

## The Claim to Correctness and Moral Constraints on Law: a Critic to the Separability Thesis

### A pretensão de correção e a limitação moral sobre o direito: uma crítica a tese da separação

*Alejandro Nava Tovar*

DPhil from Universidad Autónoma Metropolitana, Campus Iztapalapa (UAM-I), México, and former fellow of the Deutscher Akademischer Austauschdienst (DAAD). Professor of Legal Philosophy at Universidad Nacional Autónoma de México (UNAM) and Legal Researcher at Instituto Nacional de Ciencias Penales (INACIPE). Member of the Sistema Nacional de Investigadores (SNI 1).

E-mail: alextobarkley@gmail.com | ORCID: <https://orcid.org/0000-0002-5770-5998>

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## Abstract

This essay explains the claim to correctness and its moral constraints on law, according to Alexy's theory of law. In order to explain this, in a first section I expose the concept and normative nature of the claim to correctness in the work of Robert Alexy, while in a second section I present some replies raised both by Eugenio Bulygin and Joseph Raz to this claim. In the third section I connect this claim with the idea of moral constraints on law, and finally, in the fourth section, I expose my remarks to the claim of correctness, which aims to reduce the degree of arbitrariness and injustice in law, but only at some extent.

**Keywords:** Claim to Correctness. Morality. Law. Legal Positivism. Non-positivism. Radbruch Formula.

## Resumo

O presente artigo explica a pretensão de correção e os seus efeitos limitadores sobre o Direito, de acordo com a teoria do direito de Robert Alexy. Para apresentar isso, na primeira seção é apresentado o conceito e a natureza normativa da pretensão de correção na visão de Robert Alexy. Na segunda seção são apresentadas as respostas de Eugenio Bulygin e Joseph Raz à pretensão de correção. Na terceira seção é conectada a pretensão de correção à ideia de limitações morais para, no final, na quarta seção, ser apresentadas considerações sobre a pretensão de correção, em especial, proposta para reduzir o grau de arbitrariedade e injustiça no direito.

**Palavras-chave:** Pretensão de Correção. Moralidade. Direito. Positivismo Jurídico. Não Positivismo. Fórmula Radbruch.

## 1 Introduction

Since the publication of *A Theory of Legal Argumentation—The Theory of Rational Discourse as Theory of Legal Justification* in 1978,<sup>1</sup> the claim to correctness (*Anspruch auf Richtigkeit*) has been a keystone of Robert Alexy’s non-positivist theory of law. Even though the claim to correctness appeared for the first time in *A Theory of Legal Argumentation*—and it can also be argued that *A Theory of Constitutional Rights*, published in 1985,<sup>2</sup> presupposes this claim, in order to justify human rights and balancing—, it is in *The Argument from Injustice. A Reply to Legal Positivism* (*Begriff und Geltung des Rechts*), published in Germany in 1992,<sup>3</sup> in which this claim is presented as a linchpin of his non-positivist theory of law.

Indeed, in *A Theory of Legal Argumentation* the claim to correctness appeared for the first time, although this claim was part of the *special case thesis*, which holds that *legal discourse is a special case of a general practical discourse* (*Sonderfall des allgemeinen praktischen Diskurses*).<sup>4</sup> But, according to Alexy, the claim to correctness, while it was referred only to the legal argumentation, “was still quite embryonic”, because in this early work this claim “referred only to legal argumentation and legal decision making, and not law as such”.<sup>5</sup> As it can be seen now, the necessity of the claim to correctness was already in the previous work of Alexy,<sup>6</sup> but still underdeveloped in terms of showing the connection between the claim to correctness and the *dual nature of law thesis*, the core of its inclusive non-positivism. The fact that the claim to correctness is an argument on behalf of Alexy’s non-positivism suggests, as Martin Borowski has pointed out, “that there may well be intrinsic connections between the special case thesis and non-positivism”.<sup>7</sup>

In defending a later reply to legal positivism in its many forms—both inclusive and exclusive— Alexy will develop further the claim to correctness into a comprehensive argument on behalf of non-positivism. This development will appear in Alexy’s third work, *The Argument from Injustice*, a work which defends his non-

1 ALEXY, Robert. *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Frankfurt am Main, Suhrkamp, 1978.

2 ALEXY, Robert. *Theorie der Grundrechte*, Frankfurt am Main, Suhrkamp, 1985.

3 ALEXY, Robert. *Begriff und Geltung des Rechts*, München/Freiburg, Karl Alber, 1992.

4 ALEXY, Robert. *Theorie der juristischen Argumentation*, p. 33.

5 ALEXY, Robert. “Algunas reflexiones en torno a cómo mi pensamiento jurídico ha ido desarrollándose con el paso de los años”, in, BERNAL, Carlos (Ed.), *La doble dimensión del derecho. Autoridad y razón en la obra de Robert Alexy*, Lima, Palestra, 2011, p. 64.

