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Validity and the Conflict between Legal Positivism and Natural Law*

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About a year ago I had the honour of delivering at the University of Buenos Aires several lectures on the conflict between legal positivism and natural law. This conflict is often treated as the most fundamental issue in legal philosophy, dividing the field into two hostile and irreconcilable camps. Positivists characterize natural law doctrines as beliefs based on metaphysical or religious ideas incompatible with the principles of scientific thought. Proponents of natural law theory, for their part, accuse their antagonists of failing to understand the realm of spirit and value, a realm that is real enough, although it cannot be discovered or described by means of sensory experience.[1] Natural lawyers have even gone so far as to accuse the positivists of moral torpidity, and of complicity in the abominations of the Hitler regime.[2]

I in no way intended in my lectures to minimize the importance of the issue. I tried, however, to point out that to some extent the discussion has been confused owing to a lack of clarity as to the meaning of 'legal positivism', a term rarely if ever defined with precision. I especially tried to show that the most acute aspect of the controversy—namely, criticism of the attitude reflected in the German slogan, '*Gesetz ist Gesetz*' ('a law is a law'), as an attitude lacking in morality and partially responsible for the

* *Editors' note*: This paper first appeared in a bilingual printing in *Revista Jurídica de Buenos Aires* (1961), no. 4, pp. 46–93. Minor changes in the English have been made by the editors.

[1] See Giorgio Del Vecchio, 'Divine Justice and Human Justice', *The Juridical Review*, 1 (N.S.) (1956), 147–57, at 148.

[2] See Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', *Süddeutsche Juristenzeitung*, 1 (1946), 105–8, repr. in Radbruch, *Rechtsphilosophie*, 8th edn., ed. Erik Wolf and Hans-Peter Schneider (Stuttgart: K.F. Koehler, 1973), 339–51, and repr. in Radbruch, *Gesamtausgabe*, 20 vols. projected, ed. Arthur Kaufmann, vol. III: *Rechtsphilosophie III*, ed. Winfried Hassemer (Heidelberg: C.F. Müller, 1990), 83–93, 282–91 (editorial notes); Lon L. Fuller, 'Positivism and Fidelity to Law', *Harvard Law Review*, 71 (1957–8), 630–72, at 648–61.

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Hitler regime—has nothing to do with legal positivism rightly understood. Rather, it is in reality a controversy between two divergent schools of natural law.

In this paper, I want to take up once again the same line of enquiry, elaborating on it in a way impossible in oral presentation. My observations will be concerned in particular with the meaning and the function of the concept of validity in the theory of law.

I. WHAT IS MEANT BY 'LEGAL POSITIVISM'?

The term 'legal positivism', although frequently used, has never acquired any generally accepted meaning. It is most often used loosely, without any definite connotation at all. If the term is to designate a view that contrasts with natural law philosophy, it must be taken to mean not a specific doctrine but a broad, general approach to the problems of legal philosophy and jurisprudence. Correspondingly, the opposing term 'natural law' must also be understood broadly, as designating a general point of view or attitude.

Considering how the term 'positivism' is used in general philosophy, it seems to me reasonable to take the term 'legal positivism' in a broad sense to mean an attitude or approach to the problems of legal philosophy and jurisprudence, an approach based on the principles of an empiricist, antimetaphysical philosophy. By contrast, the term 'natural law' is taken in a broad sense to designate an attitude or approach to the problems of legal philosophy and jurisprudence, an approach based on the belief that the law cannot be exhaustively described or understood in terms of empiricist principles, but requires metaphysical interpretation, that is, interpretation in light of principles and ideas inherent in the rational or divine nature of man, *a priori* principles and ideas transcending the world of the senses.

The vague term 'empiricist principles' may, of course, be interpreted in various ways. I understand empiricist principles as leading to two fundamental theses that constitute for me the kernel of legal positivism.

First, the thesis that the belief in natural law is erroneous: No such law exists, all law is positive law. This is of course a thesis that pertains to the general field of moral philosophy or ethics, for it denies that ethical (moral, legal) principles or judgments are the expression of truths to be discovered and established objectively by some process of cognition. Ethics (or morality in a broad sense) is usually divided into two parts by the proponents of cognitive theories: morality in a narrower sense, and natural law. Morality, it is commonly assumed, is concerned with the ultimate ethical destiny and end of man, whereas natural law deals with

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the principles and norms that must govern the life of man in civil society (the state) to make possible the realization of his moral destiny.[3] Ethical principles are, then, either principles of morality or principles of natural law. The positivist's denial of the existence of natural law is implicit in the more general doctrine denying the existence of any ethical cognition at all: There is no natural law, just as there is no natural morality.

