# ALEXY BETWEEN POSITIVISM AND NON-POSITIVISM

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## 1. LAW AND MORALITY: LEGAL POSITIVISM VS. NON-POSITIVISM

In his book originally published in German [1] and later translated into English under the title *The Argument from Injustice. A Reply to Legal Positivism* [2], Robert Alexy, a well known adversary of legal positivism, is concerned with the problem of the definition of law, in which the dispute about the relation of law and morality occupies a central position. In his opinion, there are two main conflicting trends regarding this question: the positivism and the non-positivism. All positivistic theories defend the *separation thesis*, according to which there is no conceptually necessary connection between law and morality. Accordingly, the positivistic concept of law does not include any reference to morality and is defined by means of two characteristics: issuance in accordance with the system, and social efficacy. So for all positivistic theories what law is depends on what has been issued and/or is efficacious (4).

The non-positivistic theories defend the *connection thesis*, according to which the concept of law includes moral elements. Therefore it is defined by means of three characteristics: the two that are shared with positivism, plus the correctness of the contents of legal norms. Alexy insists that in contradistinction to some natural law theories, a non-positivist regards both issuance and efficacy as defining characteristics of law [3], together with a reference to morality.

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[1] *Begriff und Geltung des Rechts*, Karl Alber Verlag, Freiburg-München, 1994.

[2] Clarendon Press, Oxford, 2002, translation by Stanley L. Paulson and Bonnie Litschewski Paulson. The quotations and the numbers of pages in the text refer to the English edition.

[3] «No serious non-positivist is thereby excluding from the concept of law either the element of authoritative issuance or the element of social efficacy. Rather, what distinguishes the

## 2. ANALYTIC AND NORMATIVE ARGUMENTS

According to Alexy there are two kinds of arguments that can support either the separation or the connection thesis: analytical and normative. The analytical argument refers to the conceptual connection between law and morality, which is denied by legal positivism and affirmed by non-positivism. But the situation of the two is not symmetrical: the positivist is bound to deny this connection, for if he admits it, he can no longer maintain that moral elements are excluded from the definition of law, whereas a non-positivist, even if he does not prove the conceptual connection, can still argue that the connection thesis is normatively necessary.

The idea of a normative necessity seems to me extremely doubtful. Alexy admits that this kind of necessity cannot be distinguished from being commanded:

> «Normative necessity is strictly to be distinguished from conceptual necessity. That something is normatively necessary means nothing other than that it is commanded. One can, without contradicting oneself, challenge the validity of a command, but not the existence of a conceptual necessity. It is clear that only in a broader sense, then, is normative necessity a necessity» (21).

If something is commanded, then one says normally that it is obligatory or that one is bound to do it, but not that it is necessary. I see no advantage to use the term «necessary» instead of «obligatory» or «binding», for it can only lead to linguistic confusions. If normative necessity means that the connection between law and morality is commanded, then one should ask who is it that can command the connection thesis. Is it an agent empowered by the positive law, or is it a non-positive authority? Alexy gives no answer to these questions.

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non-positivist from the positivist is the view that the concept of law is to be defined such that, alongside these fact-oriented properties, moral elements are also included» (4).

Moreover, he admits that:

> «The conceptual argument will prove to be limited both in range and in force; and beyond that range, as well as to strengthen the conceptual argument, normative arguments are necessary. The thesis runs, first, there is a conceptually necessary connection between law and morality, and, second, there are normative arguments for including moral elements in the concept of law, arguments that in part strengthen and in part go beyond the conceptually necessary connection. In short, there are conceptually necessary as well as normatively necessary connections between law and morality» (22-23).

All this sounds extremely strange. If there are conceptual connections between law and morality, then there is no need to resort to normative arguments. Either the element of morality is included in the concept of law, or it is not. If it is included, then normative arguments are superfluous; if it is not included, they are useless. In this question there is no room for grading. So we can concentrate on analytical arguments. These are essentially two: the famous Radbruch formula (extremely unjust norms are not law) and, secondly, the thesis of the claim to correctness. Both arguments are closely linked with the distinction between the perspective of a an observer and that of a participant. Let us examine them separately.

