Philosophy of Law
An introduction

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3 Modern positivism and its critics

It is probably no exaggeration to say that virtually all of the problems and disputes in contemporary jurisprudence and philosophy of law – even at their most technical – either concern or can be traced back to the perennial attempts to clarify the conceptual relation between morality and the law. As we have seen, this is no easy matter, not least because there has never been general agreement on the scope of either morality or law. Contemporary responses to the 'What is law?' question, then, revolve around an examination of the senses in which concepts such as those of 'legality', 'legal validity' or 'legal system' must include or exclude considerations of moral content, moral validity or moral evaluation.

It is also the meaning of this inclusion and exclusion that is at issue. The claim that legal analysis can and must be undertaken without reference to moral concepts (content, validity, justification, justice, rights) can mean either (1) that a temporary separation 'for the purposes of study' (as urged by Llewellyn) is desirable for a truer vision of law; or (2) that the separation represents a distinction within the object of study itself, suggesting a world of hard, objective legal facts, on the one hand, and a world of legal possibilities, ideals to which all laws and legal systems should conform, on the other. On the first interpretation, the 'exclusion' of moral issues from jurisprudence is an intellectual abstraction that allows that the undivided reality of law is still out there. On the second interpretation, the 'exclusion' is more than theoretical; the law itself, the object of legal science, is interpreted as being divided into separate zones of pure fact and pure value. Either way, we arrive at the familiar distinction between descriptive and normative jurisprudence, but the distance between these two interpretations of the distinction is of the utmost importance.

The meaning of the separation thesis is one of the main points at issue in the development of contemporary theory, and in the debates between the followers of Kelsen, Hart, Fuller and Dworkin. Even when the law–morality question does not arise directly, the dispute is traceable back to it. When, for example, one legal philosopher after another presses for a more accurate factual description of a specific legal system, a stand one way or the other has already been taken on the law–morality question.

Legal validity

Although a great part of contemporary theory has focused on the question of the authentic source of legal validity, there has been a sometimes bewildering lack of consensus on what exactly the claim to legal validity involves. It is not the wide range of reference that is in doubt. The term 'legally valid' (or 'invalid') can be applied to a legal system as a whole, to a particular putative rule of law, a document such as a will or a contract, an official action such as a judicial direction or order, or the implementation of a punitive sanction. It is quite appropriate to speak of any of these in terms of validity and invalidity.

The problem arises when we ask exactly what is meant by the ascription of legal validity to any of these things. Initial attempts to elucidate tend to run into circularity or regress. A will or a contract is valid if it satisfies certain specified formal conditions; however, these in turn have been stipulated by a valid authority. Similarly, a valid sanction is one that is allowed or required by law, as laid down by a valid authority. A valid rule of law is one authorised by another rule. One general implication is that valid rules or actions cannot be legally challenged; this is what it means to be legally valid, which is to say that they are *binding*. But what exactly does this mean? Does it mean that there is an obligation to comply with it? Within the context of law, it would certainly seem so. No legal official is free to make an independent moral assessment of a legally valid order or to ignore a legally valid document, any more than a citizen is free to break any laws he or she disapproves of or finds inconvenient. In a wider context, the obligation is by no means clear. One is legally bound to obey a valid law, but is there any moral obligation? Is the claim that a law is valid equivalent to the claim that it is morally valid or justified?

The Nazi legality problem

The problem of disentangling formal validity from moral obligation came under close scrutiny after 1945, with the defeat of Germany and the dismantling of the Nazi state. There were a number of closely linked issues here. First, there was the question of the legal authority of the new courts established at Nuremberg for the purpose of war crime trials. Second, there was the question of how to regard the status of the Nazi legal system and its statutes and orders between 1933 and 1945. Third, there was the question of how the new West German Federal Constitution (1949) provided the authority for retrospective judgement of individuals whose actions had been legal under the authority of the previous regime. Each of these questions raises problems for theories of legal validity and for the morality–law separation thesis.