The second fundamental thesis of legal positivism is a doctrine pertaining to the theory or methodology of legal science. It asserts the possibility of establishing the existence and describing the content of the law of a certain country at a certain time in purely factual, empirical terms based on the observation and interpretation of social facts (human behaviour and attitudes). And it asserts, especially, that there is no use in appealing to ideas or principles taken over from natural law or natural morality.[4] This applies in particular to the idea of validity. In so far as the term 'validity' is taken to mean that the law possesses an inherent moral force ('binding force'), so that subjects are constrained by appeal to morality, to conscience, as well as by the threat of sanctions, then validity has no meaning or function in the doctrine of law. Validity, in this interpretation, is an *a priori* idea not reducible to empirical terms determined by observable facts.[5] If, now, legal science—and by this I understand the activity directed toward describing the law that is actually in force in a certain country at a certain time—is to be understood as an empirical science, there can be no place in it for any concept of this kind.

When one goes from one country to another, it is easy to observe changes in topography and climate, and no one would doubt that these facts can be described without it being necessary to transcend empiricist principles. In the case of a country's law, although the facts are more complicated, and more difficult to grasp and describe, the situation is the same. It is a fact, easy to observe, that Switzerland is mountainous whereas Denmark is flat. It is no less a fact that according to Danish law, women have the right to vote for members of Parliament, whereas this is not so in the Swiss Federation. It may, however, be rather difficult to indicate exactly *what* facts we refer to when we state the existence of a legal rule. This may be ultimately explained in various ways by means of distinct positivist doctrines. What is common to them as positivist theories is the conviction that to state the existence of a legal rule as belonging to

[3] See e.g. Alfred Verdross, *Abendländische Rechtsphilosophie*, 1st edn. (Vienna: Springer, 1958), at 248.

[4] H.L.A. Hart takes legal positivism to mean 'the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.' Hart, *CL* 181–2, 2nd edn. 185–6. This, I believe, comes rather close to my second thesis.

[5] Frede Castberg, *Problems of Legal Philosophy*, 2nd Eng. edn. (Oslo: Oslo UP, and London: George Allen & Unwin, 1957).

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the law of a certain country at a certain time is to state a set of observable social facts.

The postulate contained in this second thesis of legal positivism has the same meaning as the Austinian battle cry, 'The existence of the law is one thing; its merit or demerit another.' This means, exactly, that the law is a fact, and that a fact is and remains a fact whether you happen to like it or not, and whether you consider it in harmony or conflict with natural law principles whose truth is presupposed. It is highly misleading, however, when this doctrine is characterized—as it often is—as a doctrine of the separation of law and morality. It is obvious that legal and moral facts are interrelated in various ways.[6] Moral ideas are, without a doubt, one of the causal factors influencing the evolution of law, and the law, for its part, influences in turn prevailing moral ideas and attitudes. It is also well known that moral evaluations are not infrequently incorporated into the law by way of so-called legal standards. There is no reason for a positivist to deny this mutual dependence or any other possible relationship between the law and morality (positive morality, moral facts). If this had always been understood, a great deal of irrelevant criticism and discussion would have been avoided.

We would also have been spared other questionable discussions if it had been recognized that a legal positivist cannot be held responsible for every view propounded in the name of positivism, just as a natural lawyer cannot answer for every doctrine advanced as a doctrine of natural law. For my part, I want especially to dissociate myself from a set of doctrines derived from a too elementary conception of the social facts constituting a legal system. I am referring to the Austinian interpretation of law as commands emanating from a powerful will that, in case of disobedience, enforces them by exercising physical force. And I am referring in particular to various doctrines derived from this model of law, namely, the imperative theory, the theory of a force 'behind' the law, and the mechanical theory of the judicial process.

This last theory especially, denying that law has sources other than legislation (and custom) and describing the judge's activity in logico-mechanical terms that leave no room for intelligent discretion or for the exercise of social or moral evaluations, has often been attacked as a positivist dogma.[7] Such a theory, however, does not derive from empiricist premisses. If it is nevertheless considered to be a positivist doctrine, this is either a misunderstanding, or a manifestation of an ambiguity in the

[6] See Hart, *CL*, at 198–9, 2nd edn. at 202–4.

[7] 'If we ignore the specific theories of law associated with the positivistic philosophy, I believe we can say that the dominant tone of positivism is set by fear of a purposive interpretation of law and legal institutions, or at least by a fear that such an interpretation may be pushed too far.' Fuller (n.2 above), 669.

