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THE PLACE OF LEGAL POSITIVISM IN CONTEMPORARY CONSTITUTIONAL STATES

ABSTRACT. The aim of the paper is that of discussing some recent antipositivist theses, with specific reference to the arguments that focus on the alleged incapability of legal positivism to understand and explain the complex normative structure of constitutional states.

One of the central tenets of legal positivism (in its guise of 'methodological' or 'conceptual' positivism) is the theory of the separation between law and morality. On the assumption that in contemporary legal systems, constitutional law represents a point of intersection between law and basic moral values, antipositivists contrast legal positivism with two main arguments. First, on a more general level, the positivist theory of the separation between law and morality is questioned; then, and consequently, the 'neutrality thesis' in the juristic study of law is rejected. The author discusses both these antipositivist arguments, and offers a brief defence of methodological positivism.

KEY WORDS: legal positivism, constitutional states, relations between law and morality.

1. INTRODUCTION

In the current debate in legal theory many traditional positivistic theses are at stake. The positivistic approach (whatever this may mean) is often considered too narrow and sterile in face of the complex normative structure of contemporary legal systems.

Among the different distinctive features which characterise many contemporary legal systems, attention is drawn to the existence of a rigid constitution on the top of the hierarchy of legal sources: the new light shed by a rigid constitution on the structure of the state makes it possible to talk of a brand new model of the state: namely, the constitutional state.

According to many new 'antipositivist' scholars, then, constitutional law is the main test in order to show how incapable legal positivism is of producing a suitable understanding of the structure and the essence of contemporary legal systems. In consequence, anti-positivists maintain the need for a new approach to the classical problems of legal theory, such as the relations between law and morals, the theory of

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interpretation, the tasks of legal theory, the protection of rights, and the theory of sovereignty.

The positivist/antipositivist debate, anyway, is quite confused. The tradition of legal positivism is very wide and flexible, and many times anti-positivists seem to choose as their targets quite obsolete accounts of legal positivism, or even some theses currently (mis)represented as positivistic ones even if they are not actually maintained by any contemporary positivist scholar.

Anti-positivism, in turn, tends now to mingle with (generically) constitutionalist trends (we can refer for instance to such scholars as Alexy, Dworkin, Habermas, among others), as long as they place the inquiries into the constitutional state and contemporary constitutional law within the framework of a more general refutation of legal positivism.[1]

Anyway, the present paper will not deal with a review of the ongoing debate between positivism and anti-positivism (in their various ramifications). Rather, I will try to show which points of the positivistic approach need to be reformulated because of some peculiar features of contemporary legal systems that belong to the tradition of constitutionalism and, on the other hand, which points of the same approach need to be restated and strongly reaffirmed.

In the first part of the essay (§ 2-5.1), I'll be concerned with a definition of legal positivism, in order to single out the more important features of XX century legal positivism.

In the second part (§ 6-7), I'll try to characterise some relevant features of the normative structure of constitutional state.

Finally (§ 8), I'll try to indicate a model of legal positivism that could fit with the relevant features of constitutional state.

[1] Of course, in contemporary debate constitutionalism is not the only antagonist of legal positivism; contemporary natural law theories, such as the one of John Finnis, are important examples of anti-positivistic stances which don't belong to constitutionalism: see J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980). Later on in this paper, a short mention will be made to the opposition between legal positivism and natural law theories, but a closer investigation of the criticisms made out by Finnis and other contemporary natural lawyers to legal positivism would go beyond the scope of this essay.

2. DEFINING LEGAL POSITIVISM

Labelling cultural traditions is always a difficult task. It is even more so in the case of a comprehensive theoretical approach – such as that of legal positivism – to which many different doctrines are assumed to belong.

Considering how broad the definition of 'legal positivism' has become, given the large varieties of historical and cultural contexts in which it has flourished, it is possible to say that legal positivism is an 'essentially contested concept': a notion that is likely to be interpreted in quite different ways, even if it has a conceptual core which is commonly agreed upon.[2]

If we look at ordinary usage the first approach to the notion of legal positivism seems to refer to what legal positivism is not: legal positivism is often defined as a doctrine that is in radical - and polemical – contradiction to natural law theories. Legal positivism, as opposed to natural law theories, assumes that 'there is no other law but positive law': the existence or – more technically – the validity of law rests upon the mere fact of its being enacted by a historically determined human legislator (or norm-issuer in a broad sense): *ius quia iussum*.[3]

This simple definition embodies two important points for this preliminary discussion.

First, if we look at legal positivism and natural law as two definite theories (or 'clusters' of theories), we can notice that the former arise – in a determined historical period – as a reaction to the latter. In this sense, the above mentioned definition tells us an elementary truth, that in a certain moment of the history of legal culture and legal institutions (namely, the Enlightenment and the rise of the modern concept of state), a

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[2] See W.B. Gallie, 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society* **LVI** (1955-56), pp. 167-198.

[3] The concept of natural law could be identified with the thesis that 'the validity of positive law (i.e. the law posited by human beings) depends on its substantial conformity to a 'higher' law, which is the expression of absolute values of justice belonging to the nature (of things, of human beings…)'; according to natural law theories, then, *real law* is only *just law*, apart from its being actually enacted (*ius quia iustum*).

See M. Villey, 'Law in Things', in *Controversies about Law's Ontology*, ed. by P. Amselek and N. MacCormick (Edinburgh: Edinburgh U. P., 1991), pp. 2-12; for an up-to-date discussion about the main features of natural law theories, see *Natural Law Theory*, ed. by R. George (Oxford: Clarendon, 1992); and B. Bix, 'Natural Law Theory', in *A Companion to Philosophy of Law and Legal Theory*, ed. by D. Patterson (Cambridge MA: Blackwell, 1996), pp. 223-240.

cluster of theories 'revolts' against another cluster of theories which were prevailing till then.[4]

Moreover, it's possible to consider both legal positivism and natural law not as two specific theories, but as two general and fundamental attitudes towards the law. In this respect, the opposition between legal positivism and natural law seems to characterise the entire history of western legal thought: even in Greek and Latin legal thought we can find important examples of the antithesis between natural law and positive law, which, without necessarely being precise and articulated doctrines within specific cultural contexts, represent two fundamentally different attitudes relevant to appraisal of the law, by jurists and citizen.