It is well known that the most prominent defence at the Nuremberg trials for war crimes and crimes against humanity was that the defendants were doing their duty in carrying out orders validly issued by their superiors in

accordance with existing law. Although in reality the reasons for rejecting the legitimacy of this defence may well have been pragmatic, the explicit reasoning by the Nuremberg judges was complex. The essential point is that, although there was no explicit reference to the higher law of natural law theory, the authority of standards of conscience independent of existing positive law at the time was indispensable. This, it seemed, was the only way in which the 'following orders' defence could plausibly be rejected. Yet these rulings themselves had to be seen to be carrying the full authority of law, otherwise it would appear that the courts were importing extra-legal standards and imposing 'victors' justice' on the vanquished. It was not sufficient to denounce the content of Nazi rules of law and military orders as morally abhorrent; the actions of the accused had to be shown to be *criminal*.

Thus it was tacitly conceded that the content of rules and orders was in some sense and to some extent relevant to legal validity. This was a significant concession to natural law theory on a crucial point at issue with legal positivism. The belief was growing, especially in Germany, that the experience of Nazi law had discredited positivism as a legal theory, on the grounds that there are laws, the content of which is so foreign to any conception of justice that they do in fact lose their status as law. The Austinian precept that law is one thing, its merits and demerits another, was believed to be undermined by the unprecedented departure from the ideal of the rule of law in Nazi Germany, the 'demerits' of which had become central to assessing the regime's claims to legality.

This line of argument against positivism, however, has never been regarded as decisive. One response is that the systematic abuse of legal power on this scale is a special case, and that it is only in such extreme cases that reference to content must be made. This response is unsatisfactory; serious injustice sanctioned by various legal systems is a matter of degree. The second, more important positivist response is that the argument confuses legal validity with justification. The stamp of legal validity, this response goes, does nothing to confer moral legitimacy on a legal system, an individual rule of law or a specific order, a commercial transaction or anything else. Legal validity is concerned solely with the identification of formal criteria, and as such is morally neutral. As we shall see, much depends here on what is meant by 'morally neutral'. We must turn now to a consideration of the essential claims made on behalf of positivism by its two leading exponents, Hans Kelsen (1881–1973) and H.L.A. Hart (1907–95).

Legal normativity: Kelsen's formal theory

Of all the leading contributions to the history of legal positivism, Kelsen's stands out as the most uncompromising. Rigorously scientific and thoroughly conventionalist in his assumption that all laws are human artefacts, Kelsen refined a 'pure theory of law' with its subject matter quite purposefully sealed off from outside influence. Taking his cue from Hume, and

working in parallel with the positivist Vienna School, with which he was loosely associated, Kelsen applied the is–ought dichotomy to law in a way that was distinctive and radical. In moral theory, he developed a version of emotivism that led him to the view that moral ideals, especially that of justice, are essentially irrational, and hence entirely unsuitable for any kind of scientific analysis. The main object of scientific jurisprudence, for Kelsen, was the uncovering of the logical form behind the confusion of empirical appearances. He conceived this discovery of logical form as a project of rational reconstruction of the law as a unified whole. In this, he was influenced by Kantian epistemology rather than by the empiricist models of science. As a science, the object of study was held to be law as such, rather than any particular legal system; what he was seeking was the purely formal structures of any possible legal system. In this enterprise, Kelsen was emphatically opposed to any kind of natural law theory; justice and the higher law had no place in scientific jurisprudence. In short, he was attempting to push the positivism of Bentham and Austin to its logical conclusion, while detaching it from its objective utilitarian basis, and in so doing to root out the hidden presence of natural law assumptions in modern legal theory.

Kelsen's 'pure' theory of law is pure in two senses:

1 *The purification of subject matter*. In order to establish law as an independent science, it is necessary to strip it down to what is distinctively legal. To focus on the purely legal dimension of law – specifically legal validity – all the moral, political, sociological and psychological dimensions must be displaced from the science. The ideal sought here is a purely distilled conception of the object of legal science.
2 *The purification of the investigation*. In order to undertake this scientific investigation effectively, the investigation must itself be value-free. The science of law is 'pure' in the sense that it is free of ideology. In pure theory, there is no approval or disapproval, either implicit or explicit. The ideal sought here is a purely distilled conception of the investigating subject, the legal scientist, understood as a purely formal observer.

Taken in combination, these two conceptually interlocked senses of purification – of law itself and of its methodology – lead to a focus on the pure form of laws and the legal system. In this sense, Kelsen's theory is formalist. It involves the suspension or bracketing out of the concrete content of the laws that link up into a legal system. The concrete content – the social function, the political purpose, the justice or injustice of the laws – is irrelevant to the investigation of the formal structure of this link up.

