

## DEBATE

Chair: Carl WELLMAN

Granada, 27 May 2005

Professor Wellman:

There will now be a discussion between the two speakers in which they will take turns, posing questions, isolating issues and talking back and forth. At some point, I will accept questions from the floor. Now, if you expect to pose a question or to make a comment, would you please sit toward the front of the auditorium because it is very inconvenient to take the microphone way up to the back row, and so if you wish to intervene at any point, please sit yourself near the front and, if possible, not too far from the aisle. Finally, it will be only fair to give each speaker a very short time to make a concluding statement.

You are probably aware of the fact that it is not the case that Professor Joseph Raz has shaved off his beard and torn out all his hair in preparation for this debate. He had a serious operation two weeks ago. His physicians have forbidden him to travel for at least another two or three weeks and so he is unable to be here. Professor Andrei Marmor, from the University of Southern California, has graciously agreed at very short notice to substitute for Professor Raz and I am sure that he will do very well in maintaining the truth. But before we hear from him, I think it is fair to give the floor to Professor Robert Alexy from the University of Kiel.

Professor Alexy:

Thank you. I should like to thank Andrei Marmor very much indeed for taking over Joseph Raz's role in this debate, and we all wish Joseph Raz the very best of good health. My introductory paper, which can be found in the volume containing the plenary lectures, is addressed directly to Joseph Raz, especially to his recent writings. I will not, therefore, read it. Instead, I shall present four theses or, if there is not enough time for all four, I will present a smaller number and go on to the others later.

My first thesis could be called the "source-family thesis". It concerns the relations between the positions that are at stake here. In recent debates, the distinction between positivism and non- or anti-positivism—I use the terms "non-" and "anti-positivism" synonymously—has become highly complex and, indeed, puzzling. On the one hand, positivism nowadays says a lot about the close relation between law and morality, and, on the other, non-positivism includes the thesis that

law must be based on sources. I have attempted to capture the latter by means of the concepts, first, of authoritative issuance, and, second, of social efficacy. The disagreement between positivism and non-positivism is primarily focused on the role of a third element, namely, that of morality as part of correctness of content. But, I think, agreement exists with respect to the inclusion of sources, though they are conceptualised in different ways.

On this basis, we can make a distinction among three positions. The first position is the necessarily exclusive concept of law, that is, exclusive positivism, which is the form of positivism represented by Joseph Raz. Morality or correctness of content is necessarily excluded. The second position is the necessarily inclusive concept of law. This is non-positivism, which considers the inclusion of moral correctness of content as a necessary component. The third position contradicts both of these. It is inclusive positivism, as we know it from Jules Coleman, which says that morality is neither necessarily excluded nor necessarily included. The three positions follow the well-known scheme of the modalities. I want to defend the necessarily inclusive concept of law. The source family comprises all three positions. Among the members of this family, however, agreement with respect to the sources is accompanied by disagreement on whether morality is necessarily excluded, necessarily included, or possibly included.

My second thesis is the argument from correctness, the correctness thesis. In his recent writings, Joseph Raz argues that law necessarily raises a claim to legitimacy as including —he makes the point as clearly as one can— legitimate moral authority. This strikes me as being quite close to my correctness thesis, which says that law necessarily raises a claim to correctness, which again necessarily includes a claim to moral correctness. What can positivism say against the correctness thesis as an argument in favour of non-positivism? There are three possibilities. First, positivism could say that law does not necessarily raise a claim to correctness. The second answer would be that law, indeed, raises a claim to correctness, but this claim has nothing to do with morality. The third answer grants —and I think that this is the reply of Joseph Raz— that law necessarily raises a claim to correctness and that this claim is necessarily connected with morality, but it goes on to insist that all this has nothing whatever to do with non-positivism or anti-positivism. With this thesis I would like to take issue. Perhaps, a simple thought-experiment might be helpful. Imagine law, first, as not necessarily raising the claim to correctness and, second, as necessarily raising the claim. If law does not necessarily raise a claim to correctness that necessarily includes reference to morality, could the relation between law and morality be the same as it would be if law did necessarily raise a claim to correctness? Is it possible that the claim to correctness changes nothing? That would be my question.

Now, I come to my third thesis, which is perhaps the most problematic of the four. We might call it the “inclusion thesis”. It concerns the question of what it is that is necessarily included in the concept of law. Now the claim to correctness has two dimensions. It has an institutional or authoritative dimension and it has an ideal or critical dimension. It is precisely here, I believe, that one finds the point

of the most fundamental disagreement between positivism and non-positivism. Positivism —especially exclusive positivism, but I would like to make the same case with respect to inclusive positivism, too— cannot really grasp the second dimension of law. It may well grasp the authoritative character or nature of law, and law has, indeed, an authoritative nature – it is essentially authoritative, but it is, at the same time, essentially ideal. It cannot but strive towards correctness. The single most essential feature of law is this double character. Therefore, the concept of law I want to defend is an overarching concept that comprises these two dimensions.

I might illustrate what I have said by means of an example. Let us imagine a case in which the authoritative material allows for two interpretations: we'll call them interpretation one and interpretation two. A single additional argument is available, which is a moral argument that cannot be reduced to or traced back to a source. The moral argument speaks in favour of the first interpretation, rejecting, then, the second interpretation. I think that I am in agreement here with Joseph Raz, and with Andrei Marmor, too, namely, that we should select the first interpretation, backed by the correct moral argument, and not the morally mistaken interpretation. Again, on this point, I think, we agree. But we deeply disagree on how to understand or interpret this. We disagree in explaining what happens when the judge, for moral reasons, chooses the morally correct interpretation. Positivists say, and Andrei Marmor in his writings makes this point very explicit, that we have to interpret what takes place as a law-making act based on legal empowerment, and only on legal empowerment. It is a species of legislation – as Hart, for instance, and before him Kelsen have already put it. If this thesis is true, if from a legal point of view it is merely a question of law-making or enactment based on legal power, then, if the judge chooses the morally mistaken interpretation —that is, in our case, interpretation two— he would nevertheless be making a legally perfect decision, a decision that is in all legal aspects at the highest level. My reply is that this decision would not be a legally perfect decision in all aspects. In the light of the overarching concept of law comprising both the authoritative dimension and the ideal dimension, it would be a legally defective decision. In cases such as the one I have presented, moral incorrectness implies legal incorrectness. This is a crucially necessary connection between law and morality.

