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Legal Positivism and the Sources of Law*

I. The Nature of Legal Positivism

The perennial and inexhaustible nature of the controversy concerning the positivist analysis of the law is due in no small measure to the elusive meaning of 'positivism' in legal philosophy. True, it is well established that legal positivism is essentially independent (even though not historically unrelated) both of the positivism of nineteenth-century philosophy and of the logical positivism of the present century. But the great variation between different positivist theories of law and the large variety of philosophical motivations permeating the work of the non-positivists indicate the difficulty, perhaps the impossibility, of identifying legal positivism at its source—in a fundamental positivist philosophical outlook. The easiest approach to the continuing controversy concerning legal positivism is through the particular theses or groups of theses round which it revolves.

Three areas of dispute have been at the centre of the controversy: the identification of the law, its moral value, and the meaning of its key terms. We could identify these as the social thesis, the moral thesis, and the semantic thesis respectively. It should be understood, however, that in each area positivists (and their opponents) are identified by supporting (or rejecting) one or more of a whole group of related theses rather than any particular thesis.

In the most general terms the positivist social thesis is that what is law and what is not is a matter of social fact (that is, the variety of social theses supported by positivists are various refinements and elaborations of this crude formulation). Their moral thesis is that the moral value of law (both of a particular law and of a whole legal system) or the moral merit it has is a contingent matter dependent on the content of the law and the circumstances of the society to which it applies. The only

* My thinking on the problems discussed in this essay was greatly influenced by conversations with R. M. Dworkin and J. M. Finnis, who disagree with many of my conclusions.

semantic thesis which can be identified as common to most positivist theories is a negative one, namely, that terms like 'rights' and 'duties' cannot be used in the same meaning in legal and moral contexts. This vague formulation is meant to cover such diverse views as: (1) 'moral rights' and 'moral duties' are meaningless or self-contradictory expressions, or (2) 'rights' and 'duties' have an evaluative and a non-evaluative meaning and they are used in moral contexts in their evaluative meaning whereas in legal contexts they are used in their non-evaluative meaning, or (3) the meaning of 'legal rights and duties' is not a function of the meaning of its component terms—as well as a whole variety of related semantic theses.

Of these the social thesis is the more fundamental. It is also responsible for the name 'positivism' which indicates the view that the law is posited, is made law by the activities of human beings. The moral and semantic theses are often thought to be necessitated by the social thesis. In crude outline the arguments run as follows: Since by the social thesis what is law is a matter of social fact, and the identification of law involves no moral argument, it follows that conformity to moral values or ideals is in no way a condition for anything being a law or legally binding. Hence, the law's conformity to moral values and ideals is not necessary. It is contingent on the particular circumstances of its creation or application. Therefore, as the moral thesis has it, the moral merit of the law depends on contingent factors. There can be no argument that of necessity the law has moral merit. From this and from the fact that terms like 'rights' and 'duties' are used to describe the law—any law regardless of its moral merit—the semantic thesis seems to follow. If such terms are used to claim the existence of legal rights and duties which may and sometimes do contradict moral rights and duties, these terms cannot be used in the same meaning in both contexts.

I have argued elsewhere[1] that both arguments are fallacious and that neither the moral nor the semantic theses follow from the social one. The claim that what is law and what is not is purely a matter of social fact still leaves it an open question whether or not those social facts by which we identify the law or determine its existence do or do not endow it with moral

[1] *Practical Reason and Norms* (2nd ed., Oxford, 1999), pp. 162 ff., and see also Essay 8 below.

merit. If they do, it has of necessity a moral character. But even if they do not, it is still an open question whether, given human nature and the general conditions of human existence, every legal system which is in fact the effective law of some society does of necessity conform to some moral values and ideals. As for the semantic thesis, all the positivist has reason to maintain is that the use of normative language to describe the law does not always carry the implication that the speaker endorses the law described as morally binding. Put somewhat more precisely this means that normative language when used to state the law does not always carry its full normative force. To this even the non-positivist can agree. This does not justify the view that terms like rights and duties are used with a different meaning in legal and moral contexts.