## 3. THE OBSERVER'S PERSPECTIVE

The observer's perspective is the standpoint of those persons that pretend to describe the law without being committed to obey or to follow its norms. A typical case is that of a jurist or legal scientist. The task of legal science is to determine or to identify which norms belong to the legal system and what they prescribe, *i. e.* which actions are obligatory, prohibited or permitted by law. So it is primarily a problem of cognition of law and the identification of its norms. But the dichotomy between

observers and participants is not so sharp as Alexy seems to believe. Most observers are at the same time participants and all participants are also observers [4].

Alexy is concerned with the question whether particular legal norms or whole legal systems loose, according to the Radbruch formula, their legal status by surpassing a determinate («intolerable») degree of injustice. Now, regarding particular norms, Alexy's answer is clear: he rejects the Radbruch formula and declares to agree with positivism:

> «From the perspective of an observer, Radbruch's connection thesis cannot be supported by appeal to a conceptually necessary connection between law and morality» (30). «Thus, analytical as well as normative considerations lead to the conclusion that, from the standpoint of an observer, who looks at individual norms and enquires into a classifying connection, the positivistic separation thesis is correct. Radbruch's argument from injustice is not acceptable from this standpoint» (31). (Emphasis mine).

Regarding whole legal system the situation, according to Alexy, is different:

> «What applies to an individual norm need not apply to a legal system as a whole» (31).

This assertion is not exceedingly clear. A legal system is normally defined as a set of legal norms and so it is rather doubtful why a set of norms, all of which are legal norms, should not be regarded as a legal system. Moreover, Alexy gives no reasons for the application of the Radbruch formula for legal systems. He only mentions three examples of social orders, the first of which, called senseless or desperado order contains no norms at all and so is clearly no normative order, and therefore not a legal order. The two other examples, predatory or bandit's

[4] Cf. the excellent paper by L. Hierro, «¿Por qué ser positivista?, *Doxa*, 25 (2002), 263-302 and E. Bulygin, «Sobre observadores y participantes», *Doxa*, 21, vol. 1 (1998), 41-48.

order and governor system are normative orders, but only the second is, in Alexy's view, a legal order, in spite of the fact that it is «unjust in the extreme» (34).

The crucial question is now: What distinguishes the governor system from the bandit system? Alexy's answer to this question is:

> «The difference is not that here general rules of some kind prevail, for that is already the case in the bandit system. And the difference is not that the governor system is equally advantageous for all, even if only at the minimum level of protecting life, liberty, and property; for in this system, too, killing and robbing the governed remains possible at any time. Rather, the decisive point is that a *claim to* correctness is anchored in the practice of the governor system, a claim that is made to every one. The claim to correctness is a necessary element of the concept of law» (34).

It follows from this quotation that the Radbruch formula is never applicable in the perspective of an observer, neither to particular norms, nor to legal systems: Both can be extremely unjust without loosing their status of law.

But in spite of admitting that the Radbruch formula is never applicable in the observer's perspective, neither to particular norms, nor to systems as a whole, Alexy insists that the claim to correctness restricts the positivistic separation thesis a good bit even in the observer's perspective «albeit only in extreme and indeed improbable cases» (35). Here «the separation thesis [...] reaches a limit defined by the claim to correctness».

There is a clear contradiction between the thesis that the non-positivistic concept of law necessarily includes moral elements (4) and Alexy's assertion that even an extremely unjust system as the governor order [5] is

[5] Alexy's description of the governor system is rather eloquent: «In the long run, the predatory order proves not to be expedient, so the bandits strive to acquire legitimacy. They develop into governors and thereby transform the predatory order into a *governor system*. They continue to exploit their subjects… *The killing and robbing of governed individuals, acts that in point of*

nevertheless a legal system. What moral elements does this order contain?

The difference between the bandit's order and the governor system lies, according to Alexy, in the claim to correctness. The governor system raises this claim and though it does not satisfy it; the mere fact that this purely rhetorical claim is raised is enough for changing the predatory order into a legal system. From a moral point of view, an order that claims to be correct, but is unjust in the extreme, is considerably worse than an openly predatory order. When somebody uses the pretext of moral correctness to commit immoral actions, it is usually called hypocrisy. The transformation of a bandit's order into a legal system and a gang of bandits into legal authorities seem to be grounded on mere hypocrisy. This sounds more than strange and is certainly incompatible with the assertion that the concept of law necessarily includes moral elements.