My fourth and last point is the extreme injustice thesis. It concerns the “Radbruch formula”, which says that extreme injustice is not law. This thesis is formulated from the standpoint of the argument from correctness, that is, the correctness thesis, but naturally it cannot be deduced from the argument from correctness alone. The argument from correctness, taken alone, only says, to take up our case again, that interpretation two would be a legally defective interpretation, but legal defectiveness does not imply legal invalidity. The latter point is a corollary of the fact that the concept of legal defectiveness as such has only a qualifying power and not necessarily also a classifying power. This possibility of a qualifying connection stems from the double character of law. The import of the Radbruch formula is, however, greater; it excludes norms that are extremely

unjust from the class of legally valid norms. In order to be able to move from the claim to correctness to the Radbruch formula, we need further premises, that is, further arguments and these arguments will have to include normative components. We cannot ground the Radbruch formula on conceptual or analytical arguments alone.

Perhaps I have not made sufficiently clear, in my writings, what the main normative argument is. At page 58 in “The Argument from Injustice”, I present it in the following words: “(A) non-positivistic concept of law must of necessity be applied in order to protect the fundamental rights of the citizen”. The Radbruch formula has the task of protecting the fundamental rights of victims of totalitarian systems. And that is the main normative reason on its behalf. It excludes what Kelsen in the Second Edition of the Pure Theory of Law, *Reine Rechtslehre*, says at page 42: “According to the law of totalitarian states, the government is empowered to place persons of undesirable world views, religion or race in concentration camps and to compel them to do every sort of work, yes, even to kill them.” I think that this is a clear example of a violation of human rights, and this is the last point I want to make in these introductory remarks: that the non-positivistic concept of law I want to defend is intrinsically connected with a theory of human rights. But that can hardly be different, because in law, as always in complex areas, each thing is connected with every other element in a whole system. An adequate concept of law can be arrived at only if it is placed within a general theory of law. This concludes my introductory remarks.

Professor Wellman:

Thank you very much and now Professor Andrei Marmor will explain to us his conception and theory of law specially related to this point.

Professor Marmor:

Related to the specific point later in the discussion, right?

Professor Wellman:

Right.

Professor Marmor:

Thank you very much. A good friend of mine from Oxford, a philosopher, told me once that there is nothing more difficult in philosophy than to say something

that is actually true. Any attempt to specify what legal positivism is about, what it really boils down to sadly proves this claim that it is very difficult to say something that is true about it. Why? Partly because it is not a theory. It is a whole tradition of theories and often with contradictory theses. And partly because the complicated insights and theses of legal positivism are not as reducible to catchy slogans as many commentators assume.

Nevertheless I will do three things and very briefly in these comments. I will try to characterize some of the main insights of legal positivism at least in its contemporary forms; then I will say something about the two main challenges to those insights, one represented by Dworkin and one by Professor Alexy. And finally I will try to say a few words about why I believe the challenge presented by Professor Alexy fails. I will not say anything about the challenge that Dworkin presents.

So what are the main insights of legal positivism as I see them? I think there are three: one which for me is the least controversial is that law is essentially an instrument; that it makes absolutely no sense to think that we have any reason to seek the law for its own sake. Law is an instrument and like any instrument it can be used for good and bad purposes and like any instrument it can be more or less suitable for its tasks, it can be more or less efficient.

The second thesis often referred to in contemporary literature as the social thesis of legal positivism is that law is profoundly and essentially a social practice, a social phenomenon and social factors, actually determine what the law is. What are those facts? What kind of facts? Well, as you will know, early positivists have focused on facts about sovereignty, following probably Hobbes' insight that law is an essential instrument of political sovereignty. Twentieth-century legal philosophers following Kelsen and Hart no longer speak about sovereignty; we speak about social rules. There are social rules that determine in each society what law is. Some of us think that those rules are some type of social conventions, but some disagree, although more or less we all speak about social rules.

The third thesis, or this third insight, is what we often refer to as the separation thesis. But this is probably the least clear and the most controversial insight and I think this is mostly what the argument is about. So what is this separation thesis, this separation between law and morality? Well, in one place I offer the following formulation: the separation thesis maintains that determining what the law is does not necessarily or conceptually depend on moral or other evaluative considerations about what the law ought to be in the relevant circumstances. I think that this formulation of the separation thesis is accepted by all contemporary legal positivists. We all subscribe to this thesis. I think legal positivists disagree about an additional feature, that inclusive legal positivism maintains that moral considerations may determine under certain circumstances what the law is, but that will be a contingent matter, not necessary nor conceptual, and it would depend on the various social rules, or maybe on the law itself that happens to prevail at a particular time and at a particular place. So called exclusive legal positivism, the one that Joseph Raz, Scott Shapiro and myself, subscribe to, maintains that this

is not the case, that considerations about what the law ought to be could never determine what the law is.

So, these are the three main insights that I think positivism adheres to in its various forms. Dworkin, by the way, denies the truth of both the social thesis and the separation thesis. As Professor Alexy made quite clear a moment ago, that is how I understood him, he only denies the separation thesis and not the social thesis. But before I try to focus on what the disagreement is really about, let me clarify briefly what it is not about. What the separation thesis does not demand, what it does not claim, or it should not on any reasonable interpretation of it. Three things: one is that legal positivism has no theoretical reason to deny that we probably have very good reasons to have law, that law is probably a good thing to have. Secondly, there is no reason for legal positivism to deny that the content of law necessarily overlaps with some moral contents. It may well be true that every legal system would necessarily have some minimum moral content, even if it is, by and large, what we call a legal system. Again, I think that is something that has never been denied by any legal positivist I am aware of. Thirdly, and here I think most contemporary positivists would radically depart from one of our ancestors, John Austin, I think that contemporary positivism would deny that the law can be defined in morally neutral terms.

But we deny it for two separate reasons: one is because we think that it is hopeless to seek any definition of law, that defining such a complex social practice is impossible and would be useless, anyway. Secondly, perhaps more importantly, we think that the law really cannot be understood without reference to certain essential functional purposes it serves in society and probably some of those functions and purposes, etc. are moral in character. For instance, Hans Kelsen thought that one of the main functions of law is to monopolize the use of force in society. Joseph Raz claims that it is essential to law that it claims legitimate authority. All these are partly moral evaluative terms and, of course, the law cannot be properly accounted for without them. So all this is agreed, if this is not really in dispute, what is the dispute about? It is mostly about the concept of legal validity. So it is mostly about one crucial aspect of the separation thesis. Non-positivists claim that moral considerations do form an essential part of the conditions of legal validity. They determine essentially what the law is. And I think that there are three main versions of this challenge, of this anti-positivist stand. According to the traditional natural law doctrine, moral considerations form a necessary part, a necessary condition of legal validity. So, unjust law or maybe just grossly unjust law is not legally valid, it is not law. According to this view morality is a necessary condition of validity.

