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The Many Faces of Legal Positivism

Abstract: this paper provides a discussion on legal positivism and can be ideally divided into two main parts. The first one deals with Norberto Bobbio's distinction of three kinds of legal positivism: methodological, theoretical and ethical positivism. In this regard, the paper articulates some considerations aiming to show that, as far as it is not possible to identify what are the theses on which each one of these three kinds of legal positivism converges, the proposed classification does not seem justified. The second part of the paper is devoted to showing that, at any rate, the distinction indicated by Bobbio is still highly relevant in order to identify the different kinds of theses that characterize legal positivism as a single position. As a matter of fact, there exist different conceptions of legal positivism, which are the expression of a deep disagreement about what methodological, theoretical and ideological theses define legal positivism. In this regard, it is argued that there are at least three theses which every legal positivist is committed to accepting. Such theses do not constitute a set of necessary and sufficient conditions governing the use of the expression "legal positivism". However they make it possible to offer an analysis of the necessary properties that define a paradigmatic example of legal positivism.

Keywords: methodological positivism, theoretical positivism, ethical positivism

1. There meanings of "legal positivism"

In contemporary legal philosophy there are many articulated debates relating the contents, the status, methodology, moral commitments, etc. of legal positivism. This makes really difficult to say something substantially interesting on the subject, that is, something informative about the main problems related to legal positivism, without entering in one of those very sophisticated and specialized discussions that, actually, may attract only those scholars who take part in them. Despite this, I would like to try, and I will do it beginning from an old distinction regarding legal positivism that I think is still highly relevant.

Within continental legal philosophy, and more precisely in those countries closely connected to the Italian and Spanish tradition, one of the fundamental ideas that students learn when studying legal philosophy – and I would say that it is one of the dogmas that a student has to know if she or he wants to obtain a passing grade in the exam of philosophy of law – is an idea first stated by

Norberto Bobbio in 1961, and reproduced in hundreds of student books and other scholarly texts, according to which, there is no single position we can call "legal positivism"[1].

Bobbio's research seems to be primarily interested in giving a rational reconstruction of the heterogeneous proposals covered under the label of "legal positivism". He develops a meta-linguistic analysis of different examples along history and concludes that, in order to evaluate them "we cannot consider this movement as a monolithic block". Actually "we can distinguish three aspects of legal positivism dependent on the fact that it is configured as a) a method for studying the law, b) as a theory of law , c) as an ideology of law"[2].

Therefore, according to Bobbio, we should distinguish three kinds of legal positivisms. These positions are certainly very different from each other. A method, a theory and an ideology are not the same kind of enterprise. However, in a strict sense, they are connected. According to Bobbio[3]:

"The first meaning of legal positivism does not imply the second, the first and the second do not imply the third. …In fact, the assumption of the positivist method does not imply the assumption of the positivist legal theory… In the same way, the assumption of the positivist legal method and the theory do not imply the assumption of the ideology of ethical legal positivism".

"Nevertheless, the assertion according to which the acceptance of the positivist method does not involve the acceptance of the positivist theory, and that the acceptance of the positivist method and theory do not involve the acceptance of the positivist ideology is not reversible insofar as, to the contrary, the positivist legal ideology presupposes the positivist legal theory and the latter presupposes the positivist method."

I want to begin my reasoning having in mind this passage because I think it constitutes a really crucial and seminal distinction. As a matter of fact, different authors, who unfortunately are not familiar with Bobbio's work, have proposed some partially coincident distinctions many years

[1] I am referring to the lessons in Philosophy of law, collected by Nello Morra and first published in 1779. Hereafter: Bobbio 1996.
[2] Cfr. Bobbio 1996: 246. (my translation)
[3] Cfr. Bobbio 1996: 246-247.

after 1961. In any case, I am interested in Bobbios's ideas because I intend to propose a specific reading of them. In one sense, it is a critical reading but, in another sense, it is entirely coherent with Bobbio's own thinking.