The only plausible explanation of this inconsistency is that Alexy, while describing the observer's perspective tacitly adopts the positivistic concept of law that does not include any reference to morality. But in this case the predatory order, as well as the governor system, would be both legal systems, for both are socially efficacious and from the moral point of view they are equally unjust and moreover, if there is a difference it favors the predatory order, because it is less hypocrite.

## 4. THE PARTICIPANT'S PERSPECTIVE

Alexy maintains that in the perspective of a participant, *e. g.* a judge, the situation regarding the relation between law and justice is differ-

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*fact serve only the exploitative interests of the governors, remain possible at any time*» (33-34). The stress is mine.

ent. Whereas from the observer's perspective the positivistic separation thesis is essentially correct, from the participant's perspective, the separation thesis is inadequate, and the connection thesis is correct. (35). A norm or a system of norms must contain a minimal of justice in order to be legal, or, expressed in negative terms, they must not surpass a given threshold of injustice without loosing their character of law.

Alexy speaks of «participant's perspective» and of the «standpoint of a judge», as if these two expressions were synonymous. But if fact, their meaning is different.

Participants in the «legal game» are those persons that are interested not in a mere description of the law, but in the solution of a legal problem, for example, judges, barristers, legal councils and private persons. While the observer's perspective is based on the *description of the law*, the participant's perspective is connected to the *application of the law* for solving practical problems. In this sense judges are indeed its most important actors. But in the activity of a judge two different phases must be distinguished. When a judge has to solve a legal problem, he must adopt in the first place the perspective of an observer in order to determine what prescribes the existing law. Here there are only two possibilities: either the existing legal rules determine a univocal and clear solution of the case, or they do it not. In the first case the judge has the obligation to apply this solution. In such situation only the observer's perspective is relevant also for the judge.

But it can happen, that the existing law contains no univocal solution for a legal problem, that the solution is undetermined. Such a situation can arise, pace Dworkin, for different reasons. In the first place, certain logical flaws may occur in the legal system, like *normative gaps* (when the law contains no solution for a given case) or *normative contradictions* (when there are several incompatible solutions).

Another source are what has been called *penumbra cases* or *gaps of recognition* [6]. In all these cases the judge has to *decide* which solution is to be applied. This means that in the case of a normative gap he must «create» a new norm, in the case of a contradiction he must derogate (completely or partially) at least one of conflicting norms and in a penumbra case he must change the meaning of the relevant expressions. In all these cases the judge changes the existing law.

There is another especially interesting possibility, namely, when the law contains a univocal solution for the case, but the judge regards this solution as extremely unjust, either because the legislator did not take into account a relevant property (*axiological gap*) [7], or because the judge does not approve the value criteria of the legislator. In such cases it is possible that the judge decides not to apply the existing norm and to resort to another norm (eventually created by himself) that does not belong to the system at the time of his decision.

The application of norms not belonging to the system of the judge is nothing new. It occurs so often that there is a special branch of legal science, dealing with such cases, namely, the private international law. But in our case there is a considerable difference: What the judge applies is not foreign law, but a norm that has been modified by him, *i. e.* a norm created by the judge. This means that judges participate —even if only in exceptional cases— in the creation of the law. This is what Hart called *judicial discretion*. But it does by no means imply arbitrariness. The judge applies his own value criteria for creating, changing or derogating legal norms. It must be stressed that all these problems are typical for *application*, not for *identification* of law.

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[6] Cf. H. L. A. Hart, «Positivism and the Separation of Law and Morals», *Harvard Law Review,* 71 (1958), 593-629; C. R. Carrió, *Notas sobre Derecho y Lenguaje*, Buenos Aires, 1965, and C. E. Alchourrón and E. Bulygin, *Normative Systems*, Springer Verlag, Wien-NewYork, 1971.

[7] *Normative Systems*, 106-116.

In which way can these facts influence the concept of law? Does it mean that the judge uses another concept of law than the external observer that wants to describe it? I don't think so. When the judge does not apply a valid norm because in his opinion its application would lead to a great injustice and instead applies another norm, eventually created by him, this cannot be described as modification of the concept of law. What is modified in such cases are the norms or rules of a legal system, not the concept of law.

