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INCORPORATION BY BALANCING?

Critical Remarks on Alexy's Necessary Incorporation Thesis

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In this paper I will criticize Alexy's necessary incorporation thesis, which claims that moral principles are necessarily incorporated into the law in virtue of the judicial obligation to apply and balance principles in hard cases. I will argue that although incorporation by balancing is an unsound argument, the connection thesis can be sustained without resort to the necessary incorporation thesis.

I. The Connection Thesis and the Argument from Principles

The central claim of Alexy's anti-positivist theory of law is the connection thesis, which says that there is a necessary connection between law and morality. In an older version, this thesis stated that the concept of law is to be defined such that moral elements are included.[1] In its recent formulation, however, it claims that there exists a necessary connection between legal validity and legal correctness on the one hand, and moral merits and demerits or moral correctness and incorrectness on the other.[2] To substantiate the connection thesis, Alexy has offered three arguments: the argument from correctness, the argument from principles, and the argument from injustice.[3] The argument from correctness, the cornerstone of Alexy's argument against legal positivism, contends that law, whether individual legal norms, judicial decisions or the legal system as a whole, necessarily raises a claim to correctness. While the argument from injustice, expressed in the well-known Radbruch Formula, focuses on an exception situation with regard to the legal validity of an extremely unjust statute, the argument from principles plays a key role in bridging the gap between legal and moral correctness. As Alexy admitted, a legal positivist can accept the argument from correctness but still insists on

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1 *R. Alexy,* The Argument from Injustice. A Reply to Legal Positivism, Oxford 2002, p. 4.

2 *R. Alexy,* On the Concept and Nature of Law, in: Ratio Juris 21 (2008), p. 285.

3 *Alexy* (note 1), pp. 35–82.

the separation thesis, which denies that there is a necessary connection between legal validity or legal correctness and morality. He might concede that the law necessarily raises a claim to correctness and at the same time maintains that this claim does not have any moral implications. Alexy draws on the argument from principles to counter this challenge.

The basis of the argument from principles is the theoretical distinction between rules and principles. According to Alexy's standard definition, principles are norms commanding that something be realized to the greatest possible extent relative to the factual and legal possibilities at hand. Principles are therefore termed optimization commands. The characteristic form for applying principles is the balancing of one against another. By contrast, rules are definitive commands. A rule, if it is applied, can determine a particular decision without needing to be weighed against other reasons. The characteristic form of the application of rules is subsumption.[4] Nevertheless, the structural difference between rules and principles has no direct bearing on the connection between law and morality. To establish a necessary, positive connection between legal and moral correctness, Alexy employs mainly the argument from principles, which consists of the three following theses: first, every legal system that is at least minimally developed necessarily contains principles as part of the law (the incorporation thesis); secondly, principles are incorporated into the law in virtue of their moral content (the morality thesis); finally, applying the argument from correctness, the incorporation of moral principles leads to a necessary connection between law and correct morality (the correctness thesis).[5] In the following, I will examine whether the incorporation thesis is well-founded and serves as an indispensible argument for the connection thesis.

II. The Necessary Incorporation Thesis and Its Problems

Alexy's argument from principles has two significant characteristics: first, opposite to the so called inclusive legal positivism, which believes that it is possible, though not necessary, to incorporate moral principles into the law by means of a conventional practice, Alexy maintains that the incorporation is necessary. His incorporation thesis may be called "the necessary incorporation thesis". Second, Alexy's argument is addressed mainly to the adjudication in the open area of law. It claims that

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[4] *Alexy* (note 1), p. 70; see also *R. Alexy,* A Theory of Constitutional Rights, Oxford 2002, pp. 44–69.

[5] *Alexy* (note 1), pp. 68–81.

moral principles are necessarily incorporated into the law by means of the judicial obligation to apply moral principles in hard cases. Since balancing is the characteristic form of the application of principles, it can be called "incorporation by balancing".