Before presenting my proposal, as a necessary previous step I will try to show why I think that Bobbio's distinction fails. In this regard, I will argue, first, that there are good reasons to disagree with Bobbio on the substantial theses that he attributes to each kind of positivism. On this basis, I will finally claim that, all things considered, we have reasons to reject Bobbio's classification in itself. In other words, I will try to show that it is precisely the distinction of three kinds of legal positivisms that is not justified. I will begin by discussing the ideas that, according to Bobbio, should be attributed to each position. Firstly, I will refer to legal positivism understood as a theory of law.

According to Bobbio, the theory of legal positivism – as any other theory – is a set of true or false descriptions of an object (in this case, legal orders). To be precise, legal positivism is the view that in describing legal orders accepts six theoretical theses[4]:

(a) on the one hand, the coercive theory of law, the legislative theory of law, and the imperative theory of law, and,

(b) on the other hand, the theories about the coherent and complete character of every legal order and the theory of the logical or mechanical interpretation of the law.

Also, as stated by Bobbio, we should distinguish between the positivist legal theory, in a strict and in a wide sense. In a strict sense, positivist legal theory is committed to all the theses I've just mentioned. While, positivist legal theory, understood in a wide sense, is committed only to the first three theses. It is not my intention here to enter into the details. In a few words, the idea is that not all positivist theories of law claim that legal orders are complete, coherent and their norms

[4] Bobbio 1996: 249-250.

mechanically applicable, however, all of them accept that the law is imperative, coercive and mainly expressed through legislation.

I must confess that I find this way of understanding a positivist legal theory at least perplexing. Of course, it is true that throughout history many so called "legal positivists" have maintained these ideas. However, If we accepted this characterization it would follow that many other authors, who are considered paradigmatic examples of legal positivists do not offer a positivist legal *theory*. This is a really implausible result.

To be sure, Bobbio is perfectly aware of the fact that some positivist theorists – in a wide sense – move away and modify the three central theses that constitute the core of the positivist theory. For instance, take Hart's proposal. It is unanimously recognized as a paradigmatic example of a positivist legal theory. However, it is a positivist legal theory that, paradoxically, subscribes to practically none of the contents which, according to Bobbio, a positivist legal theory subscribes to. It is not only the case that, according to Hart, legal norms cannot be reduced to imperative and legislative norms. In Hart's view, the law is a combination of primary and secondary rules among which the ultimate and most important ones are neither imperative nor legislative. Actually, more than a modification or a revision, Hart's proposal amounts to the rejection of the imperative and legislative model of law.

Take another example: Joseph Raz is also unanimously considered a positivist legal theorist. Nevertheless, in his view it is not only false but also misleading to think that coercion is an essential property of law. In this author's perspective, what is essential to the law is its aim to be, not a threat, but a legitimate authority. That is, to constitute moral reasons to act.

Something similar can be said regarding legal realism. To the extent that this position can be seen as offering a description, or a *theory* of law, it is unanimously considered a positivist legal *theory*. However, as far as the positivist legal theory is associated to the idea that the law is a set of

legislative norms automatically applied, we cannot say that legal realists support a positivist theory of law, not even in the wide sense that Bobbio gives to this expression[5].

Thus, even if we accepted that there is something like "legal positivism" understood only as a set of descriptions of the law, i.e. a legal "theory" in Bobbio's understanding of the word, we would still have to discuss which this theory is. As we know, there are deep disagreements among putative positivist legal theorists, they offer not only different but also incompatible descriptions of the legal phenomenon. In a nutshell, it does not seem correct to assimilate the theory of legal positivism to the position that asserts the coercive, imperative and legislative character of law. Such theses are controversial and several theories, which almost every one considers positivist theories of law, actually reject them.

