

(LP*) Revisited. On John Gardner's Reduction of Legal Positivism

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Abstract

The purpose of this work is to analyse and criticise John Gardner's account (or, better still, reductive explanation) of legal positivism originally offered in his famous paper "Legal Positivism: 5^{1/2} Myths", which was originally published in 2001 and then republished in 2012's *Law as a Leap of Faith*. It will be argued that Gardner's attempt to reduce legal positivism to just one proposition (called "LP*") fails to account for several characteristics of the phenomenon that we usually call "legal positivism". This is especially clear when one contrasts Gardner's attempt with those done by legal philosophers of the Civil Law tradition like Norberto Bobbio and Eugenio Bulygin. One could say that Gardner's attempt is one rooted in the Common Law approach and tradition of legal philosophy but when one compares it with H.L.A. Hart's account one discovers that it is not the case, that accounts such as those by Hart are similar to a certain extent to those of Bobbio and Bulygin. In the end it will be concluded that Gardner's attempt fails due to one mayor problem in his approach: the lack of a due diligence of the history of legal positivism itself, what we will call "the historical approach".

Keywords: Legal Positivism. Validity. Sources. Positivity. Separation Thesis.

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0. Introduction

The present work pretends to be an homage via criticism of John Gardner, former Chair of Jurisprudence at Oxford University, and then senior research fellow at All Souls at the same university at the time of his death on the 11th of July of 2019.

As one could very well imagine the interests of such an individual were quite broad and he wrote on many of them, especially on legal philosophy, criminal law and tort law. Personally, I've enjoyed his writings on criminal law (his book, *Offences and Defences* is almost a work of art) and those on legal philosophy, the most – or especially – because I've tended to disagree with them quite a lot.

Notwithstanding the disagreements I've enjoyed quite a lot reading Gardner, something that cannot be said of all of those philosophers which one can happen to disagree with, and, I believe, learnt a thing or two from him.

The best way one can render homage to someone from whom one has learnt something is, as Bulygin often said, to criticise them. That's what I propose to do here.

The main aim of this work is to point out where Gardner's attempt to give an account of legal positivism fails. That account is based on a reduction of what means to be a member of the legal positivistic tradition. This is being treated as being equal to the assertion of a proposition that Gardner calls (LP*).

The approach fails because the strategy followed in order to frame such a proposition is the wrong one. The proposition is framed as if "legal positivism" is a concept similar and susceptible of the same kind of conceptual analysis as "legal competence" or "delict", that is similar to a legal concept itself.

It will be argued that "legal positivism" is not a concept of this kind. It is instead a concept of the history of ideas that needs a historical approach. That is, an approach that looks at the history of the evolution of an idea in order to render it intelligible and not just to a sort of conceptual analytic approach, which *may* be used but is not a necessary tool of the historical analysis.

To that aim first a reconstruction of Gardner's attempt will be given (section 1), followed by an analysis of its main problem, a lack of historical approach of the reconstruction of what legal positivism could be understood as being, and a small family of sub-problems which are derived of said main problem (Section 2).

Then a comparison will be offered with H.L.A. Hart's account of legal positivism, as offered in his "Positivism and the Separation of Law and Morals" from 1958 (Section 3) and from that it will be followed with a comparison with accounts of the Civil Law tradition rooted in the historical approach, those of Norberto Bobbio and Eugenio Bulygin. From those comparisons will emerge that there are some theses common to all approaches to account for legal positivism that Gardner neglects, either partially or fully (Section 4).

This will be followed with an attempt, if possible, to repair Gardner's account (Section 5) and then the present work will end with some conclusions (Section 6).

1. Gardner's Reduction of Legal Positivism to a Single Proposition

John Gardner gives an account of what, to his understanding, legal positivism is in a famous work titled "Legal Positivism: 5^{1/2} Myths", originally published in 2001 and then republished in his *Law as a Leap of Faith* from 2012¹.

Gardner's attempt to explain what "legal positivism" is, as it is well known, consists in a reduction. What he means by "reduction" is to give an account consisting of just one proposition. That is, to give an account of "legal positivism" that is not more than a single proposition.

The present work pretends to deal just with that proposition, what it says and what it does not say, what are its problems, if any. It will not deal with any supplementary things or arguments that Gardner may advance that are not reflected in the formulation of the proposition. If all of legal positivism can be reduced to a single proposition, then that same proposition must be able to stand on its own, with supplementary crutches, if it is to work as envisioned.

This attempt at reducing legal positivism to just a single proposition seems, at least to me, to be the same as defining "legal positivism" by way of a single statement, "*legal positivism is...*" and no more than that, and the statement that is the definition could express more than one proposition. Gardner in a way denies this by insisting that he wants to reduce the whole "legal positivist" phenomenon to just «one and only one proposition»².

This «one and only one proposition», to work as a (reductive) explanation of what "legal positivism" is, must be «the distinctive proposition of 'legal positivism'». It must allow us «to designate as 'legal positivists' all and only those who advance or endorse this proposition»³.

Gardner offers two attempts at reduction, the first one named (LP), the second one (LP*).

The first attempt at reduction is as follows:

(LP) In any legal system, whether a norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not on its merits⁴

This proposition, according to Gardner, is not chosen at random. It is chosen because it has «a tolerable extensional alignment with the use of the label [legal positivism] familiar from the history of ideas»⁵. That is, this proposition is asserted by those regarded as being members of the "legal positivist tradition" such as Hobbes,

¹ Gardner 2012: 19-53.

² Gardner 2012: 19.

³ Gardner 2012: 20.

⁴ Gardner 2012: 19.

⁵ Gardner 2012: 20.

Bentham, Austin, Kelsen, and Hart⁶.

The main argument is that, even if authors such as these ones disagree on many things (propositions regarding law), they all converge in asserting (LP), albeit «subject to some differences of interpretation»⁷. It seems that this convergence defines the extensional reach of (LP) and what is meant by “legal positivist tradition” in this respect.

The secondary argument is that contemporary legal philosophers, such as Raz and Coleman, present themselves as subscribing to (LP) – that is, they consider themselves to belong to the «legal positivist tradition»⁸, and debate about its correct meaning⁹.

Thirdly, (LP) makes sense of the “legal positivist” label in itself. As Gardner says,

What should a ‘legal positivist’ believe if not that laws are posited? And this, roughly, is what (LP) says of laws. It says, to be more exact, that in any legal system, a norm is valid as a norm of that system solely in virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it. Conversely, if it was never engaged with by any relevant agents, then it does not count as a law, even though it may be an excellent norm that all relevant agents should have engaged with unreservedly¹⁰

Gardner then compares this with Austin’s famous dictum “the existence of a law is one thing; its merit or demerit is another”, as basically meaning the same thing or as a proof that Austin asserts (LP).

