INCLUSIVE NON-POSITIVISM

NÃO POSITIVISMO INCLUSIVO

Robert Alexy*

Abstract: On the basis of the distinction between two forms of positivism and three forms of non-positivism, I argue that only one of these five concepts of law is defensible: inclusive non-positivism. The basis of my argument is the correctness thesis, which says that law necessarily makes a claim to correctness. The doctrine of correctness implies the dual nature thesis, which says that law comprises a real or authoritative dimension as well as an ideal or critical dimension. The dual nature of law is the basis of the Radbruch formula. It says, in its shortest form, that extreme injustice is not law.
Keywords: Inclusive non-positivism. Correctness. Dual nature of law. Injustice.

Resumo: Com base na distinção entre duas formas de positivismo e três formas de não positivismo, eu sustento que apenas uma dessas cinco concepções de direito é defensável: o não positivismo inclusivo. A base do meu argumento é a tese da correção, que diz que o direito necessariamente reclama correção. A doutrina da correção está implicada com a tese da natureza dual, que diz que o direito compreende uma dimensão real ou baseada em autoridade, como também uma dimensão ideal ou crítica. A natureza dual do direito é a base da fórmula de Radbruch, que sustenta, em sua versão reduzida, que a extrema injustiça não é direito.
Palavras-chave: Positivismo não inclusivo. Correção. Natureza dual do direito. Injustiça.

* Professor Doutor da Universidade de Kiel, na Alemanha; alexy@law.uni-kiel.de

1 Separation thesis and connection thesis

All positivists defend the separation thesis. In its most general form, it says that there is no necessary connection between the law as it is and the law as it ought to be. Or, in a more precise formulation, it states that there is no necessary connection between legal validity or legal correctness on the one hand and moral merits or moral correctness on the other. By contrast, all non-positivists defend the connection thesis, which says that there is a necessary connection between legal validity or legal correctness on the one hand, and moral merits or moral correctness on the other (ALEXY, 2008b, p. 284-285). This implies that in order to determine the concept and the nature of law, all positivistic theories are confined to two elements, namely, authoritative issuance and social efficacy. The characterization of non-positivistic theories includes a third element as well, correctness of content (ALEXY, 2002a, p. 3-4).

2 Forms of positivism and non-positivism

Which thesis, the separation thesis or the connection thesis, is more defensible? Both lend themselves to a variety of interpretations. The answer to our main question turns on these various interpretations.

Within positivism, the distinction between exclusive and inclusive legal positivism is the most important difference where the relation between law and morality is concerned. Exclusive positivism, as defended most prominently by Joseph Raz, maintains that morality is necessarily excluded from the concept of law (RAZ, 2009, 47). Inclusive positivism, as defended, for instance, by Jules Coleman, says that morality is neither necessarily excluded nor necessarily included. The inclusion is declared to be a contingent or conventional matter turning on what the positive law in fact says (COLEMAN, 1996, p. 316). This implies that the relation between law and morality in both cases, that of inclusive positivism as well as that of exclusive positivism, is determined solely by what is authoritatively issued and socially efficacious, that is, by social facts. Inclusive positivism is a form of positivism because it claims that the initial decision in a particular legal system to include morality in the law is contingent or conventional (ALEXY, 2012, p. 4). Non-positivism argues not only, against exclusive positivism, that morality is not necessarily excluded, but also, against inclusive positivism, that it is necessarily included; non-positivism is therefore contrary to both forms of positivism.

The differences within non-positivism are no less important than the differences within positivism. Of special importance for the debate over the concept and the nature of law are the differences that stem from different effects on legal validity that are attributable to moral defects. Non-positivism can determine the effect on legal validity that stems from moral defects or demerits in three different ways. It might be the case that legal validity is lost in all cases, or that legal validity is lost in

some cases and not in others, or, finally, that legal validity is affected in no way at all (ALEXY, 2008b, p. 287).

The first position, according to which every moral defect yields legal invalidity, is the most radical version of non-positivism. This position might be characterized as 'exclusive non-positivism' in order to express the idea that each and every moral defect precludes legal validity. With this, in cases of moral defects, it excludes social facts from the sources of law. Augustine gives us a classical statement of this view when he says that "a law that was not just would not seem to me to be a law" (AUGUSTINUS, 2006, p. 86). A recent example is Deryck Beyleveld and Roger Brownsword's thesis that "immoral rules are not legally valid" (BEYLEVELD; BROWNSWORD, 2001, p. 76).