Secondly, I will refer to what has been called "methodological positivism" (or legal positivism as a method), this position is not a set of assertive propositions about the law, it is a set of technical rules or recommendations on how to approach the study of the legal orders. A method is only a means to obtain a certain goal and cannot be appraised in terms of truth values, but in terms of convenience or instrumental adequacy to obtain the indented end. In this sense, according to Bobbio, to assume legal positivism as a method means to assume a scientific or morally not committed attitude in front of the law. From this point of view, legal positivists study the law without taking into account its moral value. This method, according to Bobbio, requires a factual or non- evaluative definition of law[6]. That is, a type of definition that does not presuppose any moral feature as a necessary or defining property of law and allows us to distinguish between the law as we think it is and the law as we think it should be, or between the question of what the law is, and the question of what its moral merits or demerits are.

[5] A contrasting interpretation can be found in Chiassoni 2013: 51-52. Chiassoni does not see any problem in classifying all these proposals as positivist legal theories in the wide, "critical" sense proposed by Bobbio.
[6] Bobbio 1996:137.

It is worth noting that the assumption of this methodological standpoint is surely compatible with the theoretical theses that Bobbio identifies as the theory of legal positivism (the imperative, coercive and legislative character of law), however, it is not committed to such a theory. In this sense, as we have already seen, from Bobbios's point of view, one can be a methodological positivist without being a theoretical positivist. Once a again, this is a perplexing result. It suggests that a legal research guided by a positivist method can produce a non-positivist theory of law. To be sure, this result is possible only because the positivist theory of law has been equated to a very specific set of theses, mostly accepted by European authors during XIX century. The key question is if beyond the undeniable historical value of this characterization, it is sufficiently illuminating and informative so to accept it as the characterization of the positivist theory of law in general, i.e. beyond XIX century.

At any rate, regarding the methodological point, I think that Bobbio is right. The distinction between the question about what the law is and the question about its moral justification is essentially linked to legal positivism. In this sense, we could say that it constitutes a typical positivist methodological prescription. The problem is that this methodological prescription is not only a positivist one. Also some natural law theories accept it. For instance, Aquinas's, Fuller's, or Finnis' approaches seem to allow for the distinction between the law, on the one hand, and its justice or injustice (or its merit or demerit) on the other hand[7]. If this is so, what should we say? That Aquinas, Fuller and Finnis are positivists, methodological positivists, because they accept this prescription? Or that, as a matter of fact, this prescription is not sufficient to capture a specific positivist approach? In other words, if there is a distinctive positivist method it should be something

[7] According to Aquinas: "... leges positae humanitus vel sunt iustae, vel iniustae… Iniustae autem sunt leges dupliciter. Uno modo, per contrarietatem ad bonum humanum, e contrario praedictis, vel ex fine, sicut cum aliquis praesidens leges imponit onerosas subditis non pertinentes ad utilitatem communem, sed magis ad propriam cupiditatem vel gloriam; vel etiam ex auctore, sicut cum aliquis legem fert ultra sibi commissam potestatem; vel etiam ex forma, puta cum inaequaliter onera multitudini dispensantur, etiam si ordinentur ad bonum commune". Cfr. Aquinas 2012: I-II q. 96 a. 4co.

more than this basic prescription. And in this case we still need to explore which other methodological prescriptions constitute such a method.

Unfortunately, also in this case, as in the former one, there seems to be an important disagreement. For instance, according to authors like Kelsen and Hart, legal knowledge is knowledge of norms, and norms are contents of sense, not empirical facts. In contrast, according to some legal realists, in order to know what the law is we have to do an empirical research, mostly related to how the judges will decide those single cases brought to them for their resolution. And, in any case, even if we accept that legal science is interested in the study of the legally existent norms, this existence has to be understood in empirical terms[8]. Then, which (if any) of these two incompatible approaches is a positivist one?. If none of them is necessary to, or distinctive of, a positivist method, which are the common features of methodological positivism?