## 5. JUDICIAL DECISIONS AND OPINIONS OF THE JUDGE

How far can the argument from injustice, *i. e.* the Radbruch formula or the claim to correctness, influence the controversy between legal positivism, and the non-positivism, *i. e.* the relation between law and morality? We have already seen that for Alexy the Radbruch formula is not applicable, neither to particular norms, nor to legal systems. That the claim to correctness can perform this task is also doubtful. In any case, Alexy gives no argument in this sense. But he seems to be of the opinion that what judges say in their verdicts is relevant for the question of which concept of law is more adequate.

In his book he mentions two practical cases. The first is destined to show that judges adduce the extreme injustice (Radbruch's formula) in order to stress that very unjust norms are not legal norms. The second example tries to show that the positivistic concept of law is not adequate from the standpoint of a judge. I am afraid that none of these examples is able to fulfill its purpose.

The first case concerns the so-called «statutory injustice». In 1941 a legal disposition (Ordinance 11) stripped emigrant Jews of German citizenship on ground of race. The Federal Constitutional Court decided in 1954 (long after the fall of Nazism) that Ordinance 11 was null and void,

*i. e.* invalid from the outset, because «its conflict with justice reached an intolerable degree». Does this decision mean that this Ordinance was not a legal norm, in spite of the fact that it was regarded as valid and peacefully applied by German judges and administrative organs during several years? I don't think so. It was a valid norm of the German law during the Nazism and later was annulled *ex tunc*, *i. e.* retroactively, by the democratic court. The sole fact that the Constitutional Court took the trouble to invalidate this ordinance shows clearly that it was a valid legal norm. If it were not a legal norm, but *e. g.* a mere manifestation of a Nazi personality like Goebbels or Streicher, no court would take the trouble to declare it void.

The second case concerns the permissibility of judicial development of the law by judges, when it is contrary to a statute, *i. e. contra legem*. According to German Civil Code, monetary compensation for non-material harm is precluded except in cases provided by statute. In the case of Princess Soraya, the ex-wife of the last Shah of Iran the competent court awarded a compensation that clearly did not fall into one of the exceptions. The Constitutional Court, which declared that the law is not identical with the totality of written statutes, confirmed this decision and also declared that the judiciary is bound not only by statute (*Gesetz*), but by «statute and law» (*Gesetz und Recht*). So a judicial decision *contra* legem is not necessarily unconstitutional.

The only thing that shows this decision is that the Constitutional Court rejects the narrow statutory positivism, *i. e.* the idea that law is identical with written statues. The trouble is that no serious positivist maintains nowadays this obsolete form of positivism. Consequently, this decision cannot be adduced as a reason for considering that the non-positivistic concept of law is more adequate than the positivistic one.

What these examples clearly show is the convenience of distinguishing between what judges say that they do and what they are doing really.

Judges rather frequently give rhetoric arguments destined to conceal what they are really doing. This happens, *e. g.,* because sometimes the demands of the positive law are logically impossible to satisfy.

The following requirements that a judge must satisfy when he has to decide a legal case are a good example:

1) The judge has the duty to give a verdict (he is forbidden to decline to decide).
2) His decision must be justified.
3) It must be grounded on valid legal norms.

Each of these requirements is fully justified, but in certain situations it is impossible to fulfill all of them. In cases of normative gaps or inconsistencies judges cannot justify their decision by means of existing law and so instead of applying an existent norm they change the law, applying a new norm, created by themselves [8]. This means that judges participate in the creation of the law. But as according to the dominant ideology, that stems from the doctrine of the division of powers, judges have the duty to apply the existent law and they are prohibited to modify it, most judges try to conceal by means of different rhetorical devices that they are really changing the law in such situations. In this sense the formula used by the Suisse Civil Code is considerably more realistic:

> «A défaut d'une disposition légal applicable, le juge prononce selon droit coutumier, et á défaut d'une coutume, selon les règles qui'il établirait s'il avait á faire un acte de législateur».

Instead of presupposing that all cases can be decided according to existent law, judges are empowered by this rule to create new norms in critical cases.

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[8] Cf. C. E. Alchourrón and E. Bulygin, *Normative Systems*, 256-268 and 287-291.