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notion of positivism. A narrow theory of the sources of law, and a theory of judicial interpretation that adheres to the words used, to 'logical' deductions and conceptual constructions, might be called 'positivist' where the term refers to 'what has been expressed in definite phrases, established in arbitrary decisions', but not where it refers to 'what is based on experience and the observation of facts.' It is perfectly possible to welcome an evolution toward a theory of more intelligent, value-directed judicial interpretation, without joining the clamor for a return to natural law. 'Away from formalism' is by no means identical with 'back to natural law'.[8]

II. WHAT IS MEANT BY 'NATURAL LAW'?

It is, I believe, less difficult to explain what is meant by 'natural law'. From the days of Aristotle and on up to our own time, we find an unbroken tradition of natural law theories, as well as great variations, of course, in the theoretical foundation and practical tenor of this philosophy. Sometimes natural law theory has been based on theological concepts, at other times, on rationality. The 'nature' from which universal principles are derived has been the nature of the cosmos, or of God, or of society and history, but most often it has been the nature of man as a rational being. Thus, we can distinguish a theological, a sociological, a historical, and a rational, anthropocentric natural law. From a politico-practical point of view, natural law theories have been just as conservative as they have been evolutionary or revolutionary. In the province of political philosophy, all political systems, from extreme absolutism to direct democracy, have been justified by natural law philosophers.

Despite manifold divergencies, there is one idea common to all natural law schools of thought: The belief that there exist universally valid principles governing the life of man in society, principles that have not been created by man but are discovered, *true* principles, binding on everyone, including those who are unable or unwilling to recognize their existence.[9] The truth of these laws cannot be established by the methods of empirical science, but presupposes a metaphysical interpretation of

[8] See Alf Ross, *A Textbook of International Law* (London: Longmans, Green, 1947), at 95; Roberto Ago, 'Positive Law and International Law', *American Journal of International Law*, 51 (1957), 691–733, at 728.

[9] 'On the affirmative side, I discern, and share, one central aim common to all the schools of natural law, that of discovering those principles of social order which will enable men to attain a satisfactory life in common. It is an acceptance of the possibility of "discovery" in the moral realm that seems to me to distinguish all the theories of natural law from opposing views.' Lon L. Fuller, 'A Rejoinder to Professor Nagel', *Natural Law Forum*, 3 (1958), 83–104, at 84.

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the nature of man.[10] For this reason, the *validity* of these laws and the *obligations* deriving from them do not imply anything observable. The validity of the laws stemming from natural law has nothing to do with their acceptance or recognition in the minds of men, and the obligations they create have nothing to do with any sense of being duty-bound, any sanction of conscience, or any other experience. The unconditional validity of the laws, and the non-psychological character of the obligations, are simple consequences of the point of departure, namely, that these laws are discovered, objectively given, a reality, although not the reality of sensory observation. While the process of cognition whereby these laws are discovered and stated is different from the empirical process, the outcome is the same: knowledge, insight, truth. The 'universal' validity of these laws means the same as the universality of true, logical, or empirical statements, namely, that they are independent of varying subjective conditions.

As mentioned above, 'natural law' is considered to be the part of general ethics that deals with the principles governing the life of man in organized society with his fellows, making it possible for him to attain his moral destiny.

III. WHAT IS THE EXTENT OF THE CLASH BETWEEN LEGAL POSITIVISM AND NATURAL LAW?

That natural law and what I have called the *first* thesis of legal positivism are antagonists is obvious, for this thesis specifically denies the existence of any natural law at all. It ought to be noted, however, that the conflict takes place not within the field of *legal* philosophy, but within the general field of ethics or *moral* philosophy. Natural law is only a part of ethics, and the positivist denial of the existence of natural law is based on the general denial of any ethical cognition whatsoever. Although everyone has a right to present an opinion on this issue, as on anything else, I believe it must be admitted that a serious discussion is possible only among those sufficiently acquainted with the modern philosophical debate on the logical status and the truth-value of moral judgments.[11]

The interesting problem is whether or not there is a conflict between natural law doctrines and the *second* positivist thesis, asserting that a legal system is a social fact that can be described in purely empirical

[10] See e.g. Del Vecchio (n.1 above), at 148–9.

[11] The question of the possibility of moral cognition is the theme of my book *Kritik der sogenannten praktischen Erkenntnis* [Critique of So-Called Practical Cognition], trans. Hans Winkler and Gunnar Leistikow (Copenhagen: Levin & Munksgaard, and Leipzig: Felix Meiner, 1933). See also my article 'On the Logical Nature of Propositions of Value', *Theoria*, 11 (1945), 172–210.

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terms. It is commonly assumed that such a conflict exists. I shall try to show that this is not so or, at any rate, that the divergencies of opinion reflect nothing more than a question of classification and terminology.

To be sure, natural law is usually presented in a way that is apt to evoke the impression of a serious conflict with empiricist postulates. It is usually said that the principles of natural law, especially the idea of justice, are necessarily implied in the concept of law. This means that no system can be recognized as a legal system unless it embodies, at least to some degree, these principles. A system that is in no way inspired by the ideas of justice, that makes no attempt, however inadequate, to carry out the principles of natural law, is not a legal system but a system of brute force, a gangster regime. A gangster may succeed in establishing a regime of terror, and you may find yourself forced to obey his orders, but a regime of terror, since it is not based on justice, lacks *validity* or *binding force*. A legal system, on the contrary, is invested with validity or binding force precisely because it is based on the idea of justice.