It is not the purpose of the present essay to explore these arguments. I mention them only to indicate the extent to which the version of positivism that will be argued for here is a moderate one which need not conflict with the natural lawyer's view concerning the semantic analysis of normative terms and the relation between law and morality. The following are but some examples of views usually associated with natural law theories which are compatible with the version of positivism defended below:

(*a*) 'A legal duty' means a duty which one has because the law requires the performance of that action.
(*b*) There is a necessary connection between law and popular morality (i.e. the morality endorsed and practised by the population).
(*c*) Every legal system's claim to authority is justified.

Whether or not these views are true, they are certainly compatible with the social thesis which is the backbone of the version of positivism I would like to defend. 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—more specifically it is a thesis about some general properties of any acceptable test for the existence and identity of legal systems.

A. The (Strong) Social Thesis

A jurisprudential theory is acceptable only if its tests for identifying the content of the law and determining its existence depend exclusively on facts of human

behaviour capable of being described in value-neutral terms, and applied without resort to moral argument.

This formulation is less clear than it might be. A more clear and lucid statement requires a fuller theoretical elaboration and is likely, therefore, to be more controversial. The above formulation strives to get at the core motivation and the basic idea underlying the various formulations of the social thesis and accepts the inevitable cost in lack of precision. Some clarification may nevertheless be called for.

First, the thesis assumes that any complete theory of law includes tests for the identification of the content and determination of the existence of the law. This seemed self-evident to many philosophers of law who saw it as one of their main tasks to provide such tests. Other equally influential legal philosophers were never stirred to do so and felt that such tests are no part of legal philosophy or are fruitless or impossible. Lon Fuller is the most eminent of those contemporary philosophers who have taken such a view. The reasons for dissenting from such positions will be indicated briefly in the next section. It is best to regard such theories as incomplete theories of law. For one reason or another most, if not all, theories of law are incomplete in that they do not propose answers to some questions which fall within the province of jurisprudence.

Secondly, the thesis assumes that there is a sufficiently rich vocabulary of value-neutral terms. It does not assume that there is a clear and sharp break between value-laden and value-free terms. Nor is it committed to any side in the naturalist/anti-naturalist dispute. That the test is *capable* of being described in value-neutral terms does not mean that no value or deontic conclusions are entailed by it. To assert that is to take an anti-naturalist position.

Thirdly, the thesis does not require disregarding the intentions, motivations, and moral views of people. Value-neutrality does not commit one to behaviourism.

Finally, it is worth noting that the social thesis can be divided into two: *A*—A social condition is necessary for identifying the existence and content of the law: A rule is a legal rule only if it meets a social condition. *B*—A social condition is sufficient for identifying the existence and content of the law: A rule is a legal rule if it meets the social condition.

II. The Social Thesis

I have claimed that the social thesis has always been at the foundation of positivist thinking about the law and that its semantic and moral consequences have all too often been misunderstood. It is not to my purpose here to expound and defend any particular view about the tests by which the existence and content of law are to be identified.[2] But since acceptance of the social thesis does give shape to theories of law which endorse it, it is important to reflect once again upon the reasons supporting the social thesis. In so doing I will inevitably commit myself to certain more definite views about the social conditions for the existence and identity of legal systems.

A. The most general and non-theoretical justification of the social thesis is that it correctly reflects the meaning of 'law' and cognate terms in ordinary language. This claim can be and has been illustrated often enough. It seems fundamentally sound as an essential part of every defence of the social thesis and yet in itself it is inconclusive. The word 'law' has non-legal uses: laws of nature, moral laws, laws of various institutions, the laws of thought, etc. Several of these have problematical status; moreover there are no clear demarcation lines in linguistic usage between the different kinds of law. Hence the dispute about the character of international law, for example, cannot be determined by appeal to ordinary language.

