

Chapter 2

Legal positivism

Imagine a powerful sovereign who issues commands to his subjects. They are under a duty to comply with his wishes. The notion of law as a command lies at the heart of classical legal positivism as espoused by its two great protagonists, Jeremy Bentham and John Austin. Modern legal positivists adopt a considerably more sophisticated approach to the concept of law, but, like their distinguished predecessors, they deny the relationship proposed by natural law, outlined in the previous chapter, between law and morals. The claim of natural lawyers that law consists of a series of propositions derived from nature through a process of reasoning is strongly contested by legal positivists. This chapter describes the essential elements of this important legal theory.

The term 'positivism' derives from the Latin *positum*, which refers to the law as it is laid down or posited. Broadly speaking, the core of legal positivism is the view that the validity of any law can be traced to an objectively verifiable source. Put simply, legal positivism, like scientific positivism, rejects the view – held by natural lawyers – that law exists independently from human enactment. As will become clear in this chapter, the early legal positivism of Bentham and Austin found the origin of law in the command of a sovereign. H. L. A. Hart looks to a rule of recognition that distinguishes law from other social rules. Hans Kelsen identifies a basic norm that validates the constitution. Legal positivists also often claim that

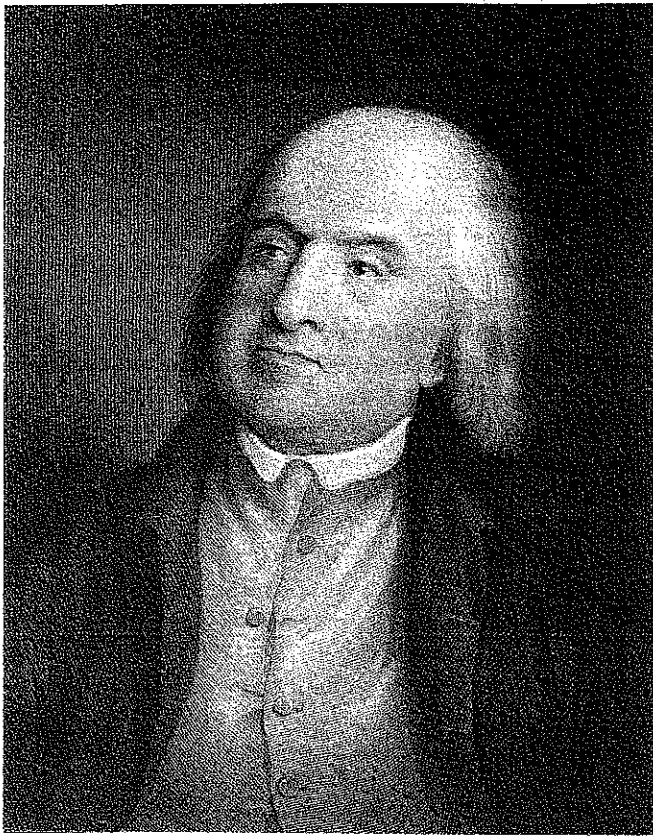
there is no necessary connection between law and morals, and that the analysis of legal concepts is worth pursuing, and distinct from (though not hostile to) sociological and historical enquiries and critical evaluation.

The highest common factor among legal positivists is that the law as laid down should be kept separate – for the purpose of study and analysis – from the law as it ought morally to be. In other words, that a clear distinction must be drawn between 'ought' (that which is morally desirable) and 'is' (that which actually exists). But it does not follow from this that a legal positivist is indifferent to moral questions. Most legal positivists criticize the law and propose means to reform it. This normally involves moral judgements. But positivists do share the view that the most effective method of analysing and understanding law involves suspending moral judgement until it is established what it is we are seeking to elucidate.

Nor do positivists necessarily subscribe to the proposition, often ascribed to them, that unjust or iniquitous laws must be obeyed – merely because they are law. Indeed, both Austin and Bentham acknowledge that disobedience to evil laws is legitimate if it would promote change for the good. In the words of the foremost modern legal positivist H. L. A. Hart:

[T]he certification of something as legally valid is not conclusive of the question of obedience, . . . [H]owever great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.