So what is Kelsen's image of law? How does he understand the formal legal reality laid bare by this positivist method? When purified of all extraneous elements, what comes into view – in any legal system – is one rationally connected structure of norms, in the shape of a pyramid. These

'norms' have to be understood as specifically legal 'oughts', which are distinct from either moral oughts or legal rules. Legal rules as rules are not logically linked with one another. Legal norms are the oughts of which legal rules are the visible manifestation. The 'formal-logical' connections that give the legal system its unity apply to norms rather than rules, and it is these connections that the formal analysis reveals.

Thus, it is in these logical connections between legal norms that Kelsen seeks the meaning of legal validity. To this effect, the language of law is formalised by recasting every rule in terms of a legal ought, each of which is expressed as an 'imputational connective' ('if X conditions obtain, then Y sanctions ought to be applied'). This is the inner structure of any possible law. The directive to apply specified sanctions, whenever given conditions obtain, is addressed to a line of legal officials enforcing any kind of law along the full length of the legal process.

Each norm can only be validated by referring it to a higher norm (in the hierarchical pyramid), 'higher' in the sense of being more general. Thus, each norm is validated logically by being a more specific instance of another norm. The formal connection, hence the validity, abstracts from the concrete content of the norm. Any statement containing a legal norm can be validated or invalidated in this way. Thus, for example, a norm which requires that anyone who insults the government should be executed would be validated by a more general norm according to which all enemies of the state should be executed.

Kelsen's basic norm

If the formal validation of any particular legal norm must always lie in the identification of another legal norm, it clearly faces a problem of infinite regress. This leads us into the central and most controversial feature of Kelsen's pure theory. If norms are always referred to other norms, what is the ultimate source of their legal validity? It is not sufficient to say that validity is derived from the fabric of the normative order, that this order is purely formal and that content is irrelevant. The continued reference to norms further up the hierarchical structure inevitably raises the question of what stands at the top of the structure, the apex of the pyramid, the most general norm. What is it that gives the legal system its rational unity? Kelsen's answer is that the existence of any legal system must assume or presuppose a basic norm (G*rundnorm*). This norm he describes as 'hypothetical', in the sense that we can only hypothesise its existence.

The basic norm, then, is the most general norm hypothesised as the norm behind the final authority to which all particular valid norms can be traced back. This is the only norm that cannot itself be questioned or validated. It is in this sense that its validity is presupposed or tacitly assumed in any legal activity – for example, the relevant actions of a court official, a police officer, a solicitor, a gaoler – which acknowledges the validity of particular

norms. It should be noticed especially that the basic norm is not the actual constitution – of the USA, the UK, Germany or wherever – which would be the empirical object of *political* science. It is what Kelsen terms the *logical* constitution that takes the form of an ought-statement that the constitution 'ought to be obeyed'. It is this norm that is presupposed as the basic one underpinning or tying the entire structure of the legal system. Another sense in which it is presupposed is that by its very nature it has never actually been posited or laid down as an act of will. In this sense, Kelsen insists, the basic norm can only be an act of *thinking*, and as such cannot be regarded as a norm of positive law.

Criticisms of Kelsen's pure theory of law come from every angle. For traditional defenders of the higher law of natural justice, the theory is seen as the high tide of dehumanising positivism. Also, as an expression of relentless formalism, seeking out the most abstract patterns in the law and deliberately excluding all sociological factors, the pure theory is clearly at the far end of the spectrum from American legal realism. It has also been attacked from within the positivist camp for its supposed ambivalence about the value-free nature of the normative science it proposes, and accused of sliding back towards the very natural law theory that it is supposed to be rooting out.