According to Dworkin's earliest writings, morality is not a necessary condition for legal validity, although under certain conditions it may be a sufficient condition. The norm can be legal under certain circumstances because it derives from the best moral justification of some other part of it. And I think that was the main idea of legal principles. According to Dworkin's more recent writings—and this is the third possible position, anti-positivist position—, legal validity

is always partly determined by moral judgements, because it is always a matter of interpretation what the law is and interpretation is always essentially in part a matter of evaluative judgements. So these are the three positions. As I understand Professor Alexy, he actually subscribes to the first of these theses, to some version of what I call the traditional natural law doctrine whereby moral considerations form a necessary condition of legal validity. And this is clearly at odds with one of the main insights of legal positivism. So, what is the argument for that?

Let me propose an argument on behalf of Professor Alexy. That is how I understand his main argument. Premise one: that the law essentially makes a claim to its moral correctness. Two, that, from the point of view of the participants, this claim to moral correctness forms part of the reason for judges and other participants to follow the law and to apply it. Three, therefore, any interpretation of the law, particularly judicial interpretation, must purport to ascribe at least some minimum moral correctness to the law. Four, since grossly unjust law cannot be morally correct, as hypothesis, judges ought to interpret the law so that grossly unjust law is rendered invalid which is, as I understand it, the famous “Radbruch formula”.

Therefore, it concludes, at least from the internal point of view, the point of view of judges, unjust law is not law, and I think that is the argument, or at least I hope I am not too far from the argument. Now let me just say in a few words very quickly what puzzles me about this argument. First I am a bit puzzled about this “truth from a point of view”. I am not sure about what it actually means. How can something be true or not true from a point of view, especially something like the separation thesis? The separation thesis is a thesis about the nature of law. So, it is either true or not true, how can it be true from one point of view and false from a different point of view? Secondly, more importantly I guess, I absolutely agree with Professor Alexy that law essentially makes a claim to its correctness, as he says, or as I would prefer just to follow Raz’s formula, that the law necessarily makes a claim to its moral legitimacy. It makes this kind of claim because it is an authoritative institution. But truly nothing follows from it about the success of such a claim at any particular instance. It is the essence of a claim to correctness, of a claim to truth, that it can fail and it can fail at any particular instance. I think that is true about law as well. The third point, and I think this is the most important and what most of our arguments and disagreements boil down to, I think that the main mistake in this reconstructed argument is to assume that everything judges do or say to justify their judicial decisions amounts to the application of law, which is just not the case. Judges can modify the law, they often have the power to change it, they can sidestep the law, they can ignore it or they can just get it wrong, and of course they may have very good reasons for doing any of these things.

But it would be a mistake to assume that these reasons are always legal reasons or even, much worse, that in applying these reasons, judges apply the law. It is possible for a judge to decide that the legal norm should be rendered void and nullify it because it is grossly unjust. And if this is possible, presum-



ably the judge should just go ahead and do that, modify the law. But this does not amount to an instance of applying the law, it changes it. Often by doing so judges exercise a legal power, as in many constitutional contexts, and sometimes they do not. But in any case, from the fact, and I am willing to assume, for the sake of the argument, that it is a moral fact, that judges ought to nullify and invalidate grossly unjust laws, it simply does not follow that in doing so they apply the law.

Finally, but this is just a side issue, when I read the text prepared by Professor Alexy for this debate, I was perplexed. This is nothing to do with the reconstructed argument, it is a separate point, perhaps it is worth mentioning it, I was perplexed about Professor Alexy's reliance on Dworkin's theory about legal principles. I just cannot see how it advances his argument. Even if there are legal principles exactly as Dworkin described them, it would not follow that anything like the Radbruch formula is true. Remember that the Radbruch formula amounts to the claim that some level of morality or justice is a necessary condition of legal validity. Dworkin's principles, on the other hand, can only show that, sometimes, moral considerations are sufficient to determine what the law is but that they are necessary. In other words nothing like the Radbruch formula can follow from Dworkin's legal principles unless, of course, one stipulates that the Radbruch formula itself is a legal principle in each and every possible legal system, which would simply be false as a matter of fact, and would in any event assume the point that needs to be sure.

Professor Wellman:

Thank you very much. Now we are going to move to the second stage of this plenary session where the speakers have an opportunity to pose questions to each other, to focus on more specific issues or pick out items they wish to emphasize, and the first person to do so will be Professor Alexy.

Professor Alexy:

Thank you very much. The first point I should like to make concerns what Andrei Marmor has said about the Radbruch formula and legal principles. The Radbruch formula is, of course, not a legal principle. It is, if you care to use Dworkin's terms, a rule, a rule that stems from the weighing of two principles: first, the principle of legal certainty, which demands that we follow those rules that are authoritatively issued, and, second, the principle of fundamental rights or justice. The result of weighing these two principles is as follows: In all cases, legal certainty or authoritativeness precedes justice or the ideal, save for one sort of case: that in which there is extreme injustice. Only at the level of extreme injustice is the preference relation reversed. That is my first point. It



underscores the point that with respect to the Radbruch formula the argument from correctness represents not more —but not less either— than a background or basis.

