Law and Philosophy
DOI 10.1007/s10982-014-9205-x

MARÍA CRISTINA REDONDO

SOME REMARKS ON THE CONNECTION BETWEEN LAW AND MORALITY

(Accepted 20 January 2014)

ABSTRACT. This article is primarily focused on two interconnected discussions presented by John Gardner in *Law as a Leap of Faith*. The first one is related to the thesis which, according to Gardner, all positivists agree on; the second one is referred to the positivist's position regarding the connection between law and morality. In order to address these issues I rely on the distinction between two kinds of criteria: the conceptual criteria and the validity criteria. On this basis, and against what Gardner asserts, I try to defend two main ideas. Firstly, that the thesis on which all positivists agree is not one about the validity criteria that norms must satisfy in order to belong to a legal system, but rather one concerning the conceptual criteria delimiting the concept of law. By the same token, I argue that, according to the positivist understanding of the concept of law, there is no necessary connection between law and morality.

I. INTRODUCTION

This article is mainly devoted to discussing two interconnected theses presented by John Gardner in *Law as a Leap of Faith*.[1] The first one is related to Gardner's view regarding the thesis which all positivists agree on; the second one is referred to as the positivist's position regarding the connection between law and morality. Gardner's proposal is really an impressive set of interconnected ideas. It offers a subtle development of many theses that we can consider 'classics' in legal jurisprudence, but it also adds many fresh contributions to them. In spite of this, my conclusions will be critical with respect to his proposal. Against what Gardner asserts, I will try to show that the thesis on which all positivists agree is not one about the validity criteria that norms must satisfy in order to belong to a

[1] John Gardner, *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012). Here forward: *LLF*.

Published online: 22 March 2014

legal system, but rather one concerning the conceptual criteria delimiting the concept of law. By the same token, I will argue that, according to the positivist understanding of the concept of law, there is no necessary connection between law and morality.

II. A NEEDED PREMISE

In order to address the two issues I intend to discuss, I need to introduce a clear distinction between two kinds of criteria: the conceptual criteria that delineate what law is and the validity criteria that set up the conditions for a norm to be part of a specific legal system. Following Herbert Hart, Gardner accepts that it is possible to indicate some common features that every legal system satisfies.[2] Insofar as these features are a determining factor to establish whether a set of norms constitutes a legal system or not, they can be considered as offering a set of conceptual criteria (hereafter 'c/criteria'). In addition, still following Hart's line of thought, among those conceptual properties that every legal system satisfies is the fact that all of them contain what Hart calls 'rules of recognition'. That is to say, every legal system has a set of validity criteria (hereafter 'v/criteria') that makes it possible to establish what norms belong to it. When we identify something as a property that every legal system satisfies we are making a general statement about the c/criteria that delineate the concept of law or legality. On the contrary, when we identify something as a feature that all the norms belonging to a legal system satisfy, we are making a parochial (committed or detached) statement on the v/criteria provided by one or many specific rules of recognition.[3]

In my view, the difference between these two kinds of criteria is crucial, and Gardner contributes to show the wrong conclusions that we can reach when they are not adequately distinguished. To be precise, Gardner criticizes Ronald Dworkin for having merged both matters not realising that what I call the parochial v/criteria (i.e. those stating the conditions for a norm to be part of a legal system)

[2] See John Gardner, 'The Legality of Law', in *LLF*, p. 181.

[3] The contrast between general and parochial statements can be configured in different ways. In this context, I rely on it only to highlight the difference between the discourses referring to the concept of law and the discourses referring to particular legal systems. I thank H. Bouvier for warning me about this possible ambiguity.

do not constitute a subset of what I call c/criteria.[4] According to Gardner, we could admit for the sake of the argument that Dworkin is right in his criticism to the rule of recognition. In other words, we can concede that it is not possible to identify something as a set of v/criteria within each legal system. In this case, it would be true that one of the conceptual properties indicated by Hart fails. However, the only thing that follows from this fact is that the presence of a rule of recognition allowing the identification of valid legal norms is not among the c/criteria that identify something as a legal system. It does not follow instead that it is impossible to find other c/criteria to identify something as a legal system. In sum, Dworkin has confused the two different kinds of criteria: the parochial v/criteria determining whether a norm belongs to a legal system or not and the c/criteria stating the defining features of every legal system.

It would be mistaken to think that there cannot be connections between both kinds of criteria, or that the conceptual discussion on the c/criteria is entirely independent of the social research on the v/criteria. On the contrary, for instance, if we accept or reject some v/criteria to identify the norms configuring a legal system, we may be committing ourselves to accepting or rejecting some features as possible or impossible conceptual properties of law. In the same way, our assertions about the concepts of law or legal systems may commit us to accepting or rejecting some v/criteria as admissible or inadmissible. However, both kinds of criteria should be clearly distinguished. As Joseph Raz has shown, a study about the characteristics or contents of specific legal systems does not necessarily presuppose a theory about the concept of law, i.e. an inquiry about a set of c/criteria.[5] Moreover, as Hart has noticed, the second kind of discourse aims to be general and descriptive[6] whereas, we can say, the first type is typically local and committed.[7]

By generalizing these ideas, I am trying to stress that the research about concepts (the c/criteria delimiting the notion of law, for instance) and the research about the contingent features of the objects

[4] See John Gardner, 'The Legality of Law', in *LLF*, pp. 182–183.

