When is a regime not a legal system?: Alexy on moral correctness and social efficacy[·]

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Abstract

Robert Alexy defines law as including a claim to moral correctness and demonstrating social efficacy. This paper argues that law's social efficacy is not merely an observable fact but is undergirded by moral commitments by rulers that it is possible for their subjects to follow the rules, that the rulers and others will also follow the rules, that subjects will be protected from violence if they act in accordance with the rules, and that subjects will be entitled to legal redress if others act violently towards them otherwise than in accordance with the rules. Alexy is correct in his conclusion that a system of norms that is not by and large socially efficacious is not a valid legal system but wrong insofar as he follows legal positivism in distinguishing this aspect of law's validity from law's claim to moral correctness.

Introduction

The contemporary legal theorist, Robert Alexy, has challenged legal positivism by arguing, in a series of articles and books, that the claim to moral correctness is intrinsic to the notion of "law" (Alexy 1989, 177; 2003, 293-96).[1] Former director of the UN genocide investigation in Rwanda, Gary Haugen has similarly argued that "The only thing that distinguishes the police officer that arrests and the kidnapper who seizes is some claim to lawfulness, proper authority or legitimacy." (Haugen 1999, 129). According to Alexy, the claim to moral correctness is made both at the level of the legal system as a whole and also in respect of individual laws within that system.

Alexy maintains that:

"individual legal norms and individual legal decisions as well as legal systems as a whole necessarily make a claim to correctness. A system of norms that neither explicitly or implicitly makes this claim is not a legal system. In this respect, the claim to correctness has a classifying significance. Legal systems that do indeed make this claim but fail to satisfy it

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[1] To the obvious objection raised by MacCormick (2007, 59) that, being merely a system or a state of affairs, "Law claims nothing", Alexy responds that "Law can and does raise a claim to [moral] correctness, for the claim is made by its representatives." (Alexy 2010, 168).

are legally defective legal systems. In this respect, the claim to correctness has a qualifying significance. An exclusively qualifying significance is attached to the claim to correctness of individual legal norms and individual legal decisions. They are legally defective if they do not make the claim to correctness or if they fail to satisfy it." (Alexy 2002, 36).

The above quotation does not capture all the essential features of Alexy's mature position as it has developed over time. Alexy distinguishes between the perspectives of observers and participants in legal systems. He concedes the positivists' point that from the observer's perspective, the inclusion of moral elements in the concept of law is not necessary (Alexy 1999, 24; 2002, 29-31; 2008, 297).

In his article, 'On Necessary Relations between Law and Morality' published in English in 1989, Alexy reserved his position on whether, from the perspective of a participant in a legal system, moral correctness was relevant to whether a norm should be classified as a legal norm. Subsequently, Alexy has argued that from the participant's perspective, the claim to moral correctness which is made in respect of individual legal norms may have a classifying significance. He has sought to defend Radbruch's thesis that "appropriately enacted and socially effective norms lose their legal character or their legal validity when they are extremely unjust" (Alexy 1999, 17; 2002, 40-62). Alexy defines a participant as "someone who within a legal system takes part in a debate about what this legal system obligates, prohibits, and permits, and what powers it confers" (Alexy 1989, 171). His paradigmatic participants are therefore Hart's officials and within that category Alexy focuses on the judge (Alexy 2002, 41). For such a participant, the relevance of the claim to moral correctness is that a law may be invalid if it is extremely unjust.

In the case of the claim to moral correctness made at the systemic level, however, Alexy has maintained the position that, viewed from either the perspective of an observer or a participant, it is merely necessary for the claim to be made for the system to fall within the class of legal systems (Alexy 2002, 35, 62-81). He argues that an observer should regard a regime which does not even *make a claim to moral correctness* as a predatory order rather than a legal system (Alexy 1989, 176-77). On the other hand, a regime which makes a claim to moral correctness which is wholly false because of the degree of injustice and exploitation within the system does not, according to Alexy, fall outside the class of legal systems for that reason alone. According to Alexy if a systems of norms which makes a systemic claim to moral correctness contains many individual legal norms which are extremely unjust, the system may fall outside the category of a legal system not because of some feature at the

systemic level but rather because of the cumulative weight of the norms which are not valid laws (Alexy 2002, 66-68, 92).

However, there is an important respect in which Alexy does require a system of norms to make out its claims in order to fall within the class of legal systems. At the conclusion of *The Argument from Injustice*, Alexy offers us his definition of law:

"The law is a system of norms that (1) lays claim to correctness, (2) consists of the totality of norms that belong to a constitution by and large socially efficacious and that are not themselves unjust in the extreme, as well as the totality of norms that are issued in accordance with this constitution, norms that manifest a minimum of social efficacy or prospect of social efficacy and that are not in themselves unjust in the extreme, and, finally (3) comprises the principles and other normative arguments on which the process or procedure of law application is and/or must be based in order to satisfy the claim to correctness." (Alexy 2002, 127)

The second part of Alexy's definition of law includes the requirement that the norms "belong to a constitution by and large socially efficacious". A number of different aspects are encompassed under the rubric of "social efficacy". In the case of individual norms, they include "the regularity of compliance with the norm and/or the imposition of a sanction for non-compliance" (Alexy 2002, 14-15). Social efficacy therefore incorporates both the habit of obedience by those subject to the rules and the ruler's habit of enforcement of the rules.

