On the Concept and the Nature of Law

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Abstract. The central argument of this article turns on the dual-nature thesis. This thesis sets out the claim that law necessarily comprises both a real or factual dimension and an ideal or critical dimension. The dual-nature thesis is incompatible with both exclusive legal positivism and inclusive legal positivism. It is also incompatible with variants of non-positivism according to which legal validity is lost in all cases of moral defect or demerit (exclusive legal non-positivism) or, alternatively, is affected in no way at all by moral defects or demerits (super-inclusive legal non-positivism). The dual nature of law is expressed, on the one hand, by the Radbruch formula, which says that extreme injustice is not law, and, on the other, by the correctness argument, which says that law’s claim to correctness necessarily includes a claim to moral correctness. Thus, what the law is depends not only on social facts, but also on what the law ought to be.

The debate over the concept and the nature of law is both venerable and lively. Reaching back more than two millennia, it has acquired in our own day a degree of sophistication hitherto unknown.

I. The Practical and Theoretical Significance of the Debate

There are practical as well as theoretical reasons for the persistence and vivacity of the issue, and these two features are closely connected. To define the concept of law or to determine its nature is to say what law is. Every jurist in every legal system has a more or less clear idea about what law is; were it otherwise, the jurist would not be able to identify what the law requires in a given legal system. In the ordinary run of cases, no problems arise. To engage in reasoning about the concept or the nature of

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law would be out of place. Things are different, however, in extraordinary cases.

1. Statutory Injustice and the Radbruch Formula

Historically, the single most spectacular class of extraordinary cases concerns statutory injustice. One example is 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 of all their property (see Alexy 1999, 18–9). The Eleventh Ordinance had been duly issued and was socially efficacious. According to the positivistic concept of law, which defines law exclusively by appeal to authoritative issuance and social efficacy (Alexy 2002, 3, 14–9), that is, as a social fact (Raz 1979, 41, 47), the Eleventh Ordinance had, indeed, served to deprive all emigrant German Jews of their citizenship and property.

By contrast, the German Federal Supreme Court¹ as well as the Federal Constitutional Court² have pursued a non-positivistic line. The jurisprudential core of their reasoning is found in Gustav Radbruch’s formula. Here only the first part³ of the formula is of interest. It says that

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\text{[t]he positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as “flawed law,” must yield to justice. (Radbruch 2006, 7)}
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Perhaps the most important feature of the Radbruch formula as an expression of a non-positivistic concept of law is that it does not require any sort of complete fit as between law and morality. That is, appropriately issued and socially efficacious norms may well be valid law even where they prove to be severely unjust. It is only when the threshold of intolerable injustice is crossed that appropriately issued and socially efficacious norms lose their legal validity. In this way, the non-positivistic concept of law builds into law an outermost limit.

Along with the term “intolerable” (unerträglich), Radbruch uses the expression “horrible” (horrend) (Radbruch 1990, 154) in order to designate the borderline. The term “extreme” seems, however, to be more suitable than either “intolerable” or “horrible” where expressing the idea of a threshold located at the upper end of a scale is concerned. The shortest conceivable form of the Radbruch formula would then run as follows:

Extreme injustice is not law.

¹ BGHZ (Decisions of the Federal Supreme Court in Civil Matters), vol. 16 (1955), 350, 353f.
² BVerfGE (Decisions of the Constitutional Court of the Federal Republic of Germany), vol. 23 (1968), 98, 106.
³ On the second part see Alexy 1999, 15–6.
Anyone who endorses this formula has not only accepted non-positivism as a theoretical view, but is also advocating a substantive legal thesis with direct practical consequences.

2. Law’s Open Texture and the Self-Understanding of Jurists

Nowhere is the practical impact of questions about the concept and the nature of law more obvious than in cases of extreme statutory injustice found in a rogue regime. The debate between legal positivism and legal non-positivism has, however, practical consequences not only in spectacular cases, but also in the everyday life of law. The everyday life of law is full of hard cases that cannot be decided simply on the basis of what has been authoritatively issued. *Contra legem* decisions are the most conspicuous examples, but jurists also have to have recourse to non-authoritative reasons in cases of gaps, in cases of conflicts between norms that can only be solved by weighing or balancing, and—the most frequent and least spectacular constellation—in cases of vagueness of the language of law or indeterminacy of the intentions of the law-maker. If legal decisions are to be based on reasons, then where authoritative reasons run out, the reasons for legal decisions will have to include non-authoritative reasons. Among these non-authoritative reasons the most important class consists of reasons referring to justice. Questions of justice are, however, moral questions. This implies that the open texture of law (see Hart 1994, 128) renders a non-arbitrary, justified application of law without moral reasoning impossible.