In both cases, it is possible to say that between legal positivism and natural law there is a *conceptual* antithesis: these theories (or 'clusters' of theories) are absolutely irreconcilable, because they are respectively based upon two different *concepts of law*.[5]

The concept of law presupposed by legal positivism could be recognised in the assumption that 'the existence of laws is not dependent on their satisfying any particular moral values of universal application to all legal systems; the existence of laws depends then upon their being established through decisions of human beings in society'.[6]

On the other hand, if the distinction between legal positivism and natural law is a conceptual one, then it's not possible for a single doctrine to belong to both of them at the same time: they are mutually exclusive. In other words, if one is to reject legal positivism, is one compelled to adopt a 'natural law standpoint'?

This last question is closely related to our present concern. In contemporary debate, indeed, the main criticisms levelled against legal positivism come from scholars that reject the 'natural law' label. Natural law, they seem to suggest, has somehow exhausted its historical function, which was to prescribe certain substantial restraints to the

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[4] In this sense, see H. Kelsen, *General Theory of Law and State* (Cambridge MA: Harvard U.P., 1945), 'Appendix'.

[5] By concept of law I mean, in short, all those assumptions about the law which are shared – even implicitly – within a certain cultural tradition: positivist and natural law theories are thus incompatible in this very sense, because they are interpretative evolutions, that is, *conceptions*, of radically different concepts of law. I draw the distinction between concepts and conceptions from J. Rawls, *A Theory of Justice* (Cambridge MA: Belknap, 1971), chp. I (who in turn developed a point made out by Hart), and R. Dworkin, *Law's Empire* (London: Fontana, 1986), pp. 65-66, 70-73, 92-94.

[6] See N. MacCormick, 'Law, Morality and Positivism', in N. MacCormick and O. Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism* (Dordrecht: Reidel, 1986), pp. 127-144, at pp. 128-129; V. Villa, 'A Definition of Legal Positivism', *ARSP*, Beiheft **70** (1997), pp. 22-29.

production and interpretation of law; nowadays those very restraints, the argument continues, meet in actual laws, such as contemporary constitutions, and it's from the 'constitutional' point of view that legal positivism has to be criticised.

Obviously enough, we need now a more precise definition of both legal positivism and constitutionalism (and the constitutional state).

In fact, if on the one hand we were to reduce all legal positivism to the conceptual definition given above and, on the other hand, identify constitutionalism with the bare existence of a constitution in the legal system, our enquiry would end abruptly with the conclusion that constitutions (especially written ones) are actually positive law, established as such by human beings, and legal positivism is not at all affected by their existence.

There must be something more.

We need to move then from the concept of law assumed by legal positivism, to more specific and articulated positivist conceptions, which are supposedly seriously compromised by the existence of the constitutional state.

3. BOBBIO ON LEGAL POSITIVISM

Norberto Bobbio has singled out three main conceptions of legal positivism: methodological positivism, theoretical positivism, ideological positivism.[7]

'Methodological' positivism is a peculiar way to conceive of the function of legal knowledge and, at the same time, of the object of legal knowledge itself. The legal positivist is characterised by commitment to a value-free, scientific approach in studying actual law. From this important methodological tenet it thus follows that there is a sharp distinction between 'actual' law and 'ideal' or 'natural' law: between law as a fact and law as a value; a distinction which aims to point to the former as the proper (indeed only) object of legal knowledge.

'Theoretical' positivism is in fact a cluster of theories about the nature of law, which are all somehow related to a 'statalist' conception of law. These theories include: an

[7] See N. Bobbio, *Il positivismo giuridico* (Turin: Giappichelli, 1979[3]).

imperative theory of law, in which the key concepts are the ones of sovereignty (in relation to the foundation of the legal system) and command (in relation to the definition of norm); a theory of legal sources, in which statute law is the supreme source; a theory of the legal system, which is supposed to be a coherent and comprehensive whole; and a theory of legal interpretation, conceived of as a merely mechanical and logical enterprise.

'Ideological' positivism is a theory about the obligation to obey the law, according to which existing laws (or established statutes, in so far as this theory incorporates the 'theoretical' one) deserve moral compliance from the citizens; people, in other words, have a moral duty to obey positive law.

This doctrine, which would be more correct to define as 'moral positivism' or 'ethical legalism', meets in two different versions. Firstly, a moderate one, according to which the very existence of legal regulations (apart from the actual content of single norms) satisfies important demands of order, social peace, certainty. Secondly, a more extreme version, which holds that the law is not merely regarded as a means to fulfil desirable values, but as a value in itself: positive law is, as such, *just* law.

Now, if we recall the distinction, as drawn above, between concepts and conception, it's possible to say that these three theories, which can at times appear variously combined, are expressions of different positivistic *conceptions*, because they share the same positivistic *concept* of law.

Undoubtedly, Bobbio has shed considerable light on this debate, and has made some definite contributions to it, such as: stressing the ambiguity of the expression 'legal positivism'; observing that these theories and ideologies, even if historically related and somehow logically consistent, can't be taken as a unitary philosophical system; and the possibility of defending the different doctrines belonging to legal positivism, by means of different arguments.[8]

In any case, it's possible to note that the three different faces of legal positivism, as singled out by Bobbio, are historically related to the rise of the modern, post-

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Different ways to characterise positivistic conceptions are to be found in H.L.A. Hart, 'Positivism and the Separation of Law and Morals', *Harvard Law Review* **I** (1958), pp. 593 ff.; and J. Raz, *The Authority of Law. Essays on Law and Morality* (Oxford: Clarendon, 1979), pp 37-52.

