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The Argument from Justice, or How Not to Reply to Legal Positivism

Joseph Raz

Professor Robert Alexy wrote a book whose avowed purpose is to refute the basic tenets of a type of legal theory which 'has long since been obsolete in legal science and practice'. The quotation is from the German Federal Constitutional Court in 1968.¹ The fact that Prof Alexy himself mentions no writings in the legal positivist tradition [in English] later than Hart's *The Concept of Law* (1961) may suggest that he shares the court's view.² The book itself may be evidence to the contrary. After all why flog a dead horse? Why write a book to refute a totally discredited theory? Perhaps Alexy was simply unlucky. The burst of reflective, suggestive and interesting writings in the legal positivist tradition reached serious dimensions only in the years after the original publication of his book, when Waldron, Marmor, Gardner, Leiter, Shapiro, Murphy, Himma, Kramer, Endicott, Lamont, Dickson, Bix and others joined those who had made important contributions to legal theory in the positivistic tradition in the years preceding the original publication of Alexy's book: Lyons, Coleman, Campbell, Harris, Green, Waluchow and others, who are still among the main contributors to legal theory in the positivist tradition. It is a great shame that nothing in these writings influenced the arguments of the book.

Perhaps this regret is misplaced. After all 'positivism' in legal theory means, and always did mean, different things to different people. What Radbruch, one of Alexy's heroes, meant when he first saw himself as a legal positivist and then recanted was not the same as what 'legal positivism' means in Britain (and nowadays in the United States as well) among those who engage in philosophical reflection about the nature of law. Perhaps Alexy is simply addressing himself to a German audience, and refuting, or attempting to refute, legal theories of a kind identified in Germany as 'legal positivism'. Perhaps, though his references to Hart show that he does not intend it that way.

My aims in this chapter are, however, reasonably clear. My main purpose is to explore whether any of Alexy's arguments challenge any of the views which I have advocated. Subsidiary aims are, first, to clarify why what Alexy says is legal positivism is not what is understood as such in the English speaking world, so that some of Alexy's sound points find

¹ Cited by R Alexy in *The Argument from Injustice: A Reply to Legal Positivism* (Oxford, Clarendon Press, 2002) original German publication as *Begriff und Geltung des Rechts* (Freiburg and Munich, Alber, 1992).

² The Federal Constitutional Court's reference is narrower than I made it appear. It refers to 'statutory positivism'. Since the case, and the passages from which the citation is extracted, are used by Alexy to show how the dispute between legal positivists and their opponents bears on legal practice, I thought it fair to assume that he took the court's statement to imply something like the following: a legal positivist theory of law requires 'statutory positivism'. Since 'statutory positivism' is false it follows that so is any theory in the legal positivist tradition.

no target; secondly, to try and clarify some of his arguments which I found, at least initially, rather obscure. Given the prominence of Alexy's book I will refer only to it, and will not consider his other publications.

Identifying Legal Positivism

According to Alexy the common feature of all legal positivist theories is 'the separation thesis which says that the concept of law is to be defined such that [sic] no moral elements are included. The separation thesis presupposes that there is no conceptually necessary connection between law and morality ... The great legal positivist Hans Kelsen captured this in the statement, "thus the content of the law can be anything whatsoever".³

It is a pity that the only support for this claim is a statement of Kelsen's which is manifestly false according to Kelsen's own theory. Since Kelsen regards the law as consisting of norms directing courts to apply sanctions for breach of duties,⁴ it follows (a) that the law can consist only of norms, (b) that it must address courts, (c) that it must stipulate for the application of sanctions, and (d) that their application must be conditional on certain conduct taking place. All these are, according to Kelsen's theory, necessary restrictions on the content of the law. Perhaps they do not violate the separation thesis as Alexy understands it, but they certainly do not support it, and, as I said, they show Kelsen's statement cited by Alexy to be false by Kelsen's own lights.

I should explain why Kelsen's statement cited by Alexy does not, even if true, support the separation thesis. But first we need to ponder what that thesis is. In the course of clarifying the thesis the irrelevance to it of Kelsen's claim will become clear. It says, according to Alexy, that 'the concept of law is to be defined such that no moral elements are included'—presumably in the definition. And as the definition is a proposition, the elements referred to must be concepts. So the thesis is that no moral concepts feature in the definition of law.

Given that it is highly debatable what are moral concepts, this is an unpromising way of identifying legal positivism. Many normative and evaluative concepts are common to moral and non-moral discourse. There are moral and non-moral reasons, duties, rights, virtues, offences, rules, laws, and so on. There are difficulties in demarcating the realm of morality, and distinguishing between it and the non-moral domain,⁵ which is but one reason why I see

³ Alexy, above n 1 at 3.

⁴ See H Kelsen, *Pure Theory of Law*, 2nd edn (M Knight (trans), Berkeley and Los Angeles, University of California Press, 1967) para 28(a) (pp. 114–17).

