

# **BETWEEN POSITIVISM AND NON-POSITIVISM? A THIRD REPLY TO EUGENIO BULYGIN**

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Serious criticism honours and challenges an author\*. Eugenio Bulygin offers me, now for the third time, the great benefit of his critique<sup>1</sup>, and I am delighted to have occasion here to respond.

## 1. NORMATIVE ARGUMENTS AND THE CONCEPT OF LAW

In *The Argument from Injustice. A Reply to Legal Positivism* I defend the non-positivistic connection thesis which says that law necessarily includes moral elements, and I claim that the supporting arguments for this thesis can be divided into two groups: analytical and normative<sup>2</sup>. On this basis, I propose to call a connection supported by normative arguments «normatively necessary»<sup>3</sup>. Normative necessity is explained in the following way: «That something is normatively necessary means nothing other than that it is commanded»<sup>4</sup>. Bulygin argues that this «idea of a

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\* I should like to thank Stanley L. Paulson for suggestions and advice on matters of English style.

<sup>1</sup> For the first two rounds see E. Bulygin, «Alexy und das Richtigkeitsargument», in A. Aarnio, S. L. Paulson, O. Weinberger, G. Henrik von Wright and D. Wyduckel (eds.), *Rechtsnorm und Rechtswirklichkeit. Festschrift für Werner Krawietz zum 60. Geburtstag* (Berlin: Duncker & Humblot, 1993), 19-24; R. Alexy, «Bulygins Kritik des Richtigkeitsarguments», in: E. Garzón Valdes, W. Krawietz, G. Henrik von Wright and R. Zimmerling (eds.), *Normative Systems in Legal and Moral Theory. Festschrift for Carlos E. Alchourrón and Eugenio Bulygin* (Berlin: Duncker & Humblot, 1997), 235-250; E. Bulygin, «Alexy's Thesis of the Necessary Connection between Law and Morality», *Ratio Juris*, 13 (2000), 133-137; R. Alexy, «On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique», *Ratio Juris*, 13 (2000), 138-147.

<sup>2</sup> R. Alexy, *The Argument from Injustice. A Reply to Legal Positivism* (first publ. 1992), trans. B. Litschewski Paulson and S. L. Paulson (Oxford: Clarendon Press, 2002), 20.

<sup>3</sup> *Ibid.*, 21.

<sup>4</sup> *Ibid.*, 21, n. 40.

normative necessity» is «extremely doubtful»<sup>5</sup>. The use of the term «necessary» instead of terms like «obligatory» or «binding», he maintains, «can only lead to linguistic confusions», and he poses the question of «who is it that can command the connection thesis»<sup>6</sup>. His conclusion:

«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»<sup>7</sup>.

My reply to this is that there exists, indeed, a conceptually necessary inclusion of morality into the concept of law, but this makes normative arguments by no means superfluous, as Bulygin suggests. On the contrary, it makes normative arguments necessary.

In *The Argument from Injustice* I describe the relation between analytical and normative arguments as a relation of supplementation and strengthening<sup>8</sup>. In order to meet Bulygin's objection, I have to add to this a relation of inclusion. The argument from inclusion consists of two parts, and the first part is this. It is a conceptual necessity that law raises a claim to correctness. The second part of the argument is that this claim to correctness necessarily leads to an inclusion of non-authoritative normative—that is, moral—elements, not only at the level of the application of law but also at the level of determining the nature and defining the concept of law<sup>9</sup>.

Eugenio Bulygin remarks that the necessity of the claim to correctness is a topic that has given rise to a long discussion between us and

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<sup>5</sup> E. Bulygin, «Alexy between Positivism and Non-Positivism», M. S., 2.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> Alexy, *The Argument from Injustice* (n. 2, above), 22.

<sup>9</sup> On the relationship between the concept and the nature of law, see R. Alexy, «On the Concept and the Nature of Law», *Ratio Juris*, 21 (2008), 281-299, at 290-292.

that—with the exception of two additional remarks—he does not wish to take up this theme still another time<sup>10</sup>. I shall follow him on this point, confining myself to comments on his two additional remarks. This, however, shall be taken up later. For the present, I will presuppose that law necessarily raises a claim to correctness, that is, I will take the first part of the argument from inclusion as given. This means that my position, as presented here, acquires a hypothetical character. It will be an answer to the question of whether, if law necessarily lays a claim to correctness, normative arguments can be employed in the determination of the nature and the definition of the concept of law.