6 For some criticism against the claim to correctness in the context of *A Theory of Legal Argumentation*, see, BÄCKER, Carsten, *Begründen und Entscheiden—Kritik und Rekonstruktion der Alexyschen Diskurstheorie des Rechts*, Baden, Nomos Verlagsgesellschaft, 2012, p. 217 ss.

7 BOROWSKI, Martin, “Discourse, Principles and the Problem of Law and Morality: Robert Alexy’s Three Main Works”, in, *Jurisprudence: An International Journal of Legal and Political Thought*, 2(2), 2012, p. 578.

positivist theory of law, and whose “mayor achievement is to bring clarity into the debate between positivism and non-positivism”.<sup>8</sup> Hence, I proceed to present the claim to correctness as it is developed in this work.

## 2 The Claim to Correctness: on what Law Claims

According to what was outlined in the introduction, the claim to correctness has a central role in Alexy’s non-positivist theory of law. Therefore, it seems a proper place to begin any inquiry concerning his non-positivist approach. This argument has even achieved the status of an almost legendary justification<sup>9</sup> of the objectivity of normative utterances. In answering the question about the nature of the claim to correctness, however, some issues arise, for various interpretations of the term “correctness” can be found in Alexy’s writings. As Jan-Reinard Sieckmann states, in some writings of Alexy correctness can be, in first place, interpreted in the sense of the truth of a statement or something analogous to truth in the case of a normative judgement, in second place, as discursive possibility, in third place, to indicate the use of the highest-level criterion for evaluation and, in fourth case, the use of justice to evaluate the distribution of goods.<sup>10</sup>

It is, however, in *The Argument from Injustice*, in which the claim to correctness fully develops into a genuine argument on behalf of non-positivism, and it was subsequently exposed in later articles as an argument concerning the dual nature of law. Thus, as Pierluigi Chiassoni argues, “the argument of correctness is unveiled as the cornerstone of the whole Alexyan construction, the axis of his anti and non-positivism. If this argument hesitates, then it hesitates all”.<sup>11</sup> But what is exactly what law claims in the context of *The Argument from Injustice*?

Indeed, to understand what the law claims is revealed both as a conceptual and normative problem. At this point some questions concerning Alexy’s claim to correctness arise: what does it mean to raise a claim to correctness?<sup>12</sup> is this claim an

8 KLATT, Matthias, “Robert Alexy’s Philosophy of Law as System”, in, KLATT, Matthias (Ed.), *Institutionalized Reason—The Jurisprudence of Robert Alexy*, New York, Oxford University Press, 2012, p. 10.

9 See, PAVLAKOS, George, “Correctness and Cognitivism. Remarks on Robert Alexy’s Argument from the Claim to Correctness”, in, *Ratio Juris*, Vol. 25 No. 1 March 2012, p. 16.

10 See, SIECKMANN, Jan-Reinard, “Human Rights and the Claim to Correctness in the Theory of Robert Alexy”, in, PAVLAKOS, George, *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy*, Portland, Hart Publishing, 2007, pp. 194-195.

11 CHIASSONI, Pierluigi, “Alexy y la doble naturaleza del derecho. Comentarios escépticos”, in, BERNAL, Carlos (Ed.), *La doble dimensión del derecho. Autoridad y razón en la obra de Robert Alexy*, Lima, Palestra, 2011, p. 130.

12 A proper answer to this question goes well beyond from the domain of legal philosophy and should be embedded into the domain of Jürgen Habermas and Karl Otto-Apel’s discourse ethics, which, in its original inspiration, “represented a response to the value skepticism growing out of the scientific contraction of reason to the scientific and technical domains” (see, REHG, William, *Insight and Solidarity—The Discourse Ethics of Jürgen Habermas*, California, University of California Press, 1994, p. 21).

assertion of legitimacy rather than justice?<sup>13</sup> what implies that the law raise a claim to correctness?,<sup>14</sup> how and what law claims?,<sup>15</sup> is this claim an empirical question?,<sup>16</sup> does this claim refers to the so called practical reasoning?,<sup>17</sup> is this claim reconstructed as a claim of the legal system, or is it given to any legal system that is necessarily connected with the concept of law?<sup>18</sup> or perhaps is this a misleading analogy, as law cannot make claims at all?<sup>19</sup> The proper answer to these questions implies a whole analysis not only of the claim to correctness but of the moral foundations of Alexy's legal philosophy. This kind of analysis goes far beyond of my scope, and, fortunately, it is not necessary here. It might be sufficing to say that the claim to correctness, as far as it is developed in *The Argument from Injustice* and other later articles about the dual nature of law, could provide enough arguments on behalf of the soundness of the claim to correctness, namely, that the authoritative dimension of law is bound to moral constraints, and therefore non-positivism succeeds to grasp a necessary connection between law and morality. Based on the participant's perspective, which covers the longest part of *The Argument from Injustice*, Alexy establish three arguments in order to show that the connection thesis is correct: *the argument from correctness*, *the argument from injustice* and *the argument from principles*. The argument from correctness, which is the basis of the other arguments, states that:

Individual legal norms and individual legal decisions as well as legal systems as a whole necessarily lay claim to correctness. A system of norms that neither explicitly nor implicitly makes this claim is not a legal system. In this respect, the claim to correctness has a classifying significance. Legal systems that do indeed make this claim but fail to satisfy it are legally defective legal systems. In this respect, the claim to correctness has a qualifying significance. An exclusively qualifying significance is attached to the claim to

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- 13 See, ALLAN, Trevor, "In Defence of Radbruch's Formula: Injustice, Interpretation and Invalidity", in, BOROWSKI, Martin, *et al.*, *Rechtsphilosophie und Grundrechtstheorie. Robert Alexys System*, Tübingen, Mohr Siebeck, 2017, p. 102.
- 14 See, COOKE, Maeve, "Law's Claim to Correctness", in, PAVLAKOS, George (Ed.), *Law, Rights and Discourse. The Legal Philosophy of Robert Alexy*, Portland, Oxford University Press, 2007, pp. 225-248.
- 15 See, GARDNER, John, "How Law Claims, What Law Claims", in, KLATT, Matthias (Ed.), *Institutionalized Reason. The Jurisprudence of Robert Alexy*, New York, Oxford University Press, 2012, pp. 29-44.
- 16 See, SOPER, Philip, "Law's Normative Claims", in, GEORGE, Robert (Ed.), *The Autonomy of Law. Essays on Legal Positivism*, Oxford, Clarendon Press, 1996, p. 217.
- 17 See, BONGIOVANNI, Giorgio; ROTOLO, Antonino; ROVERSI, Corrado. "The Claim to Correctness and Inferentialism: Alexy's Theory of Practical Reason Reconsidered", in, PAVLAKOS, George (Ed.), *Law, Rights and Discourse. The Legal Philosophy of Robert Alexy*, Portland, Oxford University Press, 2007, pp. 275-300.
- 18 See, NEUMANN, Ulfrid, "Notwendigkeit und Grenzen von Idealisierungen im Rechtsdenken", in, BOROWSKI, Martin, *et al.*, *Rechtsphilosophie und Grundrechtstheorie. Robert Alexys System*, Tübingen, Mohr Siebeck, 2017, p. 78.
- 19 See, MACCORMICK, Neil, "Why Law Makes no Claims", in, PAVLAKOS, George (Ed.), *Law, Rights and Discourse. The Legal Philosophy of Robert Alexy*, Portland, Hart Publishing, 2007, pp. 59-68.

correctness of individual legal norms and individual legal decisions. These are legally defective if they do not make the claim to correctness or if they fail to satisfy it.<sup>20</sup>

Alexy will make use of two examples to explain the idea of a *performative contradiction* and the normative force of this moral claim. The first example consist of the adoption of a constitutional provision, which states that “X is a sovereign, federal and unjust republic”.<sup>21</sup> In this case, the minority who oppress the majority would like to continue with his domination, but they would like also to be honest and express in this article what they think about his republic, namely, to make explicit what it is implicit. This article, Alexy argues, has a *conceptual defect*, for this article violates rules that are constitutive for speech acts. Indeed, the authoritative issuance of a legal norm necessarily implies a claim to correctness, which, in this context, has the character of being a claim of justice that gives moral validity to any type of legal norm. The second example consists of addressing the objection to the argument from correctness, by means of a judge who hands down the following decision: “[T]he accused is sentenced to life imprisonment, which is an incorrect interpretation of prevailing law”.<sup>22</sup> This sentence also has a *conceptual defect*, to wit, in every judicial decision there is a claim to correctness, in the sense that the law should be correctly interpreted and applied in every case, even if this claim has been satisfied or not. In other words, in the second example the judge commits also a performative contradiction and thereby denies the claim to correctness.

Both examples confirm that participants in a legal system necessarily lay a claim to correctness, which connects law with morality, understood as a claim of justice—a proper content and application of law—. This argument, however, is not enough for a legal positivist to accept the necessary connection between law and morality, because he could use two strategies: the first is the claim that the failure to satisfy the claim of correction does not involve the loss of legal quality, and the second consist of holding that the claim to correctness does have a trivial content that in no way leads to a conceptual connection between law and morality. These two objections will be answered respectively by means of using the argument of injustice, which focuses on situations where there is a statute that is extreme unjust, and the argument from principles, which is addressed to the everyday life of the law, both depending of the claim to correctness as a moral claim embedded into legal discourse.

Why does Alexy argue with such vehemence against legal positivism? He believes that legal positivism, represented by the *separability thesis* (*Trennungsthese*) between law and morality, is wrong, as well as the *Kelsenian thesis*, according to which “the

20 ALEXY, Robert. *The Argument from Injustice. A Reply to Legal Positivism*, Oxford, Oxford University Press, 2011, pp. 35-36.