(LP) would be satisfactory if not for one important problem that Gardner notices almost immediately after making his case for the adoption of it. This is due to Austin’s dictum jointly exhausting the validity criteria of a norm – its source, and its merits¹¹ –

⁶ Gardner 2012: 20.

⁷ Gardner 2012: 20. Here Gardner says something that seems to be not at all clear. He says that all of these authors affirm the same proposition even if they interpret it differently. This seems to be problematic, and it will be followed in Section 2 below.

⁸ Gardner 2012: 20. The case of Raz is notoriously difficult, as he tended to disregard labels such as “legal positivist” and derided its use.

⁹ I must confess that I do not comprehend this argument. From the fact that some important legal positivists, as legal positivists, debate about what (LP) means it does not follow that (LP) is true or that all legal positivists assert it.

¹⁰ Gardner 2012: 20. It is interesting that Gardner seems to equate the positivity of a norm or a rule with the fact that some agent announced, practiced, invoked, enforced, endorsed and/or otherwise engaged with the norm. Gardner does not mention the verb “create” which seems to be central to the idea of positing norms. One could say that “announce a norm” could also mean to “create a norm” but it does not seem to be quite clear, as “announce” is a quite vague verb.

¹¹ Gardner 2012: 20-21. He does not offer a definition of “source” and of “merit” so one must reconstruct them from what he is saying in the text. Regarding “source” he says «‘Source’ is to be read broadly such that any intelligible argument for the validity of a norm count as source-based if it is not merits-based» (2012: 20), which is by no means a definition of the term but a (very lax) guide to the use of the term. Therefore, we may understand “source” as from whom the norm originated. For instance,

but not counting for their possible non exclusivity. This results on the criteria of norm validity as being¹²

- i) source-based (*Norm N was announced or practiced by Rex*)
- ii) merits-based (*Norm N contents are morally good*)
- iii) merits-based tests of the sources (*Norm N was announced or practiced by Rex and Rex is a noble – i.e. morally good – king*), and
- iv) source-based tests of their merits (*Norm N is a reasonably good norm and Norm M orders us to apply reasonably good norms*).

According to Gardner, criteria such as *iii*) has always been excluded by the legal positivist tradition. We can also exclude *ii*) to the list of positivist criteria due to the non-acceptance of merit-based criteria being one of the constitutive elements of the legal positivist tradition, as we will see.

Criteria such as *iv*) are a more open question. The division of legal positivists in the Inclusive and Exclusive camps impinge on this. Inclusive Legal Positivists seem to accept norms based on their merits as long as said norms are recognized as legal norms by a source-based norm. Exclusive Legal Positivism deny this.

This leaves us with just two criteria of validity that can or could be accepted by all legal positivists: *i*) and *iv*).

This fact is taken by Gardner as one demanding a reformulation of (LP), so the second attempt at reduction is at follows:

(LP*) In any legal system, whether a norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not on its merits (where it's merits, in the relevant sense, include the merits of its sources)¹³

This reformulation, as can be seen, is made with the explicit intent of excluding all merits-based criteria – *ii*) and *iii*) – from the proposition that all legal positivists must assert.

Being a legal positivist, therefore, is the same as asserting (LP*) – at least, according to Gardner.

However, is this true? Could all of the legal positivist tradition be reduced to such a proposition? Also, what is (LP*) really saying?

“Norm N was posited by King Rex”. “Merit” may be understood as meaning two possible things: i) the fact that a norm is morally good (“norm N contents are morally good”); ii) the fact that the source of the norm is a morally good source (“norm N was posited by Rex, who is a noble king”). These definitions must be treated as approximative at best, due to them being dependant on one’s interpretation of the text and one could be mistaken.

¹² Gardner 2012: 21.

¹³ Gardner 2012: 21.

2. *The Mother Who Borne Them All: the Lack of Historical Approach and the Picture (LP*) Paints because of It*

2.1. Conceptual vs. Historical Approach

There is no denying that Gardner's attempt at defining – because, what is 'reducing' if not 'defining' in this context? – legal positivism in this way is an interesting one. Asserting that all the members of a definite tradition must share some beliefs (or some theses) of said tradition seems to be a sound argument. However, is this concrete attempt at explanation a sound one?

I believe it is not, and it is not by reason of the strategy chosen to pursue it – that is, the conceptual analysis approach.

Regarding Gardner's attempt, it seems to be rooted in a sort of conceptual analysis approach. That is, to identify some common property to all the variants of "legal positivism" or the "legal positivist tradition" and to define, in what Ramsey calls 'philosophical way', what that common property is.

To achieve that aim, what Gardner does is, seemingly, to identify some prominent members of what he calls "the legal positivist tradition", as he does with Hobbes, Bentham, Austin, Kelsen, and Hart. He chooses these authors and their theories because they are, unambiguously, legal positivists or representatives of the legal positivist tradition, either to the trained eye of the member of the internal legal culture and to most of those of the external legal culture alike of almost all current political societies in existence¹⁴. They are not problematic as Raz is with his rejection or lack of interest of the "legal positivist" label. All of these men are legal positivists simpliciter, unproblematic ones and obvious ones at that.

Gardner is not mistaken in this choice. As he says, this is an extensional way of reconstruction the class "legal positivist tradition", and if our aim were to just effect an extensional reconstruction of the class, the enumeration of Hobbes, Bentham, Austin, Kelsen, and Hart would be indeed enough.

This is not, however, Gardner's aim. His aim is to provide an intensional reconstruction of the class, and he goes his way about it via extensional reconstruction. Once he has an extensional approximation to "legal positivist tradition", he will try to isolate a common point between their different – for there are different and, in some cases, quite different – theories about the law in order to find a common attitude or belief – the assertion of a proposition, in his case – that can count as an intentional criteria of membership to the class of "legal positivist tradition" – "legal positivists" for short. Gardner believes that this common element is source-based validity, which he redefines in the mentioned way as (LP*), and that (LP*) is the intentional criteria of membership to the class, hence, asserting (LP*) is the same as

¹⁴ For the notions of internal and external legal cultures see Tarello 1988: 205-217.

being a member of the class, *i.e.* being a legal positivist.

The problem with such an approach is that “legal positivism” is not a concept such as “legal competence” or “legal personhood”. In other words, it is not a “legal” concept susceptible to an analysis of the sort mentioned nor to any other similar to what the expression “conceptual analysis” tends to be used.

“Legal positivism” is a concept of the history of ideas. It is, in a way, a shorthand to denote several different meanings and several different theses and their interpretations – not all of them, being meanings and theses, shared by all legal positivists, not even when it comes to source-based validity. For this reason, in order to give an account of the expression, an approach that is historical is needed – one that tracks how these meanings and these theses associated with the term “legal positivism” came about at certain points of time in different European legal cultures, particularly those of Germany, France, and England¹⁵.