The radical counterpart of exclusive non-positivism is super-inclusive non--positivism. Super-inclusive non-positivism goes to the other extreme. It maintains that legal validity is affected in no way whatever by moral defects. At first glance, this seems to be a version of positivism, not of non-positivism (Waldron, 1996, p. 1566). This first impression, however, is recognized as misleading as soon as one sees that there exist two different sorts of connection between law and morality: a classifying and a qualifying connection (ALEXY, 2002a, p. 26). These two sorts of connection are distinguished by the effects of moral defects. The effect of a classifying connection is the loss of legal validity. By contrast, the effect of a qualifying connection is legal defectiveness, which does not, however, reach so far as to undermine legal validity. It does, however, create a legal obligation or at least an empowerment on the part of appellate courts to quash unjust judgements of lower courts. Immanuel Kant's combination of the postulate of '[u]nconditional submission' (Kant, 1996, p. 506) to the positive law with the idea of a necessary subordination of the positive law to non-positive law can be read as a version of super-inclusive non-positivism (ALEXY, 2008b, p. 289; ALEXY, 2010, p. 176). The same is true of Aquinas's thesis that a tyrannical law is law but "not law simpliciter" (AQUINAS, 1962, p. 947) or, as John Finnis puts it, 'not law in the focal sense of the term "law"' (FINNIS, 1980, p. 364).

The third version of non-positivism, inclusive non-positivism, is found between the extremes of exclusive non-positivism and super-inclusive non-positivism. Inclusive non-positivism claims neither that moral defects always undermine legal validity, as represented by exclusive non-positivism, nor that they never do, as represented by super-inclusive non-positivism. It claims that moral defects undermine legal validity under some conditions and do not undermine legal validity under other conditions.

Inclusive non-positivism is given its most prominent expression in the Radbruch formula, which, in its most compressed form, runs as follows: Extreme injustice is not law (RADBRUCH, 2006, p. 7; ALEXY, 2008a, p. 427-428). According to this formula, moral defects undermine legal validity if and only if the threshold of extreme injustice is transgressed. Injustice below this threshold is included in the concept of law as defective but valid law. This means that inclusive non-positivism

includes a considerable degree of positivity, that is to say, a commitment to what is authoritatively issued and socially efficacious. The non-positivism of inclusive non--positivism consists, first, in establishing an outermost border of law and, second, in qualifying immoral or unjust law as not only morally but also legally defective. The practical consequences of establishing an outermost border become evident when one looks at the application of the Radbruch formula by German courts after the defeat of National Socialism in 1945 and after the collapse of the German Democratic Republic in 1989 (ALEXY, 2008a, p. 428-432). A practical consequence of qualifying immoral or unjust law as not only morally but also legally defective is that appellate courts acquire the possibility of quashing unjust judgements of lower court owing to their legal defectiveness.

3 The argument from correctness

The existence of two forms of positivism and three forms of non-positivism shows that the debate between positivism and non-positivism concerns far more than a mere contest between two monolithic positions, often presented as the opposition of "legal positivism" and "natural law." And this is not all. Things become even more complicated as soon as one takes account of the fact that not only positivism as well as non-positivism are in themselves complex. Complexity is also manifest in the structure of arguments for and against the different forms of positivism and non-positivism. The Archimedian point of this structure is the argument from correctness. All other arguments revolve around this centre.

The argument from correctness says that individual legal norms and individual legal decisions as well as legal systems as a whole necessarily lay claim to correctness. Ronald Dworkin has objected that the question of whether the representatives of law raise any claims is a question of fact, and not a question of necessity (DWORKIN, 2006, p. 200). This objection can be rejected if it is possible to show that the claim to correctness is necessarily implicit in law, quite apart from the intentions of its representatives. Here the idea is to show that the explicit negation of the claim of correctness leads to a contradiction (ALEXY, 2002a, p. 35-39). An example is the fictitious first article of a constitution that reads: *X* is a sovereign, federal, and unjust republic. This article is somehow absurd. The absurdity stems from a contradiction between what is implicitly claimed in framing a constitution, namely, that it be just, and what is explicitly declared, namely, that it is unjust. Now justice counts as a special case of correctness, for justice is nothing other than correct distribution and compensation. Therefore, the contradiction in our example is not only a contradiction with respect to the dichotomy of just and unjust but also a contradiction with respect to the dichotomy of correct and incorrect.