Alexy distinguishes two different ways of incorporating moral principles into the law. The first is incorporation by positive law. The example Alexy uses to illustrate this way of incorporation is the German Basic Law, which contains the principles of human dignity, liberty, equality, the Rechtsstaat or rule of law, democracy, and the social state as the fundamental principles of the German legal system.[6] However, a positivist can immediately object that these principles are legal norms because they are endorsed by the law-making authority; in other words, they are incorporated into the law not by virtue of the moral merits of their content, but by means of authoritative issuance. Incorporation by positive law is neither necessary, nor does it lead to the connection between law and morality, because it depends upon the positive law to decide whether or not to turn moral principles into the legal system. Thus, in positivists' view, a legal system which does not comprise any moral principles is still conceptually possible.[7] A more powerful challenge comes from the inclusive legal positivism, which adopts a more sophisticated version of incorporation by positive law.[8] An inclusive positivist does not deny that sometimes moral principles can become legal norms in virtue of the moral merits of their content, but this is so only when the rule of recognition of the pertinent legal system contains substantive moral criteria as necessary or sufficient conditions for legal validity. Since the rule of recognition, as most positivists believe, is a kind of social convention, it is a contingent matter whether the rule of recognition incorporates the moral criteria or not. It is possible that there exists a legal system whose rule of recognition contains only pedigree- or source-based criteria such that no principles can become part of the law simply by virtue of their moral content. A legal positivist might not deny that moral principles can be incorporated into the law, what he insists is that the incorporation, either by means of authoritative issuance or by means of the rule of recognition *qua* conventional practice, is not necessary. It is therefore hard for Alexy to base his argument solely on the incorporation by positive law. To defend the necessary incorporation thesis, he has to show

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6 Ibid., p. 71.

7 For Alexy's response to this attack, see *Alexy* (note 1), pp. 71–72.

8 See e. g. *J. Coleman,* The Practice of Principle. In Defence of a Pragmatist Approach to Legal Theory, Oxford 2001, pp. 102–119; *K. E. Himma,* Inclusive Legal Positivism, in: J. Coleman/S. Shapiro (eds.), The Oxford Handbook of Jurisprudence and Philosophy of Law, Oxford 2002, pp. 125–165; *M. H. Kramer,* Where Law and Morality Meet, Oxford 2004, pp. 17–44.

that even though the positive law does not incorporate moral principles, they still enter into the law in another way. For this purpose, Alexy proposes the second way of incorporating moral principles into the law, namely, incorporation by balancing.

Alexy's point of departure is that the positive law, as H. L. A. Hart points out, always has an open texture.[9] There are several reasons for the existence of open texture, for example, the vagueness of legal language, the possibility of norm conflicts, the absence of an applicable norm, and the possibility of making a *contra-legem* decision in certain cases. The cases falling under the open texture are usually termed "hard cases" or "doubtful cases".[10] By definition, hard cases cannot be decided exclusively on reasons based on positive law. When the reasons of positive law run out, two possibilities exist. The first is that the decision is made without any reason. The second is that the decision has to be grounded on other reasons that are not based on positive law.[11] The first possibility is excluded by the claim to correctness, so Alexy argues, for the claim to correctness implies a guarantee of justifiability.[12] According to the argument from correctness, a judicial decision necessarily raises a claim to correctness, and this claim will not be satisfied if the judge does not offer any reason to justify his decision. In other words, the claim to correctness implies the justifiability of legal decision, which means that the judge has to apply moral reasons to ground his decision when no reasons of positive law are available. Among moral reasons are principles of special significance, because in hard cases there are often competing reasons and the judge has to strike a balance in order to reach his decision. Reasons which are able to be weighed against each other, according to Alexy, are either principles or supported by principles.[13] Thus, in hard cases a judge undertakes to strike a balance of moral principles to justify his decision. Furthermore, the correctness thesis, which is the application of the argument from correctness within the framework of the argument from principles, requires that the principles on which the decision is based must have morally correct content and the result of balancing, which has to be justified on moral arguments, should also be correct.[14] It follows that the claim to correctness raised by a judicial decision neces-

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9 *H. L. A. Hart,* The Concept of Law, 2nd ed., Oxford 1994, p. 128.

10 *Alexy* (note 1), p. 69.

11 *R. Alexy,* The Nature of Arguments about the Nature of Law, in: L. H. Meyer/S. L. Paulson/T. W. Pogge (eds.), Rights, Culture and the Law. Themes from the Legal and Political Philosophy of Joseph Raz, Oxford 2003, p. 14.

12 *Alexy* (note 1), p. 78; see also *R. Alexy,* Law and Correctness, in: Current Legal Problems 51 (1998), p. 208.

13 *Alexy* (note 1), p. 72.

14 Ibid., pp. 76–78.

sarily includes a claim to moral correctness. The premises of Alexy's argument can be summarized as follows:

(1) A judicial decision necessarily raises a claim to correctness.