21 ALEXY, Robert. *The Argument from Injustice*, p. 37.

22 ALEXY, Robert. *The Argument from Injustice*, p. 38.



content of the law can be anything whatsoever” (*Daher kann jeder beliebige Inhalt Recht sein*).<sup>23</sup> Instead, the *connection thesis* (*Verbindungsthese*) between law and morality is correct, as well as the *Radbruchian thesis*, according to which extreme unjust law is not law at all (*extremes ungerecht ist kein Recht*).<sup>24</sup> Therefore, inclusive non-positivism arises as a genuine reply to legal positivism. But one has to wonder what does legal positivism has to say about this form of non-positivism. In the next section I will present some criticism to the claim to correctness.

### 3 The Positivist Strike against the Claim to Correctness

*The Argument from Injustice* did not go unnoticed for legal positivism. Such positivistic authors like Eugenio Bulygin and Joseph Raz have raised interesting and sharp objections to the main tenets of Alexy’s non-positivistic views in this work. This is not the first and last time that Alexy has had a debate with Bulygin and Raz on some topics of legal philosophy,<sup>25</sup> but their objections to the claim to correctness certainly constitute the axis of the positivist frontline against non-positivism. Both Bulygin and Raz have made more criticism against Alexy’s non-positivist approach,<sup>26</sup> but in this essay I will only focus on their objections to the claim to correctness. I will start with Bulygin’s arguments against the claim to correctness and then with Raz criticism of this claim.

On the one hand, Bulygin criticism against the claim to correctness could be summarized as follows: Alexy’s arguments fail because the claim to correctness, even if could be somehow justified, it is insufficient to show a necessary conceptual connection between law and morality because it falls into a contradiction. Bulygin’s review first appeared in a tribute to Werner Krawietz entitled “Alexy and the argument of correctness”<sup>27</sup> and it led to a hard-nosed debate about their conceptions of law. Bulygin’s objections are directed towards the justifiability of the claim to correctness, the way this claim connects law and morality and its apparent contradiction. For this reason, I will rely only on Bulygin objections to this claim.

23 ALEXY, Robert. *The Argument from Injustice*, p. 3. Here, Alexy refers to both editions of Kelsen’s *Pure Theory of Law*. On this statement, see, KELSEN, Hans, *Reine Rechtslehre*. Studienausgabe der 1. Auflage 1934, Tubinga, Mohr Siebeck, 2008, p. 74; KELSEN, Hans, *Reine Rechtslehre*. Studienausgabe der 2. Auflage 1960, Tubinga, Mohr Siebeck, 2017, p. 354.

24 See, RADBRUCH, Gustav, *Gesetzliches Recht und übergesetzliches Recht*”, in, RADBRUCH, Gustav, *Rechtsphilosophie*, Heidelberg, C. F. Müller, 2003, p. 216.

25 In 2007, Marcial Pons published into spanish a book edited by Hernán Bouvier, Paula Gaido and Rodrigo Sánchez Brigido on the discussion between Raz, Bulygin and Alexy concerning if a theory of law is possible. The book’s title is *Una discusión sobre la teoría del derecho*.

26 For a more detailed account of Bulygin and Raz replies to Alexy’s non-positivism, see, NAVA, Alejandro, *La institucionalización de la razón. La filosofía del derecho de Robert Alexy*, Ciudad de México, Anthropos/UAM Iztapalapa, 2015, pp. 268-278.

27 See, BULYGIN, Eugenio, “Alexy und das Richtigkeitsargument”, in, AARNIO, Aulis, *et al., Rechtsnorm und Rechtswirklichkeit. Festschrift für Werner Krawietz zum 60 Geburtstag*, Duncker & Humblot, Berlin, 1993, p. 19-24.

According to Bulygin, there is a contradiction regarding the reach of the claim to correctness, for it depends of the type of significance, which has a different effect. In this case, if a system of norms that neither explicitly nor implicitly makes this claim is not a legal system, then the claim to correctness has a classifying significance, but if legal systems that do indeed make this claim but fail to satisfy it are legally defective legal systems, then the claim to correctness has a qualifying significance. This difference poses a contradiction because, according to Alexy this claim is a conceptually necessary feature of legal systems, but not a definitive feature of norms and legal decisions, and, hence, it is not a conceptually necessary feature of this kind of norms and legal decisions.