This is the current tenor of natural law theory. It seems clearly to contradict the positivist position, in that it appeals to natural law, and to the *a priori* notion of validity as inherent in the concept of law, a notion that is fundamental to the description of a legal system.

Now let us examine more closely the 'validity' or 'binding force' that is said to characterize the idea of a legal system. 'Binding force', it is said, means that you are duty-bound to obey the law. What kind of duty is meant here?

It seems obvious that the duty to obey the law cannot mean, here, a legal duty or obligation in the same sense in which these terms are used to describe the legal situation arising in certain circumstances governed by a legal norm—for example, the obligation of the debtor to pay a contracted debt. An obligation in this technical sense means that the debtor runs the risk that legal sanctions will be carried out against him. For the act of 'not obeying the law', however, there is and can be no sanction different from the sanction for not paying the debt.

I can put it another way. A duty is always a duty to behave in a certain way. In this case, the required behaviour is 'to obey the law'. How do we obey the law? By fulfilling our legal obligations—for example, by paying our debts. It follows that the obligation to obey the law does not prescribe any behaviour that is not already prescribed by the law itself. And it follows in turn that if the duty to obey the prescriptions of a legal system is to mean something different from the obligation prescribed directly by this system, then the difference cannot consist in the *required behaviour*—*what* we are bound to do—but must consist exclusively in *how* we are bound. The meaning of the binding force inherent in a legal system is that the legal obligations corresponding to the rules of the system—for

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example, the obligation to pay a debt—are not merely legal duties deriving from the threat of legal sanctions. They are also *moral duties* in the *a priori* sense of true moral obligations deriving from the natural law principles that endow the legal system with its validity or binding force. The duty to obey the law is a moral duty *toward* the legal system, not a legal duty *conforming* to the system. The duty toward the system cannot derive from this system itself, but must follow from rules or principles that are outside the system.[12]

This means that validity or binding force is not really a quality inherent in the legal system, but is derived from principles of natural law. To assert that a legal system possesses validity or binding force is not to say anything about legal obligations or facts, but is to express our moral obligations. Such a statement belongs to a lecture on moral philosophy, and has nothing to do with describing the legal system.

I submit that there is no reason a natural law philosopher should not admit the positivist thesis and recognize that a legal system is a social fact to be described in purely empirical terms without reference to the concept of validity. The natural lawyer is concerned with the question of whether a certain factual system also binds people morally (in conscience, if they have sufficient understanding of what true morality requires). But before one can answer this question, one must know *that* a certain factual system exists and *what* its content is. Thus, the question of validity necessarily presupposes the positivist thesis, namely, that the existence of a certain legal system can be established, and its content described, independently of the ideas of morality or natural law.

The only issue that might separate natural lawyers from legal positivists is one of classification and terminology: Should a factual system in complete discordance with the principles of justice—for example, the Nazi regime under Hitler—be classified as a *legal* system? Or should this term be reserved for those systems that are, to some extent at any rate, based on the principles of natural law?[13]

The importance of this issue should not be overestimated. If a natural lawyer wants to reserve the term 'law' for a system having some moral value, it is because he wants to emphasize terminologically the moral difference between different systems.[14] And if a positivist prefers to classify as a legal system any factual system, whatever its moral value, that has

[12] See e.g. Johannes Messner, *Das Naturrecht*, 4th edn. (Innsbruck: Tyrolia, 1960), at 355–6.

[13] See Ross, *LJ*, at 31–2.

[14] Lon L. Fuller requires 'a definition of law that will make meaningful the obligation of fidelity to law.' Fuller (n.2 above), 635. The positivist's rejoinder is that it is preferable to define law in non-moral terms, and to understand that the moral idea of fidelity to law is not absolute, but contingent on the moral quality of the positive law.

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the same structure as a typical legal system, it is because he wants to emphasize, also terminologically, the factual, structural similarity between diverse systems, whatever their moral qualifications. A system like the Nazi regime can be described using the same concepts and the same technique as those used to describe typical legal systems.

Personally, I prefer a conceptual criterion based on scientific convenience and not on moral considerations, just as I find it reasonable to include black swans under the zoological concept of swan, although some might think black swans lack aesthetic value. If everyone nevertheless clearly understands the terminological character of the issue, there is no reason to take the discrepancy in opinion seriously.

