I

The Problem of Legal Positivism

1. The Basic Positions

The central problem in the debate surrounding the concept of law is the relationship of law and morality. Notwithstanding a discussion that reaches back more than two millennia,[1] there remain two basic, competing positions—the positivistic and the non-positivistic.

All positivistic theories defend the *separation thesis*, which says that the concept of law is to be defined such that no moral elements are included. The separation thesis presupposes that there is no conceptually necessary connection between law and morality, between what the law commands and what justice requires, or between the law as it is and the law as it ought to be. The great legal positivist Hans Kelsen captured this in the statement, 'Thus, the content of the law can be anything whatsoever.'[2]

In the positivistic concept of law, then, there are only two defining elements: that of issuance in accordance with the system, or authoritative issuance,[3] and that of social efficacy.

[1] A single example: To this day, where a 'law' is understood to be legally valid, different answers are still given to the question Alcibiades puts to Pericles in Xenophon's portrayal. 'Then if a despot, being the ruling power in the state, enacts what the citizens are to do, is this, too, a law?' Xenophon, *Memorabilia*, bk. I, ch. 2, paras. 40–6, 44, trans. Amy L. Bonnette (Ithaca, NY: Cornell University Press, 1994), 13–14, 13 (trans. altered).

[2] Kelsen, *PTL* § 34(c) (p. 198) (trans. altered); see also Kelsen, *LT* § 28 (at p. 56).

[3] The expressions 'issuance in accordance with the system' ('*ordnungsgemäße Gesetztheit*') and 'authoritative issuance' ('*autoritative Gesetztheit*') can but need not be used synonymously. They are used synonymously when they refer in the same way to norms that establish the competence to issue norms, that is, when they specify who is empowered to issue norms and in what way one is so empowered. In specifying the criteria for issuance in

The numerous variations of legal positivism[4] stem from different interpretations and assessments of these two defining elements.[5] Common to all of the variations is the notion that what law is depends solely on what has been issued and/or is efficacious. Correctness of content—however achieved—counts for nothing.

By contrast to the positivistic theories, all non-positivistic theories defend the *connection thesis*, which says that the concept of law is to be defined such that moral elements are included. No serious non-positivist is thereby excluding from the concept of law either the element of authoritative issuance or the element of social efficacy. Rather, what distinguishes the non-positivist from the positivist is the view that the concept of law is to be defined such that, alongside these fact-oriented properties, moral elements are also included. Here, too, very different interpretations and assessments are possible.

accordance with the system, then, these norms establish norm-issuing authority. Given this premiss, what is issued in accordance with the system is authoritatively issued, and vice versa. The two expressions are not used synonymously when 'issuance in accordance with the system' refers solely to competence norms, while 'authoritative issuance' refers solely or also to the actual power to issue norms. It suffices here simply to point out these variations in meaning. Since the power factor as an aspect of effectiveness can be classified under social efficacy, the two expressions for issuance will be used synonymously in what follows. (The original text of this footnote has been modified by the author.)

[4] See Walter Ott, *Der Rechtspositivismus*, 2nd edn. (Berlin: Duncker & Humblot, 1992), at 32–116.

[5] See Ralf Dreier, 'Der Begriff des Rechts', in Dreier, *Recht—Staat—Vernunft* (Frankfurt: Suhrkamp, 1991), 95–119, at 96.

2. *The Practical Significance of the Debate*

The debate surrounding the concept of law is a debate about what law is. Every jurist has a more or less clear idea here that is expressed in his or her work in the law. The concept of law underlying the jurist's endeavour is generally presupposed as self-evident, and even where it is less obvious, indulging in conceptual speculation on the law is regarded as a waste of time in the usual run of cases. Unusual, non-standard cases are a different matter, forcing the underlying concept of law to the fore as a pressing problem. The point is illustrated with the help of two decisions of the Federal Constitutional Court of Germany.

A. Statutory Injustice

The first example, a decision of 1968 on citizenship, concerns the problem of statutory injustice. Section 2 of the Eleventh Ordinance (hereafter 'Ordinance II'), 25 November 1941, issued pursuant to the Statute on Reich Citizenship of 15 September 1935,[6] stripped emigrant Jews of German citizenship on grounds of race. The Federal Constitutional Court was to decide whether, according to this directive, a Jewish lawyer had forfeited German citizenship by emigrating to Amsterdam shortly before the outbreak of the Second World War. He had been deported from Amsterdam in 1942, and since it was not known what had become of him,

[6] See respectively *RGBl* I (1941), at 722, and *RGBl* I (1935), at 1146.

he was presumed dead, ruling out the possibility of a restoration of German citizenship in accordance with art. 116, para. 2, of the post-war Basic Law[7] or Constitution of the Federal Republic of Germany.

The Federal Constitutional Court reached the conclusion that the lawyer never lost his German citizenship because Ordinance 11, pursuant to the Statute on Reich Citizenship, was null and void, that is, invalid from the outset. The Court argues as follows:

> Law and justice are not left to the discretion of the lawmaker. The idea that a 'constitutional framer can arrange everything as he pleases would mean reverting to a mental posture of value-free statutory positivism that has long since been obsolete in legal science and practice. Precisely the period of the National Socialist regime in Germany has taught that lawlessness [*Unrecht*] can issue even from the lawmaker.'[8] Therefore, the Federal Constitutional Court has affirmed the possibility of revoking the legal validity of National Socialist 'legal' provisions when they conflict with fundamental principles of justice so evidently that the judge who elected to apply them or to acknowledge their legal consequences would be administering lawlessness [*Unrecht*] rather than law.[9]
>
> Ordinance 11 violated these fundamental principles. Its conflict with justice reached such an intolerable degree that the Ordinance must be held to be null and void, that is, invalid from the outset.[10] Moreover, the Ordinance did not become efficacious in virtue of having been observed over a number of years or because some persons subject to 'denaturalization' had at the time come to terms or even concurred with National Socialist measures in particular cases. Duly enacted lawlessness that is obviously in violation of the constituting basic principles of the law does not become law in virtue of having been applied and obeyed.[11]

This is a classic non-positivistic argument. An authoritatively issued norm, socially efficacious from the time of issuance, is denied validity or—the decision is ambiguous here—legal character because it violates suprastatutory law.

