

# On Alexy's Argument from Inclusion

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## 1. Introduction

In his book *The Argument from Injustice: A Reply to Legal Positivism*, Alexy (2002a) characterizes the debate between legal positivism and non-positivism as a disagreement about how the concept of law is to be defined. According to Alexy, the positivistic concept of law does not include any reference to morality and is defined by means of two elements—authoritative issuance and social efficacy. By contrast, his non-positivistic theory of law defends the *connection thesis*, which claims that, alongside those two social-factual elements, moral elements are necessarily included in the concept of law (*ibid.*, 3–4).

Alexy distinguishes between two types of arguments in supporting the connection thesis: analytical and normative. While analytical arguments refer to the conceptually necessary connection between law and morality, normative arguments are concerned with whether it is normatively necessary to include moral elements in the concept of law (*ibid.*, 21–2). In a recent article titled “Alexy Between Positivism and Non-Positivism,” Bulygin (2013) raises doubts about the indispensability and usefulness of normative arguments in the debate about the concept of law. Bulygin’s criticism can be summarized as a dilemma: on the one hand, if analytical arguments alone succeed in establishing a necessary inclusion of moral elements in the concept of law, then normative arguments are superfluous; on the other hand, if analytical arguments fail to support such an inclusion, then normative arguments are useless (*ibid.*, 50).

In order to meet Bulygin’s challenge, Alexy argues that there is a relation of inclusion between analytical and normative arguments. He calls this the *argument from inclusion*:

The argument from inclusion consists of two parts, and the first part is this. It is a conceptual necessity that law raises a claim to correctness. The second part of the argument is that this claim to correctness necessarily leads to an inclusion of non-authoritative normative—that is, moral—elements, not only at the level of the application of law but also at the level of determining the nature and defining the concept of law. (Alexy 2013a, 226)

\* I would like to thank two anonymous referees for helpful suggestions and comments. This research was supported in part by a grant from the Taiwan Ministry of Science and Technology (NSC 100-2410-H-001-003-MY3).

Whether this argument has successfully refuted Bulygin's criticism, however, is not my main concern. Rather, the aim of this paper is to examine whether the argument from inclusion can, as Alexy wishes, carry out the task of supporting the connection thesis. For this purpose, I shall first of all set out the structure of this argument and point out some ambiguities in Alexy's connection thesis.

## 2. The Argument from Inclusion and Two Interpretations of the Connection Thesis

### 2.1. Recasting Alexy's Argument from Inclusion

In fact, the first part of the argument from inclusion, which says that law necessarily raises a claim to correctness, is a conceptual thesis. Alexy employs the method of performative contradiction, which he considers as a conceptual or analytical argument in a broader sense, to demonstrate that law's claim to correctness is a conceptual necessity (Alexy 2002a, 35–9). In this paper, as in Alexy's reply to Bulygin, the first part of the argument from inclusion will be taken as given.<sup>1</sup> The crucial issue lies in its second part, which expresses the relation between analytical and normative arguments.

However, the second part in the passage quoted above states a conclusion—that is, that the claim to correctness necessarily leads to an inclusion of moral elements in determining the nature and defining the concept of law—rather than an argument. It is not clear why and how, if law necessarily raises a claim to correctness, some normative arguments can and must be employed in supporting an inclusion of moral elements in the concept of law, and in what sense these arguments can be called "normative." To clarify this point, we shall look into the claim to correctness in some detail.

As mentioned above, the starting premise of the argument from inclusion is that law, whether individual legal norms, legal decisions, or a legal system as a whole, necessarily raises a claim to correctness. More precisely speaking, this premise says that "participants in a legal system necessarily, on all sorts of levels, lay claim to correctness" (Alexy 2002a, 35–6, 39).<sup>2</sup> A participant is one who "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 is found" (Alexy 2007, 45). In other words, a participant is interested in the question "What is the correct legal answer?" (*ibid.*, 46).<sup>3</sup>

<sup>1</sup> The argument from inclusion, as Alexy concedes, "acquires a hypothetical character" (Alexy 2013a, 226) because it takes law's claim to correctness as given. Of course, this argument will be undermined if one does not accept the hypothetical premise that the claim to correctness is necessarily raised by law or legal participants. But the hypothetical character of the argument is irrelevant to the present issue, because the main aim of this paper is to show that even if one accepts its premises, they do not necessitate the intended conclusion, i.e., the connection thesis. See Sections 3 and 4 below.

<sup>2</sup> It is doubtful whether law is capable of making claims at all. Alexy's reply to this doubt is that law's claim to correctness is raised by its representatives, i.e., "by persons, in particular, though not solely, by officials, on behalf of the law" (Alexy 2010, 168).

<sup>3</sup> Alexy (2002a, 25) distinguishes between the participant's perspective and the observer's perspective. An observer is not interested in what the correct legal answer is, but rather "asks and adduces arguments on behalf of a position that reflects how legal questions are actually decided in that legal system" (Alexy 2007, 45). Alexy thinks that the positivistic separation thesis is

The claim to correctness in its own right, however, does not suffice to establish a connection between law and morality. As Alexy admits, a positivist can concede that law necessarily raises a claim to correctness, but deny that this claim has any moral implication (Alexy 2002a, 39). Exactly at this point Alexy introduces a two-stage normative argument to bolster the conceptual argument. First, he maintains that the claim to correctness implies a claim to justifiability (Alexy 2002a, 78; 1998, 208): A participant cannot claim that his answer to a legal question is correct while giving no reason to justify it. In order to satisfy law's claim to correctness, a participant must appeal to some reasons to justify what he claims to be legally correct. Second, moral reasons or principles are among the reasons adduced by a participant in substantiating the correctness of a legal decision or proposition. To ground the latter contention, Alexy draws mainly on the dual nature of law and the judicial obligation to apply moral principles in deciding hard cases, and I shall return to these issues later.