Summing up, I maintain that a natural law philosopher as such has no reason to deny that law is a social fact describable in purely empirical terms. As a natural law philosopher, he is concerned with a branch of moral philosophy. When speaking about the *validity* of a certain factual system, he is concerned especially with the question of whether or not there is a *moral* duty to comply with the rules of this system. Before this question can be answered, he must know what the rules of the system are, that is to say, he must have a description of it as observable fact. The natural law philosopher has no reason to deny that social facts, like other facts, are the object of empirical cognition obtained by means of empirical methods. It is of no great importance whether or not the expression 'legal system' is used to designate a factual system whose norms are conceived in a spirit repugnant to the ideas of justice and humanity, as long as its structure is similar to that of well-established legal systems.

IV. QUASI-POSITIVISM AS A TYPE OF NATURAL LAW

It is satisfying to note that the view defended in the preceding section has been accepted by some contemporary natural law philosophers trained in general philosophy. One example is Professor Alfred Verdross. In his book *Western Legal Philosophy*, he writes:

> The defender of natural law cannot deny the possibility of the existence of norms that, although clashing with natural law, are actually efficacious and for this reason suitable as an object of scientific investigation. The defender of natural law is even obligated to seek cognition of all positive law as such, because he will not be able to evaluate efficacious norms until he has established their existence and ascertained their scope and content—for evaluation presupposes prior cognition of the object of evaluation.[15]

[15] Verdross (n.3 above), 254 (my translation) [trans. altered].

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With these words, Verdross accepts the second positivist thesis. And when he recognizes further that it might be reasonable to reserve the term 'law' for systems of positive norms[16] (meaning that 'natural law' is not 'law'), he has fully accepted the positivist doctrine that all law is positive law. But he remains an ardent defender of natural law.[17]

On the other hand, we find in Verdross a misunderstanding arising from the ambiguity of the word 'positivism'. Because this misunderstanding is so common and has consequences for evaluating in terms of morality the true positivist attitude, it should be considered in some detail.

Verdross distinguishes between what he calls *dogmatic* (or *extreme*) and *hypothetical* (or *moderate*) legal positivism.[18] The first term is applied to the school of thought that denies the existence of specific ethical cognition, and so, in particular, denies the existence of a natural law composed of ethical principles that can be discovered and established by human reason. The second term designates the attitude that leaves open the question of the existence of natural law, and confines itself to asserting that the answer to this question is of no importance for legal science. The subject-matter of this legal science is efficacious normative systems whose existence can be established and whose scope and content defined without appeal to natural law principles.

The reader can easily see that the kind of positivism I define and defend in this article and in previous writings must undoubtedly be classified as 'dogmatic' or 'extreme' according to Verdross. This is why I feel called upon to object passionately to Verdross's mistaken interpretation of the positivist position.

In the view of dogmatic legal positivism, says Verdross, positive law possesses absolute validity or binding force. This means that the dogmatic positivist uncritically recognizes and accepts the moral authority of any established system as such. Verdross stamps this attitude '*Kadavergehorsam*' (stupid, blind obedience), and draws the conclusion that no adherent of dogmatic legal positivism can, without contradicting himself, take a firm stand against any political system, no matter how abominable.[19]

[16] Verdross (n.3 above), 252, quoting Pope Pius XII in support.

[17] Johannes Messner, too, the Roman Catholic author of the most modern and comprehensive exposition of natural law philosophy, recognizes the independence of positive law as the subject-matter of a legal science based on purely empiricist principles of cognition. Legal science, according to Messner, belongs to the empirical sciences, whose subject-matter is the reality given in external experience. The subject-matter of legal science is the determination of the factual rules of reciprocal human relations. Messner (n.12 above), 370.

[18] Verdross (n.3 above), 251–2.

[19] Ibid. 246, 252, 254.

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The reasoning behind this line of thought is obvious. When the positivist denies that the validity of positive law derives from natural law, he must acknowledge that validity is inherent in the positive law as such, that is to say, it is unconditional, absolute.

This is a grave mistake. The consequence of denying natural law is to deny that positive law possesses validity in the same sense in which this term is used by natural law, where 'validity' designates a true moral claim on obedience, a claim that is independent of any recognition from subjects. Such a claim can only be based on ethical principles. The term has no meaning whatsoever for a doctrine that denies all ethical truths. It has no place in the positivist's vocabulary. For him, evaluating a political regime in terms of morality is a question of personally and subjectively accepting values and standards.

I would be pleased if my friend and colleague were to recognize that it is perfectly possible, without any self-contradiction, to deny the objectivity of values and morals, and, at the same time, to be a decent person and a reliable companion in the struggle against a regime of terror, corruption, and inhumanity. The belief that moral judgments are not true (or false), that they are not the outcome of a cognitive process or an insight comparable to logical or empirical cognition, is in no way incompatible with such judgments emanating from solid moral attitudes. The positivist position is concerned not with morality but with the logic of moral discourse, not with ethics but with meta-ethics.[20]

One thing is true, however, and should be emphasized in an effort to explain the misunderstanding. A number of writers usually considered to be 'positivists' have held the view described by Verdross, namely, that the established system has, as such, a claim on obedience. Verdross cites Bergbohm, the well-known representative[21] of a whole school of 'positivist' jurists who, while denying natural law, still cling to the idea that positive law possesses 'validity', derived now from the authority of the state.

