

5½ Myths of Legal Non-Positivism

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Abstract

Many legal philosophers assume that legal non-positivism misconstrues its counterpart, legal positivism; that it destroys law's positivity by allowing the judges to grab directly into the blue sky of justice; that it disempowers the legislator; that it accepts a bizarre notion of an ideal dimension of the law which is either empty or amounts to ideological particularism; that it cannot settle the eternal conflict between real and ideal elements; that it transforms a descriptive-analytical debate about what the law is into a normative-political debate about what the law ought to be. The present article unmaskes these assumptions as myths.

Keywords: Legal Positivism. Legal Non-Positivism. Concept of Law. Law and Morality. Alexy-Raz-Debate.

1. Introduction

This article addresses six prominent beliefs about legal non-positivism. I seek to demonstrate why and to what extent these beliefs are myths – widespread but untrue stories. My analysis takes issue with the debate on law and morality, but I will limit my argument to the specific version of the connection thesis maintained by inclusive non-positivism¹. All answers to whether law's validity and content depend on morality employ various background premises². Consequently, these answers are more complex than a simple Yes or No could grasp. Given the vast literature on the topic, I will concentrate here mainly on arguments put forward in the exchanges between Robert Alexy, Joseph Raz, Andrei Marmor, Scott Shapiro, and John Gardner, whose seminal article on the myths of legal positivism inspired

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¹ On the three forms of legal non-positivism, see Alexy 2012: 4–7, 2017: 327–329.

² Five distinctions matter most in this respect, see Alexy 2002: 23–27 for details.

my thoughts³. When I arrived in Oxford in 2005, I encountered John as a fascinating discussant and an extraordinarily kind, supportive mentor. I dedicate this article to his memory with gratitude.

2. The Myth of Misconstruction

According to the myth of misconstruction, non-positivism gives a wrong description of legal positivism by assigning the separation thesis to it. Gardner dubs this myth «the jurisprudence student's favourite myth about legal positivism»⁴. It is, however, likewise a myth about legal non-positivism, given that the separation and the connection theses stand in a relation of contrariety to each other⁵. A misconstruction of one thesis automatically results in a misconstruction of its counterpart.

Therefore, Gardner's myth about legal positivism necessarily implies a myth about legal non-positivism. Proving that the separation thesis is a myth about legal positivism would automatically result in an equivalent myth about legal non-positivism. Assigning the connection thesis to legal non-positivism would also be a myth. For this reason, I enlist the problem here as a myth about legal non-positivism.

The criticism based on this myth is that misconstruing its counterpart resulted in a strawman fallacy because non-positivism attacked a position nobody holds. As a result, arguments put forward by non-positivism «find no target»⁶. They are «not relevant» to the task of refuting the separation thesis⁷. Many legal positivists have reported frustration, sometimes anger, about how non-positivists picture their positivist counterparts. Marmor has put his frustration in the following words:

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 assume⁸.

Likewise, Raz laments the «failure to define legal positivism in a way which would apply to many of the theories of law commonly known as positivist»⁹. In his

³ Gardner 2014.

⁴ Gardner 2014: 48; it makes no difference to the substance of the argument that Gardner uses a different label for the separation thesis («no necessary connection thesis»).

⁵ See Alexy 2012: 4.

⁶ Raz 2007: 18.

⁷ Raz 2007: 22.

⁸ Alexy & Marmor 2005: 773.

⁹ Raz 2007: 22.

primary reply to Alexy, he stresses that «what Alexy says is legal positivism is not what is understood as such in the English-speaking world»¹⁰.

2.1. The Positivist Connection Thesis

The separation thesis is the leading example legal positivists invoke to support their claim that non-positivists misconstrued their position. According to Raz, it makes no sense to attribute to legal positivism the separation thesis because legal positivists also agreed that there existed «an indefinite number»¹¹ of «necessary connections between law and morality»¹². For the same reason, Gardner submits that the separation thesis was «absurd and no legal philosopher of note has ever endorsed it as it stands»¹³.

Indeed, legal positivists have accepted numerous connections between law and morality. Gardner refers to Hart's proposal that some element of justice comes from the mere fact that every law is a general norm that allows us to treat like cases alike¹⁴. Gardner comments, «[f]or Hart, this built-in *dash of moral merit in every law* clearly forges a necessary connection between law and morality»¹⁵.

Marmor lists law's claim to legitimacy as an example, which «already proves that there is a necessary connection between law and morality»¹⁶. Since both law and morality had the same function «to govern our lives», legal positivism agreed that «law would have some moral content, that there will be considerable overlap between the content of any legal system and moral prescriptions»¹⁷. Similarly, Shapiro maintains that legal systems solve «moral problems»¹⁸ and that legal concepts shall «be moral as well»¹⁹. Shapiro also characterises law as «necessarily having a moral aim»²⁰ and the legal point of view as purporting «to represent the moral point of view»²¹.

¹⁰ Raz 2007: 18.

¹¹ Raz 2007: 21.

¹² Raz 2011: 169. See also, from a non-positivist standpoint, Finnis' claim that conveying the debate between positivist and non-positivist theories of law as «a debate about whether there is any necessary connection between law and morality» as a «sheer oddity»: Finnis 2013: 7.

¹³ Gardner 2014: 48.

¹⁴ Hart 2001: 81.

¹⁵ Gardner 2014: 48-49, emphasis added; see also *ibid.*, text to fn. 12.

¹⁶ Alexy & Marmor 2005: 783.

¹⁷ Alexy & Marmor 2005: 783.

¹⁸ Shapiro 2011: 170.

¹⁹ Shapiro 2011: 114.

²⁰ Shapiro 2011: 215.

²¹ Shapiro 2011: 187.

Raz, addressing the issue of «identifying legal positivism»²², underlines that law's claim to authority is a «moral claim»²³ and that «the concept of legitimate authority is a moral one»²⁴. Raz maintains that legal positivists accept the moral merit of law's positivity and the possibility of evaluating the law as good or bad from a moral perspective²⁵. As a result, the positivist connection thesis claims that law has «an indefinite number of necessary moral properties»²⁶. According to Raz, the separation thesis does not correctly identify legal positivism.

2.2. Discussion

Looking more closely at the positivist connection thesis reveals significant differences vis-à-vis the non-positivist connection thesis. The positivist variant establishes only a relatively weak connection between law and morality. It is weak in two related aspects.

First, some arguments submitted by legal positivists fail to establish a necessary character of the connection between law and morality. When Marmor refers to the «considerable overlap»²⁷ between the content of the law and morality, he does not acknowledge that, for legal positivists, this overlap can only be a contingent matter. It is left to the decision and will of the lawgiver whether and to what extent to establish such overlap. Marmor does not address the decisive point here, namely that both inclusive and exclusive legal positivism deny the *necessary* character of the connection between law and morality.

