HANS KELSEN: GENERAL THEORY OF LAW, New York, Russel & Russel, 1961

Questions to the text:

1. Kelsen: Concept of law + Bix: Dictionary (p. 3-14 + Bix)

1. How does Kelsen define the concept of law?
2. What is the relationship between justice and legality?
3. Characterize the difference between legal positivism and natural law theory.
4. Characterize the difference between inclusive and exclusive legal positivism
5. From what proceeds (from what sources) regulation of human behavior in natural law?
6 What is the view of legal positivism on the dualism of positive and natural law?

Hans Kelsen: General Theory of Law and State.
New York: Russell and Russell, 1961

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NOMOSTATICS

I. THE CONCEPT OF LAW

A. LAW AND JUSTICE

a. Human Behavior as the Object of Rules

LAW is an order of human behavior. An "order" is a system of rules. Law is not, as it is sometimes said, a rule. It is a set of rules having the kind of unity we understand by a system. It is impossible to grasp the nature of law if we limit our attention to the single isolated rule. The relations which link together the particular rules of a legal order are also essential to the nature of law. Only on the basis of a clear comprehension of those relations constituting the legal order can the nature of law be fully understood.

The statement that law is an order of human behavior does not mean that the legal order is concerned only with human behavior; that nothing but human behavior enters into the contents of legal rules. A rule that makes murder a punishable delict concerns human behavior which has the death of a human being as its effect. Death itself, however, is not human behavior but a physiological process. Every rule of law obligates human beings to observe a certain behavior under certain circumstances. These circumstances need not be human behavior, they may be, for instance, what we call natural events. A rule of law may oblige neighbors to lend assistance to the victims of an inundation. Inundation is not a human behavior, but it is the condition of a human behavior prescribed by the legal order. In this sense, facts which are not facts of human behavior may enter into the contents of a legal rule. But they may do so only as related to human behavior, either as its condition or as its effect.

It might seem as if this applied only to the laws of civilized peoples. In primitive law, animals, and even plants and other inanimate objects are often treated in the same way as human beings and are, in particular, punished.* However, this must be seen in its connection with the

* In antiquity there was in Athens a special court whose function it was to condemn inanimate things, for instance a spear by which a man had been killed. Demosthenes, *Oration against Aristocrates*, 76 (English translation by J. H. Vince, 1935, p. 267): "There is also a fourth tribunal, that at the Prytaneum. Its function is that, if a man is struck by a stone, or a piece of wood or iron, or anything of

animism of primitive man. He considers animals, plants, and inanimate objects as endowed with a "soul," inasmuch as he attributes human, and sometimes even superhuman, mental faculties to them. The fundamental difference between human and other beings, which is part of the outlook of civilized man, does not exist for primitive man. And he applies his law also to non-human beings because for him they are human, or at least similar to man. In this sense primitive law is an order of human behavior, too.

However, besides law there are other orders of human behavior, such as morals and religion. A definition of law must specify in what respects law differs from these other orders of human behavior.

b. Scientific and Political Definition of Law

Any attempt to define a concept must take for its starting-point the common usage of the word, denoting the concept in question. In defining the concept of law, we must begin by examining the following questions: Do the social phenomena generally called "law" present a common characteristic distinguishing them from other social phenomena of a similar kind? And is this characteristic of such importance in the social life of man that it may be made the basis of a concept serviceable for the cognition of social life? For reasons of economy of thought, one must start from the broadest possible usage of the word "law." Perhaps no such characteristic as we are looking for can be found. Perhaps the actual usage is so loose that the phenomena called "law" do not exhibit any common characteristic of real importance. But if such a characteristic can be found, then we are justified in including it in the definition.

This is not to say that it would be illegitimate to frame a narrower concept of law, not covering all the phenomena usually called "law." We may define at will those terms which we wish to use as tools in our intellectual work. The only question is whether they will serve the theoretical purpose for which we have intended them. A concept of law whose extent roughly coincides with the common usage is obviously — circumstances otherwise being equal — to be preferred to a concept which is applicable only to a much narrower class of phenomena. Let

that sort, falling upon him, and if someone, without knowing who threw it, knows and possesses the implement of homicide, he takes proceedings against these implements in that court." Cf. also PLATO, THE LAWS, 873, and ARISTOTLE, ATHENENSIUM RES PUBLICA, cap. 57. In the Middle Ages it was still possible to bring a lawsuit against an animal, for instance a dog or a bull which had killed a man, or locusts which had caused damage by eating up the crop; and in due process of law the court condemned the accused animal to death, whereupon the animal was executed in exactly the same way as a human being. Cf. KARL VON AMIRA, THIERSTRAFEN UND THIERPROCESSE (1891).

us take an example. Even since the rise of Bolshevism, National Socialism, and Fascism, one speaks of Russian, German, and Italian "law." Nothing would prevent us, however, from including in our definition of a legal order a certain minimum of personal freedom and the possibility of private property. One result of adopting such a definition would be that the social orders prevailing in Russia, Italy and Germany could no longer be recognized as legal orders, although they have very important elements in common with the social orders of democratic-capitalistic States.