For similar reasons usage is too amorphous to give adequate support for the social thesis. It certainly suggests that law has a social base, that Nazi Germany had a legal system, etc. But it is not sufficiently determinate to establish beyond dispute that social facts are both sufficient and necessary conditions for the existence and identity of the law.

Finally, we do not want to be slaves of words. Our aim is to understand society and its institutions. We must face the question: is the ordinary sense of 'law' such that it helps identify facts of importance to our understanding of society?

B. The social thesis is often recommended on the ground that it clearly separates the description of the law from its evaluation. This, it is alleged, prevents confusion and serves clarity

[2] See Essays 5 and 6 below and my *Practical Reason and Norms*, sections 4.3–5.2, where I suggested various modifications and elaborations on Hart's ideas as expounded in *The Concept of Law* (Oxford, 1961).

of thought. This is true, but it presupposes the thesis rather than supports it. If the law is to be identified by social tests then trying to identify it without clearly separating social facts from evaluative considerations is misleading and often downright wrong. But if the identification of the law involves, as many natural lawyers believe it does, evaluative as well as social conditions then to distinguish between the two in identifying the law is misleading and wrong.

C. Adhering to the social thesis eliminates investigator's bias. It requires that the investigator should put aside his evaluative and deontic views and rely exclusively on considerations which can be investigated and described in a value-neutral way. This again, though true, presupposes the social thesis and is one of its results rather than its foundation. For in this respect too it must be admitted that if those natural lawyers who reject the social thesis are right then involving the investigator's sense of values (it will not then be called bias) is the only proper way for identifying the law. This does not mean that on this view the law is what it is because the investigator believes in certain values. It does, however, mean that the proper way for identifying the law is to inquire into the validity and implications of certain values.

D. There are, no doubt, many other reasons and variations on reasons which have been proposed in support of the social thesis and many of them have at least some truth in them. But the main justification of the social thesis lies in the character of law as a social institution. Some social institutions may have to be understood in ways which are incompatible with an analogous social thesis applied to them. But the law, like several others, is an institution conforming to the social thesis. To see this, it is necessary to specify in a general way the main ingredients of the tests for existence and identity for a legal system and to identify those with which the social thesis is concerned. The tests for identity and existence of a legal system contain three basic elements: efficacy, institutional character, and sources.

Efficacy is the least controversial of these conditions. Oddly enough it is also the least studied and least understood. Perhaps there is not much which legal philosophy can contribute in this respect. Though I believe there are at least some, however

elementary, difficulties which need to be explored.[3] Since this essay is not concerned with the precise details of the efficacy condition these difficulties can be overlooked. Suffice it that all agree that a legal system is not the law in force in a certain community unless it is generally adhered to and is accepted or internalized by at least certain sections of the population. This condition is simply designed to assure that the law referred to is the actual law of a given society and not a defunct system or an aspiring one. It is the least important of the conditions. It is not disputed by natural lawyers. And it does not help to characterize the essence of law as a kind of human institution. It distinguishes between effective and non-effective law and not between legal and non-legal systems. Consider, by way of analogy, social morality. The same condition applies. No morality is the social morality of a population unless it is generally conformed to and accepted by that population. Here the condition of efficacy does not illuminate the nature of morality. It merely tells an effective morality from one which is not.

More important and also more controversial is the second component of the tests for existence and identity—the institutionalized character of the law. Again, the many controversies about the precise nature of the institutional aspect of law can be side-stepped here. It is widely agreed (and by many natural lawyers as well) that a system of norms is not a legal system unless it sets up adjudicative institutions charged with regulating disputes arising out of the application of the norms of the system. It is also generally agreed that such a normative system is a legal system only if it claims to be authoritative and to occupy a position of supremacy within society, i.e. it claims the right to legitimize or outlaw all other social institutions.