Does Kelsen equivocate between a specifically legal concept of the validity of norms and a morally evaluative analysis of validity? Many critics believe that he does. Much of the confusion, however, is due to the normative language he is using. It often sounds as though Kelsen is describing a moral obligation when he is not. 'One ought to behave as the constitution prescribes' (Kelsen 1970: 201) is typical. When he distinguishes a state execution of a criminal from murder, by tracing the norm requiring it back to the authority of the constitution and the basic norm that this should be obeyed, it sounds as though he is justifying it. But in fact this is a purely descriptive account of why the execution is legally valid, while other acts of killing would be counted as murder. Kelsen is at least explicit in his declared *intention* to separate legal validity from any moral connotations: 'The science of law does not prescribe that one ought to obey the commands of the creator of the constitution' (ibid.: 204). Also, he insists that

> the contents of a (specific) constitution and the national legal order created according to it is irrelevant – it may be a just or unjust order; it may or may not guarantee a relative condition of peace.• The presupposition of the basic norm does not approve any value transcending positive law.
>
> (ibid.: 201)

In short, Kelsen is committed to legal positivism, to the strict separation of law and morality in the relevant senses, and indications to the contrary are misleading.

H.L.A. Hart's concept of law

While Kelsen's theoretical purification of law has continued to exert a significant influence, the theory of law that has made the greatest impact on contemporary positivism was the one developed by H.L.A. Hart in the 1950s. Hart's *The Concept of Law* (1961) is the single most influential book of this period. What he was attempting here, from within the positivist camp, was to apply the radical insights of the new linguistic philosophy to the central problems of jurisprudence in such a way that would place it on a sound theoretical footing and do justice to the complexity of law. Hart acknowledged the value of Bentham and Austin's pioneering efforts at clarification, and admired their uncompromising exposure of the weaknesses of classical common law and natural law thinking, but he saw in their commitment to the command theory – which he accepted as expressing a partial truth about some areas of law – a serious obstacle in the path of genuine understanding of the law as a whole.

Hart's attack on the command theory

In confronting the well-entrenched Austinian tradition in English jurisprudence, Hart was also turning against the older positivist way of thinking about law, in particular the basic tenet that law is essentially the expression of a will, rather than an articulation of a pre-existing good. This belief was the origin – in ancient and medieval philosophy – of the command theory running from Hobbes to Austin and beyond. Before Hart, it appeared that an outright rejection of this tenet must result in the abandonment of positivism. One of Hart's striking achievements was to show that this was not true, that it was both possible and necessary to detach positivism from command theory in order to reveal its true explanatory strength.

It was not that the command theory had previously gone unchallenged. The critiques by John Chipman Gray and Jerome Frank, for example, did not go unnoticed, but were not absorbed by the mainstream. As we have just seen, Kelsen was also sharply critical on the grounds that command theory is misdirected and confused the analysis with psychology. His own formalistic version of positivism, however, did not break with the command theory, when suitably depsychologised and aimed at legal officials rather than citizens.

For Hart, by contrast, the solution was more radical. What he aimed to show was that Austin's analysis, purporting to provide the key to unlock the secrets of jurisprudence, was fundamentally misguided. The command theory was, for Hart, seriously defective; it did not reflect the reality of any possible or actual legal system, and its explanatory power was very limited. It was not something to be renovated by adjustment; it needed to be supplanted by a new explanatory hypothesis about the nature of law.

Among Hart's most effective arguments, there are two that stand out, each pointing to his own proposed concept of law. The first concerns the range of areas of law that the theory of command backed by sanctions as

the essence of law purports to explain. There are many such areas, observes Hart, involving rules that cannot plausibly be construed as orders or commands in the required sense. Rules such as those controlling the legality or otherwise of contracts, marriages or wills are not rules, the disobedience of which is followed by a sanction. They are rules that facilitate social transactions, and the consequence of the failure to observe the legal formalities is that the transaction is null and void. To construe – as Austin does – these rules creating facilities as tacit commands, and the nullification of the transaction as a sanction, is a distortion of their power-conferring function. The command theory, then, is defective *as explanation*.

Hart's concept of a legal system

The second argument concerns a distinction between types of legal rules that are wholly different in kind. This is the argument that runs through Hart's conceptual analysis of social practices with which he attempts to rebuild the positivist theory of legal validity, having rejected the command theory. Arguing that what is missing from Austin's analysis is the concept of an accepted rule, Hart unfolds his own analysis that aims at a more sophisticated understanding of the social practice of following a rule.

He distinguishes first between social rules that constitute mere regularity of behaviour, such as social conventions of etiquette, and rules that constitute *obligations*, in the sense that there is insistent demand for conformity. Second, he argues, we then have to distinguish between obligations based on the prevailing moral code, which are enforced only by social approval and disapproval, and obligations that take the form of rules of law and are enforced by physical sanctions.