What is more, in the aforementioned example of the fictitious first article of a constitution, the contradiction there between what is explicit and what is implicit is necessary. It could be avoided only if one were to abandon the implicit claim. But

to do this would represent the transition from a legal system to naked power relations (ALEXY, 1998, p. 213-214). Thus, our example shows that law and the claim to correctness are not only connected by contingent, prudential reasons, but also – and this goes a good bit further – by reasons necessary in nature. This connection is by no means confined to such fundamental acts as framing a constitution. It is present everywhere in the legal system, and may be illustrated by the absurdity found in decisions such as the following: The accused is sentenced to life imprisonment, which is an incorrect interpretation of prevailing law.

In order to establish a necessary connection between law and morality, it is not enough that the claim to correctness be necessarily raised by law. Over and above this, it is necessary that its content necessarily refer to morality.

The claim of law to correctness would not necessarily refer to morality if it were possible that it refer exclusively to social facts, that is, to what has been authoritatively issued and is socially efficacious. A claim with this content would count as a purely positivistic claim to correctness. Hard cases, however, illustrate that the positivistic interpretation of the correctness argument gives rise to serious problems. Hard cases occur when the positive law – that is, the authoritative or source-based reasons – allow for more than one decision. The decision to be made in such an 'open' sphere is a decision on a normative matter that cannot be based on standards of positive law, for if it could be based on such standards, it would not be a decision in an 'open' sphere. If it is to be based on any standards at all, that is, if it is not to be a merely arbitrary decision, a decision that would contradict the claim to correctness, it must be based on other normative standards. Legal decisions regularly concern questions of distribution and compensation. Questions of correct distribution and compensation are questions of justice. Questions of justice, however, are moral questions. In this way, the open texture of law, taken together with the nature of legal questions, implies that the claim to correctness raised in legal decision-making necessarily refers not only to authoritative or source-based reasons but also to moral reasons. This implies that the claim to correctness necessarily raised in law leads to a necessary inclusion of morality in law (ALEXY, 2007, p. 49-50).

4 The dual nature of law

Hans Kelsen has argued against non-positivism that it presupposes 'an absolute morality, that is to say, a morality that is valid everywhere and at all times' (KELSEN, 1967, p. 68 trans. alt), and, Kelsen goes on, no such absolute morality exists. One might call this the 'argument from relativism' (ALEXY, 2002a, p. 53-55). The question of whether Kelsen's objection based on relativism is cogent is a question of interpretation. If one understands the objection as saying that there is no instance in which only one correct moral answer can be given, then the objection fails. There are cases of severe interference with human rights in which only one moral answer is correct or true, namely, that the interference violates human rights

and is, for that reason, morally wrong (ALEXY, 2012, p. 8-13).The existence of such cases suffices as an epistemological or meta-ethical basis of non-positivism. If, however, one interprets Kelsen's objection as saying that there exist a number of cases, even a considerable number, in which 'reasonable disagreement' (RAWLS, 1993, p. 55) about what is morally right or wrong is possible, then Kelsen's argument is based on a correct epistemological or meta-ethical thesis, but, and this is the point, it would then no longer suffice as an argument against non-positivism. Non-positivism is compatible with reasonable disagreement if it is possible to arrive at an approximation to truth or correctness in discourse and if there are at least some cases in which only one moral answer is right, that is, in which reasonable disagreement is not possible. Approximation to truth or correctness is possible because rational practical discourse is possible, and there are cases in which only one moral answer is possible for the reason that other results in these cases are discursively impossible – as, for instance, the legal status of a slave or the abolition of religious freedom (ALEXY, 1989, p. 187-208).

The existence of reasonable disagreement means that there are a considerable number of social problems that cannot be resolved by moral argument alone. One might call this the "problem of practical knowledge." The problem of practical knowledge can be resolved only by means of legally regulated procedures that guarantee a decision. This is the step from morality to positive law, as described, for instance, by Kant (1996, p. 456). What is more, the problem of practical knowledge is not the only problem that can be resolved only by means of positive law. A second problem is the problem of enforcement. If it is possible to violate the law without running any risk, and if some take advantage of this possibility, then compliance with the regulation is no longer assured. In short, procedures that provide for the enforcement of law are necessary. In addition, there is the problem of organization. A modern society can be effectively organized only by means of positive law.