[5] See Joseph Raz, 'Two Views of the Nature of the Theory of Law: A Partial Comparison', *Legal Theory* 4 (1998): pp. 249–282.

[6] See H. L. A. Hart, 'Postscript', in P. A. Bulloch and J. Raz (eds.), *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994), pp. 239–244.

[7] I stress the word 'typically' because the identification of the v/criteria provided by a rule of recognition can also be done in a detached way. This point is not relevant in the present context.

to which those concepts apply (the traits of concrete legal systems with their respective v/criteria, for instance) are different kinds of inquiries. They have different kinds of methods and objects. Obviously, there can be a connection between these two types of activities. In any event, as I understand them here, a conceptual research is not a study bearing upon the distinctive aspects of certain specific objects or genres of objects. It is a research about the necessary properties of all those items to which the concept apply.

III. THE FIRST ISSUE: THE THESIS ON WHICH ALL LEGAL POSITIVISTS AGREE

In Gardner's view, all legal positivists agree on at least one thesis, and this thesis (which is named LP⋆) should be formulated as follows:

(LP⋆) In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources)[8]

In what follows I will present three critical remarks related to this point. Firstly, I will maintain that LP⋆ fails to fulfil the task that it is supposed to accomplish; that is, it does not identify the thesis which all legal positivists agree on. Secondly, I will show that LP⋆ leaves an important question unanswered about the status of Legal Positivism's central thesis. In particular, it does not make clear whether the central thesis of Legal Positivism is about the concept of law or the conditions of legal validity. Finally, I will highlight some problematic conclusions following from Gardner's reading of LP⋆.

A. On the Content of LP⋆

Gardner explicitly states that legal positivists share at least one central idea, which is expressed by LP⋆. Despite this assertion, Gardner's analysis implies that LP⋆ is not the best candidate to express such a singular thesis. This is so because LP⋆ expresses at least two different tenets: a 'soft' one and a 'hard' one. Gardner – who is

[8] See John Gardner, 'Legal Positivism: 5 1/5 Myths', in *LLF*, p. 21.

not particularly interested in the debate between 'soft' and 'hard' legal positivists – prefers to 'leave (LP⋆) ambiguous in this respect'.[9]

Using the distinction between c/criteria – which state those features that all legal items have in common – and parochial v/criteria – which state those features that norms must satisfy in order to belong to a certain legal system – we can precisely see where this ambiguity relies. In fact, LP⋆ can be read as stating a v/criterion that a norm must satisfy in order to belong to any specific legal system. But, at the same time, it can also be read as providing a general c/criterion that identifies a defining or paradigmatic property of law, i.e. a feature that allows us to discriminate what is legal from what is not legal or, at least, not a central or paradigmatic case of law.

The second reading can be attributed to a version of the so called 'soft' or 'inclusive' positivist position. On this view, LP⋆ expresses a thesis regarding the positivist understanding of the concept of law. It states a c/criterion and does not imply any restriction on the parochial v/criteria provided by the rules of recognition accepted in any specific legal system. According to this version of LP⋆, it is true that to qualify something as law or legal we must rely on sources, not merits. However, it is possible that sources admit merit as a condition of validity, i.e. as a v/criterion for a norm to be part of a specific legal system.[10] At this point, it is important to remember that, as Gardner points out, the set of v/criteria established by rules of recognition is not a sub-set of conceptual criteria.[11] Accordingly, the admission that merit can be a v/criterion to determine whether a norm belongs to a legal system or not (which is admittedly 'soft' Positivism's central thesis) does not contradict LP⋆. This is so because, in this reading, LP⋆ only rejects merit as a conceptual feature of law in general, not as a possible condition to be part of a specific legal system.

In contrast, the first reading is accepted by the so called 'hard' or 'exclusive' Positivism. In this perspective, LP⋆ says nothing explicitly about the general concept of law; it says something about the content of each rule of recognition. LP⋆ states a parochial v/criterion

[9] See John Gardner, 'Legal Positivism: 5 1/5 Myths', in *LLF*, p. 22.

[10] As I have just said, this is one possible way of understanding 'inclusive' Legal Positivism. For other interpretations see, for instance, Andrei Marmor, *Positive Law and Objective Values* (Oxford: Clarendon Press, 2001), pp. 56–70.

[11] See John Gardner, 'The legality of Law', in *LLF*, pp. 178–185, especially p. 183.

determining whether a norm belongs to a legal system or not. As we have seen, it says that a norm belongs to a legal system according to its sources, not its merits.