(2) In order to satisfy the claim to correctness, the judge, above all, in deciding hard cases has to appeal to moral principles and to justify his decision on the basis of balancing.

Obviously, Alexy wants to draw from (1) and (2) the connection thesis, namely,

(3) Legal correctness has a necessary connection with moral correctness.

Does the necessary incorporation thesis also follow form (1) and (2)? The answer is negative. So far, Alexy's argument has only demonstrated that moral principles necessarily figure in judicial reasoning and that there is a necessary connection between legal and moral reasoning. This, however, does not imply that moral principles are necessarily included in the law. A positivist might quite agree with Alexy that the judge has to balance moral principles, thereby entering moral reasoning to resolve the hard case at hand. But in doing so, in the positivist's view, the judge is empowered by the positive law to create new law on the basis of extra-legal standards, the same way as the law-making acts of the legislature do. If moral principles are extra-legal standards, the positivist might continue to argue, the decision which is not grounded on the balance of moral principle is still legally perfect despite being morally defective. Therefore, the positivist can accept the premises (1) and (2) but still denies the connection thesis.[15]

Now we are in a position to see why the necessary incorporation thesis plays a crucial role in Alexy's whole argument. To counter the positivist's challenge, Alexy has to argue that, first, the judge is not merely legally empowered but also legally obligated to apply moral principles and, secondly, moral principles are legally binding on judges even if they lack social sources or authoritative support. The incorporation is indispensible for a straightforward reason: if moral principles are binding on the judge in virtue of their legality, then, arguably, the decision which does not take relevant principles into account is not only morally incorrect, but also legally defective. However, as stated above, the necessary incorporation thesis does not directly follow from (1) and (2) without adding further premises. To substantiate the claim that moral principles are necessarily incorporated into the law by virtue of the judge's obligation to balance in hard cases, i. e., incorporation by balancing, Alexy has propo-

[15] Alexy is aware of this point, see *Alexy* (note 2), p. 295.

sed two auxiliary arguments. The first is that the claim to correctness implies not only the legal power of the judge to apply moral principles in hard cases, it implies also the legal obligation to do so. According to Alexy, the claim to correctness is necessarily attached to the judicial decision; it is therefore a legal claim and not simply a moral one. Correspondingly, it is a legal obligation for a judge to satisfy the claim to correctness he raises in his decision. So, if this claim cannot be satisfied without applying moral principles, he is legally required to take moral principles as reasons for his decision, in other words, the judge has a legal obligation to ground his decision on the balancing of moral principles.[16] Alexy's second auxiliary argument appeals to the idea of legal systems as systems of procedures. According to Alexy, the legal system is not only a system of norms *qua* results or products, but also a system of procedures or processes. From the participant's perspective, at the center of which stands the judge, the reasons taken into account in the process of making and justifying a decision belong to the procedure and thereby to the legal system. Hence, if the judge is required to take moral principles as reasons for his decision, they are necessarily included in the law.[17]

Alexy's argument for the necessary incorporation thesis may be roughly summarized as follows:

(4) Everything that a judge has to apply in order to justify his decision belongs to the law.

(5) In deciding hard cases, a judge is legally obligated to apply moral principles in order to justify his decision.

(6) Therefore, moral principles are necessarily included in the law

This argument formulates the core idea of incorporation by balancing. However, it does not seem to be a sound argument. The problem lies in the premise (4). If (4) were true, then the legal system would contain all those standards that judges are required to take into account in his decision. Yet this is a very doubtful claim. Raz has used an analogy from the conflict-of-law doctrine to show that Alexy's argument is a non-sequitur.[18] In conflict of law cases, the judge is often required to apply the standards of a foreign legal system. He could not reach a correct decision without taking the foreign laws into account. Yet the obligation to apply foreign standards does not turn them into the domestic legal system. Analogously, Raz argues, the judicial obligation to look to moral princi-

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16 *Alexy* (note 1), pp. 73–74; *Alexy* (note 11), pp. 14–15.

17 *Alexy* (note 1), pp. 24–25, 73.