Now there exists a broad consensus between positivists and non-positivists to the effect that moral arguments are indispensable to legal reasoning or argumentation (Raz 1993, 7–9). The point of disagreement lies in how this is to be interpreted. According to non-positivism the moral arguments that are indispensable for a well-grounded answer to a legal question are necessarily incorporated into the law. Positivism in its weaker version, known as inclusive positivism, rejects the idea that this incorporation is necessary. And, going beyond this, the stronger version of positivism, known as exclusive positivism, maintains that such an incorporation is necessarily excluded, for—so the argument goes—moral reasons *qua* moral reasons are necessarily non-authoritative reasons, and law comprises only authoritative reasons.

This debate is, first and foremost, a debate about the self-understanding of jurists. If law and morality are separated, as positivism insists they must be, then jurists have to distinguish between two points of view in applying the law: the legal point of view and the moral point of view. On the basis of this distinction, moral wickedness has as such no influence on the legal merits of the decision. If, however, law and morality are necessarily connected, then moral wickedness does have an effect on law. Given this
condition, morally wicked decisions cannot be legally perfect in all respects. This difference in self-understanding has, unlike the Radbruch formula, no direct effects on the content of the decisions made. But one may assume that legal decision-making is influenced by the self-understanding of those who decide. In this sense, the difference in self-understanding has indirect consequences. These indirect consequences of the self-understanding of jurists are an essential part of the practical impact of the debate about the concept and nature of law.

3. The Concept of Law as a Concept of a Non-Natural Kind

If the debate about the concept and the nature of law were only of practical significance, it would simply be one more dispute in law, to be sure, a most abstract dispute, but it would not have any special character. It has, however, a special character, and this is due to its theoretical significance. The debate over the concept and the nature of law is a debate over necessary truths about the law. The truth of the controversial claims in question turns in no way on this or that aspect of the historical development of the legal system. That it does not is a reflection of the status of the issue, namely, as one part of a genuinely philosophical debate. The fact that this philosophical debate has practical consequences, that is, consequences for the law of the land, underscores the fact that law and philosophy are necessarily connected (see Alexy 2007a, 166–9).

What has been said thus far, however, will not suffice for one who wishes to understand what is truly at stake in the debate over the concept and the nature of law. The debate is not only philosophical in character but has, as well, a more specific philosophical interest.

The concept of law refers to an entity that connects the real and the ideal in a necessary way. Notwithstanding its anchorage in the real world, law cannot be reduced to a concept referring to a natural kind or object—such as the concepts of water, black holes, or killing. The concept of law is a paradigm concept of a non-natural kind that is intrinsically related to natural kinds. The analysis of such a concept would be of interest for reasons philosophical in nature even if the analysis had no practical legal consequences—which, however, it indeed has.

II. Positivism and Non-Positivism

1. Separation Thesis and Connection Thesis

The controversy between positivism and non-positivism is a dispute about the relationship between law and morality. All positivists defend the separation thesis. In its most general form, the thesis says that there is no necessary connection between the law as it is and the law as it ought to be.
In a more precise version, it states that there is no necessary connection between legal validity or legal correctness on the one hand, and moral merits and demerits or moral correctness and incorrectness on the other. By contrast, all non-positivists defend the connection thesis, which says that there is a necessary connection between legal validity or legal correctness on the one hand, and moral merits and demerits or moral correctness and incorrectness on the other.

2. Exclusive and Inclusive Positivism

Both the separation thesis and the connection thesis lend themselves to a variety of different interpretations. In order to make clear what is at issue in the dispute between positivism and non-positivism, it is well to take a look at the basic positions. The competing positions in our never-ending debate can only be fully understood by way of their opposites.

Within positivism, the distinction between exclusive and inclusive positivism is the most important division where the relation between law and morality is concerned. Exclusive positivism, as advocated most prominently by Joseph Raz, maintains that morality is necessarily excluded from the concept of law (Raz 1979, 47). Exclusive positivism stands in a relation of contrariety to non-positivism, which claims that morality is necessarily included in the concept of law, that is to say, necessarily not excluded there-from. Inclusive positivism, as defended, for instance, by Jules Coleman, counts as the rejection of both exclusive positivism and non-positivism. It says that morality is neither necessarily excluded nor