For Hart, as well as Bentham, this is one of the major virtues of legal positivism.



4. Jeremy Bentham: the Luther of legal philosophy?

Law as commands: Bentham and Austin

The prodigious writings of Jeremy Bentham (1748–1832) constitute a major contribution to positivist jurisprudence and the systematic analysis of law and the legal system. Not only did he seek to expose the shibboleths of his age and construct a comprehensive theory of law, logic, politics, and psychology, founded on the principle of

utility, but he essayed for reform of the law on almost every subject. His critique of the common law and its theoretical underpinnings are especially ferocious. Moved by the spirit of the Enlightenment, Bentham sought to subject the common law to the cold light of reason. He attempted to demystify the law, to expose, in his characteristically cutting style, what lay behind its mask. Appeals to natural law were nothing more than 'private opinion in disguise' or 'the mere opinion of men self-constituted into legislatures'.

The indeterminacy of the common law, he argued, is endemic. Unwritten law is intrinsically vague and uncertain. It cannot provide a reliable, public standard which can reasonably be



5. Bentham regarded English judges as partial, corrupt, and capricious.

expected to guide behaviour. The chaos of the common law had to be dealt with systematically. For Bentham this lay, quite simply, in codification. Legal codes would significantly diminish the power of judges; their task would consist less of interpreting than administering the law. It would also remove much of the need for lawyers: the code would be readily comprehensible without the help of legal advisers. Unlike the Continental system of law that has long adopted Napoleonic codes based on Roman law, codification in the common law world remains a dream.

John Austin (1790–1859) published his major work, *The Province of Jurisprudence Determined*, in 1832, the year of Bentham's death. As a disciple of Bentham's, Austin's conception of law is based on the idea of commands or imperatives, though he provides a less elaborate account of what they are. Both jurists stress the subjection of persons by the sovereign to his power, but Austin's definition is sometimes thought to extend not very much further than the criminal law, with its emphasis on control over behaviour. His identification of commands as the hallmark of law leads him to a more restrictive definition of law than is adopted by Bentham who seeks to formulate a single, complete law which sufficiently expresses the legislative will.

But both share a concern to confine the scope of jurisprudential enquiry to accounting for and explaining the principal features of the law. In the case of Austin, however, his map of 'law properly so called' is considerably narrower than Bentham's, and embraces two categories: the laws of God and human laws. Human laws (i.e. laws set down by men for men) are further divided into positive laws or laws 'strictly so called' (i.e. laws laid down by men as political superiors or in pursuance of legal rights) and laws laid down by men not as political superiors or not in pursuance of legal rights. Laws 'improperly so called' are divided into laws by analogy (e.g. laws of fashion, constitutional, and international law) and by metaphor (e.g. the law of gravity). Laws by analogy, together with laws set by men not as political superiors or in pursuance of legal right, are

merely 'positive morality'. It is only positive law that is the proper subject of jurisprudence.

Bentham is best known as a utilitarian (see Chapter 4) and law reformer. But he insisted on the separation between what he called 'expositorial' and 'censorial' jurisprudence. The former describes what is, the latter what ought to be. Austin was no less categorical in preserving this division, but his analysis is narrower in both its compass and purpose than Bentham's.

Though both adhere to a utilitarian morality, and adopt broadly similar views on the nature and function of jurisprudence and the serious inadequacies of the common law tradition, there are several important differences in their general approach to the subject. In particular, Bentham pursues the notion of a single, complete law which adequately expresses the will of the legislature. He seeks to show how a single law creates a single offence defined by its being the narrowest species of that kind of offence recognized by the law.

Austin, on the other hand, builds his scheme of a legal system on the classification of rights; he is not troubled by a search for a 'complete' law. Also, in his pursuit to provide a plan of a comprehensive body of laws and the elements of the 'art of legislation', Bentham expounds a complex 'logic of the will'. Austin seeks to construct a science of law rather than engage himself in Bentham's art of legislation. And while Bentham sought to devise means by which arbitrary power, especially of judges, might be checked, Austin was less anxious about these matters.