[8] See also C.S. Nino, *Introducciòn al analìsis del derecho* (Buenos Aires: Astrea, 1980[2]), chp. I; and M. Troper, 'Le positivisme juridique', in M. Troper, *Pour une théorie juridique de l'état* (Paris: PUF, 1994), pp. 27-44.

revolutionary concept of the state. It's within this context that the very idea of *Rechtsstaat* (or state-under-the-law)[9] takes place, with its corollaries: monopolisation and centralisation of normative power, a strong concept of sovereignty, separation of state powers, submission of the judge to (statute) law, and codification.

The normative structure of this model of state is characterised by the supremacy of statutory law, and for this reason in European-continental tradition it's defined *Rechtsstaat*, or *Etat de droit legislatif*.

The modern doctrine of the state arises in Continental Europe, in France and in Germany mainly, towards the end of the XVIII century, and it influences the constitutional history of many European countries until - by and large – the first half of the XX century.

The main feature of this doctrine is the need to reject the concept of the absolute state, which was characterised by the centralisation of sovereignty in a single person: namely, the absolute monarch. This trait is evident in the two versions in which the absolute state has been identified: the *Machtsstaat* and the *Polizeisstaat*.

In contrast to the absolutist model of the state, in the *Rechtsstaat* model, sovereignty no longer resides in a single person, rather it's attributed to impersonal entities: in the French model, sovereignty is assumed to belong to *la nation*, and through the device of representative democracy, it moves to the institution that represent the people, i.e. Parliament; in the German one, it belongs to the state as the supreme juristic person, which is the exclusive titular of sovereignty in place of a single natural person, or of the people as a whole.[10]

In accordance with its underlying liberal ideology, the modern state aims to protect political freedom, by rationalising political power. In the structure of the modern state, then, the doctrine of the separation of the different state powers becomes essential, and has several implications[11]. Firstly, state functions (legislation, administration,

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[9] I prefer to avoid, in this context, the expression 'Rule of law', because it refers to a quite different concept; for a detailed analysis of these two models, see N. MacCormick, 'Der Rechtsstaat und die Rule of Law', *Juristinzeitung* **39** (1984), pp. 65-70.

[10] The German doctrine of the state was elaborated in XIX century by such scholars as Gerber, Laband, Jellinek, and later accepted also by many Italian jurists (V.E. Orlando, Santi Romano). For a more detailed analysis, see M. Fioravanti, 'Costituzione e Stato di diritto', *Filosofia politica* **2** (1991), pp. 325-350; and L. Ferrajoli, *La sovranità nel mondo moderno* (Rome & Bari: Laterza, 1997).

[11] The intersection between political freedom and separation of powers is clearly stated in the famous formulation of the1789 *Déclaration des droits de l'homme et du citoyen*, art 16: 'Toute societé dans

jurisdiction) must be exercised by distinct state organs, which in turn must be run by different people; secondly, both jurisdiction and public administration are subjected to legislation: the judge, on the one hand, is required to apply the (statute) law without contamination by his personal evaluations (we find this attitude in the theory of the judge as *bouche de la loi* formulated by Montesquieu, or in the doctrine of judicial syllogism elaborated – among others – by Beccaria[12]); public administration, on the other hand, is supposed to act solely within a framework previously determined by the law, which states the aims and limits of administrative functions.

Statutes then are at the top of the hierarchy of legal sources: as a logical consequence, there are no *legal* restraints on legislation, but only restraints of a political kind, depending on the extent to which the legislature is politically consistency.

Moreover, statutes are the only legal foundation of the rights of the citizens: rights don't exist prior to or outwith the state, rather they are posed by an act of self-restraint by the state itself. This is the well-known theory of rights as 'public subjective rights', according to which the fundamental rights of the individuals are nothing but 'self-obligations' the state imposes on itself (Jellinek, Romano), or 'indirect effects' (Gerber) of the supreme regulatory power of the state.

If we now look back at Bobbio's analysis, we find that, as suggested before, the *Rechtsstaat* model of state squares with all three of the above mentioned positivistic doctrines.

In fact, this model of state is closely related to the legalistic features of legal positivism; the theory of legal interpretation as a merely logical and mechanical pursuit is the characteristic, for instance, of the *école de l'exégèse*, outstanding in XIX century French legal culture; the doctrine of the legal system as a coherent and gapless whole is conceivable (not only in terms of a theoretical hypothesis but also as a matter of fact) because of the homogeneity of the political class, which produces the higher legal source: the statutes.

Obviously enough, in this context a value-free, morally neutral approach is required in the juristic study of law: first, because jurists must not jeopardise the fundamental

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laquelle la garantie des droits n'est pas assurée ni la séparation des pouvoirs déterminée, n'a point de constitution'.

[12] See C.L. de Montesquieu, *De l'esprit des lois* (1748), book VI, Chp. 3; C. Beccaria, *Dei delitti e delle pene* (1766), § IV. Similar views were held also by Voltaire and Verri.

value of legal certainty; second, because legal dogmatics is not recognised as a legal source.

Finally, as far as ideological positivism is concerned, such a strong representation of state sovereignty (which justifies the 'dogma' of the omnipotence of the legislator) tends to grant moral value to the state, which then deserves absolute obedience. This is the case both with the Hegelian conception of the 'ethical state', in which citizens can't even claim the right to live, and with Rousseau, according to whom all the natural rights of the individuals are transferred to the state by means of the original social contract.

Anyway it's worth noting that both Hegel and Rousseau, as ideological positivists, stress the question of the absoluteness of the obligation to obey the sovereign much more then Hobbes himself, who is usually regarded as the theorist of the absolute state, and a founder of legal positivism at the same time. In the Hobbesian conception, citizens in fact still maintain a fundamental and inalienable right to life in spite of the power of the sovereign.

So far I've tried to show, along the lines of Bobbio, what features of legal positivism are historically related to a certain model of state. In the following, we'll try to see in what more specific sense legal positivism has been professed and defended in the XX century.

4. WHAT SURVIVES OF THE THREE ASPECTS OF LEGAL POSITIVISM

Among the three main positivist conceptions, ideological positivism is certainly the least convincing. To this regard, positivists are assumed to have polarised such attitudes as the so-called 'statute fetishism', or the uncritical respect for positive law.