The same point of a lack of necessity of the connection between law and morality infects the argument that legal positivism also accepted the moral merits of law's positivity. The inner morality stemming from law's «reliance on general standards»²⁸, e.g., is a *contingent* property as long as one maintains the sources thesis. If the only thing that makes a norm legally valid is that it is source-based, then generality cannot be a necessary property of the norm. Because «being source-based does not imply being general»²⁹. A legal norm lacking generality or other elements enlisted by Fuller to depict the inner morality of positive law will still be valid if validity rests solely on being source-based.

It follows that there is an essential difference between the positivist and the non-positivist variants of the connection thesis, drawing to the necessity or contin-

²² Raz 2007: 18.

²³ Raz 2007: 19 with fn. 6.

²⁴ Raz 2007: 20.

²⁵ Raz 2007: 20-21.

²⁶ Raz 2007: 21.

²⁷ Alexy & Marmor 2005: 783.

²⁸ Raz 2007: 21.

²⁹ Alexy 2007: 44.

gency of the connection between law and morality³⁰. The contingency of the connections accepted by positivists renders their connection thesis weak.

A second aspect in which the positivist connection thesis is weak is that it does not specifically relate to legal norms' validity. None of the four examples enlisted by Raz for the positivist connection thesis refer to the validity of legal norms³¹. Raz's connections do not make legal validity dependent on moral merits. It is this dependency between moral merit and legal validity, however, that stands at the centre of the debate. The weak positivist connection thesis does not even address this issue. Gardner understood this vital point much more clearly than Raz did, for he underlined that «legal positivism is a thesis only about the conditions of legal validity»³².

In a nutshell, the positivist connection thesis is weak, establishing only contingent connections that do not relate to legal validity. In contrast, the non-positivist connection thesis is strong, as it establishes a necessary connection between legal validity and moral merits. This difference allows us to clearly see the necessity of formulating the separation thesis more precisely. The phrasing Raz³³ and Gardner³⁴ attack so fiercely («There is no necessary connection between law and morality») is merely an unprecise shortcut. The debate has suffered in the past from this shortcut leading to misunderstandings. We have two variants of the precise separation thesis, which I label the validity variant (ST_{vv}) and the definitional variant (ST_{dv}):

ST_{dv}: «[T]he concept of law is to be defined such that no moral elements are included»³⁵.

From this definitional variant, immediate consequences for the content of the law follow. According to ST_{dv}, morality does not determine the content of the law. Two separate questions are what the law commands and what justice requires, or the law as it is and the law as it ought to be. From answering one, nothing follows for the answer to the other.

ST_{vv}: There is no necessary connection between legal validity and moral merits.

³⁰ I should like to acknowledge that Raz has explicitly objected against this distinction, claiming that the contingency thesis «cannot [...] be taken as a defining feature of [the legal positivist] tradition». Raz 2007: 21. However, he does not list arguments for this claim except the one referring to the moral merit of law's positivity, which I have already discussed and rejected.

³¹ Alexy 2007: 43-45.

³² Gardner 2014: 49.

³³ Raz 2007: 18 with fn. 3, citing Alexy.

³⁴ Gardner 2014: 48.

³⁵ Alexy 2002: 3; see also 20-21.

Legal positivists have overlooked, I assume, that this second variant exists in non-positivist reconstructions of legal positivism. This oversight may have occurred because Alexy's monograph on the topic presents «the basic positions» with the help of the definitional variant only³⁶. Still, the same monograph contains the roots for the validity variant. Two relevant sections are the third chapter on «the validity of law»³⁷ and the section laying down the «conceptual framework»³⁸.

In the latter section, Alexy offers an interesting discussion on the relation between the concept of law and the validity of law. This discussion is relevant since we can read it as addressing the relation between the definitional and the validity variants of the separation thesis. The distinction Alexy discusses is between law concepts that omit validity and those that embrace validity³⁹. A concept that embraces validity is present in Bergbohm's statement that the expression «valid law» was without doubt a pleonasm⁴⁰. It is also present in Jellinek's claim: «A legal norm that is not valid any more or that shall be valid only in the future is not law in the true sense»⁴¹.

Validity-embracing concepts of law like these have the disadvantage that they do not allow to characterise bygone legal systems as «legal». Kantorowicz has laid down the now classical argument by pointing out that validity-embracing concepts of law exclude the study of classical Roman law from legal science⁴². Even worse, the discipline of legal history would be eliminated from legal scholarship altogether⁴³. Kantorowicz concludes that a rule does not have to be valid to be legal⁴⁴. Therefore, a validity-omitting concept of law is preferable for most purposes and contexts. This preference also follows from the general Kantian rule that the existence of an object does not belong to its conceptual properties⁴⁵.

Things are different, however, in the context that interests us here⁴⁶. The discussion between legal positivism and non-positivism must operate based on a validity-embracing concept of law. Otherwise, the main problem gets circumvented by

³⁶ No mention of legal validity is made in the relevant passage, see Alexy 2002: 3–4.

³⁷ Alexy 2002: 83–123.

³⁸ Alexy 2002: 23–24.

³⁹ Alexy 2002: 23–24.

⁴⁰ Bergbohm 1892: 49.

⁴¹ Jellinek 1966: 333.

⁴² Kantorowicz 1980: 16.

⁴³ Kantorowicz 1980: 17.

⁴⁴ Kantorowicz uses the term «binding» instead of «valid». For my purposes here, I shall use these terms as synonyms, as does Kantorowicz; see Kantorowicz 1980: 16.

⁴⁵ See Kantorowicz 1980: 18.

⁴⁶ The context can influence a definition, and this fact is acknowledged, *e.g.*, by Campbell in his preface to Kantorowicz' work: «[...] we judge our definitions not by their correspondence with an imagined essence of things but by their coherence and their usefulness for the thinking operations on which we are engaged». Kantorowicz 1980: vii.

simply excluding any impact morality may or may not have upon law's validity from the scope of the concept of law altogether⁴⁷.

It is vital to note that the opposite does not hold. Adopting a validity-embracing concept of law does not predetermine the decision in the debate between legal positivism and non-positivism. The reason is that including validity does not mean importing specific validity criteria. The concept of law understood as including validity, will still be open to all sorts of validity criteria, including positivist ones. The validity criteria are a separate issue. Accepting a validity-embracing concept of law does not predetermine anything in that regard. Nevertheless, as I have said, the contrary is true: favouring a validity-free concept would predetermine the decision between legal positivism and non-positivism in favour of the former. This consideration is another reason to adopt a validity-embracing concept of law in the present context.

Returning to the main line of my argument, it follows from the necessary employment of a validity-embracing concept of law that we must understand ST_{dv} and ST_{vv} as two variants of the same thesis. In other words, the positivist separation thesis can separate law and morality, but it may not separate concept and validity of the law in an attempt to limit itself to the former and exclude the latter. We can now see that ST_{vv} is not a distinct variant of ST_{dv} but rather a more precise reformulation.