4 The separation thesis is sometimes expressed by means of the simple phrase: “There is no necessary connection between law and morality.” If this is interpreted as shorthand for the more precise version: “There is no necessary connection between legal validity or legal correctness on the one hand, and moral merits and demerits or moral correctness and incorrectness on the other,” this creates no problems. It is, however, possible to interpret the first phrase in such a way that its negation, that is: “There are necessary connections between law and morality,” is compatible with positivism. Raz has done so by referring the concept of a necessary connection to relations between law and morality that have, as such, nothing to do with the moral merits of law or its moral correctness. One of his examples runs as follows: “Given value pluralism, necessarily no state or legal system can manifest” to the highest degree “all the virtues or all the vices there are” (Raz 2003, 3). If value pluralism is, as Raz proposes, “[d]efined as the existence of a plurality of values which cannot be instantiated in the life of any single human being” (ibid.), than it is, indeed, necessarily true that no legal system can realize or help to realize to the highest degree all competing moral values. This necessity, however, is a logical necessity concerning the relation between legal systems and competing moral values. It has no direct bearing on the problem of positivism, for it has, as such, nothing to do with the relation between legal validity or legal correctness on the one hand, and moral merits or moral correctness on the other. In order to bear on this relation, a premise such as “All values have to be treated equally by law” would have to be added. If such a premise, or its negation, were necessarily connected with law, Raz’s example would become relevant to the problem of positivism. But this is not what he maintains. Something similar is true of Raz’s other examples of necessary relations between law and morality (see Alexy 2005, 739–40).
necessarily included. The inclusion is declared to be a contingent or conventional matter (Coleman 1996, 316) turning on what the positive law in fact says. Non-positivism, in arguing not only that morality is not necessarily excluded, but also that it is necessarily included, is contrary to both forms of positivism.

3. Exclusive, Inclusive, and Super-Inclusive Non-Positivism

Recently the division between exclusive and inclusive positivism has attracted a great deal of attention. This has not been the case, however, where divisions within non-positivism are concerned. Still, the differences within non-positivism are no less important for the debate over the concept and the nature of law than the differences within positivism.

5 The difference between inclusive and exclusive positivism allows for a further distinction, that between a separability thesis and a separation thesis. Inclusive positivism argues only for separability, whereas exclusive positivism insists on separation. For reasons of simplification, however, no use will be made of this distinction. The separation thesis as defined above relates, strictly speaking, to separability, because it does not say that there are necessarily no connections, but only that there are no necessary connections. Separation, however, implies separability. To reject separability is, therefore, to reject separation. This allows for the simpler terminology used here.

6 It might be noted, in passing, that about half a century earlier, Hans Kelsen had already introduced the main thesis of what is now termed “inclusive positivism”: “In applying a statute, there may well be room for cognitive activity beyond discovering the frame within which the act of application is to be confined; this is not cognition of the positive law, however, but cognition of other norms, which can now make their way into the law-creating process, the norms, namely, of morality, of justice—social value-judgements customarily characterized with the catch-phrases ‘welfare of the people,’ ‘public interest,’ ‘progress,’ and so on. From the standpoint of the positive law, nothing can be said about their validity and whether or not they can be identified. From this vantage-point, all such determinations can only be characterized negatively: They are determinations that do not stem from the positive law itself. In relation to the positive law, the legal act is free of such constraints, that is, the authority called upon to act is free to do so according to his own discretion unless the positive law itself authorizes some metalegal norm such as morality, justice, and so on. This norm, however, would be transformed thereby into a norm of the positive law” (Kelsen 1992, 83).

7 One may well ask for a more precise determination of the role played by contradiction, on the one hand, and by contrariety, on the other, in the relationship between and among exclusive positivism, inclusive positivism, and non-positivism. The answer is straightforward. “I” shall represent “Law includes morality.” Then, pre-facing “I” with the necessity operator “□” yields “□I.” “□I” expresses non-positivism, namely: “It is necessary that law include morality.” By contrast, exclusive positivism says: “It is necessary that law not include morality,” that is: “□¬I.” “□I” and “□¬I” stand in a relationship of contrariety, for the one excludes the other without stemming from its negation. Inclusive positivism is the conjunction of the negation of both exclusive positivism and non-positivism, namely: “¬□I & ¬□¬I,” which says: “It is neither necessary that law not include morality nor necessary that law include morality.” Each of the members of this conjunction stands in a relationship of contradiction to a position not prefixed by negation, that is, in a relationship of contradiction either to exclusive positivism (□¬I) or to non-positivism (□I). The conjunction as a whole, that is, inclusive positivism, stands to both non-positivism and exclusive positivism in a relationship of contrariety. Each of the three excludes the others without stemming from the negation of any of the others. Thus, the conjunction of the subcontraries reflects a triad, which for its part is understood in terms of contrariety.
The differences within non-positivism that are relevant here stem from different effects on legal validity that are attributable to moral defects. Non-positivism can determine the effect on legal validity that stems from moral defects or demerits in three different ways. It might be the case that legal validity is lost in all cases, or it might be the case that legal validity is lost in some cases and not in others, or, finally, it might be the case that legal validity is affected in no way at all.

