IN DEFENSE OF INCLUSIVE LEGAL POSITIVISM*

José Juan Moreso**

To Albert Calsamiglia, *in memoriam*. Even though I discussed with him many times about the subject of this paper, unfortunately he could not read any version of this paper and I could not benefit from his comments.

1. The Varieties of Legal Positivism[1]

As both the recent and less recent jurisprudential literature shows[2], the expression 'legal positivism' does not refer just to *one* concept. On the contrary, it does refer to a family of concepts, among which some relationships do often - though not always – obtain. In the following, I will deal specifically with what can be considered as the most convenient notion of legal positivism for taking certain features of the legal systems in contemporary constitutional democracies into account. In these democracies, the ideological core of the legal culture is represented by the so-called 'constitutionalism'.[3] Some authors believe legal positivism to be an unsuitable theory to account for legal systems in contemporary constitutional States and accordingly they claim, for this reason, that

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** Pompeu Fabra University (Barcelona, Spain)

[1] This title evokes Stephen R. Perry, 'The Varieties of Legal Positivism' in *Canadian Journal of Law and Jurisprudence*, 9 (1996) 361-395, but it does not mean an identification with the content of this paper.

[2] Vd., e.g., Norberto Bobbio, *Giusnaturalismo e positivismo giuridico*, (Milano: Ed. di Comunità, 1965) and H.L.A. Hart, 'Positivism and the Separation of Law and Morals' [1958] in H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, (Oxford: Oxford University Press, 1983), pp. 21-48.

[3] For a perspicous presentation of the features which define the *constitutionalism*, see Riccardo Guastini, ' La "costituzionalizzazione" dell'ordinamento italiano' in *Ragion Pratica*, 11 (1998), pp185-206. Also Joseph Raz 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Larry Alexander (ed.), *Constitutionalism. Philosophical Foundations*, (Cambridge: Cambridge University Press, 1998), pp. 152-157.

it should be given up.[4] Other authors, by contrast, believe legal positivism still to be a suitable theory to provide viable accounts of such legal systems, even though they do not always agree about which changes should be made in the conception of legal positivism.[5]

In this paper, I will try to outline a version of Hartian legal positivism, purporting to be *suitable* to the legal systems in contemporary democracies – which means, in particular, suitable to cope with the indisputable fact that these constitutions do constantly resort to moral standards (think at the Bills of Rights which are included in the majority of them).

The core of Hartian legal positivism can be captured by the following three theses:[6]

I. The Social Sources Thesis: the existence and the content of the law in a certain society depend on a set of social facts, i.e. a set of actions by the members of such a society.

II. The Separability Thesis : The legal validity of a norm (i.e. the fact that such a norm belongs to a certain legal system) does not necessarily entail its moral validity, and, on the same footing, the moral validity of a norm does not necessarily entail its legal validity.

III. The Limits of the Law Thesis (or the Discretion Thesis): Legally valid norms do not clearly regulate every behaviour. Accordingly, when the law is indeterminate, judges have discretion.

As it is well-known, in the last thirty years, these theses have been the target of a continuous criticism by Ronald Dworkin.[7] Against the Social Sources Thesis, Dworkin contends that there are applicable legal standards (i.e., principles) which have no social origin (their validity does not depend on their *pedigree*). This entails, in contrast with the Separability Thesis, the existence of legally valid standards *in virtue of* their moral validity. This conception leads to the thesis that judges have no discretion (in a strong sense, as lack of criteria to guide their decisions).

Dworkin's criticism is one of the most important reasons for the attention paid to the scope and the suitable interpretation of theses I, II and III in contemporary jurisprudential literature. In such a context, in my view, it should be placed the contemporary debate between two forms of legal positivism: *Exclusive Legal Positivism* (ELP) and *Inclusive Legal Positivism* (ILP), also called *Incorporationism* or *Soft-Positivism*, respectively.

ELP interprets the three theses as follows:

[4] Vd., e.g., Gustavo Zagrebelsky, *Il diritto mite. Legge, diritti, giustizia*, (Torino: Einaudi, 1992).
[5] Vd., e.g. Luigi Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, (Roma-Bari: Laterza, 1989) in where the changes are important, vd. also, Luis Prieto Sanchís, *Constitucionalismo y positivismo*, (México: Fontamara, 1997) and Giorgio Pino, 'The Place of Legal Positivism in Contemporary Constitutional States' in *Law and Philosophy*, 18 (1999), pp. 513-536.
[6] Perhaps the place in which these theses are more clearly expressed is a paper published in Spanish (never published in English) by H.L.A. Hart, 'El nuevo desafío del positivismo jurídico', (Spanish Trans. F. Laporta, L. Hierro y J.R. de Páramo), in *Sistema*, 36 (1990, mayo), pp. 3-19, though relevant parts of this paper appear in the 'Postscript' to *The Concept of Law*, 2 ed. by P. Bulloch and J. Raz (Oxford: Oxford University Press, 1994).
[7] Some fundamental steps of this criticism are Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977); *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985); *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986).

Ia. The Social Sources Thesis: the existence and the content of the law in a certain society only depend on a set of social facts, i.e., on a set of actions by the members of such a society, which can be identified without resort to morality.[8]

IIa. The Separability Thesis : It is necessarily the case that the legal validity of a norm does not depend on its moral validity. [9]

IIIa. The Limits of the Law Thesis (or the Discretion Thesis): When the law resorts to the morality, judges do necessarily have discretion.[10]

ELP provides an unsatisfactory picture of the law. Provided that constitutions in contemporary democracies often resort to moral standards, judicial discretion would be, in these cases, quite pervasive. Therefore, it might seem preferable to work out, if possible, some different, though plausible, interpretation of the Hartian legal positivism theses. That is precisely the intent of the authors defending ILP.[11]

Here you are the way ILP understands the Hartian theses:

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[8] In the words of the major supporter of ELP, Joseph Raz: 'A jurisprudential theory is acceptable only if its tests for identifying the content of the law and determining its existence depend exclusively on facts of human behaviour capable of being described in value-neutral terms, and applied without resort to moral argument'. Joseph Raz, *The Authority of Law*,(Oxford: Oxford University Press, 1979), pp. 39-40.

[9] J. L. Coleman has distinguished two forms of understanding the thesis II, one which presupposes the internal negation of the statement which affirms the relation between law and morality (ELP), and other which presupposes the external negation of that thesis (ILP): 'The two most plausible and distinct interpretations of the Separability Thesis can be expressed in terms of the difference between what in modal logic is called internal and external negation. On the internal negation formulation, the Separability Thesis is the claim that in all legal systems it is necessarily the case that the legality of a norm not depend on its morality or its substantive merits. On the external negation formulation, the Separability Thesis is the claim that it is not necessarily the case that in any legal system the legality of a norm depend on its morality or its substantive merits'. Jules L. Coleman, 'Second Thoughts and Other First Impressions' in Brian Bix (ed.), *Analyzing Law. New Essays in Legal Theory* (Oxford: Oxford University Press, 1998, p. 265).

