

On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique*

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Abstract. In this article the author adduces a non-positivist argument for a necessary connection between law and morality; the argument is based on the claim to correctness, and it is directed to an attack stemming from Eugenio Bulygin. The heart of the controversy is the claim to correctness. The author first attempts to show that there are good reasons for maintaining that law necessarily raises a claim to correctness. He argues, second, for the thesis that this claim has moral implications. Finally, he attempts to refute Bulygin's objection that the claim-based argument for non-positivism boils down to contradiction and triviality.

In recent debates over the concept of law the claim to correctness plays an important role. The reason for this is not hard to understand. If the law is necessarily connected with a claim to correctness, law consists of more than the pure facticity of power, orders backed by threats, habit, or organized coercion. Its nature comprises not only the factual or real side, but also a critical or ideal dimension. This thesis of a double character of law has far-reaching consequences for the old debate on whether there is some kind of necessary connection between law and morality. It is much easier to defend the positivist's point of a separation of law and morality if law lacks the ideal side defined by the claim to correctness, and, by the same token, the non-positivist's arguments for a necessary connection between law and morality have a much better chance of winning conviction if an intrinsic relation between law and correctness can be established. This does not mean that the claim to correctness is enough to substantiate non-positivism. There are positivists who both accept the thesis about the claim to correctness and deny any necessary connection between law and morality (see Soper 1996, 220). But if the correctness thesis is true, non-positivism is provided with an

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Archimedean point which considerably increases the power of normative arguments for non-positivism and against positivism.

I have tried to use the claim to correctness in the way just mentioned in order to substantiate the non-positivistic thesis of a necessary connection between law and morality (Alexy 1989a, 213ff.; 1989b, 177ff.; 1994, 39ff.). This argument was attacked by Eugenio Bulygin for the first time in 1993 (Bulygin 1993, 19ff.). My response (Alexy 1997a, 235ff.) obviously did not convince him, as the paper which reproduces the arguments he put forward in 1998 at the conference on "Constitutionalism and the Separation of Law and Morality" in Ferrara, organized by Letizia Gianformaggio, shows. In Ferrara I presented some counter-arguments against this second attack. They are recapitulated here.

Bulygin opposes all aspects of the non-positivist argument based on the claim to correctness. First, he denies that law necessarily raises a claim to correctness. Second, he maintains that even if law raised such a claim, nothing would follow from it respecting a necessary connection between law and morality. Third, he contends that the claim-based argument for non-positivism boils down to a contradiction.

I. The Necessity of the Claim to Correctness

The necessity of law's claim to correctness can be shown by means of two examples. The first is mentioned in Bulygin's new attack. It deals with the first article of a new constitution for a State called X in which a minority suppresses the majority. The minority wants to continue enjoying the advantages gained by suppressing the majority, but also wants to be honest. The constitutional convention therefore resolves that the following sentence be the first article of the constitution:

(1) X is a sovereign, federal, and unjust state.

This article is somehow absurd. Its absurdity results, as often in the case of the absurd, from a contradiction (Alexy 1998, 210). The explicit content of the resolution, the injustice clause ("X is a [...] unjust state"), contradicts the claim to correctness which is necessarily raised with the act of laying down a constitution. The claim to correctness in a resolution that is passed as a constitutional provision is essentially a claim to justice. Contradictions between the content of an act and the necessary presuppositions of its performance can be designated "performative contradictions."

Bulygin maintains that the idea of a performative contradiction is "rather obscure." He takes it for granted that performative contradictions are not logical contradictions. The reason for this, Bulygin contends, is two-fold: First, performative contradictions concern only a relation between acts, and, second, between acts there is at best some sort of pragmatic incompatibility but never a logical relation.

In order to counter this objection it is useful to begin with the question of what it means to raise a claim to correctness. It seems to be possible to analyse the concept of raising a claim to correctness by means of three concepts. Whoever raises a claim to correctness with an act *a*, first, *asserts* that *a* is correct, second, *guarantees* that *a* can be justified, and, third, *expects* that all addressees of the claim will accept *a* (Alexy 1998, 208). Only the first of these concepts is of interest here. If claiming implies asserting and if the claim to correctness in the case of a resolution passed as a constitutional provision is essentially a claim to justice, then our constitutional convention by raising the claim makes the assertion that the constitution is just, that is:

(2) The constitution of *X* is just.