⁵ I argued that the task is without theoretical significance in *Engaging Reason* (Oxford, Oxford University Press, 1999), chs 11 & 12. T.M. Scanlon's *What We Owe to Each Other* (Cambridge Mass, Belknap Press, 1998) is an interesting case. His theory proposes an account of an important moral domain: wronging others. But it acknowledges that morality is much wider, and makes no attempt to identify its

little to be gained in trying to identify which concepts are moral concepts. My own writings on the law may highlight another problem with this way of understanding the separation thesis. I maintain that necessarily the law claims to have legitimate authority, and that that claim is a moral claim.⁶ It is a moral claim because of its content: it is a claim which includes the assertion of a right to grant rights and impose duties in matters affecting basic aspects of people's life and their interactions with one another. Does it follow that I believe in a definition of law which includes moral concepts? Not necessarily. So far as I remember I did not advance a definition of law. I was merely arguing about some of its necessary features.

It was Hart who convinced many legal theorists that the concentration on defining law in some earlier writings about the nature of law is unproductive. He wrote about this in his inaugural lecture in 1953, and again in *The Concept of Law* in 1961.⁷ Without going into detail, definitions normally aim to demarcate the boundaries of what is defined, to identify a set of features possession of which is necessary and sufficient for the defined concept to apply to their possessor. Three relevant conclusions follow: first, that concepts may admit of more than one definition (in other words, there can be more than one set of necessary and sufficient conditions for the application of the concept). Secondly, arguably some concepts do not have definitions, or at least no known definitions of this kind, at all, since there are no known or knowable and informative features which constitute necessary and sufficient conditions for their application. Finally, there is no theoretical justification to focus on the definition of the concepts rather than on their necessary features, some of which may not figure in any sensible definition of them. At any rate, the question arises: what is special about the features which figure in a definition? Why should they be at the core of the separation thesis, whereas other necessary features of the concepts are not?⁸

So let us try to reformulate the separation thesis to meet these points. Possibly it would then be the proposition that a theory belongs to the legal positivist tradition if and only if it maintains that the necessary features of the law can be stated without the use of any moral concepts. By this thesis my writings on the nature of law do not belong to the legal positivist tradition, since they ascribe to the law as an essential feature that it claims legitimate authority, and the concept of legitimate authority is a moral one.

I do not care whether my views are classified with legal positivism, as they commonly are, or not. I believe that the classification of legal theories as legal positivist or non-legal positivist, which underpins the structure of Alexy's book, is unhelpful and liable to mislead.

boundaries. Domains such as supererogation, virtue, duties which are not owed to other people are left untouched.

⁶ My first publication including these points is *Practical Reason and Norms*, 1st edn (Oxford, Oxford University Press, 1975) and 2nd edn (1999) ch 5.

⁷ The explanation I give below is close to the reasons why *The Concept of Law* avoids definitions, but not to Hart's earlier argument.

⁸ There is the additional question: should we focus on the necessary features of the law or of the concept of law? But I will not stop to consider it here.

And in a way my remarks here are meant to illustrate this point. But I know of no one who thinks that the fact that a theory of the nature of law makes claims which can only be made with the use of moral concepts shows that it does not belong to the legal positivist tradition.

Arguably, Alexy himself does not understand the separation thesis to mean what it means given his statement of its content. As we saw he believes that 'the separation thesis presupposes that there is no conceptually necessary connection between law and morality'. But the proposition that the definition of law does not contain moral elements, ie can be articulated without the use of moral concepts, does not presuppose that there is no conceptually necessary connection between law and morality.

I will again use my own work to illustrate the point. In *Practical Reason and Norms*⁹ I argued (reformulating the point in a way I now find clearer and more accurate) that even if all the law's essential features can be stated without the use of moral concepts it may be the case that that it has those features entails that it has some moral merit. At different times when repeating this point I instanced Lon Fuller's and John Finnis' theories, not ones ever considered to belong to the legal positivist tradition, as possible examples, though whether they are depends on certain interpretive questions regarding their claims. These theories, among the central examples of natural law theories in recent times, at the very least show the possibility of both meeting Alexy's test for being legal positivist theories, and being at the centre of the natural law tradition. We should conclude either that legal positivists can be natural lawyers, and vice versa, that is that the classification of theories into legal positivist and others is misleading and unhelpful, or that Alexy's separation thesis is not the test for being a legal positivist. I am inclined to accept both conclusions.

I do not wish to ignore the fact that something in the general neighbourhood of Alexy's separation thesis is sometimes put forward as a defining mark of legal positivism. It is commonly understood to state that whether or not the law of any country taken in general, or each one of its legal rules taken singly, has any moral merit is a contingent matter. I will call this the 'contingency thesis'. It should not be confused with what Alexy mentions as the presupposition of the separation thesis, namely the absence of a conceptually necessary connection between law and morality. For example, it is a conceptual point about the law that it can be morally evaluated as good or bad, and as just or unjust, just as it is a conceptual fact about black holes that propositions like 'this black hole is morally better or more just than that' make no sense. So there are conceptually necessary connections between law and morality which no legal positivist has any reason to deny.