The need to solve these three problems and, therefore, the necessity of positivity, that is, of authoritative issuance and social efficacy, stems from the moral requirements of avoiding the costs of anarchy and civil war and assuring the advantages stemming from social co-ordination and co-operation. As moral reasons, these reasons are elements of the content of the claim of law to correctness. This implies that the claim of law to correctness *qua* claim to moral correctness necessarily comprises elements of positivity. This is not to say, however, that the claim to correctness comprises solely elements of positivity. This is the mistake of super-inclusive non--positivism. The claim to substantial correctness – that is, first and foremost, the claim to justice – does not disappear once law is institutionalized. It lives on in the law. For this reason, one has to distinguish two stages or levels of correctness: first--order correctness and second-order correctness.

First-order correctness concerns justice as such. Second-order correctness is more comprehensive. It refers both to justice and to positivity. Justice represents the ideal or critical dimension of law, positivity its real, factual, or institutional side. The

claim of law to correctness *qua* second-order claim unites the real and the ideal dimension of law. It is an expression of the dual nature of law (ALEXY, 2010, p. 173-174).

The dual nature of law implies that law necessarily comprises two principles: the principle of justice and the principle of legal certainty. The principle of legal certainty is a formal principle. It requires a commitment to what is authoritatively issued and socially efficacious. The principle of justice is a material or substantive principle. It requires that the decision be morally correct. These two principles, as is the case with principles generally, may collide, and they often do. Neither can ever supplant the other completely, that is to say, in all cases. On the contrary, the dual nature of law demands that they be seen in correct proportion to each other. This, in turn, can only be achieved by balancing. The idea of an outermost border of law is a result of such balancing, that is, of balancing the principles of legal certainty and justice.

5 Outermost border

The Radbruch formula which, in its shortest form, says that extreme injustice is not law is the classical expression of the idea of an outermost border of law (RADBRUCH, 2006, p. 7; ALEXY, 2008a, p. 428). This formula represents, first and foremost, a rejection of the positivistic thesis that 'any kind of content might be law' (KELSEN, 1967, p. 198). Kelsen illustrates this thesis with the following remark: 'According to the law of totalitarian states, the government is empowered to confinein concentration camps persons with rejected convictions, religion, or race and to force them to do any sort of work whatever, even to kill' (KELSEN, 1967, p. 40, trans. altered). Killing persons in concentration camps for reasons of rejected convictions, religion, or race is a clear case of extreme injustice. Therefore, according to the Radbruch formula, normsthat empower legal officials to do such things, cannot be valid law. From the positivistic point of view, the situation is different. If these norms have been authoritatively issued and are socially efficacious, they are valid law. This is also true of inclusive positivism in instances where the positive law does not actually refer, in a socially efficacious way, to moral principles that exclude the killings. From the non-positivistic point of view, everything depends on the balancing of the principles of legal certainty and justice. The principle of legal certainty stands for the view that the norm in Kelsen's example is legally valid, the principle of justice stands for the opposite result. The determination arrived at by balancing essentially depends on the intensity of interference with each of the colliding principles (ALEXY, 2002b, p. 102). Not to conceive of the norm in question as invalid would count as an extremely intensive interference with the principle of justice, for justice comprises human rights, and the interference with human rights in Kelsen's example is extreme. On the other hand, the loss in legal certainty if one were to conceive the norm as invalid would be quite limited. Even in totalitarian states, a great number of norms do not exceed the threshold of extreme injustice. Thus, the result of balancing is determined, and this result reflects precisely the Radbruch formula, that is to

say, inclusive non-positivism as defined by the formula. By contrast, super-inclusive non-positivism as well as exclusive non-positivism must fail. Super-inclusive non--positivism fails, for it gives too little weight to justice, and exclusive non-positivism fails, for it gives too little weight to legal certainty.

6 Participant and observer

This justification of the Radbruch formula, it might be objected, is flawed on the ground that it is based on normative arguments, namely the principles of justice and legal certainty. The question of the nature of law, the objection continues, concerns what law is, and what a thing is cannot be established by means of normative arguments (RAZ, 1996, p. 7; MARMOR, 2005, p. 778).