Now I come to the real point of our disagreement. You have said that if judges put forward moral reasons, then those reasons are not legal reasons. What does this claim mean? It would indeed be a mistake to assume that these moral reasons are simply legal reasons, and this is no doubt a very important point in the dispute about non-positivism. For if we are considering necessary connections between law and morality, then, if the connection is supposed to be a connection between law and morality, what is connected must be law, on the one hand, and morality on the other. Otherwise it would not be a connection between law and morality. And if the moral reasons that are to be applied in order to meet the claim to correctness became, by this means alone, legal reasons, then we would not be connecting law and morality. Instead, we would be making connections inside the law. Now, I think we have an ambiguity here of systematic importance. One could even speak here about something akin to a paradox of non-positivism, to wit: if the claim to correctness transforms moral argument into legal argument, then there is no connection between law and morality. In order to connect law and morality, moral reasons must remain in some sense or other, moral reasons, and they must nevertheless be, of necessity, required by law. The solution to this puzzle turns on the distinction between two dimensions or levels within the concept of law, which I already have mentioned. The first dimension is the authoritative one. To it belongs everything that one identifies in accordance with the sources thesis, in our case, the weak sources thesis in the Razian sense. With respect to this dimension of the concept of law, the reasons to which the Radbruch formula refers are indeed moral reasons, and you are right in insisting that they are not legal reasons. As far as this dimension is concerned, I therefore agree with you. With respect to the second dimension of the overarching concept of law —a concept that brings together the dimension of authoritativeness and that of moral correctness— all reasons required by the claim to correctness belong to the law. Thus, on the basis of the overarching concept of law, the moral reasons are at the same time legal reasons. This is the point of a concept of law that comprises both authoritativeness and correctness. The ambiguity has its place inside the concept of law. And —I am repeating myself here— I think we can recognize that we need this overarching concept of law by means of the fact that a decision is not legally perfect in all aspects if it is morally mistaken.

Well, has this been long enough? I could stop at this point, or should I continue, Mr Chairman?

Professor Wellman:

No, by all means let us try to focus on one point at a time. It will be more efficient. You will have another opportunity to make further point.

Professor Marmor:

Yes, I will concentrate on this point and maybe connect it with one other point that was mentioned earlier. I do not understand this two-level concept of law, or three or four levels. It reminds me of something like this that when I was a doctorate student in Oxford, I submitted my research proposal and my thesis title was “the concept of interpretation and the concept of law” or something like this. John Finnis was one of my examiners at the time and he asked, “Why do you need the concept? What would be lost if you delete it? Nothing! We can delete it.” The debate is about the nature of law, what law really is and how is it related to other normative domains and non-normative domains and so on and so forth. It is not about the concept in some abstract way. Now to say that we have two concepts of law is fine. We can have three concepts. We can talk about the law and morality and something else, ethical, social norms. We can talk about any concept we wish. The question is what is the relation of those concepts to the nature of law? And here I have two points. But actually I will confine myself to one point. Once we admit that in order to get to something like the Radbruch formula, you need a normative argument, you rely on a moral argument to tell us something about the law. It is no longer the case that the conclusion is about the nature of law. As simple as that. I cannot make a normative argument about the nature of anything except normative conclusions, so if I make a normative argument, a moral argument, then the conclusion is a moral conclusion. It may well be a good thing if everybody thinks that unjust law is not law, fine, we can all agree with that, but you just cannot have a moral argument concluding with the nature of anything except again moral conclusion.

Professor Alexy:

Thank you. I like this point very much indeed. I will start out by saying something about the relation between concept and nature. Our task is to recognize and explain what the nature of law is. But we cannot do this in any way other than by using concepts. Concepts, on the one hand, are always conventional, but, on the other, they always claim – as Kant puts it in one of the last passages of the *Critique of Pure Reason* (B 756), and I quote – to be “adequate to the object” (“dem Gegenstande adäquat” zu sein). We begin with conventions, but then we have to test the convention by asking whether the concept we have is adequate to its object. Now, my first thesis is that we have no direct access to the nature of things. We can only arrive at the nature of a thing via concepts, and by approaching the nature of a thing in this way concepts can be defined. It is possible, in this sense, to define the concept of law. In this context, Kant presents, inter alia, three concepts: the concept of water —he must have known Hilary Putnam, no?— the concept of gold, and the concept of law, and Kant goes on to say that we have certain concepts of these things. They may, however, be

wrong, and in that case we must render them adequate to their objects. This remark concerning the relationship between concept and nature may be enough to explain why I think it would not be adequate to disregard concepts and to look only at nature.

Now I can make my point concerning the concept of law. One can design a concept of law that refers to its first dimension alone, rather than designing an overarching concept of law. The concept of law would then be identical with the concept of authoritative enactment or something approximating that. The main issue here is, indeed, the question of the nature of law. I think the nature of law includes more than authoritativeness. That is the central point of disagreement. The nature of law includes something ideal and this, in turn, essentially includes the core of fundamental rights. It therefore belongs to the nature of law that it be a normative enterprise. As an overarching concept, the concept of law, from the beginning, connects the two dimensions I have mentioned. One will never have an adequate concept of law and will never be able to identify the very nature of law by appealing to authoritativeness alone.

Professor Marmor:

Let me start with the last point. Yes, of course I agree that law is more than authoritative, first of all because there are some sorts of authorities that are not legal, so surely the law must be more than just an authoritative institution, it has to be an authoritative institution with various other features that distinguish it as such. So I think we agree about that. I think we are still left with two or three main disagreements. One is, again I just do not see how you can come to conclusions about the nature of anything from moral arguments but moral conclusions, so you could conclude that an idea on social order would be one that respects human rights, you can conclude that an acceptable moral order, an adequate moral order, is one that respects rights and other basic demands of justice and morality. That's fine. It says nothing about what the law is. The law can be very far from ideal, the law can be very far from just, the law can be lots of things we do not approve of. By the way, and this is a historical point, the law on human rights is also anachronistic. We had very developed legal systems long before anyone thought about human rights. When I said not to focus too much on the idea of the concept of law, but to talk about the nature of law, I did not mean to imply that we can have a kind of direct epistemic access to what the law is. I just said that what we are arguing is about the nature of the thing, the nature of the social phenomenon, the nature of some aspect of our culture and not about concepts in some abstract way. Let me conclude so far: I am still completely puzzled by why you claim, or how anyone can claim, that you can use a normative argument to make a conclusion about what things are and what is their nature apart from normative conclusions, which is to say that it would be bad law, a bad legal system, on which of course we all agree.

The second point, and here I want to come back to a point that you mentioned in your opening remarks, and that I thought is very interesting and part of the debate. You gave this example: we have to suppose two possible interpretations of some law: one which is morally correct and the other one which is clearly not, and of course we all agree that it is a matter of moral reasons, and the judge should follow the correct moral interpretation. And then you said: “but if the judge does not, then it is according to legal positivism of course still law, indeed”. I do not understand what perfect law is. It is not perfect law. It is bad law, it is morally bad law but it is legal, yes, it is legal. Now, I think no one says it is not legal. I wonder what theoretical clarity we would gain by denying the positive stance, how that would help us to see things more clearly. It would be more convenient in some way if we deluded ourselves; to think that if judges make bad moral decisions then they are not legal but why would it be a clearer picture of reality? There are lots of laws that are profoundly unjust and they are laws.