Third, the crucial distinction is drawn between different types of legal rules, which Hart calls primary and secondary. *Primary* rules of law are said to be those that are essential for any kind of social existence, those that prescribe, prevent or regulate behaviour in every area with which the law is concerned. These are all the rules constraining anti-social behaviour: rules against theft, cheating, violence, and so on. As such, they constitute the great bulk of the positive laws in which the legal system consists. But any legal system must comprise more than this; it must also include what Hart called *secondary* rules, the function of which is exclusively addressed to the status of the primary rules. The secondary rules are fundamentally different in kind from the primary rules. They bring primary rules into being, they revise them, they uphold them, or they change them completely. Hart argues that the creation of secondary rules marks the transition from a prelegal society to a legal system. Without the secondary rules, the essential function of which is to create, identify and confer legitimacy on the primary rules, there would be no way of resolving doubts or disputes about them, no way of changing or adapting them to new circumstances, no one to authorise punishment for breaking them.

The most fundamental of these secondary rules Hart calls 'the rule of recognition'. This is the rule to which the authority of all the primary rules is referred. It is a secondary rule that settles doubts and uncertainties, and provides the authority to resolve them. As such, it is the all-important source of legal validity, from which the legality of any law, minor by-law or legal document, or the legitimacy of any court of law and the proceedings therein, any action by a legal official, is ultimately derived.

This basic rule, Hart maintains, can appear in any number of forms or guises. It can be written or unwritten, spoken or unspoken. It might be the rule that 'whatever the sovereign says is law'. It might be the way in which the primary rules are uttered or enacted. It might be a formal document or a constitution. In the UK, it happens to be the rule that 'what the Queen in Parliament enacts is law'. Whatever form the rule of recognition takes, it is essentially a socially accepted fact in any given legal system, every one of which must have one if it is to qualify as a legal system, rather than a prelegal assemblage of unvalidated primary rules.

Hart and Kelsen

There are, of course, clear parallels between Hart's rule of recognition as the source of legal validity and Kelsen's basic norm. They both serve the same vital function in grounding the positivist interpretation of the idea of a legal system. The rule of recognition, like the basic norm, is the linchpin that gives the system unity, and every other rule must be referred to it. The differences, however, are as great as the similarities. Hart's basic rule is a (secondary) rule of law, not a Kelsen-style norm, or 'ought-statement'. As such, it is a social fact, rather than a hypothetical norm that is presupposed by all legal activity. As a social fact and a rule of law, it is itself a part of the legal system, whereas the Kelsenian basic norm lies outside of the system. There is also a different reason for its validity being unchallengeable. For Hart, it is a meaningless question to ask whether or not the rule of recognition is valid. The demand for a demonstration of its validity, he says, is equivalent to demanding that the standard metre bar in Paris be correct. Legal validity is measured against this basic rule of law; it cannot be measured against itself.

Hart and legal positivism

We have to be clear about the sense in which Hart was a legal positivist. His concept of law was certainly a radical revision of what had previously been known as positivism. This was due largely to its association with the command theory. Hart firmly believed, as we have seen, that there was continuity as well as discontinuity between himself and the Austinian tradition. What he objected to in the command theory was that it concealed the real structure of law as the interplay between different types of rules, as revealed

by his own analysis. He did not, however, regard the command theory as a complete distortion. As noted above, the rule of recognition might well be the fact that the will of the sovereign is supreme. Thus, Hart's criterion for the unity of a legal system is more general than Austin's.

With the command theory displaced, Hart's idea of a positivist approach to law is defined by its commitment to two theses: the morality–law separation thesis and the thesis that analysis of legal concepts should be the main task of jurisprudence (Hart 1983: 57–8). However, one of the features of Hart's theory for which he is best known is his defence of the 'minimum content thesis' (Hart 1961: 189–95), according to which there are a number of natural features of humans living in society that to some extent determine the content of law as it must exist if it is to be viable as an institution consistent with the minimal purpose of human survival. Natural human vulnerability, for example, makes laws prohibiting violence absolutely basic. The environmental fact that resources are always limited dictates the need for laws protecting the security of land and the basic needs of life. The fact that most people are 'neither angels nor devils' makes law necessary and at the same time possible. These and other 'truisms' about human life point to the conclusion that laws must have a bare minimum of moral content if they are to serve their function as laws at all.