The above-mentioned concept — which actually appears in recent works on legal philosophy — also shows how a political bias can influence the definition of law. The concept of law is here made to correspond to a specific ideal of justice, namely, of democracy and liberalism. From the standpoint of science, free from any moral or political judgments of value, democracy and liberalism are only two possible principles of social organization, just as autocracy and socialism are. There is no scientific reason why the concept of law should be defined so as to exclude the latter. As used in these investigations, the concept of law has no moral connotation whatsoever. It designates a specific technique of social organization. The problem of law, as a scientific problem, is the problem of social technique, not a problem of morals. The statement: "A certain social order has the character of law, is a legal order," does not imply the moral judgment that this order is good or just. There are legal orders which are, from a certain point of view, unjust. Law and justice are two different concepts. Law as distinguished from justice is positive law. It is the concept of positive law which is here in question; and a science of positive law must be clearly distinguished from a philosophy of justice.

c. The Concept of Law and the Idea of Justice

To free the concept of law from the idea of justice is difficult because both are constantly confused in non-scientific political thought as well as in general speech, and because this confusion corresponds to the ideological tendency to make positive law appear as just. If law and justice are identified, if only a just order is called law, a social order which is presented as law is — at the same time — presented as just; and that means it is morally justified. The tendency to identify law and justice is the tendency to justify a given social order. It is a political, not a scientific tendency. In view of this tendency, the effort to deal with law and justice as two different problems falls under the suspicion of repudiating altogether the requirement that positive law should be just. This requirement is self-evident; but what it actually

means is another question. At any rate a pure theory of law in no way opposes the requirement for just law by declaring itself incompetent to answer the question whether a given law is just or not, and in what the essential element of justice consists. A pure theory of law — a science — cannot answer this question because this question cannot be answered scientifically at all.

What does it really mean to say that a social order is a just one? It means that this order regulates the behavior of men in a way satisfactory to all men, that is to say, so that all men find their happiness in it. The longing for justice is men's eternal longing for happiness. It is happiness that man cannot find as an isolated individual and hence seeks in society. Justice is social happiness.

1. Justice as a Subjective Judgment of Value

It is obvious that there can be no "just" order, that is, one affording happiness to everyone, as long as one defines the concept of happiness in its original, narrow sense of individual happiness, meaning by a man's happiness what he himself considers it to be. For it is then inevitable that the happiness of one individual will, at some time, be directly in conflict with that of another. Nor is a just order then possible even on the supposition that it is trying to bring about not the individual happiness of each, but the greatest possible happiness of the greatest possible number of individuals. The happiness that a social order can assure can be happiness in the collective sense only, that is, the satisfaction of certain needs, recognized by the social authority, the law-giver, as needs worthy of being satisfied, such as the need to be fed, clothed, and housed. But which human needs are worthy of being satisfied, and especially what is their proper order of rank? These questions cannot be answered by means of rational cognition. The decision of these questions is a judgment of value, determined by emotional factors, and is, therefore, subjective in character, valid only for the judging subject and therefore relative only. It will be different according to whether the question is answered by a believing Christian, who holds the good of his soul in the hereafter more important than earthly goods, or by a materialist who believes in no after life; and it will be just as different according to whether the decision is made by one who considers personal freedom as the highest good, i.e. by liberalism, or by one for whom social security and the equality of all men is rated higher than freedom, by socialism.

The question whether spiritual or material possessions, whether freedom or equality, represents the highest value, cannot be answered rationally. Yet the subjective, and hence relative judgment of value by

which this question is answered is usually presented as an assertion of an objective and absolute value, a generally valid norm. It is a peculiarity of the human being that he has a deep need to justify his behavior, the expression of his emotions, his wishes and desires, through the function of his intellect, his thinking and cognition. This is possible, at least in principle, to the extent that the wishes and desires relate to means by which some end or other is to be achieved; for the relationship of means to end is a relationship of cause and effect, and this can be determined on the basis of experience, i.e. rationally. To be sure, even this is frequently not possible in view of the present state of social science; for in many cases we have no adequate experience which enables us to determine how certain social aims may best be attained. Hence, this question as to the appropriate means is also frequently determined rather by subjective judgments of value than by an objective insight into the connection between means and end, that is, between cause and effect; and hence, at least for the moment, the problem of justice, even as thus restricted to a question of the appropriate means to a generally recognized end, cannot always be rationally answered. The issue between liberalism and socialism, for instance, is, in great part, not really an issue over the aim of society, but rather one as to the correct way of achieving a goal as to which men are by and large in agreement; and this issue cannot be scientifically determined, at least not today.

