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Introduction 1

Torben Spaak and Patricia Mindus

1.1 What Is Law?

Although the subject-matter of jurisprudence (sometimes called ‘legal theory’) is not understood in precisely the same way everywhere, everyone agrees that the question of the nature of law falls within the purview of jurisprudence. The central question is ‘What is law?’, or ‘What is the nature of law?’, and it is usually here that one encounters legal positivism and its main challenger, natural law theory, for the first time. The central question in the debate between legal positivists and natural law thinkers – the perennial finalists in the world cup of legal theory[1] – is often said to concern the relation between law and (true) morality: Whereas natural law thinkers maintain that law is necessarily moral, that there is a necessary connection between law and morality, legal positivists hold instead that the relation between law and morality is contingent, that law is sometimes moral, sometimes immoral, and argue that the question of whether we have an obligation to obey the law can be answered only after we have considered the content and the administration of the law in the relevant jurisdiction.[2] However, in this introduction we shall focus on legal positivism, not the legal positivism/natural law debate, and we shall attempt to provide a fuller and more adequate characterisation of legal positivism than just saying that legal positivists reject the view that there is a necessary connection between law and morality, as well as to identify certain important types of legal positivism.

However, given the energy expended throughout history by legal philosophers and jurists on the legal positivism/natural law debate and on

[1] See Honoré 1987: 32.
[2] See, e.g., Hart 1958; Coleman 1982: 140–1; Kramer 1999: 1–17. As we shall see, some influential contemporary legal positivists actually reject the separation thesis taken at face value, arguing that there are indeed necessary connections between law and morality.

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natural law theory and legal positivism considered separately,[3] one may wonder if yet another volume on legal positivism is needed. But although much has already been said about legal positivism, we believe that there is more to say, not only about what legal positivism is, or might be, and about different types of legal positivism but also about different geographical traditions of legal positivism, about the central figures of legal positivism, about the fundamental tenets of legal positivism, about the problem of legal normativity considered within the framework of legal positivism, about the meta-ethical underpinnings of legal positivism, if any, about the value or disvalue of law positivistically conceived and of positivistic legal arrangements and, of course, about the perceived problems of legal positivism, such as its alleged totalitarian implications. If we add to these questions the circumstance that there is in many quarters a considerable lack of clarity as to what, exactly, the term 'legal positivism' stands for, or should stand for, we believe that there is ample justification for bringing together a number of chapters on legal positivism in a volume such as this.

What we offer in this volume, then, is a rather comprehensive and systematic discussion by experts in the field of these and similar questions. Although some authors find fault with legal positivism, or even doubt its continued significance in the legal-philosophical landscape, we believe that legal positivism will continue to attract considerable interest in the future, not only among legal philosophers and legal scholars in general but also among other students of the humanities and the social sciences, such as philosophers, historians, political scientists, sociologists or economists. For what is interesting about legal positivism is not, of course, the taxonomic question of whether a given theory or approach is or is not positivistic, although this question may sometimes be considered important, for example by writers of textbooks, but rather a variety of general and foundational questions that tend to be raised in almost any discussion of legal positivism. For example, there are questions about what law is, and what its purpose or function, if any, is, about its action-guiding capacity and its capacity to live up to the ideals of the *Rechtsstaat* or the Rule of Law, and about the existence and content of an obligation to obey the law. In addition, there are questions about the relation of law to the state, to coercion, to morality, to norms and human behaviour, to legislation, to

[3] For an illuminating account of the historical development of natural law theory and legal positivism, see Olivecrona 1971: 7–64.

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judicial decision-making and to custom, and about how to analyse legal statements and interpret legal norms; and there is the general question of whether and, if so, how we can know the answers to these and similar questions; and more. Questions like these have for a long time attracted, and will surely continue to attract, the interest of almost anyone wishing to understand human affairs.