It would be tempting to think that this v/criterion is also a conceptual c/criterion stating a definitional restriction on what can be called 'law'. Accepting this idea would imply that nothing can be called 'law' unless it satisfies the source-condition of legal validity, i.e. unless it meets the v/criterion of 'hard' Positivism. However, if Gardner is right in accepting 'soft' Positivism as a coherent position within Legal Positivism, we have to reject this possibility.[12] As we have seen, 'soft' Positivism openly states that a norm can be legally valid by virtue of its merits. If this thesis is admissible, the exclusion of merit as a v/criterion cannot be part of the positivist understanding of the concept of law. If this were the case, 'soft' Positivism would be in direct collision with a positivist, conceptual thesis regarding law and, consequently, it would no longer be a possible stand within Legal Positivism. To be sure, the validity thesis of 'hard' Positivism is based on some understanding of the concept of law. That is to say, it is committed to some conceptual thesis. However, to the extent that 'soft' Positivism is still a positivist position, the validity thesis of 'hard' Positivism (according to which merit is excluded among the possible v/criteria) cannot be admitted as part of those positivist, conceptual theses. In other words, if we accept that the 'hard' validity thesis is part of the positivist understanding of the concept of law, we should also accept that 'soft' Positivism is not an example of Legal Positivism or, at least, it is not a paradigmatic case of it.

Gardner explicitly declares his preference for the 'hard' version of Legal Positivism, and, consequently, he reads LP* as stating a positivist criterion of legal *validity*.[13] However, he considers 'soft' Positivism as a coherent positivist position. That is to say, in his view, 'soft' Positivism is compatible with LP*. As we have seen, 'soft' Positivism can accept LP* only to the extent that it is interpreted as stating a positivist c/criterion of legality, but it would reject LP* if, as

[12] On this point, although Gardner expresses his preference for the 'hard' version of legal positivism, he takes distance from those authors according to which the admission of morality as criterion of legal validity (i.e. 'inclusive' Positivism's defining thesis) is a self-destructive or self-contradictory standpoint within Legal Positivism.

[13] His emphasis. See John Gardner, 'Legal Positivism: 51/5 Myths', in *LLF*, p. 49.

Gardner asserts, it is a thesis on legal validity providing a necessary condition for a norm to be part of a legal system.

In short, 'soft' and 'hard' positivists maintain different interpretations of LP*, and, in Gardner's view, both are possible forms of Legal Positivism. On this basis, it is suitable to ask: which is the thesis shared by every legal positivist? The admission that LP* expresses at least two different propositions does not imply that there is no single thesis which every positivist agrees on; however, it does imply that LP* does not identify such a thesis. This is not an encouraging conclusion. It leaves us without an answer regarding what exactly the content of the central thesis of Legal Positivism is.

*B. On the Status of LP**

As we have seen, Gardner manifests his preference for 'hard' Legal Positivism. However, in this context, he does not try to defend that the 'hard' version is the only correct understanding of Legal Positivism. Gardner would like LP* to remain neutral on the debate between 'hard' and 'soft' Legal Positivism. The problem is that LP* does not express a single thesis that is impartial with regard to these two positions. It rather states two different theses, according to the point of view one adopts. In other words, despite Gardner's choice, LP* remains ambiguous and admits both readings.

Unfortunately, this means that LP* also leaves us with a deeper doubt regarding one of the most debated subjects in legal theory. According to Gardner, what is the status of the legal positivist thesis? Is it the result of a general, conceptual research or a parochial one? These questions are irrelevant for those who – like Ronald Dworkin for instance – conceive of legal philosophy as the most abstract interpretive premise of any practical discourse through which the law is applied. However, it is highly relevant for those who think, as I suppose Gardner does, that there is a significant difference between the philosophical discussion about the c/criteria delimiting a general a concept of law and the parochial discussion about the v/criteria determining the conditions on which a norm belongs to a legal system.

It is usually admitted that different legal theories have different understandings about the concept of law. From this point of view, the core subject matter of legal philosophy is a conceptual debate, and

different legal theories – paradigmatically Legal Positivism and Natural Law theory – can be distinguished taking into account their specific explanations and proposals about the c/criteria we use to identify something as a *legal* item. Upon this presupposition, the set of theses on which the followers of a specific legal theory agree is a set of conceptual and methodological tenets regarding the object of their research and the way in which this research should be carried out. Consequently, the debate among the different approaches in legal philosophy is an external, theoretical debate, mainly concentrated on the concept of law or legality and the way in which they are related to many other concepts.

Gardner's proposal seems to call into question these previous assertions. In his view, the central thesis of Legal Positivism can be understood as a conceptual thesis about a necessary feature of law or as a parochial assertion about the v/criteria that a norm must satisfy in order to belong to a certain legal system.

In summary, it is unfortunate that Gardner, who is willing to use the distinction between c/criteria and v/criteria in order to criticize Dworkin, leaves the reader without a definition on precisely this point when identifying the central thesis of Legal Positivism (LP⋆). If we accept, for the sake of the argument, that it is true that LP⋆ expresses the central thesis of Legal Positivism, unfortunately it follows that the status of the legal positivists' central thesis is undetermined. LP⋆ does not decide if legal positivists agree on a general conceptual assumption or a parochial thesis about the validity criteria provided by the rules of recognition.