Professor Alexy:

Well, our picture of law might well be simpler if we followed the positivist way, but that it would be clearer seems, however, less than certain. Clarity is not the same as simplicity. My point is that positivism is an oversimplification, and it is for this reason —its oversimplification— that positivism does not adequately answer the question of the nature of law. You say that we ought not to use moral reasons in order to determine the concept or the nature of law. But law, besides being essentially authoritative, is also essentially a moral entity. If this is true, if law is essentially a moral entity, then law is not only a social fact. I think that the difference between us lies here.

The view that law is essentially a social practice, in other words, the conventional approach to law, has now been reconnected by neo-positivists, in many forms and aspects, with morality. Despite its being a social practice or convention, law is said necessarily to raise a claim to legitimate moral authority. The question then arises: why is this claim necessarily connected with law? My answer: the claim to correctness is necessarily connected with law because we are necessarily moral persons. We do not produce the law as legal persons and then, from outside —being split up into two kinds of persons— criticize it as moral persons in order to make it better. It is of course true that law is a social practice. But it is a social practice made by persons who raise claims that go further. By virtue of these claims law has an ideal dimension.

Where human rights are concerned, I should like to take up Joseph Raz’s distinction between the nature of a thing and the possession of a concept. In Roman law, for instance, people did not possess the concept of human rights, but if one looks at slave legislation in the Roman Empire one sees that there were many norms concerning legal protection, forbidding, for instance, the sale of slaves to procurers or to purveyors for gladiatorial shows, or to kill them without cause.

They did not possess the concept of human rights, but as soon as one looks at the substance of the reforms they introduced, one sees that they have, at least to a certain degree, realized elements of what belongs to the nature of human rights. Therefore, I do not think that it is anachronistic to connect the concept of law with this dimension of moral correctness. Indeed, one might even suppose that from the beginning of the existence of law, the germ of the idea of human rights existed within it. This tendency belongs to the nature of law; it is not imposed on law from without.

Professor Marmor:

I hope I am not picking on a formulation but when you said “follow the positivist way”, I think you indicate one of the main sources of the misinterpretation of this whole enterprise and the debate: positivism is not a way to be followed because it is not a normative theory. And I think that, you know, this was the famous debate between Hart and Fuller somewhere in the ‘50s and ‘60s, and that is what Hart kept telling Fuller: you describe a normative view that I do not have. Positivism is not a way to be followed. Positivism is a theory about the nature of law. And it tries to keep the truth about it.

Now there is some connection between truth and critical perspective. That in the following minimum respect there is a normative element to positivism. We hope that by getting a clear and true vision about the nature of law we open the way for some critical perspectives on it, so we will not criticise something that is just not the case. But apart from this very modest claim to a normative advantage, which is just a claim to the truth, positivism makes no normative claims, and once you start describing positivism as a normative claim, you are no longer debating about what positivism is.

The second point I want to make —and I am repeating myself here—: the law claims to be correct (which, by the way, I do not think is true of every single law; it’s true about the law in general). But let us see it like this. So the law makes a claim to correctness, just as I make a claim to truth in this debate and you make a claim to truth in this debate. And I can fail or you can fail, like everything else. So the same with law, even though the law claims correctness, it can be wrong.

Professor Alexy:

I might begin by noting that non-positivism has never claimed that the fact that law raises a claim to correctness means that this claim is always fulfilled. We already have talked about the nature of things. It belongs to the very nature of a claim that it may well not be fulfilled. The only question is: what is the consequence of not fulfilling the claim? Does not-fulfilling it simply yield a kind of moral defectiveness, or does the failure to fulfil it result in some kind of legal

defectiveness? Why do we say that the claim is necessarily connected with law? How do we know this? If you were to say that law sometimes raises this claim and sometimes does not, then you would not be saying very much on which I would care to comment. But it seems to be the case that you are saying that law necessarily raises a claim to moral correctness. That would mean that something not raising this claim would not be law. How can the new positivism say all these things about necessary relations between law and morality and still remain a species of positivism? Joseph Raz, for instance, argues that there is an infinitely long list of necessary connections between law and morality, but none of these is relevant to the distinction between positivism and non-positivism *qua* basic division in legal philosophy. Perhaps we have to think here about what we mean by connection. What do we require for there to be a connection? One can think of a strong relation. The Radbruch formula is an example. It makes the very strong point that morality is —if only in extreme cases— a necessary condition of legal validity. That is a traditional view. Morality sets limits on what can be legally valid. I think it is rather important to separate this classical question concerning the limits of law from the more abstract and general question of how the claim to correctness affects the nature of law. If it is, indeed, true that law necessarily raises a claim that necessarily relates to morality then law is fundamentally different from what it would be, if that were not the case.

Professor Marmor:

Just to express the connection about claims, not about truth. But I think that we are overplaying this necessary connection between law and morality from a legal positivist perspective. So let us be a little bit more accurate. Here is what I think is true or what the claim is that I would like to defend. The law in general is an authoritative institution like many other authoritative institutions and practices. It is in the nature of authorities, the rationale of authorities, as opposed to other forms or other practices that are similar, that it has a claim to legitimacy. And I think this is the sense in which the law differs from Hart's famous example of the gunman situation. When the gunman tells you "Your money or your life", he is not making a claim to authority and he is not making any claim to legitimacy. When the IRS demands money from you or jail, the IRS makes a claim to legitimacy. Now, from this it does not follow (a lot of things do not follow) that every single legal norm makes a claim to moral correctness. I do not think that is true. I think that governments and parliaments enact many laws that they do not regard as necessarily moral. They just regard them as expedient or beneficial to something and so on and so forth. So I do not think that you can carry the Razian insight, which I think is profoundly correct, that the law as a whole, as an authoritative institution, has a built-in claim to legitimacy, that every single norm enacted by a legal institution, by a legal authority, makes such a claim. That is one clarification.

The other clarification is that even if we focus on those cases where the law clearly does make a claim to legitimacy, or I am willing to grant moral correctness, here again the point is that it can always fail. Now, saying just because the law makes this claim, this already proves that there is a necessary connection between law and morality. Of course, it does. There are lots of necessary connections between law and morality. Morality is the reasoning about what we ought to do, and what we are allowed to do, and how to treat each other and of course a great deal of the law is about the same stuff, right? Law is there to govern our lives in many ways in which morality is. So, as I said, one thing that legal positivism never had reason to deny is that law would have some moral content, that there will be a considerable overlap between the content of any legal system and moral prescriptions and so on and so forth. All of that is not in dispute.