As we have already seen, with regards to the claim to moral correctness, Alexy holds that it is sufficient at the systemic level that the claim is made but with regard to individual norms it must be at least partially made out. With regard to social efficacy, the situation is reversed. Individual norms may remain valid even though they are "frequently not complied with and a sanction is only rarely imposed for non-compliance" so long as they belong to a legal system that is by and large socially efficacious (Alexy 2002, 91).

"The mere fact that individual norms that are legally valid according to constitutional criteria for validity lose their social validity does not by itself mean that the constitution, and with it its systems of norms as a whole, forfeits legal validity. This threshold is crossed only if the norms belonging to the system of norms are no longer by and large socially efficacious, that is, are no longer by and large complied with or a sanction is no longer by and large imposed for non-compliance." (Alexy 2002, 89-90).

Hart appears to be in agreement with Alexy on this point. Hart acknowledged that whilst "a rule of law may be said to exist though enforced or obeyed in only a minority of cases, but this could not be said of a legal system as a whole": (Hart 1983, 78). This would apply not only in cases where a system of rules is not a legal system because there is no habit of obedience to them whatsoever but also to the case where the system is not a legal system because none of the rules are ever enforced.

However, there is a sleight of hand on Alexy's part. The imposition of sanctions for non-compliance is not merely an observable fact: it is, as Lon Fuller demonstrated, an essential part of the morality of law, an indispensable element of law's claim to moral correctness. The imposition, by and large, of sanctions for non-compliance with norms belonging to a legal system is a consequence of the claim made by legal systems that the rules can be followed and will be followed by all those to whom they apply.

The dimensions of the systemic claim to moral correctness

The claim to moral correctness made by law identifies an essential aspect of law beyond mere command and coercion. There are two dimensions to law's claims to moral correctness. One is the dimension of authority and the other is the dimension of moral appropriateness. The dimension of authority is discussed only briefly by Alexy (Alexy 2002, 90) and will not be explored further here save to say that if the claim to have the authority to make laws is simply ignored by those ostensibly subject to it, as for example that made by a government-in-exile, then laws are not created because social efficacy is lacking. Alexy's theory is built around the dimension of moral correctness which might be expressed as the claim that the laws are morally appropriate.

The Fullerian legal theorist, Nigel Simmonds has challenged legal positivism in *Law as a Moral Idea* on the basis that the invocation of law by judges as a justification for their decisions and as a reason imposing obligations on defendants "is intelligible only if we grasp the way in which it is bound up with the guidance of conduct by norms: laws are intended to *prescribe* our conduct, and statements about legal rights and duties draw conclusions about what *ought* to be done, or what is *justified*, in the light of such prescriptions." (Simmonds 2007, 119). Law necessarily claims to possess legitimate moral authority (Raz 1994, 199).

The claim made by officials is intended to elicit from subjects a recognition that because the law is morally appropriate, it is *binding* on them. The claim that the rules are morally

appropriate entails the claim that obedience to the rules will be morally appropriate. Aquinas in the *Summa Theologiae*, I-II.96.4: "Whether Human Law Binds a Man in Conscience?" addressed this question in classical natural law terms and concluded that unjust laws fail to create an obligation of obedience.

As Finnis has persuasively argued, it is possible to come to the conclusion that unjust laws do not *bind* their subjects, in the sense of creating moral obligations of obedience, whilst at the same time accepting the positivist thesis that laws which do not bind in conscience are nonetheless valid (Finnis 1980).

Simmonds goes on to point out: "while … non-moral reasons might … explain the conduct of the officials in following and applying the law, they would not render intelligible the invocation of the law, by the officials, as a *justification* for the application of sanctions to the citizen." (Simmonds 2007, 135) In this respect, Simmonds moves beyond Alexy. The imposition of sanctions for non-compliance with the law is not just a social fact; it is undergirded by law's claim to moral correctness. Indeed, there may be an important moral distinction between the enforcement of an unjust law and an injustice where no pretension to lawfulness is made. A random beating by an off-duty police officer and a beating by a police officer for refusing to vacate common land which has been enclosed pursuant to the Enclosure Acts may both be substantively unjust, but the random beating is also unjustified. The significance of the distinction is that in the former case the subject could not have anticipated that he would be liable to a beating whereas in the latter case there would have been, at least to some extent, a warning that a beating may occur. This example alerts us to the fact that, for subjects, knowing when violence by rulers *is not likely to occur* is at least as important an aspect of the rule of law as knowing when rulers are likely to impose a sanction.

The importance of the limitation on official violence

The principle *nulla poena sine lege* expresses the *binding* of violence which is of the essence of legality. The rule of law creates freedom for human beings by creating areas of immunity from sanctions (Simmonds 2007, 163). From the point of view of subjects, at least as important as knowing that sanctions will, by and large, be applied for non-compliance with the rules, is knowing that sanctions will not be applied by the rulers in cases where no rules have been broken.

Therefore, as well as the question of whether laws bind those subject to them, there is another side to the question of whether laws bind: whether or not laws *bind* the law-makers.