[10] Raz, e.g., asserts: 'There is yet a third way in which the sources thesis is responsible for legal gaps and it too arises out of conflict situations. The law may make certain legal rules have prima facie force only by subjecting them to moral or other non-source-based considerations. Let us assume, for example, that by law contracts are valid only if not immoral. Any particular contract can be judged to be prima facie valid if it conforms to the 'value-neutral' conditions for the validity of contract laid down by law. The proposition 'it is legally conclusive that this contract is valid' is neither true nor false until a court authoritatively determines its validty. This is a consequence of the fact that by the sources thesis the courts have discretion when required to apply moral considerations'. Joseph Raz, *The Authority of Law* (supra n. 8), p. 75.

[11] The precedents of such conception can be found in Genaro R. Carrió (one of the first defenders of ILP, often ignored in the present debate), *Principios jurídicos y positivismo jurídico* (Buenos Aires: Abeledo-Perrot, 1971) and *Dworkin y el positivismo jurídico*, (México: UNAM, 1981); David Lyons, 'Principles, Positivism and Legal Theory' *Yale Law Journal*, 87 (1977), 415-436, Philip Soper (1977), 'Legal Theory and Obligation of the Judge: The Hart/Dworkin Dispute', *Michigan Law Review*, 75 (1977),511-542. A more developed conception it can be found in a group of papers by Jules L. Coleman, 'Negative and Positive Positivism', *Journal of Legal Studies*, 11 (1982), 139-162, 'On the Relationship between Law and Morality', *Ratio* Iuris, 2 (1989), 66-78; 'Authority and Reason' in Robert P. George (ed.), *The Autonomy of Law* (Oxford: Oxford University Press, 1996), pp.287-319; 'Second Thoughts and Other First Impressions' (supra n. 9) pp.258-278; 'Incorporationism, Conventionality, and the Practical Difference Thesis', *Legal Theory*, 4 (1998), 381-426 and in the book by W.J. Waluchow, *Inclusive Legal Positivism* (Oxford: Oxford University Press, 1994). Perhaps, this is also the account (with the name of *soft-positivism*) of H.L.A. Hart, 'Postscript' in *The Concept of Law*, (supra n. 6), but see below, in 3.

Ib. The Social Sources Thesis: the existence and the content of the law in a certain society depend on a set of social facts, i.e., on a set of actions by the members of such a society, which may contingently resort to moral standards, making them legally valid.

IIb. The Separability Thesis : It is not necessarily the case that the legal validity of a norm depends on its moral validity.

IIIb. The Limits of the Law Thesis (or the Discretion Thesis): At least in some of the cases where the law resorts to morality, it clearly regulates certain behaviours and, accordingly, it does not confer any discretion to the judges.[12]

In the following, I purport to show that ILP is consistent and plausible. To this aim, I will consider in turn four arguments waged against ILP, to which inclusive legal positivists can, in my view, successfully reply. The four arguments I have in mind may be dubbed as follows: 1) The Controversy Argument, 2) The Collapse Argument, 3) The Authority Argument, and 4) The Practical Difference Argument.

Before turning to an analysis of these arguments, however, I wish to mention a possible way of reconciling ELP and ILP, sometimes suggested in this debate, and argue why, in my view, it is not able to solve the problem.

2. Validity: membership and applicability

In positivist legal theory, it is sometimes distinguished between two senses of validity: legal validity as *membership*, and legal validity as *applicability*. A norm is valid, in the sense that it belongs to the legal system S, if and only if it is identified as a member of the system by the criteria of the rule of recognition of the legal system S. A norm is valid, in the sense that it is applicable to a certain case, if and only if there is another norm, belonging to S, which authorizes or obliges the courts in S, to apply it to such a case. [13] In the context of the discussion between ELP and ILP, J.L. Coleman put the question in the following terms:[14]

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[12] In fact, it can be argued that, in all three versions, the first and the second theses have some conceptual relationship, in contrast the third thesis is, in my opinion, conceptually independent from the other two.

[13] The distinction in these terms in Eugenio Bulygin: 'Time and Validity', in: A. A. Martino (ed.), *Deontic Logic, Computational Linguistics and Legal Information Systems*, (Amsterdam: North Holland, 1982), pp. 65-82, José Juan Moreso, Pablo Navarro, 'Applicabilità ed Efficacia delle norme giuridiche' in Paolo Comanducci, Riccardo Guastini (eds.), *Struttura e Dinamica dei sistemi giuridici*, Torino: Giappichelli, 1996, 15-36 and José Juan Moreso, *Legal Indeterminacy and Constitutional Interpretation*, trad. de Ruth Zimmerling, (Dordrecht: Kluwer Academic Publishers, 1998), pp.105-115.

[14] Jules L. Coleman, 'Incorporationism, Conventionalism, and the Practical Difference Thesis' (supra n. 11), pp. 404-405. The origin of this distinction in Joseph Raz, *The Authority of Law* (supra n. 8), pp. 101-102, 119-120. Vd,. also W. J. Waluchow, *Inclusive Legal Positivism*, (supra n. 11), p. 157 , Jules L. Coleman, 'Second Thoughts and Other Personal Impressions', (supra nota 9) pp. 260-1, n. 19 y 263 n. 22; Scott J. Shapiro, 'On Hart's Way Out', *Legal Theory*, 4 (1998): 469-508, en p.506 y Matthew Kramer, 'How Moral Principles Can Enter into the Law', *Legal Theory*, 6 (2000), pp. 103-107. On the other hand, I am indebted to Mauro Barberis, who attracted my attention on an idea of an Italian legal thinker, Santi Romano (*Frammenti di un dizionario giuridico*, Milano: Giuffrè, 1947, pp. 74-5),

A better strategy relies on the distinction Joseph Raz emphasizes between legal validity and bindingness on officials. All legally valid norms are binding on officials, but not every standard that is binding on judges is legally valid, in the sense of being part of the community's law. The laws of foreign jurisdictions, the norms of social clubs as well as other normative systems generally can be binding on officials in certain adjudicatory contexts, though they are not part of the 'host' community's law. Judges may be authorized, even directed, by otherwise valid rules to appeal to such principles. They need not be part of a community's law in order for judges to be required to appeal to them in the context of a particular suit. Thus, it does not follow from the fact that judges may sometimes be bound by certain moral principles that those principles are themselves part of the law or are legally valid.

That is, in accordance with this distinction, it can be that a moral standard is no member of the law and, nonetheless, it is binding on the courts, which have to decide according to it. In this sense, a defender of ELP could argue in favour of the strong reading of the Social Sources Thesis, even though the moral standards are, sometimes, binding on the courts. She could add that the situation has certain analogies with the situation in which certain legal provisions forbid more than ten meters tall buildings in a certain zone or limits to 400 kgr. the weight in certain elevators; in fact, in those cases, it is not necessary to assume that the law embodies the *decimal system of weights and measures*.

Even though this argument could convert the debate about the scope of the Social and Separability Theses in a merely conceptual disagreement, that is, in a disagreement about the use of the concept of legal validity, the Discretion Thesis is still substantively controversial. It is still controversial because even if the law does not include the decimal system, the rules (perhaps constitutive) of such system should be used by the courts when they decide the cases through legal provisions that contain expressions like *x meters* or *y kilos*. But courts have no discretion in these cases. On the contrary, the main problem put forward by moral standards in adjudication is whether these standards may guide judges's behaviour or, instead, they open the doors to judicial (unbound) discretion. Such a question cannot be solved by the distinction between validity as membership and validity as applicability. For this reason, the expression 'legal validity' will be used in this paper in a wide sense, as membership in a system and/or as applicability in accordance with such a system.