Professor Wellman:

I think I would like to thank the members of the audience for their patience. It is time, I believe, to allow you to enter into this discussion. At some point I would request that you limit yourself to one question, not a series of questions or one brief comment. Professor Peczenik will have the opportunity to put a question.

Professor Alexander Peczenik:

My name is Alexander Peczenik from Statin at the moment, not from Lund. Now, it is so complicated at the moment and I ask myself the question: is there any simple disagreement behind all those complexities you are talking about? And I think I see a simple disagreement. That simple disagreement follows from two quotations I think I have heard from both of you. I have heard from Professor Marmor that law is an instrument; I have heard from Professor Alexy that law is an ideal. Now, I can give other examples. Science is an instrument; we can build airplanes using science. But science is also an ideal; it serves the ideal of truth. I quote Radbruch here, another Radbruch formula. The big question is, when I talk about the nature of law or of science or many other human things, shall I pay attention to ideals or to goals or shall I only pay attention to facts I can describe? The big difference is between a scientific world picture describing facts without ideals and an Aristotelian world picture paying attention to ideals and goals. This is an old thing. Then, when we speak about some human affairs it is easier to abstract from ideals. When we speak about law, I find it is very difficult. In this sense I think that Professor Alexy has a great point. On the other hand, this is doomed to be controversial for eternity. All the rest is footnotes. Thank you.



Professor Marmor:

Can I answer first? I agree with you. I think that your comment attests to the fact that there is too much interest in legal positivism. It is not everything about the law. It is just a theory about one aspect of the law, to describe this theory about the nature of law. Now, there are lots of other interests we have in law, some of them normative, others descriptive. We can have descriptive interests in the law from a sociological perspective, from a psychological perspective, from an economic perspective, none of them would have anything to do with legal positivism. And of course we can have a whole range of normative interests in the law. We can ask ourselves what would be an ideal law, what would be a good law, what would be a just law, and so on and so forth. And again it would have nothing to do with legal positivism.

Professor Alexy:

If the nature of law is at stake, then it cannot be the case—as Andrei Marmor has just put it—that positivism treats just one aspect. To treat just one aspect of a thing is not to treat its nature. I would like to add one remark on Aleksander Peczenik's suggestion that the ideal dimension reflects Aristotle. I would prefer to use Kantian concepts here. We are concerned with ideas (*Ideen*) that are implicit in human reasoning and, therefore, implicit in a social practice based on human reasoning, as law is. All of this, taken together, forms a full concept of law, and only by means of it, I think, can we grasp the nature of law.

Professor Wellman:

Now we have an opportunity for Professor Guiburg from Buenos Aires.

Professor Ricardo Guiburg:

Thank you. The controversy about the links between law and morality or between inclusive or exclusive positivism can be an effect of the relationship between two different approaches about the nature or identification of law. One of these approaches is the ontological, which seeks the answer in a certain metaphysical reality. In other words, what characteristics does law have? The second is the political, which aims to put the concept of law and juridical discourse at the service of what some or many of us desire and therefore qualify as just. In other words, what characteristics do we demand that law has? Perhaps this is a third, methodological, approach. If we find a decidable and widely-shared method to distinguish true juridical propositions from the false, then we could postulate

an ontology that could be caught by this method. And in this way, the distinction between natural law, inclusive positivism and exclusive positivism could be overcome and dissolved. Otherwise, we could be using words more solid than the concepts that we offer as their content. The question then is “do we have such a method”?

Professor Marmor:

The unifying method; I do not think it is a question of method. It's just a question of asking different questions. We can ask what would be the kind of law that best fits with our ideal of democracy or what would be the kind of law that best fits with an adequate general moral theory, or what would be the law that best fits X. You know, lots of perspectives. These are just different questions. So I do not think that the dispute between legal positivism or natural law or Dworkin and so on and so forth is essentially a methodological one.

Professor Wellman:

I believe Professor Habermas would like to make a comment or pose a question.

Professor Jürgen Habermas:

Yes, just one quick question to Professor Alexy. Why do you need any recourse to the Radbruch formula? Once you confine the dispute to legal systems within the frame of a democracy, then constitutional principles contain all the moral content you need, and even against my friend Ronnie Dworkin I would maintain that the appeal to any other principle but those contained in the legal system as a whole would indeed be suspicious. So why are you asking for more than to have recourse, if necessary, to constitutional principles on the premise that we have a legal system where human rights are penetrating down to civil law and so on and so on?

Second question, just following up the contributions, both of them, I suppose. It is a fact that this dispute is going on for more than a hundred years. And why? Supposedly the question is not well defined. I mean, this is one of those questions where there are at least four background disputes. And one is on moral theory. I mean, seeing here, a Kantian versus a non-cognitivist, I suppose. In moral theory meta-ethic composition is one background dispute. The second one is of a methodological kind that you mentioned. I mean, do we rationally reconstruct our conceptual frame for positive law, or do we take the attitude of somebody pursu-

ing a descriptive theory? And finally, yes, there are different social theories in the background, and may be, even different conceptions of democracy. So I think it is just this bundle of questions involved that makes it all difficult to come to an end in this dispute.

Professor Alexy:

Thank you very much, Professor Habermas. The Radbruch formula is, to be sure, not required in the context of a democratic constitutional system, where injustice comes about in this system. It was required, however, in order to react to National Socialist injustices, for at the time they were committed, there were in many cases no norms of positive law that were contravened by these injustices. The *Grundgesetz*, the German constitution, was of course not valid in the Third Reich. Thus, in order to declare, for instance, ordinances that were issued pursuant to the *Reichsbürgergesetz*, which stripped emigrant Jews of their citizenship and their property, as invalid from the beginning, we required the Radbruch formula, and it is required only in such constellations. Aside from this practical necessity, which the Radbruch formula can acquire after the breakdown of a totalitarian system, it plays no role at all in the everyday legal practice of a constitutional system. There remains, however, an interesting theoretical point. In physics, for instance, extreme effects are often very important from a theoretical point of view, even if they have no impact in everyday life. Something like this applies to law, too. Extreme cases can help us to understand what is only implicit in everyday practice. That role of the Radbruch formula survives. Aside from this, it has, to be sure, no practical impact in a democratic constitutional system. I agree with you here.