Conceding that there is no better candidate than LP⋆ to express the thesis which every positivist agrees on, given that there is no single interpretation of LP⋆, the undesirable conclusion which one may derive is the following: it is false that all positivists share at least one common idea. Certainly, a different, more promising path is to acknowledge that LP⋆ is not the best candidate to express the thesis on which all positivists agree. I think this latter option indicates the route we should explore. However, before going in this direction, I propose to take a closer look at Gardner's reading of LP⋆.

C. On Gardner's Reading of LP⋆

Let's suppose for the moment that the 'hard' reading of LP⋆ – which is favoured by Gardner – is the only feasible reading of LP⋆. In other

words, let's suppose that LP* is not ambiguous, and there is only one correct understanding of it. Specifically, it states that sources, not merits, count as v/criteria to determine whether a norm belongs to a legal system. In this case, Gardner would be wrong about 'soft' Positivism since it would not be a viable interpretation of Legal Positivism. What we call 'soft' Legal Positivism is no longer a type of Legal Positivism because it rejects the basic thesis that, according to Gardner, all positivists agree on.

This position has some relevant consequences. Among other things, it is saying that the defining thesis of Legal Positivism is not directly related to the general concept of law. Obviously, legal positivists say many things about law's nature and the general concept of law, but these ideas remain on the background and they are not necessarily among those that all positivists share. To be sure, LP* is a thesis on *legal* norms, i.e. those norms belonging to *legal* systems. For this reason, it already presupposes a certain understanding of the concept of law. Specifically, LP* is articulated on the presupposition of a very thin, apparently unproblematic, conceptual thesis regarding law: law is a genre of artefacts. Nevertheless, following Gardner's analysis, beyond this minimal implicit agreement, it is not possible to assert that legal positivists share a common set of ideas about the concept of law.

It is interesting to note that, if Gardner's understanding of LP* were correct and the 'hard' reading expressed the correct way in which the central thesis of Legal Positivism (LP*) has to be understood, we should accept at least two problematic conclusions. First, we would be committed to presenting any theory that criticizes or adheres to Legal Positivism as a position criticizing or adhering to this parochial validity thesis. In more general terms, we would be committed to presenting jurisprudential debate as a parochial debate about the content of the legal system's rules of recognition. Once again, this corollary will be surely accepted by those who – like Ronald Dworkin – are anxious to show that the central theses of every legal theory – comprised Legal Positivism – are committed to parochial, internal theses on *the* law, i.e. the specific legal systems. In short, identifying Legal Positivism in these terms would constitute an implicit admission of Ronald Dworkin's opinion regarding the parochial status of the legal positivist's proposal.

Second, by accepting Gardner's reading of LP* we are implicitly taking for granted a specific understanding of the concept of law as it was not a debatable presupposition. Once again, this approach is perfectly fitting to discuss with Ronald Dworkin. Specifically, it is adequate to answer the second critique presented by Dworkin in *Law's Empire*. In this critique (apparently independent from the first one, presented in *Taking Rights Seriously*), Ronald Dworkin argues against the possibility of identifying a set of v/criteria within specific legal systems. Nevertheless, he admits the positivist understanding of the concept of law because he accepts that law is a kind of human artefact.[14]

If this is Dworkin's position, his argument is not successful because – as Gardner correctly shows – even if it were true that 'there are no such criteria as those laid down by Hart's rule of recognition'[15] (i.e. those I here call v/criteria), this fact does not have the repercussions Dworkin attributes to it. To be precise, it does not prove 'that there are no criteria that 'supply the….meaning' of the word 'law''[16] (i.e. those I here call c/criteria). Thus, as Gardner states, the failure of one of the c/criteria provided by Hart (the existence of rules of recognition) does not imply the failure of the whole enterprise of seeking c/criteria like those proposed by Hart.[17]

Admitting, for the sake of the argument, that Gardner offers a sound and complete reconstruction of Dworkin's famous critique of Legal Positivism, Dworkin's failure should be considered decisive evidence of the fact that a good argument against Legal Positivism, that is, one that unlike Dworkin's argument has a chance of being successful, cannot begin by discussing the positivist thesis about the v/criteria of legal systems leaving the question of the general concept of law aside. Whoever wants to challenge the basic thesis of Legal Positivism must be aware of the fact that the first ideas that must be called into question are the positivist conceptual commitments.

If this is correct, an intelligent critic of Legal Positivism should not accept Gardner's reading of LP* as the basic defining thesis of this position. She should even refuse to discuss LP* precisely because it

[14] See John Gardner, 'The Legality of Law', in *LLF*, p. 182.

[15] *Ibidem*.

[16] *Ibidem*.

[17] See John Gardner, 'The Legality of Law', in *LLF*, p. 184.

would be self-defeating and question-begging. This would be so due to the fact that by discussing LP* she would be already presupposing – as a conceptual implicit premise – what an effective critique needs to reject; that is, the c/criterion according to which law is always a human artefact. In fact, without discussing this implicit conceptual commitment, there is no possibility of having a fruitful confrontation with Legal Positivism.

