

The Relationships between Law and Morality:  
An Analysis of Robert Alexy's Classification

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The relationship between law and morality remains an unsolved question in legal philosophy. This study presents a novel classification of seven possible relationships between law and morality, one of which has received virtually no previous attention in major works of legal philosophy. It is not the objective of this study to argue which relationship is adequate to the object.<sup>1</sup>

The starting point of this study is Robert Alexy's classification of relationships between law and morality. There is one general and one particular reason for using his classification as the study's starting point. The general justification is that his classification is logical and can serve as a foundation for gaining further insight into the relationships between law and morality. Predominantly, Alexy visited Japan in the past year, and I translated his lecture on "inclusive non-positivisms"<sup>2</sup> from German into Japanese.<sup>3</sup> I believe that the best way to repay him for his generous contribution to Japanese academic society is to engage in critical analysis of his valuable theoretical work and improve on it.

## 1. The Nature of Law

Alexy asserts that "What is the nature of law?" is the main question of legal philosophy,<sup>4</sup> and he argues:

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<sup>1</sup> I suppose here that the object is the social fact named "law" or "morality."

<sup>2</sup> The lecture was presented on 29 November, 2014 at the law school of Chuo University, Tokyo.

<sup>3</sup> The Japanese translation has been published in *Horitsu Jiho*, Vol. 87, No. 3 (2015), 68–73, but the original German text is unpublished.

<sup>4</sup> Alexy 2004, 162.

Enquiring into the nature of something is to enquire into its necessary properties. Thus, for the question “What is the nature of law?” one may substitute the question “What are the necessary properties of law?” Necessary properties that are specific to the law are essential properties of law (Alexy 2004, 163). Essential or necessary properties of law are those properties without which law would not be law. They must be there, quite apart from space and time, wherever and whenever law exists.<sup>5</sup>

I agree with his opinion that not the contingent but the necessary properties of law are the object into which a legal philosopher should enquire. However, my agreement contains two reservations that are interrelated.

### 1.1 The Quantity of Legal Norms

First, I agree with Alexy that law consists of norms, i.e., of contents that form a normative system.<sup>6</sup> From this point onward, there are two distinct objects on which we can focus: legal norms and a legal system. When we consider a legal system as an undivided entity, we would not consider its quantity, because there is only one object, that is, law as a legal system. However, I assume that several types of legal norms belong to a legal system and that each type of legal norms can have different properties. Therefore, to enquire into the relationship between law and its properties, the quantity of legal norms should be considered. In this case, we should consider the possibility that there are properties that some legal norms of a legal system have, but other legal norms within the same legal system do not have. It is also possible, certainly, that there may exist properties possessed by all legal norms of a legal system or by no legal norms of that system.

### 1.2. Modality *de re* and Modality *de dicto*

The object into which the legal philosopher must enquire is, as Alexy maintains, the necessary properties of law. Moreover, we should consider the quantity of laws as legal

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<sup>5</sup> Alexy 2008, 290.

<sup>6</sup> Alexy 2004, 156 (abstract).

norms. It follows from this that, second, we must consider the combination of modality and quantity. A significant problem arises when we combine modality and quantity: we must make clear which modality we will grasp. Is it modality *de re* (of the thing) or modality *de dicto* (of what is said)?<sup>7</sup>

Assume that the domain of discourse is legal norms. Consider the following sentence: all legal norms are necessarily moral. If one takes M as representing the predicate “be moral,” using the necessity operator  $\Box$  and the universal quantifier  $\forall x$ , this sentence can be expressed as follows:

(modality *de re*)  $\forall x \Box Mx$  or

(modality *de dicto*)  $\Box \forall x Mx$

The first formula means that all legal norms have the property  $\Box M$ . It means that all legal norms have the property of necessarily being M (of being necessarily M). In other words, with reference to possible worlds<sup>8</sup> and without reference to modal expression (necessarily), the first formula can be paraphrased as follows: all legal norms in this world and all legal norms that are identical with those norms in this world but that belong to other possible worlds are moral. The meaning of this sentence does not exclude the existence of norms that belong to other possible worlds (but not to this world) and are unmoral. The second formula, however, means that it is necessary that all legal norms are moral. It can be paraphrased as follows: all legal norms in all possible worlds, including this world, are moral. The meaning of this sentence thereby excludes the existence of norms that do not belong to this world but do belong to other possible worlds and are unmoral.

