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BOOK REVIEWS

The Argument from Injustice: A Reply to Legal Positivism BY ROBERT ALEXY, TRANSLATED BY STANLEY L. PAULSON AND BONNIE LITSCHEWSKI PAULSON. [Oxford: Oxford University Press, 2002. xiii + 142 pp. Hardcover: £40]

The title of Robert Alexy's book, *Begriff and Geltung des Rechts* in German, literally translated, ought to read, *The Concept and the Validity of Law*. The breakdown of his chapters, after an introduction on the problem of legal positivism, reflects these two concerns. The English title actually tells us more, as this is a book primarily about the age-old jurisprudential controversy over the relation between law and morality. This review will focus on some of Alexy's arguments relating to his first concern.

Perhaps for the strategic reason of not wanting to identify with the more controversial natural law camp, Alexy is careful to locate his analysis within the framework of positivism versus non-positivistic theories. He starts by arguing that there are two basic positions on the age-old question. Positivistic theories defend the separation thesis, which argues for a definition of law that does not include moral elements. This "presupposes that there is no conceptually necessary connection between law and morality, between what the law commands and what justice requires, or between the law as it is and the law as it ought to be." (p. 3) The positivist is concerned only with the issuance of law according to authority, and with its social efficacy (p. 3). Non-positivistic theories, in contrast, include moral elements in the definition of law, without excluding either the requirement of authoritative issuance or that of social efficacy (p. 4).

Alexy stops short of calling the opponents of positivism "natural law theorists". Perhaps it is a matter of translation. Perhaps he does not wish to have to explain what type of natural law he subscribes to, whether it is a secular or theological version, whether it refers to the nature or end of Man or to some other higher law. Christian natural law theorists, for example, who take a Thomistic position, would further explicate the concept of morality by reference to universal and immutable principles which constitute a higher

law to which laws posited by humans must conform. Perhaps Alexy's category of non-positivistic theories include those which connect law with less absolute or universal conceptions of morality. Alexy's equivocation as to his own more comprehensive worldview is somewhat of a pity. His defense of the connection thesis is valuable, and it would have been interesting to see, additionally, what he has to say of legal philosophers such as Lon Fuller and Ronald Dworkin, who make the connection between law and morality, but who might have been viewed by classical natural law theorists as positivistic, had the debate been classified as that between natural law and positivism.

Alexy reminds us that the debate between positivism and non-positivistic theories is about what law is (p. 5). This is contrary to the contention of positivists that the assertion of the necessary connection with morality concerns the issue of what the law ought to be, rather than what it is. It may be interesting to read this book along with Judith N. Shklar's *Legalism: Laws, Morals and Political Trials* (1964, 1986), in which she makes the case that formalism (one form of positivism) stems as much from ideology as supposedly more ideologically charged theories of law such as natural law theory.

Alexy's most important contribution to the debate lies perhaps in the distinction he draws between the observer's perspective and the participant's perspective.

From the point of view of the observer, where individual legal norms are concerned, Alexy points out that there is no conceptually necessary connection between law and morality. Take the example of an emigrant Jew denaturalized by law on the ground of race. An observer would say that he has been deprived of citizenship according to German law, whereas a statement that he has not been deprived of citizenship according to German law is confusing. Indeed, the inclusion of a moral element from the standpoint of an observer would be contradictory, for he then says that the emigrant Jew has not been deprived of citizenship according to German law, although all German courts and officials treat him as denaturalized and support their action by appeal to the literal reading of the norm authoritatively issued in accordance with the criteria for validity that are part of the legal system efficacious in Germany (pp. 29–30). In relation to legal systems (as opposed to individual norms), from the point of the view of the observer, however, the separation thesis reaches a limit defined by the claim to correctness, such that if there is no such claim, there is no legal system. This happens, for example, where the order is a predatory one run by bandits who exploit the people through a system of rules established for the sole purpose of permanently maintaining the subjects as suitable objects of exploitation. Alexy maintains that even this turns into a system laying the claim to correctness if the bandits turn themselves into governors who claim that the system of rules exists for some higher purpose such as the development of the people (pp.

33–35). Alexy notes that this view has few practical consequences because existing systems of norms regularly lay claim to correctness. He argues that the systematic consequences of the claim to correctness are significant as it restricts the positivistic separation thesis a good bit (p. 35).

At this juncture, one notes that some of his distinctions are not easy to understand, or clearly drawn. First, why is it objectionable for an observer to make the statement that officials treat the citizen as denaturalized by the literal application of the norm, but that they are not acting legally? The classical natural law theorist may argue that the statement involves a contradiction only if there is a prior definition of law that does not necessarily include moral elements. It is not clear if Alexy successfully argues that there is no conceptually necessary connection between law and morality where individual norms are concerned, from the perspective of the observer. Second, one might not find his distinction between the system run by bandits and that run by bandit-governors who lay a claim to an avowedly good purpose convincing. Even if one accepts his definition of a legal system as a system necessarily laying a claim to correctness, it is hard to see how the distinction has any practical effect, if the focus is on the laying of the claim, as opposed to its justifiability. Further, the link between the claim to correctness, and the endorsement of some connection between law and morality, is not entirely clear. Alexy explicates on this more clearly in his consideration of the participant's perspective, which is where the cutting edge of his theory probably lies.