The judgment by which something is declared to be the appropriate means to a presupposed end is not a true judgment of value; it is — as pointed out — a judgment concerning the connection between cause and effect, and, as such, a judgment about reality. A judgment of value is the statement by which something is declared to be an end, an ultimate end which is not in itself a means to a further end. Such a judgment is always determined by emotional factors.

A justification of the emotional function by the rational one, however, is excluded in principle in so far as it is a question of ultimate aims which are not themselves means to further ends.

If the assertion of such ultimate aims appears in the form of postulates or norms of justice, they always rest upon purely subjective and hence relative judgments of value. It goes without saying that there are a great many such subjective judgments of value, very different from one another and mutually irreconcilable. That, of course, does not mean that every individual has his own system of values. In fact, very many individuals agree in their judgments of value. A positive system of values is not an arbitrary creation of the isolated individual, but always the result of the mutual influence the individuals exercise upon each other within a given group, be it family, tribe, class, caste, profession.

Every system of values, especially a system of morals and its central idea of justice, is a social phenomenon, the product of a society, and hence different according to the nature of the society within which it arises. The fact that there are certain values generally accepted in a certain society in no way contradicts the subjective and relative character of these judgments of value. That many individuals agree in their judgments of value is no proof that these judgments are correct. Just as the fact that most people believe, or used to believe, that the sun turns around the earth, is, or was, no proof of the truth of this idea. The criterion of justice, like the criterion of truth, is not dependent on the frequency with which judgments about reality or judgments of value are made.

Since humanity is divided into many nations, classes, religions, professions and so on, often at variance with one another, there are a great many very different ideas of justice; too many for one to be able to speak simply of "justice."

2. Natural Law

Yet one is inclined to set forth one's own idea of justice as the only correct, the absolutely valid one. The need for rational justification of our emotional acts is so great that we seek to satisfy it even at the risk of self-deception. And the rational justification of a postulate based on a subjective judgment of value, that is, on a wish, as for instance that all men should be free, or that all men should be treated equally, is self-deception or — what amounts to about the same thing — it is an ideology. Typical ideologies of this sort are the assertions that some sort of ultimate end, and hence some sort of definite regulation of human behavior, proceeds from "nature," that is, from the nature of things or the nature of man, from human reason or the will of God. In such an assumption lies the essence of the doctrine of so-called natural law. This doctrine maintains that there is an ordering of human relations different from positive law, higher and absolutely valid and just, because emanating from nature, from human reason, or from the will of God.

The will of God is — in the natural law doctrine — identical with nature in so far as nature is conceived of as created by God, and the laws of nature as expression of God's will. Consequently the laws determining nature have, according to this doctrine, the same character as the legal rules issued by a legislator: they are commands directed to nature; and nature obeys these commands, the laws of nature, just as man obeys the laws issued by a legislator.* The law created by a legislator, i.e. by an act of will of a human authority, is positive law. Natural law, according to its specific doctrine, is not created by the act of a human will; it is not the artificial, arbitrary product of man. It can be and has to be deduced from nature by a mental operation. By carefully examining nature, especially the nature of man and his relations to other men, one can find the rules which regulate human behavior in a way corresponding to nature and hence perfectly just. The rights and duties of man, established by this natural law, are considered to be innate or inborn in man, because implanted by nature and not imposed or conferred upon him by a human legislator: and in so far as nature manifests God's will, these rights and duties are sacred.

However, none of the numerous natural law theories has so far succeeded in defining the content of this just order in a way even approaching the exactness and objectivity with which natural science can determine the content of the laws of nature, or legal science the content of a positive legal order. That which has so far been put forth as natural law, or, what amounts to the same thing, as justice, consists for the most

* Blackstone, Commentaries on the Laws of England, Introduction, §§ 36–39: "Law, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey. Thus when the Supreme Being formed the universe, and created matter out of nothing, He impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When He put the matter into motion, He established certain laws of motion, to which all movable bodies must conform. . . . This, then, is the general signification of law, a rule of action dictated by some superior being: and, in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience. But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of action in general, but of *human* action or conduct: that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and free will, is commanded to make use of those faculties in the general regulation of his behavior." — "As man depends absolutely upon his Maker for everything, it is necessary that he should in all points conform to his Maker's will. This will of his Maker is called the law of nature. For as God, when He created matter, and edued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when He created man, and endued him with free will to conduct himself in all parts of life, He laid down certain immutable laws of human nature, whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws. . . . He has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the Creator Himself in all His dispensations conforms; and which He has enabled human reason to discover, so far as they are necessary for the conduct of human actions."