By this I do not mean the question of whether a ruler has an unfettered power to alter the law but rather the question whether a ruler is *bound* by the law until such time as it has been duly altered.

The twelfth century writer, John of Salisbury, argued that "Between a tyrant and a prince there is this single or chief difference, that the latter obeys the law and rules the people by its dictates, accounting himself as but their servant." (John of Salisbury 1159). It is tempting to read back into this dictum Aquinas's later distinction between the ruler who rules for the common good and the ruler who rules solely in his own interest (*ST* II-II.42.2 ad.3). John of Salisbury's primary point is, however, a different one. For him, the chief distinction between the tyrant and the prince is that *the latter obeys the law*. That is to say, the difference is that the prince counts himself as *bound* by the law.

In the twentieth century, this idea was picked up by sociologist Georg Simmel (Simmel 1950, 186) and re-introduced to legal philosophy by Fuller as the idea that

"there is a kind of reciprocity between government and citizen with respect to the observance of rules. Government says to the citizen in effect, 'These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct.' When this bond of reciprocity is finally and completely ruptured, nothing is left on which to ground the citizen's duty to observe the rules." (Fuller 1964, 39-40).

Fuller is arguing, in this passage, that the government binds itself to applying the rules which it expects its subjects to follow. The government therefore claims that the rules can be followed and will be followed by all those to whom they apply. Implicit within such a claim is the further claim that the rules are therefore of benefit to those who are subject to them. This claim need not be a claim that the benefits must be distributed equally or approximately equally. It is sufficient to contrast the benefits secured by the legal order against the consequences of the chaos of the state of nature, as Hobbes notoriously argued in *Leviathan*. As Rundle has recently demonstrated: "legality secures a certain quality of existence for those who live within it" (Rundle 2009, 107-8). This security may be compatible, as Hart rightly pointed out, with many kinds of iniquity (Hart 1994, 207). Nonetheless, the legal system offers protection against unrestrained violence, both from itself and from others, in exchange for obedience to its rules.

This claim to provide protection is a composite of four propositions:

1) It is possible for subjects to follow the rules (and this implies that the rules are intelligible and coherent);
2) Subjects can expect others, including the authors of the rules, also to follow the rules;

Those two claims carry with them, as their corollary, the claims that:

1') Subjects will be protected from violence if they act in accordance with the rules, and
2') Subjects are entitled to legal redress if others, including the authors of the rules, act violently towards them otherwise than accordance with the rules.

These promises constitute the systemic claim that the rules can be followed and will be followed by all those to whom the rules apply ("the moral commitment to rules"). The four claims alert us to the importance of considering law not only from the perspective of the dispassionate observer but from the perspective of the participants in the system, both those who make and apply the law on the one hand and those who are subject to the law on the other. Claim (2') is the other side of the standard claim that for a system of norms to amount to a legal system sanctions must be, by and large, applied in the event of non-compliance with the norms.

It is these claims to offer protection against unrestrained violence, both from the rulers of a system and from others, in exchange for obedience to the rules of the system, which distinguishes a legal system from three other kinds of social order discussed by legal theorists: a managerial order, a senseless order and a predatory order. Fuller contrasted his account of a legal system with a managerial order whilst Alexy has compared his concept of a legal system with both a senseless order and a predatory order.

The managerial order

In the chapter 'A Reply to Critics' added to the revised edition of *The Morality of Law*, Fuller distinguishes a legal system from a system of managerial direction. Through this discussion, Fuller sharpens his analysis of the inner morality of law to the point that he identifies the concept underlying his eighth principle (the principle of congruence between official action and declared rule) as essential to a functioning legal order. He writes:

"Surely the very essence of the Rule of Law is that in acting upon the citizen (by putting him in jail, for example, or declaring invalid a deed under which he claims title to property) a government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing." (Fuller 1964, 209-10).

It is clear from Fuller's preceding discussion of the difference between a managerial order and a legal system that it is the fact that the rules are understood as *binding* both on the subject and on the ruler which is the distinguishing mark of the *legal* system. Moreover, Fuller suggests that the directives issued by a manager are followed by those subject to them in order to fulfil the manager's purposes whereas laws are given that they may be followed by subjects in pursuit of their own ends. He also suggests that whereas a manager's prime concern is with his subjects' relations towards him and only secondarily with the inter-relationship between his subjects, the law-giver's focus is the reverse. Given the differing purposes for which a manager issues directives and a law-giver typically makes rules, Fuller shows that a manager would have reason to comply with six or possibly even seven out of the eight principles of the inner morality of law. In the interests of efficiency, a manager will wish to issue directives which are communicated and which are "reasonably clear, free from contradiction, possible of execution and not changed so often as to frustrate the efforts of the subordinate to act on them." (Fuller 1964, 208). The manager will not issue retrospective directives because "no manager retaining a semblance of sanity would direct his subordinate today to do something on his behalf yesterday" (Fuller 1964, 209). However, a manager will only have reason to issue general rather than specific directives if to do so is, in the particular case, more expedient. Because, unlike a legal system, there is no strong imperative on the manager to act in accordance with general rules,

"the subordinate has no justification for complaint if, in a particular case, the superior directs him to depart from the procedures prescribed by some general order. This means, in turn, that in managerial relation there is no room for a formal principle demanding that the actions of the superior conform to the rules he has himself announced; in this context the principle of 'congruence between official action and declared rule' loses its relevance." (Fuller 2004, 208-9).