Positivists, critics say, went far beyond the trivial perception that a legal system can't be based solely upon the threat of sanction: reducing all 'law' to 'positive law', legal positivists are assumed to grant unconditional assent to positive legal systems whatsoever, and even to morally aberrant ones (the so-called 'reductio ad Hitlerum' of legal positivism).

But it's worth stressing that at a closer look this position has not been explicitly embraced and defended by any contemporary positivist scholar.

A more careful analysis indeed shows that the attitude of a-critical moral compliance to positive law is not easy to place in the works of the main positivist authors of the XX century. Rather, that very attitude is firmly criticised and rejected by the more important positivists. Ross, for instance, has labelled this attitude as 'quasi-positivism', pointing at it as a variant of jusnaturalism[13]. Bobbio, on the other hand, has shown that the doctrine of the moral obligation to obey the law historically arose in a jusnaturalistic cultural context; it would be historically false, then, to impose on legal positivism the exclusive responsibility for the so-called moral legalism.[14]

And quite understandably so. If we take legal positivism seriously, we must note that the extreme version of ideological positivism does not derive from (nor is conceptually compatible with) the more basic epistemological requirements of methodological positivism, the most influent positivist conception in the XX century.

Since epistemological positivism focuses on a value-free approach to law, an approach which asks the jurist to keep judgements of legal validity separated from moral evaluations (the so-called 'Neutrality Thesis'), it would be self-contradictory for this approach to regard the law as a form of morality in itself.[15]

One of the reasons why the 'neutrality thesis' is so important to contemporary legal positivism is probably to be found in the convergence between legal positivism and analytical philosophy: the principle of neutrality finds a philosophical foundation in the postulate of the 'Great Division' between 'is' and 'ought' (the so-called 'Hume's Law'), which forbids - from a logical point of view - derivation of value judgements from statements of fact. Twentieth century positivism, then, also through the influence of analytical philosophy, tends more and more to emphasise its epistemological-

[13] A. Ross, 'Validity and the Conflict between Legal Positivism and Natural Law', *Revista Juridica de Buenos Aires* **4** (1960).

[14] N. Bobbio, *Il positivismo giuridico* (supra n. 7), pp. 265-284.

For a more general discussion on this topic, see G. Carriò, 'Le opinioni del prof. Dworkin sul positivismo giuridico', *Materiali per una storia della cultura giuridica* **1** (1980), pp. 143-182; C. Nino, *Introducciòn al analìsis del derecho* (supra n. 8), chp. I; A. Squella, 'Legal Positivism and Democracy in the Twentieth Century', *Ratio Juris* **3** (1990), pp. 407-414.

[15] So far as to the 'extreme' version of ideological positivism. But the answer has to be quite different about the 'moderate' version, according to which, as hinted above, the law is not a value in itself but a means to pursue relevant moral and political values such as democracy, social peace, and so on; to my mind, this version fits entirely with epistemological positivism.

methodological aspect, as a theory of legal science that states under what conditions legal dogmatics can produce genuine legal knowledge.[16]

Finally, as far as 'theoretical' positivism is concerned, we have already noted that it includes a number of theses – not logically related to each other – that have characterised a certain model of state. Apparently, no such thesis is still defended by contemporary positivists. Some theses, on the one hand, have been reformed (even radically), while some others have been abandoned or even overtly criticised by positivists in the first place. For instance, the imperativist conception of the legal norm, that originates with John Austin, is subjected to a deep revision by Kelsen's normativist theory and this last one, in turn, is reformulated (also) in the light of analytical philosophy by Hart and Bobbio. The supremacy of statutory law as a legal source is challenged by the introduction of written rigid constitutions (which we'll deal with in due course). The formalistic theory of legal interpretation has been rejected by almost every positivist in the XX century (as is evident in the Kelsenian theory of judicial interpretation, or in the criticism of interpretive formalism made out by Hart[17]), only to reappear, even if in disguised terms, in some anti-positivist scholars, along with the theory of the legal system as a coherent and gapless whole.[18]

To put it crudely, the relationship between the three aspects of legal positivism could be represented, from a diachronical point of view, by remarking that ideological positivism is probably the first to appear, with Hobbes' political philosophy; in the XIX century, then, the theoretical aspect becomes prominent (even though there is a certain balance between the three of them); by the XX century, the epistemological aspect emerges as the single key tenet of legal positivism.

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[16] On this point, see V. Villa, *Teorie della scienza giuridica e teorie delle scienze naturali. Modelli e analogie* (Milan: Giuffrè, 1984). On 'Hume's Law', see B. Celano, *Dialettica della giustificazione pratica. Saggio sulla legge di Hume* (Turin: Giappichelli, 1994).

[17] See H. Kelsen, *Reine Rechtslehre* (Wien: Deuticke, 1960), chp. VIII; H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1994, 2nd ed.), chp. VII.

[18] The 'antipositivist author' referred to in the text is of course Ronald Dworkin, whose 'one right answer thesis' is often regarded as a (unintentional perhaps) restatement of formalistic arguments. On this point, compare G. Carrió, 'Le opinioni del prof. Dworkin sul positivismo giuridico' (supra n. 14); A. Pintore *La teoria analitica dei concetti giuridici* (Naples: Jovene, 1990); L. Prieto Sanchìs, 'Costituzionalismo e positivismo', *Analisi e diritto* (1996), pp. 207-226.

Because of this evolution, the definition 'post-positivism' has been proposed to single out XX century positivist conceptions.[19]

5. THE SEPARATION BETWEEN LAW AND MORALITY

While this may be so, the neutrality thesis is a focal point of the conceptual framework of legal positivism: it's one of the possible implications of the theory of the separation between law and morality, the very battle-field on which legal positivism formerly opposed natural law and now (generically) anti-positivism. Let us then determine shortly the terms of the question, in order to see in what sense this matter is still debated.