Finally, some remarks regarding ideological positivism. In this case, we are talking about an ethical standpoint, a normative proposal according to which the law necessarily has moral value. To be precise, according to Bobbio, we should distinguish two kinds of ethical positivisms, the extreme and the moderate ones[9]. The extreme form of ethical positivism is the idea that the law has to be obeyed, just because it is the law, and regardless its content. The moderate position, in turn, claims that the law necessarily expresses or instantiates certain moral values. Using the language of contemporary legal philosophy, we could say that, in this view, the law always constitutes a reason for action, even if not a conclusive one.

At first sight, these are straightforward positions which can be easily identified. Nevertheless, also in this case it is not completely clear which exactly is the thesis that characterizes ideological positivism. Is it the idea that a) every legal system necessarily *has* certain moral

[8] For instance, according to Guastini, the assertion that a legal norm exists is equivalent to an empirical statement according to which certain acts have taken place. To be precise, an act of enactment on behalf of a competent authority or the acts of acceptance on behalf of the addressees. Additionally, the existence of a norm understood as a mere content of sense (a normative meaning) also depends on certain human acts: the *formulation* of a normative statement or the *attribution* of meaning to a given statement (i.e. an act of interpretation). See Guastini, 1999: 380-381

[9] Bobbio 1996: 247-249.

contents? (Like rules that protect human life, property, or promises, as Herbert Hart asserts), or b) the thesis that the law necessarily *promotes* some specific moral values, like certainty, order, or formal equality (as Bobbio explicitly recognizes)? Or, in contrast, c) the idea that any legal norm, in virtue of the sheer fact of being a legal norm, is endowed of moral *force*, independently of its content and the substantial values it advances? In other words, is ethical positivism the position according to which the law always instantiates or promotes some substantial moral values? Or is it the thesis according to which the law always has practical relevance, even when it is false that it has or promotes any substantial moral value? In the first case ethical positivists are implying that the law is always morally justified or correct. In the second case, they are saying that the law is always binding even if it is not substantially justified or correct.

Regarding this kind of positivism, it is also important to take into account a recent proposal, which is also called "ethical positivism" but does not designate the same kind of position that Bobbio identifies as "ethical positivism". In his book *The Legal Theory of Ethical Positivism* Tom Campbell affirms that ethical positivism is the defense of a moral ideal referring to what the law should be like[10]. It presents an aspirational model of law and advocates for "what might be called 'the prescriptive separation thesis' according to which the identification and application of law ought to be kept as separate as possible from the moral judgments which go into the making of law"[11].

It is worth noting that this way of understanding ethical positivism, in a sense, rejects the ideology that Bobbio identifies as ethical positivism. Campbell's ethical positivism is very far from defending that legal norms, in virtue of the mere fact of being legal norms are endowed of moral force, neither in a weak nor an in a strong sense.

[10] Campbell 1996.
[11] Cfr. Campbell 1996:3.

It is not my intention to present in detail all these proposals. I just want to emphasize that they represent contrasting forms of understanding ideological, methodological and theoretical positivism. This means that it is not possible to identify, in a clear and uncontroversial way, which common ideas define each position. As a matter of fact, different authors who are unanimously considered legal positivists disagree about which methodological prescriptions, theoretical assertions and ethical commitments (if any) characterize legal positivism.

On these basis, a first conclusion to draw is that it doesn't seem possible to identify three different sets of legal positivists, one converging on a common set of methodological theses, another agreeing on a set of theoretical proposals, and the last one accepting some specific ethical commitments. There is no doubt that it is possible to identify different kinds of legal positivism, however, these are not the kinds identified by Bobbio.

2. Legal Positivism as a single position

If what has been said so far is correct, there is a second interesting conclusion that should be admitted. When we affirm that there are multiple and contrasting sets of methods, theories and ethical attitudes compatible with legal positivism we are presupposing that there is something that can be identified as legal positivism. To be precise, the position we assert is compatible with different methods, theoretical assertions and ethical outlooks. In other words, we are presupposing and using some set of ideas or properties as a sort of criterion to classify different positions as positivist ones. And, if this is the case, we should try to clarify which these ideas or properties are.