The central feature of Austin's map of the province of jurisprudence is the notion of law as a command of the sovereign. Anything that is not a command is not law. Only general commands count as law. And only commands emanating from the sovereign are 'positive laws'. Austin's insistence on law as commands requires him to exclude customary, constitutional, and public international law from the field of jurisprudence. This is because no specific sovereign

can be identified as the author of their rules. Thus, in the case of public international law, sovereign states are notoriously at liberty to disregard its requirements.

For Bentham, however, commands are merely one of four methods by which the sovereign enacts law. He distinguishes between laws which command or prohibit certain conduct (imperative laws) and those which permit certain conduct (permissive laws). He argues that all laws are both penal and civil; even in the case of title to property there is a penal element. Bentham seeks to show that laws which impose no obligations or sanctions (what he calls 'civil laws') are not 'complete laws', but merely parts of laws. And, since his principal objective was the creation of a code of law, he argued that the penal and civil branches should be formulated separately.

The relationship between commands and sanctions is no less important for Austin. Indeed, his very concept of a command includes the probability that a sanction will follow failure to obey the command. But what is a sanction? Austin defines it as some harm, pain, or evil that is conditional upon the failure of a person to comply with the wishes of the sovereign. There must be a realistic probability that it will be inflicted upon anyone who infringes a command. There need only be the *threat* of the possibility of a minimal harm, pain, or evil, but unless a sanction is likely to follow, the mere expression of a wish is not a command. Obligations are therefore defined in terms of sanctions: this is a central tenet of Austin's imperative theory. The likelihood of a sanction is always uncertain, but Austin is driven to the rather unsatisfactory position that a sanction consists of 'the smallest chance of incurring the smallest evil'.

The idea of a sovereign issuing commands pervades the theories of both Bentham and Austin. It is important to note that both regard the sovereign's power as constituted by the habit of the people generally obeying his laws. But while Austin insists on the illimitability and indivisibility of the sovereign, Bentham, alive to

the institution of federalism, acknowledges that the supreme legislative power may be both limited and divided by what he calls an express convention.

For Austin, to the four features of a command (wish, sanction, expression of a wish, and generality) is to be added a fifth, namely an identifiable political superior – or sovereign – whose commands are obeyed by political inferiors and who owes obedience to no one. This insistence on an omnipotent lawgiver distorts those legal systems which impose constitutional restrictions on the legislative competence of the legislature or which divide such power between a central federal legislature and lawmaking bodies of constituent states or provinces (such as in the United States, Canada or Australia). Bentham, on the other hand, acknowledges that sovereignty may be limited or divided, and accepts (albeit reluctantly) the possibility of judicial review of legislative action.

Austin's contention that 'laws properly so called' be confined to the commands of a sovereign leads him to base his idea of sovereignty on the habit of obedience adopted by members of society. The sovereign must, moreover, be determinate (i.e. the composition of the sovereign body must be unambiguous), for 'no indeterminate sovereign can command expressly or tacitly, or can receive obedience or submission'. And this results in Austin famously refusing to accept as 'law' public international law, customary law, and a good deal of constitutional law.

Moreover, by insisting that the sanction is an indispensable ingredient in the definition of law, Austin is driven to defining duty in terms of sanction: if the sovereign expresses a wish and has the power to inflict an evil (or sanction) then a person is under a duty to act in accordance with that wish. The distinction between a 'wish' and the 'expression of a wish' resembles the distinction between a bill and a statute.

Austin's association between duty and sanction has attracted

considerable criticism, though it may be that he was merely seeking to show – in a formal sense – that, where there is a duty, its breach normally gives rise to a sanction. In other words, he is not necessarily seeking to provide an explanation for why law is obeyed or whether it ought to be obeyed, but rather when a legal duty exists. Nevertheless, he unquestionably accords unwarranted significance to the concept of duty. The law frequently imposes no direct duty, such as when it facilitates marriage, contracts, and wills. We are not under any duty to carry out these transactions, but they are plainly part of the law. H. L. A. Hart calls them ‘power-conferring rules’ (see below).