This poses a serious problem to Gardner’s reductive approach, in particular because Gardner’s approach is an extreme one. He wishes to reduce “legal positivism” to just «one and only one proposition» instead of reducing it to a small set of propositions. And such an approach forces Gardner to eschew the historical approach, even if he knows that “legal positivism” is a concept which belongs to the history of ideas instead of it being something akin a legal concept¹⁶.

This is his main problem, and it is a serious one because it is a pregnant problem. The lack of historical approach brought with it several other problems that otherwise could have been avoided.

2.2. “Validity” as a Convergence Point

One of these problems is the very way in which Gardner frames his intensional criteria of membership to legal positivism. As he is forced to argue that there is one, and just one, common element to all legal positivists approaches to law and that that common element is source-based legal validity, Gardner is forced to deny all different conceptions of such a notion as mere differences of interpretation and to exclude other convergence points – to use Gardner’s expression– as relevant elements of the proposition.

To be clear on this point, (LP*) is a criterion of validity, a definition of sorts. And it only deals with validity as source-based validity. It may mention other notions such as “source” but does not use nor defines them.

¹⁵ See Bobbio 1996: ch. 2 through 4, and Bulygin 2005: 62-70; 2007: 9-19.

¹⁶ This is clearly shown by Gardner when he affirms that his approach involves (at least at the beginning) «a tolerable extensional alignment with the use of the label [legal positivism] familiar from the history of ideas» (2012: 20).

Regarding Hobbes, Bentham, Austin, Kelsen, and Hart, Gardner says that all of them converge on (LP*) “unanimously” albeit with “some differences of interpretation” that each one of them has of (LP*). If that is indeed true, however, how could all of them converge – that is assert, (LP*) in a unanimous way– when all of them interpret (LP*) differently? The fact that every one of them interprets (LP*) in a different way means that each one of these authors asserts a different interpretation of (LP*). This means that they assert different propositions from (LP*) – for an interpretation of (LP*) must be a different proposition from (LP*) because they have differences in content and, therefore, meaning. In other words, what “validity” is for each one of them is clearly a different thing. For example, Hobbes and Bentham do not assert (LP*) but (LP*-Hobbes) and (LP*-Bentham), respectively.

If all of these authors interpret (LP*) in a different way, then all of them assert different propositions from (LP*). It does not matter how similar they could be or how “close” all of them are to (LP*) in its purest form: they are all different propositions, both from each other and from (LP*).

All these reflections are a matter of historical approach, as said approach will show that each one of these authors use “validity” in a different way, meaning that all of them assert different propositions, different beliefs, about what “validity” means.

Some of the mentioned authors assert something closer to (LP*), and others do not. For starters, (LP*) does not serve as a general proposition on validity as used by legal positivists because it itself could be ambiguous.

Remember (LP*): «In any legal system, whether a norm is legally valid, and hence whether it forms part of the law of that system...». This is an ambiguous formulation where validity can have what, following Bulygin, could be understood as descriptive or normative senses¹⁷. In other words, (LP*) can be understood either as asserting that from validity follows membership to a legal system or that validity is the same as membership to a legal system – descriptive sense of validity–, or as asserting that validity implies duty – normative sense of validity–¹⁸. (LP*) is not clear on this point and that is a problem, as some legal positivists assert a descriptive notion of validity and others assert a normative one (and the descriptive sense either follows from that or is not theoretically relevant for them). And it does not seem the case that a legal positivist that denies a normative conception of validity and one who affirms it are asserting the same proposition regarding validity – that is, (LP*).

(LP*) really seems to be a general notion of validity, even a pre-theoretical one, that serves as the basis of different – positivistic – theories of validity; but it is not something that serves as a convergence point for authors in the legal positivistic tradition. Maybe this analogy could help clarify the point: (LP*) is akin to the grammatical form of validity, the word “validity” or the sound “validity”, but it is not akin to the logical

¹⁷ Bulygin 2021: 229-231.

¹⁸ Bulygin 2021: 229-231.

form of validity, which are the theses – propositions – asserted by the different authors.

This is the consequence of the extreme reductive and ahistorical approach chosen by Gardner. It forces Gardner to ignore distinctions he knows quite well, and, in the particular case of legal validity, it gives an askew picture of the phenomena.

2.3. The Mere Mention of “Source” and Positivity

2.3.1. What is “Source” according to (LP*)

Another problem with the picture the (LP*) gives us is that of the sources of law. As we have seen, (LP*) says:

In any legal system, whether a norm is legally valid, and hence whether it forms part of the law of that system, *depends on its sources, not on its merits (where it's merits, in the relevant sense, include the merits of its sources)*¹⁹

Basically, the validity of a law is source-based, and the merits of said law are irrelevant. So far so good. However, what is a source?

(LP*) says nothing about what a “source” is. One may attempt to explain or clarify it, but the point still stands: if we guide ourselves by (LP*) the notion of “source” is undefined, so “source” can be everything that acts as a point of origin of a law. Gardner himself seems to think so when he says that «'[s]ource' is to be read broadly such that any intelligible argument for the validity of a norm count as source-based if it is not merits-based»²⁰.

An interesting point to make is that the legal positivist tradition tries to assert a narrower view of “source” than that of (LP*). It tries, in several versions of it, to point to a social or empirical notion of source. “Sources” in the legal positivist tradition are “social sources”, not just merely “sources” – that is, sources that are part of a social dimension, concrete persons or concrete organs to whom the political community gives recognition as being competent to create legal norms. As such, not any source will do. Legal sources as social sources are few in number, just some particular organs and some particular persons count as legal sources for concrete legal systems.

However, (LP*) does not make the distinction²¹. It just mentions “sources”, and even with the exclusion of merits-based approaches, a mere mention of “source” in general does not exclude non-social sources. This circumstance makes (LP*) com-

¹⁹ Emphasis added.

²⁰ See Gardner 2012: 20.

²¹ Which is not the same that asserting that Gardner also does not. He does, but his formulation of (LP*) is silent on the subject. It is more concerned with mentioning source-based validity than with what a source is.

patible with a non-socially immanent legislator, such as a deity. This would not be a problem if (LP*) was supplemented with another proposition that limits the notion of “source” to social and/or empirical sources of law, but that is not the case on Gardner’s approach.

Gardner’s approach selected source-based validity as the one and only convergence point of legal positivism, excluding all the rest – even a definition of “source”. This is quite the problem from a historical perspective, for as we shall see in the following sections, the legal positivists tradition has several convergence points in Gardner’s sense, one of them being a social source notion of “source”.

(LP*)’s *«depends on its sources»* is, at the same time, too broad and too insufficient. Too broad in the sense that it does not discriminate between different types of sources. Too insufficient in the sense that it does not reflect adequately what we do know about the legal positivistic notion of source. Even in the most vulgar sense of “legal positivism”, one than can be shared by one of the least knowledgeable members of the external legal culture of a community, it is defined by its exclusion of non-social sources of law. Indeed, a notion of “source” as a social source is one of the convergence points of all authors of the tradition. They of course converge in the grammatical sense of the expression, as with “validity”, and each of them forms their own theories about it; nevertheless, it is a clear convergence point that is neglected by (LP*)’s formulation.