18 *J. Raz,* The Argument from Injustice, or How Not to Reply to Legal Positivism, in: G. Pavlakos (ed.), Law, Rights and Discourse. The Legal Philosophy of Robert Alexy, Oxford 2007, pp. 34–35.

ples does not ipso facto incorporate moral principles into the law.[19] Of course Alexy can reply Raz's criticism by insisting that Raz's example is not appropriate. The conflict-of-law rules that direct the judge to apply the foreign laws are rules of positive law. By saying that the judge is legally required to apply the standards of foreign law, it means that the judge is required by positive law to do so. Hence Raz's refutation may be applied to inclusive positivism, but not to Alexy's necessary incorporation thesis. For Alexy, the judicial obligation to apply moral principles does not depend upon the existence of positive directive rules. Even if the positive law contains no such rules, the judge is still required by law to apply moral principles because he has to fulfill the claim to correctness necessarily raised in his decision.[20] However, I think Alexy's reply misses Raz's point. What Raz really wants to argue is that not everything that figures in judicial reasoning can be counted as part of the law. Another example drawn from Ronald Dworkin might help illustrate this point.[21] In deciding cases of torts, the judge is often required to calculate damages. In spite of no directives of positive law, the judge has to apply arithmetic rules and calculate correctly in order to get a correct decision. No one would deny that a judge who calculates damages supposing that two and two add up to five makes a mathematical mistake which will render his decision incorrect, but it is quite odd to say that arithmetic rules are therefore legal rules. An argument such as "since the judge is legally required to apply arithmetic rules to calculate damages in deciding tort cases, arithmetic rules are necessarily incorporated into the law", sounds very strange and implausible. Unfortunately, the argument Alexy employs to warrant the necessary incorporation thesis is just such one.

III. Necessary Connection without Incorporation

Does the failure of the necessary incorporation thesis lead to the refutation of the connection thesis? Not necessarily. It depends on the way in which the connection between law and morality is to be understood. In Alexy's view, this connection is conceptually necessary. Alexy even characterized the disagreement between legal positivism and anti-positivism as a debate over the concept of law. This can be clearly seen in his earlier formulation of the separation thesis and the connection thesis.

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19 See also *J. Raz,* Incorporation by Law, in: Legal Theory 10 (2004), p. 10.

20 *R. Alexy,* An Answer to Joseph Raz, in: G. Pavlakos (ed.), Law, Rights and Discourse. The Legal Philosophy of Robert Alexy, Oxford 2007, p. 55.

21 On this example, see *R. Dworkin,* Justice in Robes, Cambridge Mass. 2006, p. 238.

Whereas the positivism claims that the concept of law is to be defined such that no moral elements are included, so Alexy says, the connection thesis contends that the concept of law is to be defined such that moral elements are included.[22] However, as Dworkin recently pointed out, there are different, though interrelated in various ways, concepts we use to talk about law such that different theories about the connections between law and morality are often answers to very different kinds of questions. Dworkin distinguishes among four different concepts of law: the doctrinal concept that we use to state propositions of law, that is, claims about what the law requires, permits, prohibits or creates ("The law requires that the manufacturer is liable for injuries caused by defective products, whether or not the manufacturer is at fault"); the sociological concept we use to name a particular type of social institution ("Law does not exist where there are no specialized institutions of coercive enforcement"); the taxonomic concept of law we use to classify a particular standard as a legal norm rather than a norm of some other kind ("Though the rule that two and two makes four figures in some legal arguments, it is not itself a legal rule"); and the aspirational concept which we use to describe a distinct political value such as the value of legality or rule of law ("The Nuremberg tribunal was preoccupied with the nature of legality").[23] If the dispute between legal positivism and anti-positivism is a dispute on the concept of law, then, we might ask, which kind of concept is the subject of this dispute? With respect to the problem of the necessary incorporation thesis, here lies the taxonomic and the doctrine concept of interest.

The taxonomic concept of law assumes that the "law" is a distinct set of rules, principles, and other standards and there exist some specific criteria for testing whether a particular standard belongs to this set or not.[24] Standards which do not belong to this set cannot be counted as part of the law and are not legal norms at all. Those who regard the concept of law as a taxonomic one also insist on a distinction between legal and non-legal norms. What they disagree with each other is how this distinction is to be drawn. In Dworkin's view, the controversy surrounding the incorporation thesis is a taxonomic dispute, because it is concerned with the question of whether certain moral principles are legal principles.[25] Although Alexy regards the legal system as a system of procedures rather than a system of norms, he does not totally get away from

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22 *Alexy* (note 1), pp. 3–4.

23 *Dworkin* (note 21), pp. 2–5, 223.