The less dogmatic approach of Bentham allows that a sovereign’s commands constitute law even in the absence of sanctions in the Austinian sense. Law, according to Bentham, includes both punishments (‘coercive motives’) and rewards (‘alluring motives’), but they do not define what is and what is not law.

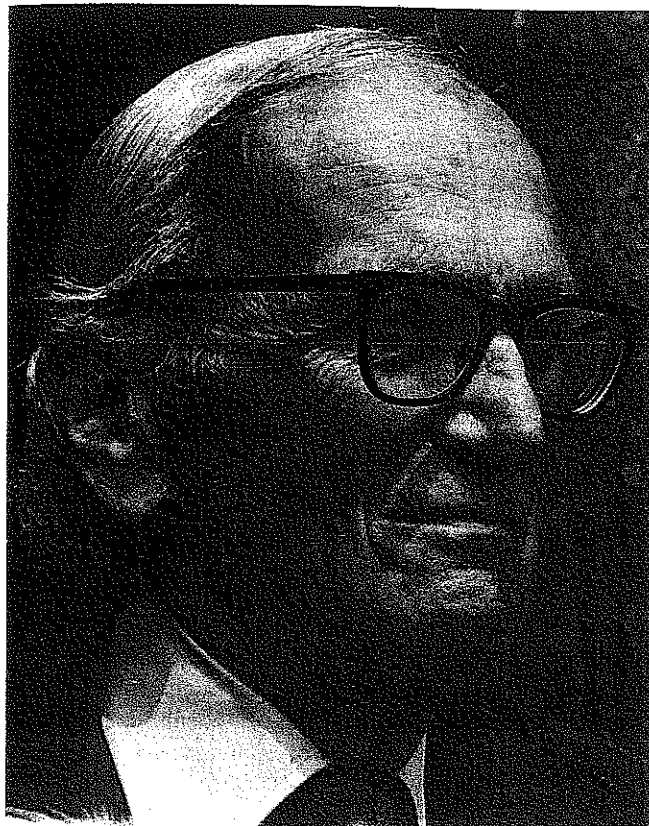
Bentham and Austin laid the foundations for modern legal positivism. But their ideas have been considerably refined, developed, and even rejected, by contemporary legal positivists. The remainder of this chapter outlines the approaches of its three leading protagonists: H. L. A. Hart, Hans Kelsen, and Joseph Raz.

Law as social rules: H. L. A. Hart

H. L. A. Hart (1907–92) is often credited with charting the precincts of modern legal theory by applying the techniques of analytical, and especially linguistic, philosophy to the study of law. His work illuminates the meaning of legal concepts, the manner in which we deploy them, and the way we think about law and the legal system. What, for example, does it mean to have a ‘right’? What is a corporation or an obligation? Hart claims that we cannot properly understand law unless we understand the conceptual context in which it emerges and develops. He argues, for instance, that language has an ‘open texture’: words (and hence rules) have a

number of clear meanings, but there are always several ‘penumbral’ cases where it is uncertain whether the word applies or not. His book, *The Concept of Law*, published in 1961, is a classic of legal theory and has served as a catalyst for many other jurists around the world.

Hart’s positivism is a far cry from the largely coercive picture of law painted by Bentham and Austin. Hart conceives of law as a social



6. H. L. A. Hart: the father of modern legal positivism.

phenomenon that can be understood only by describing the actual social practices of a community. In order for it to survive as a community, Hart argues, there need to be certain fundamental rules. He calls these the 'minimum content of natural law'. They arise out of our human condition which manifests the following essential features:

'Human vulnerability': We are all susceptible to physical attacks.

'Approximate equality': Even the strongest must sleep at times.

'Limited altruism': We are, in general, selfish.

'Limited resources': We need food, clothes, and shelter and they are limited.

'Limited understanding and strength of will': We cannot be relied upon to cooperate with our fellow men.