Law's claim to correctness refers not only to the question of whether the application of law in a concrete case is correct but also to the question of whether it is correct at all to apply law. The first concerns the concrete dimension, the second the abstract dimension of the claim to correctness.

The abstract claim to correctness, for its part, also has two dimensions: a real dimension and an ideal dimension. The most abstract principle of the ideal dimension is justice. The idea of justice as such—that is, morality *simpliciter*—does not, however, suffice to resolve the problems of social co-ordination and co-operation<sup>11</sup>. The moral costs of anarchy can be avoided only by law understood as an enterprise that strives to realize the value or principle of legal certainty. For that reason, law's claim to correctness refers not only to justice but also to positivity as defined by authoritative issuance and social efficacy<sup>12</sup>. This is what I have termed the real dimension of the claim to correctness. In this way,

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<sup>10</sup> Bulygin, «Alexy between Positivism and Non-Positivism» (n. 5, above), 9.

<sup>11</sup> R. Alexy, «The Nature of Arguments about the Nature of Law», in L. H. Meyer, S. L. Paulson and T. W. Pogge (eds.), *Rights, Culture, and Law. Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford: Oxford University Press, 2003), 3-16, at 8.

<sup>12</sup> On this concept of positivity, see Alexy, *The Argument from Injustice* (n. 2, above), 3-4, 14-19.

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the claim to correctness necessarily connects both the principle of justice and the principle of legal certainty with law. This is an expression of the dual nature of law<sup>13</sup>.

If justice as well as legal certainty are necessarily connected with law, a participant in the legal system, confronted with unjust law, must ask himself whether justice as necessary connected with law requires that he consider the unjust law as valid law. If the principle of justice were the only relevant principle here, the answer would be easy. The dual nature of law, however, requires also that he consider the principle of legal certainty. This is to say that in order to determine the borderline between valid law on the one hand and invalid law on the other, he has to strike a balance. The determination of this line, however, is a question that concerns the concept and the nature of law.

Elsewhere I have argued that the correct result of this balancing is that the principle of legal certainty precedes justice in all cases of injustice except for the case of extreme injustice<sup>14</sup>. This corresponds to Radbruch's formula<sup>15</sup>. Four points are of interest. Here balancing—and this is the first point—concerns the problem of the concept and the nature of law. The second is that the arguments applied in this balancing are normative or moral arguments. The third point is that these normative or moral arguments are, owing to the claim to correctness, necessarily connected with the concept of law. This necessary connection implies that it is impossible for a participant in a legal system to say what law is without saying what law ought to be<sup>16</sup>. And this, in turn, answers Bulygin's question of «who is it that can command the connection the-

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<sup>13</sup> See R. Alexy, «The Dual Nature of Law», *Ratio Juris*, 23 (2010), 167-182, at 173-174.

<sup>14</sup> *Ibid.*, 175, 177, n. 14.

<sup>15</sup> See R. Alexy, «A Defence of Radbruch's Formula», in M. D. A. Freeman (ed.), *Lloyd's Introduction to Jurisprudence*, seventh edn. (London: Sweet & Maxwell, 2001), 374-391, at 375.

<sup>16</sup> R. Alexy, «An Answer to Joseph Raz», in G. Pavlakos (ed.), *Law, Rights and Discourse. The Legal Philosophy of Robert Alexy* (Oxford: Hart, 2007), 37-55, at 52.

sis»<sup>17</sup>. It is the claim to correctness taken seriously by the participant. By contrast with the observer's «is», the participant's «is» includes an «ought»<sup>18</sup>. Finally, the fourth point concerns Bulygin's thesis that normative arguments are «superfluous» once «the element of morality is included in the concept of law»<sup>19</sup>. In referring to justice, the claim to correctness contains moral elements, and it is included in the concept of law. The inclusion of the claim to correctness, however, does not as such imply that the principle of justice becomes superfluous as an argument supporting the definition of the concept of law. The claim to correctness, taken by itself, does not have sufficient content to carry out this task. For this reason, the principles or values to which it necessarily refers are indispensable.