The normative argument can thus be formulated as follows: In order to satisfy law's claim to correctness, a participant must adduce moral reasons to justify a legal decision or a legal proposition. This argument can be qualified as "normative" in a double sense. On the one hand, the "must" here refers to a kind of practical necessity, as it is necessary to appeal to moral reasons for achieving a specific aim, that is, fulfilling the claim to correctness raised by a legal participant;<sup>4</sup> on the other hand, moral reasons are themselves normative reasons (Alexy 2008, 296). Moreover, this formulation also explains why Alexy thinks that there is a relation of inclusion between analytical and normative arguments: If moral reasons are brought into play to satisfy law's claim to correctness, then this claim necessarily comprises a claim to moral correctness and justifiability.

Accordingly, the rudimentary form of Alexy's argument from inclusion can be recast as follows:

- (1) Law necessarily raises a claim to correctness.
- (2) In order to satisfy law's claim to correctness, a legal participant must appeal to moral reasons to justify a legal decision or a legal proposition.

Therefore, moral elements are necessarily included in the concept of law.

Before examining whether the conclusion—namely, the connection thesis—follows from (1) and (2), it should be noted that the connection thesis can be interpreted in different ways.

wrong only from the perspective of the participant. Of course, the distinction between the participant and the observer is not uncontroversial (see, for example, Raz 2007, 22–5; Bulygin 2013, 52–4), but I will not deal with this issue here.

<sup>4</sup> An anonymous referee indicates that "practical necessity" is tantamount to something being a necessary means to a previously selected goal, and thus this argument is "instrumental" or "teleological" rather than "normative" in the proper sense. Nevertheless, since Alexy says that an argument is normative "when it is stated that, to attain a certain goal or to comply with a certain norm, it is necessary to exclude or to include moral elements in the concept of law" (Alexy 2002a, 21; emphasis mine), I will use *normative* here in a broader sense in order to include instrumental or teleological arguments. In fact, it refers to a certain kind of practical normativity, i.e., the normativity of taking necessary means to our ends, which in turn involves the problem about whether we have reason to follow the requirements of instrumental rationality. However, I cannot take up this complex issue here. For a detailed discussion about instrumental normativity, see, among others, Raz 2011, 141–72.

## 2.2. Taxonomic and Doctrinal Interpretations of the Connection Thesis

In Alexy's view, the connection thesis is the distinguishing mark of non-positivistic theories of law (Alexy 2002a, 2–3). However, the connection thesis—whether formulated as the conclusion above or in its most general form, “there is a necessary connection between law and morality”—is an ambiguous claim because law and morality can be connected in various ways. Legal positivism can embrace the existence of a necessary connection in one way but not in another. For example, almost all legal positivists subscribe to the view that it is conceptually necessary that law can be morally evaluated as good or bad, and just or unjust (see Raz 2007, 21). Some legal positivists even maintain that certain moral properties are among the necessary or essential features of law. A well-known example is Joseph Raz, who contends that a necessary feature of law is that “it claims legitimate authority, and the concept of legitimate authority is a moral one” (*ibid.*, 20).

If the crux of the debate between Alexy and his positivistic opponents is whether the connection thesis holds, it should first be ascertained what kind of necessary connection he wants to defend. However, a variety of formulations about the connection between law and morality can be found in Alexy's works. For example, he says: “[I]t is true that law is a social institution. Its being a social institution does not, however, preclude its being a moral entity” (Alexy 2007, 52–3); he also claims that “every legal system that is at least minimally developed necessarily comprises principles,” and that “the necessary presence of principles in the legal system leads to a necessary connection between law and some morality or another” (Alexy 2002a, 71, 75). Sometimes he stresses that “the claim to correctness necessarily connects both the principle of justice and the principle of legal certainty with law” (Alexy 2013a, 227). Recently, he said that the connection thesis “refers not to each and every necessary relation between law and morality, but only to the relation between legal validity or legal correctness on the one hand, and moral merits and demerits or moral correctness and incorrectness on the other” (Alexy 2013b, 98).

It is not clear whether all the “necessary connections” listed above address the same question, or how they are interrelated. One may further wonder which one is at issue in the debate between legal positivism and non-positivism. A possible explanation for such diversity and ambiguity is that there might be many distinct, though variously interconnected, concepts we use to talk about law. Perhaps various versions of the connection thesis are using different concepts of law, and they generate very different kinds of questions about the relation between law and morality.

Ronald Dworkin has made an illuminating and theoretically interesting distinction between four different concepts of law (Dworkin 2006, 1–5, 223): the *doctrinal* concept that we use in stating what the law requires, forbids, or permits (“It is required by the law not to smoke in a public place”); the *sociological* concept we use to name a particular kind of social institution (“Law does not exist where there are no specialized institutions of coercive enforcement”); the *taxonomic* concept 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 we use to describe a

distinct political value such as the value of legality ("Accusing and punishing the Nazi officials does not violate the value of legality").<sup>5</sup>

If Alexy's connection thesis is a claim about the concept of law, or to put this in Alexy's words, if the debate between him and positivists is a dispute over how to define the concept of law, then we might ask what kind of concept he intends to talk about. Although Alexy himself does not distinguish between different concepts of law, we may use Dworkin's distinction to clarify the issues raised by Alexy's different versions of the connection thesis.