These human frailties require the enactment of rules to protect persons and property, and to ensure that promises are kept. But, though he employs the shibboleth 'natural law', he does not mean that law is derived from morals or that there is a necessary conceptual relationship between the two. Nor is he saying that this minimum content of natural law ensures a fair or just society. Hart disengages his legal positivism from both the utilitarianism (see Chapter 4) and the command theory of law championed by Austin and Bentham. In the case of the latter, his rejection is based on the view that law is more than the decree of a gunman: a command backed by a sanction.

The nucleus of Hart's theory is the existence of fundamental rules accepted by officials as stipulating procedures by which the law is enacted. The most important of these he calls the rule of recognition which is the fundamental constitutional rule of a legal system, acknowledged by those officials who administer the law as specifying the conditions or criteria of validity which certify whether or not a rule is indeed a rule.

Law, in Hart's analysis, is a system of rules. His argument is as

follows. All societies have social rules. These include rules relating to morals, games, etc., as well as obligation rules that impose duties or obligations. The latter may be divided into moral rules and legal rules (or law). As a result of our human limitations, mentioned above, there is a necessity for obligation rules in all societies. Legal rules are divisible into primary rules and secondary rules. The former proscribe the use of violence, theft, and deception to which human beings are tempted but which they must normally repress if they are to coexist in close proximity. The rules of primitive societies are normally restricted to these primary rules imposing obligations. But as a society becomes more complex, there is obviously a need to change the primary rules, to adjudicate on breaches of them, and to identify which rules are actually obligation rules. These three requirements are satisfied in each case in modern societies by the introduction of three sorts of secondary rules: rules of change, adjudication, and recognition. Unlike primary rules, the first two of these secondary rules do not generally impose duties, but usually confer power. The rule of recognition, however, does seem to impose duties (largely on judges). I expand on this point below.

The existence of a legal system requires that two conditions must be satisfied. First, valid obligation rules must be generally obeyed by members of society, and, secondly, officials must accept the rules of change and adjudication; they must also accept the rule of recognition 'from the internal point of view'.

As already pointed out, Hart rejects Austin's conception of rules as commands, and the notion that rules are phenomena that consist merely in externally observable activities or habit. Instead he asks us to consider the *social* dimension of rules, namely the manner in which members of a society perceive the rule in question, their attitude towards it. This 'internal' aspect distinguishes between a rule and a mere habit.

Thus, to use his example, chess players, in addition to having similar habits of moving the Queen in the same way, also have a

'critical reflective attitude' to this way of moving it: they each regard it as a *standard* for all who play chess. They exhibit these views in their appraisal of other players, and acknowledge the legitimacy of such criticism when they are themselves subjected to it.

In other words, to grasp the nature of rules we must examine them from the point of view of those who *experience* them, or who pass judgement on them. He also employs the concept of a 'rule' to distinguish between 'being obliged' and 'having an obligation'. When a gunman says, 'Your money or your life?' you are *obliged* to obey, but, says Hart, you have no *obligation* to do so – because no rule imposes an obligation on you.

Having described the nature and purpose of primary rules, Hart attempts to show that every legal system incorporates secondary rules of three kinds. The first he calls rules of change. These facilitate legislative or judicial changes to both the primary rules and certain secondary rules (e.g. the rule of adjudication, below). This process of change is regulated by secondary rules that confer power on individuals or groups (e.g. Congress or Parliament) to enact legislation in accordance with certain procedures. Rules of change also confer power on you and me to alter our legal status (e.g. by making contracts, wills, etc.).

Secondly, there are rules of adjudication that confer authority on individuals, such as judges, to pass judgment mainly in cases of breaches of primary rules. This power is normally associated with a further power to punish the wrongdoer or compel the wrongdoer to pay damages.

Thirdly, there is the rule of recognition which determines the criteria by which the validity of all the rules of a legal system is decided. As pointed out above, unlike the other two types of secondary rules, it appears, in part, to be duty-imposing: it requires those who exercise public power (particularly judges) to follow certain rules. Hart maintains that rules are valid members of the

legal system only if they satisfy the criteria laid down by the rule of recognition. Comparing it to the standard metre bar in Paris (the definitive standard by which a metre was once measured), the validity of the rule of recognition cannot be questioned. It is neither valid nor invalid, but is simply accepted as the correct standard.