These institutionalized aspects of law identify its character as a social type, as a kind of social institution. Put in a nutshell, it is a system of guidance and adjudication claiming supreme authority within a certain society and therefore, where efficacious, also enjoying such effective authority. One may think that there is much more that can be said about the sort of social institution that law is. Why be so sparing and abstract in its description? No doubt the features of law mentioned can and

[3] See my *The Concept of a Legal System* (Oxford, 1970), ch. 9, for some of the puzzling aspects of many common views about efficacy.

should be elaborated in much greater detail. But when articulating a general test for existence and identity for the law one probably should not go beyond this bare characterization. The rest belongs properly to the sociology of law, for it characterizes some specific legal systems or some types of legal systems (modern capitalist, feudal, etc.), and not necessarily all legal systems.[4]

'Law', as was mentioned already, is used in many different contexts and is applied to norms of great variety and diversity. Lawyers quite naturally focus their professional attention on a certain range of uses: those which are tied to institutions of the type described. Many legal philosophers have suggested that the philosophical analysis of law should follow the legal profession and should pin its analysis to this kind of institution. This is quite natural and completely justified. Given even the very sketchy and rudimentary characterization proposed above, it is amply clear that law thus understood is an institution of great importance to all those who live in societies governed by law, which nowadays means almost everybody. There is more than enough justification to make it a subject of special study (which need not and should not neglect its complex interrelations with other institutions and social forces). There is also sufficient reason to encourage the general public's consciousness of law as a special type of institution.

Many natural law theories are compatible with all that was said above concerning the institutional nature of law. Yet it must be pointed out that such an institutionalized conception of law is incompatible with certain natural law positions; and this for two reasons. In the first place, it is a consequence of the institutionalized character of the law that it has limits. Legal systems contain only those standards which are connected in certain ways with the operation of the relevant adjudicative institutions.[5] This is what its institutionalized character means.

[4] The main possible addition to the facts I mentioned are sanctions, the use of coercion or of force, and the existence of institutions for law-enforcement. See on this H. Oberdiek, 'The Role of Sanctions and Coercion in Understanding Law and Legal Systems', *American Journal of Jurisprudence* (1975), 71; Raz, *Practical Reason and Norms*, pp. 154–62.

[5] Kelsen thought the relation is simple: Laws are norms addressed to courts (see, for example, *The General Theory of Law and State* (New York, 1945), p. 29). Others suggest more indirect connections. Most notable is Hart's idea that laws are standards courts are bound to apply and use in adjudication: *The Concept of Law*, pp. 89 ff.

Hence the law has limits: it does not contain all the justifiable standards (moral or other) nor does it necessarily comprise all social rules and conventions. It comprises only a subset of these, only those standards having the proper institutional connection.[6] This is incompatible with the view that law does not form a separate system of standards and especially with the claim that there is no difference between law and morality or between it and social morality.

A second and perhaps more radical consequence of the conception of law as an institutional system is that one cannot impose moral qualifications as conditions for a system or a rule counting as legal which are not reflected also in its institutional features. If law is a social institution of a certain type, then all the rules which belong to the social type are legal rules, however morally objectionable they may be. Law may have necessary moral properties, but if so, then only on the ground that all or some of the rules having the required institutional connections necessarily have moral properties. To impose independent moral conditions on the identity of law will inevitably mean either that not all the rules forming a part of the social institution of the relevant type are law or that some rules which are not part of such institutions are law. Either way 'law' will no longer designate a social institution.

III. The Sources of Law

Most positivists are ambiguous concerning one interesting point. While their general terms suggest an endorsement of the strong social thesis, their actual doctrines rest on efficacy and institutionality as the only conditions concerning the social foundation of the law. Let the combination of these two conditions be called the weak social thesis. It is easy to show that the weak and the strong theses are not equivalent. Suppose that the law requires that unregulated disputes (i.e. those with

[6] Cannot a society have judicial institutions instructed to apply all social rules and cannot we envisage such a society lacking a clear differentiation between social morality and ideal or critical morality? Such societies are possible and probably have existed. This, however, merely shows that from their point of view there was no distinction between law and morality (unless they were made conscious of the distinction by observing other communities). We who have the distinction can still apply it to them when judging that, as things stand in their community, law encompasses the whole of their social morality. But things could have been different even for them.