## 2. THE OBSERVER'S PERSPECTIVE

The distinction between the perspective of the observer and the participant has played an important role in the considerations adumbrated above on the relation between the concept of law and normative arguments. The distinction is, indeed, a central element of the non-positivistic theory of law. This leads one to expect that the distinction will be seen critically by positivists<sup>20</sup>. Bulygin's first point concerning this issue is that

«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»<sup>21</sup>.

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<sup>17</sup> Bulygin, «Alexy between Positivism and Non-Positivism», M.S., 2.

<sup>18</sup> Alexy, «On the Concept and the Nature of Law» (n. 9, above), 297.

<sup>19</sup> Bulygin, «Alexy between Positivism and Non-Positivism», M.S., 2.

<sup>20</sup> See J. Raz, «The Argument from Justice, or How Not to Reply to Legal Positivism», in J. Raz, *The Authority of Law*, 2nd edn. (Oxford: Oxford University Press, 2009), 313-335, at 319-323, and, in reply thereto, Alexy, «An Answer to Joseph Raz» (n. 16, above), 45-48.

<sup>21</sup> Bulygin, «Alexy between Positivism and Non-Positivism» (n. 5, above), 3.

I wish to begin with comments on this by noting that the distinction at issue is not one between persons but between perspectives. The participant's perspective is defined by the question: What is the correct legal answer?, the observer's by the question: Which legal decisions have actually been made, are actually, being made, and will actually be made? The version of legal non-positivism that I wish to defend defines law by means of three elements: authoritative issuance, social efficacy, and correctness of content. Authoritative issuance and social efficacy concern the real or factual dimension of law, correctness of content its ideal or critical dimension. This implies —what cannot come as a surprise— that non-positivism includes positivistic elements. This inclusion of positivistic elements, in turn, implies that the participant's perspective necessarily includes the observer's perspective. To this extent, Bulygin is, then, right in maintaining that «all participants are also observers»<sup>22</sup>. In this case, however, the observer's perspective is subordinate to the participant's perspective. The answer given to the observer's question, as hard cases make clear, is not necessarily the final answer —as it would be in case of a pure observer—. This is also the crucial point where Bulygin's thesis that «[m]ost observers are at the same time participant's is concerned»<sup>23</sup>. This might be read as follows: There are many fewer pure observers than participants.

Bulygin's main argument against my description of the observer's perspective is that it gives rise to a contradiction:

«There is a clear contradiction between the thesis that the non-positivistic concept of law necessarily includes moral elements and Alexy's assertion that even an extremely unjust system as the governor order is nevertheless a legal system. What moral elements does this order contain?».

My reply is that it by no means gives rise to a contradiction. In order to establish a non-positivistic concept of law one has to defend the con-

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*



nection thesis, which says that there is a necessary connection between law and morality or, more precisely, between legal validity or legal correctness on the one hand and moral correctness on the other. The correctness thesis requires not more than just one connection of this kind. Such a connection exists, in any case, in the participant's perspective, and this perspective is the fundamental perspective. Law is impossible without participants, but it would be possible without pure observers. The necessary connection in this necessary perspective suffices to establish a non-positivistic concept of law. If, alongside this, there were no necessary connection in the observer's perspective, this would not affect the non-positivistic concept of law.

This by itself would be enough to dismiss Bulygin's reproach of contradiction. It can be added to this that a necessary connection exists even from the observer's perspective. A system of rules that does not lay claim to correctness is not a legal system, even from the point of view of an observer<sup>24</sup>. The claim to correctness, however, necessarily raised by law, implies a necessary connection between law and morality. Bulygin's reproach of contradiction is, therefore, wrong for two reasons.

Bulygin links this reproach to another objection. The existence of a legal system requires only that the claim to correctness be raised. The claim need not be met. Thus, from the observer's perspective, a system of rules can be considered as a legal system even if it is extremely unjust, provided that the claim to correctness is raised<sup>25</sup>. Now Bulygin argues that such a hypocritical claim is, from a moral point of view, «considerably worse than an openly predatory order»<sup>26</sup>. For this reason, he maintains, the thesis that the claim to correction transforms a bandit's order into a legal system—one might call it the «transformation thesis»—«is certainly incompatible with the assertion that the concept of law neces-

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<sup>24</sup> Alexy, *The Argument from Injustice* (n. 2, above), 34.