We can note at first that the problem of the relation (or, conversely, of the separation) between law and morals can be (and in fact has been) expressed in many different ways[20]. For instance:

1. There must not be any relation between actual law and morality whatsoever, either in the law-making process, or in the judicial application of the law (this point was firmly established in the Enlightenment by legal utilitarianists, and recently restated – mainly in criminal law– by Hart and Ferrajoli);
2. There is no necessary relation between law and morality: certainly, it can happen that a legal system, or some of its norms, embodies moral values, but in the opposite case the legal system or its norms do not lose their legality (Hart, Raz);
3. Even in those cases in which a legal systems' criteria of (legal) validity include respect for some moral values (which somehow makes necessary the relation between law and morality), those would still be simply *conventional* moral values, agreed upon by human beings in society, not *objective* or *universal* ones;

[19] See for instance M. Jori, *Il giuspositivismo analitico italiano prima e dopo la crisi* (Milan: Giuffrè, 1987), pp. 47-80.

[20] A very interesting taxonomy of relationships and differences between law and morality is offered by R. Shiner, 'Law and Morality', in *A Companion to Philosophy of Law and Legal Theory*, ed. by D.

4. The task of legal science is to describe positive law without evaluating it; better, without confusing scientific description and moral evaluation of the law; evaluations belong not to legal science but to (to put it in Benthamite terms) 'censorial jurisprudence', which is of course a worthy activity, but one that should not be confused with the former (Bentham, Hart, Kelsen, Bobbio, Ross, and generally every XX century positivist).

These theses, as well as other ones which I'm not mentioning here, are not on the same level: apart from the fact that they have been conceived and defended in different political and cultural contexts, some (1, 4) are normative theses, prescribing a suitable model (of law, of legal science), others (2, 3) are conceptual in character.

Nevertheless, the separation between law and morality is often regarded as a weakness of legal positivism.

Leaving aside the alleged immorality of ideological positivism, apparently two criticisms are now more 'fashionable': first, that there is indeed a necessary conceptual relation between law and morality, which makes false the positivist thesis of the merely contingent connection ('Fallibility Thesis'); second, the positivist requirement of a value-free legal science, even if it does not end in a moral acceptance of positive law, still makes it impossible for the jurist - as a jurist - to criticise positive law from a moral point of view.

Both criticisms tend to question the neutrality thesis[21]: indeed, if a conceptual relation between law and morality is deemed necessary, then the jurist will have to use also moral 'tools' to study, evaluate, and criticise positive law, and this will still be regarded as a genuine legal knowledge, not legal policy or ideology (provided that this distinction would still be accepted).

I will discuss the two criticisms separately: the first now, the second in the last section.

Patterson (supra n. 3), pp. 436-449. See also L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale* (Rome & Bari: Laterza, 1989), pp. 203-209.

[21] For an accurate insight of both the 'fallibility thesis' and the 'nuetrality thesis', see K Fusser, 'Farewell to Legal Positivism: The Separation Thesis Unravelling', in *The Autonomy of Law. Essays on Legal Positivism*, ed. by R. George (Oxford: Clarendon, 1996), pp. 119-162.

5.1. CONCEPTUAL RELATIONS BETWEEN LAW AND MORALITY?

We have already seen that the problem of the necessary relation between law and morality has characterised natural law tradition. The renewed interest in this topic is now raised not only by natural lawyers, but also by anti-positivist scholars. Moreover, and somewhat ironically, the new way to approach this subject is considered as a development of some points put forward by one of the more eminent XX century positivists: H.L.A. Hart.

Indeed, Hart has maintained that the very existence of a legal system depends on its being accepted (in some sense) by the citizens, or at least by public officials (judges in the first place), as long as they maintain an internal point of view to the norms of that legal system, or at least to its rule of recognition.

Some then have interpreted the need for an internal point of view in the sense that at least a qualified group of people must be *morally* engaged with that legal system (but Hart just talked of acceptance of the rules *as standards of conduct*, without specifying that a *moral* acceptance is in question); and that would be so because every legal system carries a 'claim of correctness', at least at the level of its rule of recognition, i.e. its constitution[22]. For this reason, a constitutional norm claiming that 'X is a just state' would be merely redundant.

Indeed, the positivistic thesis of the separation between law and morality, at its origin, is an attempt to separate the law and the state from the overwhelming claims of tradition and religion[23]. In this perspective, law has to have an essentially conventional character, it must not be subjected to an ideal, absolute morality (let's just remind ourselves of the concept of law assumed by legal positivism as mentioned earlier, at § 1), and the genuine juristic study must not be influenced by an external morality. In other words, legal positivism professes the separation between law and every *objective*, i.e. *critical* morality.

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[22] See E. Garzòn Valdés, *Derecho, Etica y Politica* (Madrid: Centro de Estudios Constitucionales, 1992); R. Alexy, 'On Necessary Relations Between Law and Morality', *Ratio Juris* **2** (1989), pp. 167-183; A. Peczenik-S. Urbina, 'Why Officials? On Legal Positivism Old and New', *Rechtstheorie* **27** (1995), pp. 139-162.

[23] That was the case, for instance, with Bentham and Austin and their attack to the Common Law tradition.

But things are different as long as *positive* morality is concerned, i.e. the morality that belongs to the social group that enacts a certain legal regulation.

Indeed, all positivists agree that a certain degree of social effectiveness is a necessary prerequisite of legal validity, both – even if in different ways – at the level of the legal system and of single norms[24], and no positivist has claimed that efficacy can be reached solely by means of coaction. In other words, the positivist concept of law implies an evident relation between law and positive morality.[25]

If we now pay attention to the kind of relation between law and morality antipositivists require, we can note that they emphasise just exactly the same requirement of a necessary (conceptual or even normative) relation between law and *positive* morality. This has been repeatedly shown about Dworkin[26], but it's even more clear in the case of Alexy, who asserts the existence of a claim of correctness in the law, but in terms of the correctness as understood by a certain social group, or even by those who have the power: Alexy makes the example of a group of people that subjugates a community of slaves in order to – say – sell their body organs; now, Alexy says that the commands of the slavers, even if organised by certain schemes, procedures, hierarchies, and so on, can't be regarded as 'law' unless they share a claim of correctness. But let us beware: this correctness is considered from the partecipants' perspective or, *mutatis mutandis*, from the point of view of the slavers themselves.