part of empty formulas, like *suum cuique*, "to each his own," or meaningless tautologies like the categorical imperative, that is, Kant's doctrine that one's acts should be determined only by principles that one wills to be binding on all men. But the formula, "to each his own," does not answer the question as to what is everybody's own, and the categorical imperative does not say which are the principles that one ought to will to be binding on all men. Some writers define justice by the formula "You shall do the right and forbear from doing the wrong." But what is right and what is wrong? This is the decisive question, and this question remains without answer. Almost all the famous formulas defining justice presuppose the expected answer as self-evident. But this answer is not at all self-evident. In fact, the answer to the question as to what is everybody's own, as to what is to be the content of the general principles binding on all men, as to what is right and what is wrong — the answer to all these questions is supposed to be given by positive law. Consequently all these formulas of justice have the effect of justifying any positive legal order. They permit any desired positive legal order to appear just.

When the norms claimed to be the "law of nature" or justice have a definite content, they appear as more or less generalized principles of a definite positive law, principles that, without sufficient reason, are put forth as absolutely valid by being declared as natural or just law.

Among the so-called natural, inborn, sacred rights of man, private property plays an important, if not the most important, role. Nearly all the leading writers of the natural law doctrine affirm that the institution of private property corresponds to the very nature of man. Consequently, a legal order which does not guarantee and protect private property is considered to be against nature and, hence, cannot be of long duration. "The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. If 'Thou shalt not covet,' and 'Thou shalt not steal,' [rules presupposing the institution of private property] were not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free." * It was John Adams who wrote these sentences, expressing thereby a conviction generally accepted at his time. According to this theory, a communistic organization which excludes private property and recognizes only public property, a legal order which reserves ownership of land and other agents of production to the community, especially to the State, is not only against nature and hence unjust, but also practically not maintainable.

* 6 Works of John Adams (1851) 9.

It is, however, hardly possible to prove this doctrine; history shows besides legal orders instituting private property others that recognize private property, if at all, only to a very restricted extent. We know of relatively primitive agricultural societies where the most important thing, the land, is not owned by private persons, but by the community; and the experiences of the last twenty-five years show that a communistic organization is quite possible even within a powerful and highly industrialized State. Whether the system of capitalism based on the principle of private property, or the system of communism, based on the principle of public property, is better, is another question. In any case, private property is historically not the only principle on which a legal order can be based. To declare private property as a natural right because the only one that corresponds to nature is an attempt to absolutize a special principle, which historically at a certain time only and under certain political and economic conditions has become positive law.

It does happen, even if less frequently, that the principles put forth as "natural" or "just" run counter to a definite positive law. Socialism too has been advocated by the specific method of the natural law doctrine and private property has been declared as being directed against nature. By this method one can always maintain and apparently prove opposite postulates. Whether the principles of natural law are presented to approve or disapprove a positive legal order, in either case their validity rests on judgments of value which have no objectivity. A critical analysis always shows that they are only the expression of certain group or class interests. Accordingly, the doctrine of natural law is at times conservative, at times reformatory or revolutionary in character. It either justifies positive law by proclaiming its agreement with the natural, reasonable, or divine order, an agreement asserted but not proved; or it puts in question the validity of positive law by claiming that it is in contradiction to one of the presupposed absolutes. The revolutionary doctrine of natural law, like the conservative, is concerned not with the cognition of positive law, of legal reality, but with its defense or attack, with a political not with a scientific task.*

* Roscoe Pound, An Introduction to the Philosophy of Law (1922) 33f., says: "The conception of natural law as something of which all positive law was but declaratory, as something by which actual rules were to be measured, to which so far as possible they were to be made to conform, by which new rules were to be framed and by which old rules were to be extended or restricted in their application, was a powerful instrument in the hands of the jurists and enabled them to proceed in their task of legal construction with assured confidence." A "powerful instrument" indeed! But this instrument is a mere ideology, or, to use a term more familiar to jurists, a fiction.