<sup>25</sup> *Ibid.*

<sup>26</sup> Bulygin, «Alexy between Positivism and Non-Positivism» (n. 5, above), 4.

sarily includes moral elements»<sup>27</sup>. It is, that is to say, incompatible with the connection thesis.

I agree with Bulygin that extreme injustice along with hypocrisy is morally worse than extreme injustice without hypocrisy. I do not think, however, that this leads to any incompatibilities between the transformation thesis and the connection thesis. The opposite is true. Tyrants, despots, and dictators usually strive to acquire legitimacy in order to avoid open suppression. For this reason they mask the suppression by means of a legal façade. The necessity of the claim to correctness implies in this case the necessity of hypocrisy, and public hypocrisy endangers legitimacy. Show trials, for instance, are an attempt to eliminate opponents in a legitimate way; they are, however, owing to hypocrisy, at the same time a risk for legitimacy. The fact that the claim to correctness never allows tyrants to attain more than hypocritical legitimacy does not refute the connection thesis. It corroborates it.

### 3. THE PARTICIPANT'S PERSPECTIVE

The observer's perspective is a perspective rather favourable to positivism. The case is different with the participant's perspective. Bulygin nevertheless argues that positivism also fits in the case of the participant's perspective best — especially the perspective of a judge.

His argument is based on the distinction between plain and hard cases. A plain case is at hand when «the existing legal rules determine a univocal and clear solution of the case»<sup>28</sup>. According to Bulygin, «[i]n such [a] situation only the observer's perspective is relevant also for the judge»<sup>29</sup>. Here one must object. To be sure, in many cases the authorita-

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<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, 5.

<sup>29</sup> *Ibid.*

tive material, especially statutes and precedents, dictate a univocal answer. Nevertheless, the ostensible clarity of plain cases is not a simple matter. One who asserts that the solution is clear is to be understood as asserting that there are no arguments that might give rise to serious doubts. Such arguments, however, are always conceivable. Bulygin alludes to such arguments when he says that

«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»<sup>30</sup>.

This shows that the categorization of a case as «plain» includes a negative judgment with respect to all possible counter-arguments<sup>31</sup>. These possible counter-arguments comprise moral reasons. This negative judgment transcends, therefore, the observer's perspective. It is conceivable only as an act performed from the participant's perspective. For this reason it is never the case that «only the observer's perspective is relevant also for the judge»<sup>32</sup>.

Positivists and non-positivists generally agree that every positive law has, as Hart remarked, an open texture<sup>33</sup>. This is necessitated, *inter alia*, by the vagueness of legal language, the possibility of a conflict between norms, the gaps that exist in the law, and the possibility of deciding a case contrary to the language of a statute in special cases. Cases within the scope of this open texture are hard cases.

Like Kelsen and Hart, Bulygin argues that no argument against positivism can be grounded on the existence of hard cases. In such cases, the judge has to be seen as creating new law on bases other than legal

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<sup>30</sup> *Ibid.*, 6.

<sup>31</sup> R. Alexy, *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification* (first publ. 1978), trans. R. Adler and N. MacCormick (Oxford: Clarendon Press, 1989), 8.

<sup>32</sup> Bulygin, «Alexy between Positivism and Non-Positivism» (n. 5, above), 5.

<sup>33</sup> H. L. A. Hart, *The Concept of Law*, 2nd edn. (Oxford: Clarendon Press, 1994), 128.

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standards and according to his own discretion, much as in the case of a legislature<sup>34</sup>. The positivistic concept of law, Bulygin stresses, is in no way affected by this:

«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 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»<sup>35</sup>.

I agree with Bulygin that the *contra legem* decision of the judge cannot be described as a modification of the concept of law by this judge. What the judge thinks he is doing or says he is doing, is not decisive<sup>36</sup>. What is decisive is what he really does and what the law necessarily requires him to do. This is a question of the correct description of legal decision-making. Bulygin describes legal decision-making in hard cases as a law-making act that transforms moral considerations into law. I think that this description is insufficient. The first point of my argument is, again, the claim to correctness. A judge necessarily raises this claim. The second point is that this claim refers, like Raz's claim to «legitimate, moral, authority»<sup>37</sup>, not only to positive law but also to justice, that is, to morality<sup>38</sup>. Bulygin's argument might be interpreted as saying that the avoidance of «great injustice» is only a personal or subjective con-

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<sup>34</sup> H. Kelsen, *Reine Rechtslehre*, 2nd edn. (Vienna: Franz Deuticke, 1960), 350-351; Hart, *The Concept of Law* (n. 33, above), 126, 135, 204-205; Bulygin, «Alexy between Positivism and Non-Positivism» (n. 5, above), 6.