Bulygin doesn't believe that legal systems raise a claim to correctness, and for this reason he focus on both examples of Alexy, for Bulygin there are some problems with these examples, insofar the failure of these examples is political but not a conceptual one, namely, it is "politically inexpedient".<sup>28</sup> Hence, if the performative contradiction fails, then the claim to correctness would also fail to connect law with morality. In another article, published later in *Ratio Juris*,<sup>29</sup> Bulygin attacks the idea of a performative contradiction for considering it somewhat obscure in the context of the connection between law and morality. Bulygin doubts that every legal authority pretend that their norms are morally just and, even if they have this claim, which warranty do we have that authorities such as Genghis Khan, Felipe II of Spain, Khomeini or Pinochet raise a universal claim to correctness? Bulygin's final objection against the claim to correctness concerns the ideal dimension of law. He, Bulygin, tries to end the debate between positivism and non-positivism (the *end of the debate thesis*) by means of arguing that even unjust legal systems, namely, systems who doesn't raise this claim, still are legal systems, so why shouldn't see them as legal systems?<sup>30</sup>

On the other hand, Raz argues that Alexy's reply to legal positivism fails to refute legal theories identified as legal positivism. Raz's reply, published as "The Argument from Justice or How Not to Reply to Legal Positivism", appeared for the first time in *Law, Rights and Discourse—The Legal Philosophy of Robert Alexy*, edited by George Pavlakos,<sup>31</sup> and then in the second edition of *The Authority of Law. Essay on Law and Morality*.<sup>32</sup> In order to clarify his reply against Alexy's characterization of legal positivism, Raz divides his arguments in five parts, according to the main tenets of *The Argument from Injustice*. The third part is dedicated to the claim to correctness.

28 See, BULYGIN, Eugenio, "Alexy und das Richtigkeitsargument", p. 22.

29 See, BULYGIN, Eugenio, "Alexy's Thesis of the Necessary Connections Between Law and Morality", in, *Ratio Juris*, Vol. 13, Núm. 2, 2000, pp. 133-137.

30 BULYGIN, Eugenio, "Robert Alexy und der Begriff des Rechts", in, CLÉRICO, Laura; SIECKMANN, Jan-Reinard (Eds.), *Grundrechte, Prinzipien und Argumentation. Studien zur Rechtheorie Robert Alexys*, Baden-Baden, Nomos Verlagsgesellschaft, 2009, p. 236.

31 See, RAZ, Joseph, "The Argument from Injustice or How Not to Reply to Legal Positivism", in, PAVLAKOS, George (Ed.), *Law, Rights and Discourse. The Legal Philosophy of Robert Alexy*, Portland, Hart Publishing, 2007, pp. 17-36.

32 See, RAZ, Joseph, *The Authority of Law. Essays on Law and Morality*, Oxford, Oxford University Press, 2009, p. 313 ss.



According to Raz, the claim to correctness, explained as an instance of a still more general thesis applying to all intentional actions and their products—which explains reference to “the claim made by a speech act” in the way this utterances theory was developed by John Austin<sup>33</sup> and John Searle<sup>34</sup>—, says nothing special about the law, for even bandits are committed to the claim that what they do is appropriate, namely, that their actions are correct:

They (the bandits) may think of them as Christian actions, they may act intending to act in a Christian way (perhaps that is how Robin Hood and his band intended their actions). In that case they are claiming correctness by that standard, ie by the standard of Christianity. Their actions may not be intentional under the description “bandit actions”, and they may not be claiming correctness by those standards, if there are such.<sup>35</sup>

Raz also thinks that the claim to correctness, while a conceptual truth, is not empty, but formal in that it does not determine what standards apply, so there is nothing that can be learnt from the correctness thesis about the nature of law, insofar we should know first what is the nature of law in order to say which commitments the law makes and which other commitments law cannot trespass according to its own nature. As we can see, the claim to correctness has faced some hard criticism from legal positivists such as Bulygin and Raz. Still, critical arguments against the claim to correctness do not by themselves count as a rebuttal at all. What does Alexy has to say on behalf of the linchpin of his non-positivist theory?

## 4 Correctness and Moral Constraints

*The Argument from Injustice* aims to connect law and morality. Alexy’s alternative to legal positivism lies in the claim to correctness, which consists of three elements: (1) the assertion of correctness, (2) the guarantee of justifiability, (3) and the expectation of acceptance of correctness.<sup>36</sup> Rather, this claim is what makes law binding in a normative sense—understanding normativity as some kind of property that makes something correct or rational, in this case, law—<sup>37</sup> and, therefore, aims to impose some moral constraints on law. For this reason, Alexy answers both replies.

33 See, AUSTIN, John, *How to Do Things with Words*, Oxford, Clarendon Press, 1962.

34 See, SEARLE, John, *Speech Acts: An Essay in the Philosophy of Language*, Cambridge, Cambridge University Press, 1970.

35 RAZ, Joseph, “The Argument from Injustice or How Not to Reply to Legal Positivism”, in, PAVLAKOS, George (Ed.), *Law, Rights and Discourse. The Legal Philosophy of Robert Alexy*, Portland, Hart Publishing, 2007, p. 27.

36 ALEXY, Robert. “Law and Correctness”, in *Current Legal Problems* 51, 1998, p. 208.

37 In the current debates about the binding force of some forms of normativism in philosophy and social sciences, the normativity of the law stands out as a paradigmatic case. On this, see, TURNER, Stephen, *Explaining the Normative*, Cambridge, Polity Press, 2010, pp. 66-94.