This attitude, however, has nothing to do with empiricism (true positivism). It is itself a doctrine of 'validity', a moral philosophy marked by the derivation of validity not from abstract principles inherent in human reason, but from historical evolution and from established institutions.[22]

As far as I can see, this kind of moral philosophy has several roots. One, I think, reaches back to the teachings of Martin Luther, who gave new

[20] No moral judgment or principle can be deduced from the meta-ethical proposition that moral judgments are neither true nor false. See Alf Ross, *Why Democracy?* (Cambridge, Mass.: Harvard UP, 1952), at 94.

[21] See Karl Bergbohm, *Jurisprudenz und Rechtsphilosophie* (Leipzig: Duncker & Humblot, 1892, repr. Glashütten im Taunus: D. Auvermann, 1973).

[22] See Ross, *Kritik* (n.11 above), at ch. 12; Ross, *LJ*, at 149–50.

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scope to St. Paul's words to the effect that all state authority comes from God. Another is to be found in the philosophy of Hegel, condensed into the famous slogan, 'What is real is valid, and what is valid is real.'[23] And there is consonance with the conservative ideology that what succeeds is justified, because God has permitted it to succeed. These diverse tendencies seem to have created, especially in Germany, an uncritical deference and submissiveness toward official authority, toward anyone in uniform. It is this attitude that is revealed in the slogan noted above, '*Gesetz ist Gesetz*' ('a law is a law'), meaning that every legal system is law and, as such, must be obeyed whatever its spirit and tendencies. If there is any truth in the belief that 'positivism' paved the way for the Hitler regime, it must refer to this type of 'positivism', this school of natural law, and not to true positivism understood as an empiricist theory in the field of moral philosophy.

To avoid confusing this school of thought with true positivism, I propose to name it 'quasi-positivism'.

V. THREE DIFFERENT FUNCTIONS AND MEANINGS OF 'VALIDITY'

To prepare the way for later sections, I want to point out that the term 'validity' is used in (at least) three different ways, that is, it has three different meanings performing three distinct functions.[24]

First, the term is used in current doctrinal expositions of prevailing law to indicate whether or not a legal act—say, a contract, a last will and testament, or an administrative order—has the desired legal effect. The act is said to be invalid or void if this is not the case. It is an internal function, for to state that an act is valid or invalid is to state something *in accordance with* a given system of norms. The statement is a legal judgment applying legal rules to certain facts.

Second, the term is used in general legal theory to indicate the existence of a norm or a system of norms. The validity of a norm in this sense means its actual existence or reality, contrary to the case of a rule merely imagined or that of a mere projection. This is an external function, for to state that a rule or a system of rules exists or does not exist is to state something *about* the rule or the system. The statement is not a legal judgment, but a factual assertion referring to a set of social facts.

I understand, however, that this use of 'validity' may appear odd in English. In Danish as in German, a distinction is made between *gyldig* (*gültig*) and *gældende* (*geltend*). A contract is said to be *gyldig* or *ugyldig*

[23] See Ross, *Kritik* (n.11 above), at 409–10; Ross, *LJ*, at 251–2.
[24] See Verdross (n.3 above), at 246.

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(valid or invalid, void), but we use another term to speak of the law, namely, '*gældende*', to mean prevailing law, law actually in force, actually existing. It is noteworthy that for the negation of '*gældende*', there is no word corresponding to the negating '*ugyldig*' ('invalid'). Unable to find an English equivalent for '*gældende*', I have used 'valid' in the English versions of my writings to cover not only the function of '*gyldig*', but also that of '*gældende*'. I understand now that this translation might be confusing.[25]

Third, 'validity' in ethics and in natural law, as we have seen, is taken to mean a specifically moral, *a priori* quality, also called the 'binding force' of the law, which gives rise to a corresponding moral obligation.

VI. KELSEN AS QUASI-POSITIVIST

It follows from what is said above that if the term 'valid' (Danish '*gældende*') is used to indicate that a rule or a system of rules is a reality (and not simply a projection or something imagined), then, according to empiricist principles, the term must be taken to refer to observable social facts and nothing else. It may be difficult to define exactly which facts and which observations are suitable for verifying the assertion that a rule exists, but broadly speaking the existence (validity) of a norm is the same as its efficacy. To state that a rule or a system of rules exists is the same as to state the occasion of a complex of social facts—understanding 'social facts' broadly, to include psychological conditions too. In this context, then, the term 'validity' has nothing to do with any normative statement of a duty (in the moral sense) to obey the law. Such an idea of duty, characteristic of quasi-positivist and natural law thinking, has no place in a theory of law based on empiricist principles.