3. The Dualism of Positive and Natural Law *

Natural law doctrine is characterized by a fundamental dualism between positive and natural law. Above the imperfect positive law, a perfect — because absolutely just — natural law exists; and positive law is justified only insofar as it corresponds to the natural law. In this respect the dualism between positive law and natural law so characteristic of the natural law doctrine resembles the metaphysical dualism of reality and the Platonic idea. The center of Plato's philosophy is his doctrine of the ideas. According to this doctrine — which has a thoroughly dualistic character — the world is divided into two different spheres: one is the visible world perceptible with our senses, that which we call reality; the other is the invisible world of the ideas. Everything in this visible world has its ideal pattern or archetype in the other, invisible world. The things existing in this visible world are only imperfect copies, shadows, so to speak, of the ideas existing in the invisible world. This dualism between reality and idea, an imperfect world of our senses and another perfect world, inaccessible to the experience of our senses, the dualism between nature and super-nature, the natural and the super-natural, the empirical and the transcendental, the here and the hereafter, this reduplication of the world,† is an element not only of Plato's philosophy; it is a typical element of every metaphysical, or, what amounts to the same thing, religious interpretation of the world. This dualism has an optimistic-conservative or a pessimistic-revolutionary character according to whether it is claimed that there is agreement or contradiction between empirical reality and transcendental ideas. The purpose of this metaphysics is not — as is that of science — rationally to explain reality, but rather emotionally to accept or reject it. And one is free to choose the one or the other interpretation of the relationship between reality and ideas since objective cognition of ideas is not possible in view of the transcendentalism involved in their very definition. If man had complete insight into the world of ideas, he would be able to adapt his world and especially his social world, his behavior, to its ideal pattern; and since man would become perfectly happy if his behavior corresponded to the ideal, he would certainly be-

* Cf. the Appendix.

† In his criticism of Plato's doctrine of ideas, Aristotle (*Metaphysics* 990 b) says: "But as for those who posit the Ideas as causes, firstly, in seeking to grasp the causes of the things around us, they introduced others equal in number to these, as if a man who wanted to count things thought he could not do it while they were few, but tried to count them when he had added to their number. For the Forms are practically equal to or not fewer than the things. . . ."

have in this way. He, and hence his own empirical world, would become entirely good. Hence there would be no empirically real world at all in distinction to a transcendental ideal world. The dualism between this world and another world, as a result of man's imperfection, would disappear. The ideal would be the real. If one could know the absolutely just order, the existence of which is asserted by the doctrine of natural law, positive law would be superfluous, nay, senseless. Faced by the existence of a just ordering of society, intelligible in nature, reason, or divine will, the activity of positive law makers would be tantamount to a foolish effort at artificial illumination in bright sunshine. Were it possible to answer the question of justice as we are able to solve problems of the technique of natural science or medicine, one would as little think of regulating the relations among men by an authoritative measure of coercion as one thinks today of forcibly prescribing by positive law how a steam engine should be built or a specific illness healed. If there were an objectively recognizable justice, there would be no positive law and hence no State; for it would not be necessary to coerce people to be happy. The usual assertion, however, that there is indeed a natural, absolutely good order, but transcendental and hence not intelligible, that there is indeed such a thing as justice, but that it cannot be clearly defined, is in itself, a contradiction. It is, in fact, nothing but a euphemistic paraphrase of the painful fact that justice is an ideal inaccessible to human cognition.

4. Justice and Peace

Justice is an irrational ideal. However indispensable it may be for volition and action of men, it is not subject to cognition. Regarded from the point of view of rational cognition, there are only interests, and hence conflicts of interest. Their solution can be brought about by an order that either satisfies one interest at the expense of the other, or seeks to achieve a compromise between opposing interests. That only one of these two orders is "just" cannot be established by rational cognition. Such cognition can grasp only a positive order evidenced by objectively determinable acts. This order is the positive law. Only this can be an object of science; only this is the object of a pure theory of law, which is a science, not metaphysics, of the law. It presents the law as it is, without defending it by calling it just, or condemning it by terming it unjust. It seeks the real and possible, not the correct law. It is in this sense a radically realistic and empirical theory. It declines to evaluate positive law.

One statement a theory can make, however, on the basis of experience: only a legal order which does not satisfy the interests of one at

the expense of another, but which brings about such a compromise between the opposing interests as to minimize the possible frictions, has expectation of relatively enduring existence. Only such an order will be in a position to secure social peace to its subjects on a relatively permanent basis. And although the ideal of justice in its original sense as developed here is something quite different from the ideal of peace, there exists a definite tendency to identify the two ideals, or at least to substitute the ideal of peace for that of justice.