24 Ibid., p. 4.

25 This view is elaborated in Dworkin's criticism of the debate between inclusive and exclusive legal positivism, see *Dworkin* (note 21), pp. 232–240.

the taxonomic view about the concept of law. This can be obviously seen in his definition of law: "The law is a system of norms … that comprises the principles and other normative arguments on which the process or procedure of law application is and/or must be based in order to satisfy the claim to correctness."[26] Alexy's idea of legal systems as systems of procedures merely offers a different criterion for classifying certain standards as legal norms; his definition still presupposes a taxonomic concept of law. Alexy's necessary incorporation thesis is indispensible to the connection thesis so long as the latter is conceived as a taxonomic claim that moral principles are necessarily included in the law, wherein the "law" is regarded as a discrete set of norms or standards. As mentioned above, this inclusive taxonomic claim suffers from Raz's attack. Raz denies that everything that figures in the process or procedure of law application should be counted as legal norms. According to Raz, from the fact that the judge is obligated to apply moral principles to justify a legal decision it does not follow that moral principles therefore become part of the law. This is an exclusive taxonomic claim to the effect that it is impossible to incorporate moral principles into the law simply by means of the moral merits of their content.

Suppose Raz is right. Incorporation by balancing is a flawed argument. Alexy's necessary incorporation thesis is refuted because moral principles can never be turned into the law through the judicial obligation to strike a balance. Does the connection thesis stand and fall with Alexy's necessary incorporation thesis? The answer seems affirmative if the connection thesis is understood as an inclusive taxonomic claim. However, if the connection thesis is conceived as a doctrinal claim, we will have a different picture. We use the doctrine concept of law to make claims or statements about what the law (of a particular jurisdiction) requires, permits, prohibits or creates. Following Dworkin's usage, such claims or statements are called "propositions of law".[27] In using the doctrine concept of law, we are mainly concerned with whether a proposition of law, such as "The Jewish lawyer A has been deprived of citizenship according to the law in Nazi Germany" or "In cases involving major violations of the right to personal privacy the law permits monetary compensation for non-material harm", is true or correct. To answer this question we have to explore what makes a proposition of law true, when it is true. Let us call the conditions which must hold to make a proposition of law true "the truth conditions of propositions of law". If the debate between legal positivism and anti-positivism is conceived as a debate about the doc-

[26] *Alexy* (note 1), p. 127.
[27] *Dworkin* (note 21), p. 4.

trinal concept of law, the main issue of this debate shall be whether moral considerations figure among the truth conditions of propositions of law.[28]

In my view, Alexy's argument from correctness is primarily a doctrinal claim. The claim to correctness can be understood in the following way: If one makes claims about what the law requires or permits or prohibits or creates, he necessarily, though often implicitly, asserts that the propositions of law he claims or defends are true and has to offer reasons to substantiate his claims. Accordingly, the judge's claim to correctness implies that he can warrant the implicit assertion that his decision is correct, namely, the propositions of law which his decision states or is based on are true. The connection thesis, which in Alexy's recent formulation contends that legal correctness necessarily depends on moral merits or demerits, should be better regarded as an inclusive doctrinal claim. To put it more precisely, it maintains that moral considerations are necessarily included in the truth conditions of propositions of law. Positivist's separation thesis can thus be understood as the denial of this claim, namely, the truth conditions of propositions of law do not necessarily contain moral considerations. If my view is correct, I suggest, the point of Alexy's argument from principles should be whether and how moral principles are relevant in deciding when propositions of law are true. In other words, the crucial question is whether and in what way moral principles necessarily figure among the truth conditions of propositions of law, not whether they should be counted as belonging to a distinct set of norms called legal.

Characterizing the connection thesis as a doctrinal claim avoids making the fallacious taxonomic argument that everything that figures among the truth conditions of propositions of law should be counted as part of the law. From premises (1) and (2) stated above, Alexy has been able to infer that moral principles are among the truth conditions of propositions of law, and at least in hard cases, the judge has to appeal to moral principles in deciding which propositions of law are true. Perhaps the underlying reason for adding the necessary incorporation thesis to his argument is the following assumption: "If moral principles are not legal norms, they are irrelevant in deciding whether propositions of law are true". Yet this is a doubtful assumption that attaches a doctrinal consequence to a taxonomic antecedent. As Raz points out, if moral reasons are binding in virtue of the merits of their content, then judges are bound by them regardless of whether they are incorporated into the law