Hart presented this minimum content thesis as consistent with his 'rule of recognition' version of positivism, but not with the command–positivist thesis that law is the effective enforcement of the will of the sovereign. Contentiously describing his thesis as 'the core of truth' in the natural law idea, he claims that it constitutes 'a reply to the positivist thesis that law may have any content' (Hart 1961: 195). What he is explicitly repudiating here is the Austinian version of the separation thesis. On his own version, the content is constrained by a natural connection between law and basic natural needs, but the conceptual connection between law and morality or justice is decisively rejected.

This is a subtle version of positivism. It is not, as many have mistakenly believed, a version of natural law, however minimal.

Fuller's secular version of natural law

Lon L. Fuller (1902–78), a distinguished Professor of Law at Harvard from 1939 to 1972, contributed more than any other individual to the revival of natural law in the postwar years. Inspired by a deep antipathy to the positivist concept of law, but equally unimpressed by the dead weight of the traditional natural law approach, he developed an original humanistic perspective based on the idea that law itself, as a human institution, naturally generates a specifically legal morality that is the proper starting point for the solution to the problems of legal theory. Fuller's early criticism was directed at classical positivism, but from the 1950s on it was increasingly directed at his contemporaries Kelsen and Hart, with whom he was engaged in an extended controversy over the basic question of the nature of law.

How and why Fuller regarded his own position as a modern version of natural law theory is the main question we will need to consider here.

Natural law and secularism

The idea that natural law can be detached from religious ethics, that it can flourish without an ultimate authority in the will of God, has never been entirely absent from natural law theory. What has always been uppermost is the place in the theory occupied by the natural faculty of reason. Even in Aquinas's natural law theology, the role of reason is pivotal as the source of legal validity. It was ventured as early as the fourteenth century by the Ockhamist Gregory of Rimini that offences against reason would still be sinful, even if God did not exist. The famous declaration by Grotius in the seventeenth century, that 'even if that which cannot be conceived without the greatest iniquity, that God did not exist, were true, natural law would still have binding force', echoed and reinforced this idea, and paved the way for the secularisation of the Enlightenment. Many legal thinkers of the eighteenth century, while detaching themselves from Christian orthodoxy, were still committed to the foundational ethical principle of natural law.

Nevertheless, the survival of natural law theory into the twentieth century, against the tide of scientific positivism, owed a great deal to the tradition of Aquinas and the influence of the Roman Catholic Church. The idea that human behaviour is and should be controlled by objective ethical standards derived from a higher law, ultimately sanctioned by the will of God, was still central to early twentieth-century natural law thinking.

Fuller's attraction to natural law theory was a purely rationalistic one, which owed nothing to the 'higher law' of the traditional theory. Along with his insistence on putting God out of play, he rejected the idea of law itself, in Holmes's famous aphorism, as 'a brooding omnipresence in the sky', a pre-existing moral order to which lawmakers have to submit. In contrast to this 'higher law' analysis, Fuller saw law as an entirely natural, human creation, but one that was subject to the same kind of 'natural laws' as other human crafts, such as carpentry or engineering. Just as there are unskilled methods by which tables or window frames cannot be crafted, there are ways in which laws and legal systems cannot be constructed. This 'good carpentry' metaphor was central to Fuller's entirely secularised version of natural law. The sense in which these laws are discovered, rather than made or freely invented, is the sense that aligns Fuller's theory with the basic natural law idea, the foundationalist idea that laws are drawn from natural sources, rather than being the product of pure will.

The procedural shift

With Fuller's complete secularisation comes the most controversial adjustment to natural law theory: the shift of focus from the substantive to the

procedural. What this means is that the validity of individual laws or the legality of the legal system does not depend in any way on an assessment of the justice or other moral qualities of individual laws or the legal system. Without the higher law, there is no absolute standpoint from which to make such assessments. Fuller's strategy is to avoid the problem of the variability of moral codes and conceptions of justice by denying the need to engage natural law theory in this kind of argument. The shift to the procedural is a change of focus to what Fuller regards as crucial: the inner morality of law. What he means is that moral values are written into the very idea of law, in such a way that laws and legal systems can be assessed according to the extent to which they satisfy criteria that are specifically legal and procedural.