respect to which the law is unsettled) be determined on the basis of moral considerations[7] (or a certain subclass of them, such as considerations of justice or moral considerations not fundamentally at odds with social morality). Suppose further that it is argued that in virtue of this law moral considerations have become part of the law of the land (and hence the law is never unsettled unless morality is). This contention runs directly counter to the strong thesis. If it is accepted, the determination of what is the law in certain cases turns on moral considerations, since one has to resort to moral arguments to identify the law. To conform to the strong thesis we will have to say that while the rule referring to morality is indeed law (it is determined by its sources) the morality to which it refers is not thereby incorporated into law. The rule is analogous to a 'conflict of law' rule imposing a duty to apply a foreign system which remains independent of and outside the municipal law.

While all this is clear enough, it is equally clear that the contrary view (according to which morality becomes part of the law as a consequence of the referring law) does not offend against the requirement of efficacy. For here too the bulk of the legal system may be conformed to. Nor is this view inconsistent with the institutional aspect of law: morality becomes law, on this view, by being tied to the relevant institutions. Finally, the allegation that morality can be thus incorporated into law is consistent with the thesis of the limits of law, for it merely asserts that source-based laws may from time to time incorporate parts of morality into law while imposing perhaps various conditions on their applicability. Having said that I should add that the result of admitting the view under consideration is that some non-source-based moral principles are part of almost every legal system, since most legal systems require judges to apply moral considerations on various occasions.

The difference between the weak and the strong social theses is that the strong one insists, whereas the weak one does not, that the existence and content of every law is fully determined by social sources. On the other hand, the weak thesis, but not the strong one, builds into the law the conditions of efficacy and

[7] Note that the reference is to morality, not to social morality. Social morality is based on sources: the customs, habits, and common views of a community.

institutionality. The two theses are logically independent. The weak thesis though true is insufficient to characterize legal positivism. It is compatible with:

(*a*) Sometimes the identification of some laws turns on moral arguments,

but also with

(*b*) In all legal systems the identification of some laws turns on moral argument.

The first view is on the borderline of positivism and may or may not be thought consistent with it. But whereas the first view depends on the contingent existence of source-based law making moral considerations into the criteria of validity in certain cases (as in the example above), the second view asserts a conceptual necessity of testing law by moral argument and is clearly on the natural law side of the historical positivist/natural law divide.

I will argue for the truth of the strong social thesis (thus excluding both (*a*) and (*b*)).[8] I shall rename the strong social thesis 'the sources thesis'. A 'source' is here used in a somewhat technical sense (which is, however, clearly related to traditional writings on legal sources). A law has a source if its contents and existence can be determined without using moral arguments (but allowing for arguments about people's moral views and intentions, which are necessary for interpretation, for example). The sources of a law are those facts by virtue of which it is valid

[8] The weak social thesis provides all the ingredients by which one determines whether a normative system is a legal system and whether it is in force in a certain country. In other words, the weak social thesis provides a complete test of existence of legal systems, a test by which one determines whether there is a legal system in force in a country. It also contributes (i.e. the institutional character of law contributes) some of the ingredients which make up the test of identity of a legal system (i.e. the test by which one determines whether two norms belong to the same legal system), but here it is insufficient and has to be supplemented by the strong social thesis, i.e. by the claim that all laws have social sources.

E. P. Soper, 'Legal Theory and the Obligation of the Judge: The Hart/Dworkin Dispute', *Michigan L. Rev.* 75 (1977) pp. 511 f., and D. Lyons, 'Principles, Positivism and Legal Theory', *Yale L.J.* 87 (1977) pp. 424 f., argue that legal positivism is consistent with (*a*). Supporters of such a conception of the law have to provide an adequate criterion for separating legal references to morality, which make its application a case of applying pre-existing legal rules, from cases of judicial discretion in which the judge, by resorting to moral considerations, is changing the law. I am not aware of any serious attempt to provide such a test.

and which identify its content. This sense of 'source' is wider than that of 'formal sources' which are those establishing the validity of a law (one or more Acts of Parliament together with one or more precedents may be the formal source of one rule of law). 'Source' as used here includes also 'interpretative sources', namely all the relevant interpretative materials. The sources of a law thus understood are never a single act (of legislation, etc.) alone, but a whole range of facts of a variety of kinds.