## 6. THE CLAIM TO CORRECTNESS

This topic gave rise to a long discussion with my friend Robert Alexy[9], and I do not wish to repeat my arguments against this thesis, nor his replies. But two additional remarks should be in order.

### a) The Necessity of the Claim

Alexy maintains that every law-creating act is conceptually connected with the claim to correctness. Normative systems that do not raise this claim are not legal systems, and if this claim is raised but not fulfilled, then they are legally faulty systems. A particular norm that does not raise this claim is still a legal norm, but it is legally faulty. The same happens if it raises the claim without fulfilling it.

Alexy introduces the notion of legal faultiness as a proof of the necessity of the claim. On the other hand, this faultiness is a very peculiar property of the law, which is basically different from other properties. Indeed, Alexy's position on this problem is ambiguous. On the one hand he says that the sentences (10): «Legally faulty systems are faulty» is an ordinary tautology like the sentence (11): «Continental legal systems

[9] Cf. R. Alexy, «On Necessary Relations between Law and Morality», *Ratio Juris*, vol. 2, núm. 2, 1989, 167; E. Bulygin, «Alexy und das Richtigkeitsargument», in Aulis Aarnio *et al.* (eds.), *Rechtsnorm und Rechtswirklichkeit. Festschrift für Werner Krawietz zum 60. Geburtstag*, Duncker & Humblot, Berlin, 1993, 19-24; R. Alexy, «Bulygins Kritik des Richtigkeitsarguments», in E. Garzón Valdés et al. (eds.), *Normative Systems in Legal and Moral Theory. Festschrift for Carlos E. Alchourrón and Eugenio Bulygin*, Duncker & Humblot, Berlin, 1997, 235-250; E. Bulygin, «Alexy's Thesis of the Necessary Connection between Law and Morality» and R. Alexy, «On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique», both in *Ratio Juris*, vol. 13, núm. 2, 2000, 133-137 and 138-147. All these papers have been reproduced in Spanish, in P. Gaido (ed.), *La pretension de la corrección del derecho. La polémica sobre relación entre derecho y moral*, Universidad Externado de Colombia, 2001.

are continental» and both are trivial [10]. On the other hand, he maintains that:

> «Nevertheless, there is a difference concerning the relation of the predicates "faulty" and "continental" to the concept of legal system» (Alexy, 2000, 146).

But then the sentence (10) is not as trivial as (11) and consequently it is not an ordinary tautology. This sounds very rare; I would say that both sentences are analytically true and in this sense both are trivial. Alexy's contention that the peculiarity of (10) consists in the fact that legal systems necessarily raise the claim to correctness, while they do not claim to be continental [11] is not only not convincing, but it makes his argumentation circular: The claim to correctness is necessary because normative systems that raise it without fulfilling it are faulty. And this faultiness has a special character because it is based on the necessity of the claim. So the necessity of the claim is at the same time a reason and a consequence of this claim.

### b) Necessary inclusion of moral elements into the concept of law

As the claim to correctness, according to Alexy, is necessary and it implies moral correctness, it follows that the law necessarily includes moral elements. But this sentence is ambiguous: it can mean, first, that every legal system includes always some, but not necessarily the same, morality or, secondly, that there is one special morality that is included

[10] Alexy, 2000, 146: «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"».

[11] «It is the necessity of the claim to correctness which gives faultiness a special character. This special character consists in that faultiness contradicts correctness, which is necessarily claimed by law», Alexy, 2000, p. 146.

in every law. The difference appears quite clear if one uses predicate logic notation. If we symbolize law by L, morality by M and the relation of inclusion by I, then the first version says:

$$(x)\ Lx \rightarrow (Ey)\ (My\ \&\ xIy),$$

whereas the second version says:

$$(Ey)\ My\ \&\ (x)\ (Lx \rightarrow xIy)$$

The first version, that Alexy calls the weak connection thesis, is completely innocuous. No positivist would deny that every law includes some moral principles. The second version (the strong connection thesis) asserts something quite different, namely, that there is a necessary connection between every legal system and a certain morality, or as Alexy puts it, the idea of a correct or justified morality [12].