From these considerations we can reach some conclusions. First, as we know, there is a deep disagreement among legal positivists regarding the possibility that merit, especially moral merit, can be a criterion of legal validity. Therefore, Gardner's view, according to which the thesis that all legal positivists agree on is one about validity criteria, is indeed surprising. This point is crucial: as far as LP* expresses a thesis about validity criteria, LP* is not the thesis which all legal positivists agree on. Second, if 'soft' and 'hard' stands are both possible positions within Legal Positivism, there must be some more basic thesis (or theses) which they agree on. Any attempt to identify these theses should explicitly state the conceptual commitments (i.e. the c/criteria) which these positions rely on. In other words, it should refer to their shared comprehension of the concept of law. Otherwise, the attempt will fail because it would be silent precisely about those theses which all positivists are committed to.

IV. THE SECOND ISSUE: THE CONNECTION BETWEEN LAW AND MORALITY

In this section I will present some considerations regarding Gardner's view about the connection between law and morality and the position that Legal Positivism adopts on this issue. In order to do so, I submit, it is necessary to clarify whether, when connecting law to morality, we are talking about the concepts of law and morality or the genre of things they identify. For this reason, before entering into the discussion, it is important to review Gardner's opinions about both the concepts of law and morality and law and morality as genres of things.

A. The Concept of Law and Law as a Genre of Things

According to Gardner, the word 'law' is ambiguous because it applies to, (a) a general genre or class of artefacts (law); (b) those

specific institutions we call legal systems (*the* law of Great Britain or Italy, for instance); (c) those norms which belong to the specific legal systems (laws in plural); and (d) a sort of practice.[18]

Gardner says very little about the general concept of law. What is clear is that the concept of law (like the concept of human being, for instance) cannot be defined by a set of necessary and sufficient properties. According to Gardner, we can appeal to paradigmatic or central cases to obtain c/criteria to apply the concept. It is interesting to note that, on the one hand, these cases stand as criteria because no counter-example can show that a proposed paradigm is not a paradigm. As Gardner says: 'a paradigm or central case is simply the case that shows how the other cases – including those supposed counter-examples – ought to be'.[19] However, on the other hand, the positive and negative criteria that a central case sets are defeasible. As Gardner puts it, 'there might be cases (even statistically preponderant cases) that do not exhibit all the features that make the central case a central case'.[20] In other words, they do not necessarily determine the inclusion/exclusion of something as an instantiation of the concept. In Gardner's opinion, at least some of the negative criteria '*qualify* rather than *deny* the application of the concept to a particular case, and do so by relegating that case to non-paradigmatic status'.[21] In short, law is a combinatorially vague concept that applies to many different things that do not share a common set of necessary properties.

Having admitted that law is a combinatorially vague concept, it is surely misleading to insist on an inquiry about the necessary properties of law. In reality, such research should be denounced as committing an essentialist fallacy. This is so because it would be improperly presupposing what we have just said is false: that all those things to which we apply the concept of law do have some common necessary properties.

Taking these ideas into account, it is important to see the distinction between those approaches – like Raz's approach, for instance – that propose a study of the concept of law and those – like Gardner's – that propose an exploration on law as a genre of things,

[18] See John Gardner, 'The Legality of Law', in *LLF*, pp. 178–185.

[19] See John Gardner, 'Nearly Natural Law', in *LLF*, p. 152.

[20] *Ibidem*.

[21] Cf. John Gardner, 'Nearly Natural Law', in *LLF*, p. 169.

in this case, human-made things like norms, systems, institutions, etc.

Establishing relations between two sets of things, or between something and the genre (or genres) of things to which it belongs is different from establishing relations between two concepts or between a concept and the individual things or events that constitute instantiations of it. For instance, we can admit that a norm is a legal norm if it satisfies the v/criteria provided by a legal system's rule of recognition. This relation between a norm and a legal system is an example of the first kind of relationship. It is clear that it constitutes a membership relationship, similar to the relationship existing between an individual and an orchestra or a football team in which the individual takes part. To the same extent, it should be clear that the relationship between an object and the genre, or the genres, to which it belongs, is one of this kind as well. So, just like an individual can be part of an orchestra, a church, and a football team at the same time, norms can contemporaneously belong to different genres. For instance, they can be moral, aesthetic or social norms.

One of the characteristics of this membership relation is that it is not transitive.[22] For this reason, even if we admit that, for instance, the norms expressed by the Italian civil code belong to the Italian legal system, and the Italian legal system belongs to the class of objects having primary and secondary norms, we cannot infer that the legal norms expressed by the Italian civil code belong to the class of objects having primary and secondary norms. This would be a *non sequitur* precisely because the membership property is not transitive.