3. The Controversy Argument

according to which when legal norms resort to the moral standards, then we have 'un rinvio non ricettizio del diritto alla morale' (cfr. also Mauro Barberis, *Filosofia del diritto* (Bologna: Il Mulino), p. 207.

The Controversy Argument is underlying most of the criticisms to ILP. It has been identified in the following words by J.L. Coleman (an argument which Coleman does not share, but he elaborates from certain ideas of R. Dworkin)[15]:

The argument is this: moral principles are inherently controversial. Judges will disagree about which putative principles satisfy the demands of morality and what is required of the principles that do. In contrast, the rule of recognition is a social rule partially constituted by or supervenient on a convergent social practice. Thus, convergence is a condition of the rule of recognition. Convergence, however, is undermined by the disagreement that would attend any rule that makes morality a condition of legality. Thus, Incorporationism is incompatible with the Conventionality Thesis.

That is, if the norms identified by means of the rule of recognition resort to moral standards and these standards are inherently controversial, then the rule of recognition is useless to identify any standard. In particular, it is useless to meet the function for what H.L.A. Hart introduced it: i.e., to remedy to the uncertainty which besets any system made of primary rules only.[16]

According to some authors, the only way of avoiding the aforementioned conclusion would consist in endorsing moral objectivism.[17] However, this move seems incompatible with a legal theory purporting to be neutral as to metaethical issues. Furthermore, it creates some tensions within the *soft positivism* defended by Hart in the *Postscript*.

Here Hart clearly assumes this position,[18] but he also asserts the following:[19]

If the question of the objective standing of moral judgements is left open by legal theory, as I claim it should be, then soft positivism cannot be simply characterized as the theory that moral principles or values may be among the criteria of legal validity, since if it is an open question whether moral principles and values have objective standing, it must also be an open question whether 'soft positivist' provisions purporting to include conformity with them among the tests for

[15] Jules L. Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis' (supra n. 11), p. 410.
[16] Vd. H.L.A. Hart, *The Concept of Law*, (supra n. 6), 94. These are the words of Hart: 'The simplest form of remedy for the *uncertainty* of the regime of primary rule is the introduction of what we shall call a 'rule of recognition'. This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts'. Vd; the criticism in this line by E. Mitrophanous: 'The first criticism of soft positivism is that its admission of moral criteria in the rule of recognition is inconsistent with the function of the law to identify with certainty the legal standards of the system'. Eleni Mitrophanous, 'Soft Positivism', *Oxford Journal of Legal Studies*, 17 (1997), p. 627.
[17] Eleni Mitrophanous, 'Soft Positivism' (supra n. 16), pp.635-7; Philip Soper, 'Two Puzzles form the Postscript', *Legal Theory*, 3 (1998), p. 365; Susanna Pozzolo, 'Riflessioni su *inclusive* e *soft positivism*' in Paolo Comanducci and Riccardo Guastini (eds.), *Analisi e Diritto 1998. Ricerche di giurisprudenza analitica*, p. 240.
[18] H.L.A. Hart, *The Concept of Law*, (supra n. 6), pp. 250-251.
[19] *Ibidem*, p. 254.

existing law can have that effect or instead, can only constitute directions to courts to *make* law in accordance with morality.

The passage seems to entail the following conclusion: ILP is plausible only if moral objectivism is; if, on the contrary, moral objectivism is false, then ELP must be adopted, at least in relation with the discretion of courts in cases of application of moral standards ('...can only constitute directions to courts to *make* law in accordance with morality').

My reply to the Controversy Argument has two parts. In the first part, I will try to show that there is a kind of moral objectivism which is compatible both with many different metaethical doctrines and with many substantive ethical doctrines; and, moreover, that it is a plausible doctrine. However, I think that such a view in moral philosophy is not necessary to defend ILP. The second part of my reply is independent from any consideration about moral philosophy.[20]

Let's begin with the first part of my reply. The Controversy Argument is basically related to the problem of whether it is possible to provide *objective* answers to such questions as whether a certain treatment is degrading or not (the Spanish Constitution forbid, in art. 15, inhuman and degrading treatments, resorting in this way, by the use of moral terms, to morality).[21] Usually the problem of moral objectivity has been associated with the problem of moral realism, i.e., the problem of the existence of moral facts and properties independently from human acts (*out there*, as it were), capable to make true our moral judgements. Moreover, a negative answer to this question – as it is argued sometimes - entails a non-cognitivist outlook about the moral realm, that is to say, the idea that moral judgements are not suited to truth. These premisses lead some people to the following conclusion: there is no place for objectivity in the moral realm; there is no place for rational agreement in moral matters. This was the account, e.g., of moral emotivism within the logical positivism outlook.[22] I believe that there are some unsound steps in this line of reasoning. Moral antirealism neither does entail moral non-cognitivism, nor both of them do imply the rejection of moral objectivism. On the other side, however, moral realism goes along with moral cognitivism and moral objectivism.

It is possible to reject moral realism, by denying the existence of moral properties in the world. In this way, if moral judgements are descriptions of such moral properties, it would be sound to

[20] Hart's answer has also been considered insufficient as a defense of *soft postivism* and has been argued that there are other alternatives. Vd., Kenneth Einar Himma 'Incorporationism and the Objectivity of Moral Norms', *Legal Theory*, 5 (1999), 415-434 and Matthew Kramer, *In Defense of Legal Positivism. Law without Trimmings*, (Oxford: Oxford University Press, 1999), pp. 152-161.

[21] In this point I will follow Bernard Williams's ideas, as they appear in ch. 8 of *Ethics and the Limits of Philosophy*, (London: Fontana Press, 1985); 'Ethics' in A. C. Grayling (ed.), *Philosophy*, (Oxford: Oxford University Press, 1995), pp. 546-582 and 'Truth en Ethics', *Ratio* 8 (1985), 227-242.

[22] Vd., e.g., A. J. Ayer, *Language, Truth, and Logic*, (London: Victor Gollancz, 1936). Such a thesis depends on the absolute acceptation of the principle of verification. As Georg Henrik von Wright affirms (*Norm and Action*, London: Routledge & Kegan Paul, 1963, p. 104 note 1): 'Yet there was a time not long ago when it was seriously maintained in some philosophical circles that norm-formulations actually are 'meaningless' because removed from truth or falsehood. This illustrates the power of philosophical dogmas –in this case the so-called verificationist theory of meaning- of perverting the philosopher's use of language'.

entertain about them an *error theory* , like the one proposed by John Mackie's[23], stating that, if moral judgments are descriptive, they are false. It seems plausible to believe that moral facts have no independent explanatory power,[24] that they do not make up for what Bernard Williams called 'the absolute conception of the world'.[25] However, the rejection of realism, by itself, does not lead to non-cognitivim. Colours do not make up for the absolute conception of the world but, nonetheless, statements about colours can be either true or false. Thus, there is some conceptual room for cognitivist antirealism.[26] It is possible to argue that the analogy between secondary qualities, like colours, and moral properties does not make sense, while at the same time defending moral objectivism. We can accept that moral judgements are reducible to prescriptions and leave still plenty of space for objectivity – in the sense of rational agreement – in moral matters. An obvious case is represented by Kantian moral theory.[27] According to Kant, basic moral judgements are prescriptions and the fundamental principle of morality is, literally, an imperative. More recently, R.M. Hare has defended a prescriptivist account compatible with moral objectivism.[28]