What, then, are we to say of the contingency thesis? It is false, and Alexy of course agrees with its rejection. But the interesting point is that it is false for reasons which have no relevance to the main theses of theories of law in the positivist tradition. It cannot therefore be taken as a defining feature of this tradition. John Gardner dubbed the association of legal

⁹ See above n 6.

positivism with this thesis as one of the myths about positivism.¹⁰ It is easy to see why. It is a necessary fact, for example, that rape cannot be committed by the law.¹¹ There are naturally an indefinite number of necessary moral properties that the law of any country must have if it has this one, or others similar to it. Such truth as there is in Fuller's claims that some of the formal, in themselves non-moral, necessary features of the law, such as its reliance on general standards, restrict its ability to be arbitrary, shows those features to be among those which establish a necessary connection between law, specified without reference to morality, and morality

. It would be evident to all that the fact that the law necessarily has moral properties of the kind illustrated (and there are other more interesting examples) does not invalidate anything which I or any theorist within the legal positivist tradition ever held dear. You can now see why Kelsen's assertion that the law can have any content whatsoever, even if true, lends no support to Alexy's separation thesis, or to any of its reformulations and modifications that we examined. It is even consistent with the rejection of the contingency thesis.

These reflections may help explain why I am referring not to 'legal positivism', but to 'theories in the positivist tradition'. Theories belong to a tradition by their frame of reference, sense of what is problematic and what is not, and by similar historical features which do not presuppose that they all share a central credo. But possibly there is a fairly important thesis which is common to all the theories within the tradition of legal positivism. If so, then it is likely to be 'that determining what the law is does not necessarily, or conceptually, depend on moral or other evaluative considerations about what the law ought to be in the relevant circumstances'.¹² Andrei Marmor, whose formulation this is, calls it 'the separation thesis', and as it is much more successful in getting at the common core of the positivist tradition, when referring to the separation thesis without qualification it is this thesis I will have in mind. I believe it to be correct. Indeed I have endorsed, under the name of the 'sources thesis' in *The Authority of Law*,¹³ a stricter thesis, namely that the identification of law never requires the use of moral arguments or judgements about its merit; although the sources thesis was not endorsed by Hart, and is not endorsed by many writers within the positivist tradition, those who are now variously known as inclusive positivists, or soft positivists.

Observers and Participants

¹⁰ See J Gardner, 'Legal Positivism: 5 /12 Myth' (2001) 46 *American Journal of Jurisprudence* 199 at 222.

¹¹ See this example and more generally on the issue J Raz, 'About Morality and the Nature of Law' (2003) 48 *American Journal of Jurisprudence* 1.

¹² A Marmor, *Positive Law and Objective Values* (Oxford, Clarendon Press, 2001) 71.

¹³ J Raz, *The Authority of Law* (Oxford, Clarendon Press, 1979).

What has all this to do with Alexy's refutation of legal positivism? Alexy's failure to define legal positivism in a way which would apply to many of the theories of law commonly known as positivist does not entail that he failed to refute theories belonging to that tradition. It only means that some of his arguments, aimed as they are at refuting his separation thesis, are not relevant to that task. Even when successful they do not refute legal positivism in the sense in which the term is used in the English-language tradition of legal thought, especially in its contemporary meaning. Nevertheless, some of Alexy's arguments, if sound, would undermine the success of theories in that tradition, which, as I indicated, is best identified by Marmor's separation thesis. Ignoring the rest, I will try to examine those arguments. What are they?

They are preceded by a long series of distinctions not all of which I understand. One distinction which is put to instant use by Alexy has to be confronted. It is the distinction between the participant's and the observer's perspective. The participant's perspective is that 'adopted by one who, within the legal system, participates in disputation about what is commanded, forbidden, and permitted in the legal system, and to what end this legal system confers power'.¹⁴ It is contrasted with 'the observer perspective', namely that 'adopted by one who asks ... how decisions are actually made in a certain legal system'.¹⁵ This characterisation is multiply puzzling. What for example is it to participate in a disputation about the law 'within the legal system'? What is it to participate in such a disputation without or outside the legal system? If I¹⁶ write an article about the German law regarding the rights of asylum seekers in Germany for a British magazine am I within the legal system or outside it? Would my article, if presented to a German court as part of an interpretative argument about German law, turn into one written from within, whereas until then it was one written from outside? I suspect that the phrase 'within a legal system' is better omitted. It adds nothing but confusion to the characterisation of the distinction.

Similarly, I suspect that 'participates in disputation' is not intended to mean what it means. If I publish an article expressing a view about what German law is on certain matters (eg that there is, or there is not local income tax in Germany), or if I explain German law to my students I do not participate in any disputation. But a lawyer could make the very same points, express the very same propositions when arguing before a court, and what determine the truth of his assertion are the same factors which determine the truth of my assertion. I can see no way of distinguishing the disputant's perspective from mine, and as Alexy does not explain what the difference may be I will assume that there is none, and that the participant's perspective has nothing to do with participation in disputations.

¹⁴ Alexy, above n 1 at 25.

¹⁵ *Ibid.*

¹⁶ To remove doubt let me admit that I am not German, never lived in Germany and have no academic qualifications in German law.

The way Alexy uses the distinction¹⁷ makes clear that his typical participant is not so much someone participating in a disputation as a judge, or court, deciding a case. But again, leaving aside the fact that a court's decision is binding on the litigants, and as such has the effect of law-making between them, and focusing exclusively on the reasons the court gives in support of its decision, we cannot see here any evidence of a special perspective. Normally we expect a court to be as faithful to the truth about the law as we do a litigating lawyer, an academic scholar or a foreign commentator. Whatever their other aims, when stating what German law is they all normally¹⁸ have the same aim: to state truly how German law is.