Compliance by the ruler with the declared rules therefore constitutes a key distinction between a legal system and a regime of managerial direction. In terms of the four propositions which make up the moral commitment to rules, it should be noted that managerial regimes, both benign and malign, can comply with (1). It is (2), (1') and (2') which are not necessary features of managerial direction. Claim (1) is even present in the regimes of managerial direction to be found in concentration or extermination camps. However, like other regimes of managerial direction, the rules in such a camp are not a legal system because (2), (1') and (2') are absent.

The senseless order:

Alexy describes a "senseless order" as a society in which those with power issue contradictory, impossible and arbitrary rules from moment to moment. Such "a *senseless order* … that neither reveals consistent purposes of the ruler … nor makes a continuous pursuit of the subjects' purposes possible" (Alexy 1989, 176) is not one which we would recognize as a legal system.

The senseless order fails as a legal system because any regime whose orders were unintelligible and or mutually contradictory would not create a legal system. Those subject to such an arbitrary and uncertain regime have no reason whatsoever to regard the commands issued to them as morally appropriate. This is, however, best regarded as a failure on the part of rulers to act in accordance with declared rules. A regime whose implicit claim (1) wholly failed would not have created a legal system vis-à-vis any of its subjects.

Hart also acknowledged that the senseless order is not a legal system. With regard to claim (1), in *The Concept of Law*, he wrote:

"If social control [by rules] is to function, the rules must satisfy certain conditions: they must be intelligible and within the capacity of most to obey, and in general they must not be retrospective, though exceptionally they may be. This means that, for the most part, those who are eventually punished for breach of the rules will have had the ability and opportunity to obey. Plainly these features of control by rule are closely related to the requirements of justice which lawyers term principles of legality. … [I]f this is what the necessary connection of law and morality means, we may accept it. It is unfortunately compatible with very great iniquity." (Hart 1994, 207).

However, Hart is not a reliable guide on these issues because although purporting to disagree with Fuller, on some occasions he appears to concede Fuller's point that the principles of legality are intrinsic to the concept of a legal system whilst at other times he maintains his denial Waldron 2008).

The predatory order:

Further illumination as to why the claim that the rules can be followed and will be followed by all those to whom they apply is intrinsic to the nature of a legal system is provided by the example of the predatory order. Alexy uses Augustine's famous rhetorical questions to develop a distinction between a predatory order and a legal system:

Remota itaque iustitia quid sunt regna nisi magna latrocinia? Quia et ipsa latrocinia quid sunt nisi parva regna? "Justice being taken away, then, what are kingdoms but great robberies? For what are robberies themselves, but little kingdoms?"

In a predatory order, the ruling class is now organised and draws up a system of rules for the sole purpose of exploiting its subjects more efficiently. The ruling class issues rules which are binding on the subjects but which give them no rights whatsoever against the rulers. The predatory order makes no pretence whatsoever to be governing for the benefit of its subjects. In this society, although he concedes that is arguable that the ruling class has a legal system *inter se*, Alexy contends that "the system as a whole is not for conceptual reasons alone" (Alexy 1989, 176).

What Alexy takes from Augustine's band-of-robbers illustration is that the key difference between the predatory order and a legal system is that the legal system *claims* that it operates for the benefit of those who are subject to its rule. However, the essence of Augustine's band-of-robbers argument is that the claim to moral appropriateness need only be internal to a community. After posing his rhetorical question, Augustine continues:

"The band itself is made up of men; it is ruled by the authority of a prince, it is knit together by the pact of confederacy; the booty is divided by the law agreed on.   If, by the admittance of abandoned men, this evil increases to such a degree that it holds places, fixes abodes, takes possession of cities, and subdues people, it assumes the more plainly the name of a kingdom,

because the reality is now manifestly conferred on it, not by the removal of covetousness, but by the addition of impunity." (Augustine 1993, 112).

Augustine identifies in this passage both dimensions of the claim to moral correctness. There is, on the one hand, the dimension of authority: the band of robbers is "ruled by the authority of a prince." There is also, on the other hand, the dimension of moral appropriateness. There is "a pact of confederacy" in accordance with which "the booty is divided by the law agreed on". According to Augustine, social life, even amongst a band of robbers, requires the adoption of a rule with regard to the internal division of the booty. Augustine warns, however, that all this may be pursued at the expense of those who are not part of the band. Read in this way Augustine's argument calls to mind Hart's focus on the internal viewpoint adopted by the "officials" of a legal system.

Nonetheless, Augustine's choice of example illustrates the difference which is made by the moral commitment to rules. The band of robbers is governed by the moral commitment to rules *inter se*. Its members are therefore subject to a regime in which the imposition of sanctions is certain and the application of violence is controlled by the rules. However, those on whom it preys are subject to a rule in which they are vulnerable to violence at any moment. On this reading, Augustine contends that systems of rules may constitute legal systems normative for those who benefit from the moral commitment to rules whilst at the same time amounting to nothing more than violence towards those who are only exploited by them. It is for this reason that the implication of Augustine's argument is whilst the band of robbers may have a legal system *inter se*, they act unlawfully towards those on whom they prey.