By the preceding metaethical detour, I am trying to show that moral objectivity is not inconsistent with a very wide spectrum of substantive philosophical perspectives and, therefore, that the possibility of objectivity in moral matters, in the sense of rational agreements, undermines the Controversy Argument. Sometimes, moral objectivism is only accepted within a particular moral system, while making clear that there are many moral systems and the choice of the *axioms* (the principles and the basic values of the system) of such systems is not subject to rationality.[29] I believe that this relativistic account presupposes the acceptance of *foundationalism* in moral epistemology. Even though I cannot analyze here this very complex epistemological question, I think that there are reasons for giving up epistemological foundationalism and endorsing a *coherentist strategy* in epistemology.[30] I mean a "coherentism" valid for beliefs and attitudes alike. If we adopt such a strategy, there are no *ultimate* principles and values within any system, but all principles are, therefore, open to revision as soon as new and better arguments are offered.

I realize that much more should be explained about moral objectivism, in order to make sense of this claim. However, I think that it is not necessary for defending ILP.

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[23] Vd. *Ethics. Inventing Right and Wrong*, London: Penguin, 1977.
[24] Vd. Gilbert Harman, *The Nature of Morality*, Oxford: Oxford University Press, 1977, ch. 1.
[25] Bernard Williams, *Ethics and Limits of Philosophy*, ,(supra n. 21), pp. 138-140.
[26] Vd., e.g., John McDowell, 'Values and Secondary Qualities' in Ted Honderich (ed.), *Morality and Objectivity*, (London: Routledge & Kegan Paul, 1985), pp. 110-129.
[27] Vd. Bernard Williams, 'Ethics', (supra note 21), p. 558.
[28] Vd., e.g., R. M. Hare, *The Language of Morals*, (Oxford: Oxford University Press, 1952) and recently, *Sorting Out Ethics*, (Oxford: Oxford University Press, 1997). Other accounts near to the moral emotivism, but compatible with the objectivism are, e.g., Allan Gibbard, *Wise Choices, Apt Feelings*, (Oxford: Oxford University Press, 1991) and Simon Blackburn, *Ruling Passions*, (Oxford: Oxford University Press, 1998).
[29] Vd., e.g., Paolo Comanducci, *Razonamiento jurídico. Elementos para un modelo*, (México: Fontamara, 1999), pp. 48-49.
[30] Willard v. O. Quine, 'Two Dogmas of Empiricism', in *From a Logical Point of View*, (Cambridge, Mass.: Harvard University Press, 1953), pp. 20-46.

The second part of my reply will purport to show that the rejection of moral objectivism does not lead to abandoning ILP. Non-cognitivist theories usually concern moral judgements containing the so-called *thin moral concepts* which, perhaps, possess only a prescriptive dimension, like *good, right* or *ought*. But the moral discourse also contains *thick moral concepts*, like *honest, coward* or *degrading treatment* and the moral concepts included in our constitutions are usually thick concepts. It seems odd to reject the possibility of knowledge in the use of thick moral concepts.[31] We possess these concepts and we know often their reference when we use them. An explanation of the aptness to the truth and, therefore, to the objectivity of moral judgements which contain thick concepts, in the line of Harean prescriptivism, is to distinguish sharply between two dimensions of these concepts, namely, a descriptive and a prescriptive dimension. Their descriptive content has truth-conditions. Their prescriptive content fits their evaluative dimension. The descriptive content makes the concept to be guided by the world, its prescriptive dimension enables it to be a guide for action, to provide reasons for action. Other authors, as Bernard Williams, think that the evaluative dimension cannot sharply be separated from the descriptive content, perhaps, because they think that evaluating is not totally reducible to prescribing, i.e. evaluating is not only a function of desiring and, probably, this is so because they reject the so-called *centralism* in morals, a theory which presupposes that thin concepts are the most basic ones, while at the same time they affirm that our use of thin moral concepts actually supervenes on our use of thick moral concepts.[32]

Fortunately, it is not necessary to elucidate this question in order to accept that statements which predicate thick moral concepts of certain actions are truth-apt. The members of the community where is in force the Spanish Constitution possess the concept of degrading treatment and we are able to apply it truthfully to certain cases. In this way, our constitutional statements referring to degrading treatments have aptness to truth and objectivity.

It can be argued that the use of statements which contain thick concepts by legal interpreters or by courts (as Constitutional Courts) is a *quotation* use, a use referred to the understanding of degrading treatment in Spanish social morality, a use without evaluative dimension.[33] The fortune of this argument depends on the possibility of sharply separating the descriptive dimension from the evaluative dimension of thick concepts. However, even though this possibility is maintained, the legal interpreters or the judges need to fashion the concept, to put it together with other close concepts, and, inevitably, fashioning moral concepts requires a moral background. That is to say, a conceptual network where the moral concepts have their place and this conceptual network must be checked, in a kind of *reflective equilibrium*, by appealing to our intuitions, and this in turn requires facing a moral reflection.

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[31] Bernard Williams, *Ethics and the Limits of Philosophy*, (supra note 21) , ch.. 8. Vd. also Joseph Raz, 'Notes on Value and Objectivity' in *Engaging Reason. On the Theory of Value and Action*, (Oxford: Oxford University Press, 1999), ch. 6.

[32] Vd. Susan Hurley, *Natural Reasons*, Oxford: Oxford University Press, 1990, ch. 2.

[33] Vd. Carlos E. Alchourrón y Eugenio Bulygin, , 'Los límites de la lógica y el razonamiento jurídico', in Carlos E. Alchourrón y Eugenio Bulygin, *Análisis lógico y Derecho*, (Madrid: Centro de Estudios Constitucionales, 1991), pp. 315-316.

This conclusion allows us to submit that the application of constitutional provisions which contain moral predicates is not *always* discretional. There are clear cases of application of the concept "degrading treatments". Moreover, a concept without clear cases of application is not even a concept. It is obvious, however, that thick moral concepts are *essentially contested concepts*.[34] It can be said that a concept is essentially contested if and only if: 1) it is evaluative, that is, it attributes to the cases it applies something of value or disvalue, 2) the structure of the concept is internally complex and covers different criteria which reconstruct its meaning and compete among them and 3) real or hypothetical, there are some cases which are paradigms of the application of the concept. For this reason, there can be uncertainty in the application of a thick moral concept to an individual case, and different *conceptions* of the same *concept* can produce different solutions.[35] Thus, there will be *constitutional hard cases*, where the law remains indetermined and judicial discretion cannot be eradicated.

It is convenient, however, to remind an argument by Joseph Raz, the major supporter of ELP, referred to the problem of discretion as connected to the application of moral standards:[36]

> Supporters of such a conception [ILP] of the law have to provide an adequate criterion for separating legal references to morality, which make its aplication a case of applying pre-existing legal rules from cases of judicial discretion in which the judge, by resorting to moral considerations, is changing the law. I am unaware of any serious attempt to provide such a test.