One can ask whether this argument was altogether necessary in the decision on citizenship. The Court could have sought to substantiate its finding solely with the argument that *present* recognition of the legal efficacy of this deprivation of citizenship violates both the general equality provision of art. 3, para. 1, of the Basic Law[12] as well as the prohibitions of discrimination found in art. 3, para. 3.[13] This possible tack does diminish the weight but not the general significance accorded the non-positivistic argument in the citizenship case decided here. Not in every case involving evaluation of the legal consequences of a rogue regime (*Unrechtsregime*) are there comparable constitutional safeguards. Moreover, there are cases that turn on whether or not a norm was null and void, that is, invalid from the outset, a finding that cannot stem from a later constitution. One thinks, for example, of authoritatively issued and socially efficacious norms of a rogue regime that command or permit persecution measures contrary to human rights.[14] The question of whether persons who acted in accordance with these norms can be punished after the downfall of the rogue regime depends largely—where no retroactive statute is enacted—on whether or not these norms were null and void, that is, invalid from the outset.

[7] *GG* art. 116, para. 2: 'Former German citizens who, between 30 January 1933 and 8 May 1945, were deprived of their citizenship on political, racial, or religious grounds, and their descendants, shall be regranted German citizenship on application. They shall be considered as not having been deprived of their German citizenship if they established their domicile (*Wohnsitz*) in Germany after 8 May 1945 and have not expressed a contrary intention' (trans. altered).

[8] *BVerfGE* 3 (1954), 225, at 232 (citation in the Court's opinion).

[9] ibid. 58, at 119; ibid. 6 (1957), 132, at 198 (citation in the Court's opinion).

[10] See *BGH*, in *RzW* (1962), 563; *BGHZ* 9 (1953), 33, at 44; ibid. 10 (1953), 340, at 342; ibid. 16 (1955), 350, at 354; ibid. 26 (1958), 91, at 93 (citation in the Court's opinion).

[11] *BVerfGE* 23 (1968), 98, at 106.

[12] *GG* art. 3, para. 1: 'All persons are equal before the law.'

[13] *GG* art. 3, para. 3: 'No one may be disadvantaged or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions.'

[14] *BGHSt* 2 (1952), 173, at 174–7.

B. Judicial Development of the Law

The second example, a decision of 1973 on judicial development of the law, concerns the permissibility of law development by judges that is contrary to the literal reading of a statute—the permissibility, in other words, of a *contra legem*[15] decision. According to section 253 of the German Civil Code, monetary compensation for non-material harm is precluded except in the narrowly defined cases provided by statute. The Federal Supreme Court has not adhered to this regulation, having granted, since 1958, monetary compensation in a great many cases involving major violations of the right to personal privacy. The case at issue concerned a weekly magazine that had published a completely fabricated interview about private matters that Princess Soraya, the ex-wife of the last Shah of Iran, sought to have protected. The Federal Supreme Court awarded Princess Soraya damages in the amount of 15,000 German marks, at odds with the literal reading of section 253 of the Civil Code, permitting *solatium*, or damages for non-material harm, 'only in those cases specified by statute'. The case of Princess Soraya clearly was not one of these cases. The Federal Constitutional Court upheld the decision of the Federal Supreme Court. A pivotal part of its argument runs as follows:

> The traditional view that the judge is bound by the statute—a significant component of the principle of the separation of powers and thereby of the *Rechtsstaat* or rule of law—has been modified at least in its formulation in the Basic Law to read that the judiciary is bound by 'statute and law' ['*Gesetz und Recht*'].[16] The received opinion is that with this formulation, a narrow statutory positivism is being rejected. The wording supports the sense that statute and law do in fact generally coincide, but not necessarily and always. The law is not identical with the totality of written statutes.

[15] Literally 'contrary to law'.

[16] *GG* art. 20, para. 3 (citation in the Court's opinion): 'Legislation is subject to the constitutional order; the executive and the judiciary are bound by statute and law' (trans. altered).

> As against the express directives of state authorities, there can be in some circumstances a greater law that has its source in the constitutional legal system as a totality of meaning and that may function as a corrective vis-à-vis the written statute; to discover this law and to put it into practice in decisions is the task of the judiciary.[17]

The decision of the Federal Constitutional Court is controversial. The charge against the Court is that civil courts were not themselves permitted to decide on a restriction of the text of section 253 of the Civil Code; rather, in accordance with concrete judicial review as provided by art. 100, para. 1, of the Basic Law,[18] they would have had to request a decision of the Federal Constitutional Court as to whether section 253 conforms to the constitution.[19] The merits of this objection turn,

[17] *BVerfGE* 34 (1973), 269, 286–7. While the Federal Constitutional Court, in later decisions, has on several occasions exercised greater caution in commenting on judicial law development *contra legem* or contrary to the literal reading of the statute, it has maintained the fundamental permissibility of such development; see *BVerfGE* 35 (1974), 263, at 278–80; ibid. 37 (1975), 67, at 81; ibid. 38 (1975), 386, at 396–7; ibid. 49 (1979), 304, at 318–22; ibid. 65 (1984), 182, at 190–5; ibid. 71 (1986), 354, at 362–3; ibid. 82 (1991), 6, at 11–15.

