Alexy's Anti-Positivism

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Date : May 11, 2016

Robert Alexy, *Legal Certainty and Correctness*, 20 **Ratio Jur.** 441 (2015), available at Universidade Nova de Lisboa.

Robert Alexy is one of the foremost contemporary legal theorists of this generation. His work has been very influential, both in analytic legal philosophy (*e.g.*, *A Theory of Legal Argumentation* (Oxford, 1989) and *The Argument from Injustice: A Reply to Legal Positivism* (Oxford, 2002)) and in constitutional theory (*A Theory of Constitutional Rights* (Oxford, 2002)). He is a German theorist; while most of his important works were written first in German, many (like those just listed) have been translated into English, and many shorter articles have appeared originally in English, including the subject of the current jot.

In analytical legal philosophy, Alexy is best known for his "anti-positivist" views—views critical of the legal positivist theories associated with H. L. A. Hart, Joseph Raz, and others. His theory is nicely summarized in the short article being reviewed. Alexy argues that law has a dual nature: (1) a "real" or "factual" dimension, and (2) an "ideal" side. The real or factual dimension is associated with "authoritative issuance and social efficacy"; the ideal dimension is connected with "the element of correctness of content." (P. 441.) Alexy argues that it is part of the nature of law that it claims to be (morally) correct. And following the German legal theorist of an earlier generation, Gustav Radbruch (in the works he wrote just after World War II), Alexy argues that a rule that is sufficiently unjust loses its status as valid law (the "Radbruch formula"). For Alexy, the claim of correctness and its correlate, the Radbruch formula, display necessary connections between law and morality, thus showing that legal positivism (which claims a *separation* between moral content and legal validity) is mistaken.

In the article, Alexy admits that there is a tension between the claim to correctness and the role of law in guiding behavior, which he connects to a "principle of legal certainty." (P. 443.) Much of the article involves an evaluation of the extent to which legal certainty is undermined by the Radbruch formula (making extremely unjust legal rules void) or by claims that judicial application of general norms inevitably involves significant discretion. Alexy concludes that ultimately the inroads on certainty and predictability from those sources are modest and tolerable.

A challenge to Alexy (which I have raised in the past), similar to an objection Joseph Raz raised to Ronald Dworkin's theory, states, roughly, that the theorist might be conflating a theory of adjudication with a theory of law. In the background is a problem of jurisprudential (or, more generally, philosophical) methodology: at a certain level of abstraction, it is hard to decide between competing characterizations of what judges have done or should do. Alexy and Radbruch say that an otherwise valid enactment, if sufficiently unjust, loses its status as valid law. Legal positivists (like Raz) would say that significantly unjust laws would often warrant citizen disobedience, and may create moral obligations for judges and other officials to change those rules or mitigate their impact, but the laws remain valid legal rules until they are changed. Alexy and Radbruch can point to German courts treating unjust rules (from Nazi Germany and East Germany) as "not law" because unjust. But what are we to say of cases where courts, in many countries and at many times, have (legally) enforced extremely unjust rules? Should we say (along with Raz) that the courts' mistake is a moral one—that the judges should have done what they could to change the law or mitigate its effects—or should we say (with Alexy and Radbruch) that

the mistake was a legal or conceptual mistake—that the courts somehow missed that the rules were not in fact legal norms? At the least, there are reasonable arguments for both characterizations, and I worry that Alexy—and Radbruch before him—have not offered enough arguments for treating their views as being conceptual claims about the nature of law rather than being prescriptive claims for how judges should decide cases.

At the same time, one should not too quickly dismiss (or overlook) Alexy's views. If Ronald Dworkin was the most famous critic of legal positivism in recent decades in the United States, his counterpart in Europe was, and is, Robert Alexy. It is hard to overstate the influence of Alexy's "Correctness Thesis" among Continental theorists; and this article, *Legal Certainty and Correctness*, works as a very good short introduction to the Alexy's nuanced critique of legal positivism.

Cite as: Brian Bix, *Alexy's Anti-Positivism*, JOTWELL (May 11, 2016) (reviewing Robert Alexy, *Legal Certainty and Correctness*, 20 **Ratio Jur.** 441 (2015), available at Universidade Nova de Lisboa), https://juris.jotwell.com/alexys-anti-positivism/.