

Alexy's Thesis of the Necessary Connection between Law and Morality*

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Abstract. This paper criticizes Alexy's argument on the necessary connection between law and morality. First of all, the author discusses some aspects of the notion of the claim to correctness. Basically, it is highly doubtful that all legal authorities share the same idea of moral correctness. Secondly, the author argues that the claim to correctness is not a defining characteristic of the concepts of "legal norm" and "legal system." Hence, the thesis of a necessary connection between law and morality based on such claim cannot be accepted.**

1. The Claim to Correctness

Alexy's defence of his *Verbindungsthese*, i.e., the thesis of the necessary connection between law and morality is based on the idea that law (understanding by "law" both legal norms, and whole legal systems) necessarily makes a claim to correctness. This is so because the very act of issuing a legal norm already implies the raising of such a claim. Alexy tries to show this by means of an example.

A constitutional assembly that enacts as part of the constitution the following article:

(1) X is a sovereign, federal and unjust republic

commits, according to Alexy (1989a, 179), a performative contradiction, for "the content of [...] constitutional act denies this claim, while [the author of a constitution] raises it with the execution of this act." A *performative contradiction* is supposed by Alexy to be a *conceptual fault*.

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The idea of a performative contradiction is rather obscure. It certainly is not a logical contradiction, because there are no logical relations between acts. It is at best some sort of pragmatic incompatibility between two acts: the act of issuing a norm and the act of denying any claim to correctness. But I will not discuss this point.

Alexy's example can be generalized: Each time a legal authority (be it a constitutional assembly, an ordinary legislator or a judge) issues a legal norm, this very act of issuing must necessarily contain a claim to correctness or justice. Alexy is not quite clear about the nature of this claim. On the one hand he says that it can be either explicit or implicit; on the other hand he maintains that an authority that explicitly claims that its norm is correct, for instance, a constitutional assembly that enacts an article like

(2) X is a just state

commits a performative redundancy, which is presumably also a conceptual fault.

Now, I very much doubt that *all* legal authorities claim that their norms are morally correct or just. At least it is very doubtful in the cases of Caligula or Nero and yet it is hard to deny that there was a legal system in Rome under those emperors. But even if we concede that there is such a performative implication, I do not see how it can support Alexy's *Verbindungsthese*.

According to it there is a conceptual, necessary connection between law and morality. Now even if we admit that all legal authorities (kings, emperors, dictators, presidents, legislators, judges, etc.) necessarily make the claim that the norms issued by them are morally correct or just, what guarantee do we have that all of them understand the same thing by "moral correctness" or "justice"? Is it the same idea of justice that moved Ghengis Khan, Philip II of Spain, England's Henry VIII, Khomeini or Pinochet to enact legal norms? Probably they understood quite different things by justice or moral correctness. Now, 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. In the case of Alexy it is the universalistic morality, based on a procedural discourse ethics. The alleged fact that all norm-issuing acts performatively imply a claim to justice does not prove that there is a necessary connection between all legal systems and this specific morality. In order to sustain this last thesis Alexy must not only prove that there is one objective morality; he must also prove that this morality is shared by all law-makers.

2. Classifying and Qualifying Connections

As we have already seen, according to Alexy "individual legal norms and decisions as well as whole legal systems *necessarily* make a claim

to correctness" (Alexy 1989b, 178; italics mine). What kind of necessity is meant here?

Alexy explains it in the following terms: "Norm systems which do not explicitly or implicitly make this claim are not legal systems. So far the theory of claim is of defining character." This seems to be in order: The claim to correctness is a defining characteristic of the term "legal system"; insofar as every legal system necessarily makes a claim to correctness; if it does not, it is not a *legal* system (or rather, the term "legal system" is not applicable to it).

Subsequently Alexy explains what he means by "qualifying connection":

Legal systems which make this claim but do not fulfil it are legally faulty legal systems. In this respect the theory of claim is of a qualifying character. The theory of claim plays an exclusively qualifying role in the case of individual legal norms and decisions. They are legally faulty if they do not make or fulfil the claim to correctness. (Alexy 1989b, 178)

This explanation suggests that fulfilling the claim to correctness is *not* a defining characteristic of "legal system" and that making the claim is equally *not* a defining characteristic of "legal norm." If it is not a defining characteristic, then it is not necessary, but contingent. This is how I interpreted Alexy in Bulygin (1993). On this interpretation Alexy falls into a contradiction when he says that legal norms *necessarily* make a claim to correctness, for if such claim is not defining of "legal norm," then it is not necessary.