[18] *GG* art. 100, para. 1: 'If a court considers that a statute on whose validity the court's decision depends is unconstitutional, the proceedings shall be stayed, and a decision shall be obtained from the *Land* court with jurisdiction over constitutional disputes when the constitution of a *Land* is held to be violated, or from the Federal Constitutional Court when this Basic Law is held to be violated. This shall also apply when the Basic Law is held to be violated by *Land* law or where a *Land* statute is held to be incompatible with a federal statute.'

[19] See Hans-Joachim Koch and Helmut Rüßmann, *Juristische Begründungslehre* (Munich: C. H. Beck, 1982), at 255; see also Friedrich Müller, '*Richterrecht*' (Berlin: Duncker & Humblot, 1986), at 69–70. § 253 *BGB* is pre-constitutional law. According to the opinions of the Federal Constitutional Court, § 253 *BGB*, as pre-constitutional law, can be subjected to concrete judicial review as provided by art. 100, para. 1, of the Basic Law only if the federal legislator has 'incorporated it into his legislative policy', *BVerfGE* 64 (1984), 217, at 220. Where that is not the case, the civil courts would have been able to hold § 253 *BGB* unconstitutional in part for violating *GG* art. 2, para. 1, in connection with *GG* art. 1, para. 1. The obstacle presented by the literal reading of § 253 *BGB* would then have been eliminated for these courts.

first, on whether or not the non-positivistic interpretation of the clause 'statute and law' in art. 20, para. 3, of the Basic Law is correct and, second, on the question of how, if that interpretation is correct, the relation between art. 20, para. 3, and art. 100, para. 1, of the Basic Law is to be defined. Only the first of these is of interest here. The significance of the statement, 'The law is not identical with the totality of written statutes', is preserved even if one holds that, because of the procedure provided in the German legal system by art. 100, para. 1, of the Basic Law, *contra legem* decisions are generally impermissible. The problem of the *contra legem* decision arises in every legal system, although not every legal system has a procedure for concrete judicial review like that provided by art. 100, para. 1, of the Basic Law. What is more important still, far beyond the realm of *contra legem* decisions, is that this statement has significance in every doubtful case. A doubtful case is, say, when the statute to be applied is indeterminate and the rules of legal method do not lead definitively to precisely one result. Whoever identifies the law with the written statute, that is, whoever endorses the thesis of statutory positivism,[20] must say that in doubtful cases the decision is determined by extra-legal factors. The position of the non-positivist is altogether different. For the non-positivist, who does not identify the law with the statute, the decision can be determined by the law even if it is not definitively prescribed by the statute. To be sure, differing views of what law is need not lead to different results—but they can.

[20] Only one variation of legal positivism, namely, statutory positivism, is under consideration here. The argument can easily be extended, however, to other species of positivism.

II

The Concept of Law

1. *Central Elements*

The question is this: Which concept of law is correct or adequate? An answer to the question turns on the relation of three elements to one another—authoritative *issuance*, social *efficacy*, and *correctness* of content. Altogether different concepts of law emerge according to how the relative significance of these elements is assessed. Attaching no significance whatsoever to authoritative issuance and social efficacy, focusing exclusively on correctness of content, one arrives at a concept of law purely reflective of natural law or the law of reason. One arrives at a purely positivistic concept of law by ruling out correctness of content altogether and staking everything on authoritative issuance and/or social efficacy. Between these extremes, many intermediate forms are possible.

The tripartite division indicates that positivism has two defining elements. A positivist must exclude the element of correctness of content, but then can define in many different ways the relation between the elements of authoritative issuance and social efficacy, giving rise to numerous variations of legal positivism. I look first at the differing versions and then criticize positivistic concepts of law as inadequate.

2. *Positivistic Concepts of Law*

Not only is it possible to combine the elements of social efficacy and authoritative issuance in different ways, it is possible to interpret them very differently, too. Because of this, the variety of positivistic concepts of law is wellnigh unlimited. These can be divided into two main groups: concepts of law that are primarily oriented toward efficacy and those that are primarily oriented toward issuance. The qualifier 'primarily' should make it clear that, as a rule, a given orientation represents simply the main focus, meaning that the other element is not being altogether excluded.

A. Primarily Oriented toward Efficacy

Definitions of law that are oriented toward efficacy are usually found in the realm of sociological and realist legal theories. What distinguishes one definition from another is whether the focus is on the external or the internal aspect of a norm or a system of norms. Here too, in most cases, the distinction reflects relative significance, not a strict dichotomy. And, in addition, there are frequently combinations of external and internal aspects.[21]

(i) External Aspect

The external aspect of a norm consists in the regularity of compliance with the norm and/or the imposition of a sanction

[21] An example of a combination of the external with the internal aspect is found in Alf Ross, *Of Law and Justice*, trans. Margaret Dutton (London: Stevens & Sons, 1974), at 73–4.

for non-compliance. What counts is observable behaviour, even that requiring interpretation, and the main thrust of sociological definitions of law focuses there. Examples are the definitions of Max Weber and Theodor Geiger. Weber writes:

> A system is to be called . . . *law* if it is externally guaranteed by the possibility of (physical or psychic) *coercion* through action aimed at enforcing compliance or punishing violation, the action of a *staff* of persons *expressly* geared to this task.[22]

Geiger's definition reads:

> What law is, that is, the content that it seems to me practical to characterize with the word 'law', has already been explained in great detail: the social system of a centrally organized, broadly inclusive community, provided this system is based on a sanction-apparatus implemented monopolistically by particular organs.[23]

Efficacy-oriented concepts of law that focus on the external aspect are also found in legal philosophy, especially in pragmatic instrumentalism or legal realism. A famous example is the predictive definition of Oliver Wendell Holmes:

> The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.[24]

[22] Max Weber, *Law in Economy and Society*, trans. Max Rheinstein, in Weber, *Economy and Society* (1st pub. 1922), ed. Guenther Roth and Claus Wittich (Berkeley and Los Angeles: University of California Press, 1978), pt. I, ch. 1, sect. 6 (p. 34) (emphasis in original) (trans. altered). In its details, Max Weber's sociological concept of law is far more complex than the quotation would suggest. Here, however, as with the other examples of definitions, we are concerned simply with the basic idea. For a more detailed account of Weber's concept of law, see Fritz Loos, *Zur Wert- und Rechtslehre Max Webers* (Tübingen: J. C. B. Mohr, 1970), at 93–112.