What exactly is meant by this idea of 'procedural', rather than substantive justice? What Fuller means by it is that, in all legal systems deserving of the title, the creation and implementation of legal rules are guided and constrained by principles relating to the purpose of these rules. These 'qualities of excellence' include generality and efficiency, clarity and intelligibility. Also, they must be well publicised as guides to action. Laws that are internally inconsistent, applied retrospectively or impossible to comply with are excluded. Taken as a complete set, general fidelity to these principles constitutes observance of the rule of law, which means more than effective coercion authorised by a sovereign power. The rule of law means that the exercise of legal powers is constrained by the requirements of procedural correctness.

Several features of this set of criteria should be emphasised and borne in mind. First, as qualities of legal excellence, they were conceived by Fuller as perfections that legal practice aspires to but rarely attains completely. Second, this implies that fidelity to each of these principles or to the whole set is nearly always going to be a matter of degree. Third, as these principles are conditions for the existence of a legal system, law as such is taken to be inherently moral, in the sense that 'where there is truly law, there is procedural excellence'.

Fuller's rejection of the separation thesis

It should be plain why these procedural criteria indicate a clear-cut rejection of the morality–law separation thesis. If the very existence of a legal system requires the satisfaction of moral criteria, then it is impossible to say what the law is in fact without reference to the way it ought to be. The credibility of Fuller's challenge to positivism hinges on clarifying this claim that the separation thesis is not only undesirable but also actually false, that law may not have any content, that what law is actually includes its positive qualities. Its qualities and defects are not extraneous to the question of whether or not it is law. This, for Fuller, is what the necessary connection between law and morality means. He maintained that the attempt to separate law from morality breaks down with the recognition of law as essentially purposive. Law as a whole – a legal system – has a purpose that makes it what it is. The

purpose is to provide a framework of guidance by which people can regulate their own behaviour. Within this framework, each individual law has an essential purpose, for example, to discourage fraud and avoid its harmful consequences. All laws are means to specific ends. The general purpose of law can only be implemented by the acknowledgement and observance of the eight rule of law principles, without which it would be ineffective in promoting its essential purpose and would fail as law.

It should be understood that Fuller – as an advocate of a distinctly secular version of natural law – was not trying to reinstate the traditional outlook that Bentham and Austin had broken down. As we saw in the previous chapter, the integrity of law and morality for common law thinkers like Blackstone was exposed by Bentham as Christian moral sermonising about the virtues of existing law. The necessary connection between law and morality in this context meant that 'if it is law, it must be justified'. The assault on this kind of confusion of law and morality was inspired by the need for clarity, in order to expose and denounce bad laws by the standards of utility, and to campaign for legal reform. The crucial Benthamite point here is that there can be and often are bad laws; their mere legality is not an argument for their moral worth.

Over the course of the following century, this interpretation was upheld by Holmes, Gray, Kelsen, Hart and the Scandinavian realists, all of whom insisted that individual laws are contingently related to morality, in the sense that they can range from the most enlightened to the most reactionary, prejudiced and unjust. The stamp of legal validity guarantees nothing about their moral status. All of these thinkers were opposing what they took to be the natural law idea, whether explicit or residual, that legality means justice. The main reason for this was their belief that every version of natural law theory is essentially Blackstonian in that it encourages the doctrine that all law is good law; that it resists legal reform and has a tendency to consecrate the existing legal order, by conceptually excluding criticism of it. It was also generally recognised, of course, that the natural law slogans inherited from Cicero and St Augustine, to the effect that an unjust law is not law at all, appeared to have the opposite implication. On this interpretation, only good laws are legal. Manifestly unjust 'laws' do not even enjoy the status of legality, regardless of their authoritative source. In this way, 'the necessary connection between law and morality' can mean that legal systems and laws must satisfy a minimum 'morality test'.

Fuller's adoption of the natural law standpoint as the best vehicle for his theory of procedural justice led him to a conclusion distinct from either of these. On the one hand, he rejected outright the notion that mere legality confers moral legitimacy, and denies that natural law implies this. On the other hand, he does not argue that substantive injustice in the content of a law invalidates it as law. What he does argue, in opposition to positivism, is that the violation of or disregard for the basic procedural principles demanded by secular natural law reduces the validity of a legal system in proportion to the extent of these violations.