In his answer Alexy (1997) argues that there is no such contradiction: in the case of qualifying characteristics there are also necessary connections. A legal system that does not fulfil the claim to correctness is necessarily a faulty legal system and a legal norm that does not raise such a claim is necessarily a faulty legal norm. But this is trivial: Alexy defines a faulty legal system as one that does not fulfil the claim and a faulty legal norm as a norm that does not make the claim. So both characteristics are *defining*, but they are not defining of "legal system" or "legal norm," but of a "faulty legal system" and "faulty legal norm." Of course, once we adopt these definitions, it is analytically (and so trivially) true that legal norms that do not make the claim to correctness are faulty, but it is exactly like saying that faulty legal norms are faulty.

Alexy seems to be aware of this difficulty; he says:

One could think that the qualifying connection leads to a triviality, that can be expressed in the sentence: "Faulty legal systems are faulty," which expresses in fact a necessary truth. This tautology cannot capture, however, the kernel of the claim to correctness. This claim necessarily connects the correctness as an ideal dimension and milestone of criticism with the law. The faultiness is therefore more than a merely deplorable negative property. It is something that according to the concept of law should not be there. (Alexy 1997, 240)

All this sounds very mysterious, and I must confess that it lies beyond my capacity of understanding. I am unable to see what this "ideal dimension" of

law consists of and why this faultiness is more than a negative property. I am inclined to think that the tautology quoted by Alexy captures admirably well what he actually says about the obscure concept of necessity of qualifying connections. Unfortunately there is no such thing; only defining characteristics are necessary and Alexy's qualifying characteristics are indeed defining, but not defining of "legal system" or "legal norm," but of "faultiness."

Using Alexy's argumentation we could, e.g., maintain that there is a qualifying, but necessary connection between women and beauty, i.e., that women necessarily claim to be beautiful. If a woman does not fulfil this claim, that is, if she is not beautiful, she is still a woman, but she is ugly and ugliness is a conceptual fault. Lack of beauty is not a merely deplorable negative property of some women, for the claim to beauty confers on women an ideal dimension and so necessarily connects women with beauty. I quite agree with the conclusion of this argument, for beauty indeed confers an ideal dimension on women, but the argument seems to me to be logically faulty.

Alexy could perhaps say that the necessity of qualifying characteristics is another kind of necessity: It is not logical, but *normative necessity*. This is suggested by his phrase "It is something that according to the concept of law should not be there." But is there such a thing as normative necessity?

Alexy (1989a, 169, n. 4) admits that by "normative necessity" he just means *obligatoriness*: "Something being normatively necessary means no more than its being obligatory."

It seems to me that the use of the term "necessary" in this connection is not very fortunate. According to the standard definition of necessity, a proposition *p* is necessary if and only if it is true in all circumstances or in all possible worlds. But if *p* is obligatory, then it must be false at least in some possible world, for if it is always true, then it makes no sense to make it obligatory. Norms with analytical contents (e.g., Shut the door or leave it open!) are clearly senseless, for it must be possible to disobey or disregard a norm. So there is a crucial difference between "necessary" and "obligatory." Therefore to speak of "normative necessity" is to use a rather obscure metaphor. It is not a logical necessity, nor is it an empirical necessity. Unfortunately Alexy gives no explanation of what kind of necessity is meant with this curious expression.

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References

- Alexy, Robert. 1989a. On Necessary Relations between Law and Morality. *Ratio Juris* 2: 167–83.
- . 1989b. *Begriff und Geltung des Rechts*. Freiburg: Alber.
- . 1997. Bulygin's Kritik des Richtigkeitsarguments. In *Normative Systems in Legal and Moral Theory. Festschrift für Carlos E. Alchourrón and Eugenio Bulygin*. Ed. Ernesto Garzón Valdés *et al.*, 235–50. Berlin: Duncker & Humblot.
- Bulygin, Eugenio. 1993. Alexy und das Richtigkeitsargument. In *Rechtsnorm und Rechtswirklichkeit. Festschrift für Werner Krawietz zum 60. Geburtstag*. Ed. Aulis Aarnio *et al.*, 19–24. Berlin: Duncker & Humblot.