[23] Theodor Geiger, *Vorstudien zu einer Soziologie des Rechts* (1st pub. 1947), 4th edn., ed. Manfred Rehbinder (Berlin: Duncker & Humblot, 1987), 297.

[24] Oliver Wendell Holmes, 'The Path of the Law', *Harvard Law Review*, 10 (1896–7), 457–78, at 461, repr. in Holmes, *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920), 167–202, at 173. See Robert S. Summers, *Instrumentalism and American Legal Theory* (Ithaca, NY: Cornell University Press, 1982), at 116–35.

Definitions of this kind are addressed primarily to the perspective of the lawyer.

(ii) Internal Aspect

The internal aspect of a norm consists in the motivation—however generated—for compliance with the norm and/or for application of the norm. What counts are psychic dispositions, and one example of a definition with that focus is Ernst Rudolf Bierling's, where the concept of recognition plays a central role:

> Law in the juridical sense is generally everything that human beings who live together in some community or another mutually recognize as norm and rule of their life together.[25]

Niklas Luhmann provides another variant of a legal definition in which an essential role is played by the internal aspect, here in the form of a normative expectation of behaviour:

> We can now define law as structure of a social system, a structure based on the congruent generalization of normative expectations of behaviour.[26]

B. Primarily Oriented toward Issuance

Concepts of law that are oriented toward issuance are usually found in analytical legal theory, that is, in that branch of legal theory where the first concern is the logical or conceptual analysis of the jurist's participation in the law. While it is the observer's perspective that is dominant in concepts of law oriented toward efficacy, it is the participant's perspective—in particular, the judge's—that is foremost in concepts of law oriented toward issuance.

[25] Bierling, Ernst Rudolf, *Juristische Prinzipienlehre*, vol. 1 (Freiburg i. Br. and Leipzig: J. C. B. Mohr, 1894, repr. Aalen: Scientia, 1979), 19.

[26] Niklas Luhmann, *A Sociological Theory of Law*, trans. Elizabeth King and Martin Albrow (London: Routledge & Kegan Paul, 1985), 82 (emphasis omitted) (trans. altered).

A classic example of a concept of law oriented toward issuance is found in the work of John Austin. According to Austin, the law is composed of commands:

> Every law or rule . . . is a command.[27]

A command is defined as being armed with a sanction:

> A command is distinguished from other significations of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded.[28]

Not every command, but, rather, only the command of a politically superior authority is law:

> Of the laws or rules set by men to men, some are established by political superiors, sovereign and subject: by persons exercising supreme and subordinate government, in independent nations, or independent political societies . . . To the aggregate of the rules thus established, or to some aggregate forming a portion of that aggregate, the term law, as used simply and strictly, is exclusively applied.[29]

Summarizing, one can say that Austin defines the law as the totality of a sovereign's commands armed with sanctions. While a stronger orientation toward issuance is scarcely possible, elements of efficacy also play a not unimportant role in Austin's theory. Thus, in defining the sovereign as someone who is customarily obeyed, Austin combines the element of issuance with the element of efficacy:

> If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society . . .[30]

[27] Austin, *Province* 13; Austin, *Lectures* vol. 1, 88 (emphasis omitted).

[28] Austin, *Province* 14; Austin, *Lectures* vol. 1, 89.

[29] Austin, *Province* 11; Austin, *Lectures* vol. 1, 86–7 (emphasis omitted).

[30] Austin, *Province* 194; Austin, *Lectures* vol. 1, 221 (emphasis omitted).

The most significant twentieth-century representatives of issuance-oriented legal positivism are Hans Kelsen and H. L. A. Hart. Kelsen defines the law as a 'normative coercive order'[31] whose validity rests on a presupposed basic norm

> according to which one ought to comply with a constitution actually issued and by and large efficacious, and therefore ought also to comply with norms actually issued in accordance with this constitution and themselves by and large efficacious.[32]

The status of Kelsen's basic norm will be considered below.[33] Here it suffices to note that the basic norm is an altogether content-neutral norm that is only imagined or thought, a norm, according to Kelsen, that must be presupposed if one's aim is to interpret a coercive system as a legal system. What is of significance here is simply that Kelsen's definition, while it is indeed primarily oriented toward issuance, also includes the element of efficacy:

> In the basic norm, issuance and efficacy are made a condition for validity—efficacy in the sense that it must be added to issuance so that the legal system as a whole, as well as an individual legal norm, not forfeit its validity.[34]

According to Hart, the law is a system of rules that are identified by appeal to a rule of recognition.[35] While the function of Hart's rule of recognition corresponds to that of Kelsen's basic norm, its status is altogether different, something to which I return below.[36] Its existence is a social fact:

> [T]he rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.[37]

[31] See Kelsen, *PTL*, at § 6(c) (pp. 44–50).
[32] See ibid. § 34(g) (at p. 212) (trans. altered).
[33] See below, this text, at 96–116.
[34] Kelsen, *PTL* § 34(g) (at p. 212) (trans. altered).
[35] (This sentence of the original text has been modified by the author.)
[36] See below, this text, at 121–3.
[37] Hart, *CL* 107, 2nd edn. 110.

Hart formulates a pivotal point of the rule of recognition for the English legal system: '[W]hat the Queen in Parliament enacts is law.'[38]

[38] Hart, *CL* 104, 2nd edn. 107.