On the one hand, Alexy replies to Bulygin's objections raised against the distinction between the classifying and qualifying significance, and to the claim to correctness and the performative contradiction. Alexy defends this distinction with the argument that raising a claim to correctness is a different matter to fulfill it. If a legal system only raises this claim but doesn't fulfill it, then, it will be a legally defective legal system. The claim here has the character of a constitutive role, hence, individual norms and decisions will establish a derivative connection with the claim to correctness raised by the legal system as a whole. As for the idea of a performative contradiction, which Bulygin finds somewhat obscure, Alexy will make use of this idea within the context of discourse ethics in order to make explicit the implicit deontological structure of law, and thus showing that the content of the law cannot be anything whatsoever.

Although this argument did not come into action in *the Argument from Injustice*, in a later article concerning the nature of legal philosophy Alexy expresses that making the very deontological structure of law explicit is one of the most important tasks in legal philosophy and, thus, in similar terms of Robert Brandom's famous expression,<sup>38</sup> "every method that make explicit what it is implicit (*das Implizit explizit zu machen*) can be applied for this goal. One of them lies in the construction of performative contradictions".<sup>39</sup> This method allows law to claim a moral content and constraints with far more reaching implications than just a moral disapproval, thus, the connection between law and morality is demonstrated. In this case, the performative contradiction makes explicit the morality embedded within legal systems, although this doesn't mean that legal systems satisfy such claim of correctness. This shows that the connection between law and morality is not contingent or possible, but a necessary connection.

On the other hand, Alexy replies to Raz objections erected against the moral content and reach of the claim to correctness. Alexy argues that only if the claim to correctness has a moral universal scope then it can derive moral validity. Raz is right when he argues that bandits are indeed committed to the claim that what they do is appropriate for them, for they act intentionally to obtain some specific goals. But *acting appropriate for some specific goals* is different to *act according to correctness, that is, act according to universal moral standards*. For Alexy, the claim to correctness is connected to moral objectivity, and the claim to appropriateness (*Anspruch auf Angemessenheit*) is not necessary connected to this kind of claim, for moral objectivity cannot justify every intentional action for a participant's perspective. Even in a dictatorship the leader cannot claim that he wants to oppress the political opposition by means of law. Contrariwise, he will not be able to convince the people about what lies implicit in his goals. This shows that not every claim could be approved according to some universal

38 See, BRANDOM, Robert, *Making it Explicit: Reasoning, Representing and Discursive Commitment*, Oxford, Harvard University Press, 1998.

39 ALEXY, Robert. "Die Natur der Rechtsphilosophie", in, BRUGGER, Winfried, et al., *Rechtsphilosophie im 21. Jahrhundert*, Frankfurt am Main, Suhrkamp, 2008, p. 22.

moral standards, substantiated by different kinds of normative rules and principles, like the ones proposed by discourse ethics. In this case, the performative contradiction has the task of creating moral constraints within legal systems.

If these arguments are sound, then the claim to correctness has the property of showing the foundation of some moral constraints of law, turning moral defectiveness into legal defectiveness, for moral correctness affects legal validity when these moral constraints are not posited in legal systems. But also the claim to correctness serves as the keystone to understand the ideal dimension of law. Therefore, the claim to correctness could also justify the connection between law and morality. Moral defectiveness turns to be not only a moral judgment anymore, but a very legal defectiveness. Until now I have exposed both arguments from Bulygin and Raz and Alexy concerning the claim to correctness. But now I will expose my reflections concerning the claim to correctness, remarks that seek to enrich the debate.

## 5 Some Reflections on the Limits of the Claim to Correctness

With the passage of time it is more difficult to deny that law raises some kind of claims. Of course, elucidating the concept and nature of these claims is a task concerning the moral point of view imbedded in law. Rather, elucidating the concept and nature of these claims has become another way of expressing up to what point law and morality met, and up to what point law and morality diverge. The claim to correctness, understood as the endeavor to apprehend the normativity of social and legal institutions, is nothing new. The foundation of universal moral standards were at the very beginning of reflections concerning moral, political and legal philosophy. According to Cornelius Castoriadis, the greek polis was aware of this claim, although its form and scope were different. For example, the polis recognized that the collectivity itself was the source of its institutions, that's why Athenians's laws always began with a famous preamble which contained a claim to correctness. The preamble states the following expression:

*edoxe tē boulē kai tō demō*<sup>40</sup> (it seemed right to the boule and to the demos).<sup>41</sup>

40 From the greek expression, *εδοξε τε βουλε και το δεμο*"

41 "In the ancient world, it was recognized that is the collectivity itself that is the source of the institution, at least of the political institution properly speaking. The laws of the Athenians always began with the famous preamble: *edoxe tē boulē kai tō demō*, it appeared (it seemed) good to the council and to the people, that [...] the collective source of the law is made explicit". CASTORIADIS, Cornelius, "The Greek and the modern Political imaginary", in, *World in Fragments. Writings on Politics, Society, Psychoanalysis and Imagination*. Edited and Translated by David Ames Curtis, California, Stanford University Press, 1997. p. 92.