1.1.1 Legal Positivism as an Intellectual Tradition

As we shall see, this volume assumes that we can speak meaningfully of some central tenets of legal positivism, and that legal positivists are thinkers who accept these tenets. Nevertheless, not everything that is said about legal positivism in the volume immediately concerns these tenets. To see the relevance of matters that do not immediately concern the tenets, one may choose to think of legal positivism along the lines of (what we shall refer to as) normative, theoretical, ideological or methodological positivism (to be introduced in Section 1.1.6) or, alternatively, to think of it not as a theory (or a set of tenets) at all but rather as an intellectual tradition that includes a number of writers in different countries over a long stretch of time, dealing with rather different topics, whose connections to one another are at least partly to be found in an attitude to legal scholarship or an interest in certain themes or questions and, perhaps, ultimately in terms of family resemblance in Wittgenstein's sense.[4] This way of conceiving of legal positivism is in keeping with our claim that there is in many quarters a considerable lack of clarity as to what the term 'legal positivism' stands for, and also with our related claim that in three of the main geographical traditions of legal positivism, the German, the Italian and the French, the equivalents to the English term 'legal positivism' have had no very clear meaning.

1.1.2 Geographical Traditions

Compared to natural law theory, legal positivism is a newcomer on the scene. In Europe, it developed in the nineteenth century along somewhat different lines in England, France, Germany and Italy – in the case of Italy due to

[4] This question has been briefly discussed by Raz 2007: 18–22 and Gardner 2012: 19, among others. On family resemblance, see Wittgenstein 1960: 17–20; 1968: s. 66.

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autochthonous re-elaborations of ideas from the French codification-centred tradition, the German tradition and Auguste Comte's positivistic philosophy.[5] Thus, Jeremy Bentham, who wrote on legal positivism already in the late eighteenth century, appears to have been the first legal positivist in England, though it has been said that his predecessor, Thomas Hobbes, too, was a legal positivist, or at least an ancestor of Benthamite legal positivism.[6] In Germany, Gustav Hugo, Friedrich Carl von Savigny and Georg Friedrich Puchta, all writing in the first half of the nineteenth century, can be said to have been the first legal positivists;[7] and in France, the members of the exegetical school, including Jean-Charles Florent Demolombe and Raymond-Théodore Troplong, writing in the nineteenth century, are said to have been the first legal positivists.[8] In Italy, finally, legal positivism in the shape of ideological or methodological (or scientific) positivism was the ruling view until the 1960s; and since then these forms of legal positivism together with theoretical positivism have been the subject of sophisticated meta-philosophical reflections by Norberto Bobbio and Uberto Scarpelli, in particular.[9]

Although the different geographical traditions of legal positivism are similar, being traditions of *legal positivism*, they are also different. For example, Karl Olivecrona points out that nineteenth-century legal positivism in England and Germany differed in that the former type of theory aimed at providing a factual, naturalistic explanation of the nature of law and did not purport to account for the binding (or obligatory) force of law, whereas the latter type of theory did aim to account precisely for the binding force of law, which it conceived in non-naturalistic terms.[10] Moreover, the French tradition of legal positivism appears to differ from the other traditions in that even though some scholars and judges have

[5] See Olivecrona 1971: 7–64.

[6] See Chapter 9. As that chapter explains, one can also view Bentham's legal philosophy in a different light.

[7] See Chapter 5; Olivecrona 1971: 35–41. Interestingly, Kelsen maintains that the doctrine of the *Volksgeist* embraced by von Savigny, according to which both legislation and custom are nothing more than *evidence* of pre-existing law, is a typical variant of natural law theory. Kelsen 1999: 127.

[8] On this, see Chapter 6.

[9] On this, see Chapters 7 and 14.

[10] See Olivecrona 1971: 27–33, 35–41. If Olivecrona is right, this might explain Hart's claim in the Hart–Fuller debate, namely that Gustav Radbruch had misunderstood legal positivism by failing to see that what is legally obligatory is not necessarily morally obligatory. See Hart 1958: 615–21. Hart might not have realised that Radbruch understood legal positivism differently from the way it was (and is) understood in the English-speaking world.

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indeed called themselves positivists, or have been called positivists by others, there has been almost no legal-philosophical discussion of legal positivism conceived as a theory of law, though things have begun to change in the past twenty years or so. Indeed, it appears that the equivalents to the English term 'legal positivism' in German, Italian and French – *Rechtspositivismus*, *positivismo giuridico* and *positivisme juridique*, respectively – have for a long time had no very clear meaning and that the debates on legal positivism in these jurisdictions have only in the second half of the twentieth century come to touch on the central tenets of legal positivism, as we understand them today, and as they will be presented in this introduction. The various geographical traditions of legal positivism will be treated in Part II of the volume.