It is indeed regarding this question where Bobbio's distinction proves to be really useful. In a nutshell, it is true that Bobbio's proposal does not justify the distinction of three different types of legal positivisms, however, it does justify the distinction of three different types of *theses* that define legal positivism as a single position. As a matter of fact, if we pay attention to the most

important debates among so called “legal positivists” regarding their own identity we could see that they are debates on which methodological, theoretical or ethical theses (if any) characterize legal positivism. These debates have a singular status because they express fundamentally different points of view about the basic premises that every legal positivist is committed to accept or reject, and these fundamental disagreements bring about irreconcilable types or conceptions of legal positivism.

In this regard, I have already mentioned various well-known conceptions of legal positivism. Now, I would like to return briefly on them just to emphasize that, in effect, they constitute different views about which methodological, theoretical and ethical premises characterize legal positivism.

Firstly, for instance, what we call "legal realism" and "normative positivism" are two kinds of legal positivism and represent two antagonistic visions about which method is the correct one in order to identify and explain what the law is. We can think that these two methodological standpoints are in fact the result of two contrasting pre-theoretical ideas about what the law is. In any case, the important thing is that that pre-theoretical disagreement leads to two incompatible methods of study. According to a realist approach, legal theory should use the method of the natural sciences, which is a clearly external point of view[12]. On the contrary, according to normative positivism, the law is a set of norms and we cannot approach the study of norms in the same way we approach the study of empirical facts. In this view, according to J. Raz, it is necessary to adopt a detached legal point of view[13]. According to McCormick, one does not need to adopt the full internal point of view, however, it is necessary to assume the cognitive aspect it[14].

Secondly, In a similar way, what we call “inclusive” and “exclusive” legal positivism are two conflicting positions that maintain a strong disagreement about a basic theoretical thesis regarding the identification of law. These positions disagree on what conditions can, or cannot be

[12] Leiter 2007: chapter I.
[13] Raz 1975: 170-175.
[14] MacCormick 1996: 33 f.

accepted as criteria of legal validity[15]. As it is well-known, inclusive legal positivists claim that legal systems *can* incorporate moral requirements as conditions of legal validity and, by contrast, exclusive legal positivists reject this possibility as incompatible with other theoretical theses which, in their view, legal positivism is committed to.

Finally, we can also identify two different ideological or ethical positions within legal positivism. Even if they do not make room for two explicit branches or conceptions of legal positivism, as a matter of fact, these positions coexist and constitute two opposite standpoints on whether legal positivists, besides studying the law, should assume some moral commitments about the existence or the content of law, or regarding their own activity as legal scholars.

Taking into account the deep disagreements involved in these debates, we might conclude that there is not a communal position that can be called "legal positivism". However, to the extent that these debates are all understood as discussions among legal positivists (and this is the way in which they are presented in contemporary legal philosophy), it is presupposed that there are some common premises that all these positions accept and that allow us to classify them as species or types of legal positivism.

Thus, in the last part of this work, I would like to try to justify this presupposition. That is, the idea that all these views are positivists ones, and this is so because they all share a communal set of theoretical, methodological and ideological premises. These common premises are surely highly abstract. However they are not void of content and, combined, allow us to distinguish Legal positivism from other kinds of legal approaches.

First of all, as has been emphasized by different authors, all the positions mentioned so far agree on the idea that what we call "the law" is always an instance or an example of social reality. The idea that the law is an instance of social reality, as a matter of fact, is a very complex one, and if we should describe it at length, it is highly probable that, once again, we will find many

[15] See, for instance, Waluchow 1994: 82. Also Himma 2002: 125-165.

disagreements. For this reason, in this context, I am referring only to what some authors have labeled "the social fact thesis"[16], that is, the idea that the law is a human artifact; it is the result of human action[17].