The decisive point of my argument is that to these precise, reformulated versions of the separation thesis, the weak positivist connection thesis is no interesting counterpart. The reason is that the weak positivist connection thesis does not relate moral elements to legal validity. Furthermore, even more critically, ST_{vv} is maintained by most legal positivists. Marmor, *e.g.*, gives the following formulation of the separation thesis:

[T]he 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 circumstances⁴⁸.

Marmor stresses that all contemporary legal positivists accept this formulation of the separation thesis⁴⁹. He then goes on to name the core aspect of the dispute and identifies it as «legal validity»⁵⁰, and legal validity, according to Marmor, is «one crucial aspect of the separation thesis»⁵¹. Commenting on Alexy's position that «moral considerations form a necessary condition of legal validity», Marmor stresses that «this is clearly at odds with one of the main insights of legal positivism»⁵². Later in his debate with Alexy, he returns to this point and again stresses

⁴⁷ Alexy 2002: 24.

⁴⁸ Alexy & Marmor 2005: 773; Marmor is referring here to his Marmor 2001: 71.

⁴⁹ Alexy & Marmor 2005: 773.

⁵⁰ Alexy & Marmor 2005: 774.

⁵¹ Alexy & Marmor 2005: 774.

⁵² Alexy & Marmor 2005: 775.

that the dispute is «really about one crucial aspect [...] of legal validity»⁵³. For this reason, I submit that we can read Marmor's following sentence as relating to legal validity by adding a word into the following quotation: «Whether something is [scil. valid] law does not necessarily conceptually depend on its moral content, and this is what we claim»⁵⁴.

These remarks, taken together, amount to adopting ST_{vv} and labelling it as the common core of all contemporary legal positivists. The fact that Raz, referring to Marmor's formulation cited above, and in open contradiction to his fierce resistance, almost disgust⁵⁵, to identify a core of legal positivism, says that Marmor's formulation does get close to «the common core of the positivist tradition»⁵⁶, confirms my interpretation. Raz adds that he believes it «to be correct»⁵⁷ – so he endorses it himself. Raz then stresses that his sources thesis holds that «the identification of law never requires the use of moral arguments of judgements about its merits»⁵⁸. What could «identification of law» be other than a statement upon the concept of law? Moreover, what could «identification of law» be other than the identification of *valid* law? It seems clear to me that Raz endorses both ST_{dv} and ST_{vv} here. Both variants of the separation thesis accurately describe Raz's sources thesis. There is no trace of a misconstruction.

3. The Myth of the Blue Sky

3.1. Destroying Law's Positivity

This myth departs from the view that legal non-positivism somehow ignored the value of law's positivity by getting too enamoured with the free, blue sky of justice. One way to describe this myth is by juxtaposing it with Gardner's first myth of legal positivism, which he entitled «the value of positivity»⁵⁹. According to Gardner, it is a myth that legal positivism necessarily entailed what he labels «positivity-welcomers». Positivity-welcomers are positions that identify some evaluatively meritorious elements in law's positivity. «They see some built-in redeeming merit in legal norms *qua* posited»⁶⁰. Gardner argues that the evaluative question is a separate issue that

⁵³ Alexy & Marmor 2005: 788.

⁵⁴ Alexy & Marmor 2005: 788.

⁵⁵ I am referring here to the tone in Raz 2007: 17–19.

⁵⁶ Raz 2007: 22.

⁵⁷ Raz 2007: 22.

⁵⁸ Raz 2007: 22.

⁵⁹ Gardner 2014: 26.

⁶⁰ Gardner 2014: 29.

does not go hand in hand with either positivism or non-positivism⁶¹.

We can mirror this myth for legal non-positivism. The result is a myth saying that non-positivism, rather than overstating the value of law's positivity, as in Gardner's myth, would deny or downplay the value of law's positivity.

A similar way of describing this is by mirroring Gardner's second myth, closely related to the first. Gardner's second myth suggests that «[...] legal positivists insist on the evaluation of laws according to their "form" (e.g. their clarity, certainty, prospectivity, generality, and openness) as opposed to their contents»⁶². Gardner summarises these formal criteria as purported «"content-independent" evaluative criteria»⁶³. He then goes on to demonstrate that the form/content distinction is not what characterises legal positivism correctly. Instead, Gardner convincingly argues that the distinction that matters is the one between sources-based and merits-based criteria⁶⁴.

Still, we can use Gardner's considerations to identify a second formulation of the myth of the blue sky. This second formulation says that legal non-positivism would insist on evaluating laws according to their merits alone, employing only merit-dependent criteria. Since the latter would belong to the blue sky of justice, legal non-positivists downplay, if not ignore, sources-based criteria by focusing on merits. Many critics of legal non-positivism believe this. Their myth is that legal non-positivists would overemphasise the blue sky of justice by ignoring law's positivity (first formulation) and downplaying sources-based criteria (second formulation).

Another way to describe this myth is by arguing that legal non-positivism would necessarily result in an overmoralisation of the law. This myth is present when Shapiro uses the term «natural lawyers» to designate the opponents of legal positivism. Shapiro also characterises them as claiming «that unjust rules are not laws»⁶⁵ or as legal philosophers who «deny that the Nazis, the Soviets, the Taliban, and others had law»⁶⁶. Others have argued that *qua* overmoralisation non-positivism poses an unacceptable threat to the «normativity»⁶⁷ of the positive law and to «the rationality of decisions»⁶⁸.

⁶¹ Gardner 2014: 26, 29.

⁶² Gardner 2014: 29.

⁶³ Gardner 2014: 29.

⁶⁴ Gardner 2014: 31.

⁶⁵ Shapiro 2011: 409.

⁶⁶ Shapiro 2011: 16.

⁶⁷ Reese 2013: 15.

⁶⁸ Reese 2013: 138. Reese makes this claim for the constitution specifically, while I discuss the more general variant of the myth here.

3.2. Blue Sky Adjudication

The general idea of this myth is that by accepting an ideal dimension of the law, non-positivism destroyed law's positivity⁶⁹. A narrower variant of the myth maintains that non-positivism led to blue sky adjudication. The judges would, so to speak, grab directly into the blue sky of justice to pull down a solution to the case before them, ignoring – and, ultimately, destroying – law's positivity.

This myth mirrors two of Gardner's myths of positivism. First, Gardner lists a myth entitled «positivistic adjudication», which holds that judges «decide cases only by applying valid legal norms to them» and that they avoid having «regard to the merits»⁷⁰. The term «merits» is unclear here, but it seems natural to interpret it as referring to moral merits. Gardner's differentiation between an adjudication that sticks solely to «source-based norms»⁷¹ and an adjudication that goes «beyond the mere application of posited [...] norms»⁷² is very close, if not identical, with adjudication following the real and the ideal dimensions of the law respectively. Consequently, we could rephrase Gardner's myth as claiming that legal positivism thinks judges decide cases only by referring to sourced-based norms and not moral merits. This interpretation allows us to mirror the myth: For legal non-positivism, judges decide cases only by referring to their moral merits and not to source-based norms.