On the face of it, Hart's analysis differs from that of Alexy's with regard to the predatory order. In respect of the predatory order, Alexy gives priority to the perspective of the victim of the robber band (the subject participant) and argues that from this perspective the predatory order is not a legal system. Alexy acknowledges that the case of the member of the robber band (the ruling participant) may be different. For the ruling participants, Alexy allows for the possibility that the members of that class may be governed by a legal sytem *inter se*. Hart, by contrast, gives priority to the perspective of an observer. For Hart, because legal systems seek to provide for human survival, they must provide rules against the unrestrained use of violence and rules which protect property: (Hart 1983, 80). Hart expressly contemplates the possibility of a legal system which "might deny to a vast rightless slave population the minimum benefits of protection from violence and theft": (Hart 1983,

81). Nonetheless, such a system would qualify as a legal system unless “the rules failed to provide these essential benefits and protection for anyone – even for a slave-owning group”: (Hart 1983, 81-82). A regime which does not protect *anyone* against violence or theft is either a senseless order or anarchy. For Hart, however, an observer can recognise a legal system which permits chattel-slavery as a valid legal system.

From all three perspectives, that of the observer, that of the slave-owner and that of the chattel slave, claim (1) is at least partially fulfilled by such a system. Amongst the slave-owners, claims (2), (1’) and (2’) are also fulfilled.

However, for the chattel-slaves, claims (2), (1’) and (2’) are wholly falsified. Hence, whilst a slave-owning system is a valid legal system from the perspective of the slave-owners, it is not a legal system but only a predatory order from the perspective of the slaves. The same would be true for the victim of the robber band.

Indeed, this conclusion seems to be implicit in Hart’s own argument. Denied any protection against violence and any (share in) property rights, the chattel slaves are neither subject to the rule of law nor under any moral obligation to obey the law. For them, the regime is not a legal system it is a regime of unrestrained violence. For such chattel slaves, in their relations with their masters they are dependent on their masters’ will; in their relations with one another they are subject to such customary rules as may arise; in their relations with others who are neither their masters nor their fellow-slaves they are not legal subjects but only legal objects.

On such a reading, Hart agrees with Simmonds who has argued that because helots are not addressed by law as subjects therefore law is not valid law for them, it is merely violence (Simmonds 2007, 101). Slaves do not benefit from law because, as Rawls puts it: “slaves are human beings who are not counted as sources of claims, not even claims based on social duties or obligations, for slaves are not counted as capable of having duties or obligations. Laws that prohibit the abuse and maltreatment of slaves are not founded on claims made by slaves on their own behalf, but on claims originating either from slaveholders, or from the general interests of society (which does not include the interests of slaves). Slaves are, so to speak, socially dead: they are not publicly recognized as persons at all.”: (Rawls 1985, 243).

Thus it is when claims (2), (1’) and (2’) are wholly falsified that a regime fails to constitute a legal order vis-à-vis certain of those over whom it rules.

The legal system:

Alexy identifies not one but two key developments which mark the transition from a predatory order to a legal system. The first is that the rulers "now pursue [their] acts of exploitation as a practice guided by rules". The second is that the rulers "claim that the practice is right" (Alexy 1989, 177; 2002, 33-34). In the legal system, therefore, claims (1) and (2) and their corollaries are at least partially made out. These claims are, of course, aspirational and only in a society of angels would they be completely vindicated. In reality, the best that can be hoped for is that subjects can usually rely on claim (1') being true and in the event that it is not, they can usually rely on claim (2') being true. In such circumstances, we would consider the legal system to be in good health.

Thus far, it has been demonstrated that a commitment to rules by rulers is an essential feature of a legal system and that where such a commitment is wholly absent, there is no legal system. Where such a commitment is only made in respect of certain people within a society but not others, a legal system is created only vis-à-vis those towards whom the commitment is at least partially fulfilled.

Before turning to consider whether the commitment to rules is necessarily regarded as a moral commitment on the part of rulers, the analytical power of the thesis that a commitment to rules is necessary for a regime to amount to a legal system will be explored by reference to the examples of the Soviet system in the USSR, the system in Nazi Germany, and the system of apartheid in South Africa.

Did the USSR have a legal system?

Under Communist rule in the USSR, for ordinary citizens there were some aspects of life in respect of which the claims (1) and (2) were made out and others where they were not. In such circumstances, the system remained a legal system albeit one which was defective. It was defective precisely because many in the Party did not have a commitment to the rules of the Soviet legal system and because, for long periods of its history, Soviet citizens were at risk of severe sanctions being imposed even in cases where they had not failed to comply with any rules. From both the perspective of observers and participants, the USSR is therefore best understood as having had a defective or an incomplete legal system.

A system ceases to be a legal system if there is no moral commitment to the rules on the part of rulers with the result that the rulers are ignoring the rules in practice. Breaking point

is reached when the claim that the rules can be followed and will be followed by all those to whom they are apply is wholly false.