5. Justice and Legality

This change of meaning of the concept of justice goes hand in hand with the tendency to withdraw the problem of justice from the insecure realm of subjective judgments of value, and to establish it on the secure ground of a given social order. "Justice" in this sense means legality; it is "just" for a general rule to be actually applied in all cases where, according to its content, this rule should be applied. It is "unjust" for it to be applied in one case and not in another similar case. And this seems "unjust" without regard to the value of the general rule itself, the application of which is under consideration. Justice, in the sense of legality, is a quality which relates not to the content of a positive order, but to its application. Justice in this sense is compatible with and required by any positive legal order, be it capitalistic or communistic, democratic or autocratic. "Justice" means the maintenance of a positive order by conscientious application of it. It is justice "under the law." The statement that the behavior of an individual is "just" or "unjust" in the sense of "legal" or "illegal" means that the behavior corresponds or does not correspond to a legal norm which is presupposed as valid by the judging subject because this norm belongs to a positive legal order. Such a statement has logically the same character as a statement by which we subsume a concrete phenomenon under an abstract concept. If the statement that certain behavior corresponds or does not correspond to a legal norm is called a judgment of value, then it is an objective judgment of value which must be clearly distinguished from a subjective judgment of value by which a wish or a feeling of the judging subject is expressed. The statement that particular behavior is legal or illegal is independent of the wishes and feelings of the judging subject; it can be verified in an objective way. Only in the sense of legality can the concept of justice enter into a science of law.*

* Cf. *infra*, pp. 47 ff.

Brian H. Bix: A Dictionary of Legal Theory. Oxford University Press, 2004

legal pluralism The extent to which a single nation or community is subject to entirely separate sets of norms. Sometimes the term is used to apply to situations where, for example, colonial rulers had recognized or incorporated in part local customary law, along with the rules that the colonial powers had brought with them. Other theorists use the term more loosely, to indicate the way that *most* societies are subject to multiple law or law-like orders.

legal positivism Legal positivism asserts (or assumes) that it is both possible and valuable to have a morally neutral descriptive or conceptual theory of law. (Legal positivism is *not* related to Auguste Comte's (1798–1857) sociological positivism or the logical positivism put forward by the Vienna Circle philosophers in the 1920s.)

In one sense, legal positivism is best understood as the belief that positive law is a subject worthy of separate study. ('Positive law' is law that is created by human officials and institutions, as contrasted with 'natural-law' moral principles, which are asserted to be timeless and, according to some natural-law theorists, of divine origin). This contrasts with earlier approaches to law, which focused more on the prescriptive task of arguing what laws should be enacted, rather than on the descriptive or conceptual study of law ('as it is'). In this limited sense of focusing on positive law, or bringing a purely descriptive or conceptual approach to law, legal positivism can probably be traced back to Thomas Hobbes (1588–1679). Some have even nominated Thomas Aquinas (1225–74), the great natural-law theorist, as the originator of the idea that positive law is a subject worthy of separate analysis. However, modern legal positivism is more conventionally traced to the work of Jeremy Bentham (1748–1832) and John Austin (1790–1859). While Bentham may have been the more powerful theorist, the text most consider his best work on legal theory, *Of Laws in General*, completed in 1782, was not published until long after Bentham's death. Therefore, positivism is usually seen as beginning with Austin's *The Province of Jurisprudence Determined* (1832), where he wrote what is sometimes considered the summary of legal positivism: 'The existence of law is one thing; its merit or demerit is another.'

Legal positivism was traditionally contrasted with natural law theory or at least some of the more 'naive' forms of traditional natural law theory that equated legal validity with not being unjust. By

contrast, legal positivism purports to separate the question of whether some norm is 'law' within a particular system, and whether the system as a whole deserves the title 'law', from the question of the merits of that norm or that system.

Varieties of legal positivism

If the dominant strand of English-language legal positivism clearly follows the work of H. L. A. Hart (1907–92) (subdividing into 'inclusive legal positivism' and 'exclusive legal positivism', based on contrary interpretations of law's conceptual separation from morality, as will be discussed below), there remain other strands in legal positivism that deserve mention. Historically, the first strand is the command theory that both Austin and Bentham offered. This approach reduced law to a basic picture of a sovereign (someone others are in a habit of obeying, but who is not in the habit of obeying anyone else) offering a command (an order backed by a threat). Though the command theory (in particular, Austin's version of it) was subjected to a series of serious criticisms by Hart and others, this approach continues to attract adherents. Its potential advantages compared to the mainstream Hartian theories are: (1) it carries the power of a simple model of law (if, like other simple models of human behaviour, it sometimes suffers a stiff cost in distortion); (2) its focus on sanctions, which seems, to some, to properly emphasize the importance of power and coercion to law; and (3) because it does not purport to reflect the perspective of a sympathetic participant in the legal system, it does not risk sliding towards moral endorsement of the law.