So we can now answer this anti-positivist criticism in this way: first, the same kind of relationship between law and morality they argue for is consistent with, or even implied by, a positivist point of view; second, this criticism in the end is much less meaningful than we would expect, because it relates the law to a claim of correctness, i.e. of 'justice'. But in the end this would be quite an empty concept of justice, whose fulfilment would simply depend by its consistency with the positive morality of a social group: even, then, of a group of slave-traders.

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[24] Leaving aside Legal Realism, let us just remind the definition of rule, and the conditions of existence of the legal system according to Hart; moreover, often it's not paid enough attention to the fact that Kelsen himself, in the 1960 edition of the *Reine Rechtslehre* (supra n. 17), regards efficacy not only as a basic requirement for the existence of the legal system but also of single legal norms.

[25] See also J. Raz, 'Intention in Interpretation', in *The Autonomy of Law. Essays on Legal Positivism* ed. by R. George (supra n. 21), pp. 249-286, spec. at p. 260 ff.

[26] See L. Prieto Sanchìs, 'Costituzionalismo e positivismo' (supra n. 18).

In the end, the problem of the relation between law and morality seems to raise a point of serious difference only from the perspective of a universalistic conception of morality, such the one assumed by the natural law tradition.[27]

The first anti-positivistic criticism, concerning a necessary conceptual relation between law and morality, seems entirely ineffectual.

6. CONSTITUTIONAL STATE

The second criticism aims to question epistemological positivism.

The principle of epistemological neutrality is criticised not only on the grounds of the above mentioned thesis of the necessary connection, but also because of the overwhelming importance moral principles have within the framework of the supreme legal source in contemporary legal systems, i.e. the rigid constitution.[28]

This model of legal system, which is commonly referred to as the 'constitutional state', is characterised by several important features, among which are: the introduction of a rigid constitution, coherent in its normative content; the supremacy of the constitution over sub-constitutional norms, statutes in the first place, which makes the constitution a rigid one; and the judicial review of legislation, which guarantees the supremacy of the constitution.[29]

The introduction of rigid constitutions in contemporary legal systems is one of the most interesting points in XX century legal history, and it has been compared to a 'paradigm change' (using Kuhn's terminology) in the legal culture. Indeed, contemporary constitutions embody both procedural rules concerning norm-production, and substantive principles that are to be pursued (or at least not infringed) by the norms

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[27] In the same sense, N. MacCormick, 'Comment' to G. Postema, 'The Normativity of Law', in *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart*, ed. by R. Gavison (Oxford: Clarendon, 1987), pp. 105-113; R. Caracciolo, 'L'argomento della credenza morale', *Analisi e diritto* (1994), pp. 97-110; P. Comanducci, 'Diritto, morale e politica', in P. Comanducci, *Assaggi di metaetica due* (Turin: Giappichelli, 1998), pp. 3-15.

[28] Even if the following discussion aims to be a general one, it is mainly based on continental-European contemporary experience.

[29] Other basic conditions of the 'constitutionalisation' of a legal system are: the binding force of the constitution; the direct enforcement of constitutional norms; a constitutionally coherent interpretation of statutes; the influence of the constitution on political relations. Cfr. R. Guastini, 'Remarques sur la constitutionnalisation de l'ordre juridique. Le cas italian', in Associazione Italiana di Diritto Comparato,

that are produced. These substantive standards are intended to constrain the content of legal norms, also providing a legal restraint against legislation, i.e. the branch of state activity which was formerly conceived as supreme and (legally) unrestricted. In a constitutional state, then, legislation itself is *sub lege*, which no longer renders acceptable the 'dogma' of the omnipotent legislator.

The constitutional state is framed by different normative levels, hierarchically related. Nothing new so far: every legal order has a certain hierarchical structure. What is indeed new is that, in Kelsen's terminology, the constitutional state is not only a dynamic but also a static normative system.[30]

While the legislative state has an essentially dynamic framework (at legislative level at least), the constitutional state shares at the same time both a static and a dynamic dimension because the constitution establishes not only the procedures of normative production, but also its substantial limits.[31]

To use a different concept elaborated by XX century positivistic theory, we could say that a constitutional state is a legal system whose rule of recognition includes both formal and substantive criteria to identify the valid rules of the system.[32]

The constitutional standards of substantive validity are mainly identifiable with the protection of fundamental rights, such as the principle of equality, the immanent dignity of the human being, various civil and political rights, as well as 'welfare rights' such as the right to health, to education, to social assistance and so on. In short, we can say that, as long as fundamental constitutional rights are concerned, in some cases the state is under a 'negative' obligation, because legislation must refrain from obstructing the

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Rapports nationaux italiens, XIVéme Congrés International de Droit Comparé, Bristol 1998, (Milan: Giuffrè, 1998), pp. 449-478.

[30] For the distinction between static and dynamic normative systems, see H. Kelsen, *Reine Rechtslehre* (supra n. 17), chp. V.

[31] See L. Ferrajoli, 'Il diritto come sistema di garanzie', *Ragion pratica* **1** (1993), pp. 143-161; L. Gianformaggio, 'The Question of Moral Criticism of the Law: Is It Internal or External?', in A. Aarnio-S.L. Paulson-O. Weinberger-G.H. von Wright-D. Wyduckel (eds.), *Rechtsnorm und Rechtswirklichkeit. Festscrift fur Werner Krawietz zum 60. Geburstag* (Berlin: Duncker & Humblot, 1993).

[32] Hart himself seems to put in close relation the constitution and the rule of recognition. Compare the following passage, in which Hart defends the concept of rule of recognition from Dworkin's criticism: '[…] in some systems of law, as in the United States, the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of *legal constitutional restraints*', H.L.A. Hart, *The Concept of Law* (supra n. 17), 'Postscript', p. 247 (italics added). A quite similar argument is developed by W.J. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon, 1994), pp. 142-165.

exercise of certain fundamental freedoms; in some other cases, instead, the state has to promote all the structural conditions that enable the citizens to use those rights.