The next puzzle is this: is the 'observer's perspective' one which those inquiring 'how decisions are actually made' should adopt if they are to succeed in finding the answer to their question? Or does it consist simply in inquiring how decisions are actually made, so that adopting it is no more than asking that question? A parallel question arises regarding the participant's perspective. To make vivid the difference think of a methodological claim in anthropology: some anthropologists claim that to understand a culture one must adopt the point of view of its participants; that the explanation of a culture misses its target if it does not explain the meanings rituals had for the people who engaged in them. Here we have a clear separation between (a) the subject of inquiry (the rituals of a particular population) and (b) the method of inquiry (explaining the meaning the rituals have for the members of that population). Providing statistics about the impact of the ritual on economic productivity may be interesting, but will not—according to this claim—constitute an explanation of the ritual.

At no point does Alexy say anything which can be taken as assigning any content to the two perspectives. He does not specify different methodologies as being employed by their practitioners. We are thus forced to the supposition that having these perspectives is simply seeking or endorsing propositions or views about what the law is ('participant's perspective') or about how courts actually decide cases ('observer's perspective'). I will assume that to be his view, odd though it is to say that a class of truths identified by their subject matter constitutes a perspective. It would be odd, eg, to think that those interested in physics and those interested in the pay and status of physicists adopt, just by the fact that they have different subjects, two different perspectives. And Alexy gives us no more reason for assuming that his 'participant and observer perspectives' are perspectives.¹⁹

¹⁷ eg Alexy, above n 1 at 42.

¹⁸ The qualification allows for cases in which they aim to deceive, or just do not care about the truth of their utterances. Such cases exist but are necessarily parasitical on the normal case.

¹⁹ Unless his reference to the alleged similarity of his distinction to Hart's between the internal and external point of view is taken to be one. But that would be a mistake. The two distinctions bear no similarity to each other. Hart's internal point of view marks the position of a person who endorses a set of norms or reasons. There is nothing of that in Alexy's 'participant's perspective'.

Given that we are given no choice but to assume that the difference between the observer's and the participant's perspective is the subject matter of their inquiry there is no reason to expect them not to be able to share the same concepts. One or the other of them may find that some concepts crop up more often in his inquiries, but there is no principled reason why they should diverge in any way in their concepts. It is therefore surprising to find Alexy claiming that the statement:

A has not been deprived of citizenship according to German law, although all German courts and officials treat A as denaturalized ...²⁰ as a statement of an observer contains a contradiction.²¹

Given that being contradictory is a property of statements or of propositions and not of the relations between them and those who make or express them, it is odd that the statement is contradictory 'as a statement of an observer'. If Alexy means that the same statement can be made either from a 'participant's' or from 'an observer's perspective' then, given that it is the same statement, if it contains a contradiction if made from one point of view it does so if made from any point of view.

Moreover, given the way the observer's perspective was defined it is odd to regard this as an observer's statement. Surely, it consists of two component statements; the first, being about what the law is, is—by Alexy's definition—a participant's statement, while the second is an observer's statement, since it is about what legal institutions actually do. Taken together they imply that the officials are flouting the law by the way they treat A. This is, we assume, unfortunate, but it is hardly a contradiction. If I am right so far then Alexy's conclusion that the observer has a special concept of law and that his statement avoids contradiction because of that cannot be sustained. There may well be more than one concept of law in current use, but no reason is given here, nor anywhere else in the book, for thinking that 'participants' and 'observers' are committed by their role to use different concepts. That is, the study of what the law is, and the study of how judges deal with cases, can use the same concepts. Indeed they had better use the same concepts (though they may use more than one) since the second (the study of how judges actually deal with cases) is meant to tell us, among other things, what happens to the law (the very same law we study when we are 'participants') in the hands of the courts. All this has the unfortunate consequence that Alexy's statement that 'the separation thesis is essentially correct from the observer's perspective'²² is not supported by his own analysis. I will return to Alexy's use of the distinction between the two perspectives below.

The Correctness Thesis

²⁰ Alexy, above n 1 at 29–30.

²¹ *Ibid* at 30.

²² *Ibid* at 35.

Alexy states that while his argument is one from injustice its foundations are in the more basic thesis, the thesis of correctness, which says—and this is all we are ever explicitly told about it—that the law as a whole, and each of its norms and decisions, claim to be correct.²³ I assume that the thesis is not explained because Alexy thinks that it is too obvious to require explanation. Let me explain my difficulties.

You may say that the claim made by the law is that it is correct as law, that it is what the law should be. The claim made by any legal decision is that it is correct qua legal decision. I am, it claims, what I should be. The decision claims: I am the decision that I should be. This sounds plausible, but how is it to be understood, and how does Alexy establish this conclusion? A natural reading is to take it to be a special case of a more general thesis: every speech act presents itself as doing something: stating how things are, raising a question, expressing goodwill, making a promise, giving advice. In presenting itself as such an action it claims to be, in the circumstances of the case, correct as an action of that kind.