Again, this is a result of extreme reduction which leaves out of (LP*) a proper definition of “source” which dovetails into another problem: that of the positivity of legal norms.

2.3.2. The Hole in Things regarding Positivity

If the notion of “source” is at least mentioned in the formulation of (LP*), the same cannot be said to be the case regarding “positivity”.

One could argue that this is an outstanding thing. The fact that legal norms are positive norms, that they are posited by some agent, seems to be at the core of legal positivism. One could assume that (LP*) would have something to say about that fact, but it does not happen in the formulation of the proposition. There, “norms” are mentioned without any qualification in regard to their positive status.

It could be argued that positivity does not merit a mention. The mere fact that one could mention a norm means that, at least in some level, said norm exists because it can be considered the value of a variable. In that way, one could argue, that norm is a positive one. It is something that can be simply implied or presumed by the utterer of (LP*), and that would be enough.

A reasoning of this kind betrays a lack of historical approach, for it does not take into account that the problem of which norms are positive and which are not is the

starting point of legal positivism itself²².

The notion of positivity stems from the very first natural lawyers, who needed a distinction between those norms that can be derived from general principles or from regularities in nature (the so-called natural law) and those norms that were created (posited) by individual agents, both human and divine. This last distinction is crucial, because it allows for at least two kinds of positivity: human and non-human/divine. And this is the main point, as we shall see on Section 4, from which the main theses of legal positivism sprang of.

This does not mean that Gardner does not consider positivity in any way, because he does so. He treats positivity as some fact of legal norms that is valued by some legal positivists, like Hobbes and Bentham, as valuable in itself, as something “good” that one can say about the law, calling people who ascribe to this approach as “positivity welcomers”. However, in regard to the formulation of (LP*), the fact – not the value– of positivity is not mentioned. In a way, it is assumed by Gardner but not mentioned in the formulation of (LP*). And this is a worrisome absence: a sort of hole in the approach that impinge both on the notions of source-based validity of (LP*) and on the notion of source itself.

Both natural lawyers and legal positivists use the notion of positivity in order to construe their notions of validity and of source²³. On the one hand, natural lawyers advance the theses that a) that there are two kinds of norms, non-positated and posited norms; b) that there are two kind of sources, what we may call social sources (human agents) and non-social sources (non-human agents such as God or no agent at all, norms that exists because they are derived from nature, reason, general principles, etc.). On the other hand, legal positivists base their whole approach to law on the fact that norms, in the relevant sense, are only human positive norms. For then, this is a fact, not a value judgement. They are not “positivity welcomers” because of this. It is from the factual assumption that legal norms are only human positive norms that they construe a) a source-based validity account of norms as the only one feasible, that is certain and scientific; and b) a social source concept of source as the only one feasible and scientific.

From a historical approach, then, it is possible to see that positivity is the seed from which the most relevant concepts and theses of legal positivism stem from. A proposition taken as defining what is understood as “legal positivism” should take this into account and introduce the notion of positivity into its formulation, because the fact of positivity is central in the separation of natural law and legal positivism – that is, the exclusion of all non-positive sources and norms from the idea of a feasible and scientific account of what law is. This is the way the legal positivists have seen the distinction since its inception.

²² As we shall see in Section 4.

²³ See Bobbio 1996: 3-11.

These three problems are just some of the problems that a lack of historical perspective can bring on an approach such as the one behind (LP*). Although there are more, we will not dwell on them here: the three problems we have analysed here are by themselves sufficient in order to argue that (LP*) is somewhat flawed as a reductive explanation of legal positivism.

Now, we will turn our attention to other possible accounts of what legal positivism is: one from the common law tradition and two from the civil law tradition. These accounts are based on historical approaches, albeit some more than others; they provide a better picture of what legal positivism could be taken to be than (LP*), and they may be useful in order to “repair” the problems of (LP*).

3. One Common Law approach: Hart’s

The first alternative approach that will be *briefly* discussed is that of H.L.A. Hart.

Hart’s account is an interesting one because it does not deal with legal positivism directly but, mainly, with one of its main theses, and a fuller, albeit schematic, account is given in a quite *meaty* footnote. Here, I am referring to his 1958 Holmes Lecture, “Positivism and the Separation of Law and Morals”, republished in 1983 in his *Essays in Jurisprudence and Philosophy*. In this essay, Hart tries to give an account and a defence of the separation thesis that affirm that law and morals are two distinct and independent normative systems, and that there are no necessary connections between them²⁴. While doing that – in a footnote, no less! – Hart attempts to define or characterise legal positivism as a grouping of several theses or propositions.

3.1. An Open-Ended Extensional Approach

²⁴ Recently it has been argued, mainly by philosophers of the common law tradition, that Hart (and no other positivist for that matter) ever affirmed a thesis postulating the lack of a necessary connection between law and morals. I will not deal with this problem here, but I believe that a cursory reading of Hart’s essay is more than enough to reject this view at least in Hart’s respect. Gardner, in his essays under analysis (2012: 48-51) advances the view that I reject by mistaken Hart’s conceptual positivism with some personal valuations that he makes about the existence of law, like an almost positivity welcomer in Gardner’s sense, which are purely ideological in Tarello’s sense of the expression (Tarello took notice of these ideological tendencies, and some others, in Hart’s *The Concept of Law* and took him to task for presenting them in such a confused way. See Tarello 1974: 101-121). This kind of confusions tend to happen not just because one author such as Hart maybe presented his ideas in a confusing way but also for not distinguishing clearly between different senses of “legal positivism”. Following Bobbio (1972: 105-114) we can say that Hart description of what the law is consists in an exercise of conceptual legal positivism, that is an attitude (not a method!) regarding the analysis and study of law, and his valuations of how «every law necessarily exhibits a redeeming moral merit, a dash of justice that comes of the mere fact that a law is a general norm that would have like cases treated alike» (Gardner 2012: 48; the italics are mine) are an example of his ideological positivism, that is: the value he ascribes to positive law because it exists. These are two different things that authors such as Gardner do ill to confuse.

In order to give a proper account of what Hart says, the footnote bears being quoted in full:

It may help to identify five (there may be more) meanings of 'positivism' bandied about in contemporary jurisprudence:

- (1) the contention that laws are commands of human beings; see 58-62 *infra*;
- (2) the contention that there is no necessary connection between law and morals as it is and ought to be; see 50-6 *supra*;
- (3) the contention that the analysis (or study of the meaning of legal concepts is (a) worth pursuing and (b) to be distinguished from historical inquiries into the causes or origins of law, from sociological inquiries into the relation of law and other social phenomena, and from criticism or appraisal of law whether in terms of morals, social aims, functions or otherwise; see 64-6 *infra*;
- (4) the contention that a legal system is a 'closed logical system' in which correct legal decisions can be deduced by logical means from predetermined legal rules without references to social aims, policies, moral standards; see 64-6 *infra*, and
- (5) the contention that moral judgements cannot be established or defended, as statements of facts can, by rational argument, evidence or proof ('noncognitivism' in ethics), see 64-6 *infra*.