When Alexy says that law is a social institution that, at the same time, is a moral entity, he seems to deploy the sociological concept and be interested in the question of whether a social institution has to exhibit some moral features in order to be classified as "law" in the sociological sense. His contention that principles are necessarily included in every legal system is to answer the taxonomic question of whether certain moral principles are also principles of law. The necessary connection between legal correctness or validity and moral correctness, as discussed in more detail below, seems to be concerned with the question about the doctrinal concept of law: whether social facts alone can decide which propositions of law are true or correct. Finally, the principle of legal certainty and the principle of justice can be regarded as two competing values that legal practice strives to promote: Both of them express the ideal of legality.<sup>6</sup>

In the following I will focus primarily on the taxonomic and doctrinal interpretations of the connection thesis. This is because they not only state the conclusions that Alexy intends to draw from the argument from inclusion, but they are also the central issues in the disagreement between Alexy and his positivistic opponents, such as Bulygin (2013) and Raz (2007). A common point of contemporary analytical legal positivists, though they often fail to distinguish between the taxonomic and doctrinal concepts of law, is that they deny that moral principles are necessarily part of the law, or that morality necessarily figures in determining what the law requires, permits, or forbids (see Dworkin 2006, 232–40).

Let us begin with the taxonomic interpretation of the connection thesis. The taxonomic concept of law supposes that law is a discrete set of rules, principles, or other kinds of norms (*ibid.*, 4). Although Alexy regards the law not only as a system of norms but also as a system of procedures—that is, "a system of processes or actions based on and governed by rules, actions by means of which norms are

<sup>5</sup> An anonymous referee argues that perhaps Dworkin's distinction does not show there are four different concepts, but rather that the same concept of law can be used in different ways. Even if that were the case, it would not prevent the connection thesis from being interpreted in different ways, nor would it undermine the importance of distinguishing among different issues that various uses of the concept of law raise about the connection between law and morality. In particular, as we shall see later, it is still of significance to distinguish the taxonomic question of whether moral principles are necessarily included in the legal system from the doctrinal question of whether morality is among the truth conditions of legal propositions. In fact, Dworkin insists that his distinction between the four concepts is not a verbal one because each concept collects different instances. For example, the sociological concept collects institutions or patterns of behavior; the doctrinal concept collects valid normative claims or propositions; and the taxonomic concept collects rules, principles, or other standards that are labelled "legal" as opposed to moral or some other kinds of standards (see Dworkin 2006, 263).

<sup>6</sup> The relation between the value of legality and the doctrinal concept of law in Alexy's theory will be briefly discussed in Section 4 below; see footnote 19.

issued, justified, interpreted, applied, and enforced" (Alexy 2002a, 24)—his definition of law at the end of *The Argument from Injustice* suggests that he still adopts the taxonomic concept of law:

The law is a system of norms that (1) lays claim to correctness, (2) consists of the totality of norms that belong to a constitution [...], as well as the totality of norms that are issued in accordance with this constitution [...], and, finally, (3) 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. (Alexy 2002a, 127)

The third part of this definition is termed by Alexy the *incorporation thesis*, which says that moral principles are necessarily incorporated into the legal system (*ibid.*, 71). In Dworkin's view (2006, 4), when one asks whether certain moral principles count as part of the law, he uses the taxonomic concept of law. Hence, if Alexy's connection thesis is interpreted as a taxonomic thesis, it can be formulated as follows:

- (C1) Moral principles are necessarily included in the law (i.e., the set of legal norms).

In section 3, I will argue that the argument from inclusion cannot sustain the taxonomic connection thesis unless it is supplemented by an auxiliary premise that will lead to an implausible overinclusion.

Let us turn to the doctrinal interpretation of the connection thesis. The doctrinal concept is used to make claims or statements about what the law requires, permits, or prohibits. Such claims or statements can be called "propositions of law" or "legal propositions." In using the doctrinal concept of law, we are concerned with whether a proposition of law is true or correct and, when it is true or correct, what makes it so. According to Dworkin (2006, 2), the main controversy over the doctrinal concept of law is whether moral considerations are ever, and if so when, among the truth conditions of legal propositions (i.e., the conditions that must hold to make such a proposition true). While doctrinal non-positivism affirms that the truth conditions of legal propositions necessarily contain some moral considerations, doctrinal positivism denies this.

Alexy's thesis that law necessarily raises a claim to correctness might be conceived as a contention about the doctrinal concept of law. If a legal participant makes claims about what is required, permitted, or prohibited by the law, he necessarily, though often implicitly, asserts that the propositions of law he claims or defends are true or correct and must offer reasons to ground his claims. If the claim to correctness is understood in this way, it is also possible to interpret the connection thesis as a doctrinal thesis. Alexy seems to be inclined in his recent writings to adopt the doctrinal interpretation. This can be obviously seen in "a more precise version" of the connection thesis, which states 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" (Alexy 2008, 285; 2013b, 98).

Nevertheless, it is still not clear what kind of connection is stated in this more precise version. Alexy himself seldom speaks of "propositions of law" or "legal propositions," but he endorses the semantic concept of norms, according to which

a norm is the meaning of a normative statement, and a normative statement expresses that something is required, permitted, or prohibited (Alexy 2002b, 21–5). Legal propositions are thus a sort of normative statement in that they state what is required, permitted, or prohibited by the law, and we might say that their meaning or normative content are legal norms in Alexy's sense.<sup>7</sup> According to Alexy, a normative statement can be used to assert that a certain norm (i.e., its normative content) is valid. If normative statements are used in this way, they are capable of being true or false: A normative statement is true if, and only if, the norm it asserts is valid (Alexy 2002b, 28–9). Correspondingly, the truth conditions of legal propositions, when they are intended to express which norms are legally valid, can be viewed as the conditions of legal validity, that is, the conditions that make a certain normative content (for example, "One ought not to smoke in a public place") legally valid.<sup>8</sup>

In this way, the debate between Alexy and legal positivists will be characterized as a disagreement over whether the conditions of legal validity include not only social facts—that is, authoritative issuance and social efficacy—but also moral elements. If so, the doctrinal version of the connection thesis can be formulated in the following manner:

(C2) Moral elements are necessarily included in the conditions of legal validity.