Something different occurs when we move to consider concepts and the relations we can establish between them and the objects or other examples to which they apply. When we talk of conceptual relations, we can be talking about the relation between some intensional contents or properties, or we can also be referring to the relation obtaining between those contents or properties and the genres they define or the individual things or events which they apply to. Neither of these relations is one of membership. For instance, if an individual legal contract is an instance of the concept of law and the concept of law is an instance of the concept of abstract object, we can infer that a legal contract, necessarily, is an instance of

[22] See J.J. Moreso and P.E. Navarro, 'Some Remarks on the Notions of Legal Order and Legal System', *Ratio Juris* 6, 1(1993): p. 51.

the concept of abstract object. In this sense, the relation 'to be an instance of the concept C', unlike the relation 'to be a member of the genre G', seems to be a transitive relation of inclusion.

As a matter of course, concepts (if we admit them as a kind of objects) can also stand in membership relationships. For instance, we can discuss whether the concept of law belongs to the genre of interpretative concepts, abstract objects, theoretical constructions, etc. There are many different theories about what concepts are and the genre or genres they belong to. According to our theoretical standpoint, concepts can be said to belong to different classes or genres.

I have stressed these differences between concepts and genres of things because when we talk of the necessary or non-necessary connection between law and morality, it is still not clear if we deal with a connection between concepts, between genres of things, or between concepts and genres of things.

B. The Concept of Morality and Morality as a Genre of Things

Like the concept of law, the concept of morality cannot be defined by a set of necessary and sufficient properties. Nevertheless, we can identify some features which are generally used as c/criteria for applying this concept. Let me stress three of these traits mentioned by Gardner:

(i) If something is a moral requirement, it is a reason to act in a certain way.[23] In other words, to be a reason to act is something conceptually implied in calling something a 'moral' norm or consideration. In this way, it is conceptually incoherent to say, 'Yes, this is a moral requirement, but I don't care'.

(ii) If something is a moral requirement, it is justified, and, more precisely, it is justified by virtue of its merits. In other words, morality not only implies but also presupposes reasons.[24]

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[23] This is clearly an internalist conception of morality. According to Gardner, to be moral is sufficient but not necessary to constitute a reason for action. This is so to the extent that he subscribes to the idea that moral reasons do no exhaust the realm of reasons. There can be prudential reasons as well. According to Gardner, prudential and moral reasons do exhaust the realm of reasons for action. Cf. John Gardner, 'Haw Law Claim, What Law Claims', in *LLF*, p. 137.

[24] In different ways, Gardner expresses this idea in various essays. For instance, see John Gardner, 'Legal Positivism: 5 ½ Myths', in *LLF*, pp. 24–25 and 'Nearly Natural Law', in *LLF*, p. 152.

(iii) If something is a moral requirement, it is so, independent from any human belief or attitude. This is a corollary of the previous attribute. It means that to be moral is an objective property and all our beliefs about something being a moral requirement could be completely wrong.[25]

Nonetheless, the word 'morality' can also refer to a genre or a class of things, or, more precisely, to a set of norms. For instance, when Gardner talks about 'morality as necessarily comprising some valid norms', or legal theorists discuss 'the enforcement of morality', 'the incorporation of morality', 'the conformity to morality', etc., they are not talking *about* the concept of morality they are talking *of* morality, understood as a set or norms, reasons or considerations. Still more, as Hart noticed, in this case there is a further ambiguity. It is not always clear if 'morality' refers to a set of norms that are 'actually accepted and shared by a given social group', or the set of 'general moral principles used in the criticism of actual social institutions including positive morality'.[26] In other words, it is not clear if by 'morality' we refer to positive morality or critical morality. However, it is clear that in both cases we are using the word 'morality' in reference to a set of reasons or norms.

We can say that in the same way as we apply the word 'law' to those sets of norms called 'legal systems', we apply the word 'morality' to those sets of norms named 'positive morality' or 'critical morality'. From this point of view, for instance, different moral theories of justice (like Libertarianism and Liberal Egalitarianism) in some contexts are not discussing – or at least not primarily discussing – the concept of justice or the concept of morality. To be sure, they can have partially different understandings of the c/criteria delimiting these concepts and the way in which they relate to other concepts. However, they are mainly dealing with morality understood as a class of norms because they are discussing and disagreeing about the v/criteria that will allow one to identify the set of morally valid norms that should guide public institutions. By using the v/criteria that these theories provide, we can identify a specific set of norms that, in their view, belong to critical morality.

[25] According to Gardner, 'If the norm does not turn out to be justified… then it is not a moral norm'. Cf. John Gardner, 'Nearly Natural Law', in *LLF*, p. 152.

[26] Both quotations are taken from H. L. A. Hart, 'The Enforcement of Morality', in *Law, Liberty, and Morality* (Stanford, CA: Stanford University Press, 1963), p. 20.

As we have seen, the words 'morality' and 'law' have a similar kind of ambiguity. That is to say, when we use 'morality' sometimes we refer to the concept of morality and, some other times, to a set of norms. Being aware of this ambiguity, we can see how an author like Joseph Raz can contemporaneously defend the necessary connection between law and morality and the necessary exclusion of morality from law. Obviously, this is so because in the first case he refers to the concepts of law and morality. In the second case, he regards morality as a set of reasons and norms.