Bentham and Austin held the views (1), (2) and (3) but not those of (4) and (5). Opinion (4) is often ascribed to analytical jurists; see 64-6 *infra*, but I know of no 'analyst' who held this view.²⁵

This note is important for two reasons. First, here Hart considers legal positivism to be a set of at least five different theses or propositions. These five propositions, however, do not exhaust the set, for there may be more propositions belonging to the set that Hart has not yet identified. Hence, we may consider that – at least, according to Hart – we may have an extensional, not definitive approach, to what legal positivism is.

Second, according to Hart not all legal positivists affirm all the theses or propositions of the set. Some positivists, such as Bentham, may affirm the first three of them; others may affirm other theses or propositions. At least in Hart's example, there is no quorum of propositions that must be asserted or a definitive convergence point in Gardner's sense.

3.2. Advantages and Disadvantages of Hart's Account as Opposed (LP*)

We may add a few things to this, for Hart is quite schematic in his approach. Firstly, the theses or propositions that Hart identifies are taken from the history of the legal positivistic tradition. This appears clearly from the reading of the whole essay, where Hart – notwithstanding the fact that the essay itself deals with the

²⁵ Hart 1983: 57-58, *in fine*.

separation thesis (proposition (2) in Hart's footnote)– takes great care in individuating each one of these five propositions from the history of the legal positivistic tradition²⁶. Secondly, it gives an open answer to what legal positivism is. Hart clearly does not feel conformable with clear and cut definitions such “positivisms is such-and-such” and does not even attempt such an approach. An extensional approximation more than suffices for his purpose of clarifying – at least a bit – what we understand “legal positivism” to be²⁷.

Thirdly, as was already mentioned, Hart's approach has no clear convergence points in Gardner's sense. A positivist such as Bentham may assert (1), (2) and (3), and other positivist may not assert them and still being legal positivists, for Hart does not mention neither a quorum of propositions that must be asserted in order to be a legal positivist nor singles out a particular proposition of the set as the key proposition of legal positivism. In a way, it seems by the footnote that, for Hart, “legal positivism” is a concept prone to combinatorial vagueness, i.e. a concept composed by a series of properties – in this case, the propositions– that does not have a quorum of properties that one must manage in order to apply it.

It could be argued that, given the whole essay, for Hart the most important thesis – the one he endeavours to clarify and defend – is the separation thesis, his proposition (2). From his attempts at defend it would seem plausible to conclude that, at least to him, the separation thesis is the central thesis of legal positivism. However, this does not follow from the footnote. There, Hart just enumerates several theses, including the separation thesis, as belonging to the legal positivism set. No more, no less. It does not assert that any of them is more important and more central than the others, and it would be unwarranted to put words in Hart's mouth, so to speak, regarding this point.

Hart's conception of legal positivism is, some would say, an incomplete one, for it only given what I call an extensional approximation to the legal positivist set. It provides an enumeration of propositions, but an incomplete one. Even so, it seems to be a more useful criterion than (LP)*²⁸. On the one hand, Hart's awareness of the history of the tradition, in particular regarding the separation thesis, allows us to place the five enumerated propositions more clearly within the set of those propositions belonging to the vast legal positivistic tradition. On the other hand, this apparent combinatorically vague approach to the problem of legal positivism allows

²⁶ At least with as much care that one can feel allowed to ask to a non-historian such as Hart.

²⁷ Gardner also begins with an extensional approximation, as we have seen, but only as a prolegomenon to an intensional criteria of the set “legal positivism”.

²⁸ It is interesting to note that Bulygin, in the introduction to the Italian edition of his 2005 book *El Positivismo Jurídico*, also seems to endorse something similar to Hart's open ended extensional approach. Instead of five theses he recognises eight of them. He also seems to endorse the property of combinatorial vagueness of “legal positivism” that Hart seems to imply. We shall return to this point in the following section. Cf. Bulygin 2007: 4-5.

us to ascribe membership to the set to a group of quite diverse authors that historically have been considered legal positivists in a surest manner than just ascribing to them an assertion of (LP*), in the way Gardner formulates the proposition, in a way that is historically doubtful²⁹.

The problem with a reductive approach such as that of (LP*) is that it is extremely narrow. The fact that one has to converge unambiguously with it implies an exact convergence with a particular formulation of the proposition, excluding all its possible variants. A fact that – Gardner knows – is not historically correct in the case of Hobbes, Bentham, Austin, Kelsen, and Hart.

However, there is one point where (LP*) is extremely important: the fact that it is a proposition about the validity of norms, in particular source-based validity. None of the five propositions mentioned by Hart refers to source-based validity, and this is quite the blind spot.

Even if Hart takes an open-ended approach to the enumeration of the propositions that belong to the set of legal positivism, it is quite odd that he does not mention – not even once – a proposition regarding the validity of norms as being source-based. In this, Gardner has a clear advantage, even if his approach is quite narrow. As mentioned before, source-based validity is central to the legal positivistic tradition, as we saw – albeit briefly – how it stems from the notion of positivity.

It could be argued that source-based validity can be construed from two things: the fact of positivity and the separation thesis. The only relevant norms for the study of law are legal norms posited by human agents because they can be considered certain due to the certainty of who are the agents that create them. All the other norms, like those derived from nature and those posited by non-human agents, are uncertain due to the uncertainty of their origins. Both non-human agents and naturalistic-derivability are a matter of opinion, and thus, are not certain facts. That is, of course, if law and morals are conceptually distinct. However, Hart does not draw the inference or anything like it, at least in the footnote.

(LP*), or something akin a repaired (LP*), should be added to Hart's repertoire of propositions included in the set "legal positivism". We may call it "proposition (6)".

²⁹ Think, for instance, about the case of Kelsen's notion of validity, which is a more normative notion than a descriptive one (at least in some periods of Kelsen). It hardly seems to be a case of clear-cut of (LP*). Kelsen would not assert (LP*) exactly but something different, (LP-Kelsen) for instance, and would not "converge unambiguously" on (LP*), as was stated on section 2.2 of the present work. As asserting (LP*), and just (LP*) is the necessary and sufficient condition of membership to the set of legal positivists, one must conclude that Kelsen is not a legal positivist, which seems odd. In Hart's extensional approximate approach that is not the case. One could argue that Kelsen asserts propositions (2), (3) and (5), and even some more not yet enumerated propositions, and be a legal positivist as Bentham even while not sharing (1). Also, to Hart's advantage, his propositions are generic and not constrained by any particular formulation.