In Section 4, I will argue that although the argument from inclusion supports the view that moral arguments must figure in determining what are among the conditions of legal validity, this does not entail (C2) without the help of some further premises.

### 3. Necessary Incorporation of Moral Principles into the Legal System?

In this section, I will examine whether the argument from inclusion, *mutatis mutandis*, can support the taxonomic connection thesis (C1), namely, Alexy's incorporation thesis. Contrary to the so-called inclusive legal positivism, which maintains that the incorporation of moral principles—either by means of authoritative issuance (that is, some moral principles are legal principles because they are endorsed by the positive law) or by means of the rule of recognition *qua* conventional practice—is a contingent matter, Alexy's incorporation thesis makes a much stronger claim: Moral principles are necessarily incorporated into the law. To defend this thesis, Alexy argues that, even if moral principles are not transformed into the positive law, they can still be incorporated into the law in another way, that is, by means of the judicial obligation to apply moral principles in deciding hard cases.

<sup>7</sup> In Alexy's view, "X has a right to . . ." is also a normative statement because it can be analyzed in terms of complex deontic modalities; in other words, right-statements also express norms. See Alexy 2002b, 24.

<sup>8</sup> For such an account of the truth conditions of legal propositions, see also Marmor 2011, 3. It is to be noted that the formulation of the doctrinal connection thesis here refers only to legal validity. In Section 4 below, the relation between legal validity and correctness will be elaborated on.

Alexy's point of departure is that every positive law has, as H. L. A. Hart (1994, 128) remarks, an open texture. This is, *inter alia*, because of 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 (Alexy 2002a, 68–9). Cases within the scope of the open texture are usually called "hard cases." By definition, hard cases cannot be decided exclusively on grounds of positive law. In Alexy's view, when reasons based on positive law—authoritative or social fact-based reasons—run out, there are two possibilities. The first is that the decision is made without any reason. However, this possibility is excluded by the claim to correctness because, as stated above, a judicial decision necessarily lays claim to correctness and this claim comprises a claim to justifiability: A judge cannot claim that his decision is correct while giving no reason to justify it.

Hence, only the second possibility is available: The decision is made on other reasons that are not based on positive law. Among those non-authoritative reasons are moral reasons of special significance (Alexy 2003a, 14; 2008, 283). Alexy stresses that there are often competing moral reasons in hard cases and a judge must balance these reasons in order to justify his decision. Reasons that can be weighed against each other are either principles or supported by principles (Alexy 2002a, 72). Thus, in order to satisfy the claim to correctness, a judge has to apply moral reasons—that is, strike a balance between relevant moral principles—to justify his decision on a hard case. "From the point of view of a broader non-positivist conception of law, this amounts to an inclusion of moral reasons within the law" (Alexy 2003a, 14), so Alexy argues, for "the moral arguments that are indispensable for a well-grounded answer to a legal question are necessarily incorporated into the law" (Alexy 2008, 283).

For supporting the taxonomic connection thesis, the argument from inclusion can thus be put as follows:

- (1) A judicial decision necessarily raises a claim to correctness.
- (2) In order to satisfy this claim, a judge in deciding a hard case must appeal to moral principles to ground his decision.

Therefore, moral principles are necessarily incorporated into the law. (C1)

However, this argument, as Raz criticizes, is a *non sequitur* (Raz 2007, 34). Premises (1) and (2) can at most demonstrate that moral principles are necessarily among the reasons that can be adduced to justify a correct legal decision or show that there is a necessary connection between legal and moral reasoning. But this is by no means equivalent to the claim that moral reasons or principles are necessarily included in the legal system.

Raz (2007, 34–5) has taken an analogy from the doctrine of private international law to explain why (C1) does not follow from (1) and (2).<sup>9</sup> In the cases of private international law, a judge is often required by domestic law to apply the norms of some foreign legal system, and cannot reach a correct decision without applying the foreign laws. Yet the fact that the judge has to apply foreign laws to decide a case does not make them part of the domestic legal system. For example,

<sup>9</sup> Bulygin also employs such an analogy to attack Alexy's connection thesis; see Bulygin 2013, 53.

according to Taiwanese law, a Taiwanese judge has to apply the German tort law in order to decide whether a defendant is legally liable to a plaintiff for damages arising out of an accident in Berlin. Although the German tort law figures in the judge's reasoning to justify his decision, it does not mean that the German tort law therefore becomes a part of Taiwanese law. By the same token, even though a judge must appeal to moral principles to justify his decision in a hard case, it cannot be concluded from this fact that moral principles are therefore included in the legal system. In other words, the judicial obligation to look to moral principles does not *ipso facto* incorporate moral principles into the law (see also Raz 2009a, 46).

However, Alexy thinks that this analogy is misleading. Whereas in the cases of private international law a judge is required by positive law to apply the standards of foreign legal systems, the judicial obligation to apply moral principles in deciding hard cases does not depend on the existence of some authoritative rules. Even if the positive law contains no such rules requiring a judge to apply moral principles, he is still required "by the nature of law" to do so because he has to fulfill the claim to correctness raised by his decision (Alexy 2007, 55). According to Alexy, "this claim, because it is necessarily attached to the judicial decision, is a legal claim and not simply a moral one. Corresponding to this legal claim to correctness is a legal obligation to satisfy the claim, quite apart from the legal consequences of failing to do so" (Alexy 2002a, 73). In other words, instead of the rules of positive law, it is law's necessary claim to correctness (this is what Alexy means by "the nature of law") that requires a judge to appeal to moral principles to ground his decision.<sup>10</sup>

Nevertheless, I think that Alexy's reply misses Raz's point. What Raz's analogy is intended to show is not that the judicial obligation to apply moral principles depends on the requirement of positive law, but rather that not everything that figures in judicial reasoning can be counted as part of the law. However, Alexy insists on the contrary:

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

This is exactly the auxiliary premise with which he supplements the argument from inclusion for supporting the necessary incorporation thesis.