Second, Gardner also enlists a myth referring to interpretation. Gardner's myth says that legal positivists «must favour particular methods of legal interpretation», namely textualism and originalism⁷³. It is easy to see how the corresponding myth for non-positivism goes: Legal non-positivism favours modes of interpretation that look «to what would make the norm morally defensible»⁷⁴ or more fit for its objective (rather than intended) purpose. It favours, hence, justice-related, free, unbound interpretation.

3.3. Discussion

Some variants of legal non-positivism are indeed vulnerable to the objection from overmoralisation. To the relatively small and uninteresting extent that this is so, the myth bears a kernel of truth. Classical natural law doctrine has, indeed, overmoralised the law by seeing the law as essentially and purely ideal⁷⁵. In more

⁶⁹ See Alexy 2019a: 20.

⁷⁰ Gardner 2014: 34.

⁷¹ Gardner 2014: 36.

⁷² Gardner 2014: 35.

⁷³ Gardner 2014: 42.

⁷⁴ Gardner 2014: 47.

⁷⁵ Blackstone 2016: 41; see Klatt 2019: 45.

modern terms, this position is identified as «exclusive non-positivism», according to which «every moral defect yields legal invalidity»⁷⁶. Exclusive non-positivists claim that «immoral rules are not legally valid»⁷⁷. This position pays too much attention to law's ideal dimension.

It is easy to see that exclusive non-positivism is indefensible. Endicott has argued convincingly that a complete «rule of justice», that is, a state of affairs in which «the law prohibit[s] all injustices and give[s] recourse against them», would be «tyrannical»⁷⁸. This is why we rarely find such views in the literature.

Shapiro's blanket characterisation of non-positivists as «natural lawyers»⁷⁹ rests on a myth. Overmoralisation is a myth because all interesting, modern, defensible variants of legal non-positivism are not vulnerable to the reproach of overridealisation. For all these variants, the real dimension of the law does not simply vanish by accepting an ideal dimension. On the contrary, the real dimension, law's positivity, is also relevant for legal non-positivists. As Alexy has said in his debate with Marmor, «[n]o non-positivist would claim that judges have the [...] competence not to apply what is authoritatively issued and socially efficacious simply because they think it is morally wrong»⁸⁰. Law's positivity is not a point on which positivists could claim a monopoly. Murphy has stressed this point:

All natural law theorists believe that the existence and content of law necessarily depend on non-normative facts - meaning, that the spelling out what it is for a law to exist includes an appeal to some non-normative facts holding⁸¹.

We can see all this best in the leading opposition to legal positivism: inclusive non-positivism. The Radbruch formula can characterise it, the shortest conceivable form of which is «Extreme injustice in not law»⁸². This formula does not require a complete fit between law and morality⁸³. Even more importantly, below the threshold of extreme injustice, any conflict between the real and the ideal dimension of law, between legal certainty and justice, is solved in favour of the real, authoritative dimension⁸⁴. Inclusive non-positivism has stressed the necessity of law's real dimension consistently⁸⁵. It does not seem easy to describe this as destroying law's positivity, as the myth does.

⁷⁶ Alexy 2008: 287.

⁷⁷ Beyleveld & Brownsword 2001: 76.

⁷⁸ Endicott 2022: 1851.

⁷⁹ Shapiro 2011: 409.

⁸⁰ Alexy & Marmor 2005: 790.

⁸¹ Murphy 2017: 353.

⁸² Alexy 2008: 282.

⁸³ Alexy 2008: 282.

⁸⁴ Alexy 2016: 303; for a similar point in the context of constitutional rights, see Alexy 2019a: 20-21.

⁸⁵ See, *e.g.*, Alexy 2017: 322-323, 2019b: 499.

According to the Radbruch formula, an adequate account of the relation between the real and the ideal dimension requires balancing the material principle of justice and the formal principle of legal certainty. This balancing entails legal reasoning, so the dual nature of law necessarily leads to argumentation. As I have defended elsewhere, discourse is the bridge required to integrate law's ideal and real dimensions. This function is so essential that discourse must be accepted as a third element of the nature of law, lending the latter a triadic rather than dual nature⁸⁶. The vital point of the triadic nature of law is that under the discursive nature of law, the acceptance of an ideal dimension does not lead to an overmoralisation:

[T]he seal of a totalitarian paralysis, stemming from the purportedly absolute moral principles of law's ideal dimension, is broken once and for all. In the procedural paradigm of law, there are no sacrosanct principles, except for the necessary conditions of rational discourse. The procedural paradigm already accounts for this essential objection against accepting an ideal dimension of law. It is hence mistaken to argue, as many sceptics do, that only a complete renunciation of the ideal dimension of law would allow for tolerance in a democratic society⁸⁷.

In order to shed more light on how this balancing works, I would like to refer to a concept I introduced some years ago: the dual nature of legal argumentation⁸⁸. Moreover, with this, I am moving towards addressing the myth of the blue-sky adjudication. I should underline that a theory of the nature of law will inevitably impact the theory of legal reasoning. The two are by no means two separate things⁸⁹. So this myth's starting point, *e.g.*, accepting an ideal dimension of law has consequences for legal reasoning, is unobjectionable.

However, this still does not lead to blue-sky adjudication, as the myth maintains. Given the dual nature of law, legal argumentation also has a dual nature, comprising an ideal and a real dimension. We can identify the dual nature of legal argumentation in all major canons and legal methods⁹⁰. The fundamental idea behind this approach has been aptly condensed by Allan:

There are good reasons to honour both the decisions of a democratic assembly and any legitimate expectations such decisions have induced; and those reasons will often commend close adherence to the canonical form of an enacted rule, aligning the normative rule with ordinary textual meaning. Against these reasons, however,

⁸⁶ Klatt 2020.

⁸⁷ Klatt 2020: 393; see also Fuller 1946: 394–395.

⁸⁸ Klatt 2016.

⁸⁹ See, however, Massimo La Torre's remark in the discussion between Alexy and Marmor, Alexy & Marmor 2005: 787.

⁹⁰ For details, see Klatt 2016: 31–36; for the connectedness between nature of law and the nature of legal argumentation, see already Klatt 2012: 14–16.

must be set any contrary considerations of justice – in particular, those considerations of justice embodied in presumptions of legislative intent, which serve to bolster the integrity of the rule of law. The legal effect of an enactment, accordingly, is always a matter of judgment, sensitive to all the applicable moral reasons⁹¹.