This thesis can be explained as an instance of a still more general thesis applying to all intentional actions, which explains reference to ‘the claim made by a speech act’ by reference to a commitment of the speaker, or, more generally, the agent: the agent commits himself to the action’s being correct, or appropriate. That means that if an agent acts intentionally and is proven to have acted inappropriately or unwisely, or in some other way to have acted as he should not have, he must, once convinced of his mistake, believe that he should not have acted as he did, on pain of irrationality. In this sense every intentional action ‘claims’, that is commits its agent to, its own correctness. As is evident the thesis merely means that (a) actions of different kinds are subject to evaluation as actions of those kinds (though perhaps also to other evaluations as well), and (b) it is part of the concept of intentional action that one who performs an intentional action knows that his action is subject to assessment by the standard applying to actions of that kind (the kind under which it is intentional).

The law is not an action, but it is the product of intentional actions, and it is common to attribute to the product of an action some of the properties of the action. For example, if the agent states that things are thus and so, then he commits himself to the statements not only that it was right to state that they are thus and so, but also that they are thus and so, namely that the proposition expressing his statement is true. Thus the law-maker commits himself that the act of making this law was appropriate, and this can be taken as a commitment that the law thus made is as it should be.

There are two difficulties in understanding Alexy’s correctness thesis in this way. First, my interpretation of the correctness thesis renders it, I think, true, but at the cost of taking it to be a general thesis about intentional actions and their products, thus denying that it says anything special about the law. Alexy, by way of contrast, rather than taking the thesis to be an instance of a wider one, regards it as perhaps special to the law. At any rate he denies that

²³ *Ibid* at 35–6.

it applies to the actions of 'a bandit system'.²⁴ But surely if the bandits act intentionally as bandits their actions manifest the thesis: bandits are committed to the claim that what they do is appropriate (being self-enriching, looking after their own children, wreaking revenge, or whatever are the considerations which explicitly or implicitly they take to establish the appropriateness of their actions). Perhaps some bandits are guilt-ridden believing themselves to be always in the wrong. Perhaps some bandits are motivated by self-hate, and a desire for self-debasement which leads them subconsciously to want to do the wrong thing. One doubts that such motivations are more prevalent among bandits than among the judges of the High Court, but it does not matter. People who are so motivated manifest as clearly as others that they share the commitment that their actions be correct. For only through the violation of this commitment can they realise their self-debasing desires. More interesting is the possibility that the bandits do not think of their actions in the way Alexy describes them. They may think of them as Christian actions, they may act intending to act in a Christian way (perhaps that is how Robin Hood and his band intended their actions). In that case they are claiming correctness by that standard, ie by the standard of Christianity. Their actions may not be intentional under the description 'bandit actions', and they may not be claiming correctness by those standards, if there are such.

The second difficulty in understanding Alexy's correctness thesis along the lines I suggested is that he thinks (or implies) that the correctness thesis involves, though it is not exhausted by, a claim that the law is morally correct.

These difficulties notwithstanding, I think that my interpretation is the right interpretation of what is true in the correctness thesis, for there is something true in it, and that Alexy is at least half aware of it. For no sooner has he invoked as an example of the correctness claimed by the law a claim to justice,²⁵ than he concedes²⁶ that 'a positivist can endorse the argument from correctness and nevertheless insist on the separation thesis' (this is, of course, Alexy's separation thesis). Alexy explains that, among other reasons, the legal positivist can 'maintain that the claim to correctness, having trivial content lacking moral implications, cannot lead to a conceptual connection between law and morality'. Taken literally, as I think it should be, these points allow that if there is an argument against positivism, the correctness thesis does not contribute to it (for 'a positivist can endorse' it, etc).

I think that Alexy is right on this point. The inability of the correctness thesis to yield substantive results is worth understanding properly: the correctness thesis, as I explained and generalised it, is not empty, but it is formal. It is also a conceptual truth. It marks the nature of purposive activity (and its products). Having a purpose involves subjecting oneself to some standards of correctness, standards establishing that the purpose is worth adopting and

²⁴ *Ibid* at 34.

²⁵ *Ibid* at 36–7.

²⁶ *Ibid* at 39.

pursuing, etc. It is a conceptual thesis not specifically about the law (though it applies to the law) but about the nature of purposes, intentional actions and their products, ie that in being endorsed by their agents, who could in principle reject them, they commit their agents to standards of appropriateness.

The thesis is formal in that it does not determine what standards apply. Obviously, since it is so general, applying to all purposeful conduct, it cannot do that. Different standards apply to different activities and pursuits. It is the nature of various activities, and of the circumstances in which they are undertaken, which determines which standards apply to them. If the law is committed to standards of justice this follows from the nature of law, not from the nature of purposeful activity. It follows that nothing can be learnt from the correctness thesis about the nature of law. Rather, once we have established, in light of other arguments, what is the nature of law, and only then, will we be able to conclude which commitments the law makes, or what claims it makes. The correctness thesis, being a formal thesis, while true, affords no specific help in elucidating the nature of law. I will return to Alexy's use of the thesis below.