I am unsure which modality Alexy has in mind, but I am sure that the modality *de dicto* is more appropriate for discussing relationships between law and morality. This is because we must assume that sources of legal norms (statutes, judicial precedents, and possibly social customs and situations) vary according to time and place and that legal

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<sup>7</sup> On modality *de re* and modality *de dicto*, see Priest 2008, section 14.5.

<sup>8</sup> On possible worlds, see Priest 2008, chapter 2.

norms are therefore also variable. We should include not only concrete legal norms in a current specific place but also possible legal norms in a past or a future place as subjects of discussion.<sup>9</sup> To discuss whether possible legal norms in a past or a future place are moral requires us to discuss the modality of the sentence “all legal norms are moral.” This modality is not the modality *de re* but the modality *de dicto*.

## 2. Positivism and Non-Positivism

Is morality part of the nature of law? Alexy divides the answers to this question into positivistic and non-positivistic ones. He says:

The controversy between positivism and non-positivism is a dispute about the relationship between law and morality. All positivists defend the separation thesis. In its most general form, the thesis says that there is no necessary connection between the law as it is and the law as it ought to be. In a more precise version, it states that there is no 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. By contrast, all non-positivists defend the connection thesis, which says 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.<sup>10</sup>

I find an unclarity in Alexy’s use of the word “or” in explaining both the separation and the connection thesis. It could be that “or” means that the two terms are synonymous and that the concepts of legal validity and legal correctness are identical. But later in the same article, Alexy considers a version of non-positivism, which he calls “super-inclusive non-positivism,” according to which “legal validity is in no way at all affected by moral defects or moral incorrectness.”<sup>11</sup> This description of what he consid-

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<sup>9</sup> Strong versions of natural law theory, according to which there can exist only identical legal norms in all times and places, are not considered here.

<sup>10</sup> Alexy 2008, 284–285 (emphasis added).

<sup>11</sup> Alexy 2008, 288.

ers a type of non-positivism seems actually to support the separation thesis, as long as we interpret “or” as connecting two synonymous terms, and therefore it seems in fact to present a variation of positivism. But Alexy does not intend to argue this in his article. Therefore, I assume that the formulations of the separation thesis and the connection thesis are misleading and that the three words “legal validity or” in both theses should be deleted. In this case, the two theses assume a concept of law that does not encompass its validity. It means that law can be either valid or not valid in the above-mentioned theses.<sup>12</sup>

### 2.1. Exclusive and Inclusive Positivism

After defining positivism as a position that denies a necessary connection between law and morality, Alexy subdivides positivism into two subtypes: exclusive and inclusive. According to him, exclusive positivism maintains that morality is necessarily excluded from the concept of law, and inclusive positivism maintains that morality is neither necessarily excluded nor necessarily included.<sup>13</sup> In other words, exclusive positivism says that such inclusion is impossible, inclusive positivism says that such inclusion is contingent.

To summarize, then, we now have three categories: non-positivism supports a necessary connection between law and morality, exclusive positivism supports its impossibility, and inclusive positivism supports its contingency. I assume that this correspondence between positions on the concept of law and modalities is somewhat simplistic. As discussed above, we should consider not only modality but also quantity, because law as a legal system consists of legal norms. By combining three types of modalities (necessarily, impossible, and contingent) and three types of quantities (all, nothing, and some),

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<sup>12</sup> On the other hand, in his previous works (Alexy 1989, 170; Alexy 1992, S. 45–46), Alexy has argued that “in order to discuss legal positivism, it is advisable to choose a concept of law which does include validity.” Alexy explains the reason for this choice as follows: “In this way a trivialization of the problem can be avoided. The latter would lie in first defining law as a class of norms for e.g., outward behaviour without reference to the dimension of validity (cf. Dreier 1987, 374f.) only to say then that there could be no conceptually necessary connection between law and morality, because one could imagine norms for outward behavior with any possible content.” This argument seems not to be in harmony with the separation and connection theses presented in Alexy’s 2008 article.