When the point is reached that citizens can no longer expect that others will follow the rules nor that others will be sanctioned if they fail to follow the rules, and can no longer expect that they will be protected from violence if they follow the rules, then the legal system has collapsed. What is left is not enforcement of the law but rather acts of violence. When the claim that the rules can be followed and will be followed by all those to whom they apply is wholly false, the regime's commands cease to be legal commands. Wholly unjustified and undisciplined force, i.e. force which is not disciplined by the application of rules, is not legal force. It is a return to the Hobbesian state of nature in which officials simply have a comparative advantage in terms of violence.

The case of the Jews under Nazi rule:

With regard to Nazi Germany, an initial distinction needs to be drawn between those who the regime regarded as Aryans and those whom the regime regarded as Jews.[2] For Aryans, Nazi law, like law in the USSR, probably created a valid legal system but one which was defective in certain respects.[3] More careful analysis is required to determine whether the Nazi regime was a legal system vis-à-vis the Jews.

With regard to those the regime regarded as Jews, Kristen Rundle has argued that there is a difference between the early Nazi period, where through the Nuremberg laws the Nazis pursued a flagrantly racist persecution by legal means, and the later Nazi period where first *Kristallnacht*, then giving the SS jurisdiction over Jewish life, and finally a policy of extermination were pursued through non-legal means (Rundle 2009). *Kristallnacht* in 1938, argues Rundle, was the turning point. Prior to that, however substantively unjust the Nazi laws were, the claims (1), (2), (1') and (2') were not wholly falsified with regard to the Jews. From *Kristallnacht* on, as Martin Chalmers put it: 'Jews realize[d] that there is no one and nothing to protect them.' (Chalmers 1998, xiv). From that point on, at least (2), (1') and (2') were wholly false so far as the Jews were concerned. They were no longer subject to a legal

[2] In order to avoid complicating the discussion I have put to one side in the main text issues relating to the Roma or the status of those treated as *Mischling*.
[3] Fuller was prepared to deny the name "law" to Nazi rule on grounds which included the resort to extra-legal terror (Fuller 1957, 660) although his analysis of the ways in which Nazi rule abused the laws governing the operation of the political system whilst leaving private law less affected also resembles Alexy's argument that an extremely unjust legal system may cease to amount to a legal system at all by reason of the cumulative effect of the extreme injustices of individual laws within it.

system but instead the victims of a regime of violence. From 9 November 1938, although a legal system may have existed under Nazi rule for Aryans, it did not for Jews.

On Alexy's account, Jews subject to Nazi rule would continue to be the subjects of a system of law until such time when Nazi Germany ceased to make any claim to moral correctness vis-à-vis the Jews whatsoever.[4] It would therefore seem to follow that until an extremely late point, Alexy would regard the Jews in Nazi Germany as having been the subjects of a legal system, albeit a legal system some of whose putative laws were not in fact laws because they were extremely unjust. He may well be able to sustain his case that it was permissible for the post-War German courts to approach the matter on that basis. However, from the point of view of the Jews at the time, were they not entitled to ask themselves: is what I am facing in the Nazi order a legal system or is it merely a predatory order?

The case of blacks in apartheid South Africa:

The same question could be asked in respect of apartheid South Africa. Is the legal system of apartheid South Africa best regarded as a valid legal system for all its subjects, albeit one in which some of the putative laws were not in fact laws because they were extremely unjust?, or, is it best regarded as having become, at some stage, (perhaps following the Black Homeland Citizenship Act 1970 which removed citizenship from black South Africans and made them instead citizens of one of 10 "homelands") a mere regime of unrestricted violence vis-à-vis (at least some) black South Africans because the claim that its rules would be followed by all those to whom they applied was no longer even partially true? That is an empirical question, requiring the sort of research which Rundle has applied to the Jewish experience under Nazi rule. What is key is whether or not the rules adopted exercised any meaningful restraint on the activities of the ruling authorities and the privileged races.

The moral commitments by rulers involved in the limitation on official violence

It seems clear, therefore, that a commitment on the part of rulers not only to enforce sanctions when the rules have been broken but also not to use force when no rules have been broken is one of the essential conditions for the existence of a legal system. Is such a commitment properly regarded as a moral commitment and best analysed as an aspect of law's claim to

[4] And this is so even if one leaves out of account those Nazi orders which Hobbes would have denied created an obligation of obedience, see *Leviathan*, chapter 21.

moral correctness or is it sufficient to regard the absence or only occasional use of force in circumstances where no rules have been broken as a mere observable fact?

What is required is that rulers act in accordance with the moral commitment to rules not that they believe in the moral commitment to rules

It may be objected that all that has been demonstrated is that, as an observable fact, the ruler applies force when the rules have been broken and refrains from applying force when the rules have not been broken and this may be done by the ruler purely for self-regarding reasons. Such a response does not, however, meet Simmonds' point, which is that even if the ruler has *in pectore* self-regarding reasons for adhering to the rule of law, the ruler must act *as if* he had made a moral commitment to applying force against his subjects only when the rules have been broken.