1.1.3 Central Figures

We have said that there is in many quarters a lack of clarity as to what 'legal positivism' stands for, or should stand for. There can, however, be no doubt that, through the years in the respective traditions, some writers have been considered central figures of legal positivism. Thus, central figures in the German tradition, in addition to von Savigny and Puchta, include Rudolf von Ihering, Georg Jellinek, Hans Kelsen and Ota Weinberger; central figures in the Italian tradition, in addition to Bobbio, include Icilio Vanni, Biagio Brugi, Alessandro Levi and, in more recent times, Uberto Scarpelli, Giovanni Tarello and Luigi Ferrajoli; central figures of the French tradition, in addition to the mentioned members of the exegetical school, include Raymond Carré de Malberg and Léon Duguit;[11] and central figures in the British tradition, in addition to Bentham, include John Austin, T. E. Holland, H. L. A. Hart and Joseph Raz. Finally, a central figure in the history of legal positivism is the contemporary Argentinian legal philosopher Eugenio Bulygin. The versions of legal positivism defended by some of these central figures will be treated in Part III of the volume. As the reader will see, however, it is not clear that they are always talking about the same thing, and it may in some cases be a challenge to determine the precise sense in which they were thought to be legal positivists, or

[11] It is worth noting that Kelsen maintains that the doctrine of social solidarity embraced by Duguit, according to which both legislation and custom are nothing more than *evidence* of pre-existing law, is a typical variant of natural law theory. See Kelsen 1999: 127.

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precisely how this sense relates to our understanding today of what legal positivism is.

1.1.4 Descriptive Legal Positivism: A Framework Theory

As we have said, we may distinguish between different types of legal positivism, such as descriptive positivism, as we might refer to it, theoretical positivism, normative positivism, ideological positivism and methodological (or scientific) positivism. Our focus in this volume, however, is going to be on descriptive legal positivism, which is considered by most of its defenders to be the central form of legal positivism;[12] and in what follows, we have this version in mind when we speak of 'legal positivism', unless we indicate otherwise.

Accordingly, we might say that what legal positivism does, at least as legal positivists see it, is to lay down conditions that have to be satisfied by anything that purports to be a correct theory of law: If *X* does not satisfy the relevant conditions, *X* will not be, and cannot be, a correct theory of law. Speaking about a central tenet of legal positivism, the social thesis, Joseph Raz puts it thus: the social thesis 'is best viewed not as a "first-order" thesis but as a constraint on what kind of theory of law is an acceptable theory'.[13] On this analysis, Kelsen's, Hart's and Raz's theories are first-order theories of law in the sense that they are theories precisely of *law*, and they are positivistic in the sense that they conform to the fundamental tenets of legal positivism (to be discussed in Section 1.1.5); and we might therefore refer to legal positivism as a second-order theory of law in the sense that it is primarily a theory about *theories* of law, *not* a theory of law.

Alternatively, we might think of legal positivism not as a second-order theory but as a first-order theory that differs from other first-order theories of law, like the ones defended by Kelsen, Hart, Raz and others, by being more general, in much the same way that consequentialism differs from utilitarianism or ethical egoism by being more general. Thus, whereas consequentialism ascribes moral value to actions, events and states of affairs solely because of their consequences, utilitarianism ascribes value

[12] See, e.g., Coleman 1982: 147. For a discussion of this question, see also Chapter 3 and Waldron 2001: 413–14.

[13] Raz 2009: 39.

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to such things solely because of their consequences for human happiness (or perhaps welfare).[14] On this analysis, too, legal positivism lays down adequacy conditions for theories of law. Some might prefer this latter way of characterising legal positivism on the grounds that they find the distinction between specificity and generality to be less problematic than the distinction between first- and second-order theories.