To argue for (3), Alexy again relies on the idea of legal systems as systems of procedures:

[F]or a participant, the legal system is not only a system of norms qua results or products, but also a system of procedures or processes, and so, from the participant's perspective, the reasons taken into account in a procedure—here, the process of making a decision and justifying it—belong to the procedure and thereby to the legal system. (Alexy 2002a, 73)

<sup>10</sup> In this way, Alexy thinks that he has answered Bulygin's challenge: "If normative necessity means that the connection between law and morality is commanded, then one should ask who it is that can command the connection thesis" (Bulygin 2013, 50). Alexy's answer to this question is: "It is the claim to correctness taken seriously by the participant" (Alexy 2013a, 227).

Consequently, so Alexy concludes, “[e]verything on which an official applying the law in the open area of the law bases and/or must base a decision in order to satisfy the claim to correctness belongs to the law” (Alexy 2002a, 129).

If a rule, principle, or standard “belongs to the law” in the taxonomic sense,<sup>11</sup> this means that it acquires membership in the set of norms labeled “legal” and can be termed “*legal* rule, principle, or standard.” Thus, what (3) claims is that certain rules, principles, or standards can be counted as legal norms, thereby becoming part of the law, simply by virtue of their being considerations that a participant has to take into account in making and justifying a legal decision. Correspondingly, moral principles are necessarily incorporated into the law—that is, they are turned into legal principles—precisely because a judge has to apply them to ground his decision when he faces a case within the open texture of positive law.

Of course, (1) and (2) together with (3) entail (C1). But the cost of adding this auxiliary premise is an implausible overinclusion: Too many norms or standards, including those we usually do not count as legal norms, will be incorporated into the law. If (3) were true, the legal system would comprise all those rules or standards that a judge has to take into account in justifying his decision, and they could all be labeled “legal.” Yet it is a very doubtful claim. An example from Dworkin (2006, 238) might help to illustrate the embarrassment of overinclusion. In spite of a lack of directives of positive law, a judge, when calculating damages in a case of torts, has to apply some arithmetical rules such as “two and two add up to four” in order to get a correct decision; but it seems quite odd to say that arithmetical rules therefore become legal rules and turn into part of the law.<sup>12</sup>

Alexy would object that this example is inappropriate because it has less to do with legal correctness. If a judge who calculates damages supposes that two and two add up to five, he makes only a mathematical, not a legal, mistake. By contrast, if a judge who decides a hard case does not apply moral reasons to strike the correct balance, his decision is not only morally defective but also legally defective, for law’s claim to correctness implies the claim to moral correctness, but it does not always include a claim to mathematical correctness.

However, this reply can be refuted by another example drawn from Alexy himself. Alexy has proposed a weight formula to characterize the formal structure of weighing and balancing (Alexy, 2003b). According to the weight formula, one has to use the rules of multiplication and division to compare the relative weight of competing

<sup>11</sup> In Section 2, I pointed out that although Alexy regards the legal system not only as a system of norms but also as a system of procedures, his definition of law does not escape the taxonomic concept of law.

<sup>12</sup> In fact, there seems to be another argument against introducing the premise (3). As Dworkin (2006, 5, 238–9) points out, the important question is whether and how moral principles are relevant in deciding a hard case, but it is irrelevant whether or not they are labeled “*legal*” principles. In order to reach a correct decision, a judge has to take various considerations into account, including moral principles, arithmetical rules, laws or legal practice in other jurisdiction, and so forth. We have considerable leeway in making a linguistic choice of whether to classify certain considerations as part of the law, but which choice we make does not affect their relevance to the decision. If moral principles are indispensable for reaching a correct decision, a judge is bound to apply them to the justification of his decision, regardless of whether they are incorporated into the law or not. On this account, the premise (3) contributes nothing to the normative significance of moral principles for legal decisions. For a similar view, see Raz 2009b, 201–2.

principles, thereby determining which principle (or set of principles) takes precedence over the other (or the other set).<sup>13</sup> In Alexy's words, "the Weight Formula represents a scheme which works according to the rules of arithmetic" (*ibid.*, 448).

Hence, whenever a judge strikes a balance between two competing principles, he has to apply the rules of multiplication and division in order to decide which one takes priority. If he has not calculated in accordance with these arithmetical rules, he will not get the correct result of balancing and thus fail to reach a correct legal decision. In such a case, a mathematical mistake renders a decision not only morally, but also legally incorrect. In other words, in order to satisfy the claim to correctness, which in this case comprises a claim to correct balancing, a judge who deals with competing principles must apply the arithmetical rules to justify his decision. According to (3), this implies that the rules of arithmetic also belong to the set of legal norms, a result that seems both very odd and implausible.

In brief, as an argument for the taxonomic connection thesis, Alexy's argument from inclusion is in a dilemma: On the one hand, without resorting to the auxiliary premise (3) it cannot support the intended conclusion (C1); on the other hand, if it is supplemented with (3), Alexy has no alternative but to accept a questionable overinclusion.

#### 4. Necessary Inclusion of Moral Elements in the Conditions of Legal Validity?

The taxonomic version of the argument from inclusion is addressed mainly to adjudication in hard cases. As previously stated, its point of departure is the fact that moral principles necessarily figure in legal reasoning because every positive law has an open texture. By this, it seems that moral reasons would come into play only in the open area of positive law and have no bearing on legal decisions whenever authoritative reasons are available. However, it is a wrong impression that moral principles function only as plugs to fill the gap left by positive law. On the contrary, in Alexy's non-positivistic theory, moral principles play a more fundamental role, in that even the positive or social-factual dimension of law—that is, the elements of authoritative issuance and social efficacy—is grounded on moral arguments. This brings us to the second version of the argument from inclusion, which aims at supporting the doctrinal connection thesis.