<sup>35</sup> *Ibid.*

<sup>36</sup> Bulygin, *ibid.*, 7, however, ascribes the opposite opinion to me. Naturally, it is possible that the judge is doing what he says he is doing. In this case one can also refer to what he says.

<sup>37</sup> J. Raz, «On the Nature of Law», *Archives for Philosophy of Law and Social Philosophy*, 82 (1996), 1-25, at 6.

<sup>38</sup> R. Alexy, «Law and Correctness», *Current Legal Problems*, 51 (1998), 205-221, at 216.

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cern of the judge, and not something that is objectively required by law's claim to correctness. If this subjective interpretation should reflect Bulygin's intention, then our respective descriptions take altogether different paths already at this point. But a positivist can grant the point that law's claim to correctness comprises a claim to moral correctness, and nevertheless contest the claim that this amounts to a necessary connection between legal validity or legal correctness and morality. This third point seems to be the decisive one.

My thesis is that a necessary connection, once one has arrived at the third point, is indispensable. One might imagine a case in which the positive law allows for two different interpretations:  $I_1$  and  $I_2$ .  $I_1$  is just,  $I_2$  unjust. In this case, law's claim to correctness requires  $I_1$ . Perhaps, positivists and non-positivists may agree up to this point. Disagreement begins where the question has to be answered of what happens when  $I_2$ , that is, the unjust interpretation, is chosen. According to positivism the decision is a legally perfect decision with moral defects. According to non-positivism the decision is not only morally defective but also legally defective<sup>39</sup>. It is legally defective, for not only is morality's claim to correctness violated in the case of a morally defective legal decision, but law's claim to correctness is violated, too. This leads to a necessary qualifying or ideal connection between law and morality<sup>40</sup>. With this, the claim to correctness implies that law necessarily comprises an ideal dimension as well as a real or authoritative dimension. That defects in either dimension are legal defects can, however, be adequately grasped only by means of a non-positivistic concept of law. This is the theoretical aspect of the problem. A practical aspect has to be added. If the defect were only a moral one, it would be difficult to explain why a higher court should have the power to set aside unjust decisions of a lower court in cases in which a just decision is as compatible with the positive law as the unjust decision.

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<sup>39</sup> Alexy, «On the Concept and the Nature of Law» (n. 9, above), 295-296.

<sup>40</sup> Alexy, *The Argument from Injustice* (n. 2, above), 26.

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#### 4. CONSTRUCTION - THRUST AND PARRY

In *The Argument from Injustice* I presented two cases with an eye to demonstrating the practical significance of the debate over positivism. The first concerns the application of Radbruch's formula to the Eleventh Ordinance, 25 November 1941, issued pursuant to the Statute on Reich Citizenship of 15 September 1935, which stripped emigrant Jews of German citizenship and property on ground of race<sup>41</sup>. The second case concerns the permissibility of a development of law by judges that is contrary to the literal reading of a statute —the permissibility, in other words, of a *contra legem* decision—<sup>42</sup>. Both decisions express a non-positivistic understanding of law. Bulygin argues that the non-positivistic arguments put forward in these cases are no more than «rhetorical devices» by means of which judges attempt to conceal «that they are really changing the law»<sup>43</sup>. For this reason one has to distinguish «between what judges say that they do and what they are doing really»<sup>44</sup>. The German Federal Constitutional Court declared that the Eleventh Ordinance was null and void, that is, invalid from the outset, because «[i]ts conflict with justice reached [...] an intolerable degree»<sup>45</sup>. Bulygin objects that the Eleventh Ordinance was in fact «a valid norm of the German law during [...] Nazism»<sup>46</sup>. What the Court really did was to annul the ordinance «*ex tunc*, *i. e.* retroactively»<sup>47</sup>. Something similar applies, according to Bulygin, to the *contra legem* case. The German Federal Constitutional Court simply empowers judges «to create new norms in critical cases»<sup>48</sup>.