The second strand is that of Hart and his followers. Hart's approach (e.g. in *The Concept of Law* (1961)) can be summarized under its two large themes: (1) the focus on social facts and conventions, and (2) the use of a hermeneutic approach, emphasizing the participant's perspective on legal practice. Both themes, and other important aspects of Hart's work, are displayed in the way his theory grew from a critique of its most important predecessor. Hart built his theory in contrast with Austin's command theory, and justified the key points of his theory as improvements on points where Austin's theory had fallen short. Where Austin's theory reduced all of law to commands (by the sovereign), Hart insisted on the variety of law: that legal systems contained both rules that were directed at citizens ('primary rules') and rules that told officials how to identify, modify, or apply the primary rules ('secondary rules'); and legal systems contained both rules that imposed duties and rules that conferred powers—conferring powers not only on officials, but also on

citizens, as with the legal powers conferred in the ability to create legally binding contracts and wills.

Austin's work can be seen as trying to find a 'scientific' approach to the study of law, and this scientific approach included trying to explain law in empirical terms: an empirically observable tendency of some to obey the commands of others, and the ability of those others to impose sanctions for disobedience. Hart criticized Austin's efforts to reduce law to empirical terms of tendencies and predictions, for to show only that part of law that is externally observable is to miss a basic part of legal practice: the acceptance of those legal norms, by officials and citizens, as giving reasons for action. The *attitude* of those who accept the law cannot be captured easily by a more empirical or scientific approach, and the advantage of including that aspect of legal practice is what pushed Hart towards a more 'hermeneutic' approach. The possibility of popular acceptance (whether morally justified or not) is also what distinguishes a legal system from the mere imposition of rules by force by gangsters or tyrants.

The third strand is that of Hans Kelsen (1881–1973), who published much of his work in German, and remains better known and more influential on continental Europe than he is in England and the United States. Kelsen's work has certain external similarities to Hart's theory, but it is built from a distinctly different theoretical foundation: a neo-Kantian derivation, rather than (in Hart's case) the combination of social facts, hermeneutic analysis, and ordinary language philosophy. Kelsen tries to apply something like Kant's Transcendental Argument to law: his work can be best understood as trying to determine what follows from the fact that people sometimes treat the actions and words of other people (legal officials) as valid norms. Kelsen's work can be seen as drawing on the logic of normative thought. Every normative conclusion (e.g. 'one should not drive more than 55 miles per hour' or 'one should not commit adultery') derives from a more general or more basic normative premise. This more basic premise may be in terms of a general proposition (e.g. 'do not harm other human beings needlessly' or 'do not use other human beings merely as means to an end') or it may be in terms of establishing an authority ('do whatever God commands' or 'act according to the rules set down by a majority in Parliament'). Thus, the mere fact that someone asserts or assumes the validity of an individual legal norm ('one cannot drive faster than 55 miles per hour') is implicitly to affirm the validity of the foundational link of this particular normative chain ('one ought to do whatever is authorized by the historically first constitution of this society').

Inclusive v. exclusive positivism

The debate between 'inclusive legal positivism' (also sometimes called 'soft legal positivism' or 'incorporationism') and 'exclusive legal positivism' (also sometimes known as 'hard legal positivism') is a difference in elaborating one detail of legal positivist belief: that there is no *necessary* or 'conceptual' connection between law and morality. Exclusive legal positivism (whose most prominent advocate has been Joseph Raz (1939–)) interprets or elaborates this assertion to mean that moral criteria can be neither sufficient nor necessary conditions for the legal status of a norm. In Raz's terms: exclusive legal positivism states that 'the existence and content of every law is fully determined by social sources'.

The most common argument for exclusive legal positivism is one based on the relationship between law and authority. Legal systems, by their nature (the argument goes) purport to be authoritative, and to be capable of being authoritative legal norms must be ascertainable without recourse to the (moral and other) reasons the norms were meant to resolve. Under this argument (and in Raz's phrasing), those subject to an authority 'can benefit by its decisions only if they can establish their existence and content in ways which do not depend on raising the very same issues which the authority is there to settle' (*Ethics in the Public Domain* (1994)).

Inclusive legal positivism (whose advocates have included Jules Coleman, Wilfrid Waluchow, Philip Soper, and David Lyons) interprets the view differently, arguing that though there is no *necessary* moral content to a legal rule (or a legal system), a particular legal system may, by conventional rule, make moral criteria necessary or sufficient for validity *in that system*. The strongest argument for inclusive legal positivism seems to be its fit with the way both legal officials and legal texts talk about the law. Additionally, the inclusive view allows theorists to accept many of Ronald Dworkin's (1931–) criticisms of legal positivism without abandoning what these same theorists consider the core tenets of legal positivism (its conventional or social facts grounding). It is sometimes convenient to distinguish situations when moral criteria are said to be *necessary* conditions for legal validity (the common situation of moral criteria as part of constitutional judicial review) and when they are said to be *sufficient* conditions for legal validity (the way some commentators view the operation of common-law decision-making, and a possible explanation for the operation of legal principles in other forms of decision-making).