Recall the second part of Alexy's formulation of the argument from inclusion: Law's claim to correctness necessarily leads to an inclusion of moral elements in determining the nature and defining the concept of law. If "the concept of law" here

<sup>13</sup> Alexy's complete weight formula is as follows:

$$Wi, j = \frac{Ii \cdot Wi \cdot Ri}{Ij \cdot Wj \cdot Rj}$$

Wi, j stands for the concrete weight of a principle Pi relative to a colliding principle Pj, and is defined as the quotient of, first, the product of the intensity of the interference with Pi (Ii) times the abstract weight of Pi (Wi) times the degree of the reliability of the empirical assumptions concerning what the measure in question means for the nonrealization of Pi (Ri), and, second, the product of the corresponding values with respect to Pj (Ij, Wj, Rj). Pi precedes Pj if and only if  $Wi, j > 1$ , and Pj precedes Pi if and only if  $Wi, j < 1$ . If  $Wi, j = 1$ , it is a stalemate. See Alexy 2003b, 444–9.

is conceived as the doctrinal concept, then from this formulation the following thesis can be formed: What to count among the truth conditions of legal propositions is not only a conceptual or analytical, but also a normative matter; in other words, the conditions of legal validity are determined by moral considerations. Nonetheless, I will argue that this thesis does not amount to the doctrinal connection thesis, which says that moral elements are necessarily included in the conditions of legal validity.

Let us at first look more closely at Alexy's account of the role of moral or normative arguments in determining the nature of law. His starting point is the dual nature thesis: Law's claim to correctness necessarily comprises a real as well as an ideal dimension. Whereas the ideal dimension refers to justice or moral correctness, the real dimension refers to the correctness of positivity defined by authoritative issuance and social efficacy (Alexy 2010, 167; 2013a, 227). Correspondingly, one can draw a distinction between two sorts of reasons for justifying a legal proposition: nonauthoritative or moral, and authoritative or based on social facts (Alexy 2007, 51). A legal proposition or decision is morally correct if it can be justified by moral reasons, and it is positively correct if it can be justified by authoritative reasons.

The ideal and the real dimension are by no means unconnected. On the contrary, Alexy argues that the necessity of the real or positive dimension is to be explained by virtue of some moral values. His argument runs as follows (Alexy 2008, 293): Although morality demands a resolution of problems of social coordination and cooperation in order to avoid the moral costs of anarchy, morality as such does not suffice to resolve these problems. They can only be resolved by law *qua* enterprise that strives to realize the value of legal certainty. Therefore, morality requires law *qua* enterprise that strives to realize the value of legal certainty.<sup>14</sup> Alexy thinks that legal certainty can be achieved only by means of positivity; therefore, it is a moral demand that the real dimension must be part of the nature of law (Alexy 2010, 174; 2013b, 102). In other words, if the claim to correctness implies moral correctness, and moral correctness includes a demand for realizing legal certainty, then law's claim to correctness must include the correctness of positivity.

On the basis of this argument, Alexy distinguishes between two stages or levels of correctness: *first-order correctness* and *second-order correctness*:

First-order correctness refers only to the ideal dimension. It concerns justice as such. Second-order correctness is more comprehensive. It refers both to the ideal and to the real dimension. This means that it concerns justice as well as legal certainty (*Rechtssicherheit*). [...] In this way, the claim to correctness, *qua* second-order claim, necessarily connects both the principle of justice and the principle of legal certainty with law. (Alexy 2010, 174; see also Alexy 2013b, 102)

In Alexy's phrase, the principle of legal certainty is a formal principle, which requires commitment to authoritative materials, such as statutes or precedents; the principle of justice is a material or substantive principle, which requires that a legal proposition or a legal norm be just or morally correct. However, both principles may collide, and their collision, as with the conflict of principles in general, is to be resolved by weighing and balancing. Thus, so Alexy says, "second-order correctness is a matter of balancing" (Alexy 2010, 174). To put it another way, if

<sup>14</sup> For an elaborate account of legal certainty in Alexy's nonpositivistic theory of law, see Berteau 2007.

authoritative and moral reasons are both applicable for justifying a legal proposition or a legal norm, and they conflict with each other (for example, authoritative reasons count in favor of the correctness of a legal proposition but moral reasons do not), then, in order to satisfy the second-order claim to correctness, a participant has to strike a balance between the formal and the substantive principle to decide which sort of reasons prevail.

With respect to legal correctness, the premises of Alexy's argument from inclusion might be reformulated as follows:

- (1) Law necessarily raises a claim to correctness.
- (2) In order to satisfy this claim, a legal participant must strike a balance between the principle of legal certainty and the principle of justice to decide whether a legal proposition or norm is correct.

The question now is whether (1) and (2) together directly entail the doctrinal connection thesis (C2): "Moral elements are necessarily included in the conditions of legal validity." Unfortunately, the answer is negative.

So far, Alexy's argument based on the dual nature of law has only shown that moral as well as authoritative reasons contribute to the correctness of legal propositions or norms, and that the normative force of authoritative reasons is traced back to the formal principle of legal certainty. Both the principle of legal certainty and the principle of justice are moral values that may compete with each other; therefore, legal correctness *qua* second-order correctness is a matter of how to balance these two moral principles. Since the argument refers only to legal correctness, what follows from the two premises above is a weaker version of the connection thesis:

- (C3) Moral elements—the principle of legal certainty and the principle of justice—are necessarily among the conditions of legal correctness.

Nevertheless, (C3) is not equivalent to (C2), because according to Alexy's theory, legal correctness is not identical to legal validity.

According to Alexy, since law's claim to correctness comprises first-order correctness, namely, moral correctness as such, then moral incorrectness implies legal incorrectness. But he emphasizes that legal incorrectness does not necessarily lead to the loss of legal validity: "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" (Alexy 2008, 296).