As the beginning of this quotation demonstrates, the ideal dimension of legal argumentation⁹² does not allow for blue-sky adjudication. The value of law's real dimension, its positivity, and the value of finality⁹³ in public decision-making continue to exert influence upon adjudication. A balancing between ideal and real elements of legal reasoning is required, and a Dworkinian ideal of integrity must inspire this.

I have summarised these considerations in the “Radbruch formula of legal argumentation”, which runs: Arguments from law's real dimension (literal meaning, will of the historical legislator, original intent, etc.) take preference over arguments from law's ideal dimension (justice) unless we can cite rational grounds for granting preference to the latter⁹⁴. This formula captures the balancing between ideal and real elements, which is necessary in every instance of legal reasoning. From accepting an ideal dimension of legal reasoning, «it does not follow that the law cannot diverge from justice»⁹⁵. Even more importantly, the formula does give a default (albeit rebuttable) preference to the real elements of legal reasoning. This default preference is why the reproach of overmoralisation of legal argumentation is a myth.

4. The Myth of Juristocracy

The myth of juristocracy is based upon the myth of the blue sky but gives the reproach of overmoralisation a distinct institutional angle. The criticism is that non-positivism gives the judges too much authority by allowing for an ideal dimension of law and legal argumentation while disempowering the legislator. This disempowerment contradicts the principle of the separation of powers and the principle of democracy. In a nutshell, non-positivism leads to juristocracy. Habermas has raised this concern prominently:

Once the judge is allowed to move in the unrestrained space of reasons that [...] a “general practical discourse” offers, a “red line” that marks the division of powers between courts and legislation becomes blurred. In view of the application of a particular statute, the legal discourse of the judge should be confined to the set of

⁹¹ Allan 2020: 588.

⁹² See Alexy 2019a: 26.

⁹³ See Endicott 2022: 1866–1870.

⁹⁴ Klatt 2016: 38.

⁹⁵ Allan 2020: 588.

reasons that legislators either in fact put forward or at least could have mobilised for the parliamentary justification of that norm. The judge, and the judiciary in general, would otherwise gain or appropriate a problematic independence from those bodies and procedures that provide the only guarantee for democratic legitimacy⁹⁶.

My discussion of this myth can be brief. Because the same reasons that disprove the blue-sky myth also count against the myth of juristocracy. If blue sky adjudication is not a necessary consequence of law's ideal dimension, if legal reasoning is not by necessity overmoralised, then it is wrong to claim a disempowerment of the legislator. As I have stressed above, the Radbruch Formula of legal argumentation includes a *prima facie* preference for authoritative arguments, stemming from law's real dimension: By default, judges are not empowered to resort to «the unrestrained space of [moral] reasons», as Habermas has put it.

Suffice it to add that this misdiagnosis also rests on an idea that is too narrow regarding the principle of democracy. Democracy also has a dual nature⁹⁷. On the one hand, it is a formal decision procedure based on the simple mechanism of majority will. On the other hand, democracy is intrinsically linked to the idea of public discourse, and discourse strives for material correctness. The concept of deliberative democracy unites both aspects. The myth of juristocracy, however, presupposes a narrow idea of democracy that concentrates exclusively on its formal side, ignoring its dimension of material correctness.

5. The Myth of Mistaken Idealism

This myth maintains that the notion of an ideal dimension of law is of a highly suspicious character in itself. As has been remarked in the discussion following the debate between Alexy and Marmor, «[t]here are some thinkers who believe that the idea of the just, the unjust and the theory of legal argumentation are simply rubbish»⁹⁸.

Idealism may be suspicious for two distinct reasons. Either one assumes that the blue sky is empty. There are no moral entities that could inform an ideal dimension of the law. This is the non-existence variant of the myth. It claims that moral entities do not exist. Kelsen objected to non-positivism, which «presupposes an absolute moral order, that is, one that is valid at all times and places»⁹⁹. According to Kelsen, however, such an absolute, «a priori»¹⁰⁰ morality does not exist: «In view of the extraordinary heterogeneity, however, of what men in fact have considered as good

⁹⁶ Habermas 1999: 447; see also Reese 2013: 250.

⁹⁷ Alexy 2017: 338.

⁹⁸ Alexy & Marmor 2005: 791.

⁹⁹ Kelsen 1967: 68.

¹⁰⁰ Kelsen 1967: 65.

and evil, just and unjust, at different times and in different places, no element common to the contents of the various moral orders is detectable»¹⁰¹. Under this view, idealism is mistaken because it can only be upheld as perverted deontological liberalism. If the blue sky is empty, anything goes. Consequently, the notions of moral justification and knowledge degenerate into subjectivist, relativist, non-cognitivist or emotivist contingencies¹⁰².

According to the second variant of this myth, idealism automatically turns into ideologism. Because the blue sky is empty, idealism gets monopolised by particularistic views that are unjustified from a rational standpoint. In addition to the purported irrationality and paternalism, there are worries that ideological particularism is ill-suited to function in pluralistic societies where a certain leeway and room for a plurality of correctness standards is essential¹⁰³. This is the reproach of invariance: «[T]o ask the pure concept or ideal to work as an a priori element requires an approach to invariance that indeed is very difficult to attain»¹⁰⁴. According to this claim, idealism goes hand in hand with a one-right-answer thesis that knows only a single, pure moral truth.

It follows from these considerations that the central and arguably decisive argument¹⁰⁵ in favour of law's ideal dimension – law's claim to correctness – seems either too strong or too weak. The claim to correctness is directed into an empty, contentless airiness or a rigid, inflexible, ideologised stock of moral truths. Both alternatives are likewise unattractive and unconvincing, the myth of mistaken idealism maintains.

Both variants of this myth point to the *content* of law's claim to correctness, and both misunderstand this content, albeit in opposite ways¹⁰⁶. The misunderstanding lies primarily in overlooking that the correctness is discursive. The content of law's claim to correctness is neither preestablished, set in stone, before any discourse, nor does the discourse necessarily lead into an empty blue sky. Instead, the content is being established and constructed discursively; it is a *discursive* correctness that matters for law's ideal dimension.

This understanding allows us to reject both variants of the myth. Candidates for ideal elements of the law have to justify and defend themselves in rational discourse. There are no sacrosanct, rigid, predetermined, absolute elements. This is a reason against Kelsen's objection to «absolute morality». The misunderstanding of correctness demands too much of that standard and then prematurely discredits the ideal dimension of law for not meeting that excessive standard. A weaker understanding

¹⁰¹ Kelsen 1967: 64.

¹⁰² See Alexy 2004: 166.

¹⁰³ See Bix 2020: 126.

¹⁰⁴ Alexy and Marmor 2005: 791.

¹⁰⁵ Alexy 2004: 164.

¹⁰⁶ On the problem of the content of law's claim, cf. Bix 2020: 125-130.

of correctness suffices for the ideal dimension to exist – an understanding that uses the notion of rational justifiability instead of absolute rationality¹⁰⁷.