The first position, according to which every moral defect yields legal invalidity, is the most radical version of non-positivism, and it is only rarely found in the literature. This position might be characterized as “exclusive non-positivism” in order to express the idea that each moral defect is considered as excluding social facts from the sources of legal validity (Alexy 2006, 173). An example of exclusive non-positivism is the position defended by Deryck Beyleveld and Roger Brownsword. According to their position

[I]mmoral rules are not legally valid. (Beyleveld and Brownsword 2001, 76)

This seems, on first glance, to be rather curious. It looks as if morality completely ruled the law. But this, due to “the inherently controversial nature of moral issues” (Beyleveld and Brownsword 1994, 369), would amount to anarchism. Beyleveld and Brownsword are, however, well aware of the problem, and they develop a complex theory to delimit what appear to be the pervasive effects of the conflict between law and morality on legal validity (ibid.). This seems, however, to be a paradigmatic case of an auxiliary construction that serves, at best, to treat the consequences of a mistake instead of curing the disease as such (Alexy 2006, 171). The disease as such consists in overlooking the dual nature of law. Law comprises a factual as well as an ideal dimension. This precludes any effort to ground the impact of the factual or authoritative dimension on merely auxiliary considerations. The factual dimension, defined by authoritative issuance and social efficacy, like the ideal dimension, defined by moral correctness, belongs to law from the beginning.

The second version of non-positivism, which might be termed “inclusive non-positivism,” claims that exclusive non-positivism as represented by Beyleveld and Brownsword expresses an unjustified bias toward the ideal dimension of law. Therefore, exclusive non-positivism may be reproached for overidealization. This mistake can be avoided by means of the Radbruch formula, which claims neither that moral defects always undermine legal validity nor that they never do so. Moral defects undermine legal validity if and only if the threshold of extreme injustice is transgressed.

8 For a related approach, which however uses the expressions “exclusive” and “inclusive natural law” in a different way, see La Torre 2006, 200, 207.
Beneath this threshold the effects of moral defects are confined to legal defectiveness. This is the version of non-positivism that will be defended here.

Accepting the Radbruch formula is to adhere to a version of inclusive non-positivism which maintains that legal validity is lost in some cases of moral defects or demerits and not in others. There remains, as mentioned, a third version of non-positivism. It maintains that legal validity is in no way at all affected by moral defects or moral incorrectness. On first glance, this version of inclusive non-positivism looks even more curious than exclusive non-positivism. Is it really possible to remain a non-positivist in claiming that legal validity is in no way affected by moral defects? Does one not thereby revert inevitably and unavoidably to positivism? A glance at Kant’s theory of law might help us in answering this question, a question that appears to be of some significance for the understanding of the nature of non-positivism. Kant begins with claims that are profoundly non-positivistic in character. Especially important are his assumptions to the effect that there exists an “innate right” to freedom (Kant 1996c, 393) and that there exists a right, based on nothing other than pure reason, to acquire property (ibid., 406), both resting “only on a priori principles” (ibid., 393), that is, existing independently of any positive law. Kant’s second step leads from non-positive or “natural law” (ibid., trans. altered) to positive law. Kant argues that without a transformation into positive law, these non-positive or natural rights would remain completely without effect. For this reason, everyone has the obligation, established a priori by practical reason, to subject himself to positive legislation and the positive administration of law:

Before a public lawful condition is established individual human beings, peoples and states can never be secure against violence from one another, since each has its own right to do what seems right and good to it and not to be dependent upon another’s opinion about this. So, unless it wants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined by law and is allotted to it by adequate power (not its own but an external power). (Ibid., 456)

The crucial point of Kant’s argument is that the transition from non-positive law to positive law is as radical a step as one can conceive. Once a positive legal system is established, every form of resistance or disobedience by appeal to non-positive or natural rights is prohibited—and, Kant

9 Another example might well be the interpretation of Aquinas’s concept of “law in a secondary sense” as found in Finnis 1980, 364–6.
adds, “this prohibition is unconditional” (Kant 1996b, 298). The prohibition applies even in cases in which the legislator “has empowered the government to proceed quite violently (tyrannically)” (ibid.).