A legal system exists, according to Hart, only if valid primary rules are obeyed, and officials accept the rules of change and adjudication. In Hart's words:

The assertion that a legal system exists is ... a Janus-faced statement looking both to obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of official behaviour.

You and I, as ordinary members of society, do not need to accept the primary rules or the rule of recognition; it is necessary only that the *officials* do so from 'an internal point of view'. What does this mean? Hart's answer is as follows:

What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong.'

This 'internal' dimension of rules thus distinguishes social rules from mere group habits. By accepting secondary rules, officials need not approve of them. Judges in an iniquitous legal system may detest the rules they are required to apply, but by accepting them they satisfy Hart's conditions for a legal system to exist.

Hart concedes that where a legal system fails to receive general approval, it would be both morally and politically objectionable. But

these moral and political criteria are not identifying characteristics of the notion of 'legal system'. The validity of a legal system is therefore independent from its efficacy. A completely ineffective rule may be a valid one – as long as it emanates from the rule of recognition. But to be a valid rule, the legal system of which the rule is a component must, as a whole, be effective.

Law as norms: Hans Kelsen

Hans Kelsen (1881–1973), in his complex 'pure theory of law', expounds a subtle and profound account of the way in which we should understand law. We should do so, he insists, by conceiving it to be a system of 'oughts' or *norms*. Kelsen does concede that the law consists also of legal acts as determined by these norms. But the essential character of law derives from norms – which include judicial decisions and legal transactions such as contracts and wills. Even the most general norms describe human conduct.

Influenced by the great 18th-century philosopher, Immanuel Kant, Kelsen accepts that we can understand objective reality only by the application of certain formal categories like time and space that do not 'exist' in nature: we use them in order to make sense of the world. Similarly, to understand 'the law' we need formal categories, such as the basic norm – or *Grundnorm* – which, as its name suggests, lies at the base of any legal system (see below). Legal theory, argues Kelsen, is no less a science than physics or chemistry. Thus we need to disinfect the law of the impurities of morality, psychology, sociology, and political theory. He thus propounds a sort of ethical cleansing under which our analysis is directed to the norms of positive law: those 'oughts' that declare that if certain conduct (X) is performed, then a sanction (Y) should be applied by an official to the offender. His 'pure' theory thus excludes that which we cannot objectively know, including law's moral, social, or political functions. Law has but one purpose: the monopolization of force.



7. Hans Kelsen attempted the ethical cleansing of legal theory.

Kelsen's concept of a norm entails that something ought to be, or that something ought to happen – in particular, that a person ought to behave in a specific way. Hence both the statement 'the door ought to be closed,' and a red traffic light constitute norms. To be valid, however, a norm must be authorized by another norm

which, in turn, must be authorized by a higher legal norm in the system. Kelsen is intensely relativistic: he repudiates the idea that there are values 'out there'. For him all norms are relative to the individual or group under consideration.

The promotion of social order is achieved by governments enacting norms that determine whether our conduct is lawful or unlawful. These norms, argues Kelsen, provide sanctions for failure to comply with them. Legal norms therefore differ from other norms in that they prescribe a sanction. A legal system is founded on state coercion; behind its norms is the threat of force. This distinguishes the tax collector from the robber. Both demand your money. Both, in other words, require that you *ought* to pay up. Both exhibit a *subjective* act of will, but only the tax collector's is *objectively* valid. Why? Because, says Kelsen, the subjective meaning of the robber's coercive order is not interpreted as its objective meaning. Why not? Because no basic norm is presupposed according to which one ought to comply with this order. And why not? Because the robber's coercive order lacks the 'lasting effectiveness without which no basic norm is presupposed'. This demonstrates the essential relationship in Kelsen's theory between validity and effectiveness, which is discussed below.