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<sup>41</sup> *Ibid.*, 5-7. See also Alexy, «A Defence of Radbruch's Formula» (n. 15, above), 18-19.

<sup>42</sup> *Ibid.*, 8-10.

<sup>43</sup> Bulygin, «Alexy between Positivism and Non-Positivism» (n. 5, above), 8.

<sup>44</sup> *Ibid.*

<sup>45</sup> Decisions of the Federal Constitutional Court, vol. 23 (1968), 98-113, at 106 —quoted from Alexy, *The Argument from Injustice* (n. 2, above), 6.

<sup>46</sup> Bulygin, «Alexy between Positivism and Non-Positivism» (n. 5, above), 7.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, 8.

Now Bulygin is right in maintaining that one has to distinguish between what judges say they are doing and what they really are doing. But this distinction does not imply that judges are always doing something different from what they say they are doing. In order to show this, one has to analyze their arguments. Bulygin simply substitutes for the non-positivistic construction a positivistic construction. The mere confrontation of the non-positivistic construction with a positivistic counterpart does not suffice, however, as a rejection of the non-positivistic construction. For this purpose it has to be shown that the positivistic construction of the cases is better than the non-positivistic counterpart. To show this is to show, *inter alia*, that positivism is better able to grasp the nature of law than non-positivism. But this is precisely the question at issue. Bulygin's criticism of the two decisions, therefore, presupposes what has to be established.

## 5. THE CLAIM TO CORRECTNESS: TWO POINTS

In my second reply to Bulygin, I compared the following two sentences:

«(10) Faulty legal systems are faulty»

and

«(11) Continental legal systems are Continental».

The result I arrived at was —how could it have been otherwise?— that both are trivial, and that the triviality is of the same kind in both cases. I then continued as follows:

«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

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to correctness, whereas they do not necessarily raise a claim to be, or not to be, Continental»<sup>49</sup>.

Bulygin objects:

«But then the sentence (10) is not as trivial as (11) and consequently it is not an ordinary tautology. This sounds very rare»<sup>50</sup>.

I agree with Bulygin that it would be rather strange to consider (10) as less trivial than (11). But this is not my point. The triviality of (10) and (11) stems from the relation between «faulty» and «faulty» on the one hand, and «Continental» and «Continental», on the other. The relation between «faulty» and «faulty» is the same as the relation between «Continental» and «Continental». The difference, to which I referred —perhaps in a way that suggested misunderstandings— concerns the relation between the concept of a legal system on the one hand and the predicates «faulty» and «Continental» on the other. My point is that being Continental is not necessarily connected with the concept of a legal system, whereas there exists a necessary connection where faultiness is concerned. The necessary connection stems, first, from the necessity of the claim to correctness, and, second, from a negation. The claim to correctness is equivalent to the claim not to be faulty or defective, for correctness is non-faultiness or non-defectiveness. This implies that the necessity of the claim to correctness necessarily connects the concept of non-faultiness with law. When I said: «It is the necessity of the claim to correctness which gives faultiness a special character»<sup>51</sup>, I had this in mind.

According to Bulygin my argument is not only «very rare», but also «circular»:

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<sup>49</sup> Alexy, «On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique» (n. 1, above), 146.

<sup>50</sup> Bulygin, «Alexy between Positivism and Non-Positivism» (n. 5, above), 10.

<sup>51</sup> Alexy, «On the Thesis of a Necessary Connection between Law and Morality: Bulygin's Critique» (n. 1, above), 146.

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«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»<sup>52</sup>.

Indeed, I claim that the concepts of correctness and faultiness or defectiveness are analytically connected by means of negation. But I do not claim that this equivalence is a relation of substantive reason and substantive consequence, as it would have to be if the reproach of circularity were defensible.

Bulygin's second comment on the claim to correctness concerns the kind of connection that is established by this claim. In *The Argument from Injustice* I make a distinction between a weak and a strong version of the connection thesis:

«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»<sup>53</sup>.