The Argument from Injustice

Alexy aims to vindicate Radbruch's formula, namely:

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 a 'lawless law' must yield to justice.²⁷

On its face this passage is ambiguous between two positions: it could mean, consistently with legal positivism, that it is the duty of the court to refuse to apply a statutory provision which is grossly unjust.²⁸ Alternatively, it can mean that the law necessarily (for I assume that Radbruch was not writing merely about German or any other specific legal system), contains a legal norm instructing the courts to refuse to apply laws which perpetrate gross injustices (either because every legal system contains a rule dictating that grossly unjust law is not law, or because every legal system contains a legal rule, which overrides all others, which directs judges to disregard unjust rules even if they are law).²⁹ I am no Radbruch scholar, but I assume that Alexy is right in ascribing to Radbruch the second view. In any case this is the view which Alexy defends.

²⁷ See G Radbruch, *Rechtsphilosophie III. Vol 3 of the Gustav Radbruch Gesamtausgabe* (A Kaufmann (ed), Heidelberg, CF Mueller, 1990) 89.

²⁸ Legal positivists are more likely than natural lawyers or other non-legal positivists to affirm that sometimes courts have (moral) duties to disobey unjust laws.

²⁹ One may regret that Radbruch did not consider some related issues. For example, what if refusing to apply the unjust law would itself yield grossly unjust results, as can be the case; or, what if the law is not grossly unjust, but its application to a particular case is? To simplify matters, I will myself ignore all such relevant but complicating factors.

Surprisingly, his defence, elaborate and often subtle, takes the form of disputing, often successfully, a large number of unsuccessful arguments against the Radbruch formula. To find in the book any argument for the thesis is hard. But that is what I would try to do.

Alexy argues thus:

Take the substantive thesis that there are good legal reasons for the judge not to apply Ordinance 11 ... Given this presupposition it would be unsatisfactory for the judge to say that Ordinance 11 is law. He must characterise his decision as 'law' since he is deciding on the basis of legal reasons. Since his decision contradicts Ordinance 11, then if he were also to classify Ordinance 11 as 'law', he would be characterizing contradictory norms as 'law'. ... This contradiction can be resolved without difficulty if the judge says that Ordinance 11 is indeed *prima-facie* law but in the end not law at all. What is expressed thereby is that, in the course of the norm-applying procedure, Ordinance 11 is denied legal character. If there are good legal reasons for not applying Ordinance 11 then not only is it possible for the judge to say that the Ordinance is in the end not law, it is necessary that he do so in order to avoid a contradiction.³⁰

Given that there can be legal reasons for the judge to invalidate Ordinance 11—their existence is a contingent matter—the concept of law may include moral elements.³¹

There is, however, nothing in the argument, assuming *arguendo* that it is sound when understood as Alexy intends it, to show that the concept of law includes moral elements. It only shows that the law includes such elements, ie that the law can include a norm that grossly unjust laws are invalid, if, for example, the legislature passes a statute to that effect. On that assumption, consistent with everything in the argument, the concept of law need include nothing but that the law is whatever the legislature legislates. When the legislature instructs a court to use its power to set aside grossly unjust laws the court should use its judgement on moral matters to decide which laws to set aside.

This seems consistent with Alexy's observation that one can describe what happened in the case as 'derogating judge-made law'.³² Is there anything in the quotation to explain why that is not the correct description of the situation? Alexy says that the judge 'must characterise his decision as "law" since he is deciding on the basis of legal reasons'. How are we to understand this? Perhaps Alexy means that the judge must hold his decision to be legally binding. That is so, however, not because he is deciding on the basis of legal reasons, but because he has the legal power to determine the matter litigated before him. That makes his decision binding in law, and it is so binding even if it is mistaken in law, that is, even if it is not correctly based on legal reasons. Perhaps Alexy means not merely that the court's decision is binding, but that it is in fact also a correct application of legal reasons (ie the assumed legal rule empowering the court to set aside a grossly unjust law).

This too is consistent with the hypothetical situation as well as with legal positivism. By assumption there are two conflicting rules involved here: Ordinance 11 and the rule which

³⁰ Alexy, above n 1 at 42.

³¹ Alexy, above n 1 at 42.

³² See Alexy, above n 1 at 41.

directs the courts to set aside any rule which is grossly unjust. Lots of issues remain unspecified. We know that the second rule, by its nature and content, overrides the first. So the correct decision according to the law is for the court not to follow Ordinance 11. The important point is that whatever the content of the legislated rule against unjust rules, the example poses no difficulty for my explanation of the nature of law, nor for any other which allows, indeed insists, that courts have the power, sometimes in virtue of legal rules, sometimes independently of them, to change law, for example on the ground that it is grossly unjust.³³

The example imagines one such situation. The second law, instructing courts to disregard grossly unfair laws, directs the court to set aside Ordinance 11. When doing so the court both makes law, and (by that very act) it also follows law. There is nothing here which cannot be described by either observer or participant. There are, of course, other cases as well. There are cases in which the law denies the courts law-making powers on certain matters, and they, defying the law, nevertheless assume such power, perhaps for good moral reasons. In such cases they may not be free to acknowledge that they change the law. They may well be advised to disguise the true nature of their action, and pretend that the law has always been as they now say it was. This is not the situation Alexy invites us to examine. But let it be observed that while such situations are real enough they hardly justify postulating a special perspective. Lying or pretending that things are other than one knows them to be is not to be confused with the existence of any perspective.