At the same time, Fuller attempts to turn the tables on positivism by accusing it of degenerating into the kind of formalism that assumes that the law is the law and is there to be obeyed, whatever one may feel about it. This, he argues, is implicit in the separation thesis. The attempt to study law in a coldly factual, scientific manner leads to the acceptance of the authority of law, no matter how unjust. What he is arguing is that the identification of law on strictly factual criteria has the effect of endorsing it as law in such a way that it will, in practice, command moral authority. On these grounds, Fuller follows Rommen, Radbruch and others in holding legal positivism partly responsible for the success of Nazism and its perversion of the legal system.

Fuller also questions the central positivist claim to greater analytic clarity. He denies that the separation thesis, which might have originally been directed against the mystification created by common law moral verbiage, does in fact lead to greater clarity about the nature of law. What it does lead to, he argues, is the command theory, which even the positivist Hart can accept does not reflect the reality of law. Real clarity, he maintains, will only be attained by relinquishing the separation thesis along with the command theory.

What the obsession with trying to describe the law in its pure facticity obscures is the crucial dimension of law, namely, its purposiveness. In eliminating value, the scientific approach is eliminating what is at the centre of law. Stripped of its general and specific purposes, a law or a legal system is not fully intelligible. If the legal analyst deliberately puts these purposes out of play for the sake of scientific accuracy, the picture created will not be one of law the way it actually is, but of the way it would be if legal systems and laws had no essential purpose. This approach treats law as if it were an inert, natural object. For Fuller, it is the result of the inappropriate transfer of positivist methodologies of natural science to the science of law. If a scientific method devised to root out and exclude all traces of teleology is applied to law, the result will be a 'factual' account of legal behaviour that bears little resemblance to the reality of law. Law is essentially a human creation and must be treated as such.

Conclusion

Any assessment of the ongoing dispute between positivists and their natural law critics must take account of the ways in which these doctrines have evolved since the days of the classic theories of Bentham and Austin. The differences between the modern versions of positivism and those of their predecessors are almost as important as their arguments against natural law. Similarly, modern versions of natural law have evolved in response to the valid criticisms made by positivists. What is perhaps most important is to approach cautiously the varying responses to the separation thesis, because it is in their respective interpretations of this thesis that modern legal theorists reveal their most fundamental understanding of the law.

Study questions

General question: Is it possible to have a morally neutral description of law?

Further study questions: Explain and evaluate Hart's criticism of Austin's command theory of law. Is Hart's concept of law more convincing than Austin's? Compare Hart's positivism with Kelsen's pure theory of law. Is the key to the unity of a legal system to be found in Kelsen's basic norm or Hart's rule of recognition? What are the criteria for legal validity? Can the injustice of a law invalidate it *as law*? Is Fuller's theory of natural law more successful than traditional versions in countering the standard positivist criticisms?

Suggestions for further reading

Kelsen (1970) is the main text for his pure theory of law. Some radically different perspectives on Kelsen are available in the collections of Tur and Twining (1986), and in Summers (1971). Useful short commentaries include Harris (1997: ch. 6), Riddall (1991: ch. 10) and Dias (1985: ch. 17).

The basic texts for Hart's critique of the command theory are Austin (1995: Lectures 1, 5 and 6) and Hart (1961: chaps 1–6). Important reactions include Raz (1970: chaps 1–2) and Dworkin (1977b: ch. 2). Useful short commentaries include Lyons (1984: ch. 2) and Riddall (1991: ch. 3). Earlier criticism of the command theory can be found in Gray (1921: 85–8).

Hart's classic work (1961) is fundamental to his theory of law. Among the numerous studies and commentaries on Hart, those that stand out are Lacey (2004) MacCormick (1981) and the essays collected in Hacker and Raz (1977), Gavison (1987) and Summers (1971).

Fuller (1964) is his most famous and important work. Summers (1984) is the best full-length study of Fuller. See also Summers's 'Professor Fuller on Morality and Law', in Summers (1971) and Lyons (1993: ch. 1). For details on the Hart–Fuller debate and the rule of law, see Lyons (1984: 74–87), Harris (1997: ch. 11) and Riddall (1991: ch. 7).