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[28] This is the view of Dworkin in *Justice in Robes,* see *Dworkin* (note 21), pp. 26–33, 232–234.

or not.[29] Maybe Alexy wants to emphasize that moral principles are legally binding. However, as Raz argues, that certain standards are legally binding, i.e., the application of them is legally required, does not make them part of the law.[30] Nevertheless, if the connection thesis along with the argument from principles is located within a theory about the doctrinal concept of law, it is not difficult to respond to Raz's challenge. Consider the conflict-of-law analogy again. Suppose a Taiwanese judge has to decide whether a particular Taiwanese defendant X is legally liable to a particular German plaintiff Y for damages arising out of an accident in Berlin. According to Taiwanese law, the judge has to apply German tort law to decide this case. Although it would indeed seem odd to say that by this way German tort law becomes part of Taiwanese law, it is indisputable that the Taiwanese judge could not reach a correct conclusion on the question of liability without correctly applying and interpreting German tort law. We may concede that German tort law is not part of Taiwanese law, but German tort law certainly figures in the truth conditions of the proposition that under Taiwanese law X has an obligation to compensate Y for injuries arising from the accident in Berlin. Similarly, if a judge could not reach a correct legal decision without taking moral principles into account, then moral principles necessarily have an impact on the truth of the pertinent proposition of law that the judge defends in his decision even though they are not incorporated into the law. Since the justificatory power of moral principles depends, among other things, on the merits of their content, it is irrelevant whether or not they are labeled "legal". Legal correctness depends necessarily on moral correctness, not because moral principles are necessarily part of the law, but because moral principles are necessarily among the considerations that make the propositions of law true. Recall the example of calculating damages in tort cases. If a judge who calculates damages supposes that two and two add up to five, we will say that he makes a mathematical, not a legal, mistake, because it is very odd to say that arithmetic rules are rules of the tort law. Yet the mathematical mistake will affect the truth of the proposition about the amount of damages the defendant is bound to compensate for. Though arithmetic rules are not legal rules, the judge would reach an incorrect legal decision if he had not applied them correctly. Analogously, if a judge does not ground his decision on correct balancing of moral principles, we might be inclined to say that he makes a moral rather than a legal mistake. But this moral mistake will lead to some false propositions of law and therefore has a significant impact on the correctness of his decision. So, if judges must look to moral princi-

[29] *Raz* (note 19), p. 17.
[30] Ibid., p. 10.

ples in deciding which propositions of law are true, then, no matter whether and how moral principles are turned into the law, legal correctness necessarily has a connection with moral correctness. This is exactly what the connection thesis says.

IV. Concluding Remarks

In the previous section I have argued that incorporation by balancing is a fallacious taxonomic argument and the connection thesis as a doctrinal claim can be defended without resorting to the necessary incorporation thesis. It is worth noting that there is another problem in Alexy's argument for the connection thesis. According to Alexy, moral principles necessarily figure in legal reasoning because the positive law necessarily has an open area. This seems as if moral principles would only come into play in hard cases, in other words, moral principles had no bearing on legal decisions whenever the reasons of positive law are available. However, it is wrong to assume that principles function only as plugs in filling the gap left by the positive law. On the contrary, moral principles play a more fundamental role in deciding what the law requires. Very roughly speaking, this fundamental role consists in the fact that even the normative force of authoritative or source-based reasons is grounded on some principles of political morality which explain or justify why and in which way certain social facts or institutional decisions such as legislative enactment or judicial convention are capable of making propositions of law true.[31] In his earlier writing, Alexy takes the view that the elements of authoritative issuance and social efficacy, alongside moral elements, are also included in the concept of law. Within the framework of a theory of the doctrinal concept of law, this view amounts to the claim that as a conceptual matter, authoritative issued or socially efficacious standards such as statues and precedents are among the truth conditions of propositions of law.[32] Recently, Alexy comes to emphasize that this conceptual claim is founded on evaluative or normative considerations. In his reply to Raz, Alexy divided reasons that judges use to justify legal decisions or propositions of law into authoritative and non-authoritative reasons. These two sorts of reasons correspond to what Alexy calls "the dual nature of law", that is, law necessarily comprises an authoritative

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[31] For detailed arguments for this view, see *N. Stavropoulos,* Interpretivist Theories of Law, in: E. Zalta (ed.), *The Stanford Encyclopedia of Philosophy,* http://plato.stanford.edu/entries/law-interpretivist; *M. Greenberg,* How Facts Make Law, in: Legal Theory 10 (2004), pp. 157–198.