Is there anything in the example which is inconsistent with legal positivism? I see nothing of this kind. If we assume that the rule giving the courts power to set aside grossly unjust laws can exist in some legal systems and not exist in others then its existence can only be a matter of social fact, for by assumption there is no moral difference between these systems which would justify its existence in one, but not in the other. To argue against legal positivism Alexy needs to show not only that the courts of any and all legal systems should set aside unjust laws, but that necessarily the law gives them this power as a legal power, so that its exercise can never be a violation of the law.

It is not clear what reasons Alexy has for that claim. Andrei Marmor has suggested to me that implied in the book is something like the following argument:

- (1) The law essentially makes a claim to its moral correctness.
- (2) From the participant's point of view, this claim to moral correctness forms part of the reasons to follow the law, and in the case of judges, to apply it.
- ...(4) Since a grossly unjust law cannot be morally correct (*ex hypothesis*), judges ought to interpret the law so that grossly unjust law is rendered invalid.

³³ For a more recent and more nuanced explanation of this power see my 'Incorporation by Law' (2004) 10 *Legal Theory* 1. In dealing with this and similar situations, Alexy applies his distinction between the participant's and the observer's perspectives. My observations here illustrate why it is not needed, by showing how such situations can be described without reference to it.

- (5) Therefore, from the internal point of view, from the point of view of judges, unjust law is not law.³⁴

Neither Marmor nor I are sure that this is a correct presentation of Alexy's underlying thought. But something like it may be the best argument to be culled from the book. How good is it?

Something like the first thesis is true. I remarked earlier that while it is true that the law, like all intentional actions and their products, can be said to make a claim to correctness, whether the claim is to moral correctness depends on an argument, not provided by Alexy, about the nature of the institution. I have argued³⁵ that the law claims to have legitimate authority, in the sense that legal institutions both act as if they have such authority, and articulate the view that they have it. This is, of course, a moral claim but it is not a claim to moral correctness. It is in the very nature of authoritative rules that they are binding even if not correct. So authorities (police, courts, administrative agencies) can be aware both that the rules they apply are morally wrong, and that they are morally binding on them and on their subjects. Of course, if they have power (whether legally sanctioned power or not) to change them or to refrain from applying them they may have to do so.³⁶ But that is not always the case, and when it is such actions are not always authorised by law, hence it is not true that the law makes a claim to moral correctness.

A more serious mistake creeps into the second proposition. It is generally true that participants, if this means officials such as judges, administrators, police and the like, generally follow the law not because it *claims* to be morally legitimate, but because they think that *it is* morally legitimate. The claim by itself is neither here nor there. To examine the rest of the argument we need to assume that while unjust laws may be morally binding, grossly unjust laws cannot be, that is we need to assume that grossly unjust laws are not only morally deficient, they also exceed any legitimate (ie morally binding) authority which anyone may have. Will that assumption vindicate the conclusion that officials (ie Alexy's participants) are always morally justified in refusing to apply such laws? Not necessarily, for as was observed above, the evil flowing from not applying them may sometimes be worse than the evil of applying them. Suppose that we succeed in identifying a class of cases such that relative to any given authority they (a) lie beyond the legitimate power of that authority, and (b) it would be right not to follow them. The possible existence of such a class of cases is not surprising, at least not to anyone who believes that legitimate political and legal authority is always limited. The question is whether this can lead to the conclusion that no grossly unjust law is law, or that courts have inherent legal power to set such laws aside? Clearly the assumptions

³⁴ Private communication (from notes prepared by him for a debate with Alexy at IVR World Congress, Granada, Spain, 27 May 2005). I have left out the third step in his argument.

³⁵ The reader will be glad that I will not repeat the arguments here yet again. They have been adumbrated in *Practical Reasons and Norms*, above n 6, *The Authority of Law*, above n 13, *Ethics in the Public Domain* (Oxford, Clarendon Press, 1985).

³⁶ But not always, as the evil caused by changing a bad law may be greater than that of allowing it to stand and applying it.

do not in themselves entail such a conclusion. Such an inference requires the additional premise that law can never be unjust in these ways. But after all the whole argument is about the truth of that premise. Does looking at matters as they appear to the officials change matters? No, for officials just like other people may, and should, believe that some laws should be set aside, but it does not follow that they think that they are authorised by law to set them aside. If it would turn out that officials, qua officials, must believe that about the law, we may have the beginning of an argument towards Radbruch's formula. But Alexy does not provide any reason to think that they must think that. Clearly not all judges do think that, as the statements of various judges that they are morally bound to obey the law come what may show. Legal positivists claim that they should not think that, for to do so would be to confuse their moral duty to set aside such laws with their legal duty. Alexy does not agree, but I fail to find the argument.