4. Two Civil Law Approaches: Bobbio's and Bulygin's

There are two other attempts of clarify what legal positivism is, and both are part of the civil law tradition. I am referring to Norberto Bobbio's and Eugenio Bulygin's reconstruction of what legal positivism could be considered to mean and the different theses that one of its meanings conveys.

Of both approaches, Bobbio's is the central one. This is so because Bulygin based his reconstruction on Bobbio's and, while they share the belief on what the possible meaning of "legal positivism" are, they have different ideas regarding the theses conveyed by one of the meanings of "legal positivism".

As the discussion of both approaches will be a – very! – brief one, as was in the case of Hart's, both approaches will be treated conjunctly³⁰.

4.1. From Revolution to Human Posited Laws: the Origins of Legal Positivism

One point on which there is complete methodological agreement between B&B is about the importance of history in order to characterise what "legal positivism" may be taken as meaning³¹. Both authors frame the analysis of the discussion in the XVIIIth century, particularly in Germany and France³².

B&B identify a focal historical point for the development of what we call "legal positivism": the French Revolution and the subsequent Napoleonic Codification³³. Both authors single out the fact that the Revolution and posterior codification of the French civil law introduced a radical change on the notion of "judge" that positioned the old idea of positive law in the forefront of legal practice and legal theory.

Traditionally, at least since the Middle Ages, the role of judge was characterized by two general duties³⁴:

³⁰ From now on, I will refer to Bobbio and Bulygin as "B&B" when I am mentioning something that apply to both authors.

³¹ A very recent book on legal evolution contains multiple contributions that, in one way or the other, stress the importance and usefulness of historical approaches for the analysis of legal concepts and legal institutions. See Załuski, Bourgeois-Gironde, Dyrda 2024. Among those contributions, Rabanos' shows the importance of this type of approach when analysing the concept of legal system, and also how a historical and contextual analysis (in that case, the context of social and political evolution) can contribute to the explanation of the changes in both the content and the understanding of the phenomena that what we denominate legal system. See Rabanos 2024. What she argues for related to "legal system" can also be understood as applying to "legal positivism" itself.

³² See Bobbio 1996: ch. 1 through 3, and Bulygin 2005; 2007: ch. 1. Bulygin frames the scope of his analysis to Continental Europe and goes out of way to make clear that what he has to say may not apply to Britain. Bobbio, on his part, extends his historical analysis to the British Isles, particularly England and the works of Bentham. See Bobbio 1996: ch. 4.

³³ See Bobbio 1996: section 1, ch. 3, especially 66–71; Bulygin 2005: 67–71, 2007: 15–19.

³⁴ See Bobbio 1996: section 1, ch. 3 and Bulygin 2005, 2007: ch. 1.

- i)* All judges are obliged to pass sentence on all matters relative to their competence.
- ii)* All judges must offer a justification of the decisions expressed in said sentences.

The Revolutionaries added a third obligation³⁵:

- iii)* All justifications of the decisions expressed in the sentences of the judges must be based on valid positive law.

B&B rightly point out that this addition changed everything. Up until this point, legal decisions could be justified by any sort of argument that could be presented in syllogistic form; the use of a valid legal norm was not needed in order to construct a valid decision. From the Revolution onwards, that changed. The toolkit of justifications that judges tended to use became considerably reduced to just valid legal norms issued by the competent authorities and nothing else. Until that moment, human posited laws were just one of the many tools at the judge's disposal; now, they became the only legal tools at their disposal.

This change clearly created a great need for the study of human posited laws, to the point of asserting that only human positive law was the law. And this is the origin, as B&B say of what we call positive law.

4.2. The Different Senses of Legal Positivism

The need for the study of human positive laws was not taken up in an orderly fashion. It took three different directions and, as B&B point out, three different meanings of "legal positivism" which were mostly confounded by positivists and non-positivists alike.

During the XIXth century legal positivism could be understood in three different ways:

- i)* As a theory about what the law is, its structure, its place in the framework of the state, and so on.
- ii)* As an evaluation of the law as something good or useful based on the fact of its (human) positivity.
- iii)* As an attitude that scholars undertake while studying what the law is.

Bobbio gave the following names to these meanings:

- i)* Theoretical legal positivism

³⁵ See Bobbio 1996: section 1, ch. 3 and Bulygin 2005, 2007: ch. 1.

ii) Ideological legal positivism

iii) Methodological legal positivism³⁶

Regarding methodological legal positivism, Bobbio is quite clear that this variant or meaning is not a method in itself but an attitude that the scholar undertakes³⁷. Given that, the name “methodological legal positivism” can result a bit confusing. For that reason, I shall refer to this meaning as “conceptual legal positivism”³⁸ or just “positivistic attitude”.

Although an analysis of these three meanings goes beyond the scope of this essay, a few considerations present themselves as necessary. Firstly, all of these meanings stem from the very idea of positivity. Positivity is the central, almost brute, fact that serves as the springboard for all variants of positivism in the legal sphere, and it cannot be ignored by anyone who endeavours to account for what legal positivism is.

Secondly, these meanings are not mutually exclusive. On the contrary, in some cases, they presuppose one another³⁹. For example, a positivistic attitude is necessary in order to create theories about what the law is (theoretical legal positivism). This is something that Bentham saw quite clearly when he proposed his distinction between expository and censorial jurisprudence. His expository jurisprudence presupposes the positivistic attitude and the result of said jurisprudence are theories about the law. Examples of this are famous works such as Bentham’s *Of Laws in General*, Kelsen’s *General Theory of Law and the State* and Hart’s *The Concept of Law*.

Thirdly, while the positivistic attitude and the theoretical positivism are, in my view, the province of the legal scholar, ideological positivism is not. Any person, scholar or not, can have valuations about the law, even one based of its positivity. What Gardner calls “positivity welcomers” are persons who indulge in ideological legal positivism. Gardner, regarding the ideological problem, commits one very right thing. (LP*) could be considered as a proposition belonging to the positivistic attitude, and therefore a prolegomenon to a theory of law. Gardner does well in excluding the ideology of the positivistic welcomer from it, at least in theory. He has some problems in separating legal theories of authors from their valuations. The

³⁶ See Bobbio 1972, 1996, section 2, ch. 1 and 7; and Bulygin 2005 and 2007, ch. 2.

³⁷ See Bobbio 1972: 105-107 and 121-124. It is curious how the label “methodological legal positivism” came about because Bobbio does not use it. He goes out of his way to show that it does not constitutes a method. Nevertheless, the use of the methodological label stands, as Bulygin’s use of it shows.

³⁸ This is the label used by Carlos S. Nino. See Nino 2003: 37.