C. On the Connection Between Law and Morality

According to Gardner, students' favourite myth about Legal Positivism is that 'there is no necessary connection between law and morality' (henceforth the NNC thesis).[27] Unfortunately, this statement is affected by the ambiguity I have just mentioned, and, in my view, it is this ambiguity which explains why Gardner believes that the NNC thesis is obviously false while students (along with many legal philosophers) believe it is obviously true.

I would like to take a very quick look at some of the considerations presented by Gardner in favour of the necessary connection between law and morality (henceforth the NC thesis). In my view, these arguments miss the point because the kind of relation they give support to is not a relation between concepts. In other words, some of the arguments on which Gardner relies are not suitable to prove what they are supposed to prove: the existence of a relation between the concept of law and the concept of morality.

Among other considerations in favour the NC thesis, Gardner asserts that both law and morality 'are necessarily alike in both necessarily comprising some valid norms'.[28] To be sure, as Gardner admits, 'there are many other necessary connections between law and morality on top of this rather insubstantial one'.[29]

Leaving aside its substantial or insubstantial character, in my view, what is important to ask here is whether this is the kind of relation that theorists are discussing when they accept or reject the existence of a conceptual connection between law and morality. The

[27] See John Gardner, 'Legal Positivism: 5 ½ Myths', in *LLF*, p. 48.

[28] *Ibidem*.

[29] *Ibidem*.

fact that two classes of things necessarily share some components does not mean that there is a connection between the concepts through which we identify such classes of things. For instance, we can pacifically admit that human beings and ice creams are necessarily alike in both being made of water. Water is one of their common essential components. Would we say that this is a consideration relevant in establishing a conceptual connection between human beings and ice creams? Unquestionably, law and morality – like human beings and ice creams – are necessarily alike in both necessarily comprising several common elements. It is as obvious that there is this kind of connection between them as it is extravagant to think that this is the kind of connection that legal theorists have been discussing for so many years.

Another consideration offered by Gardner in order to sustain the NC thesis is that law is an appropriate object to be appraised from a moral point of view.[30] Once again, this is clearly true, and I do not think that any legal theorist or student interested in rejecting the NC thesis would be willing to suggest something different. However, it says nothing about the relation between the concepts of law and morality. Also intentions and commercial transactions are apt to be evaluated from a moral point of view, but this is not a proof of a relation between the concept of morality and the concepts of intention and commercial transaction.

Taking into account the kind of considerations offered by Gardner, it is clear that he is not thinking of a relation between the concepts of law and morality. He is thinking about the relation between those things that belong to the genre law and those that belong to the genre morality. So understood, he might be right in asserting that the NNC thesis 'is absurd and no legal philosopher of note has ever endorsed it as it stands'.[31] However, he is wrong in thinking that those sustaining the NNC thesis are talking about these kinds of connections. The main objection to Gardner's analysis is that showing that the set of things we call 'law' has necessarily common elements/components with another set of things we identify as 'morality' is irrelevant to prove any connection between the concepts of law and morality.

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[30] Cf. John Gardner, 'Hart on Law, Justice, and Morality', in *LLF*, p. 222.

[31] See John Gardner, 'Legal Positivism: 5 ½ Myths', in *LLF*, p. 48.

In contrast to this kind of analysis, following Joseph Raz, we can admit that aiming to constitute a moral reason is a defining feature of law. On this basis, in order to grasp the concept of law, we need to know what a morally binding reason is, i.e. we need to have the concept of moral reason. In this sense, there is a necessary relation between the concept of law and the concept of moral reason. However, this fact does not imply that among the c/criteria defining the concept of law there exists the property of being a moral reason. In other words, even if the concept of law is necessarily related to the concept of moral reason, it would be an error to think that to be an instance of the concept of law necessarily implies being an instance of the concept of moral reason.

The relationship that Raz is pointing out is a relation between concepts and not a relation between things or genres of things. To be precise, it is the kind of relationship that Herbert Hart explicitly rejects, among other considerations, because he finds 'little reason to accept such a cognitive interpretation of legal duty in terms of objective reasons or the identity of meaning of 'obligation' in legal and moral contexts' that Raz's account would secure.[32] In any event, I am not interested in discussing here whether Herbert Hart accepted any kind of relation between the concepts of law and the concept of morality. I would only like to stress that, in this sense, by accepting or rejecting a non-necessary connection between law and morality we are accepting or rejecting the relation between two sets of c/criteria: those c/criteria that outline the concept of law and those c/criteria that shape the concept of morality. This means that, in this case, neither 'law' nor 'morality' refer to specific things or genres of things. More precisely, in this case, neither 'law' nor 'morality' refer to a set of reasons or norms.

V. FINAL REMARKS: SOME THESES ON WHICH ALL LEGAL POSITIVISTS AGREE

If what has been said so far is accepted, it becomes clear where the ambiguity of the NNC thesis resides. In the wording proposed by Gardner, the NNC thesis says that 'there is no necessary connection between law and morality'. However, as we have seen, not only

[32] See H. L. A. Hart, 'Legal Duty and Obligation', in *Essays on Bentham, Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), p. 159.