Alexy has much more to say. Many of his arguments have to do with claims that the world would be morally better if the concept of law had this feature or that (eg positivistic versus non-positivistic features). I cannot see how any such arguments can help establish what features the concept of law does have. Much of what Alexy says in these contexts involves both conceptual confusions and highly speculative empirical assumptions. Let me give but one example. Alexy maintains that 'if there are notions of justice which are rationally justifiable, then one who rationally justifies his view that an action is unjust can be said to know this. Now the following principle applies: the more extreme the injustice the more certain the knowledge of it'.³⁷ First a conceptual point: one can argue rationally to a mistaken conclusion, that is, having reached a false belief (which one arrived at by reasoning) and having irrationally accepted a belief are not necessarily co-extensive notions. Can knowledge (as distinct from belief) be more or less certain, that is admit of degrees (this too is a conceptual point)? Is it true that the greater the injustice the less likely we are to make mistakes about it being an injustice? There is some empirical evidence to doubt the last claim. Many will admit that slavery as practised by Muslims and Christians in the sixteenth and seventeenth centuries was among the greatest injustices of those times, yet it was not among the most obvious injustices to the people who engaged in it. The repression of women or of gays in many cultures provides similar examples. I think we are lucky that such arguments do not bear on the question of the nature of law.

I do not find any arguments put forward by Alexy which can refute Marmor's separation thesis. I suspect that Alexy feels that his question is the right one to ask for he is aware of only one other, namely, the clarification of linguistic usage, which he claims correctly cannot settle the issue. He seems unaware of a theoretical task of explaining the nature of a social institution we have, which is neither a question of linguistic usage, nor the question of which linguistic usage would be, if it prevails, morally better.

³⁷ See Alexy, above n 1 at 52.

The Argument from Principle

Alexy finds another argument, completely independent of the argument from injustice, for a necessary connection between law and morality. As pointed out, my own view, and the separation thesis, are consistent with the existence of such necessary connections. They may, however, be inconsistent with the kind of connection Alexy aims to establish, and it may, therefore, be of interest to find out whether he succeeds, and if so what kind of connection he establishes.

As a first step in a complex argument he claims that all developed legal systems include principles, which he understands, following Dworkin, to be standards which can be realised to varying degrees.³⁸ Naturally, so can rules. The idea is, however, that sometimes realising a principle to less than the highest degree is not a violation of that principle, whereas failing to conform completely to a rule is a breach of that rule. Perhaps we can identify principles with prima facie reasons, whereas rules are conclusive reasons. Alexy discusses here only principles whose function or role is to instruct courts how to decide cases to which conflicting reasons apply.

It is not implausible to expect that all developed legal systems include principles. Alexy's argument to that effect does not, however, secure that conclusion. It is roughly that because of the thesis of correctness, 'in all legal systems in which there are doubtful cases that give rise to the question of striking a balance, it is legally required to strike a balance and thereby to take principles into account. Thus, in all legal systems of this kind, principles are, for legal reasons, necessary elements of the legal system'.³⁹ This argument can be generalised to establish that every legal system contains various kinds of laws: in all legal systems in which deciding a case requires enforcing a duty there are duty-imposing rules, in all legal systems in which deciding a case requires protecting a right there are right-protecting rules, etc. All such arguments have a core of good, if unexciting, sense. In all these cases it is plausible to suppose that legal systems include legal standards of varying kinds, which are needed for the resolution of practical disputes. Since such practical disputes involve conflicts of rights, duties, etc, it is plausible to expect the law to have rules on these matters.

This observation is not, however, an argument for the inevitable presence of such rules in all legal systems. Does not Alexy provide such an argument? His argument, unfortunately, is not valid, for it concludes that the law of a country includes principles from the sole premise that the courts are required, by law, to apply principles. That is a non-sequitur. The courts of Britain are required by law to apply standards of foreign law, and many others which are not parts of the law of the land in Britain. Alexy's argument here confirms the suspicion mentioned above that he fails to conceive of the possibility that standards which courts are required by law to apply may nonetheless not be part of the legal system which requires their application.

³⁸ See Alexy, above n 1 at 70.

³⁹ *Ibid* at 74.

The rest of the argument does not add much. Alexy relies on his correctness thesis to claim that laws, eg principles, which are morally wrong, or incorrect, should be changed. For reasons explained earlier the correctness thesis does not establish that conclusion. To establish it one has to establish that the law should be morally correct. That is not an empty, trivial conclusion. But it can be established, and indeed, I know no one who disputes it. It is a blemish in the law that it is morally defective, unjust, etc. If this establishes anything regarding the credentials of legal positivism it establishes that Alexy's separation thesis, which he so laboriously undermined by his argument to this conclusion, has nothing to do with legal positivism. After all it was Bentham, the founder of legal positivism in Britain, who did more than anyone to argue that the law should be moral, and expose the moral deficiencies of the law of his day.

Paradoxically, the generally critical tone of this chapter is more a result of agreement than of disagreement. To be sure I find some of the book's central contentions unsupported by its arguments, and some of them are, I think, wrong. But to a considerable degree the critical tone of this chapter is due to the large measure of agreement with Alexy. On many matters he is wrong not in the views he takes, but in thinking that he is contradicting legal positivists in taking them. It would, however, be a bad mistake to think that my aim was to defend legal positivism. I see Alexy's book as a missed opportunity, the opportunity to go beyond the dispute about legal positivism. The very fact that so many issues, including several that Alexy takes up, which are or were thought to characterise the divide between legal positivist and other accounts of the nature of law, serve no such purpose shows that legal theorists both on the legal positivist and the opposing side have advanced the discussion about the nature of law beyond the point where legal positivism is an illuminating category in such discussions. Perhaps it is time not to refute legal positivism, but to forget the label and consider the views of various writers within that tradition on their own terms.