As shown below, this assertion contradicts an assertion implied by the injustice clause. The injustice clause is not a description of the state constituted by the constitutional convention but the expression of a normative principle, which can be called the “principle of injustice” (see Alexy 1997a, 246). This principle can be expressed in the following way:

(3) Legislature, administration, and adjudication are obligated to realize justice.

Because the source of this principle is an article of the constitution of *X* (4) follows:

(4) The constitution of *X* commits legislature, administration, and adjudication to realize justice.

(4), as little as (3), directly contradicts (2). In order to arrive at an assertion which directly contradicts (2), we need to add the premise:

(5) A constitution which commits legislature, administration, and adjudication to realize justice is an unjust constitution.

This premise seems to be analytically true. It makes possible the derivation of (6):

(6) The constitution of *X* is unjust.

The contradiction in the case of a constitutional convention just considered, is based on a double implicitness. The statement (2) “The constitution of *X* is just” is implicit in the act of passing a constitution because with this act a claim to correctness is necessarily raised. The statement (6) “The constitution of *X* is unjust” is implicit in what is explicitly enacted, the injustice clause. The second example that can be used to demonstrate the necessity of the claim to correctness is less complex. It concerns a judge who announces the following verdict:

(7) The defendant is sentenced to life imprisonment, albeit wrongly, because valid law was interpreted incorrectly.

Here, we have an explicit assertion (“albeit wrongly, because valid law was interpreted incorrectly”) which contradicts the implicit claim that the verdict is correct. This example, therefore, illustrates the point at issue with simple implicitness.

In both cases, the analysis shows that the core of a performative contradiction is contradiction in the classical sense. The performative character results from the fact that only one part of the contradiction stems from what is explicitly stated by performing the legal act, whereas the other part is implicit in the claim necessarily connected with the performance of this act. Thus, Bulygin’s objection that there are no logical relations between acts does not apply to the idea of a performative contradiction, for this idea is not based on the notion of a contradiction between acts, which is indeed obscure. It is based on the classical concept of contradiction, which can be applied to law-making acts because those acts express and imply assertorial or propositional contents.

Generally, the claim to correctness is raised implicitly. But it can be made explicit too (Alexy 1994, 64). An example is a constitutional convention that resolves to pass an article such as:

(8) *X* is a just state.

I have argued that such an article would be redundant (Alexy 1994, 67). The redundancy results from the necessity of the claim to correctness. In Bulygin’s view this shows that I am not quite clear about the nature of the claim to correctness. First, I allow that the claim to correctness may be raised not only implicitly but also explicitly, and then I declare an explicit raising of the claim to be a redundancy. However, a redundancy—Bulygin talks about a “performative redundancy”—is a mistake or fault. One might come to think, therefore, that it is possible to make a mistake by raising the claim to correctness.

This problem can be easily solved by pointing out that redundancy is a mistake of a completely different kind from that of not raising the claim to correctness. The latter is a fundamental mistake. As such, it compares with a constitution which lacks any regulation about who has legislative, adjudicative, and administrative power. In this case, one could well ask whether there is a constitution at all. By contrast, the first mistake is comparable to a constitution that empowers the parliament at two points. This would not be a fundamental mistake but rather an instance of clumsiness. Abandoning the claim to correctness undermines the nature of law, whereas redundancy only makes it less elegant.