His model of a legal system is therefore a succession of interconnected norms advancing from the most general 'oughts' (e.g. sanctions ought to be effected in accordance with the constitution) to the most particular or 'concrete' (e.g. Charles is contractually bound to mow Camilla's grass). Each norm in this hierarchical system draws its validity from another higher norm. The validity of all norms is ultimately based on the basic norm.

As the validity of each norm depends on a higher norm whose validity depends in turn on another higher norm, we eventually reach a point of no return. This is the basic norm or *Grundnorm*. All norms emanate from this norm in escalating levels of 'concreteness', including the very constitution of the state. Since,

by definition, the validity of the basic norm cannot depend on any other norm, it has to be presupposed. Without this presupposition, Kelsen claims, we cannot understand the legal order. The basic norm exists, but only in the 'juristic consciousness'. It is an assumption that makes possible our comprehension of the legal system by the legal scientist, judge, or lawyer. It is not, however, selected arbitrarily, but by reference to whether the legal order as a whole is 'by and large' effective. Its validity depends on efficacy. In other words, the validity of the basic norm rests, not on another norm or rule of law, but is *assumed* – for the purpose of purity. It is therefore a hypothesis, a wholly formal construct.

The nature of the basic norm is illustrated by Kelsen's religious analogy in which a son is instructed by his father to go to school. To this individual norm, the son replies, 'Why should I go to school?' In other words, he asks why the subjective meaning of his father's act of will is its objective meaning, i.e. a norm binding for him – or, which means the same thing, what is the basis of the validity of this norm. The father responds, 'Because God has commanded that parents be obeyed – that is, God has authorized parents to issue commands to children.' The son retorts, 'Why should one obey the commands of God?' He is, in Kelsenian terms, asking why the subjective meaning of this act of will of God is also its objective meaning – that is, a valid norm or, which amounts to the same thing, what is the basis of the validity of this general norm. The only possible answer to this is: because, as a believer, one presupposes that one ought to obey the commands of God. This is the statement of the validity of a norm that must be presupposed in a believer's thinking in order to ground the validity of the norms of a religious morality. It constitutes the basic norm of a religious morality, the norm that grounds the validity of all the norms of that morality – a 'basic' norm, because no further question can be raised about the basis of its validity. The statement is not a positive norm – i.e. not a norm posited by a real act of will – but a norm presupposed in a believer's thinking.

The basic norm is intended to have two major functions. First, it assists us in distinguishing between the demands of a robber and those of the law. In other words, it enables us to regard a coercive order as objectively valid. Secondly, it explains the coherence and unity of a legal order. All valid legal norms may be interpreted as a non-contradictory field of meaning.

Kelsen frames the basic norm as follows:

Coercive acts ought to be performed under the conditions and in the manner which the historically first constitution, and the norms created according to it, prescribe. (In short: One ought to behave as the constitution prescribes.)

The basic norm, as a purely formal construct, has no specific content. Any human conduct, Kelsen says, may be the subject matter of a legal norm. Nor can the validity of a positive legal order be denied merely because of the content of its norms.

Since Kelsen argues that the effectiveness of the whole legal order is a necessary condition of its validity of every norm within it, implicit in the very existence of a legal system is the fact that its laws are generally obeyed. In *The Pure Theory of Law* he puts the matter bluntly: 'Every by and large effective coercive order can be interpreted as an objectively valid normative order.' But this is problematic. How can we know whether laws are actually being observed or disregarded? How do we test whether the law is, in Kelsen's phrase, 'by and large' effective? Many would say that the efficacy or otherwise of a legal order is an empirical matter, something we can witness or observe. But the pure theory spurns 'sociological' enquiries of this kind.

Kelsen also eschews any consideration of the reasons why the law might be effective (its rationality, goodness, etc.). If the validity of a legal order requires the effectiveness of its basic norm, it follows that when that basic norm of the system no longer attracts general

support, there is no law. This is what happens after a successful revolution. The existing basic norm no longer exists, and, Kelsen says, once the new laws of the revolutionary government are effectively enforced, lawyers may presuppose a new basic norm. This is because the basic norm is not the constitution, but the presumption that the altered state of affairs ought to be accepted in fact.