'law' can designate the concept of law or a set of norms, i.e. legal systems. Also 'morality' can stand for the concept of morality or for a set of (positive or critical) norms. What it is important to note is that, by disambiguating 'law' and 'morality', we can identify the different positions that some legal positivists subscribe to on this issue. That is to say, we can see that there are some disagreements among legal positivists in this regard. However, at the same time, we can see that, contrary to Gardner's opinion, every legal positivist (be it a 'soft' or a 'hard' one) subscribes to an NNC thesis regarding law and morality. In other words, if I am right, by holding any of the two senses we can attribute to LP*, one commits oneself to a NNC thesis.

As we have seen, (a) according to Joseph Raz and many other legal positivists, we need the concept of morality in order to grasp a conceptual feature of law. It is clear that, in this case, what it is stated is a specific necessary connection between the concept of law and the concept of morality. Besides this position, as we also know, (b) according to 'hard' Positivism, the v/criteria that allow one to identify *the* law, understood as a set of reasons and norms, are necessarily not connected to morality, understood as a set of reasons and norms based on merit. On the contrary, (c) according to 'soft' Positivism, it is possible that the v/criteria that allow one to identify *the* law, understood as a set of reasons and norms, are connected to morality, understood as a set of reasons and norms based on merit. Finally, (d) both 'hard' and 'soft' positivists maintain that the concept of law is necessarily not connected to morality understood as a set of reasons or norms. In other words, as far as the concept of law is concerned, all legal positivists assume the same conceptual commitment: considerations based on merit (moral merits comprised) are not among the c/criteria to identify something as an instance of law. Moral merit is not among the necessary properties of law.

I have tried to show that Gardner's proposal of the LP* thesis has two possible readings. It can be interpreted as a thesis about the v/criteria for a norm to be part of a legal system or as a thesis about the c/criteria that a norm has to meet in order to be an instance of the concept of law. The interesting point is that both interpretations presuppose the same conceptual premise, namely that there is no necessary connection between the concept of law and morality

understood as a set of reasons or norms. In other words, Legal Positivism does subscribe to an NNC thesis.

To be sure, to accept *this* NNC thesis between the concept of law and morality (understood as a set of norms) is entirely compatible with recognizing the truth of the NC thesis regarding the concept of law and the concept of morality. As far as Joseph Raz's theory is concerned, it is just as important to stress the latter as it is important to emphasise the former. At any rate, besides Raz's theory, in order to put forward the NC thesis, it is not only unnecessary but also misleading to conceal or deny the NNC one.

The thesis according to which a connection to morality (understood as a set of norms) is not among the c/criteria to apply the concept of law constitutes not only an obvious agreement among legal positivists, it is the crucial idea that distinguishes Legal Positivism from a Natural Law theory. Herbert Hart has made this point very clear showing the contrast between the c/criteria proposed by Natural Law theory (according to which those norms that do not conform to morality cannot be classified as legal norms) and the c/criteria accepted by Legal Positivism (according to which conformity to moral norms is not a necessary condition to be a legal norm). In Hart's view, 'plainly we cannot grapple this issue if we see it as one concerning the proprieties of linguistic usage. For what really is at stake is the comparative merit of a wider and a narrower concept or way of classifying rules'.[33] Certainly, in Hart's opinion, the wider of these two rival concepts of law is superior 'in the way it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both'.[34]

Summing up, despite the great appeal of Gardner's general approach, there are some conclusions following from such approach that we have reasons to reject. If my remarks are correct, Legal Positivism is a general theory based on a shared understanding about the concept of law, not legal validity. Accepting this allows us to accommodate the idea that, although defending incompatible theses regarding the criteria of legal validity (what I have called the v/criteria), both 'hard' and 'soft' positivists agree on some theses about the c/criteria that delimit the concept of law.

[33] See H. L. A. Hart, The Concept of Law, op. cit., p. 209.

[34] See H. L. A. Hart, The Concept of Law, op. cit., 209–210.

Unfortunately, agreement is not massive among legal positivists. It is true that many positivists accept the existence of a necessary relation between the concept of law and the concept of morality. But it is also true that many others reject it. The crucial point is that, even if controversial, the acknowledgement of a necessary connection between both concepts is entirely compatible with Legal Positivism, and this is so because what characterizes Legal Positivism is not the acceptance or the rejection of this thesis. Instead, what characterizes Legal Positivism is that it defends the thesis, a conceptual one, that conformity with morality, understood as a set of reasons and norms, is not among the defining properties of law. In order to emphasize the interest of the former thesis, it would be misleading to ignore or dismiss the latter one which, unlike the former, is one of the few, enduring points of agreement among legal positivists.

ACKNOWLEDGMENTS

I am grateful to R. Guastini, P. Comanducci, H. Bouvier, P. Navarro, G. B. Ratti and an anonymous referee who have read an earlier draft of this paper and contributed to clarify many points.

Conicet/University of Genoa, La Plata 426,
5000, Córdoba, Argentina
E-mail: criredon@hotmail.com