To the extent that a commitment to apply force only when the rules have been broken is given on the part of rulers, it is a moral commitment because, as Waldron points out, "it asks the ruler to facilitate the pursuit of interests other than his own even when doing so conflicts with his own interests" (Waldron 2008, 1154). Both the imposition by rulers, by and large, of sanctions for non-compliance with the norms of a system and the non-imposition by rulers of sanctions where no norms have been broken are expressions of a moral commitment to the rules on the part of the rulers. There is, in short, a claim that it is morally justified to use force to enforce the rules and, as a corollary of that claim, that it is not morally justified to use force where it is not permitted by the rules.

The same point can be made in another way. As has been seen, the moral commitment to the rules made by rulers is a composite of four claims. Claims (1) and (2) are a summary of Fuller's eight principles, with claim (1) covering the first seven principles and claim (2) the eighth. Claims (1') and (2') highlight that these claims are made against the threat of the Hobbesian state of nature. It is because claims (1) and (2) carry with them claims (1') and (2') as their corollary that they are moral claims: they restrict the freedom of others to act in accordance with their own interests.

A system where this commitment is wholly disregarded is, as Alexy would recognise, not a system of law. This is not, however, merely an observable social fact. It is, instead, because the internal morality of law has not been respected by the rulers. This is, in fact, the clear implication of Alexy's own chosen example of the predatory order. According to Alexy, what distinguishes the predatory order from the legal system is that the latter makes a *claim* that the rules are for the benefit of those subject to them whereas the former does not.

However, there is also another distinction: in the predatory order, "[The] rules establish no rights for the subjects, that is, no obligations on the part of the bandits toward the subjects." (Alexy 2002, 33; 1989, 176). A predatory order could not make a claim that observing its rules would be for the benefit of its subjects because that claim would be wholly falsified by the fact that neither proposition (1') nor proposition (2') is even partially true in the predatory order. However, there have been, in the past, regimes of managerial direction and predatory orders which have made a claim to moral correctness, but which we would nonetheless not regard as creating legal systems vis-à-vis all of their subjects because propositions (2), (1') and (2') have been wholly false for those subjects.

The case of persons subject to the *potestas* under Roman law:

Roman law, during those phases of its development in which the *pater familias* enjoyed an unrestricted *potestas* over the members of his household, both slave and female, (including *vitae necisque potestas*, the power of life and death) directed its claim to moral correctness primarily at the *patres familias*. Alexy could happily agree that in Roman society at those times, *patres familias* lived under a legal system created by Roman law, whereas the members of their households did not.

However, we need to consider the stance of Roman law towards those subjected to the unrestricted *potestas* in more detail. First, Roman law imposed duties on them, both towards their own *pater familias* and towards the other *patres familias* who were the beneficiaries of legal rights in Roman law. They were subject to a regime of managerial direction. Second, Roman law did not recognise them as enjoying any of its own benefits in their own right. Third, Roman law asserted that it was morally correct that they should be subject to the *potestas* of their *pater familias*.[5] This third proposition was part and parcel of Roman law since it was possible for sons and freed slaves to transform their status from being non-persons according to Roman law and to become citizens or recognised subjects in their own right. It is this third proposition which creates difficulties for Alexy's position. If the mere fact of making a claim to moral correctness at the systemic level is sufficient for the validity of a legal system then Roman law in the pre-classical period was not only a legal system between the *patres familias inter se* but also as regards those for whom it merely meant that

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[5] In the late Middle Ages certain Dutch jurists made a similar claim to moral correctness to justify slavery on the basis that people's rights to life and liberty were their sovereign property and were capable of being traded away; this, it was argued, slaves had done: (Tuck 1979, 48-65).

they were subjected wholly to the will of another and potentially to unrestrained violence. At this point we either have to revise our intuition that to be subject to unrestrained violence is to exist outside the rule of law or we have to ask whether there is in fact a dimension to the claim to moral correctness which must be at least partially true in order for a system of rules to amount to a legal system vis-à-vis all whom it addresses.

The importance of perspective:

In giving his account of *The Concept of Law*, Hart approaches his task as an observer concerned primarily with the perspective of the officials of the legal system and only secondarily with the attitude of its subjects. In Fuller's account, it is the perspective of the conscientious legislator which is prioritised (Fuller 1964, 93), while for Alexy the quintessential participant in a legal system is the judge (Alexy 2002, 35). As is evident from what happens when, in the case of the predatory order, Alexy turns his attention to the perspective of the subject, clarification is achieved from all perspectives. Where the claim that the rules can be followed and will be followed by all those to whom they apply is at least partially made out, a legal system exists, from the perspective of its subjects, of its officials and of observers. Where that claim is wholly falsified from the perspective of all of its subjects, then a legal system does not exist, even from the perspective of an observer. Where that claim is wholly falsified vis-à-vis some of the subjects (S2), they are not subject to a legal system but some other form of regime. An observer should therefore note that a valid legal system exists only as regards those for whom those claims are at least partially true (S1). In those circumstances, the observer's conclusions might be expressed as: Ruritania has a legal system as regards its subjects S1 but does not have a legal system as regards its subjects S2. This is equivalent to the observer concluding that the subjects S1 are the subjects of Ruritania's legal system but that the subjects S2, though under Ruritania's control and power, are not *subjects* but merely *objects* of Ruritania's legal system. Although Ruritania's legal system makes valid law for its subjects S1, it does not make valid law for its subjects S2.[6]

Expressing the observer's conclusions in this latter way clarifies the responsibilities of the participants in Ruritania's legal system both during its persecutory phase and afterwards.