What are the reasons for accepting the sources thesis? Two arguments combine to support it. The one shows that the thesis reflects and explicates our conception of the law; the second shows that there are sound reasons for adhering to that conception.

When discussing appointments to the Bench, we distinguish different kinds of desirable characteristics judges should possess. We value their knowledge of the law and their skills in interpreting laws and in arguing in ways showing their legal experience and expertise. We also value their wisdom and understanding of human nature, their moral sensibility, their enlightened approach, etc. There are many other characteristics which are valuable in judges. For present purposes these two kinds are the important ones. The point is that while it is generally admitted that both are very important for judges as judges, only the first group of characteristics mentioned is thought of as establishing the legal skills of the judge. The second group, though relevant to his role as a judge, is thought of as reflecting his moral character, not his legal ability. Similarly, when evaluating judgments as good or bad, lawyers and informed laymen are used to distinguishing between assessing judicial arguments as legally acceptable or unacceptable and assessing them as morally good or bad. Of many legal decisions we hear that they are legally defective, being based on a misinterpretation of a statute or a case, etc. Of others it is said that though legally the decisions are acceptable, they betray gross insensitivity to current social conditions, show how conservative judges are, that they are against trade unions, or that in their zeal to protect individuals they go too far in sacrificing administrative efficiency, etc.

These distinctions presuppose that judges are, at least on

occasion, called upon to rely on arguments revealing their moral character rather than their legal ability. (It is unreasonable to suppose that the judge's moral character reveals itself only when he is wrong in law. It affects decisions too often for that to be a reasonable hypothesis.) As indicated above, the use of moral judgment is regarded not as a special case of applying law or legal arguments, but is contrasted with them. This is manifested in the way the two kinds of tests evaluating judges and judgments are related to two further distinctions. The first is that between applying the law and creating, innovating, or developing the law. It is a common view that judges both apply the law and develop it. And though their two functions are extremely hard to disentangle in many cases, yet sometimes, at least, it is clear of a case that it breaks new ground, while of many others it may be equally clear that they merely apply established law. The important point is that it is our normal view that judges use moral arguments (though perhaps not only such arguments) when developing the law and that they use legal skills when applying the law (though not only legal skills are used when they have to decide whether to apply a precedent or distinguish or overrule it. I shall disregard this problem in the sequel and will return to it in Essay 10 below).

Finally there is the distinction between settled and unsettled law. All lawyers know that on some questions the law is unsettled. Sometimes they say on such cases that no one knows what the law is—as if there is law on the question which is very difficult to discover. But most of the time they express themselves more accurately, saying that this is an open question, that the law is unsettled, etc. (On the interpretation of these expressions, see Essay 4.) It is primarily in deciding cases regarding which the law is unsettled (as well as in distinguishing and reversing settled law) that judges are thought to develop the law using moral, social, and other non-legal arguments. It is when deciding cases where the law is settled that the judges are thought of as using their legal skills in applying the law.

The sources thesis explains and systemizes these distinctions. According to it, the law on a question is settled when legally binding sources provide its solution. In such cases judges are typically said to apply the law, and since it is source-based, its application involves technical, legal skills in reasoning from

those sources and does not call for moral acumen. If a legal question is not answered by standards deriving from legal sources then it lacks a legal answer—the law on the question is unsettled. In deciding such cases courts inevitably break new (legal) ground and their decision develops the law (at least in precedent-based legal systems). Naturally, their decisions in such cases rely at least partly on moral and other extra-legal considerations.