Validity in the normative sense has no function in describing and explaining reality. Its function is to reinforce the legal system by proclaiming that the legal obligations of the system are not merely legal obligations backed up by sanctions, but also moral duties. The normative notion of validity is an ideological instrument supporting the authority of the state. When this notion is used by a quasi-positivist, support is unconditional; when used by a natural law philosopher, support is conditioned by some degree of harmony with the presupposed standards of natural law.

In this respect, Kelsen's Pure Theory of Law is a continuation of quasi-positivist thought. Kelsen has never overcome the idea that an established legal system, as such, possesses validity in the normative sense of

[25] I have discovered this from H.L.A. Hart's criticism, see § VII below.

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the word. According to Kelsen, the existence of a norm is its 'validity', and to say that a norm possesses validity means 'that individuals ought to behave as the norm stipulates.'[26] But if the norm itself expresses in its immediate content what individuals ought to do, then we question the meaning of saying that individuals ought to do what they ought to do. I have analysed this idea above, in section III. We have seen that the idea of a duty to obey the law (to fulfil legal obligations) only makes sense on the supposition that the duty spoken of is a true moral duty corresponding to the 'binding force' inherent in the law.

Although this interpretation is not in harmony with the admittedly empiricist programme of the Pure Theory of Law, it is inevitable and ought to be taken as the survival of natural law philosophy of the quasi-positivist kind.

The interpretation is supported by the way Kelsen tries to explain the significance of the reiterated admonition to behave as the norm requires. The significance, he says, is that the subjective meaning of the norm is objective as well.[27] And this is the same as saying that the norm expresses a *true* obligation: Individuals are not only 'commanded' to behave in a certain way, but they also 'really', 'in truth', 'objectively' ought to behave as required by the norm. The idea of a true norm or an objective duty, however, is exactly the idea that is operative in natural law philosophy, an idea that has meaning only on the assumption of objective, *a priori*, moral principles from which true duties are derived.

Kelsen's concern with the traditional problem of the moral quality that distinguishes a legal system from a gangster regime is apparent in the way he illustrates the idea of validity as having objective, normative meaning. He writes,

> Not every act whose subjective meaning is a norm is objectively one as well. For example, a robber's command to hand over your purse is not interpreted as a binding or valid norm.[28]

This interpretation alone makes it possible to understand the view, peculiar to Kelsen, that it is logically impossible to regard a particular legal rule as valid, and at the same time to accept as morally binding a moral rule prohibiting the behaviour required by the legal rule.[29] Kelsen's view here, puzzling in light of empiricist principles, gains a foothold if legal validity is understood as a moral quality inherent in the established system. It should be noted that the presupposition of the

[26] See Hans Kelsen, 'Value Judgments in the Science of Law', *Journal of Social Philosophy and Jurisprudence*, 7 (1942), 312–33, at 317, repr. *WJ* 209–30, at 214; *GTLS*, at 115–16, 369; *Phil. Fds.* § 4 (at pp. 395–6).

[27] See Hans Kelsen, 'Why Should the Law be Obeyed?', *WJ* 257–65, at 257 (the first appearance of this paper is in *WJ*).

[28] Ibid.

[29] *GTLS* 373–5; *Phil. Fds.* § 14 (pp. 408–10).

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basic norm as investing the factual system with validity is attributed by Kelsen to what is called 'juristic thinking'. The presupposition is simply revealed—and accepted—by legal science.[30] 'Juristic thinking' refers, I suppose, to ideas and beliefs commonly held by lawyers, but it is not a reliable guide for logical analysis. It is possible, and highly probable in both the field of law and that of morality, that the usual way of 'thinking' is saturated with ideological concepts that reflect emotional experience but have no function in describing reality, which is the task of legal science. In that case, the job of the analyst is to reject, not to accept, the idea of validity.[31]

VII. COMMENTS ON HART

Emerging from the preceding sections are my main theses on the meaning and the function of the concept of validity. They are:

(1) If the term 'validity' is taken in the sense in which it is used in natural law (including quasi-positivism), that is, if it is used to designate a moral quality of a legal system, the quality that invests the obligations of the system with binding force, then it has no place in a legal science based on empiricist principles;

(2) If the term 'valid' (Danish '*gældende*', German '*geltend*') is used to designate the existence (the reality, the occasion) of a norm or a system of norms, it must be understood as an abbreviated reference to a complex of social facts, namely, those social facts that are considered in legal science to be necessary and sufficient to verify a proposition on the existence of the rule or the system of rules. In my book *On Law and Justice*, I develop this idea,[32] trying to show that in the final analysis verification is concerned with the future behaviour of judges (and of other law-enforcing authorities) under certain conditions; and that for this reason the proposition, '*D* (a certain directive or rule) is valid Danish law', is equivalent to the predictive proposition that the courts, in certain circumstances, will base their decisions (also) on the directive *D*. Such a prediction is possible only on the basis of a whole complex of social facts (including psychological facts of behaviour and attitude).