It appeared right to the council and to the people, but it is not right, to wit, it appeared *to be* correct as a claim, but it *is* not correct. This old normative claim, however, shows that the claim to correctness is something necessarily embedded in any moral, political and legal discourse, for every authority needs to be seen as legitimate before the eyes of its audience, even if their real intentions are illegitimate and unjust.

Nevertheless, I would like to lay out an argument regarding the claim to correctness. Perhaps a practical problem with the claim to correctness is that it has proved to be essentially correct: the connection between law and morality — what Alexy understands as “morality” — can be substantiated through the claim to correctness, the keystone of his non-positivist theory of law. The question is whether there are any reasons to believe that the claim to correctness prevents to use law as an instrument of cruelty or extreme injustice. Alexy is right to maintain that even a dictatorship cannot make explicit what lies implicit, but the core of my question is the possibility of still inflicting severe injustice in the name of moral claims.

The claim to correctness, while is necessarily bound to a claim to justifiability,<sup>42</sup> is not enough to guarantee that bad judges and governors can be halted in their tracks, that is, this claim cannot prevent daily abuses of law, nor that all abusers will repent of what they do, for the wrongfulness of abuses of power could be justified from a personal, although immoral, point of view. There are some cases in which the dividing line between severe and extreme injustice could be seen as not so “self-evident” as Alexy believes, and by this incorrect norms and legal decisions could find a justification under the tapestry of correctness. What is more, one can say with confidence that even unjust legal systems could make use of the claim to correctness to morally justify corrupted law, for we will look in vain if we try to find for explicit utterances of power and domination, like the ones presented by Alexy.<sup>43</sup> The pervasiveness of disagreement about what is ought to be understood as morally justified in some cases provide reasons to doubt about the reach of this moral claim, which seeks to turn moral defectiveness into legal defectiveness. But even if the claim to correctness is never enough to guarantee that immoral legal systems can be institutionalized and maintained through the very force of law, it is possible to give a reasonable weight to the arguments on behalf of the claim to correctness and, therefore, to create moral constraints on law.

42 GAIDO, Paula, “The Place for Morality in Law. An Exchange between Robert Alexy and Joseph Raz”, in, BOROWSKI, Martin, *et al.*, *Rechtsphilosophie und Grundrechtstheorie. Robert Alexys System*, Tübingen, Mohr Siebeck, 2017, p. 137.

43 I hasten to add that the scope of Alexy’s examples have the task of showing that not any content can be law, not so show if absurd norms have ever existed. In fact, these examples made by Alexy could be considered as a kind of philosophical mental experiments, since they bring together the three elements of these types of mental experiments: (1) an introduction around a philosophical problem (*Einleitung durch philosophische Fragestellung*), (2) a counterfactual scenario (*Kontrafaktisches Szenario*) (3) and the evaluation of the scenario related to this problem (*Auswertung des Szenarios in Bezug auf die Fragestellung*). For a detailed typology of philosophical experiments, see, Bertram, Georg (ed), *Philosophische Gedankenexperimente. Eine Lese- und Studienbuch*, Stuttgart, Reclam, 2012, pp. 17-22.

As long as unjust governments can make use of legal systems as a means to an illegitimate end, they will claim that what they are doing is correct. They will pretend to act correctly, unless they want to be honest, under the penalty to lose legitimacy and contradict the very idea of what the nature of law aims at, or, in other words, they will never make explicit what lies implicit in their actions. At some point, his actions will require from some sort of moral claim to strengthen their goals, and for this goal they will require a moral support to their legal provisions and decisions. Thus, this argument reinforces the idea of the necessity of raising a claim to correctness, regardless of an author's true intentions.

Whether one agrees or not with the uses of the claim to correctness from a strategically point of view, this claim has proved to be an essential element for Alexy's non-positivism. After *The Argument from Injustice*, the *dual nature of law thesis* came into scene as the "new banner under which Alexy presents his theory of law".<sup>44</sup> This idea has been present in later articles of Alexy,<sup>45</sup> and has a central role in determining the ideal or critical dimension of law, as a part of one of its essential properties, alongside social efficacy (*soziale Wirksamkeit*) and authoritative issuance (*ordnungsgemäße Gesetztheit*), represented by the real dimension of law. However, it is still possible that severe injustice could be applied in the name of moral correctness. I shall develop this argument.