3. *Critique of Positivistic Concepts of Law*

This brief look at positivistic concepts of law shows that very different positions are represented within the field known as legal positivism. The only thing common to all of them is the thesis of the separation of law and morality. If the positivistic separation thesis were certainly correct, analysis of the concept of law could be completely confined to the questions of what the best interpretation is of the elements of efficacy and issuance and how the relation between the two elements is best understood. The Federal Constitutional Court decisions sketched above, however, show that the separation thesis can at least be regarded as less than obvious. So the question becomes whether a positivistic concept of law as such is adequate in the first place, and that depends on whether it is the separation thesis or the connection thesis that is correct.

A. Separation Thesis and Connection Thesis

The separation thesis and the connection thesis tell us how the concept of law is to be defined. They formulate the result of a line of reasoning without giving voice to the arguments behind it. The supporting arguments can be divided into two groups: analytical and normative.[39]

[39] One might think of a third group of arguments, namely, empirical arguments. On closer inspection, however, one sees that, where the concept of law is being defined in terms of either the separation thesis or the connection thesis, empirical arguments become components of analytical or normative arguments. It is an empirical thesis that a legal system that protects neither the life nor the liberty nor the property of any legal subject has no prospect of long-term validity. But the protection of life, liberty, and property is also a moral requirement. Thus it can be said that the satisfaction of certain minimum moral requirements is factually necessary for the long-term validity of a legal system. The empirical argument leads to precisely this point and no further. The bridge to the concept of law is inserted into an analytical argument that says that, for conceptual reasons, only systems having long-term validity are legal systems. By contrast, there is an insertion into a normative argument when, for example, the empirical thesis that certain goals like survival can be attained only if the law has a certain content, coupled with the normative premiss that this goal ought to be attained, is adduced as an argument for a certain definition of law.

The most important *analytical* argument for the positivistic separation thesis is that there is no conceptually necessary connection between law and morality. Every positivist must defend this thesis, for if it is granted that a conceptually necessary connection between law and morality does exist, then it can no longer be said that the definition of law is to exclude moral elements. By contrast, the non-positivist is free in arguing at the analytical level. He can either claim a conceptually necessary connection or not. If he succeeds in spelling out a conceptually necessary connection, he has settled the debate in his favour. If he fails in spelling out or does not claim a conceptually necessary connection, he has not yet lost the debate. He can appeal to normative arguments in attempting to support his thesis that the definition of the concept of law is to incorporate moral elements.

It is a *normative* argument that supports the separation thesis or the connection thesis when it is stated that, to attain a certain goal or to comply with a certain norm, it is necessary to exclude or to include moral elements in the concept of law. A separation or a connection justified in this way may be called 'normatively necessary'.[40] It is a normative argument, for example, when it is stated that only the separation thesis

[40] Normative necessity is strictly to be distinguished from conceptual necessity. That something is normatively necessary means nothing other than that it is commanded. One can, without contradicting oneself, challenge the validity of a command but not the existence of a conceptual necessity. It is clear that only in a broader sense, then, is normative necessity a necessity.

leads to linguistic and conceptual clarity or guarantees legal certainty, or when it is established that the problems of statutory injustice can best be resolved with the help of the connection thesis.

In recent debates about the concept of law, the prevailing view has been that the expression 'law' is so ambiguous, so vague, that nothing in the debate about legal positivism can be settled by means of conceptual analysis,[41] that what is at stake here is simply 'a normative determination, a definitional postulate'.[42] This kind of concept formation can, by definition, only be justified by normative arguments or considerations of expediency, a thesis presupposing the thesis that a connection between law and morality is neither conceptually impossible nor conceptually necessary. The first part of this presupposed thesis is correct, that is, the claim that a connection between law and morality is not conceptually impossible. In some contexts there is no contradiction in a sentence like: 'The norm *N* is authoritatively issued and socially efficacious but not law, for it violates fundamental principles.' Such a sentence would have to be contradictory, however, if a connection between law and morality were conceptually impossible. The second part of the thesis, on the other hand, is doubtful—that is, the claim that there is no conceptually necessary connection between law and morality. Indeed, in what follows, just such a connection will be shown to exist. And if this showing is successful, then the prevailing view is incorrect, the view, namely, that the debate surrounding the concept of law turns exclusively on an expediential decision that can only be justified by normative arguments. I do not mean to suggest that in the discussion on the concept of law, normative considerations have no role to play. The conceptual argument will prove to be limited both in range and in force; and beyond that range, as well as to strengthen the conceptual argument, normative arguments are necessary.

[41] See Ott, *Der Rechtspositivismus* (n. 4 above), at 142–53.
[42] Hoerster, *VR* 2481.

The thesis runs: first, there is a conceptually necessary connection between law and morality, and, second, there are normative arguments for including moral elements in the concept of law, arguments that in part strengthen and in part go beyond the conceptually necessary connection. In short, there are conceptually necessary as well as normatively necessary connections between law and morality.

B. A Conceptual Framework

The thesis that there are conceptually necessary as well as normatively necessary connections between law and morality will be substantiated within a conceptual framework consisting of five distinctions.[43]

(i) Concepts of Law Omitting Validity and Embracing Validity

The first distinction is between concepts of law that *omit* validity and those that *embrace* validity. The former is a concept of law that does not include the concept of validity, the latter, a concept of law that does.[44] It is easy to see that there is occasion for making this distinction. One can say without contradiction, '*N* is a legal norm, but *N* is not (is no longer, is not yet) valid.' And, imagining an ideal legal system, one can remark without contradiction, 'This legal system will never be valid.' Conversely, in appealing to valid law, one need not speak of validity; one can simply say, 'This is required by law.' Thus, both are clearly possible: a concept of law that includes the concept of validity, as well as a concept of law that does not include the concept of validity.

[43] See Robert Alexy, 'On Necessary Relations between Law and Morality', *Ratio Juris*, 2 (1989), 167–83.
[44] See Hermann Kantorowicz, *The Definition of Law*, ed. A. H. Campbell, with an introduction by A. L. Goodhart (Cambridge: Cambridge University Press, 1958), at 16–20.