<sup>13</sup> Alexy 2008, 285–286; Alexy 2012, 3–4.

as I will soon explain, seven combinations of modalities and quantities arise. Before we discuss these seven combinations, we should examine Alexy's sub-classifications of non-positivism.

## 2.2. Alexy subdivides non-positivism into three positions: Exclusive, Inclusive, and Super-Inclusive Non-Positivism

He says:

The differences within non-positivism that are relevant here stem from different effects on legal validity that are attributable to moral defects. Non-positivism can determine the effect on legal validity that stems from moral defects or demerits in three different ways. It might be the case that legal validity is lost in all cases, or it might be the case that legal validity is lost in some cases and not in others, or finally, it might be the case that legal validity is affected in no way at all.<sup>14</sup>

Alexy names the first position, which claims that every moral defect undermines legal validity, "exclusive non-positivism"; he calls the second position, which he supports and which claims that moral defects undermine legal validity if and only if the threshold of extreme injustice is transgressed, "inclusive non-positivism"; and he terms the third position, which claims that no moral defect denies legal validity, "super-inclusive non-positivism."

At this juncture, two points are unclear to me. First, it is unclear how each of the three variations of non-positivism are related to the necessary properties of law. It seems that the classifications of exclusive, inclusive, and super-inclusive non-positivism have nothing to do with the nature of law. Moreover, why should exclusive positivism and inclusive positivism not be subdivided into three sub-categories? It seems that the two variations of positivism have nothing to do with the quantity of legal norms.

Second, if my interpretation is correct, Alexy supposes a concept of law that does not include validity when he distinguishes between non-positivism, exclusive positivism,

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<sup>14</sup> Alexy 2008, 287; Alexy 2012, 5.

and inclusive positivism. However, when he distinguishes between exclusive, inclusive, and super-inclusive non-positivism, he supposes a concept of law that does include validity. There seems to be an inconsistency here, and a justification for this inconsistency (or at least for the appearance of an inconsistency) is desirable.

In the next section, I will present another way to classify the relationships between law and morality. In this classification, in order to overcome the above-mentioned two points of unclarity, modality and quantity are connected. In this connection, modality is interpreted as modality *de dicto*. Therefore, modality is added not to the predicate but to the sentence. Moreover, it is not defined whether the concept of law encompasses validity. The concept of law supposed in a classification of relationships between law and morality should be as indefinite as possible, because classifications that suppose a particular concept of law are not universally applicable and are therefore of little use.<sup>15</sup>

### 3. Another Classification

To simplify the discussion, the domain of discourse is limited to legal norms that form a legal system. This means that a universal set of legal norms is a legal system. Under this limitation, the first relationship between law and morality in a legal system is formulated as follows:  $\forall xMx$ . Here  $\forall x$  is a universal quantifier and means “for all x.”  $Mx$  means “x is moral.” Hence, the formula  $\forall xMx$  means that any legal norms are predicated to be moral. In short, this formula claims that all legal norms are moral.

The second relationship is formulated as follows:  $\forall x\neg Mx$ . Here,  $\neg$  means “not.” The formula means that all legal norms are unmoral.