There are at least two objections that can be raised against this idea: In the first place it is by no means clear that there is something like *the* correct or true morality and secondly, one must distinguish between the correct morality and the *idea* of a correct morality [13]. Even if there were one correct morality, there certainly are many different ideas of it.

In order to prove that the strong connection thesis is true one should be able to show that all persons have the same idea of a correct morality. This is extremely improbable. Is it the same what such people as Kant, Hitler, Stalin, Gandhi or Bush have understood by a correct morality?

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[12] «…one must distinguish between two versions of the thesis of a necessary connection between law and morality: a weak version and a strong version. In the weak version, the thesis says that a necessary connection exists between law and *some* morality. The strong version has it that a necessary connection exists between law and the *right* or *correct* morality» (75).

[13] «The qualifying or soft connection that emerges when the system is considered as a system of procedures, too, from the perspective of a participant leads not to a necessary connection between law and a particular morality, to be labelled as correct in terms of content, but, rather, *to a necessary connection between law and the idea of correct morality as a justified morality*» (80). (The stress is mine).

## 7. COINCIDENCES AND DIFFERENCES BETWEEN THE POSITIVISM AND THE NON-POSITIVISM

The recognition that «the positivistic separation thesis is from the observer's perspective essentially correct» puts an end to the debate between positivism and non-positivism, at least concerning the concept of law, because positivism is interested not in the application of law, but in its identification. The positivistic separation thesis means that the contents of a legal system can be determined without any reference to morality. On this point agree all serious positivists from Bentham, Kelsen and Hart to Raz and Hoerster, and Alexy agrees too, something that might surprise some of his followers. On the other hand, no positivist denies that judges often use moral arguments.

If one compares the ideas of a positivist like Kelsen or Hart with those of a non positivist like Alexy one arrives to strange results.

1. Both parties agree that authoritative issuance and social efficacy are defining characteristics of law. Alexy adds to them the connection with morality, but it is not clear what this means, taking into account that he regards extremely unjust and hence immoral normative orders as legal orders.

2. Both parties agree (1) that in the observer's perspective, *e. g.* in the perspective of a jurist, the concept of law does not include any moral element and (2) that legal systems, as well as particular norms, can be immoral without loosing their legal character. The Radbruch formula is not applicable in this perspective. Not even an extreme injustice can deprive a norm issued by a competent legal authority and the corresponding legal system of their legal character.

3. From Alexy's book it follows clearly that for an external observer, who only wants to describe the law it is possible to identify all legal

norms without resorting to moral values. And this is exactly what all serious positivists, from Bentham to Raz, maintain. And Alexy agrees with them, at least concerning the observer's perspective. This means that the legal science is, or rather can be, purely descriptive. Though legal norms express valuations, there is nothing that would make impossible a purely descriptive legal science. As Hart states in his famous *Postscript*:

> «My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law [...] A description is still a description even if what is described are values» [14].

And though Alexy is not very explicit on this point, there is nothing in his writings that would be incompatible with the ideal of a purely descriptive science of law except his metaphorical invocation of the ideal dimension of the law [15].

4. Regarding the participant's perspective both parties agree that judges sometimes do not apply those norms, which they regard as very unjust. For a positivist they do it for moral reasons, for Alexy for legal reasons. But both agree that they do it. So where lies here the big difference?

One could think that Alexy concedes more importance to the participant's perspective than the positivists. This might be true regarding Kelsen, but not regarding Hart [16].

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[14] H. L. A. Hart, *The Concept of Law*, second edition, Clarendon Press, Oxford, 1994, 244 and 240.

[15] «Thus, the claim to correctness leads to an ideal dimension that is necessarily linked with the law» (81).

[16] «… there is nothing in the project of a descriptive jurisprudence as exemplified in my book to preclude a non-participant external observer from describing the way in which participants view the law from such an internal point of view», *The Concept of Law*, 242.

I have the impression that the discrepancy looks very like a verbal one. Alexy is not very enthusiastic about the recognition that an unjust normative order can be regarded as law, though he does not deny it, while a positivist asserts that the positive law, like any other product of human activity can be good or bad, just or unjust. By denying calling «law» an unjust normative order, we do not remove the injustice. Unjust normative orders certainly deserve to be sharply criticized, but there is no reason not to call them «legal orders».