Kelsen's ideas have been cited by a number of courts in countries which have experienced revolutions: Pakistan, Uganda, Rhodesia, and Grenada.

Law as social fact: Joseph Raz

The writing of the Oxford philosopher, Joseph Raz (b. 1939) does not lend itself to simple synopsis. As a leading 'hard' or 'exclusivist' legal positivist, Raz maintains that the identity and existence of a legal system may be tested by reference to three elements; efficacy, institutional character, and sources. Law is thus drained of its moral content, based on the idea that legality does not depend on its moral merit. 'Soft' positivists, like H. L. A. Hart, reject this view, and acknowledge that content or merit may be included or incorporated as a condition of validity. They are therefore also called 'incorporationists'.

Raz argues, however, that the law is autonomous: we can identify its content without recourse to morality. Legal *reasoning*, on the other hand, is not autonomous; it is an inevitable, and desirable, feature of judicial reasoning. For Raz, the existence and content of every law may be determined by a *factual* enquiry about conventions, institutions, and the intentions of participants in the legal system. The answer to the question 'what is law?' is always a fact. It is never a moral judgement. This marks him as a 'hard' or 'exclusive' positivist. 'Exclusive' because the reason we regard the law as authoritative is the fact that it is able to guide our behaviour in a way that morality cannot do. In other words, the law asserts its

primacy over all other codes of conduct. Law is the ultimate source of authority. Thus, a legal system is quintessentially one of authoritative rules. It is this claim of authority that is the trademark of a legal system.

Raz identifies three principal claims made by positivists and attacked by natural lawyers:

The 'social thesis': that law may be identified as a social fact, without reference to moral considerations.

The 'moral thesis': that the moral merit of law is neither absolute nor inherent, but contingent upon 'the content of the law and the circumstances of the society to which it applies'.

The 'semantic thesis': that normative terms such as 'right' and 'duty' are not used in moral and legal contexts in the same way.

Philosophy of Law

Raz accepts only the 'social thesis' on the basis of the three accepted criteria by which a legal system may be identified: its efficacy, its institutional character, and its sources. From all three, moral questions are excluded. Thus, the institutional character of law means simply that laws are identified by their relationship to certain institutions (e.g. the legislature). Anything – however morally acceptable – not admitted by such institutions is not law, and vice versa.

Raz actually postulates a stronger version of the 'social thesis' (the 'sources thesis') as the essence of legal positivism. His major justification for the sources thesis is that it accounts for a primary function of law: the setting of standards by which we are bound, in such a way that we cannot excuse our non-compliance by challenging the rationale for the standard.

It is mainly upon his acceptance of the social thesis, and his rejection of the moral and semantic theses, that Raz assembles his case against a general moral obligation to obey the law. In reaching this conclusion, he repudiates three common arguments made for

the moral authority of law. First, it is often argued that to distinguish, as positivists do, between law and other forms of social control, is to neglect the functions of law; and because functions cannot be described in a value-free manner, any functional account of law must involve moral judgements – and so offend the social thesis. Raz argues that, while law does indeed have certain functions, his own analysis of them is value-neutral.

Nor, secondly, does Raz accept that the content of law cannot be determined exclusively by social facts: so, for example, since courts unavoidably rely on explicitly moral considerations, they creep into determinations of what the law actually is. Although Raz concedes that moral concerns do enter into adjudication, he insists that this is inevitable in any source-based system. But it does not, in his view, establish a case against the sources thesis. Finally, it is occasionally argued that what is distinctive about the law is that it conforms to the ideal of the rule of law, the belief that no one is above the law. Surely, some contend, this demonstrates that the law is indeed moral. Raz attempts to refute this proposition by arguing that, while conformity to the rule of law reduces the abuse of executive power, it does not confer an independent moral merit upon the law. For him the rule of law is a negative virtue – for the risk of arbitrary power is created by the law itself. He thus concludes that, even in a legal system that is fair and just, there is no *prima facie* duty to obey the law.

Legal positivism