To establish his view that from the participant's perspective, the separation thesis is inadequate and the connection thesis is correct, Alexy relies on three arguments: the argument from correctness, the argument from injustice and the argument from principles. Participants lay a claim to correctness, and insofar as the claim has moral implications, a conceptually necessary connection between law and morality is demonstrated (p. 39). Alexy notes that a positivist can accept the correctness argument and insist on the separation thesis through two strategies: First, he might show that the failure to satisfy the claim does not lead to the forfeiture of the character of the legal system; second, he might argue that the claim to correctness has a trivial content lacking in moral implications, and cannot lead to a conceptually necessary connection between law and morality. The argument from injustice counters the first strategy and the argument from principles counters the second (p. 39).

Where the argument from injustice is concerned, Alexy argues that there are good reasons for a judge who considers an extremely unjust individual norm to acknowledge that the norm does not have legal character, i.e. the connection thesis is preferred over the separation thesis. He makes his case through arguments from language, clarity, effectiveness, legal certainty, relativism, democracy, dispensability and candour (pp. 40–62). These are

the most interesting arguments in his book, and an interested reader should turn to them in detail. Alexy systematically disabuses advocates of legal positivism by pointing out the tenuous nature of some conventionally held views. For example, in relation to the common argument that positivism is "simpler" and a "clearer concept of law" than that which includes moral elements, a view commonly held by fans of H.L.A. Hart, Alexy points out plainly that "clarity in terms of simplicity is not the only goal of concept formation" (p. 43). "Simplicity must not prevail at the expense of adequacy" (p. 43). The apparent lack of clarity that stems from the need to draw a line between norms that are unjust in the extreme and those which are not should be addressed as a question of legal certainty, rather than clarity, for it may well be confusing for a judge to have to hold an extremely unjust norm to be law (p. 44). Legal certainty, in turn, is not compromised if notions of justice are rationally justifiable and extreme injustice is more certainly known (p. 52). Further, legal certainty is again not the only value, and must be weighed against material justice (p. 52). One might note, however, that "radical relativists" (pp. 53–55) or moral non-cognitivists may not buy Alexy's argument. Another persuasive argument that Alexy makes is that a non-positivistic theory makes it riskier for a bad judge to uphold a law in a rogue state. This is because he runs a higher risk of being unable to justify himself later and thus being prosecuted in the new order that takes over at the collapse of the rogue state. If a positivistic theory rules, however, the risk is a lesser one as the bad norms are laws, and it takes a retroactive statute to prosecute him. An incentive arises for self-interested officials to tone down injustice if a non-positivistic theory rules (pp. 50–51) (See also S.H. Tan (2003) 15 Reg. U. L. Rev. 195.). Alexy cautions that his views apply in the case of individual norms, the injustice of which do not extend to all other norms in the system (the rejection of the "extension thesis" pp. 64–66). Nor does the system collapse as a whole if very many individual norms, particularly those important to the legal system, are denied legal character (the rejection of the "collapse thesis" pp. 66–68).

The argument from principles is addressed to "the everyday life of the law", not the exceptionally unjust cases (p. 68). It holds that "the judge is legally bound even in the open area of the positive (issued and efficacious) law, indeed, legally bound in a way that establishes a necessary connection between law and morality" (p. 69). Through a distinction between rules (definitive commands) and principles (which are "norms commanding that something be realized to the greatest possible extent relative to the factual and legal possibilities at hand"), a necessary connection is established between law and morality through three theses: the incorporation thesis, the morality thesis, and the correctness thesis (p. 70). Through the incorporation thesis, Alexy argues that principles are necessarily incorporated, as opposed to being incorporated only by choice of positivists, in every

minimally developed legal system which cannot be gap-free, and which requires the judge to strike a balance by reference to such as principles of liberty and equality (pp. 71–74). The morality thesis states that these principles are always found to belong to some morality or other (p. 75). One notes there that Alexy defends what he calls the "weak connection" and not the stronger connection, which states that principles are found in the right morality, as opposed to some morality or other. At this point, one wishes that Alexy goes further to defend the stronger connection. The defense of Alexy of non-positivistic theories is somewhat inadequate from the classical natural law viewpoint, which takes off from an absolute conception of morality. This is the substance of the correctness thesis—that there is some kind of a necessary connection between law and correct morality. Again, Alexy reminds us that the claim to correctness implies a claim to justifiability and moral correctness of the principles on which the decision is based. Even outside the threshold of extreme injustice, while the norm may not forfeit legal character, there is a qualifying connection offered by morality in that the norm may be viewed as legally defective. As for the suggestion that the concern is with the claim rather than its satisfaction, Alexy notes that even outside the threshold of extreme injustice, while controversy exists as to whether something is unjust, there are standards. The claim to justifiability leads to requirements that must be satisfied at a minimum by morality in order that the morality not be identified as false morality, and it leads to requirements that must be satisfied to the greatest possible extent by morality in order that it stands a chance of being the correct morality (pp. 76–81).

This book does not examine in any detail questions as to the source, nature, content, or method of arriving at the content, of the "correct morality"—questions which the reader is left with, and questions with regard to which the reader should search for answers in this relativistic age when morality is thought of as subjective. If Alexy persuades us that morality is always involved in the enterprise of Law, it is troubling if we, as teachers, practitioners and students of the Law, fail to ask the deeper questions.

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