³⁹ In his *La Forma del Derecho*, Fernando Atria considers this fact as a sort of proof of the unfeasibility of Bobbio’s distinction when, in reality, this fact was always affirmed by Bobbio since the very day in which he introduced the distinction. This is very well shown by Navarro Gezan (see 2020). In a way, Atria’s point is somewhat similar to Scarpelli’s, who in his *Cos’è il positivismo giuridico?* (1965) rejects Bobbio’s distinction in favour of what he calls «a unitary definition of legal positivism» that takes into account its attitudinal, ideological and theoretical elements in a unified way. The main difference is that Scarpelli is a positivist and Atria (maybe?) is not.

case of his analysis of Hart as a positivistic welcomer is quite clear. Gardner confounds his theories about what the law is with the value that Hart ascribe to some laws qua rules that treats like cases alike as some “good”. That value judgement is completely independent from Hart’s theory of law for one can make such a value without presupposing a theory such as Hart’s or the distinction between primary and secondary rules, etc.⁴⁰

4.3. The Main Theses of the Positivistic Attitude

For both B&B, the main sense of legal positivism – at least from a theoretical standpoint– is the positivistic attitude⁴¹. When they talk about the main theses of legal positivism, they are referring to the main theses of which constitutes the positivistic attitude⁴². For sake of brevity, here I will do the same.

Regarding this point, both B&B are in agreement about two theses of legal positivism. Let us call them “BB” theses⁴³:

- i)* BB1: A version of the separation thesis or non-necessary connection thesis between law and morality. As Bulygin puts it: «the legal validity of a norm does not necessarily imply its moral validity and the moral validity of a norm does not necessarily imply its legal validity».
- ii)* BB2: A version of the social sources’ thesis. As Bulygin puts it: «the existence and the content of the law in a given society depends on social facts, that is, acts or activities of the members of such a society».

Bobbio adds three more theses to this catalogue (“BO” theses):

- i)* BO3: a theory of the legal norm as prescriptions (imperatives).
- ii)* BO4: coercion as a central element of the law.
- iii)* BO5: the theory of the legal order as a closed and consistent system of laws.

Bulygin explicitly rejects BO5 (which he calls «thesis of the law’s complete-

⁴⁰ See Gardner 2012: 26- 29, and fn. 24 of the present work.

⁴¹ Which is quite sensible, as the positivistic attitude is the attitude that a positivist must have in order to produce a proper theory of law (in the expository jurisprudential way).

⁴² See Bulygin 2005: 73-74, and 2007: 23-24; Bobbio 1996: 129-132. On this point, Bulygin is more straightforward than Bobbio.

⁴³ The B&B theses will be explained mostly by Bulygin’s formulation of them, as his formulation is clearer and more direct than Bobbio’s.

ness»)⁴⁴ while not mentioning either BO3 or BO4⁴⁵. He instead proposes a further thesis (“BU” thesis)⁴⁶:

i) BU3: the thesis of (interstitial) discretionality.

BU3 is a thesis that claims that, when the legal norms do not regulate in a clear way an individual legal case (due to problems of ambiguity, vagueness, legal gaps and legal antinomies, etc.), the judges may solve those cases by applying their own discretion within the limits and constraints of the valid positive law of the system.

Bulygin considers that not all legal positivists endorse this thesis but argues that since Hart introduced it in *The Concept of Law* it has become part of the «definitional kernel of legal positivism in its methodological variant»⁴⁷.

The real interesting thing here are not the disagreements between B&B, but their agreements: the fact that they converge on BB1 and BB2. Notwithstanding the fact that BB gives a proper historical background of all of the mentioned theses, BB1 and BB2 are the only ones that – it could be argued – are asserted in some variant by all the classics of the legal positivistic tradition, both those mentioned by Gardner and others that one can think of.

Particular emphasis here on the “variants” part, as history shows – in B&B’s reconstruction – that members of the legal positivistic tradition may agree on general terms with BB1 and BB2 but may not agree on their possible formulations. A mere family resemblance is more than sufficient between different assertions of BB1 and BB2 by different authors in order to consider them legal positivists. The convergence shown by the history of the tradition is not a unanimous convergence, but one based on a general agreement with room for difference of opinion and emphasis regarding the contents of both BB1 and BB2.

(LP*), due to the content and due to the convergence, demands fly in the face of historical knowledge about legal positivism. It is too stringent a proposition for a movement whose requirements for membership seem to be on the lax side.

However, the point of relevant convergence may be not BB1 and BB2, but a by-product of them. After all, BB1 and BB2 are too general: just some considerations about the separateness of law and morals and some general consideration

⁴⁴ Bulygin goes out of his way to reject that thesis at length. I could be argued that that was the case because BO5 could be considered an old burden from XIXth century theoretical positivism that modern technics in logic applied to law have shown to be false (see Alchourrón, Bulygin 1971). In fact, one could argue, that both BO3 and BO5 are both classic theses of XIXth century positivism. That is not the case of BO4, as Schauer (2015) has demonstrated.

⁴⁵ Given Bulygin’s whole approach to law one may conclude that he also rejects them. See the whole of Bulygin 2015 for a primer on Bulygin’s thinking about the law.

⁴⁶ Bulygin 2005: 74, 2007: 24, respectively.

⁴⁷ Bulygin 2005: 74, 2007: 24, respectively.

on sources, without an explicit mention of validity. We may entertain this thought briefly to see where it leads us.

As we have seen, the fact of positivity is central to the formulation of both BB1 and BB2. These two theses, in order, are also the bedrock of a further thesis of source-based validity that follows from them. In fact, BB1 in a way anticipates the notion of legal validity; once it is combined with BB2 – in whichever variant –, a thesis about legal validity that is source-based follows. This thesis could be the central point of convergence, and that thesis could be (LP*). Indeed, then, (LP*) could be the product of pre-theoretical assumptions such as positivity, BB1 and BB2.

This conclusion could be plausible if not for the actual formulation of (LP*) which, as we have seen previously, does not properly define either “validity” and “source”. All the while, the combination of BB1 and BB2 gives us a notion of validity that is strongly source-based and firmly rooted in human positivity.

Hence, whatever follows from BB1 and BB2 is a proposition about legal validity – but it is not (LP*).

4.4. A Postscript from Bulygin in Preface Form

As a way of closing this section, I would like to draw the reader's attention to a curious fact regarding Bulygin's Italian edition of his account of what legal positivism is.

In 2005, he gave an account based on the shared theses of the definitional kernel, BB1, BB2 and BU3. He even went out of his way to refute BO5 at considerable length. Two years later, he seemed to have completely changed theories. What he says in 2007 is quite interesting, and bears being quoted in full:

What are the central theses of legal positivism? I believe this question does not have a clear answer. Bobbio had already pointed out that three very distinct things can be understood by legal positivism: a specific approach to law, which is usually called “methodological positivism”; a certain ideology, “ideological positivism”, whose central thesis is that every positive law must be obeyed; and a theory of law, whose characteristics are statalism (all law comes from the state), imperativism (norms are commands) and interpretative formalism. Many of the criticisms directed at positivism, especially in the era immediately following the Second World War, were based on the confusion between methodological positivism and ideological positivism. Returning to the theme of the characterization of legal positivism, I would say that it is possible to draw up a fairly long list of the central theses of positivism, but it must be kept in mind that not all positivist authors share them all.