It should be noted, first, that this is more a prediction (under what circumstances a society could and could not survive) than a conceptual analysis. Second, to whatever extent it is a 'concession' to natural law theory, it still leaves substantial room for disagreement with traditional natural law theory. The most evil regimes (whether one thinks of Nazi Germany, Stalin's Soviet Union, or Apartheid South Africa) have all easily met the 'test' of the minimum content of natural law.

See **Hart, H. L. A.; natural law theory**

natural law theory Natural law theory is a mode of thinking systematically about the connections between the cosmic order, morality, and law. This approach has been around, in one form or another, for thousands of years. Different natural law theories can have quite disparate objectives: e.g. offering claims generally about correct action and choice (morality, moral theory); offering claims about how one comes to correct moral knowledge (epistemology, moral meta-theory); and offering claims about the proper understanding of law and legal institutions (legal theory). Additionally, natural law has played a central role in the development of modern political theory (regarding the role and limits of government and regarding natural rights) and international law.

Important aspects of the natural law approach can be found in Plato (*c.*429–347 BC), Aristotle (384–322 BC), and Cicero (106–43 BC); it was given systematic form by Thomas Aquinas (1224–74). Early natural law thinking can also be seen as deriving in part from the *ius gentium* ('law of [all] peoples') of ancient Roman Law (mentioned by Gaius, *Institutes* 1.1) which was thought to derive from general principles of reason, and thus be legitimately applicable to dealings of Romans with foreigners (though Gaius distinguishes *ius gentium* from 'natural law', *ius naturale* (*Institutes* 2.65)).

In the medieval period and through the Renaissance, with the work of writers such as Francisco Suárez (1548–1617), Hugo Grotius (1583–1645), Samuel Pufendorf (1632–94), John Locke (1632–1704), and Jean-Jacques Rousseau (1712–78), natural law and natural rights theories were integral parts of theological, moral, legal, and political thought. The role natural law has played in broader religious, moral, and political debates has varied considerably. Sometimes it has been identified with a particular established religion, or more generally with the status quo, while at other times it has been used as a support by those advocating radical change. Similarly, at times those writing in the natural law tradition have seemed most concerned with the

individual-based question, how is one to live a good ('moral', 'virtuous') life?; at other times, the concern has been broader—social or international: what norms can we find under which we can all get along, given our different values and ideas about the good?

Some of the modern legal theorists who identify themselves with the natural law tradition seem to have objectives and approaches distinctly different from those classically associated with natural law, most of whom were basically moral or political theorists, asking: How does one act morally? or, more specifically, What are one's moral obligations *as* a citizen within a state, or as a state official? and, what are the limits of legitimate (that is, moral) governmental action? By contrast, some modern theorists working within the tradition are social or legal theorists, narrowly understood. Their primary dispute is with other approaches to explaining or understanding society and law. In fact, much of modern natural law theory has developed in reaction to legal positivism, an alternative approach to theorizing about law. The two different types of natural law—natural law as moral/political theory and natural law as legal/social theory—can be seen as connected at a basic level: as both exemplifying a view of (civil) law not merely as governing, but also as being governed.

Many of the modern legal theorists identified (or self-identified) as 'natural law theorists' are working within the tradition established by the work of Aquinas (the most prominent example may be John Finnis (1940–)). However, there are also theorists identified to varying degrees with 'natural law' who offer quite different approaches: e.g. the 'procedural natural law' theory of Lon Fuller (1902–78) and the 'interpretive theory' of Ronald Dworkin (1931–).

See **Aquinas, Thomas; Aristotle; Cicero; Fuller, Lon L.; Grotius, Hugo; Hart, H. L. A.; human nature; legal positivism; *lex iniusta non est lex*; Locke, John; natural law, minimum content of; Pufendorf, Samuel; Radbruch, Gustav; Stammler, Rudolf; Suárez, Francisco; teleology; voluntarism**

naturalism Within philosophy, naturalism is a school of thought under which even traditionally metaphysical topics and issues are approached in the manner of the natural sciences. For example, W. V. O. Quine (1908–2000) advocated a naturalized approach to epistemology ('Two Dogmas of Empiricism', *Philosophical Review* (1951)). Within legal philosophy, some theorists, most prominently Brian Leiter (1963–), have argued that jurisprudence should stop approaching such questions as 'What is law?' with the tools of conceptual analysis, but should rather use empirical inquiries.