The nature of law is directly at stake when Bulygin expresses doubt about whether or not “all legal authorities claim that their norms are morally correct or just” (Bulygin 2000, 134). He presents Caligula and Nero as examples. To simplify matters we might imagine a public legal act of Nero as, for instance, an arbitrary death sentence, which he declares to be

pronounced just for the fun of it and in order to demonstrate his power.¹ With respect to cases like this Bulygin is right in contending that no claim to correctness is raised. But this is not enough to refute the thesis that law necessarily raises a claim to correctness. That it is not can be demonstrated by means of two distinctions. The first is the distinction between a subjective or personal and an objective or official raising of the claim to correctness (Alexy 1998, 206). In our imaginary case, Nero does not raise subjectively or personally a claim to correctness. But since he acts, as Bulygin says, as a “legal authority,” such a claim is objectively connected to his role in the legal system. It is just this conflict between the subjective and the objective dimension that gives Nero’s death sentence its scandalous character.

Second, we have to distinguish between individual legal acts and norms and the legal system as a whole. An individual decision need not lose its legal character if those who make it do not raise the claim to correctness.² The reason for this is that the individual decision is embedded in the legal system, which raises a claim to correctness as a whole. The legal character resulting from this institutional connection can be called “parasitic.” Bulygin is right in stressing that it is hard to deny that there was a legal system in Rome under Caligula and Nero. Legal systems do not lose their legal character if some individual norms or decisions do not raise the claim to correctness. This would only be the case if such a large number of norms or decisions goes without the claim to correctness that one can say that the system as a whole abandons this claim. Such a general renunciation of the claim to correctness can come about in a variety of ways. One way would be that all or most judges practice and confess in public something like a negation of Ulpian’s famous three *iuris praecepta*:³

(9) *Iuris praecepta sunt haec: inhoneste vivere, alterum laedere, suum cuique non tribuere.*⁴

It can be taken as granted both that this maxim was not the maxim of the Roman judges which were contemporaries of Caligula and Nero, and that no system ruled by it will ever be a legal system. Caligula and Nero acted as

¹ The historical details are, naturally, more complex, as Tacitus’ report about the persecution of Christians in 64 shows. The official or public reason for punishing the Christians was not for the fun of it or for the sake of some other feeling or disposition of the emperor. On the contrary, Nero ordered that the Christians be accused of incendiaryism in order to transfer the blame for the burning of Rome to them. Tacitus describes Nero’s rather bizarre behaviour during the executions, and he criticizes it because it lent the impression that the Christians had to die not for public welfare but because of the cruelty of one person: “*tamquam non utilitate publica, sed in seavitiā unius absumerentur*” (Tacitus, ann. XV 44, 2–5). The fact that the circumstances of the executions induced this impression does not, however, mean that the death sentences as such contained something like a cruelty-of-one-person clause, which would indeed have been an open or explicit denial of the claim to correctness.

² Something else might well be the case where failing to raise the claim to correctness goes with extreme injustice; see Alexy 1999, 15ff.

³ Ulp. D. 1,1,10,1: “*Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*” See also, Inst. 1,1,3.

⁴ “The commandments of law are such: live dishonourably, injure others, give nobody his due.”

parasites of a legal system that raised as a whole a claim to correctness. They exemplify no more than the possibility of abusing law. This possibility does not destroy the necessity of law's claim to correctness; on the contrary, the concept of abuse presupposes the concept of correct use.

II. The Moral Implications of the Claim to Correctness

Bulygin does not confine himself to an attack on the proposition that law necessarily raises a claim to correctness. The second part of his critique is addressed to the thesis that a necessary connection between law and correctness implies a necessary connection between law and morality. According to Bulygin, this implication would presuppose that all legal systems are based on the same idea of justice: "The thesis of the necessary connection between law and morality implies that there is a conceptual link between any legal system, on the one hand, and one and the same morality, not just any moral system, on the other" (Bulygin 2000, 134). It is easy for Bulygin to point out that there exists no specific morality "shared by all law-makers" (ibid.). He simply offers a list of names comprising Ghengis Khan, Philip II of Spain, England's Henry VIII, Khomeini, and Pinochet.

There is indeed no doubt at all that different legal systems give expression to quite different conceptions of justice. If one adds to this Bulygin's thesis that a necessary connection between law and morality is only possible if there exists just one objective morality actually shared by all law-makers, then the conclusion is clear: There is no necessary connection between law and morality. Fortunately, only the inference is valid, not its second premise. A necessary connection between law and morality does not presuppose a morality actually shared by all. It is compatible with moral dispute.