However, at least for the cases of application of contested concepts resorting to morality, the criterion which ILP might use is the following: given that these concepts have an indisputable descriptive component and that they point to paradigms, in the paradigmatic cases, and also in those sufficiently close to them, judges apply pre-existent standards and do not change the law; by contrast, in the cases where different conceptions compete and solve the case in incompatible ways, judges have discretion.[37]

I'll end up my reply to the Controversy Argument, with the following remark. The fact that the identification of applicable standards by courts resorts, in some cases, to morality, does not necessarily lead to the conclusion that legal theory is an evaluative practice; indeed, as Hart reminded us, 'description may still be description, even when what is described is an evaluation'.[38]

4. The Collapse Argument

[34] The *locus classicus* is W. B. Gallie, 'Essentially Contested Concepts', *Proceedings of Aristotelian Society*, 56 (1955-6), 167-198.
[35] Vd. Ronald Dworkin, *Law's Empire*, (supra n.7), pp. 70-73.
[36] Joseph Raz, *The Authority of Law*,(supra n. 8), p. 47 note 8. Vd. also Eleni Mitrophanous, 'Soft Positivism', (supra n. 16), p. 642.
[37] A similar account in Timothy Endicott, 'Raz on Gaps –The Surprising Part', draft presented in University of Palermo (Italia), september 1999.
[38] H.L.A. Hart, *The Concept of Law* (supra n. 6), p. 244.

The Collapse argument asserts that ILP is a view highly unstable which, if properly understood, leads to the destruction of the core theses of legal positivism. This is, as it is well-known, the opinion of Ronald Dworkin. With his own words:[39]

It [*Soft Conventionalism*, as Dworkin calls ILP] is, rather, a very abstract, underdeveloped form of law as integrity. It rejects the divorce between law and politics that a conventionalist theory with the motives I described tries to secure.

According to Dworkin, *Soft Conventionalism* claims that the law in a certain community includes all that is implicit in the conventions. In this way, ILP maintains that there might be an abstract agreement about the criteria for identifying the law in a community, while, at the same time, there might be no agreement about, so to speak, their "implicit side" or "implicit contents". But, this is a very poor way of accepting what is implicit in the conventions: for logical reasons, it is always possible to go up to a more abstract, though less thick, agreement.[40]

In fact, my reply to this argument by Dworkin is indirect. I will try to show that the Dworkinian conception, *law as integrity*, is in accordance with the Thesis Ib (Social Sources Thesis) and the Thesis IIb (Separability Thesis) of ILP and that his reject of the thesis IIIb (Discretion Thesis) depends on his conception of the legal practice as an interpretive practice of a special character, which needs additional premisses. In his analysis of the stages of interpretation, Dworkin seems to assume a certain version of the Social Sources Thesis :[41]

First, there must be a 'preinterpretive' stage in which the rules and standards taken to provide the tentative content of the practice are identified. (The equivalent stage in literary interpretation is the stage at which discrete novels, plays, and so forth are identified textually, that is, the stage at which the text of *Moby-Dyck* is identified and distinguished from the text of other novels). I enclose 'preinterpretive' in quotes because some kind of interpretation is necessary even at this stage. Social rules do not carry identifying labels. But a very great degree of consensus is needed -perhaps an interpretive community is usefully defined as requiring consensus at this stage- if the interpretive attitude is to be fruitful, and we may therefore abstract from this stage in our analysis by presupposing that the classifications it yields are treated as given in day-to-day reflection and argument.

That is, Dworkin accepts a minimum element of conventionalism in the identification of the law, which is sufficient, in my opinion, to attribute him some version of the Social Sources Thesis (a

[39] Ronald Dworkin, *Law's Empire* (supra n. 7), pp. 127-8.
[40] *Ibidem*, pp. 126-7. N. Rescher asserts: 'At some point of abstraction there is always a seeming 'agreement'. I think *p*, you think *q*. It is then clear that both of us are logic-bound to endorse *p*-or-*q*. But this agreement surely cuts no ice for a serious consideration of matters of consensus regarding beliefs.' Nicholas Rescher, *Pluralism. Against the Demand for Consensus*, (Oxford: Oxford University Press, 1993), pp. 44-45. Vd., also, Juan Carlos Bayón, 'Law, Conventionalism, and Controversy' en *Jurisprudence on the Continent. Symposium on analytical jurisprudence*, St. Catherine's College, Oxford, February 13, 1999.
[41] Ronald Dworkin, *Law 's Empire* , (supra n. 7), pp. 65-66.

very weak version, as it were). The same thing happens with the Separability Thesis. Here, Dworkin seems willing to accept that even though Nazi law was unjust, it did not lose at all, for that very reason, its character of "law" (at least, in the preinterpretive sense): 'It [Nazy system] is law, that is, in what we have been called the 'preinterpretive' sense'.[42]

Obviously, Dworkin rejects the thesis III, the Discretion Thesis. Such a rejection, however, requires additional premisses and it is by no means clear that these premisses are compatible with his conventionalist analysis and with his rejection of moral realism. In this sense, M. Moore has written:[43]

My proper conclusion about all of this is that there is no way for Dworkin to hang on to both his conventionalist and his right answer theses. It is obvious to me which he should hang on to and which he should give up, although anyone with legal positivist inclinations will doubtlessly think just the opposite.

If the argument by Moore is right (and I think that it is right),[44] then the Dworkinian theory may be regarded as a specially *optimistic* form of ILP. Accordingly, ILP does not collapse at all into anti-positivism; on the contrary, it is *law as integrity* which appears as a form of ILP.

5. The Authority Argument

Nevertheless, the most important argument against ILP is, perhaps, the so-called "Authority Argument", which may be derived from the Razian conception of authority related to his account of the central thesis of legal positivism.[45] In fact, Raz does not share the Controversy Argument, provided that he asserts:[46]

That the existence and content of the law is a matter of social fact which can be established without resort to moral arguments does not presuppose nor does it entail the false proposition that all factual matters are non-controversial nor the equally false view that all moral propositions are controversial.

[42] *Ibidem* p. 103.
[43] Michael Moore, 'Methaphysics, Epistemology and Legal Theory', *Southern California Law Review*, 60 (1987), 453-506, p. 494. Vd., also, José Juan Moreso, *Legal Indeterminacy and Constitutional Interpretation*, (supra n. 13), pp. 145-147.
[44] Moreover, it has been argued (with plausibility) that moral realism is compatible with moral indeterminacy. Vd., Russ Shafer-Landau, 'Ethical Disagreement, Ethical Objectivism and Moral Indeterminacy', *Philosophy and Phenomenological Research*, 54 (1994), 331-344 and 'Vagueness, Borderlines Cases and Moral Realism', *American Philosophical Quarterly*, 32 (1995), 83-96.
[45] Vd., e.g., Joseph Raz, *The Morality of Freedom*, Oxford: Oxford University Press, specially, chs.. 2-3 and 'Authority, Law, and Morality' in *Ethics in the Public Domain*, Oxford: Oxford University Press, 1994, 194-221.
[46] 'Authority, Law, and Morality', (supra n. 45), p. 218.