Bulygin presents a formalization of these two versions, which employs «*L*» for law, «*M*» for morality, and «*I*» for the relation of inclusion. The weak version says:

$$(1) \quad \forall x (Lx \rightarrow \exists y (My \wedge Ixy)),$$

whereas the strong version maintains:

$$(2) \quad \exists y (My \wedge \forall x (Lx \rightarrow Ixy))$$
<sup>54</sup>.

Bulygin is entirely right in saying that the weak version causes no problem at all for positivists, for «[n]o positivist would deny that every

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<sup>52</sup> *Ibid.*, 10.

<sup>53</sup> Alexy, *The Argument from Injustice* (n. 2, above), 75.

<sup>54</sup> Bulygin, «Alexy between Positivism and Non-Positivism» (n. 5, above), 11. I have made slight changes in the notation.

law includes some moral principles»<sup>55</sup>. His argument is, therefore, directed solely to the strong version. Here he presents two objections:

«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. Even if there were one correct morality, there certainly are 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. It is the same what such people as Kant, Hitler, Stalin, Ghandi or Bush have understood by a correct morality?»<sup>56</sup>.

These two objections show that the concept of morality used in the strong connection thesis, that is, in (2), can be understood in quite different ways. The strongest interpretation would have «*M*» understood as representing, first, the one and only correct morality conceivable, second, as a system of moral norms that provides for a single right answer to each moral question, which, third, can be established in a real discourse. This shall be expressed by «*M*<sub>1</sub>». Now it is easy to see that the thesis

(3)  $\exists y M_1 y$ <sup>57</sup>

is difficult to defend. There are many moral questions for which a single right answer cannot be established in a real discourse<sup>58</sup>. This suffices to preclude the possibility that (2), that is, the strong connection thesis,

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<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> If one wants to express that there exists exactly one morality one could also use the following formula:

(<sup>3</sup>)  $\exists x (Mx \wedge \forall y (My \rightarrow (x = y)))$ .

(<sup>3</sup>) however, is not identical with (3), for (3) says not only that there exists exactly one morality but also that this one morality provides for a single right answer to each moral question that can be established in a real discourse.

<sup>58</sup> Alexy, *A Theory of Legal Argumentation* (n. 31, above), 206-208.

is to be interpreted by means of  $M_1$ .  $M_1$  is too strong an interpretation of  $M$ .

Bulygin's second objection turns to the concept of the «idea of a correct morality»<sup>59</sup>. In order to understand what Bulygin means by the «idea of a correct morality», one has to look at the list of people he presents in connection with such an idea. His list comprises Kant, Hitler, Stalin, Ghandi, and Bush. This suggests that Bulygin simply wants to say that different people have different moral ideas. Morality ( $M$ ) in (2) would then stand for a morality that is actually or really held. Such a morality shall be represented by « $M_2$ ». Now, the thesis

$$(4) \quad \exists y M_2 y$$

is without any doubt true. But (2), that is, the strong version of the connection thesis, would be mistaken if one substituted  $M_2$  for  $M$ . There exists no actually held morality that is included in all legal systems. For this reason,  $M_2$  is too weak an interpretation of  $M$ .

The question is whether an interpretation of  $M$  is possible that is neither too strong nor too weak. It is, I think, possible. For there exists a third interpretation of  $M$ , « $M_3$ », that suffices as the basis of a defence of the strong connection thesis. This third interpretation leads to

$$(5) \quad \exists y (M_3 y).$$

$M_3$  consists of two elements. The first element is a theory of basic human rights that can be established as discursively necessary<sup>60</sup>. This is an elementary form of the one and only correct or right morality, but it does not suffice to provide for a single right answer to each and every moral question. The second element consists of the rules and forms

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<sup>59</sup> Bulygin, «Alexy between Positivism and Non-Positivism» (n. 5, above), 11 (emphasis removed).

<sup>60</sup> R. Alexy, «Discourse Theory and Human Rights», in *Ratio Juris*, 9 (1996), 209-235, at 221-233.

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of rational practical argumentation or discourse<sup>61</sup>. The first element is substantive, the second procedural. To be sure, these two elements, even taken together, by no means guarantee a single right answer in each and every case. They define, however, a regulative idea that transcends the convictions of actual persons. It is an idea necessary for all rational beings. This idea defines the ideal dimension of law. Interpreted in this way, the strong connection thesis is true.