[30] *GTLS* 116; Kelsen, 'Value Judgments in the Science of Law' (n.26 above), 324, 326–7, repr. *WJ* 221, 224.

[31] I have presented a similar critique of Kelsen in my review of *What is Justice?*, in *California Law Review*, 45 (1957), 564–70. Kelsen, for his part, has propounded a penetrating analysis and critique of my views in his article 'Eine "realistische" und die Reine Rechtslehre', *ÖZöR*, 10 (1959), 1–25.

[32] See Ross, *LJ*, at 29–50.

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In his article 'Scandinavian Realism', Professor H.L.A. Hart propounds a criticism of my analysis of 'validity'.[33] It might be of interest to ascertain to what extent, if any, Hart disagrees with my views as I have stated them here.

As far as I can see, there is virtually no disagreement at all. The objections advanced by Hart rest on a misunderstanding of my intentions, partly caused by the linguistic fact (which I have understood only recently) that the English 'valid' can hardly be used in the same way as the Danish '*gældende*'.

The term 'valid' is used by Hart in the first sense[34] and in the third sense[35] mentioned above, in section V. Since, however, he uses the word in the third sense (as a moral quality) only in the exposition of natural law views and not of his own, we shall limit ourselves here to Hart's analysis of the term as it occurs and functions in current legal thinking.

The concept of validity analysed by Hart is the concept as it functions when a certain contract, will, or other legal act is said to be valid or invalid (void). A legal act is said to be valid when it has been performed in such a way that it fulfils the conditions—established in a legal norm—necessary for it to have the intended legal effect.

This concept of validity is well known to every lawyer, and my own analysis of it is in complete harmony with Hart's views.[36] When, however, in *On Law and Justice*, I discuss at some length the meaning of the assertion, '*D* is valid Danish law', my concern is not that concept fulfilling that function. The way the problem is raised and treated leaves no doubt that the issue discussed is what Hart treats under the heading of the *existence* of a legal rule or a legal system.[37] As mentioned above, I am now aware that the Danish '*gældende ret*' should not have been translated into English as 'valid law'. I regret my lack of sufficient feeling for English usage, but, at the same time, I believe that had Hart been a little more attentive, he would have noticed that the problem I treat under 'validity' is altogether different from the problem he considers under the same heading. Had he understood this, there would have been no basis for his criticism, namely, that statements about legal validity have nothing to do with predicting judicial behaviour.

It is interesting to note that when these misunderstandings are eliminated, there seems to be no disagreement between our views as to what is involved in the question of the *existence* of a legal system. In clear

[33] H.L.A. Hart, 'Scandinavian Realism', *Cambridge Law Journal*, 17 (1959), 233–40, repr. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 161–9.

[34] Hart, *CL* 22, 28–31, 68, 70–1, 100–2, 2nd edn. 22, 28–32, 69–70, 71–3, 103–5.

[35] Hart, *CL* 152, 182, 195–207, 2nd edn. 156, 186, 200–12.

[36] Ross, *LJ* 204, and see at 32, 79.

[37] Hart, *CL* 106, 109, 117, 245 (note), 2nd edn. 109–10, 112–13, 120–1, 292–3 (note).

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opposition to Kelsen, Hart rejects the idea that the existence of a legal system is its validity, expressed in a basic norm that exhorts individuals to obey the law. He rightly calls it mystifying to speak of a rule that prescribes that another rule be obeyed.[38] Hart's own position is put forward with all desirable precision in this statement:

> The question whether a rule of recognition exists and what its content is, i.e. what the criteria of validity in any given legal system are, is regarded throughout this book as an empirical, though complex, question of fact.[39]

Anyone acquainted with the special terminology used by Hart will easily see that he is concerned here with the existence of the supreme norm or of the legal system as a whole. His view that this issue is to be treated as a question of empirical fact is in complete harmony with the idea basic to my book *On Law and Justice*. Hart writes further that when we assert that a legal system exists, 'we in fact refer in compressed, portmanteau form to a number of heterogeneous social facts', and he writes that the truth of this assertion can 'be established by reference to actual practice: to the way in which courts identify what is to count as law, and to the general acceptance of or acquiescence in these identifications.'[40] The similarity here between Hart's position and my own is still more striking.

[38] Hart, *CL* 246 (note), 2nd edn. 293 (note).
[39] Hart, *CL* 245 (note), 2nd edn. 292–3 (note).
[40] Hart, *CL* 109, 105, 2nd edn. 112, 108.

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PART III

The Normativity Problematic, continued: Kantian Doctrines versus Kelsen without Kant

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