Raz's argument is complex and has been widely revised and discussed. In the following, I'll limit myself to a very sketchy account of the argument, and focus on a few of its steps.

A philosophical theory about the law ought to be useful in order to understand the more relevant features of the nature of this social institution. A distinctive feature of law as compared with other coercive systems is its claim of authority. Legal authorities claim that their norms are legitimate, that is, they claim to be entitled to impose obligations upon the members of a social group. That, of course, does not mean that legal authorities are really legitimate, provided that their legitimacy depends on moral norms independent from legal norms. However, a central point in order to distinguish a gunman from a legal authority is their invocation of reasons which justify their directives backed by threats. To attribute authority to someone is to recognize her capacity to bind us through her norms. Therefore, a philosophical theory should explain to us in which consists and to which extent it is possible that the law has authority.

According to Raz, a positivistic outlook as to the law is the only suitable position in order to take the feature of authority into account. The basic structure of his argument runs as follows.

Normative authorities are practical authorities, i.e., their norms modify our reasons for action. For instance, we acknowledge no authority to a mad person in order to fix what percentage of our income should be destined as contribution to the public expenses. Even though, the mad person orders us to pay a 25% of our income, this directive provides us no reason for action. Instead, if the same directive is enacted by the Parlament, then to acknowledge authority to the Parlament means that we have an obligation of contributing with 25% of our income.

Valid norms are exclusionary reasons. They replace our ordinary reasons in the balance of reasons. Usually, authorities try to solve problems and social conflicts through their directives. The justification of their norms is related to the underlying reasons that persons have in order to behave in a certain way. For this reason, Raz calls this conception *the service conception of authority.*

One main feature of this conception is that authorities are legitimate only if their directives meet the following conditions: (a) the directives are such that, if our actions do actually follow them, our actions will be guided by the reasons they *ought* to be guided by; (b) the existence of such directives provides our actions with a better and more certain guidance. Accordingly, legal authority provides us with the useful service of turning into established formulations (norms) those underlying reasons which should bear on the balance of reasons for our actions. This is the *Dependence Thesis.* Another feature of this conception of authority allows us to overcome the objection claiming the "irrelevance" of authorities, and it is called the *Normal Justification Thesis*. In accordance with this thesis, the normal way to acknowledge authority to a person involves showing that an alleged subject is likely better to comply with reasons which apply to him if she accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if she tries to follow the reasons which apply to her directly. Therefore, the fact that an authority makes an action obligatory is a reason for its performance which should not be added to all other relevant reasons in the deliberation of the subject, but, rather, it should replace her deliberation. This is the *Pre-emption Thesis.*

The pre-emptive function of authoritative directives entails that the subjects can identify the content of the directives without resorting to the dependent on underlying reasons, because this would mean to re-open the balancing of reasons. For this reason, to abandon the strong version (the ELP version) of The Social Sources Thesis implies to leave unexplained a central feature of the law: its authoritative nature. In the debate between ELP and ILP, we should adopt ELP because ELP is the only theory capable to take the authoritative nature of law into account.

This perspective assumes the claim of authority to be a central feature of the law, i.e., that it is not conceivable a legal system whose authorities do not claim to be legitimate. A claim, it is necessary to remind it, that Raz considers implausible for every norm of legal systems, and for this reason he thinks that it does not exist, not even in a *prima facie* way, an obligation to obey the law.[47] The claim of legitimacy supposes that authorities of the legal system claim that there is a moral obligation to obey their directives. This is a disputable idea.[48] Even though I share Hart's doubts concerning this Razian idea about the nature of the law, in my reply to the Authority Argument I will presuppose that the claim of authority is a definitional feature of our concept of law.

My criticism arises from the idea that the law does not claim the kind of authority described in the "service conception of authority". Specifically, the law does not claim that legal norms should always be considered opaque to the underlying reasons which justify them. In my view, legal norms do often only partially replace some of the dependent reasons and require the resort to the underlying reasons for the identification of the law applicable by the courts.

It is worthwhile reminding that Raz begins his explanation of the concept of authority with the example of two people who refer a dispute to an arbitrator.[49] It seems that there are convincing reasons to consider the arbitrator's decision as an exemplification which fits the three theses of authority: specifically, the arbitrator's decision is a reason for action which reflects the deliberation among the previous dependent reasons and, on the other hand, this decision replaces the previously existent reasons. It is, also, obvious, that the arbitrator's decision cannot - if it must solve the dispute - resort again to the underlying reasons, issuing a decision like: 'A ought to pay X dollars to B, if B's behaviour was performed in good faith', because this decision would not be complete, since it would not provide a solution to one of the underlying questions in dispute: i.e., the question of the good or bad faith of B. It seems that this argument also accounts for judicial decisions and, therefore, the authority of ajdiudication agencies and, in particular, the *res iudicata doctrine* may be understood in accordance with Raz's conception of authority. However, one may wonder whether the authority of legislative organs might also be understood in this way. Are the norms enacted by

[47] Joseph Raz, *The Authority of Law*, (supra n. 8), chs. 12-13.
[48] Even though Hart follows the Raz's analysis of *exclusionary reasons*, in H.L.A. Hart, 'Commands and Auhoritative Legal Reasons' in *Essays on Bentham*, (Oxford, Oxford University Press, 1982), ch. X, Hart rejects the idea that legal authorities necessarily claim moral legitimacy. Vd. also Matthew Kramer, *In Defense of Legal Positivism*, (supra n.20), ch. 4: 'Requirements, Reasons, and Raz: Legal Positivism and Legal Duties'.
[49] Vd., also, 'Authority, Law, and Morality', (supra n. 45), pp. 196-7.

legislative authorities totally opaque as to underlying reasons?[50] I do not believe that to be the case. And not only because our constitutions use moral concepts, resorting directly to underlying reasons in order to solve the cases at hand, but also because the legislation of our legal systems often contains moral elements which resort to the underlying reasons. Justifications in criminal law, causes of voidness in contracts in private law, and others, necessarily resort to moral standards.[51] We cannot apply to a case the justification of legitimate defense or nullify a contract because of duress without resorting to underlying reasons. In this sense, our constitutions only make clearer a tendency which is present in contemporary law. Raz has considered the possible difference between legislative and adjudicative authorities, but - for reasons which are not completely transparent to me - he asserts that legislative authorities are similar in all relevant aspects to the arbitrator's case and, therefore, their norms are authoritative in the same sense of the arbitrator's norms.[52]

In fact, Raz does not consider that the law has pre-emptive force for judges in all cases. Moreover, he rejects the thesis of the autonomy of law and considers that one thing is *reasoning about the law* and another thing is *reasoning according to law*. Only in the first case, the reasoning is governed by the Social Sources Thesis; in the second case, instead, judges do have discretion to depart from the law identified through the Social Sources Thesis and apply moral reasons.[53] Such a view, however, seems to create a conceptual tension among his Sources theory, his theory of authority and his theory of adjudication.[54] A tension that, perhaps, could be solved by a clear distinction between the problems of law's identification and the problems of law's adjudication.[55] This way will not be explored here.