Professor Marmor:

I just want to reply to one part of the question: why is the debate going on? Well I could answer in the easiest way, that every debate in Philosophy has been going on for long time, and probably they are here to stay, like what is knowledge? But I think that actually here there is an additional reason. And I think the reason is that though apparently about legal positivism and its various non-positivist challenges, essentially the debate is really a philosophical one about the nature of law and the concept of law and so on and so forth, it has become hostage to, understandably so, a debate between various moral political views about this or that legal system or how to react to atrocities of this or that kind, how to regard the international norms of human rights and so on and so forth. And that is a very unfortunate combination because then people just tend to focus on slogans and debate about that. And in terms of slogans positivism does not fit very well. You think that positivism simply says, “Oh, law can just be anything whatsoever”,

surely that cannot be right. So I think that one of our objectives should be to keep separate things separate and not to confuse various political moral dilemmas with serious philosophical debates about the nature of law.

Professor Alexy:

I would like to add one point concerning the interminable character of the dispute over legal positivism. The dispute concerns the self-understanding of jurists. This is a difficult question. Disputes concerning self-understanding are always highly complex and interminable, and the self-understanding of jurists is a reflection of their concept of law. We are discussing not only a concept, we are also discussing how we are to understand ourselves. I think that this helps to explain the deep and permanent character of the debate.

Professor Massimo Latorre:

I would refer to Professor Marmor's concluding remarks in the debate. He said, "law certainly relates to what people ought to do, to what lawyers ought to do". There is an element, there is a norm. On the other side, you said "the nature of law, the question of the nature of law, has nothing to do with the 'ought to' of the law". Now, I must say, one thing is the theory of reconstruction of what lawyers have to do or ought to do and another thing is the theory of the nature of law. They are two different things. I remember that Joseph Raz somewhere makes a distinction within the theory of legal reasoning, which is intrinsically morally imbued. In the theory of legal reasoning we have to do with morality, morality by necessity; so in order to understand what the law to apply is we need some relation to morality, we need to introduce moral arguments, this is what Joseph Raz says, if I am not wrong.

But another thing is the theory of the nature of law. There are two different things: the theory of legal reasoning and the theory of the nature of law. Now, if we assume the Hartian methodology that says, first, that the law is a practice so the law is what lawyers do. It is a practice. It is not just as it is done. It is a practice. And the second, in order to understand the practice, we should assume the internal point of view. So in order to understand what the law is, we should assume the perspective of what the lawyers do. And what the lawyers do is to determine what lawyers ought to do. And in order to know what lawyers ought to do, we should imply or introduce moral arguments; if this is the case, and I think this is the case, if we would like to remain Hartian, in this case you cannot maintain the separation between law and morality. So my conclusion is the following: there is an article where Neil MacCormick defined Dworkin as a pre-Benthamite author. I would like to define Professor Raz's new positivist thesis and yours: a pre-Hartian positivism.

Professor Marmor:

I mentioned at least three and I can mention more very important senses in which we cannot talk about law without morality, where there is probably a necessary conceptual connection between law and morality. In my opening remarks I said probably it is true that we have very good moral reasons to have law, it is probably true that there is a necessary overlap between the concepts of law and morality and so on and so forth. So what the debate boils down to is not whether there is a connection between law and morality. We all admit that there is. There are several connections and probably many more than those I mentioned. The question is really about one crucial aspect of the concept of legal validity. Whether something is law does not necessarily conceptually depend on its moral content and this is what we claim. Now I do not think that the distinction between various points of view is of any particular use in this respect. It is important for other methods but not for this, so if I have time in my concluding remarks I will say something about that.

Professor Wellman:

I know at least five people who wish to be recognised and there is time, I understand, don't worry, you won't get lost. But first I would like to recognise this lady here on the aisle.

Professor Nora Wolfzun:

Nora Wolfzun, from Argentina. I will try to speak in English. This is a question for Professor Alexy. You pointed out the inner connection between law and morality, specially anchored in the fields of the human rights. I would like to know if there is any possibility to anchor this inner connection between these two fields in the line of Habermas' developments in a moral procedure, if that could possibly be another anchorage for this inner connection. Thank you.

Professor Alexy:

Thank you very much for your question. My answer begins with the claim to correctness. The concept of correctness is highly complex. I have sought to point out that it has both an authoritative and an ideal dimension. Now the authoritative dimension in a democratic constitutional state is not simply authoritative, for it speaks, too, to the results of the democratic process. In this way, authoritativeness in a democratic constitutional state is connected internally with the procedures of public will formation, which essentially include public discourse that seeks to bring

about correct results. For this reason, I cannot agree with Andrei Marmor when he says that not all parliamentary statutes raise a claim to correctness or justice. Neil MacCormick once made the point that it would be absurd if a parliament were to enact a statute with the title: “a law on the unjust taxing of the rich”. No parliament in the world would give such a name to its law. This shows that the claim to correctness is always present in legislation.

The Radbruch formula is to be distinguished from this general point. Radbruch’s formula refers to the special issue of extreme injustice and, thus, to a material or substantial aspect. It protects the core of human rights. This leads to the question of whether human rights exist, for a core of human rights can exist only if human rights exist. I think we have good reasons for assuming that the idea of human rights is not only not an empty idea, but is, indeed, a new topic. Here, I want only to point out the dimensions of the claim to correctness, and, with it, the overarching concept of law.

Professor Eugenio Bulygin:

I think we must distinguish between two quite different problems. One problem is the identification of law, or of legal rules, or norms, or whatever you call them. This is one problem; this is a theoretical problem. There, in this problem, the important thing is as Professor Marmor clearly stated. The other problem is what we should do once we identify legal norms. I think that even a judge who has correctly identified legal rules and after that says, “law requires me to do something like B and for moral reasons I will not do it, so I will not apply law”, there is no contradiction at all in these two statements. According to Professor Alexy’s thesis, this would be contradictory because law raises the claim to moral correctness. But for moral reasons I can refuse to apply a statute or legal rule. And I think there is no contradiction at all, even if a judge says that.