One need not assume complete convergence between the distinctions mentioned above and the sources thesis. If, in fact, the sources thesis coincides with the way these distinctions are generally applied, it has explanatory power and is supported to that extent. It can then be regarded as being a systemizing or a tidying-up thesis where it goes beyond the ordinary use of these distinctions. This argument for the sources thesis is not an argument from the ordinary sense of 'law' or any other term. It relies on fundamental features of our understanding of a certain social institution, the primary examples of which are contemporary municipal legal systems but which extend far beyond them. It is not part of the argument that a similar conception of legal systems is to be found in all cultures and in all periods. It is part of our ways of conceiving and understanding the working of social institutions. There is nothing wrong in interpreting the institutions of other societies in terms of our typologies. This is an inevitable part of any intelligent attempt to understand other cultures. It does not imply that in interpreting alien institutions you disregard the intentions, beliefs, or value-schemes of their participants. It only means that at some stage you classify their activities, thus interpreted, in terms of a scheme for analysing social institutions of which the participants themselves may have been ignorant.

Still, it may be reassuring to know that the sources thesis is not merely a reflection of a superficial feature of our culture. I shall argue briefly that the sources thesis captures and highlights a fundamental insight into the function of law. It is a commonplace that social life requires and is facilitated by various patterns of forbearances, co-operation, and co-ordination between members of the society or some of them. The same is true of the pursuits of goals which the society or sections in it may set themselves. Different members and different sections

of a society may have different views as to which schemes of co-operation, co-ordination, or forbearance are appropriate. It is an essential part of the function of law in society to mark the point at which a private view of members of the society, or of influential sections or powerful groups in it, ceases to be their private view and becomes (i.e lays a claim to be) a view binding on all members notwithstanding their disagreement with it. It does so and can only do so by providing publicly ascertainable ways of guiding behaviour and regulating aspects of social life.[9] Law is a public measure by which one can measure one's own as well as other people's behaviour. It helps to secure social co-operation not only through its sanctions providing motivation for conformity but also through designating in an accessible way the patterns of behaviour required for such co-operation. This fact has been emphasized by many a natural lawyer for it forms part of the justification of the need for positive law. Locke is a prominent and well-known example. Hart more than anybody else emphasized the point among legal positivists.

To prevent misunderstanding let me elaborate some of the crucial steps in the argument. Many societies (large or small) have a relatively formal way of distinguishing between expressions of views, demands, etc., and authoritative rulings. Such a distinction is an essential element in our conception of government, be it in a family, in a loosely organized community, or in the state. Not all authoritative rulings are laws, not all systems of such rules are legal systems. But marking a rule as legally binding is marking it as an authoritative ruling. This marking-off of authoritative rulings indicates the existence in that society of an institution or organization claiming authority over members of the society that is holding them bound to conform to certain standards just because they were singled out by that purported authority regardless of whether or not they are justifiable standards on other grounds. Since it is of the very essence of the alleged authority that it issues rulings which are binding regardless of any other justification, it follows that it

[9] I do not mean to suggest that all laws are open. Secret laws are possible provided they are not altogether secret. Someone must know their content some of the time. They are publicly ascertainable and they guide the behaviour of the officials to whom they are addressed or who are charged with their enforcement by being so.

must be possible to identify those rulings without engaging in a justificatory argument, i.e. as issuing from certain activities and interpeted in the light of publicly ascertainable standards not involving moral argument.

If the first argument for the sources thesis was that it reflects and systemizes several interconnected distinctions embedded in our conception of the law, the second argument probes deeper and shows that the distinctions and the sources thesis which explicates them help to identify a basic underlying function of the law: to provide publicly ascertainable standards by which members of the society are held to be bound so that they cannot excuse non-conformity by challenging the justification of the standard. (Though, of course, in many countries they are free to act to change it.) This is the reason for which we differentiate between the courts' applying the law, i.e. those standards which are publicly ascertainable and binding beyond a moral argument open to the litigants, and the activity of the courts in developing the law relying on moral and other rational considerations. In making this a test for the identification of law, the sources thesis identifies it as an example of a kind of human institution which is of decisive importance to the regulation of social life.