7. THE CONSTITUTIONAL STATE AND LEGAL THEORY

The enforcement of fundamental rights in a constitution brings out somehow new theoretical queries for legal philosophy and legal theory.[33]

As far as legal philosophy is concerned, we can note that constitutionalism apparently makes the traditional opposition between legal positivism and natural law less 'actual', so to say. Indeed, natural lawyers themselves seem to have discarded this very label: the polemic arguments formerly used by natural lawyers against legal positivism (concerning the need for a moral evaluation of positive law, rather than the supposed fidelity to the law ascribed to legal positivism) are now used by anti-positivist scholars that are not willing to be labelled as natural lawyers; rather, their arguments are regarded as a (not particularly original) variant of natural law by their positivist opponents.

Of course, between constitutionalism and natural law there are many relations, both historical and conceptual ones, but it is a fact that in contemporary debate very few authors critique legal positivism from a clear-cut natural law point of view.

Moreover, the opposition between legal positivism and natural law looks lees interesting in respect of the question of the juridical character of fundamental human rights. Since the former natural rights (or at least a conspicuous number of those) have been laid down in positive (constitutional) norms, the matter of their ontological foundation loses its 'practical' interest, becoming by and large an abstract 'philosophical' question.

In Bobbio's words, 'the critical problem in our times is not one of finding fundamental principles for human rights, but that of protecting them'.[34]

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[33] On the process of 'constitutionalisation' of fundamental rights, see A. Perez Luno, *Los derechos fundamentales* (Madrid: Tecnos, 1984), pp. 57-65; L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale* (supra n. 20), pp. 347-362; G. Zagrebelsky, *Il diritto mite. Legge diritti giustizia* (Turin: Einaudi, 1992), pp. 57-96.

[34] N. Bobbio, *The Age of Rights*, transl. by A. Cameron (Cambridge: Polity, 1996), p. 12.

Of course, from a genuine philosophical point of view, the distinction between legal positivism and natural law still stands, and it rests on the basic choice between moral realism and moral relativism, i.e. the objective or relative foundation of moral values. In this sense, natural law theories are still based on the belief in the existence of universal objective values that can be apprehended by human reason, while legal positivism assumes moral values to be rooted in specific cultural and social contexts.[35]

It's worth noting, on the other hand, that an appeal for the recognition of the importance of natural law has also been from time to time promoted in the context of the constitutional state, and more precisely in the case of constitutional interpretation. Indeed, it has been claimed that the process of interpretation and argumentation based on constitutional norms and principles cannot be similar to the one based on legislative rules, because constitutional norms 'normally' show an openness to meta-juridical values that is 'normally' lacking in legislative rules.[36]

The concept of natural law appealed to in these cases is not represented, obviously enough, by the rationalistic doctrines belonging to the XVII and XVIII centuries (according to which the ideal legal system is thought of as a perfectly axiomatic system, built *more geometrico* on self-evident rational principles); rather, reference is made to 'personalistic' natural law doctrines, as elaborated after World War II, that tend to reduce natural rights to human rights.[37]

Now, if one assumes that the interpretation of the constitution is (or has to be) a kind of natural law-based interpretation, this is not a mere preference for a certain rhetoric style, rather it's a precise policy-choice, with relevant practical consequences. For instance, the adoption of a 'natural law' argumentative style is likely to justify the claim that the constitutional protection of fundamental rights can't be restricted just to explicitly mentioned constitutional rights; or that there is a constitutional 'core' whose revision would be legally forbidden; or that, since principles entered the legal system via the constitution, the judicial review of legislation could be conceived as a judgement

[35] Compare F. Viola, 'Ragion pratica e diritto naturale: una difesa analitica del giusnaturalismo', *Ragion pratica* **1** (1993), pp. 61-81; V. Villa, 'Legal Theories and Value Judgements', *Law and Philosophy* **16** (1997), pp. 447-477, at p. 459.

[36] See G. Zagrebelsky, *Il diritto mite. Legge diritti giustizia* (supra n. 33), p. 156; A. Baldassarre, 'Costituzione e teoria dei valori', *Politica del diritto* **4** (1991), pp. 639-658; L. Mengoni, *Ermeneutica e dogmatica giuridica. Saggi* (Milan: Giuffrè, 1996), p. 114.

[37] For an outline of contemporary 'personalistic' natural law, see F. Viola, *Diritti dell'uomo diritto naturale etica contemporanea* (Turin: Giappichelli, 1989).

of 'justice' of legislative norms, even without precise reference to the wording of the constitution.

The consequence is that, in all those cases, constitutional judges are granted a power that seems to exceed the limits of the constitution itself. And it's not strange, to my mind, that this way of conceiving of the role of the judges fits quite well with Ronald Dworkin's theory of law as integrity.[38]

Of course, I'm not arguing for a 'legalistic' interpretation of the constitution; rather, I think it's important to show that there is a difference between taking the constitution seriously – as a guide for the interpretation of sub-constitutional rules – and assuming that it's always possible to find one right answer in the constitution; moreover, interpreting the constitution as a coherent whole is one thing, assuming that some parts of the constitution can't be legally modified is another.[39]

At the end of the day, the emphasis on the judicial review of legislation in accordance with fundamental constitutional rights can't be separated from the claim that constitutional judges are themselves bound by the constitution. In this context, we have to keep in serious consideration the attempt made by Robert Alexy, for instance, to develop the importance of constitutional principles, but within the impartial procedural framework worked out by a complex theory of argumentation.[40]

8. LEGAL POSITIVISM AND THE CONSTITUTIONAL STATE

To recapitulate the argument so far: Legal positivism, which nowadays is based essentially on a scientific and neutral approach to the study of law, is criticised for its rejection of a necessary conceptual relation between law and morality, and consequently for its (supposed) incapacity to evaluate critically positive law. We have seen three possible positivistic replies to these criticisms:

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[38] See M. Troper, 'Judges Taken Too Seriously: Professor Dworkin's Views on Jurisprudence', *Ratio Juris* **2** (1988), pp. 162-175.