[6] I am particularly grateful to Julian Rivers for pointing out this reversibility and suggesting its possible implications.

After the collapse of Ruritania's persecutory regime, a judge ought to conclude that its rules were of no effect vis-à-vis the persecuted group S2. It is open to her to do so, either by holding that some of the rules are invalid because they are extremely unjust or by holding that none of the rules had any legal effect with regard to the persecuted group because they were not law *for them*.

During the currency of the persecutory regime, the courageous judge ought either to have the courage to find the rules to be invalid because of their extreme injustice towards the persecuted group, S2, or to re-establish the rights of S2 as legal subjects and the rule of law by recognising their claims (2), (1') and (2'), (as was the effect of Lord Mansfield's judgment in *R v Knowles, ex p. Somersett* (1772) 20 State Tr 1, overruling the decision of Lord Hardwicke in *Pearce v Lisle* (1749) Amb 75, 27 ER 47, that slaves were mere items of property under English law).

Wholesale failure to make out any one of the four claims means that a regime is not a legal system:

As was set out above, the claim that the rules can be followed and will be followed by all those to whom they apply is shorthand for four separate propositions:

1) It is possible for subjects to follow the rules (and this implies that the rules are intelligible and coherent);
2) Subjects can expect others, including the authors of the rules, also to follow the rules;
1') Subjects will be protected from violence if they act in accordance with the rules, and
2') Subjects are entitled to legal redress if others, including the authors of the rules, act violently towards them otherwise than accordance with the rules.

It has already been argued that the senseless order in which claim (1) is not made out is not a legal system. An order in which claim (2) is wholly false is not a legal system either because it is a managerial order or something more sinister. A regime in which claim (1') is not made out is a predatory order. It is, perhaps, impossible to conceive a system in which, in practice, subjects could have both an expectation of protection from violence if they act in accordance with the rules (claim (1')) without also having an expectation that others, including the authors of the rules, would behave in accordance with the rules (claim (2)). If such a regime could be imagined, it would be one which combined protection against physical violence with

an unrestricted liability to have one's goods confiscated at any moment, without any warning and without any reason. This would also be a predatory order.

In relation to claim (2'), it is impossible to conceive of a system in practice in which people could have secure expectations that claims (2) and (1') will be fulfilled if there is no entitlement to redress in the event that those expectations are disappointed. If such a system can be conceived of, it remains a gunman situation writ large because its subjects are held hostage by the regime without the possibility of redress if the regime chooses to ignore the rules which it has established.

Therefore, a legal system does not exist if any one of the four propositions which together comprise the claim that the rules can be followed and will be followed by all those to whom they apply is wholly falsified. It is because a regime is not a legal system if any one of these four aspects of law's claim to moral correctness is not made out that, contrary to Alexy's position, in this respect at least the claim by a legal system that its rules are morally appropriate must be at least partially made out before the system falls within the class of legal systems at all.

All this can be said whilst recognising that the claim that the rules can be followed and will be followed by all those to whom they apply can be partially made out by regimes which are unjust and iniquitous in many different respects. It can be said whilst acknowledging that the fact that such a claim is partially made out does not resolve the question of whether the subjects of a legal subject owe a moral obligation of obedience to the individual rules of the system or even to the system as a whole. All of those questions remain open. Nonetheless, from the perspective of the subject of such a regime and from the perspective of an observer seeking to understand the regime's nature, it is only when such a claim is both made and partially true that a legal system exists vis-à-vis that subject S2. If the claim is wholly false, S2 is not a subject of that legal regime.

Conclusions

At a systemic level, the claim to moral correctness, which Alexy persuasively argues is essential to law, contains two dimensions. One is the dimension of authority, the other is the dimension of moral appropriateness. The dimension of moral appropriateness itself contains two aspects, one relating to the content of the norms within the system, the other relating to a commitment to apply the norms within the system. With regards to the dimension of authority, it is sufficient that the claim to authority is made. With regards to the contents of

the norms within the system, if the claim to moral correctness is not made out, it is not made out in respect of individual norms and the system only falls outside the class of legal systems as a result. It is different, however, with regards to the commitment to apply the norms of the system. The claim that the laws can be followed and will be followed by all those to whom they apply promises the subjects of the regime protection from unrestrained violence.

This claim is made up of four propositions: the proposition that it is possible for subjects to follow the rules, which is wholly false in the case of a senseless order; the proposition that subjects can expect others, including the authors of the rules, to follow the rules, which is wholly false in the case of a managerial order; the proposition that subjects will be protected from violence if they act in accordance with the rules, which is wholly false in the case of a predatory order; and the proposition that subjects will be entitled to legal redress in the event that others act violently towards them otherwise than in accordance with the rules, which is necessary to support the other three propositions.

It is because a regime is not a legal system if any one of these four parts of law's claim to moral correctness is not made out that, contrary to Alexy's position, in this respect at least the claims by a legal system must be at least partially made out before the system falls within the category of a legal system at all.

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