An essential and often overlooked consequence of this discursive understanding is that accepting an ideal dimension of the law does not necessarily go hand in hand with adopting a specific, narrow moral theory at the expense of bluntly excluding all other moral theories. Instead, under the discursive understanding of law's ideal dimension, this dimension is open towards a plurality of moral theories that have to defend and prove their respective value in rational discourse, according to the strength of the better argument. For this reason, the reproach of invariance mentioned above is mistaken. I must mention only one element of discourse theory here, namely the three discursive modalities of discursively necessary, impossible, and possible propositions¹⁰⁸. The latter category leaves ample room for variance.

On the other hand, it is not true that discourse could not justify some aspects as necessary – hence, the blue sky is not empty. The plurality of correctness standards in an open, diverse society does not go so far that differences in rational justifiability among the various normative proposals vanish altogether. I want to acknowledge that the myth of mistaken idealism has a valid starting point. The argument from law's claim to correctness presupposes that some moral objectivity, rationality, or correctness exists. The non-positivist concept of law indeed rests on a moral theory¹⁰⁹. The myth goes astray, however, when it denies that non-positivism can meet the burden of demonstrating the existence of moral objectivity.

In the case of inclusive non-positivism, the required moral theory is discourse theory. Moral correctness is continuously developed, constructed, challenged, and reconstructed in moral discourse. The outcome of the latter is not mere emptiness, as the first variant of the myth maintains. Human rights, for example, exist because they can be rationally justified in a «game of giving and asking for reasons»¹¹⁰. They are discursively necessary elements of justice and, hence, substantive and necessary content of the correctness claimed by the law¹¹¹. The ideal dimension, then, is not empty. Moreover, it is a dimension of law precisely, as opposed to a mere dimension of morality, because the legal principles necessarily incorporated in our legal systems express an ideal or *prima facie* «ought» that directly ties in with human rights and, more generally, justice¹¹². Constitutional rights are positive laws, but they still keep raising a claim to correctness that refers to human rights, thus linking the real dimension with an ideal dimension¹¹³.

¹⁰⁷ Alexy 1989: 220; cf. Bix 2020: 126.

¹⁰⁸ See, e.g., Klatt 2012: 6, 25.

¹⁰⁹ See also Alexy 2013: 101.

¹¹⁰ Brandom 2000: 189, borrowing a phrase from Sellars.

¹¹¹ Alexy 2012: 8–13.

¹¹² On this norm-theoretic argument for the dual nature of law, see Alexy 2010: 180.

¹¹³ See Alexy 2019a: 18–19.

The claim to correctness is neither too strong nor too weak, as the myth would have it. To be sure, nothing of the above settles the distinct question of how legal practice can meet law's claim to correctness under the conditions of a dual nature of law. The two dimensions can lie in conflict, and the problem arises of determining the relation between the Real and the Ideal. This distinct problem is the issue of the next myth.

6. The Myth of Lacking Integration

The critics of non-positivism argue that if one accepts the dual nature of law, then law dissolves into a fragmented chaos, since the real and the ideal lie in eternal conflict. It was impossible to overcome this conflict by some magic harmonising means. The legal sociologist Ludwig Gumpłowicz sneered at Jellinek's attempt to construct a dual nature of the state by comparing it to «eating a Beethoven sonata with spoons»¹¹⁴. The modern variant of this critique is the objection from incommensurability¹¹⁵. It informs the myth of the lack of integration of the two dimensions¹¹⁶. In order to avoid being tossed back and forth between real and ideal elements of the law, one needs to limit the law to one dimension only, the real one, adopting legal positivism.

A variant of this myth criticises the Radbruch Formula. Since the Radbruch formula attempts to arrive at a justified, integrated relationship between the real and the ideal dimension, criticism against the formula directly affects the idea of integrating the two dimensions by balancing legal certainty and justice. Many objections against the Radbruch Formula have been raised. I shall consider only three of them here. Habermas joined in the Alexy-Marmor debate with the following question:

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 [...] ¹¹⁷

Shapiro, on the other hand, objected with an eye to the Nazi regime that «regimes that are morally illegitimate may still have law»¹¹⁸. Raz maintained that the Radbruch Formula was compatible with legal positivism since «its existence can only be a matter of social fact»¹¹⁹, and it led only to a moral¹²⁰ obligation to disobey unjust laws.

¹¹⁴ Gumpłowicz 1907: 450.

¹¹⁵ Finnis 2014: 108.

¹¹⁶ Elsewhere, I have labelled this myth the bridge problem, see Klatt 2019: 57; cf. also Klatt 2020: 390.

¹¹⁷ Alexy & Marmor 2005: 785.

¹¹⁸ Shapiro 2011: 16.

¹¹⁹ Raz 2007: 31.

¹²⁰ Raz 2007: 29 with fn. 28.

The myth of the lack of integration points towards an essential characteristic of legal non-positivism. Once we accept an ideal dimension of the law and, accordingly, allow for some role of moral arguments in legal reasoning, we incorporate the uncertainties and imponderabilia of morality into the law¹²¹. Moral reasoning sometimes ends with rational disagreement, and the functions of the law then necessitate an authoritative decision¹²². This necessity, however, points towards law's real dimension, and if that is what the ideal dimension is leading us to, the very point of the ideal dimension seems to vanish.

These considerations would count against legal non-positivism unless the latter can demonstrate how morality can be part of the law without destroying its real, authoritative dimension. Legal non-positivism cannot leave unexplicated the relation between ideal and real elements of the law¹²³. Legal non-positivism has to deal with two concepts of correctness, each of which relates to one of the two dimensions¹²⁴. It must demonstrate a third overarching correctness since what is correct in the real dimension can conflict with what is correct in the ideal dimension. An explication of this integration and overarching correctness is required, which is not a small burden.

I have already discussed an aspect of this integration problem above, referring to how, in legal reasoning, discourse is the bridge capable of binding together real and ideal arguments¹²⁵. Here, I shall concentrate on the Radbruch formula and the more general field of the concept of law. The Radbruch Formula is an attempt to achieve integration. To be sure, one does not have to accept this formula to be a non-positivist. However, it is the only justifiable position within legal non-positivism. Its fundamental idea is that «the question of how to determine the relation between the ideal and the real dimension of law boils down to how to determine the relation between the principle of justice and the principle of legal certainty»¹²⁶. Its explanatory power lies in the combination of achieving two things simultaneously. On the one hand, the formula can explain the limits of law by demonstrating that we must exclude extreme injustice from the law.

On the other hand, the formula can allow for these limits without destroying the authoritative dimension of the law. Below the threshold of extreme injustice, it gives preference to law's real dimension. In this way, it represents a well-balanced integration of both dimensions. This advantage, in turn, contrasts the alternative positions within the camp of legal non-positivism, which either pay too little atten-

¹²¹ See my inheritance thesis developed in Klatt 2014: 899.