The claim to correctness raised in law is not identical with the claim to correctness raised in morality. It is far more complex. The reason for this is that legal claims are embedded in the institutional context of a legal system. This cannot be elaborated here (see Alexy 1998, 214ff.). All we need for our argument is that adjudication involves moral arguments, at least in hard cases, and that legislation claims to be morally justifiable even in case of political compromise. In both cases we can talk about moral *elements* active in law. Something similar applies to administration. Moral elements are only one side of the relationship between law and morality. The other side can be characterized as the moral *framework* of law. Law's claim to correctness not only concerns the moral correctness of certain legal decisions and certain legal norms. It also concerns the moral correctness of using law as such, or the form of law, for solving social problems, and of doing so by means of certain procedures such as democratic election, parliamentary legislation, and trial ruled by ideas such as *audiatur et altera pars*.

Moral controversies can occur in law both at the level of elements and that of framework. The claim to correctness raised in law then directly

concerns moral questions. Here it substantially turns into a claim to moral correctness. This claim to moral correctness can be interpreted in a weak and a strong sense. Interpreted in the weak sense, it is fulfilled if a moral judgment is justifiable on the basis of a certain morality, whatever it may be. Interpreted in the strong sense, the claim to moral correctness can be fulfilled only if the judgment is justifiable on the basis of a correct morality, that is, on the basis of a morality that itself is justifiable. The idea of correctness demands the strong interpretation. A moral judgment which is justifiable on the basis of a morality that is not itself justifiable is not correct. It might be objected that the notion of a justifiable morality is an illusion. To this one has to reply that arguments for and against specific moralities are possible, and that some moralities have little chance of survival in a free process of argumentation (see Alexy 1994, 134ff.). This is enough. In order to obtain a necessary relation between law and morality one does not need—as Bulygin assumes—an objective morality actually shared by all law-makers. The idea of a correct morality, the practice of rational argumentation about what is morally correct, and the possibility of constructing, on this basis, practical rationality suffice.

III. Necessary Qualifying Connections

It is one thing to raise a claim and quite another to fulfil it. Up until now the discussion has concerned the raising of the claim. Normative systems which do not raise the claim to correctness are not legal systems. They are systems of power, force, and coercion beyond the categories of correct and wrong, and just and unjust. To this extent, the claim to correctness has a defining or classifying character.⁵ One might come to think that the fulfilment of the claim to correctness has a defining character, too. This, however, would have disastrous consequences. Each and every incorrectness of the legal system or of an individual norm or decision would automatically destroy the legal character and, thereby, the legal validity of the system or the individual norm or decision. For normative reasons, especially those of legal certainty, this is not acceptable (Alexy 1994, 63ff.; 1999, 28ff.). Nevertheless, incorrectness is a fault. Therefore, the claim to correctness establishes a second kind of connection between law and morality, besides the defining or classifying one. It is the qualifying connection between law and morality. Legal systems which raise the claim to correctness, but do not fulfil it, are necessarily qualified as legally faulty systems. With respect to individual legal norms and decisions only qualifying connections exist. They are legally faulty if they do not raise or fulfil the claim to correctness (Alexy 1989b, 178). It is only when their faulty character transgresses the threshold of extreme injustice that their legal character is destroyed (Alexy 1994, 63ff.; 1999, 28ff.).

⁵ In earlier writing (Alexy 1989b, 171, 178) I used the term “defining.” Later (see, e.g., Alexy 1994, 48ff., 61ff.; 1999, 24) I came to prefer the expressions “classifying” or “classificatory.”