It is noteworthy that Alexy makes a distinction between classifying and qualifying connections between law and morality:

This distinction concerns the effects of moral defects. The effect of a classifying connection is the loss of legal validity. By contrast, the effect of a qualifying connection is legal defectiveness or incorrectness that does not, however, undermine legal validity. The decisive point here is that the effect of moral defectiveness or incorrectness is legal defectiveness or incorrectness. (Alexy 2013b, 104; see also Alexy 2010, 176)

Having noticed this distinction, we can grasp the difference between the conditions of legal correctness and the conditions of legal validity.

The conditions of legal correctness, as Mark Murphy (2012, 54–7) suggests, can be viewed as the nondefectiveness conditions of law. The inclusion of substantive moral principles in the conditions of legal correctness only sets a normative standard (i.e., “being morally correct or justifiable”) that a legal norm ought to meet in order to be nondefective, but a legal norm that falls short of this standard is only defective as law and does not necessarily lose its legal validity or legality. This can be explained by analogy with assertions. Since making an assertion necessarily raises a claim to truth, “being true” is a normative standard for the nondefectiveness of assertions. A false assertion, though it is defective, is still an assertion.<sup>15</sup> By the same token, one can accept that an authoritatively issued but morally incorrect norm is legally defective, while at the same time insist that such a defective legal norm is still a law; in other words, one can merely defend a necessary qualifying connection but deny a classifying connection.

If the aim of the argument from inclusion is to support not only the weak, but also the strong version of the doctrinal connection thesis (C2), Alexy has the argumentative burden of showing how to move from (C3) to (C2). He owes us an account of how the inclusion of first-order moral correctness in the conditions of legal correctness leads to an incorporation of moral elements into the conditions—at least the necessary conditions—of legal validity. Such an account, however, is based on two additional arguments.

First, Alexy must explain the relation between legal correctness and legal validity. In fact, such an explanation has been suggested in his argument for the necessity of the real dimension of law. In determining what makes a certain normative content legally valid, we have to appeal to the moral principles among the conditions of legal correctness. If these conditions include the principle of legal certainty, then it is necessary in order to realize this principle to include the element of authoritative issuance in the conditions of legal validity, since the problems of social coordination and cooperation are to be resolved by directives issued by an authority. Analogously, if the conditions of legal correctness comprise the principle of justice, some moral criterion must be included in the conditions of legal validity such that the correct or just distribution or compensation can be achieved through the law. The relationship between legal correctness and legal validity explained in such a way might be called “practical necessity” or, using Murphy’s expression,

<sup>15</sup> According to Murphy (2013, 3–6), the notion of defectiveness is connected to the notions of kind, ought, and good. The criteria for defectiveness are always fixed by a certain kind. To call A defective is to say that it lacks some property that an instance of K to which A belongs ought to have, and in this sense, A is not a good K. For example, to be a toaster is to be an artifact manufactured to toast bread. A toaster that does not toast bread is a defective one; as a toaster, it ought to toast bread. We can say that “being capable of toasting bread” is a property among the nondefectiveness conditions of toasters, and a good toaster is one that can toast bread. For a similar, but more analytically refined account of defectiveness and ought, see Thomson 2007. The notion of defectiveness understood in this way might help us comprehend Alexy’s somewhat opaque statement: “the participant’s ‘is’ includes an ‘ought’” (Alexy 2013a, 227). From the participant’s perspective, to be a law is to be something that can be correct *qua* law. If a law fails to meet the standard of legal correctness, it is a defective law. Thus, a participant might say that to be a law is to be something that ought to meet the standard of legal correctness. It should be noticed that the “ought” here, as Murphy stresses, is a distinctive sort of “ought”—i.e., the ought of kind membership—which is connected to the nondefectiveness conditions internal to the kind in question.

"hypothetical necessity,"<sup>16</sup> because the conditions of legal validity in this explanation are realization conditions for being legally correct; in other words, what makes a norm legally valid is intended to realize moral principles that constitute the normative standard of legal correctness.

However, the argument from practical or hypothetical necessity is not yet conclusive for supporting the stronger version of the doctrinal connection thesis. Consider the following objection: Even though the conditions of legal correctness contain the substantive as well as the formal principle, and both figure in deciding what makes a norm legally valid, the latter is so weighty that the conditions of legal validity should not include any moral elements but consist only of authoritative or social-factual ones. Consequently, the impact of the substantive moral principle cannot extend beyond legal correctness; in other words, one can accept (C3) but reject (C2). Alexy terms such a position "super-inclusive non-positivism." Super-inclusive non-positivism is distinct from positivism only in that it admits the effect of moral incorrectness on legal defectiveness.<sup>17</sup> With respect to legal validity, however, there is no difference between super-inclusive non-positivism and legal positivism because both affirm that legal validity is by no means affected by moral incorrectness (Alexy 2010, 176; 2013b 105–7).<sup>18</sup>

In fact, the argument from hypothetical necessity on its own can only demonstrate that moral principles necessarily figure in determining what are among the conditions of legal validity, but this conclusion, as the objection from super-inclusive non-positivism shows, does not amount to the necessary inclusion of moral elements in the conditions of legal validity. Super-inclusive non-positivism also appeals to certain moral or normative arguments (i.e., the absolute priority of the principle of legal certainty) to argue that moral elements should be excluded from the conditions of legal validity. In order to counter this challenge, another auxiliary argument is needed. The key point of this argument is the necessity of

<sup>16</sup> Murphy's argument from hypothetical necessity is a functional or teleological argument. Roughly speaking, it assumes that law has a characteristic function or purpose, and in order to fulfill this purpose or to perform this function, the existence conditions of law—i.e., the conditions of legal validity—must be constituted by certain elements and these elements must be configured in a certain way; see Murphy 2013, 11–6. In fact, Alexy also maintains that law is necessarily connected with some purposes or functions because law's claim to correctness necessarily refers to these purposes and functions. For instance, he says that the basic formal purposes of law are defined by the values of legal certainty and efficiency; see Alexy 2008, 293. To discuss the functional argument as a whole is beyond the scope of this paper. For a detailed study on the functional argument in jurisprudence, see also Moore 2000, 294–332.