If we negate the first formula, we obtain the formula:  $\neg\forall xMx$ . This is identical with the formula:  $\exists x\neg Mx$ .  $\exists x$  is an existential quantifier and means “There is at least one x.” This formula should be read as follows: there is at least one unmoral legal norm. Furthermore, if we negate the second formula, we obtain the formula:  $\neg\forall x\neg Mx$ . This is identical with the formula:  $\exists xMx$  and means that there is at least one moral legal norm. Therefore, someone who disagrees with both the first and second formulas agrees

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<sup>15</sup> Alexy’s sub-classification of non-positivism depends on a concept of law that includes legal validity. Therefore, it is not considered in the following discussion.

with the third formula:  $\exists x \neg Mx \ \& \ \exists x Mx$ . This formula should be read as declaring that there is at least one unmoral legal norm and also that there is at least one moral legal norm.

These three formulas describe three possible relationships between law and morality in a legal system. If we only aimed to describe a relationship in a particular legal system in a particular time and place, these three formulas would suffice. However, if we wish to describe all possible relationships between law and morality in all possible legal systems, as would seem most suitable for the task of legal philosophy, the consideration of modalities should be added.

First, there are cases where relationships between law and morality in all possible legal systems are the same. This means that one of the three relationships described above is necessary. These cases can be expressed by the following formulas:

- (1)  $\Box \forall x Mx$
- (2)  $\Box \forall x \neg Mx$
- (3)  $\Box (\exists x \neg Mx \ \& \ \exists x Mx)$

The first formula,  $\Box \forall x Mx$ , maintains that it is necessary that all legal norms are moral. This means that all legal norms of all possible legal systems are moral. This position can be named non-positivism. The second formula,  $\Box \forall x \neg Mx$ , maintains that it is necessary that all legal norms are unmoral. It means that all legal norms of all possible legal systems are unmoral. This position can be characterized as exclusive positivism. The third formula,  $\Box (\exists x \neg Mx \ \& \ \exists x Mx)$ , maintains that at least one unmoral legal norm and at least one moral legal norm must necessarily exist. It means that there is at least one unmoral legal norm and, simultaneously, at least one moral legal norm in every possible legal system. To the best of my limited knowledge and insight, I believe that this position has probably never been presented in the major works of legal philosophy.

Second, there are cases wherein two relationships are possible ( $\diamond$ ) and the third is impossible ( $\neg \diamond$ ). These cases can be expressed by the following formulas:



- (4)  $\diamond \forall x Mx \ \& \ \diamond \forall x \neg Mx \ \& \ \neg \diamond (\exists x \neg Mx \ \& \ \exists x Mx)$   
(5)  $\neg \diamond \forall x Mx \ \& \ \diamond \forall x \neg Mx \ \& \ \diamond (\exists x \neg Mx \ \& \ \exists x Mx)$   
(6)  $\diamond \forall x Mx \ \& \ \neg \diamond \forall x \neg Mx \ \& \ \diamond (\exists x \neg Mx \ \& \ \exists x Mx)$

Finally, there is the case where all three relationships are possible. This case can be expressed by the following formula:

- (7)  $\diamond \forall x Mx \ \& \ \diamond \forall x \neg Mx \ \& \ \diamond (\exists x \neg Mx \ \& \ \exists x Mx)$

All the formulas from (4) to (7) can be classified within inclusive positivism. This shows that there are four sub-versions of inclusive positivism.

#### 4. Concluding Remarks

In this study, taking Alexy's classification of relationships between law and morality as my starting point, I have analyzed and improved on it. I then presented another classification of seven possible relationships between law and morality. Moreover, I identified that one of these relationships,  $\Box(\exists x \neg Mx \ \& \ \exists x Mx)$ , has not received significant attention in the major works of legal philosophy.

In conclusion, I would like to make two additional comments on the classification presented above. First, this classification does not suppose any definition of morality, and therefore it is neutral to particular definitions of morality. Moreover, this classification is applicable not only to relationships between law and morality but also to relationships between law and anything. It means that there are always seven relationships between law and something else. This something else may be, for example, the authority of law or the social efficacy of law.

Second, I have not discussed herein which relationship between law and morality is adequate to the object and is therefore true. This discussion is beyond the objective of this study; however, I intend to elaborate on it in the near future.

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