If the argument concerning the connection between law and morality is correct, then moral correctness can achieve the foundation of some minimum universal moral standards within the limits of reason. Even if the claim to correctness were relativized or culturally nuanced, it would still stand. By virtue of this claim a necessary connection between law and morality arises, and it is not possible to deny it easily, as some hard-nosed positivists believe. In fact, as Julian Nida-Rümelin argues, "whoever argues for or against the development of concrete criteria of political justice, implicitly implies that a rational discourse on these questions is possible".<sup>46</sup> In other words, it is not possible to affirm that someone's moral, political or legal position is right or wrong without taking into account necessarily some moral criteria or constraints that sustain one's position. However, as I have warned before, the persistent issue with the claim to

44 See, SIECKMANN, Jan-Reinard, "La tesis de la naturaleza dual en la teoría del derecho de Robert Alexy", in BERNAL, Carlos (Ed.), *La doble dimensión del derecho. Autoridad y razón en la obra de Robert Alexy*, Lima, Palestra, 2011, p. 89. On some criticism on this "dual" or "double" nature of law, see, SIECKMANN, Jan-Reinard, *La teoría del derecho de Robert Alexy. Análisis y crítica*, Bogotá, Universidad Externado de Colombia, 2014, pp. 106-128.

45 See, for example, ALEXY, Robert. "The Nature of the Arguments about the Nature of Law", in, MEYER, Lukas, *et al.*, *Rights, Culture and the Law. Themes from the Legal and Political Philosophy of Joseph Raz*, Cambridge, Oxford University Press, 2003; ALEXY, Robert. "On the Concept and Nature of Law", *Ratio Juris*, Vol. 21, No. 3, 2008; ALEXY, Robert. "Die Natur der Rechtsphilosophie", in, BRUGGER, Winfried, Neumann, Ulfrid and Kirste, Stephan, *Rechtsphilosophie im 21 Jahrhundert*, Frankfurt am Main, Suhrkamp, 2008.

46 NIDA-RÜMELIN, Julian, "Politische Ethik I", en, NIDA-RÜMELIN, Julian (ed), *Angewandte Ethik. Die Bereichsethiken und ihre theoretische Fundierung*, Stuttgart, Alfred Kröner Verlag, 1996, p. 140.



correctness is that serious injustices can still be carried out in the name of the noblest ideals. In fact, no dictator has ever said that he commits crimes in the name of pure evil; rather, he will appeal to justice.

Perhaps it is in some cases in which extreme injustice appears to be not self-evident, where substantive constraints are required to make a clearer distinction between different grades of injustice. Drawing on this, disagreement concerning the moral threshold of law should be analyzed through the use of *rational argumentation* in order to *refine the arguments* given within the boundaries of practical reasoning—for “rational disagreement” in law turns to be a possibility in many cases—,<sup>47</sup> but this claim should also be necessarily connected with *human and constitutional rights* in order to *constraint substantive content* of law, for they could provide for a moral foundation to determine whether an injustice surpass some moral threshold, and here the *Radbruch formula* might come into action, for this formula is connected to morality and human rights.<sup>48</sup> With this, the claim to correctness connects law and morality with rational standards of argumentation, human and constitutional rights, and finally with justice and legal certainty. By doing this, non-positivism could succeed in making sense of some moral constraints.

## 6 Concluding Remarks

The relation between law and morality has been addressed in many forms, either to affirm it or to deny it. Whether one agrees with Alexy’s characterization of the connection thesis and the separability thesis into the modern debate of positivism and non-positivism—for one can argue that there could be some cases in which law and morality are *ought* to be separated for normative reasons—,<sup>49</sup> the claim to correctness, just as it is developed by Alexy in *The Argument from injustice*, and later articles concerning the dual nature of law, is thus presented as nothing other than the endeavor to apprehend and portray the law as something than can be rational, by means of showing that law cannot be anything whatsoever, for the concept of law turns out to be a typical case of a *thick concept* that is both action-guiding and world-guided.<sup>50</sup> Thus, the claim to correctness represents a relentless reply to legal positivism

47 On the problem concerning how law and politics can claim legitimate authority over citizens in the light of reasonable disagreement about such basic matters as justice and democracy, see, Waldron, Jeremy, *Law and Disagreement*, Oxford, Clarendon Press, 1999.

48 See, ALEXY, Robert. “Law, Morality, and the Existence of Human Rights”. *Ratio Juris*, v. 25, n. 1, 2012. p. 2-14.

49 I think, for example, in cases in which law and morality are ought to be separated for very *moral reasons*, such as the *Hart-Devlin debate*, a debate that influenced Günther Patzig’s arguments concerning the distinction between law and morality. On this, see, PATZIG, Günther. *Ethik ohne Metaphysik*, Göttingen, Vandenhoeck-Reihe, 1983, pp. 7 ss.

50 According to Bernard Williams, there are concepts in which evaluation and description are connected, and the concept of law, I believe, is certainly one of them, insofar is action-guiding and world-guided. See, for example, WILLIAMS, Bernard. *Ethics and the Limits of Philosophy*, Cambridge, Harvard University Press, 1985, chapter 8.



and its respective forms of moral relativism and skepticism. It is correct that the claim to correctness does not guarantee righteous legal systems or appropriate moral content of law, but it can reduce the degree of arbitrary or even criminal content on it. This is why the claim to correctness, *qua* moral correctness, matters so much in contemporary legal philosophy, for not every argument and conviction is valid, not any content of law is correct, and not any concept of law serves to put the proper place of morality in law by making explicit the implicit connection between law and morality.

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