If one were to follow Jeremy Waldron here, one would have to “leave Kant in the classic, but honest, predicament of the true legal positivist” (Waldron 1996, 1566). But is this true? The basis of Kant’s argument in favour of the strict authority of positive law is the “idea of a political constitution as such” (Kant 1996c, 505, trans. altered), without which “establishing public law” (ibid., 506, trans. altered), that is, assuring the efficacy of rights, would be impossible. This idea—as with, according to Kant, ideas in general—demands “the greatest perfection possible” (Kant 1996a, 364). A “perfect legal constitution” (Kant 1996c, 505, trans. altered), however, would require not only perfect positive authority, but also a perfect realization of the non-positive rights: It would demand that a society be established “in which freedom under external laws to the greatest possible extent is combined with irresistible force” (Kant 1991, 45, trans. altered). The concept of idea makes it possible for Kant to connect the complete or “[u]nconditional submission” (Kant 1996c, 506) under positive law with a necessary subjugation of positive law to non-positive law. Law as idea is necessarily a part of the concept of law just as law as fact is. Thus, where positive law fails to meet the demands of law qua idea, this has the effect of rendering positive law not only morally defective, but also legally defective. When Kant talks about a “perfect legal constitution” or about “grave defects and gross faults” (ibid., 505, trans. altered) of a constitution, he has precisely this in mind. A theory of law, however, that not only bases the validity of positive law on principles that are non-positivistic in character—as normative positivism does—but, over and above this, also makes positive law’s quality of being legally defective necessarily dependent on non-positivistic principles, is a non-positivistic theory of law. To be sure, the fact remains that each and every norm, if only authoritatively issued and socially efficacious, has to be classified by this version of non-positivism as a legally valid norm. That is, every norm based on social facts is a legally valid norm. The connection between law and morality is, therefore, not a classifying one, but only an ideal or qualifying one (see Alexy 2002, 26). This, however, suffices to establish a necessary connection between law and morality, a connection that cannot be reconciled with the positivistic separation thesis. For this reason, it seems to be preferable to conceive of theories such as that of Kant’s not as positivistic theories, as Waldron proposes, but as non-positivistic theories. Without any doubt,

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10 Kant uses both the concept of a “perfect legal constitution” (Kant 1996c, 505, trans. altered) and the concept of a “perfectly just civil constitution” (Kant 1991, 46). These two concepts are connected by the fact that, according to Kant, a constitution that is not perfectly just is not a perfect legal constitution.

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such theories count as fairly extreme versions of non-positivism. They represent the highest degree conceivable of the inclusiveness of non-positivism. For that reason this version of non-positivism might be termed “super-inclusive non-positivism.” Owing to its radical character, super-inclusive non-positivism is exposed to objections quite similar to those raised against exclusive non-positivism. Whereas exclusive non-positivism expresses an unjustified bias toward the ideal dimension of law, super-inclusive non-positivism expresses a doubtful bias in favour of law’s real or factual dimension. The reproach of overidealization that has been put forward against exclusive non-positivism has its counterpart in the reproach of paying too little heed to the ideal dimension of law that must be raised against super-inclusive non-positivism.

III. Concept and Nature

The debate within non-positivism as well as the debate between non-positivism and the different forms of positivism is a debate over the concept and the nature of law. The question of how to resolve such a debate depends on what the concept and the nature of a thing is. These questions lead one to the very heart of philosophy. Only certain aspects can be taken up here.

1. Nature

Enquiring into the nature of something is to enquire into its necessary properties. Thus, for the question “What is the nature of law?” one may substitute the question “What are the necessary properties of law?” Necessary properties that are specific to the law are essential properties of law (Alexy 2004, 163). Essential or necessary properties of law are those properties without which law would not be law. They must be there, quite apart from space and time, wherever and whenever law exists. Thus, necessary or essential properties are at the same time universal characteristics of law. Legal philosophy qua enquiry into the nature of law is, therefore, an enterprise universalistic in nature.

To be sure, the question as to whether there exist necessary properties of law, properties that define its nature, can be contested and has often been contested. Here the thesis will be defended that law necessarily comprises a real or factual and an ideal or critical dimension. This might be termed the dual-nature thesis. A central element of the real dimension of law is coercion or force. A central element of its ideal dimension is a claim to correctness, which includes a claim to moral correctness and which, if violated, implies legal defectiveness in normal cases and legal invalidity in extreme cases. With an eye to establishing that both coercion and the claim to correctness are necessary or essential properties of law, appeals to
intuitions are of no help at all. Talk about the nature of law makes sense only if arguments are at hand. In this way, the question of the nature of law leads directly to the question of arguments about the nature of law.

2. Concept

At exactly this point a bridge can be constructed between the nature and the concept of law, for arguments about the nature of law stand in a close relation to arguments about the concept of law. Close relations, however, do not exclude differences. According to Joseph Raz, the difference between concept and nature is fundamental. The concept of law is said to be parochial, whereas the nature of law is universal:

While the concept of law is parochial, that is, not all societies have it, our inquiry is universal in that it explores the nature of law wherever it is to be found. (Raz 2005, 332)

The “parochial nature” (ibid., 335) of the concept, Raz contends, is not a property specific to the concept of law. Rather, it is a characteristic of all concepts: “[A]ll concepts are parochial” (Raz 1996, 5). The reason for this is that they are “the product of a specific culture” (ibid.).