<sup>17</sup> Alexy attributes super-inclusive non-positivism to Aquinas, Kant, and John Finnis. It is impossible here to discuss whether it is appropriate to interpret their natural law theories in this way.

<sup>18</sup> This claim holds only for exclusive legal positivism, but not for inclusive legal positivism. Inclusive legal positivism maintains that it is possible, though not necessary, to incorporate moral elements into the necessary conditions of legal validity. Given that some moral criteria can figure as the necessary conditions for a norm to be legally valid, it is possible that an authoritatively issued norm will lose its validity when its content fails to satisfy the incorporated moral criteria; in other words, moral defectiveness can undermine legal validity in some cases (see, for example, Himma 2002, 136–7). Thus, inclusive legal positivism allows for the effect of moral defects on legal validity; it just insists that such a moral constraint on positive law is a contingent or conventional matter—it depends on the incorporation of some moral principles by virtue of a rule of recognition *qua* conventional practice; see Coleman 2001, 108–9.

balancing in determining the conditions of legal validity. Given that the principle of legal certainty and the principle of justice may collide with each other, one has to strike a balance between these two principles to determine what are among the conditions of legal validity. The result of this balancing is reflected in the corresponding theory about the conditions of legal validity.<sup>19</sup>

The necessity of balancing is still not sufficient for supporting a necessary inclusion of moral elements in the conditions of legal validity. In order to sustain (C2), Alexy has to argue that the formal principle does not always prevail over the substantive principle; rather, the correct result of balancing should allow some cases in which the formal principle is outweighed by the substantive principle. In Alexy's view, super-inclusive non-positivism is based on an incorrect balancing in that it attributes too little or even no weight to the principle of justice. He says:

[T]he correct result of this balancing is that the principle of legal certainty precedes justice in all cases of injustice except for the case of extreme injustice. (Alexy 2013a, 227; see also Alexy 2007, 53)

This might be called the *correct balancing thesis*, corresponding to the well-known Radbruch formula (Radbruch 2006): An authoritatively issued and social efficacious norm, even when it is unjust, may be a valid law unless its injustice reaches an extreme degree. Alternatively put, it is only when the threshold of extreme injustice is transgressed that a norm of positive law will lose its legal validity.

If the correct balancing thesis is true, then at least the moral element "being not extremely unjust" would be included in the conditions of legal validity. The connection between the argument from hypothetical necessity and the correct balancing thesis can thus be put in the following way. If second-order correctness is a matter of balancing, and the correct result of this balancing is that the principle of legal certainty takes general priority over justice, except in cases of extreme injustice, then the incorporation of "being not extremely unjust" into the conditions of legal validity is necessary for legal norms to fulfill the second-order claim to correctness.

If law's claim to correctness is a claim to second-order correctness, which, as Alexy argues, is a matter of balancing, we might say that this claim also comprises a claim to correct balancing. Accordingly, in order to substantiate (C2), the second premise of the argument from inclusion can be transformed into:

- (2') In order to satisfy this claim, a legal participant must strike a correct balance between the principle of legal certainty and the principle of justice to determine what are among the conditions of legal validity.

<sup>19</sup> From this point, we may see that there is an intrinsic relationship between the doctrinal concept and the aspirational concept of law. As Dworkin (2006, 168–78) argues, the value of legality and the problem of identifying true or valid claims of law are intertwined with each other. If the formal principle of legal certainty and the material principle of justice are regarded as two competing conceptions of the contested value of legality, the debate between different theories about the truth conditions of legal proposition is, in the end, a disagreement over what kind of value legal practice strives to realize and, more importantly, how different conceptions of the value of legality can be arranged in correct proportion to each other.

However, such a transformation does not make the argument from hypothetical necessity and the correct balancing thesis superfluous. They are still indispensable because, first, the transition from legal correctness to legal validity has to be explained by the hypothetical necessity, and second, (1) and (2') would not entail (C2) if the correct balancing thesis were not true—to be sure, whether it is indeed true remains a controversial matter to be discussed further.

In summary, the argument from inclusion can support the strong doctrinal connection thesis only when it is supplemented by the argument from hypothetical necessity and the correct balancing thesis. Without the help of these two auxiliary arguments, it can only establish the weak doctrinal connection thesis, which states merely a qualifying connection.

## 5. Conclusion

Alexy's argument from inclusion is intended to show that normative arguments are indispensable for defending the connection thesis. In this paper, I have reconstructed this argument and distinguished between two different versions of the connection thesis: a taxonomic one, which says that moral principles are necessarily incorporated into the legal system, and a doctrinal one, which says that moral elements are necessarily included in the conditions of legal validity.

My main aim is to examine whether the argument from inclusion on its own can substantiate the taxonomic and doctrinal connection thesis. The answer is negative. First, it cannot support the taxonomic connection thesis unless it is supplemented by a doubtful premise, which insists that everything that a judge has to apply in order to justify his decision belongs to the law, but adding this auxiliary premise will lead to an implausible overinclusion: Too many rules or standards, including those we usually do not count as legal norms, will be incorporated into the law.

Second, the argument from inclusion can sustain the doctrinal connection thesis only with the help of two additional premises: the argument from hypothetical necessity, which explains the relation between legal correctness and legal validity, and the correct balancing thesis, which claims that the principle of legal certainty can be overridden by the principle of justice in certain cases. Without the help of these premises, the argument from inclusion can only establish a necessary inclusion of moral elements in legal correctness and not in the conditions of legal validity.

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