1. The distinction between law as it is and law as it ought to be (Bentham).
2. The rejection of a necessary connection (a conceptual one) between law and morals (Bentham, Kelsen, and many others).
3. The idea that the existence and the content of the law depends on social facts: the

thesis of the “social sources” (Raz).

4. Ethical scepticism (or non-cognitivism in ethics) (Kelsen, Alf Ross).
5. The rejection of natural law: all law is positive law (Kelsen, Alf Ross).
6. The conception of legal theory as a science (Kelsen).
7. The conception of philosophy as conceptual analysis (Hart).
8. The idea that judges have a discretionary power when resolving dubious cases (Hart).⁴⁸

All these theses have been supported by some positivists, but probably very few (including me) would subscribe to them all. On the other hand, there are positivist authors who have defended theses that are completely foreign to positivism, and which seem to me to be erroneous. Thus, for example, there are those who maintain that judges apply, and never create, law, while others, like Kelsen, maintain that judges always create and apply law.⁴⁹

This is a quite radical change, and it fully embraces an extensional approach such as Hart’s. It is not completely clear if Bulygin’s extensional approach is also an open-ended one, but that is neither here nor there⁵⁰.

The really interesting thing is that, when one looks at it, an open-ended extensional approach seems to be useful. It is quite difficult, if not impossible, to constrain a complex historical phenomenon of the history of ideas within the tight corset of definition.

Gardner’s attempt at doing so, however interesting and noble it may have been, serves as a cautionary tale regarding the risks of doing so; and Hart’s and the latter Bulygin’s approaches serve to entice us with the glint of opportunity and (possible) success.

It would be possible to mix both approaches, the extensional and the intensional. It might be possible to consider legal positivism as a vague concept or class that is composed by several theses, such as the ones enumerated by Hart and Bulygin, but with two caveats: firstly, that enumeration is not an exhaustive one, and secondly, some of those theses consist in a quorum, a minimum that anyone must assert in order to begin to be a legal positivist – the bare minimum. This bare minimum is some kind of variants of BB1 and BB2.

This criterion has two advantages. On the one hand, it follows the historical trend followed by the tradition of legal positivism, taking as central the two theses that stem from the fact of positivity. On the other hand, it is not an already closed class: it admits more theses than the kernel, and allows for an evolution of the number of theses that can be considered positivist in the future, as long as the tradition

⁴⁸ Bulygin does not tag himself in the list but for what we have previously seen we can say that theses 1 and 2 are variants of BB1, thesis 3 is a variant of BB2 (and maybe thesis 5), and 8 is a variant of BU3. Bulygin also defended thesis 4 for a time, but at the end of his life he stopped considering it as part of the kernel of legal positivism.

⁴⁹ Bulygin 2007: 4-5.

⁵⁰ One could argue it both ways. Bulygin nowhere says, as Hart does, that the list could admit more theses, but the list hardly seems complete and absolute.

keeps being developed upon.

The question remains as to what should be done with (LP*). Can it retain its present form, and can it have a place in the definitional kernel? Let us turn to that.

5. With a Little Help from My Friends: Trying to Mend the Shed

At the end of Section 1, we asked ourselves three questions regarding (LP*), and now we can provide some answers to them:

- i) *Is (LP*) true?* No, it is not. Mainly because it does not define in a proper way what “validity” and “source” means and also because of the answer to the next question.
- ii) *Could all of the legal positivist tradition be reduced to such a proposition?* No, because – as we have seen – they do not converge on it directly.
- iii) *Also, what is (LP*) really saying?* It says that validity is central to legal positivism but in a quite fuzzy way, as validity is not clearly defined, the notion of source is too broad, and the fact of positivity seems to be irrelevant to its content.

After all this one may be tempted to ask

- iv) *Was all of this useless?*

Absolutely not. In more than one opportunity in this essay, it was explicitly pointed out where Gardner was in the right with his proposal and how something akin to (LP*) must follow from what we called the definitional kernel of legal positivism, BB1 and BB2.

Gardner was in the right when asserting that a proposition about source-based validity must be asserted by the legal positivists, especially because such a proposition follows from BB1 and BB2

His mistake was one of optimism, if any. He thought that a concentration of theories divorced from their history was sufficient to define legal positivism as the assertion of a specific formulation of source-based validity. His most important mistake was the eschewing of history from the account. That gave way to other problems that obscured why something like (LP*) is needed.

As an account of what legal positivism is, (LP*) seems to fail; however, it serves as a stressing point about the relevance of source-based validity to the tradition. Some proposition such as (LP*) is clearly implied by the assertion of BB1 and BB2, and it is time to make it explicit.

So, the definitional kernel of legal positivism – as positivistic attitude – could remain something like this:

- i)* BB1: legal validity of a human posited norm is one thing, and the moral validity of a human posited norm is another thing.
- ii)* BB2: the content of a human posited valid legal norm depends on social sources alone.
- iii)* GA1: the validity of human posited legal norms rests ultimately on its social sources alone, and all considerations of moral validity are irrelevant to its legal validity.

Naturally, it might be this understanding of these theses or whatever variant of them: it is not necessary to marry with a specific formulation of any of these theses, and room needs to be left for the rest of the legal positivists to do their thing. Repairing, so to speak, (LP*) means this:

- i)* To focus on the general content of the propositions, not on a specific formulation.
- ii)* To abandon the idea of reducing legal positivism to just one and only on proposition.

It may be argued that legal positivism requires this kernel in order to be legal positivism; however, it must also leave room for other theses to be asserted, and also to help shape the content of different variants of the kernel.

6. An Attempt at a Conclusion

From the preceding sections we may conclude that:

- i)* To give a proper account of what legal positivism is, one must look at its history, for legal positivism is not a concept in the same sense as other legal concepts; it is a historical concept and an analysis of such a concept must take into account its history.
- ii)* One may give an extensional account or an intensional account of what legal positivism is.
- iii)* An extensional account is an enumeration of several theses asserted by members of the class “legal positivism” through its history. Such an attempt may be open ended (Hart) or not (possibly Bulygin 2007), and such an attempt could be combinatorically vague, as that does not contradict the history of the tradition.
- iv)* An intensional account proposes a set of theses as a definitional kernel of legal positivism. An intensional account must not reduce the definitional kernel to just one thesis, as that would be unfeasible.
- v)* Both attempts are not mutually exclusive. The definitional kernel could be considered as the quorum of properties needed to apply the concept to a person,

while other properties may also be presented.

- vi) A good candidate for the position of definitional kernel is the conjunction of BB1, BB2 and GA1 [(LP*) repaired], where GA1 is an implied proposition derived from the conjunct assertion of BB1 and BB2 made explicit.

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