Professor Alexy:

Thank you very much. I think the problem of contradiction is a problem of the concept of law we use. I do not agree with Andrei Marmor that we cannot use—according to different points of view—different concepts of law. If a judge says “Law requires me to do *A* and morality requires me to forbear from doing *A*”, he refers with the expression “law” in the first proposition exclusively to what is authoritatively issued and socially efficacious. Given this condition, there is no contradiction between these two propositions. It is not a contradiction to say that what is authoritatively issued and socially efficacious requires me to do *A*, whereas morality requires that I forbear from doing *A*. The question, however, is whether it is adequate, when acting as a judge, to employ a concept of law that is restricted in this way.

As soon as the overarching concept of law is employed, things change dramatically. To be sure, no non-positivist would claim that judges have the power or competence not to apply what is authoritatively issued and socially efficacious simply because they think it is morally wrong. Things are more complex. It is not the case that moral incorrectness never justifies a *contra legem* decision, and it is not the case that it always does so either. Rather, there exists something like a three-stage scale, which begins with the Radbruch formula. In cases of extreme injustice, morality always precedes what is issued, even if the actual circumstances do not allow this priority to become socially efficacious. In this way, the Radbruch formula resolves the contradiction between the factual and the ideal dimension of the overarching concept of law, in cases of extreme injustice, in favour of the ideal dimension. The *contra legem* problem *qua* problem relevant to normal legal practice is then found at a level below that of extreme injustice. Many different sorts of reasons may justify a *contra legem* decision. Only the moral reasons are of interest here. It has already been said that moral defectiveness as such is by no means sufficient to justify a *contra legem* decision. In normal cases of moral defectiveness, the contradiction between the factual and the ideal dimension is simply an expression of legal defectiveness that cannot be resolved by a judge. In order to justify a *contra legem* decision, the defect must be of a certain kind and degree. In many legal systems the resolution of this problem has been institutionalized. One way of doing so is to establish a constitutional court. The constitutional court will apply constitutional norms, especially fundamental rights norms in order to decide the case. This shows that legal systems of the democratic constitutional type have internalised moral standards *qua* constitutional law, as Habermas has pointed out. But if we do not have the remedies of a democratic constitutional system, then the *contra legem* problem has to be resolved by the judge in its pure form. The overarching concept of law requires the judge to resolve the contradiction between the factual and the ideal as a legal problem. This is a matter of balancing the principles of legal certainty, separation of powers, and democracy, on the one hand, and substantial justice, on the other.

Professor Wellman:

Gentleman on this aisle, would you please identify yourself and then very quickly make your point?

Professor Pasquale Policastro:

Pasquale Policastro, from Poland and Italy, currently in Statin. The question is the following: do you not think that the historical question may be relevant? Positivism develops at a historical moment and the choice to develop the positivistic approach comes from essentially moral reasons. I mean, and I will tell you, that



rather than dealing with the complexity of society, the new positivistic approach, the disturbing corrections given to the model are dealing with inherently moral reasons. Therefore I would not know if such an approach, such a question may be relevant to the problem, because at the end, to ask the pure concept or ideal to work as an *a priori* element requires an approach to invariancy that indeed is very difficult to attain, not only in social sciences but also in physical sciences. So the question is that for the two methodologies there is something to say, I mean, and what I say, I conclude, is: as positivism developed historically may its development be relevant to the issue?

Professor Marmor:

Surely it would be relevant to understand how positivism develops and you know, it would be relevant to any other theory. You can ask about the history of ideas. But, whatever you come up with, even if it is true that there was this or that historical reason for developing this theory or that idea at a particular time, it would still have nothing to do with the question we are interested in, if the theory is true or not.

Professor Sergio Pormunzio:

Thank you very much. In the era of inclusive and exclusive positivism and human rights one question causes a certain perplexity in Brazil. The question I ask is a practical one. There are some thinkers who believe that the idea of the just, the unjust and the theory of legal argumentation are simply rubbish. On the other hand, there are thinkers who defend the idea of the just, the unjust and the theory of legal argumentation in judicial decisions as the basis of justice. This results in an antagonistic and paradoxical jurisprudence. My question is how in practice to resolve the effects of this dichotomy about which thinkers debate?

Professor Marmor:

Sorry, I understand that all over the world in many places and in different times, there are very difficult practical dilemmas. How to deal with cases where very bad things have been done in the name of the law? And now the question is, do we want to say that it was just really bad law or we want to come up with some kind of legalistic argument, that it is not law after all? Now, let us separate practical questions from theoretical ones. I can understand why often from a practical political point of view it would be better to make the legalistic argument a kind of a natural law argument that says not only that it was bad law, it was not really law to begin with. Ok? It may be more politically acceptable or legally acceptable,

it may have some practical advantages but that does not make it theoretically true. My own view is that overall all of us would be better off if we see the truth. Truth is that law is not necessarily a particularly nice thing, sometimes very bad things happen when you follow the law. And therefore the law ought to be criticized and often not followed. But I understand that sometimes it is not politically expedient to say that. It still does not make it true.

Professor Alexy:

It is true that sometimes, when law is applied, very unfortunate things happen. But when something unfortunate happens in this way, it is not external to the law as is the death of the victim to the knife with which he has been killed. Rather, it is inside the law, and that is the crucial point. I would like to add a remark to what Professor Policastro has said. It is, indeed, the case that there exists a close relationship between positivism, or non-positivism as the case may be, and the form of political organisation. This does not, however, mean that our issue can be reduced to a question of political organisation.

Professor Wellman:

It is time to allow each of our speakers to make a very brief concluding remark and first it will be Professor Marmor.

Professor Marmor:

I would suggest that it is too late now for concluding remarks, but just one point, basically to repeat my previous answers. I think that many confusions in this whole debate about legal positivism stem from the fact that the debate itself is hugely overblown, and it is seen as involving major normative questions about constitutional democracies and constitutionalism and about the conditions that would justify invalidating laws and so on and so forth, whereas from the philosophical perspective the debate is much narrower than that, it is really just about some key questions about the nature of law. All that leaves this big moral political debate completely intact and I think that this is as it should be.

Professor Alexy:

I am opposed to this. It belongs to the nature of law that it has a systematic character. This does not exclude the use, in some circumstances, of a narrow concept of law, one that refers exclusively to authoritative issuance and social efficacy. But

law is a complex entity; it is not exhausted by these features. Its nature can only be fully grasped by means of an overarching concept that includes morality.

Professor Wellman:

I want to thank our two main speakers but also all those in the audience that participated by speaking and by listening so carefully and patiently. Thank you very much.