¹²² Alexy 2004: 165.

¹²³ See Alexy & Marmor 2005: 790: «The overarching concept of law requires the judge to resolve the contradiction between the factual and the ideal as a legal problem».

¹²⁴ Alexy 2017: 323–324.

¹²⁵ See my discussion of the dual nature of legal reasoning, and the triadic nature of law, point 3.3. above.

¹²⁶ Alexy 2013: 102.

tion to law's ideal dimension (super-inclusive non-positivism) or too much attention to it (exclusive non-positivism)¹²⁷.

The abovementioned objections against the Radbruch formula misunderstand its meaning. Habermas' objection that it was superfluous under the conditions of a constitutional democracy holds only for standard cases in a stable, well-functioning constitutional state¹²⁸. Such a state may have enough internal resources to prevent injustice, and it may then be unlikely that we ever transgress the threshold of extreme injustice. Still, the dormant, quasi-hypothetical scenario of extreme injustice helps us to stay vigilant and realise when the situation deteriorates so much that applying the Radbruch formula is required. It thus allows us to «understand what is only implicit in everyday practice»¹²⁹. The need to nurture our awareness in this regard is acute even in Western democracies, which nowadays face situations of abusive constitutionalism. The potential for abuse is why we cannot follow Habermas's suggestion to dispose of the formula.

Regarding Shapiro's objection that even morally illegitimate regimes may still have law, it overlooks that we cannot use the Radbruch formula to evaluate legal systems as a whole. Instead, it applies only to individual legal norms¹³⁰. It does not deny that a legal system may contain some norms that are legally invalid because they are extremely unjust, as well as some other norms that are legally valid because they do not reach the threshold¹³¹.

Lastly, the validity of the Radbruch formula cannot be a matter of social fact, as Raz maintains. If it were a matter of social fact, its validity would depend on the authoritative decision alone. This, however, would collapse non-positivism into inclusive positivism. Non-positivism addresses the problem of *non-authoritative* reasons for extreme injustice¹³². Another misunderstanding lies in Raz's claim that the Radbruch formula was consistent with legal positivism since the latter also could accept a moral obligation not to obey immoral laws. It is the very point of the formula to make legal validity dependent upon morality, if only in extreme cases. It is not about a «moral» obligation but a legal one. The same misunderstanding seems to inform Allan's statement that the Radbruch threshold was «the point at which our ordinary duties of collaboration cease and moral duties of resistance and rebellion succeed them»¹³³. The Radbruch formula is not about ordinary (legal) duties versus moral duties but about a conflict between two types

¹²⁷ See Alexy 2008: 290; see also Alexy 2013: 107–110.

¹²⁸ See Alexy & Marmor 2005: 786.

¹²⁹ Alexy & Marmor 2005: 786.

¹³⁰ Alexy 2016: 305.

¹³¹ In fact, Shapiro's position is not even consistent, since despite his criticism he also adopts a position very similar to the Radbruch formula, cf. Alexy 2016: 305.

¹³² Alexy 2007: 51.

¹³³ Allan 2020: 589.

of *legal* duties – those binding us to authority and positivity and those binding us to justice.

I conclude that the three objections against the Radbruch formula are not convincing. The integration between the Real and the Ideal, which inclusive non-positivism specifically defends, represents a well-balanced integration of the two dimensions of law. Radbruch also reminds us that we may only determine the preference of one or the other dimension by «responsible decision» of changing eras¹³⁴. This decision, however, must take place in open and public discourse, and it remains subject to further discourse¹³⁵. Our discursively justified decisions about the correct relation between the real and the ideal dimension of the law have «at any one time a preliminary character»¹³⁶.

7. The Myth of the Wrong Methodology

This myth accuses non-positivism of pursuing a wrong methodological approach towards the concept or nature of law. It comes in two variants, criticising the analytical and normative approaches. Here, I only address the objection against the normative approach.

This objection argues that non-positivism mixes prescriptive political arguments into a descriptive project. Marmor criticises that non-positivism can only justify the Radbruch Formula by normative argument. Drawing to normativity, however, was a methodologically wrong turn in a conceptual analysis: «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»¹³⁷ – rather than an analytical conclusion about the concept of law. Marmor also distinguishes between two approaches to the nature of law. First, the ontological one, which answers the question of “what characteristics does law have?”, and which Marmor identifies with legal positivism. Second is the political approach, which, in his words, «aims to put the concept of law [...] at the service of what some or many of us desire and therefore qualify as just», which Marmor identifies with non-positivism. Similarly, Shapiro argues that «statements of legal authority, legal rights, and legal obligations are *descriptive*, not normative»¹³⁸. Raz maintains that the nature of law is a matter of theory and not advocacy; he urges us to concern ourselves only with «how things are»¹³⁹.

¹³⁴ Radbruch 1990: 50.

¹³⁵ See also Allan 2020: 583-584.

¹³⁶ Klatt 2019: 62.

¹³⁷ Alexy & Marmor 2005: 778.

¹³⁸ Shapiro 2011: 188.

¹³⁹ Raz 1996: 7.

The myth is that non-positivism was a normative-political theory rather than a conceptual, descriptive theory about the nature of law. This reproach is true, so I list this point as a “half” myth. It is still a myth, though, because the normative character of the argument does not weaken non-positivism’s position in the debate on the concept of law.

Let me briefly explain these two aspects of my argument. First, it is only a “half” myth because the Radbruch formula is a normative argument. The normative character may have been sometimes overlooked because Alexy’s main frame is a conceptual-analytical argument on the concept of law. Nevertheless, he has made explicit the normative character of the argument from injustice: «[...] the debate surrounding Radbruch’s formula cannot be decided based on analytical or conceptual arguments alone. What matters is expedient or adequate concept formulation that is justified by normative arguments»¹⁴⁰.

Still, the reproach of wrong methodology is a myth because the normative character of the argument does not weaken non-positivism’s standpoint. This is so for two reasons. First, the Radbruch formula is a compelling normative argument. Its core insight is that one transgresses the limits of the law when one violates a core of human rights very severely. It is hardly surprising that we can only justify this proposition with recourse to moral reasons¹⁴¹. The real question is not whether it is a normative point but whether these moral reasons are convincing. On the condition that human rights mean anything to us at all, I find it very difficult to argue against the normative claim to exclude such transgressions from the realm of the law¹⁴². The protection of human rights requires a non-positivistic concept of law¹⁴³.

Second, it is vital to see that even though legal positivism is a purely descriptive¹⁴⁴ theory for most contemporary legal positivists, many theorists in the legal positivist tradition also argue normatively¹⁴⁵. This is no surprise, given that value relativism is the main argument for the separation thesis¹⁴⁶. Because questions of practical philosophy could never be answered objectively, rationally, and universally, but only in a subjective, irrational, parochial fashion, we had better exclude morality from the law – so the argument goes. For this reason, a normative, prescriptive dimension of legal positivism has been accepted, *e.g.*, by Jeremy Bentham, Bruno Celano, Jeremy Waldron, Liam Murphy, Stephen Perry, and Fred Schauer¹⁴⁷. In addition, the view

¹⁴⁰ Alexy 2002: 40; see also Alexy 2008: 296; Alexy & Marmor 2005: 772.