For the discussion of positivism, it is well to select a concept of law that includes the concept of validity. What can be avoided thereby is trivializing the problem by first ignoring the dimension of validity and defining the law as a class of norms, say, for external behaviour,[45] in order to argue, then, that because it is possible to imagine the content of norms for external behaviour being anything whatsoever, there can be no conceptually necessary connection between law and morality. Incorporating into the concept of law the concept of validity means including in the concept of law the institutional context of lawmaking, law application, and law enforcement, a context that can be of significance on the question of a conceptually necessary connection between law and morality.

(ii) Legal Systems as Systems of Norms and as Systems of Procedures

The second distinction is between the legal system as a system of norms and the legal system as a system of procedures.[46] As a system of *procedures*, the legal system is a system of processes or actions based on and governed by rules, actions by means of which norms are issued, justified, interpreted, applied, and enforced. As a system of *norms*, the legal system is a system of results or products of norm-creating procedures, whatever the origin or character of these procedures. One can say that to regard the legal system as a system of

[45] See Ralf Dreier, 'Neues Naturrecht oder Rechtspositivismus?' *Rechtstheorie*, 18 (1987), 368–85, at 374–5.

[46] On the legal system as a system of procedures, see Robert Alexy, 'Die Idee einer prozeduralen Theorie der juristischen Argumentation', in *MEA* 177–88, at 185–8, repr. in Alexy, *Recht, Vernunft, Diskurs. Studien zur Rechtsphilosophie* (Frankfurt: Suhrkamp, 1995), 94–108, at 104–8. Lon L. Fuller's distinction between 'the purposive effort that goes into the making of law and the law that in fact emerges from that effort', Fuller, *The Morality of Law*, rev. edn. (New Haven: Yale University Press, 1969), 193, may well approach the distinction between norm and procedure introduced here.

norms is to refer to its external side, whereas to regard it as a system of procedures is to refer to its internal side.

(iii) Observer's and Participant's Perspectives

The third distinction is between the observer's perspective and the participant's perspective. This dichotomy is ambiguous, and the interpretation here is as follows. The *participant's perspective* is adopted by one who, within a legal system, participates in disputation about what is commanded, forbidden, and permitted in this legal system and to what end this legal system confers power. At the centre of the participant's perspective stands the judge. When other participants—say, legal scholars, attorneys, or interested citizens—adduce arguments for or against certain contents of the legal system, they refer in the end to how a judge would have to decide if he wanted to decide correctly. The *observer's perspective* is adopted by one who asks not what the correct decision is in a certain legal system, but, rather, how decisions are actually made in a certain legal system. An example of this kind of observer is Norbert Hoerster's white American, who, wanting to travel with his African-American wife in South Africa, where apartheid laws prevailed at the time, reflected on legal particulars of his trip.[47]

The distinction between the participant's perspective and the observer's perspective is related to H. L. A. Hart's distinction between internal and external points of view.[48] Correspondence in every respect, however, is out of the question, if for no other reason than the ambiguity of Hart's distinction.[49] Therefore, this proviso: Whenever I speak of an internal and an external standpoint without further elucidation, I mean precisely what I have defined above as the participant's perspective and the observer's perspective.

[47] Hoerster, *VR* 2481.

[48] Hart, *CL* 86–7, 2nd edn. 88–90.

[49] See Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978), at 275–92.

III

The Validity of Law

1. *Concepts of Validity*

Corresponding to the three elements of the concept of law—the elements of social efficacy, correctness of content, and authoritative issuance—are three concepts of validity: the sociological, the ethical, and the juridical.

A. The Sociological Concept of Validity

The subject-matter of the sociological concept of validity is social validity. A norm is valid *socially* if it is complied with or a sanction is imposed for non-compliance. This definition allows for numerous interpretations. One reason it does is that the concepts employed in the definition—the concepts of compliance and the imposition of a sanction for non-compliance—are ambiguous. This is especially true of the concept of compliance with a norm. One may ask, say, whether it is sufficient for compliance with a norm that behaviour conform externally to the norm, or whether compliance with a norm presupposes certain knowledge and motives on the part of the complying person. If one focuses on the latter, one faces the question of what knowledge and which motives must be present before one can speak of compliance with a norm. The second reason the definition of social validity allows for numerous interpretations is that a norm may be complied with to varying degrees, and the imposition of a sanction for non-compliance may also vary in degree. The result is that the social efficacy of a norm and thereby its social validity is a matter of degree. A norm with a high degree of efficacy is complied with in, say, 80 per cent of the

situations in which it is applicable, and a sanction is imposed in, say, 95 per cent of the cases of non-compliance. By contrast, the degree of efficacy is very low for a norm that is complied with in, say, merely 5 per cent of the situations in which it is applicable, and where a sanction is imposed in, say, merely 3 per cent of the cases of non-compliance. Between these extremes, however, the matter is less clear. Consider two norms, a norm at an 85 per cent level of compliance, but where a sanction is imposed in merely 1 per cent of the cases of non-compliance, and a norm at a mere 20 per cent level of compliance, but where a sanction is imposed in 98 per cent of the cases of non-compliance. The question of which of these two norms has a higher degree of social efficacy cannot be answered on the basis of the percentages alone. Any answer presupposes a determination, within the framework of the concept of social validity, of the relative significance of, on the one hand, compliance and, on the other, the imposition of a sanction for non-compliance.