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[50] Some doubts about the use of the arbitror's example in order to take the central features of legal authorities into account have been put forward also in Yasutomo Morigiwa, 'Second-Order Reasons, Uncertainty and Legal Theory' en *Southern California Law Review*, 62 (1989): 897-913, in p. 901 and W.J. Waluchow, *Inclusive Legal Positivism*, (supra n. 11), p. 132. A defense of Raz' account in Tim Dare, 'Wilfrid Waluchow and the Argument from Authority' *Oxford Journal of Legal Studies*, 17 (1997):347-366, in 356-359 and a reply of W.J. Waluchow in 'Authority and the Practical Difference Thesis: A defense of Inclusive Legal Positivism' *Legal Theory* 6 (2000), 45-81. Even if I share some of Waluchow's arguments I will not insist in his idea that there are other functions which the arbitror's decisions can meet, apart solving disputes, and in these cases she could resort to the dependent reasons. Here I do not follow either one of the paths suggested by Coleman, according to it is necessary to distinguish two functions in the rule of recognition: validation function and epistemic function. According to Coleman, if the rule of recognition had as function tthe identification of the content of legal norms, then it should be governed by the doctrine of authority, but for Coleman the rule of recognition can have only a validation function. In my view, however, the rule of recognition is a rule which allows us to *identify* the valid norms in a legal system. Vd., Jules L. Coleman, 'Authority and Reason' (supra n.11), pp. 287-319; 'Second Thoughts and Other First Impressions' (supra n. 9) pp.258-278; 'Incorporationism, Conventionality, and the Practical Difference Thesis', (supra n. 11), pp. 381-426

[51] Vd. in this line the reflections of Francisco Laporta in *Entre el Derecho y la moral*, México: Fontamara, 1993, pp. 60-63.

[52] *The Morality of Freedom*, (supra n. 45), pp. 43-52.

[53] Vd., por ejemplo, Joseph Raz, 'Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment' *Legal Theory*, 4 (1998), 1-20 and 'On the Autonomy of Legal Reasoning' in *Ethics in the Public Domain*, (supra n. 45), pp. 310-324.

[54] Vd. Fernando Atria, 'Legal Reasoning and Legal Theory Revisited' *Law and Philosophy*, 18 (1999), 537-577 and Juan Carlos Bayón, 'Law, Conventionalism, and Controversy', (supra n. 40).

[55] A suggestive conception which follows this distinction in M. Cristina Redondo, 'Reglas "genuinas" y positivismo jurídico' in Paolo Comanducci and Riccardo Guastini (eds.), *Analisi e Diritto 1998. Ricerche di giurisprudenza analitica*, pp. 243-276.

In any case, it does not seems plausible to believe that legal norms always have to work as exclusionary reasons of *every* dependent reason.[56] The norm that justifies certain behaviours in legitimate defense excludes some dependent reasons (for instance, the reasons for regarding such a behaviour as legally justified), but it does not exclude the substantive reasoning about whether the protected good was, at least, equally valuable as the sacrificed good, and this consideration also underlies the norm which declares legitimate defense as justified. That is, legal norms combine opacity with transparency.[57]

Therefore, Raz's service conception of authority should be given up. As Dworkin affirms, 'Raz thinks law cannot be authoritative unless those who accept it *never* use their own conviction to decide what it requires, even in this partial way. But why must law be blind authority rather than authoritative in the more relaxed way other conceptions assume?'[58] But, what are these theories of authority 'more relaxed'? Obviously, to present a theory of authority exceeds my intentions in this paper. However, I can offer some general indications.

If it makes sense speaking about the principles of practical reason, then such principles are the only ones which are endowed with authority. Directives enacted by human beings only can have a derived and indirect authority, insofar as they reflect the authority of such principles.

Perhaps a way of understanding this idea is resorting to the sequence that, according to J. Rawls, goes from the most basic underlying reasons to the opaque reasons which are the judicial decisions. Rawls imagines a four-stage sequence for the just institutional arrangement made by rational beings. In the first stage the parties have adopted the principles of justice in the original position, which are authoritative principles of practical reason. In the second stage, they move to a constituional convention, where they decide the content of constitutional provisions in accordance with the principle of equal liberty for all. In the third stage, the legislative stage, they establish legislative rules in accordance with the principles of justice – and here, provided the basic rights in the second stage are preserved, legislative decisions should fit the principle of difference. Only in the fourth stage, these rules are applied to the individual cases. Each one of these stages presupposes a progressive clearing of the veil of ignorance which, on the one hand, allows to articulate the convenient norms for each concrete society and, on the other hand, allows to do it in a just way, because in each stage the principles of justice ought to be respected.[59] Thus, I believe that only in the stage of legal adjudication we can attribute to the legal directives the features of the service conception of authority, provided that the underlying principles have governed the three former stages. To the extent that, in some stage, the directives do not reflect the authoritative force of the principles of practical reason, legal rules lack authority.

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[56] Vd. Raz's relevant reflections on the scope of the exclusionary reasons ('It should be remembered that exclusionary reasons may vary in scope; they may exclude all or only some of the reasons which apply to certain practical problems' in Joseph Raz, *Practical Reason and Norms*, (New Jersey: Princeton University Press, 19912), pp. 40.

[57] Vd. W.J. Waluchow, *Inclusive Legal Positivism* (supra n. 11), pp. 129-140 and Stephen Perry, 'Judicial Obligation, Precedent and the Common law' *Oxford Journal of Legal Studies*, 7 (1987), pp. 222-3, 241-2.

[58] Ronald Dworkin, *Law's Empire*, (supra n. 6), pp. 429-30, nota 3.

[59] John Rawls, *A Theory of Justice*, (Cambridge, Mass.: Harvard University Press, 1971), pp. 195-201.

Therefore, on the one hand, there can be law which lacks authority (this is a consequence of the positivistic thesis of Separability, always accepted by Raz); and, on the other hand, there can be law whose identification requires a partial resort to underlying reasons, in accordance with the Social Sources Thesis of ILP, but in contrast with the strong reading of the Social Sources Thesis of Razian ELP.

6. The Practical Difference Argument

The problem put forward by the Practical Difference Thesis has been presented in a fine way by J.L. Coleman: We can attribute to Hart the following three theses, 1) The Incorporationist Thesis (some version of ILP), 2) the Conventionalist Thesis, that the law exists as a result of an interdependent convergence of beliefs and attitudes, that is, an 'agreement' among people expressed by a conventional rule, the rule of recognition, and 3) the Practical Difference Thesis, that legal norms have to be able to make a practical difference, that is, to affect motivationally the structure or the content of subjects's deliberation and action. Coleman adds: "The problem is that Incorporationism and the conjunction of the Conventionality and Practical Difference Thesis constitute an inconsistent set".[60]

The Practical Difference Thesis has recently been formulated by S. J. Shapiro,[61] who argues that if we accept this Thesis we will give up ILP. We should give up ILP, according to Shapiro, because if the legal directives applicable by courts resort to moral standars, then such standards will not be able to motivate judges's behaviour, provided that moral standards add no reasons to the reasons for action which judges would have, if they were rational beings. In other words, the appeals of law to morality are superfluous[62] and, therefore, the only plausible conception of law, as an instrument making a "practical difference", is ELP.

It is important to be aware that the Practical Difference Thesis does not look for the conditions in which judges would be *justified* in applying moral norms; rather, it looks for the conditions in which judges can be *motivated* by the moral norms which are resorted to by the rule of recognition.