¹⁴¹ See Finnis 2013: 7.

¹⁴² See also Alexy 2002: 62 for further arguments in favour of the argument from injustice.

¹⁴³ See Alexy 2002: 58; Alexy and Marmor 2005: 772.

¹⁴⁴ For convincing arguments against this self-description, see Schauer 2021: 69–71, 2005: 495–497.

¹⁴⁵ See the remark by Pasquale Policastro in Alexy and Marmor 2005: 790: «The choice to develop the positivistic approach comes from essentially moral reasons»; cf. Gardner 2014: 26–29.

¹⁴⁶ Alexy 2002: 53–55.

¹⁴⁷ See Schauer 2021: 61–71 for details; Schauer 2005: 498–499 with fn. 21.

that legal position is a prescriptive enterprise was the shared, if unspoken, premise of both Hart and Fuller in their famous debate¹⁴⁸. For these two reasons, I cannot conclude that the argument from injustice's normative character weakens non-positivism's position in the debate.

Nevertheless, there is still more to say. While embracing the normative necessity of a non-positivist concept of law, Alexy has distanced himself from views that defy any conceptual argument and see all arguments as normatively laden so we could settle the debate on the concept of law only by normative considerations¹⁴⁹. Admitting that Radbruch's formula is a normative point allows for some role of normative considerations while maintaining that the connection between law and morality is also *conceptually* necessary. The role precisely that inclusive non-positivism envisages for the normative argument is «in part [to] strengthen and in part [to] go beyond the conceptually necessary connection» between law and morality¹⁵⁰.

These remarks allow us to make an intricate connection between the conceptual and normative arguments for inclusive legal non-positivism. The two arguments are not entirely separated from each other. A complete separation between the conceptual and the normative argument would mean an open choice between a purely descriptive and a normative approach. Some scholars indeed frame the debate in this way, as if it was simply a matter of individual methodological preference whether one adopts a normative or a descriptive concept of law. I label this strategy the "Pilatus-move" of descriptive legal positivism, adopted, *e.g.*, by Marmor in his debate with Alexy.

Descriptive methodology, however, is adequate only if one adopts a pure observer perspective, which limits itself to merely describing social facts of legal practice. It is interesting to note that non-positivists agree that legal positivism is correct from an observer's perspective¹⁵¹.

Things change dramatically, however, if one adopts a participant's perspective. A participant asks, "What is the *correct* legal answer I *ought* to give to a legal problem?". This reference to correctness and ought inevitably leads her into a normative rather than descriptive inquiry. A participant «cannot be disengaged, offering neutral reports of what other people think»¹⁵². Instead, he must «join the practice he proposes to understand»¹⁵³.

Given this difference between the two perspectives, justifying the perspective one adopts is vital. This is the point at which conceptual analysis enters the stage. Because of conceptual necessity, law raises a claim to correctness, and this claim

¹⁴⁸ See Schauer 2005: 494–495.

¹⁴⁹ Alexy 2002: 22.

¹⁵⁰ Alexy 2002: 23.

¹⁵¹ Alexy 2007: 45.

¹⁵² Allan 2020: 592 fn. 81.

¹⁵³ Dworkin 1986: 64.

transforms legal practice into a normative enterprise, lending it a «context-transcending dimension»¹⁵⁴ that the descriptive observer cannot grasp. The observer's view of the law is too restricted to the empirical truth of propositions. It is so detached that «we can only report other people's opinions of the law's requirements rather than our own considered view»¹⁵⁵. In that way, it inevitably misses that the participant's view includes some considerations of what the law ought to be into what the law is. Allan aptly described this holistic, integrative approach: «What the law requires is always a matter of interpretative judgment, dependent on an evaluation of all the matters relevant to an appropriate integration of fact and value»¹⁵⁶.

The participant's descriptive approach to the concept of law, so to speak, always includes some elements from the realm of moral ought¹⁵⁷. There is no free choice between normative or descriptive methodology for these conceptual reasons. Instead, the normative participant perspective is conceptually necessary. Otherwise, we risk constructing an incomplete, oversimplified concept of law that is blind to law's ideal dimension¹⁵⁸. If we follow these considerations, we may discover that the half myth is, in fact, a complete myth because the normative necessity of legal non-positivism is conceptually necessary.

8. Conclusion

In my discussion of the myths of legal non-positivism, I have sought to demonstrate why and to what extent certain beliefs, albeit widely shared, misconstrue legal non-positivism. First, non-positivism correctly states the core of its debate with legal positivism by employing the separation and the connection theses. Second, legal non-positivism does not overemphasise the blue sky of justice, and it neither ignores law's positivity nor downplays sources-based criteria. In legal reasoning and adjudication, non-positivism even allows for a default preference of authoritative elements over ideal elements. Third, legal non-positivism does not violate the principles of the separation of powers and democracy; it does not lead to juristocracy. Judges are not empowered to grab into an unrestrained space of morals reasons – but they cannot ignore the ideal dimension of democracy either.

Fourth, accepting an ideal dimension of the law does not make the law dependent upon subjectivist, relativist contingencies. Law's claim to correctness has a

¹⁵⁴ Cooke 2012: 285; Alexy 2016: 302.

¹⁵⁵ Allan 2020: 592.

¹⁵⁶ Allan 2020: 592.

¹⁵⁷ See Alexy 2008: 297; Klatt 2012: 13–14.

¹⁵⁸ Klatt 2020: 381; Alexy and Marmor 2005: 780; Alexy 2007: 52; most interestingly Gardner acknowledges that «legal positivism naturally supplies only part of the answer» in the very last paragraph of his article, see Gardner 2014: 53.

discursive character; consequently, ideal elements of the law must justify and defend themselves in rational discourse. Non-positivism is hence open for a plurality of correctness standards in our diverse societies, while this openness does not go so far that differences in rational justifiability among the various normative proposals vanish altogether. Fifth, discourse theory disproves the myth that integrating the ideal and the real was impossible. Lastly, regarding the objection that non-positivism mixes prescriptive political arguments into a descriptive project, I have argued that this is true but does not weaken the justification of non-positivism. Furthermore, if we acknowledge the link between analytical and normative arguments established by law's claim to correctness, this half-myth turns even into a complete myth.

I conclude that legal non-positivism is an adequate theory of the nature of law, while legal positivism limits itself to an observer perspective that can only see law's real dimension. Half-blind legal positivism does not give us the whole story of law's nature. We should not settle for less than the complete picture.

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