Only the concept of law is of interest here. Is it really the case that the concept of law can be distinguished from the nature of law on the ground that the former is parochial, that is, particular, whereas the latter is universal? One has to answer: yes and no. The reason for this mixed reply turns on the two-fold character of concepts. To be sure, the genesis of concepts depends on culture. As products of a culture, concepts are socially established rules that concern the meaning of words. To this extent, concepts have a conventional character. They are conventional rules of meaning. But concepts—and this is the other side of the coin—are conventions of a special kind. They claim, as Kant puts it, to be “adequate to the object” (Kant 1996a, 680). In this way, they are intrinsically related to the correctness or truth of the propositions constructed by means of them. This claim to adequacy necessarily connects the concept of a thing with its nature. With concepts—as part of a practice that is intrinsically connected with truth, justification, intersubjectivity, validity, objectivity, and reality—one strives to grasp the nature of the things to which they refer as perfectly, as correctly, as possible. This is the non-conventional or ideal dimension of concepts. To the degree to which those who use a concept are successful in fulfilling the claim to adequacy necessarily raised by the use of that concept, to that degree the concept corresponds to the nature of its object. And it has universal validity to the degree it

11 In this context Kant refers, among other things, to the concepts of water, gold, and law.
corresponds to its object. Thus, the ascription of parochiality to concepts has to be restricted. Concepts, as always on the path to the nature of those things to which they refer, are in part parochial or conventional and in part universal.

This dual nature of concepts explains why an analysis of the concept of law can be, at the same time, an analysis of the nature of law. If “concept” is understood as “adequate concept,” the question “What is the concept of law?” can always be substituted for the question “What is the nature of law?” and vice versa. This is the reason why H.L.A. Hart’s *The Concept of Law* can well be read as a book about the concept of law and equally well as a book about the nature of law.

This is not to say, however, that the other side of the coin, that is, concepts as conventional rules of meaning, has no role in philosophical analysis. Concepts as conventional rules are indispensable for the identification of the object of analysis. Without a concept of law *qua* conventional rule, we would not know what we are referring to when we undertake an analysis of the nature of law. Moreover, while the analysis of the actual use of language is, as J. L. Austin aptly remarks, “not the last word,” it provides a starting point for analysis, as a “first word” (Austin 1970, 185).

### IV. The Dual Nature of Law

The basis of non-positivism as defended here is the thesis that the single most essential feature of law is its dual nature. The thesis of the dual nature of law presupposes that there exist necessary properties of law belonging to its factual or real dimension, as well as necessary properties belonging to its ideal or critical dimension. Coercion is an essential feature found on the factual side, whereas the claim to correctness is constitutive of the ideal dimension.

#### 1. Coercion

The necessity of coercion or force is the easier case. It seems to be quite natural to argue, first, that a system of rules or norms that in no case whatever authorises the use of coercion or sanction—not even in the case of self-defence—is not a legal system, and that, second, this is the case owing to conceptual reasons reflected in the actual use of language. Would anyone be inclined to use the expression “law” in connection with such a system of rules? Conceptual reasons of this kind, however, have little force on their own. Concepts reflected in the actual use of language are, as already explained, in need of modification once they prove not to be adequate to their object or—to put it in another way—once a divergence from the nature of the objects to which they refer appears. It is of course possible not only to argue for the inadequacy of a concept, but also to
defend its adequacy. To include coercion in the concept of law is adequate to its object, the law, for it mirrors a practical necessity essentially connected with law (see Alexy 2003, 8–9). Coercion is necessary if law is to be a social practice that fulfils its basic formal purposes as defined by the values of legal certainty and efficiency. This practical necessity is the reason why the conceptual necessity implicit in the use of language is based not merely on a convention but also on the nature of the thing to which the concept refers. It is, in this sense, an absolute necessity.