To reply to this objection, the distinction between the observer's perspective and the participant's perspective is fundamental (ALEXY, 2002a, p. 25). An observer poses questions and adduces arguments on behalf of a position that reflects the way in which legal questions are actually decided in a legal system, whereas the participant poses questions and adduces arguments with an eye to what he deems to be the correct answer to the legal question at hand. The observer's perspective is defined by the question "How are legal decisions actually made?," the participant's by the question "What is the correct legal answer?."

Positivism reflects quite well the observer's perspective (ALEXY, 2002a, p. 27-35). From this perspective what the law is depends exclusively on what has actually been issued and is socially efficacious. By contrast, the participant's perspective presupposes non-positivism. For a participant, the law is what it is correctly taken to be. What it is correctly taken to be depends, however, not only on social facts but also on moral reasons. In this way, normative arguments make their way into what the law is as soon as the participant's perspective is taken up. What is more, this perspective must be taken up – for law is possible without observers but not without participants.

References

ALEXY, Robert. *A theory of legal argumentation*. Translation Adler, R. and MacCormick, N. Oxford: Clarendon Press, 1989.

ALEXY, Robert. Law and correctness. *Current Legal Problems*, v. 51, p. 205-521, 1998.

ALEXY, Robert. *The argument from injustice. A reply to legal positivism*. Translation Litschewski Paulson, B. and Paulson, S. L. Oxford: Clarendon Press, 2002a.

ALEXY, Robert. *A theory of constitutional rights*. Translation Rivers, J. Oxford: Oxford University Press, 2002b.

ALEXY, Robert. An Answer to Joseph Raz. In: PAVLAKOS, G. (Ed.). *Law, rights and discourse. The legal philosophy of Robert Alexy*. Oxford: Hart Publishing, 2007.

ALEXY, Robert. A defence of Radbruch's formula. In: FREEMAN, M. D. A. (Ed.). *Lloyd's introduction to jurisprudence*. London: Sweet & Maxwell and Thomson Reuters, 2008a.

ALEXY, Robert. On the concept and the nature of law. *Ratio Juris*, v. 21, p. 281-299, 2008b.

ALEXY, Robert. The dual nature of law. *Ratio Juris*, v. 23, p. 167-82, 2010.

ALEXY, Robert. Law, morality, and the existence of human rights. *Ratio Juris*, v. 25, p. 2-14, 2012.

AUGUSTINUS, Harrison. *De liberoarbitrio*. Ed. Brachtendorf, J. and Decroll, V. H. Paderborn: Schöningh, 2006.

AQUINAS, Thomas. *Summa theologiae*. Turin: Paoline, 1962.

BEYLEVELD, D.; BROWNSWORD, R. *Human dignity in bioethics and biolaw*. Oxford: Oxford University Press, 2001.

COLEMAN, Jules. Authority and reason. In: GEORGE, Robert P. (Ed.). *The autonomy of law. Essays on legal positivism*. Oxford: Clarendon Press, 1996.

DWORKIN, Ronald. *Justice in robes*. Cambridge, MA: Harvard University Press, 2006.

FINNIS, John. *Natural law and natural rights*. Oxford: Clarendon Press. 1980.

KANT, Immanuel. The metaphysics of morals. In: KANT, Immanuel. *Practical philosophy*. Translation and edition Gregor, M. J. Cambridge: Cambridge University Press, 1996.

KELSEN, Hans. *Pure theory of law*. Translation Knight, M. Berkeley: University of California Press, 1967.

MARMOR, Andrei. Debate. *Anales de la cátedra Francisco Suárez*, v. 39, p. 769-793, 2005.

RADBRUCH, Gustav. Statutory lawlessness and supra-statutory law. Translation Litschewski Paulson, B. and Paulson, S. L. *Oxford Journal of Legal Studies*, v 26, p. 1-11, 2006.

RAWLS, J. *Political liberalism*. New York: Columbia University Press, 1993.

RAZ, John. On the nature of law. *Archives for Philosophy of Law and Social Philosophy*, v. 82, p. 1-25, 1996.

RAZ, Joseph. *The authority of law*. 2nd. ed. Oxford: Oxford University Press, 2009.

WALDRON, Jeremy. Kant's legal positivism. *Harvard Law Review*, v. 109, p. 1535-1566, 1996.