## 6. INCLUSIVE NON-POSITIVISM

The title of Bulygin's article: «Alexy between Positivism and Non-Positivism» might give rise to the impression that there exists a third position or a third way between positivism and non-positivism. I think that this impression would be mistaken. One can only be a positivist or a non-positivist: *tertium non datur*. The decisive criterion is whether a necessary connection —of whatever kind— is assumed between legal validity or legal correctness on the one hand and moral correctness on the other<sup>62</sup>.

Bulygin maintains that my thesis «that the positivistic separation thesis is essentially correct from the observer's perspective»<sup>63</sup>.

«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»<sup>64</sup>.

This has to be rejected for three reasons. The first is that my statement about the correctness of the positivistic separation thesis from the observer's perspective does not simply say that the separation thesis is

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<sup>61</sup> Alexy, *A Theory of Legal Argumentation* (n. 31, above), 188-206.

<sup>62</sup> Alexy, «On the Concept and the Nature of Law» (n. 9, above), 285.

<sup>63</sup> Alexy, *The Argument from Injustice* (n. 2, above), 35.

<sup>64</sup> Bulygin, «Alexy between Positivism and Non-Positivism» (n. 5, above), 11.

correct. It says that it is «essentially correct». This allows for restrictions. A highly important restriction stems from the fact that «[e]very legal system lays claim to correctness»<sup>65</sup>. This, indeed, has «few practical consequences, for actually existing systems of norms regularly lay claim to correctness however feebly justified the claim may be»<sup>66</sup>. It has, however, significant systematic consequences. Specifically, it excludes, from the concept of law, those systems of norms that do not raise the claim to correctness. In this way, «it restricts the positivistic separation thesis a good bit even in the observer’s perspective»<sup>67</sup>.

The second reason for rejecting Bulygin’s thesis on the end of the debate between positivism and non-positivism is that the concept of law is by no means a concern solely of positivism. As just stated, even from the observer’s perspective a necessary connection exists; it stems from the claim to correctness. Over and above this, from the participant’s perspective normative arguments are necessarily included in the concept of law — as I have argued in the first part of this paper, where I discuss the relation between normative arguments and the concept of law. These normative arguments establish a threshold of extreme injustice, as expressed by Radbruch’s formula. This concerns —as I have attempted to show in the fourth part of this text, where I discuss the relation between construction and counter-construction— not only the application but also the identification of law. The formula does not say that «extreme injustice should not be law» but, rather, that «extreme injustice is not law».

The third reason for rejecting Bulygin’s end-of-the-debate thesis is that the claim to correctness has the effect —as elaborated in the third part of this article, where I discuss the participant’s perspective— of transforming moral defectiveness into legal defectiveness. This, too, is an issue concerning the concept of law.

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<sup>65</sup> Alexy, *The Argument from Injustice* (n. 2, above), 34.

<sup>66</sup> *Ibid.*, 35.

<sup>67</sup> *Ibid.*

To be sure, the version of non-positivism that I defend contains strong positivistic elements. It by no means substitutes correctness of content for authoritative issuance and social efficacy. On the contrary, both are necessarily included. For this reason, the version of non-positivism I wish to defend can be characterized as «inclusive non-positivism»<sup>68</sup>. But this inclusion does not mean that law is reduced to the real dimension as defined by issuance and efficacy. The ideal dimension as defined by correctness is alive, too<sup>69</sup>. Bulygin suggests that this is no more than a «metaphorical invocation»<sup>70</sup>. My reply is that the exclusion from the concept of law of those systems of norms that do not lay claim to correctness and of individual norms that are extremely unjust shows, along with the transformation of moral defectiveness into legal defectiveness by the claim to correctness, that this is not the case. This provides an answer, too, to Bulygin's final thesis «that the discrepancy looks very like a verbal one»<sup>71</sup>. The dispute between positivism and non-positivism is not a verbal issue. On the contrary, it reaches to the essence of law.

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<sup>68</sup> Alexy, «On the Concept and the Nature of Law» (n. 9, above), 287-288.

<sup>69</sup> Alexy, «The Dual Nature of Law» (n. 13, above), 173-174.

<sup>70</sup> Bulygin, «Alexy between Positivism and Non-Positivism» (n. 5, above), 12.

<sup>71</sup> *Ibid.*, 13.

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