At first sight, this may seem a rather meager or unsubstantial agreement. However, it is only apparently so because, and this is my claim, this basic idea gives support to at least three theses regarding the relationship between law and morality that constitute a minimal common set of contents which all legal positivists agree on.

To begin with, as we know, many legal positivists accept the existence of different kinds of contingent and necessary connections between law and morality. However, in a very precise sense, all legal positivists accept a kind of non-necessary connection between law and morality. That is, they firmly subscribe to the idea that a moral justification is not among the essential features of law. Or, in other words, that to be a moral reason is not a necessary property of law[18]. This thesis is a minimal theoretical agreement about the ontology of law. it is clearly supported by the social fact thesis according to which, in one way or another, the law always depends on human actions and attitudes. Moreover, it is clearly a negative thesis because it only affirms something about what the law not necessarily is. (I would call this the "ontological" or "metaphysical" non-necessary connection between law and morality)

In turn, this basic theoretical agreement is linked to a methodological one. From this point of view, all legal positivists assume the possibility of a clear distinction between an epistemic enterprise guided by a mind-to-world direction of fit (of which, the search for knowledge is a paradigmatic example) and a political or moral enterprise guided by a world-to-mind direction of fit (of which critical appraisals and proposals of change are typical examples). This is a really relevant

[16] Himma 2002:125.
[17] Gardner 2012.
[18] On this specific kind of non-necessary connection between law and morality, see Redondo 2014: 788-794 and Gardner 2014: 833-837.

point that shows a big distinction between the methodological standpoint of legal positivism and that of Ronald Dworkin, for instance. As we know, within Dworkin's theory these two attitudes cannot be clearly separated. For this reason, every theoretical thesis about the law is unavoidably morally committed[19]. In a few words, we can say that legal positivism assumes while Ronald Dworkin rejects a "methodological" non-necessary connection between the study of the law and its moral appraisal.

Finally, from an ethical or ideological point of view, it is true that some legal positivists admit that the existence of a law, without taking into account its content, is always morally relevant. In other words, they accept, even if in a moderate way, a connection between legal validity and the existence of moral reasons[20]. However, the social fact thesis gives support to an ethical corollary that all legal positivists seem to accept. According to it, it is not the case that from the sheer existence of a valid legal norm we can infer a moral *duty*. In other words, there is no necessary connection between legal validity and a *conclusive* reason to act. In this sense, legal positivists are committed to reject what Bobbio called the extreme form of ethical positivism. They should not assimilate a legal duty to a moral one. To be sure, it is possible that the expression "legal positivism" (as Bobbio correctly observed) is used to refer to this strong ideology that justifies blind obedience to the law. Taking this into account, the only thing we can say is that it is a non-coherent use of the expression because this last ideological position is at odds with the ontological and the methodological theses accepted by legal positivism.

To conclude, and to summarize the ideas I have presented: Given that there are so many and so deep disagreements about which theses define or delimit legal positivism, perhaps the only conclusion we can justifiably draw is that it is not possible to identify something like the essential properties of legal positivism. At least if by "essential properties" we understand a set of necessary and sufficient conditions that make a certain tenet to be a legal positivist one. Actually, the features

[19] Dworkin 1986: 14, 78-86.
[20] See Gardner 2012: 174-176.

I have mentioned as communal to all legal positivists are, communal only to those cases which are clear or paradigmatic examples of legal positivists. This means that the concept of legal positivism can be used (and as a matter of fact is usually used) to refer to positions that do not share all these features or do not share them in a clear way.

In any case, what I have tried to show is that, in the sense proposed by Bobbio, the distinction of three kinds or species of legal positivisms (a methodological, a theoretical and an ethical one) does not seem justified. Instead, it seems plausible to admit that, even if there are different kinds or conceptions of legal positivism (legal realism, normative positivism, inclusive and exclusive legal positivism, ethical positivism) there is also a kernel of ideological, theoretical and methodological theses which is shared by all the paradigmatic representatives of these different conceptions.

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