Bulygin maintains that the theory of necessary qualifying connections involves a contradiction. At first glance, he is right. I am indeed saying both that individual legal norms and decisions necessarily raise a claim to correctness and that norms and decisions which do not raise this claim are legally faulty. But how can something that necessarily raises a claim be in a position not to raise that claim? If it is possible not to raise the claim, it is not necessary to raise it. The claim would indeed be contingent, which contradicts the thesis of its necessary character (compare Bulygin 1993, 20f.). This contradiction, however, can be resolved by means of the distinction between a subjective or personal raising of a claim and an objective or official one, which has already been employed in the cases of Caligula and Nero. Legal acts are embedded in the institutional context of a legal system. The legal validity of a judicial ruling or a legislative act results from the norms of competence which empower the judge or the parliament. The persons who exercise these competences or powers practice an official role in the legal system. To this official role the claim to correctness is necessarily connected—necessarily connected so long as the legal system as a whole raises this claim. A judge who denies the claim to correctness can do this only in a subjective or personal way.⁶ So long as he acts as a judge, the claim to correctness is raised objectively or officially. There is inevitably a contradiction between the subjective or personal and the objective or official side. That is another way of expressing the theory of performative contradictions.

This explains how it is possible that legal acts necessarily raise a claim to correctness that can be denied. The institutional character of law provides the possibility of a divergence of the objective or official and the subjective or personal dimension. This makes a parasitic denial of the claim to correctness possible.⁷ Such a parasitic denial is a fault. Nothing else is meant with the thesis that legal acts that do not raise the claim to correctness are to be qualified as faulty.

The problem of contradiction is not the only problem which, according to Bulygin, is connected with the idea of a qualifying connection. Another and, perhaps, more serious problem is that of triviality. Bulygin maintains that necessary qualifying connections cannot exist: "There is no such thing" (Bulygin 2000, 136). Necessary connections are always defining, and because qualifying connections are *ex definitio* not defining, they are not necessary. On closer examination, the connections I am calling "qualifying" are defining, too—defining, however, not of "legal system" or "legal norm" but of "faulty legal system" and "faulty legal norm." All I am saying is that legal

⁶ This does not exclude his using his official role to express his personal denial of the claim. Through this, the personal denial gains an official character, if only a parasitic one, and the whole affair becomes a public or institutional absurdity; see Alexy 1997a, 249.

⁷ This possibility does not exist in the case of moral judgments. Moral statements which do not raise a claim to correctness are not moral judgments, but only something like utterances of an emotional reaction, reports on individual attitudes, or appeals to others to feel the way the speaker feels.

systems not fulfilling the claim to correctness are faulty legal systems, and that legal norms not raising or fulfilling the claim to correctness are faulty legal norms. This amounts, in the end, to the triviality “that faulty legal norms are faulty” (ibid., 135).

The sentence:

(10) Faulty legal systems are faulty

is indeed trivial. Its triviality is of the same kind as the triviality of the sentence:

(11) Continental legal systems are Continental.

Nevertheless, there is a difference concerning the relation of the predicates “faulty” and “Continental” to the concept of a legal system. The difference stems from the fact that legal systems necessarily raise a claim to correctness, whereas they do not necessarily raise a claim to be, or not to be, Continental. Faulty legal systems do not fulfil the claim to correctness in all respects. It is the necessity of the claim to correctness which gives faultiness a special character. This special character consists in the fact that faultiness contradicts correctness, which is necessarily claimed by law.

As long as one considers only the abstract concepts of correctness and faultiness, one can only say that faulty legal systems and norms contradict themselves in the sense just explained. Things become far more vivid if the concept of correctness is made more concrete. The claim to correctness raised by law comprises a claim to justice. Justice is correctness with respect to distribution and balance (Alexy 1997b, 105), and law, in all its ramifications, cannot do without distribution and balance. Questions of justice are moral questions. If the law makes incorrect distributions or balances, it thereby commits a *moral* fault. This fault is, at the same time, a non-performance of the claim to correctness, necessarily raised by law. The non-performance of a claim necessarily raised by law is, however, a *legal* fault. According to legal positivism, moral faultiness is something outside of the domain of law. The claim to correctness transforms moral faultiness into legal faultiness. And this is by no means trivial. It is the conversion of positivism to non-positivism. Law’s claim to correctness is on no account identical with the claim to moral correctness, but it includes a claim to moral correctness. It is this inclusion which most clearly shows that it is not only possible to talk about qualifying connections, but also necessary if we are to understand the nature of law.

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