The problems of social validity are thoroughly discussed in the field of legal sociology,[144] where empirical questions raised in the research into effectiveness[145] require a more precise statement. For our purposes here, three insights suffice. The first is that social validity is a matter of degree. The second is that social validity is recognizable with the help of two criteria: that of compliance and that of the imposition of a sanction for non-compliance. The third insight is that the imposition of a sanction for non-compliance with legal norms includes the exercise of physical coercion, which, in developed legal systems, is a task reserved to the state.[146]

[144] See Hubert Rottleuthner, *Rechtstheorie und Rechtssoziologie* (Freiburg and Munich: Karl Alber, 1981), at 91–115; Klaus F. Röhl, *Rechtssoziologie* (Cologne *et al.*: Carl Heymann, 1987), at 243–51.

[145] See Hubert Rottleuthner, *Einführung in die Rechtssoziologie* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1987), at 54–77.

[146] See above, this text, at 14–15.

B. The Ethical Concept of Validity

The subject-matter of the ethical concept of validity is moral validity. A norm is valid *morally* if it is morally justified. An ethical concept of validity underlies the theories of natural law and the law of reason. The validity of a norm of natural law or a norm of the law of reason rests neither on its social efficacy nor on its authoritative issuance, but, rather, solely on the correctness of its content, to be demonstrated by moral justification.

C. The Juridical Concept of Validity

The sociological and the ethical concepts of validity are pure in the sense that they need not necessarily include elements of the other concepts of validity. It is different for the juridical concept of validity. Its subject-matter is legal validity. If a norm or a system of norms is not socially valid at all, that is, fails to manifest the slightest social efficacy, then this norm or system of norms cannot be legally valid either. The concept of legal validity necessarily includes, then, elements of social validity. If it includes only elements of social validity, it is a positivistic concept of legal validity, whereas if it also comprises elements of moral validity, it is a non-positivistic concept of legal validity.

The fact that a fully developed concept of legal validity qua positivistic concept includes elements of social validity and qua non-positivistic concept includes elements of both social and moral validity does not preclude the formation of a *concept of legal validity in a narrower sense*. Such a concept refers exclusively to specific characteristics of legal validity and is, then, a concept in contrast to the concepts of social and moral validity. Such a concept of legal validity is reflected in the statement that a norm is *legally* valid if it has been issued in the duly prescribed way by a duly authorized organ and does not violate higher-ranking law, in short, if it is authoritatively issued.

The juridical concept of validity poses two problems, an internal and an external problem. The internal problem is that the definition of legal validity seems to be circular in that it presupposes legal validity at the outset. How else should one say what a 'duly authorized organ' is or what the issuance of a norm 'in the duly prescribed way' amounts to? This internal problem leads to the problem of the basic norm. The external problem lies in determining how the juridical concept of validity is related to both of the other concepts of validity. The relation to the ethical concept of validity has been discussed above in the context of legal positivism, the relation to the sociological concept of validity is still outstanding. The external problem will be aired here first, in the course of which, for systematic reasons, the relation of the juridical concept of validity to the ethical concept of validity will be taken up once again.

2. *Collisions of Validity*

Extreme cases enable one to see what is scarcely visible in ordinary situations. For concepts of validity, the extreme cases are collisions of validity. The collision of legal and social validity will be our first concern.

A. Legal and Social Validity

It has been shown above that what applies to a system of norms need not necessarily apply to an individual norm. Systems of norms alone, then, will be considered first.

(i) Systems of Norms

A condition for the legal validity of a system of norms is that the norms belonging to the system be *by and large* socially efficacious, that is, socially valid.[147] Only developed legal systems will be considered here. The legal validity of the norms of a developed legal system rests on a written or unwritten constitution that states the conditions under which a norm belongs to the legal system and therefore is legally valid. 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 system 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

[147] See Kelsen, *PTL* § 34(g) (at pp. 212–13).

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.

The question of the validity of a system of norms as a whole is posed with greatest clarity where two incompatible systems of norms compete. This situation may arise, say, in the case of a revolution, a civil war, or a secession. It is easy to say what is valid following the victory of one party or the other. Then, the system of norms that has prevailed against the other system is valid, for its prevailing means that it is now the only system of norms that is by and large socially efficacious. It is not so easy to say what is valid during the competition between the systems of norms, that is, during the political struggle. There are three possibilities. The first is that neither of the two systems of norms is valid as a system of norms, because neither is by and large socially efficacious. The second possibility is that the system of norms victorious in the end is already valid, although no one knows yet which system this will be. The third possibililty is that the old system of norms, although it is no longer by and large efficacious, is valid until the new system of norms has prevailed, that is, is by and large socially efficacious. A theory of the changing from one legal system to another is charged with the study of these possibilities as well as of numerous intermediate forms.

According to Hoerster, a characteristic of the concept of law is that a system of norms is a legal system, or is legally valid, only if it 'prevails in the event of open conflict with other normative coercive systems in the society'.[148] This criterion may be called the 'dominance criterion'. The dominance criterion, because it is contained in the criterion that a system of norms be by and large socially efficacious, adds nothing to that criterion. A system of norms that fails to prevail against other normative coercive systems is not by and large socially efficacious.

[148] Hoerster, *LR* 184.

(ii) Individual Norms

An authoritatively issued norm of a legal system that is by and large socially efficacious does not forfeit its legal validity simply because it is frequently not complied with and a sanction is only rarely imposed for non-compliance. Unlike legal systems, individual norms need not be by and large socially efficacious as a condition for legal validity. It is easy to see the reason for this difference. One may say of an individual norm that it is valid because it belongs to a legal system that is by and large socially efficacious. To say the same thing of a legal system, which could belong to no other legal system than itself, makes no sense.

There is, nevertheless, for individual norms, too, a relation between legal and social validity that can have consequences for legal validity in the event of a collision between the two. A condition for the legal validity of an individual norm is not, to be sure, that the norm be by and large socially efficacious, but, rather, that the norm exhibit a *minimum social efficacy or prospect of social efficacy*. Corresponding to this is the phenomenon of derogation through customary law (*desuetudo*), which consists in the forfeiture of the legal validity of a norm owing to a decline in the efficacy of the norm to a level below the minimum. Like the standard requiring that legal systems be by and large socially efficacious, this minimum for individual norms cannot in general—that is, apart from the case of complete inefficacy—be stipulated exactly. Thus, there can be cases where it is highly uncertain whether or not a norm has forfeited its legal validity owing to a derogation through customary law.