If we think of legal positivism as a framework theory in one of the ways suggested, that is, as a theory laying down adequacy conditions for theories of law, we see that it is not much of an objection to legal positivism to point out that in itself it does not say much about what law is, how it should be interpreted and applied, or whether it should be obeyed or disobeyed, and so forth. For, on this analysis, to be a legal positivist is not to have a complete theory of what law is, how it should be interpreted and applied, or about law obedience, and so forth.[15]

1.1.5 Descriptive Legal Positivism: Central Tenets

Even though legal positivists differ on a number of issues, most of them accept three central tenets, namely, the social thesis, the separation thesis and the thesis of social efficacy.[16] In addition, some legal positivists accept a fourth thesis, called the semantic thesis.[17] Crudely put, the social thesis has it that what is law and what is not is a matter of social fact; the separation thesis says that there is no necessary connection between law and morality;[18] the thesis of social efficacy says that the validity (or existence) of law presupposes that the law is socially efficacious; and the semantic thesis has it, in one version, that legal normative or evaluative terms such as ‘right’, ‘duty’ and ‘authority’ have different meanings (senses) from the corresponding moral terms and, in another version, that (first-order) legal statements are statements solely about social facts.

[14] On consequentialism, see Williams 1973: 82–93.
[15] On this, see, e.g., Gardner 2012: 51; Green 2018: 29.
[16] Raz is an exception. He accepts the social thesis but rejects the separation thesis (and the semantic thesis). See Raz 2009: 38–9. Note also that different writers may refer to the same, or very similar, tenets in slightly different ways. For example, Jules Coleman calls the social thesis the ‘social fact thesis’ and the separation thesis the ‘separability thesis’. See Coleman 2001: 75, 104.
[17] See, e.g., Kelsen 1999: 60; Hart 1982: 159–60. See also Holmes 1896–7: 461.
[18] As we saw in footnote 2, this is not quite right. We shall have to qualify this thesis.

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Some legal positivists maintain that the backbone of legal positivism is to be found in the social thesis.[19] The precise meaning of the social thesis has been debated by legal positivists for the past forty years or so, however.[20] For example, while exclusive legal positivists argue that, properly understood, the social thesis requires (in a conceptual sense) the use of *exclusively* factual criteria of legal validity, and hold that any reference to moral values (primarily in the rule of recognition but also in, say, constitutional provisions) is best understood as granting the judge power and discretion to create new law,[21] inclusive legal positivists maintain instead that the criteria of validity can, but need not, be of a moral nature, provided they are grounded in (social) facts.[22] That is to say, whereas exclusive legal positivists insist that both the basis and the content of the criteria of validity be factual, inclusive legal positivists hold instead that while the basis of such criteria must be factual, their content need not be factual but can be normative or evaluative. One may, however, also think of this debate as concerning the correct interpretation of the *separation* thesis. On that analysis, whereas exclusive positivists defend the 'separation thesis', inclusive positivists defend the 'separability thesis'.[23]

In more recent years, the jurisprudential debate about the social thesis has also concerned the question of whether the social foundation of law, often taken to be something like a rule of recognition, is to be understood along the lines of legal conventionalism or along the lines of a more recent view called law as a shared activity.[24] Whereas H. L. A. Hart,[25] Gerald J. Postema[26] and Andrei Marmor,[27] to mention only a few, have defended a conventionalist account of the rule of recognition, Jules Coleman and Scott Shapiro have both defended a law-as-a-shared-activity account of this foundational rule.[28] The main difference between these two types of account is that whereas the former takes the social practice underlying, or constituting, the rule of recognition to be necessarily conventional, the latter defends instead an account of said practice according to which a conventional element may, but need not, be part of the practice.

[19] See, e.g., Raz 2009: 38; Coleman 2001: 75; 2009: 383; Simmonds 2002: 127–31.
[20] See, e.g., Soper 1977; Lyons 1977; Dworkin 1978: 345–50. [21] See Raz 1986: 1110.
[22] See Coleman 2001: ch. 7; Hart 1994: 247–8, 250–1; Waluchow 1994.
[23] On this, see Chapter 21. [24] On this, see Chapter 17.
[25] See Hart 1961: 112 and 1994: 255–6. [26] See Postema 1982. [27] See Marmor 2011.
[28] See Coleman 2001: 74–102; Shapiro 2011.