[32] *Alexy* (note 1), pp. 3–4.

as well as an ideal dimension.[33] The two dimensions are further connected with two kinds of values or principles.[34] The abstract value or principle of the authoritative dimension includes legal certainty, procedure justice, fairness, and so on. Principles of this sort are occasionally termed by Alexy as "formal principles".[35] The most abstract value or principle of the non-authoritative dimension is (material or substantive) justice. With regard to judicial decision, whereas the substantive principle of justice requires the judge to make a morally correct decision, the formal principles requires the judge to comply with the authoritative settlement, such as statues or precedents. Authoritative reasons can or ought to be used to justify a legal decision because doing so serves certain political values such as legal certainty, procedure justice and fairness. Thus, the normative force of reasons of positive law or source-based reasons is traced back to abstract principles of political morality. To put it in a more abstract way, the fundamental task of moral principles is to determine which considerations, authoritative or non-authoritative, and for what reasons, are capable of making propositions of law true.

The role of moral principles sketched above might provide a more stringent argument for the connection thesis than that based on the open texture of positive law. This argument, I believe, is one that Alexy recently employed to establish the connection thesis.[36] However, it is noteworthy that we can distinguish two forms of claims: first, moral principles necessarily figure in the truth conditions of propositions of law; and, second, moral principles necessarily figure in justification for any theory about the truth conditions of propositions of law.[37] The legal positivists might accept only the second, while rejecting the first claim. They can argue, for example, that legal certainty or fairness is better served, or that democratic collective decision is better respected, or that proce-

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33 *Alexy* (note 20), p. 52; *Alexy* (note 2), pp. 292–296.

34 *Alexy* (note 20), pp. 52–53.

35 See *Alexy,* A Theory of Constitutional Rights (note 4), pp. 58, 82, 414–425.

36 See *Alexy* (note 2), p. 293. Alexy's argument is the following: Though morality demands a resolution of problems of social co-ordination and co-operation, morality as such does not suffice to resolve these problems. These problems can be only resolved by law *qua* enterprise that strives to realize the value of legal certainty. This implies that moral correctness includes the demand of law *qua* enterprise that strives to realize the value of legal certainty. If law necessarily raises a claim to correctness and this claim necessarily comprises moral correctness, so Alexy argues, then the premises above suffice to establish a necessary connection between legal correctness and some values of political morality, such as the value of legal certainty.

37 On this distinction, see Dworkin's response to Mark Greenberg's "How Facts Make Law", in: Scott Hershovitz (ed.), Exploring Law's Empire. The Jurisprudence of Ronald Dworkin, Oxford 2006, pp. 310–311.

dure justice is better realized, if the truth conditions of propositions of law consist only of authoritative or source-based considerations.[38] On this view, the impact of substantive moral principles on deciding what the law requires should be excluded for reasons of political morality. To counter this challenge, Alexy has to argue that, firstly, the underlying value of formal principles is not the only political virtue the law is meant to serve and, secondly, formal principles can be weighed against substantive principles and it is possible that sometimes the latter will prevail over the former.[39] How to resolve the tension between formal and substantive principles, for example, the competing relation between legal certainty and material justice, is surely a question of political morality. A detailed study of the interrelations between formal and substantive principles in deciding the truth of propositions of law is beyond the scope of this paper. Here I may only conclude, from what has been said above, that the debate between different theories about the truth conditions of propositions of law is, in the end, a disagreement over what kind of values legal practice strives to realize. If so, the focus of the controversy between legal positivism and anti-positivism shall shift away from the connection thesis, whether conceived as a taxonomic or doctrinal claim, toward the best understanding of the contested value of legality.[40]

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38 This position is what Dworkin calls "political doctrinal positivism", see *Dworkin* (note 21), pp. 26–30.

39 Alexy has attempted to argue in this way to defend his argument from injustice against Raz's criticism, see *Alexy* (note 20), p. 53.

40 Thus, we may see that the doctrinal concept of law is intrinsically related to the aspirational concept of law. In Dworkin's view, this means that the conceptions of the value of legality and the problem of identifying true propositions of law are intertwined with each other. For Dworkin's full account of this view, see *Dworkin* (note 21), pp. 168–186.