[39] On this point, see A. Pace, 'Diritti fondamentali al di là della Costituzione?', *Politica del diritto* **1** (1993), pp. 3-11; M. Troper, 'La notion de principes supraconstitutionnels', *Journées de la société de législation comparée* (1993), p. 337 ff.; J.J. Moreso, *Legal Indeterminacy and Constitutional Interpretation* (Cambridge/Boston/London: Kluwer, 1998), chp. V.

[40] See R. Alexy, *Begriff und Geltung des Rechts* (Freiburg & Munchen: Alber, 1992).

1. If the relevant relation is between law and *positive* morality, then the anti-positivist criticism misses the target, because this thesis is perfectly consistent with a positivistic stance (§ 5);
2. This criticism is not so interesting anyway, unless positive morality is thought of as linked to a certain (absolute and objective) content, which every legal system in turn must satisfy (§ 5.1);
3. That would be a jusnaturalistic stance, and we have seen that the 'constitutionalisation' of fundamental natural rights in contemporary constitutional states somehow makes redundant the appeal to natural law arguments (§ 7).

The above mentioned arguments could be regarded a brief defence of legal positivism. We have to see now what specific contribution legal positivism can give to a useful understanding of the normative structure of constitutional state.

One of the most important contributions towards a 'constitutional positivism' is to be found in Ferrajoli's theory of legal validity[41]. As is well-known, legal validity is a key-concept for legal positivism, according to which a norm is legally existent on the basis of its belonging to a certain legal system: a norm is valid if it meets the established criteria of 'membership' of that system. This concept of validity is closely linked in legislative states to the 'neutrality thesis', whose meaning was to bind the jurist to those established criteria, which were only formal-procedural in character: as we have seen, in that context legislation didn't meet any substantial *legal* restraint. In this way, the jurist was able to identify valid law with merely positive law, i.e. the law enacted in a procedurally correct way.

But the concept of legal validity changes radically in constitutional states, within which substantial *legal* restraints are established not only for every level of norm-production, but also for legislation.

Thus, legal validity is no longer reducible to mere enactment, because the norm-issuer is bound not only by respect for certain procedures, but also by pursuit of the relevant substantial legal values incorporated in the constitution, such as the protection of fundamental rights.

[41] L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale* (supra n. 20), pp. 347-362, 898-922.

In a constitutional state, then, the concept of legal validity must be separated from other different aspects of the norm, that have been at times confused by different doctrines in the history of legal ideas. To put it crudely, natural law tended to identify legal validity with justice: that is to say, a norm is 'properly' valid only if it is coherent with certain objective values. Normativism, in turn, reduced validity to bare enactment: a norm is valid if it has been established according to certain procedures. Legal realism, eventually, identified validity with efficacy: a norm is valid if it's actually implemented in society.

Ferrajoli's thesis is that the concept of validity has to be specifically understood in terms of a relation of coherence between a certain norm and the other – higher – norms, constitutional ones in the first place. Of course, the fact that the norm has been enacted in accordance with a certain procedure still remains a preliminary step of validity, but it's important to stress that mere enactment doesn't coincide with validity. On the other hand, the notion of enactment should include not only explicitly established legal rules, but also those rules that can be derived by means of generalisation from explicitly established rules, such as - for instance – legal principles (whose validity would be a further question).

Dissociating legal validity from mere enactment brings forth relevant consequences, not only for the positivist theory of the legal norm, but also for the theory of legal science and the neutrality thesis.

Indeed, there is an obvious difference in ascertaining legal validity on the one hand, and enactment on the other. Undoubtedly, it can be argued that in both cases interpretation is involved, but still the latter has a factual dimension that is lacking in the former: the judgement of legal validity is prominently based on value-judgements and substantive arguments.

The question is: is this way of conceiving legal validity consistent with the positivist neutrality thesis?

Let us remind ourselves that the neutrality thesis is justified by two basic requirements: the avoidance of the 'naturalistic fallacy', related to 'Hume's Law', and the need to keep the study of the law separated from the evaluation of the law. Well, these two bases of the neutrality thesis don't seem to be affected by the fact that the jurist – when dealing with relevantly value-laden 'objects' – takes into account this

aspect of the rules, and of legal practice in general. But this does not imply that the scholar, in turn, has to assume a moral point of view: the mere fact that the scholar uses value-laden 'tools' (that are embodied in the constitutional norms) in order to ascertain legal validity doesn't mean that he or she has to share those very values.[42]

If so, value-judgements seem to have a role to play in legal knowledge, provided that only those values that are internal to the legal practice come in consideration, and not on any account values that the scholar tries to introduce in the legal system[43]. Of course, the line between internal and external values is not a sharp one; rather, it has an interpretative character, in Dworkinian terms; but it's a fact that the traditional way to conceive of legal certainty necessarily becomes rather questionable in 'constitutionalised' legal systems.[44]

The possibility of using internal value-judgements in legal knowledge enables the jurist to describe the enactment of void legal norms, or conversely the disimplementation of valid norms, and so on.

A critical legal positivism can ascribe this role to legal science without losing its basic requirements, and without becoming a mere 'apostle of made law'.[45]

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[42] See E. Bulygin, 'Norms, Normative Propositions, and Legal Statements', in *Contemporary Philosophy. A New Survey*, vol. 3, ed. by G. Floistad (The Hague-Boston-London, 1982); P. Comanducci, 'Diritto, morale e politica' (supra n. 27).

[43] On this point, see L. Gianformaggio, 'The Question of Moral Criticism of the Law: Is It Internal or External?' (supra n. 31); V. Villa, 'Legal Theory and Value-Judgements' (supra n. 35), p. 479 ff.

[44] See P. Comanducci, 'Principi giuridici e indeterminazione del diritto' in P. Comanducci, *Assaggi di metatetica due* (supra n. 27), pp. 81-95; G. Pino, 'Coerenza e verità nell'argomentazione giuridica. Alcune riflessioni', *Rivista internazionale di filosofia del diritto* **1** (1998), pp. 84-126.

[45] The expression is taken from L.L. Fuller, *Anatomy of the Law* (New York: The New American Library, 1969), p. 175.