The argument presented thus far has, however, a weak point. One might grant that coercion is necessarily connected with legal certainty and efficiency, but object that there exists no necessary connection between law and either of these values. This leads to the question of how values, purposes, or functions can be conceived as standing in a necessary relation to law. The answer is that they are so connected because the claim to correctness necessarily connected with law necessarily refers to them. The reasons for this answer can only be sketched here. I will confine myself to the value of legal certainty. The argument starts with the assumption that morality as such does not suffice to resolve problems of social co-ordination and co-operation (Alexy 2003, 8). The argument continues with the premise that morality demands a resolution of these problems in order to avoid the moral costs of anarchy. To these two premises the statement is added that those problems can only be resolved by law qua enterprise that strives to realize the value of legal certainty. From this it follows that morality requires law qua enterprise that strives to realize the value of legal certainty. Moral correctness, therefore, includes the demand of law qua enterprise that strives for legal certainty. This will suffice to establish a necessary connection between law and the value of legal certainty provided that two further theses are true. The first says that law necessarily raises a claim to correctness, the second says that this claim necessarily comprises moral correctness. Something more on this will be said in the next section. Here it shall only be noted that the correctness thesis, if true, plays a central role not only with respect to the ideal or critical dimension of law but also with respect to its factual or real dimension. The reason for this is that moral correctness comprises formal or procedural as well as substantive or material correctness.

As far as the dispute between positivism and non-positivism is concerned, the most pressing problems occur on the substantive side of the claim to correctness, namely, where formal correctness is accompanied by substantive incorrectness, in particular, by extreme substantive

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12 A famous example of a necessary relation of values, purposes, or functions to the law is Radbruch’s connection of justice, purposiveness, and legal certainty qua elements of the idea of law with the concept of law (Radbruch 1950, 107–8; see on this Paulson 2006, 31–2).
In what follows, two questions will be addressed, first, whether moral incorrectness necessarily brings about legal incorrectness, and, second, whether, as per the Radbruch formula, extreme moral incorrectness necessarily results in legal invalidity.

2. Correctness

With respect to the thesis that the claim of law to correctness is the source of a necessary relation between law and morality, that is, the correctness thesis, three objections arise. According to the first objection, it is not true that law necessarily raises a claim to correctness. There can be law quite apart from such a claim. The answer to this objection consists in demonstrating that the claim to correctness is necessarily implicit in law. The best means of demonstration is by means of the method of performative contradictions (Alexy 2002, 35–9). An example of a performative contradiction is the fictitious first article of a constitution that reads: “X is a sovereign, federal, and unjust republic.” It is scarcely possible to deny that this article is somehow absurd. The idea underlying the method of performative contradiction is to explain the absurdity as stemming from a contradiction between what is implicitly claimed in framing a constitution, namely, that it is just, and what is explicitly declared, namely, that it is unjust. Much could be said about whether this explanation is sound, and whether it really shows that the claim to justice, which is a special case of the broader claim to correctness, is necessarily raised. This point will not, however, be elaborated here. The question of whether law necessarily raises a claim to correctness is not the main issue with respect to correctness in the debate over positivism versus non-positivism. No less a proponent of positivism than Joseph Raz, when he argues “that the law necessarily claims legitimate authority” (Raz 1996, 16), comes quite close to the thesis that law necessarily raises a claim to correctness.

The second possible objection to the correctness thesis grants the point that law raises a claim to correctness, but contests the view that the claim of law to correctness has anything to do with morality. With an eye to meeting this objection, one addresses those cases in which, first, the reasons based on positive law—that is, source-based reasons—have run out, and, second, reasons based on justice—that is, moral reasons—are available. In order to meet the objection, one has to show that in such cases,
the decision at issue has to be grounded on moral reasons. This point, too, will not be elaborated here, for it, too, is not a point crucial for the question of whether positivism or non-positivism is right. A positivist can grant the point that law’s claim to correctness comprises a claim to moral correctness, but contest the claim that this amounts to a necessary connection between legal validity or legal correctness and morality. Raz’s thesis “that it is essential to the law that it claims to have legitimate, moral, authority” (ibid., 6, emphasis added) seems to fit this reading of law’s claim to correctness well.

The third objection is the decisive one. It grants the point that law necessarily raises a claim to correctness and that this claim is necessarily connected with morality, but it goes on to insist that all this is compatible with positivism as well as with non-positivism. It is with this thesis that I should like to take issue.

Perhaps an example will be helpful. Let us imagine a case in which the authoritative material allows for two different interpretations. A single additional argument is available, which is a moral argument that cannot either be reduced or traced back to a source. The moral argument speaks in favour of the first interpretation, rejecting, then, the second interpretation. I think that non-positivists are in agreement here with positivists who, like Joseph Raz, assume that “judges are subject to morality anyway” (Raz 2004, 12). That is, we ought to adopt the first interpretation, backed by the correct moral argument, and not the morally mistaken second interpretation. Still, positivists and non-positivists disagree sharply on how to understand or interpret this.¹⁵ Positivists say that we have to interpret what takes place as a law-making act that transforms moral considerations into law on the basis of legal empowerment and legal empowerment alone. If this thesis were true, if from a legal point of view it were merely a question of law-making or issuance based on legal power, then, if the judge chose the morally mistaken interpretation, he would nevertheless be making a legally perfect decision, a decision that counts in all legal aspects as being at the highest level. My rejoinder is that this decision would not be a legally perfect decision in all aspects. Due to the fact that the claim to correctness necessarily raised by law necessarily comprises an ideal dimension as well as an authoritative dimension, a judge who chose a morally mistaken interpretation in a case in which the positive law allows as well for a morally correct interpretation would not be making a legally perfect decision. In such