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Some legal positivists choose, however, to focus their discussions of legal positivism on the separation thesis instead of the social thesis. For example, although Hart emphasizes the idea of the rule of recognition in the *Concept of Law*, he explicitly identifies legal positivism with the separation thesis;[29] and Matthew Kramer in his *In Defense of Legal Positivism* concentrates on the legal positivist claim that law and morality are 'strictly separable', that legality and morality are 'disjoinable'.[30] Robert Alexy, too, in his critique of legal positivism, chooses to focus not on the social thesis but precisely on the separation thesis because he believes that the social thesis is not unique to legal positivism but is accepted by all serious non-positivists.[31]

The separation thesis, we have said, has it that there is no necessary connection between law and morality, where the relevant morality is understood to be true morality, not the morality or moralities actually accepted by the subjects of the relevant law. But, as we have pointed out, some contemporary legal positivists, including Joseph Raz, Leslie Green and John Gardner, reject the separation thesis, arguing that there are indeed necessary connections between law and morality.[32] Gardner, for example, points out that law and morality 'are necessarily alike in both necessarily comprising some valid norms'.[33] How, then, are we to understand the separation thesis if we wish to think of it as a tenet of legal positivism? The proper way to qualify this thesis, we believe, is to think of the necessary connection in question as a connection between morality and the *content* of law.[34] We may then usefully distinguish between the separation thesis conceived as a thesis about the *content of* (first-order) *legal statements*, namely, a thesis according to which such legal statements do not entail (first-order) moral statements,[35] and the separation thesis conceived as a thesis about *legal status*, according to which even (grossly)

[29] See Hart 1961: 181–2. See also Hart 1958.
[30] Kramer 1999: 1. See also Green 2018.
[31] See Alexy 2002: 3, 20–3. Alexy takes the separation thesis to say that 'the concept of law is to be defined such that no moral elements are included'. Thus conceived, he points out, it *presupposes* that there is no necessary connection between law and morality, that is, what we call the 'separation thesis' in this introduction.
[32] See, e.g., Raz 2007: 18–22; Gardner 2012: 48–51; Green 2008.
[33] Gardner 2012: 48.
[34] It is worth noting that this appears to be in keeping with what Kelsen and Hart have said on the issue. See, e.g., Kelsen 1992: 56; Hart 1961: 181–2.
[35] To be clear about whether legal statements entail moral statements or not, we should distinguish between a *de dicto* and a *de re* interpretation of the statement content version of the separation thesis. If we do, we also see that, on a *de dicto*, but not on a *de re* interpretation, the status version of the thesis entails the statement content version.

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immoral norms can be (part of) law. It seems, however, that the majority of those who consider the separation thesis take it to be primarily a thesis about legal status and only secondarily, if at all, a thesis about the content of legal statements,[36] often with no explicit view of the logical relation between the two versions of the thesis. Kelsen, for example, appears to have in mind the status question when he maintains that '[a]ny content whatever can be law; there is no human behavior that would be excluded simply by virtue of its substance from becoming the content of a legal norm'[37] and the question of statement content when he claims that '[a] statement about the law must not imply any judgment about the moral value of the law, about its justice or injustice'.[38]

To see that there really is a difference between the separation thesis about statement content and the separation thesis about legal status, it may be helpful to consider the position of a moral error theorist, such as John Mackie,[39] as regards the separation thesis. If you are an error theorist, you believe that all moral statements are false, and this means that you will have to accept the separation thesis about legal status, though you may choose to reject the separation thesis about statement content. For if you do not accept the status version of the thesis, you will not be able to recognize the existence of legal systems, and this would be decidedly odd; if, on the other hand, you do not accept the statement-content version of the thesis, you may without much oddity hold that legal statements entail (false) moral statements.

One reason to focus one's attention on the social thesis rather than the separation thesis, conceived as a thesis about legal status, is that the latter thesis follows from the former, assuming that the laws of logic do not allow that a normative (or evaluative) conclusion can follow from a (consistent) set of factual premises.[40] That is to say, if, in keeping with the social thesis,

[36] See, e.g., Hart 1958 and Andrei Marmor's discussion of the separation thesis in Chapter 19.
[37] Kelsen 1992: 56.
[38] Kelsen 1959–60: 273. See also Hart 1982: 159–61, 266–7. To be sure, Kelsen might have intended *both* claims to be about the status question. It is difficult to say what, exactly, he means.
[39] Mackie 1977a: ch. 1. We are here considering – for purposes of illustration – what an error theorist might, or would have to, say about this thesis. We do not attribute any view on this to Mackie himself.
[40] This is one way of understanding Hume's law. The idea is that the entailment relation is such that the conclusion in a valid inference (or argument) only makes explicit what is already implicit in the premises, so that proving a theorem in logic or mathematics is to make explicit the content of one or more axioms.

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