Sometimes, the question is put forward in the following way: How is it possible that a rule of recognition like "Obligatory moral norms are legally valid" would motivate judges?[63] However, this is a rather bizarre way to put the problem of the practical difference. The law in a social group exists

[60] Jules L. Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis' (supra n. 11), p. 382-383.
[61] Scott J. Shapiro, 'On Hart's Way Out' en *Legal Theory*, 4 (1998), 469-508 and 'The Difference That Rules Make' en Brian Bix (ed.), *Analyzing Law. New Essays in Legal Theory*, (supra n.9), pp. 33-64. The thesis, though recent, has produced a wide discussion, vd. Jules L. Coleman, 'Incorporationism, Conventionalism, and the Practical Difference Thesis' (supra n. 11), pp. 381-422; Kenneth Einar Himma, 'Waluchow's Defense of Inclusive Positivism' *Legal Theory*, 5 (1999), 101-116 and 'H.L.A. Hart and the Practical Difference Thesis', *Legal Theory*, 6 (2000), 1-43; W. J. Waluchow, 'Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism' (supra n. 50), 45-81 and Matthew Kramer, 'How Moral Principles Can Enter into the Law', (supra n. 14), 103-107.
[62] For a similar argument on the superfluousness of the law, vd. Carlos S. Nino, *The Ethics of Human Rights*, (Oxford: Oxford University Press, 1991), Appendix vi, pp. 394-5.
[63] Scott J. Shapiro, 'On Hart's Way Out', (supra n. 61), p. 496.

only if there is a certain institutional structure. In this institutional structure, it is required the establishment of, at least, primary organs of adjudication, which means that some rules defining the competence and procedures of these organs are needed.[64] In this sense, moral standards to which the law resort cannot be applied by any person in any moment; rather, they ought to be applied, in certain occasions, by the organs entitled to do it. The practical difference of these standards does not arise from their content, but from their connections with secondary rules which make legally possible to make decisions in accordance with them. As Waluchow asserts, "it fails to follow from the fact that a function is attributable to the legal system that it must be attributable to any and all laws within the system. This no more follows than it follows from the fact that the function of the army is to defeat the enemy that the function of Private Bailey, chief cook and bottle-washer, is to do the same".[65]

In any case, Shapiro advances a distinction between two tipes of ILP: 1) according to the first version, morality is a *sufficient* condition of legal validity, 2) according to the second version, morality is only a *necessary* condition of legal validity.[66] The first version of ILP seems to me very implausible and vulnerable to the criticism of the Practical Difference Argument. Indeed, moral principles are compatible with a great number of ways of "implementing them" (no moral principle establishes that the speed limit inside the cities should be of 45, 50 or 55 km per hour), and accordingly moral principles without other conditions of validity do not make practical difference.

Moreover, the first version is, in my opinion, liable to the charge of what Shapiro calls the *self-effacing* effect of the inclusive rules of recognition.[67] That is, a rule of recognition, which establishes moral validity as sufficient condition of legal validity, would not guide the behaviour neither of the citizens nor of the courts in an effective way. Curiously, that is also a consequence of certain sceptical conceptions about legal interpretation: if the interpretive canons are always potentially conflictive and can produce contradictory solutions in all cases, then normative formulations do not get to guide the behaviour of judges. Perhaps a consequence of scepticism may be the rejection of the Practical Difference Thesis.[68]

In contrast, the second version of ILP – according to which, in some legal systems and in accordance with the content of some rules inside the system, the validity of some legal norms

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[64] Joseph Raz, *The Authority of Law*, (supra n. 8), ch. 6.

[65] W. J. Waluchow, 'Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism' (supra n. 50), p. 76.

[66] Scott J. Shapiro, 'On Hart's Way Out' en *Legal Theory*, (supra n. 61), pp. 500-503, vd. also Kenneth Einar Himma, 'H.L.A. Hart and the Practical Difference Thesis' (supra n. 61), pp. 2-4; W. J. Waluchow, 'Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism' (supra n. 50), pp. 78-79 y Matthew Kramer, 'How Moral Principles Can Enter into the Law', (supra n. 14), pp. 92-93.

[67] Vd., Scott J. Shapiro, 'The Difference That Rules Make' (supra n. 61), p. 59. Vd. also Juan Carlos Bayón, 'Law, Conventionalism, and Controversy' (supra n. 40).

[68] Vd. this argument attributed to Karl Llewellyn (*The Bramble Bush*, (New York: Ocreana, 1930), pp. 72-76) by Brian Leiter, 'Legal Indeterminacy' en *Legal Theory*, 1 (1995), p. 483 and vd. similars consequences of the sceptical ideas on the identification of legal norms in Tecla Mazzarese: ' "Norm Proposition": Epistemic and Semantic Queries', *Rechtstheorie*, 22 (1991), 39-70, Riccardo Guastini, *Distinguendo. Studi di teoria e metateoria del diritto*, (Torino: Giappichelli, 1996), pp. 165-172 y 173-191and Pierluigi Chiassoni, 'Interpretative Games. Statutory Construction Through Gricean Eyes' in

depend on their agreement with some moral standards – seems to me not to be adversely affected by the Practical Difference Thesis. E.g., the Spanish Constituion -as I said before- forbid inhuman and degrading treatments and, in this way, resorts to a moral standard. However, this standard makes practical difference as included in the institutional structure of the Spanish legal system. Thus, it is not sufficient that a judge regards a certain punishment included in the Criminal Code as a "degrading treatment", in order to reject its application, but he should file a complaint of unconstituionality to the Constitutional Court. Moreover, also for the Constitutional Court this norm makes practical difference, as placed in a convenient context, because to consider a certain punishment degrading, the Court must do it by some of the procedures which the Spanish legal system authorize. To sum up: the practical difference of law conceptually depends on its institutional structure, for this reason the Practical Difference Thesis is not incompatible with ILP.

7. Conclusions

I have discussed four arguments, which seem to me specially important and which try to show the inconsistency (when we take into account other accepted premisses) or the implausibility of ILP. The Controversy Argument, to which I replied that it is not always the case that, when the law resorts to morality, some indeterminacy pops up in the controversial cases. The Collapse Argument: to which I replied that Dworkin's arguments are not suited to show the plausibility of an anti-positivistic strategy. Furthermore, I have proposed to give up the Razian conception of authority, in accordance to which, in the identification of the law legal reasons always replace underlying or dependent reasons, and I have suggested to replace it by a theory of authority compatible with the presence of legal reasons not totally opaque to the underlying reasons. Finally, I have tried to argue that the institutional structure of law shows the way in which moral standards included within the law can make practical difference and, in this sense, guide the behaviour of the judges.

If these four arguments were the only arguments able to challenge ILP and my replies were conclusive, then I would show that ILP is a consistent and plausible view. Unfortunately, I have good reasons to guess that there are other arguments against ILP and, mainly, that my replies contain argumentative gaps which should be filled up. In any case, I hope my arguments point to some paths which purport to make ILP a consistent and plausible conception.

Paolo Comanducci and Riccardo Guastini (eds.), *Analisi e Diritto 1999. Ricerche di giurisprudenza analitica*, pp. 79-99.