¹⁵ Raz describes the reasoning that has to take place in such cases as reasoning “about how legal disputes should be settled according to law” or as reasoning “about how courts should decide cases in accordance with law” (Raz 1993, 2–3). This seems to allow for three different interpretations, namely, that the moral reasoning in the open area of law is reasoning “according to law” or “in accordance with law,” first, because it does not violate the law, or, second, because it is required by some sources of the respective legal system, or, third, because it is required by the law qua law. The third reading, however, would lead to non-positivism.
cases, moral incorrectness implies legal incorrectness. To be sure, there are many cases that are far more complex than the simple constellation set out here. This constellation suffices, however, to show that there exists a necessary connection between moral and legal correctness. This connection has, as such, only a qualifying character. Nevertheless, this qualifying connection brings about a fundamental shift in our picture of law.

V. What the Law Is and What It Ought to Be

The question remains of whether there also exists a classifying connection as defined by the Radbruch formula, which says that extreme injustice is not law. To be sure, the Radbruch formula cannot be deduced from the correctness thesis. The correctness thesis, taken alone, refers only to legal defectiveness. And legal defectiveness as such does not imply legal invalidity. This is a corollary of the dual nature of law. Law is, at one and the same time, essentially authoritative and essentially ideal. All defects on the ideal side are legal defects, but by no means all of these defects have the wherewithal to undermine what has been established as law by the authoritative side. To take this further step, additional reasons are necessary.

These additional reasons must comprise moral reasons. Moral reasons are normative reasons. The moral or normative reasons standing behind the Radbruch formula comprise human or fundamental rights. This makes it possible to give expression to non-positivism in normative terms: “[A] non-positivistic concept of law must of necessity be applied in order to protect the fundamental rights of the citizen” (Alexy 2002, 58). It is at exactly this point that one of the main problems of non-positivism comes to light. It can be cast in terms of the following question: “Is it possible to apply normative arguments in order to determine the nature and the concept of law?” My answer is affirmative.

On first glance, however, a negative answer may seem to be right. To determine the nature of law is to say what the law is, and, as noted, the concept of law has to be defined with an eye to its nature. Is there any basis for considering how the law ought to be as a step in determining what the law is? It comes as no surprise to learn that positivists stress just this point. Raz, for instance, argues that the nature of law is a matter of theory and not of advocacy, and that theory is concerned exclusively with “how things are” (Raz 1996, 7). Similarly, Andrei Marmor insists:

Once we admit that in order to get to something like the Radbruch formula, you need a normative argument, you rely on a moral argument to tell us something about the law. It is no longer the case that the conclusion is about the nature of law. As simple as that. (Marmor 2005, 778)

16 On the concept of a qualifying connection see Alexy 2002, 26; see also 2000, 144–6.
Is it really as simple as that?

The reasons as to why it is more complex stem from the fact that it is a part of the nature of law that there exists an observer’s perspective as well as a participant’s perspective (see on the one hand, Raz 2007, 22–25, and on the other, Alexy 2007b, 45–48). The difference between these two perspectives is that the observer asks and adduces arguments on behalf of a position that reflects how legal questions are actually decided in a legal system, whereas the participant asks and adduces arguments on behalf of what he deems to be the correct answer to a legal question in the legal system in which he finds himself. The observer’s perspective is defined by the question “How are legal decisions actually made?”, the participant’s by the question “What is the correct legal answer?”

These two perspectives correspond to two different views about what the law is: a restricted view and a comprehensive view. According to the restricted view, what the law is depends exclusively on what has actually been issued and is socially efficacious. It is a matter of social fact. According to the comprehensive view, what the law is depends on what it is correctly taken to be. This view constitutes the participant’s perspective. What is correctly taken to be the law depends not only on social facts but also on moral correctness. In this way, what the law ought to be finds its way into what the law is. This serves to explain the Radbruch formula, which says not that “Extreme injustice should not be law” but, rather, that “Extreme injustice is not law.” Much more could and should be said about the difference between the observer’s “is” and the participant’s “is.” Perhaps what has been said will suffice, however, to indicate what non-positivists mean when they claim that their more complex explication is closer to the nature of law than the simpler explication offered by the positivists.

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