B. Legal and Moral Validity

The collision between legal and moral validity has been covered above in the context of the critique of positivistic concepts of law.[149] The sole concern here, then, is to compare

[149] See above, this text, at 20–81.

the results of that enquiry with the resolution of the collision between legal and social validity.

(i) Systems of Norms

A system of norms that neither explicitly nor implicitly lays claim to correctness is not a legal system and therefore cannot be legally valid. This has few practical consequences, for actually existing legal systems regularly lay claim to correctness, however feebly justified the claim may be.

Practically speaking, significant problems first turn up where the claim to correctness is indeed made, but remains unsatisfied to such a degree that the system of norms is classified an unjust or a lawless system (*Unrechtssystem*). The issue then is the application of the argument from injustice to a system of norms as a whole. It appears on first glance that a usable formula might correspond to the one used in resolving the collision between legal and social validity, that is, to say here that a system of norms forfeits its legal validity if it is by and large unjust in the extreme. The discussion of the extension and the collapse theses has shown, however, that this solution is out of the question.[150] Application of the argument from injustice is limited to individual norms. Only when, owing to the argument from injustice, legal character is denied to so many individual norms that there is no longer a minimum complement of norms, the minimum necessary for the existence of a legal system, only then does the system cease to exist as a legal system. That is not, however, a consequence of applying the argument from injustice to the legal system as a whole, but a consequence of the consequences of applying the argument from injustice to individual norms. As for legal systems, there is an asymmetry between the relation of legal and social validity and the relation of legal and moral validity in that the legal validity of a legal system as a whole depends more on social validity than on moral validity. A legal system

[150] See above, this text, at 62–8.

that is not by and large socially efficacious collapses as a legal system. By contrast, a legal system may continue to exist as a legal system although it is by and large not morally justifiable. It collapses only when legal character and thereby legal validity is denied to so many individual norms because of extreme injustice that there is no longer a minimum complement of norms, the minimum necessary for the existence of a legal system.

An adequate concept of law turns on the relation of three elements to one another—authoritative issuance, social efficacy, and correctness of content.[151] It is now clear that authoritative issuance must be joined by social efficacy and correctness of content not in a general, equally weighted relation but, rather, in an ordered, hierarchical relation.

(ii) Individual Norms

Individual norms forfeit their legal character and thereby their legal validity if they are unjust in the extreme. In its structure, this criterion corresponds to the formula that an individual norm forfeits its legal validity if it fails to exhibit a minimum social efficacy or prospect of social efficacy.[152] Both statements focus on a limiting case. Instead of saying that an individual norm must exhibit a minimum social efficacy or prospect of social efficacy, one could say that the norm may not be extremely inefficacious socially or have a very slight prospect of social efficacy. Conversely, the formula that a norm forfeits legal validity if it is unjust in the extreme could be replaced with the formula that a condition for the legal validity of an individual norm is that the norm exhibit a minimum moral justifiability.[153] The latter admittedly invites misinterpretation. Even if a norm is simply unjust but not in the extreme, it still lacks a minimum moral justifiability, for an unjust norm as such cannot be justified and therefore

[151] See above, this text, at 13.
[152] See above, this text, at 91.
[153] See Ralf Dreier, 'Recht und Moral', in *RMI* 180–216, at 198.

cannot be justified to a marginal extent either. Nevertheless, a norm that is simply unjust can be legally valid. According to the formula focused on a minimum, however, this presupposes that the norm exhibit a minimum moral justifiability. The contradiction here can be resolved by applying the concept of a minimum moral justifiability not to individual norms as such, but to their legal validity. Because there are moral advantages to the existence of a legal system, the legal validity of a norm belonging to the system can exhibit a minimum moral justifiability even if the norm by itself, being unjust, does not do this. Thus, when the formula that focuses on a minimum is applied to moral justifiability, it presupposes complicated deliberations, giving the advantage to the straightforward criterion of extreme injustice.

The conclusion, then, is that the respective roles of social and moral validity within the framework of the concept of legal validity are structurally the same in terms of individual norms. In both, the focus is on a limiting case alone, giving expression to the fact that authoritative issuance within the framework of a socially efficacious legal system is the dominant criterion for the validity of individual norms. This conclusion is borne out every day in the work of the jurist.

3. Basic Norm

A concept of legal validity that leaves out the elements of social efficacy and correctness of content was classified above as a concept of legal validity in a narrower sense. It was noted that this concept poses two problems. Alongside an external problem that lies in determining how the concept of legal validity is related to social and moral validity, there is an internal problem, too.[154] The internal problem is the circularity of the definition of legal validity, which says that a norm is legally valid if it has been issued in the duly prescribed way by a duly authorized organ and does not violate higher-ranking law, in short, if it is authoritatively issued. The concepts of the duly authorized organ, issuance of a norm in the duly prescribed way, and higher-ranking law, however, all presuppose at the outset the concept of legal validity. They can only mean: an organ authorized on the basis of legally valid norms, issuance of a norm in a legally regulated way, and legally valid higher-ranking law. Otherwise this would not be about the concept of legal validity in a narrower sense.

The basic norm is the most significant instrument for resolving the circularity of the concept of legal validity in a narrower sense. Notwithstanding a great variety of possibilities for differentiation, three kinds of basic norm can be distinguished: analytical, normative, and empirical. The most important variant of the analytical basic norm is found in Hans Kelsen's legal theory, of the normative basic norm, in Kant's theory, and of the empirical basic norm, in H. L. A. Hart's theory.

[154] See above, this text, at 88.