nazi morality (53–5). But there are two serious flaws in this argument: even if morality can be rationally defended, this

does not mean that there won't be judges who will still follow Nazi morality, and will try to implement it through the law. Moreover, the claim that Nazi morality will have effect only in a country already taken by such morality is a double-edged sword: the same could be said about 'enlightened' morality, and hence there would be no positive effect to choosing a non-positivistic concept of law. But wasn't the whole point of Radbruch's original invocation of this new concept of law to diminish the chances of Nazi morality taking over again? Thirdly, Alexy mentions several commentators who argued that Radbruch's formula is dispensable, because the same result can be achieved by means of retroactive legislation: thus judges or legislators in post-Nazi Germany could have abolished the Nazi law retroactively. Alexy's response is that retroactive legislation has problematic implications, which are avoided if we adopt a Radbruch's formula (56–9). But, first, in many cases the change in the law can be done in a prospective manner: the judge or legislator can acknowledge the fact that unfortunately unjust laws have been part of the legal system for some time. More importantly, retroactivity is not a technical term, one that can be avoided by a change of definitions. The evil in retroactivity is in the fact that (justified) expectations people have and actions that people take on the basis of what they take to be the law at a particular time are hampered by the retroactive change of the law. This sort of harm is not avoided by saying that what people thought was the law was not really the law. Even if these cases are different (because Alexy might insist that in cases of extremely immoral laws people's expectations resulting from relying on the law are not justified), the situation of an extremely immoral law as part of a relatively moral legal system will (almost) only arise when the concept of law at a particular time is a positivist one. In such a situation even if the agent is sure that she is right in not obeying a particular law because it is unjust in the extreme, and even if she miraculously knows that she will be tried for the violation of this immoral norm only after the current regime is overthrown, how can she know that the new regime will adopt a non-positivist concept of law? In any case, one could answer Alexy the way he did with regard an argument against the impaired certainty of a non-positivist concept of law (51–3): retroactivity should be given its respective and relative weight, not an absolute one.[19]

Alexy wanted to argue that in all cases non-positivism fares at least as well as positivism, and in few occasions it outdoes positivism, so that by some preponderance, non-positivism wins. But if my responses to Alexy's

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[19] This is close to Hart's claim of the 'candour' of legal positivism, which Alexy discusses (59–61). Alexy's answer is that the cases in which this situation will arise are cases in which the immorality of the norm is obvious. But in such a case many positivists hold that, if at all, there is a very weak obligation to obey the law.

arguments were on the right track, this conclusion is no longer warranted, and his arguments for premise (iv) fail.

Finally, let us assume that Alexy has managed to provide convincing answers to all the queries that have been raised about his argument from injustice. Does this mean that he has shown a necessary connection between law and morality? I am not sure, and here is why: if we choose a non-positivist concept of law, then it means that things could have been different; after all, no-one forced us to choose this definition of law, and had we chosen another, there would not have been a necessary relation between law and morality.[20]

IV. Conclusion

I tried to reconstruct Alexy's arguments in various ways in order to see whether they could show the necessary connection that allegedly exists between law and morality, but both the conceptual route and the normative route were found wanting. It does not follow that there are no necessary connections between law and morality. Much hangs here on understanding two points. First, what sort of necessary connection is claimed to exist between law and morality. This is an issue about which Alexy's book is virtually silent, and therefore about which I did not write here. Then comes a second question, namely which necessary connection between law and morality is supposed to exist: is morality necessarily required for explaining law's normativity, or the validity of legal norms, or their content? Or perhaps the necessary connection is merely the fact that law's excellence is examined against the requirements of morality. And as these possible connections are by and large independent of each other, there can be various different necessary connections between law and morality. All this lends credence to John Gardner's words quoted in the beginning of this essay that there are very few legal philosophers today who deny the existence of some sort of necessary connection between law and morality. I doubt, however, if those who do, will feel compelled to change their view as a result of Alexy's arguments.

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20 Even if Alexy's arguments are *a priori* they can still be contingent. See Saul Kripke, *Naming and Necessity* (1980) 54–7.