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Normativity for Positivists

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1. *The Elusive Quest for Law's Normativity*

There has been a time – quite a long time, actually – when the main preoccupation of jurisprudents working in the tradition of legal positivism was to vindicate the separation of law and morality. Jeremy Bentham, John Austin, Hans Kelsen, Norberto Bobbio, Alf Ross, H.L.A. Hart, were all engaged – among other things – in defending the idea that it is not a necessary truth that the law has moral merits, that it is not a necessary truth that legal validity depends on moral merit, that the identification of something as law is conceptually different (and independent) from the moral evaluation of the law. Over time, such theses have been named the 'separability thesis', and the main aim of those who defended them was to mark a meaningful and polemic distinction between legal positivism and the natural law tradition (Hart 1958; Ross 1961).

Remarkably, in the last forty years or so one prominent feature of the jurisprudential debate, even in positivistic quarters, is the loss of centrality of the separability thesis[1]. On the one hand, it has been consistently shown that the separability thesis is not just *one* single thesis – it includes several different theses. In this spirit, it has been shown that *a*) many different relations between law and morality are reasonably conceivable; and *b*) that many such relations can be easily accommodated, or at least need not be refuted, by legal positivism (Raz 1985, 226-227; 2003; Green 2008; Pino 2014). On the other hand, some positivists have gone even further, to the point of questioning the importance of the separability thesis for the positivist project[2], or even its importance as such[3].

Accordingly, the jurisprudential space formerly occupied by the separability thesis has progressively been occupied by a new field of inquiry: the 'normativity' of law – the sense and the ways in which the law is 'binding', has 'authority', provides 'reasons for

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[1] Similarly, also the traditional opposition between legal positivism and natural law is now usually recast in terms of positivism vs 'antipositivism' or 'non-positivism' (see e.g. Plunkett and Shapiro [2017]), presumably because in the last few decades the main criticism of legal positivism have been mounted by scholars such as Ronald Dworkin and Robert Alexy, who do not avowedly subscribe to the natural law tradition.

[2] According to Jules Coleman, for instance, the separability thesis should not be regarded as a defining feature of legal positivism, as opposed to the much more qualifying 'social fact thesis' (Coleman 2001, 151-153; 2007).

[3] See the striking claim by John Gardner to the effect that the idea that there is no necessary connection between law and morality 'is absurd and no legal philosopher of note has ever endorsed it as it stands' (Gardner 2001, 48).

action', and some such[4]. The normativity of law has suddenly become a central topic in jurisprudential debates, it has been treated as an allegedly essential property of the law, and explaining it has apparently become an unavoidable task for jurisprudence (Postema 1982, 165; Coleman and Leiter 1996, 241-242; Coleman 2001, 74-102; Shapiro 2011, 181-188; Marmor 2012, 4, 11-12). Much of this debate has revolved around the following questions: does the law derive whatever normativity it has from morality – such that the reasons for action provided by the law are indeed moral reasons, the duties imposes by the law are moral duties, the rights granted by the law are moral rights, and so on and so forth? Or, rather, does the law create specifically 'legal reasons', which are different in nature, and autonomous from, moral as well as from prudential reasons.

Now, while it's true that the topic of the normativity of law may be deemed, at the end of the day, just as one special case of the multifarious relations between law and morality, at the same time the jurisprudential shift that has been brought about by the 'normativity debate' is quite remarkable. Indeed, whereas 'traditional' legal positivists mainly deployed the idea of the separation/separability between law and morality in order to mark the dividing line between legal positivism and natural law, now it seems that in theorizing on the normativity of law some positivists are trying to occupy positions previously held by natural lawyers[5].

For better or for worse, one is tempted to add. Indeed, much of the debate on the normativity of law is far from illuminating – it frequently uses ambiguous and/or undefined notions, it makes sometimes use of philosophical concepts and tools whose explanatory power with regard to the law is quite dubious[6], and it often mixes levels of discourse that are better kept separated[7]. It is not surprising, then, that some effort has been recently devoted to introducing several distinctions within the province of the topic of the normativity of law[8], and also to downscaling the jurisprudential import of the normativity issue altogether[9].

My own contribution, here, will be just in this spirit. To that end, I first introduce some distinctions that I deem important in the framework of any discussion about the normativity of law (§ 2). Then, I take on the issue of the normativity of law, at least from the point of view of legal positivism (§ 3). I conclude with a quick illustration of the implications of all this for some topics routinely discussed in the jurisprudential debate (§ 4).

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[4] Arguably, this strand of contemporary jurisprudential debate finds its very roots in H.L.A. Hart's rejection of both the idea of an 'habit' and of predictive approaches in order to explain the concept of legal 'duty' or 'obligation'. But its development has been decisively influenced by J. Raz's theorizing on authority and on reasons for action.

[5] I borrow this suggestion from Spaak (2018, 343). In much the same vein, Christiano and Sciaraffa (2003, 488) note that an approach to the normativity of law such as the one defended by Jules Coleman 'seems to imply a rather strong version of natural law theory'. And also Joseph Raz concedes that his own conception of legal validity (i.e. validity as binding force) adopts 'the natural law view on the meaning of "validity"' (Raz 1977, 150).

[6] Jules Coleman's 'SCA' (Coleman 2001) and Scott Shapiro's 'plan' (Shapiro 2011) are good cases in point. But also the concept of 'convention' (Postema 1982) has proved less amenable to – and less fruitful for – jurisprudential use then some expected (Green 1999; Celano 2003, 2013; Dickson 2007).

[7] For a conspicuous exception, see Bertea (2009).

[8] See e.g. Enoch (2011); Spaak (2018).

[9] Schauer (1998; 2019); Enoch (2011, 2019); Bix (2018); Marmor (2018, fn 1, confessing to his participation in the 'mistake' of giving pride of place to the question of the normativity of law).

2. *Setting the Stage*

I believe that any jurisprudential discussion on the question of the normativity of law should be mindful of a few simple but important distinctions.

The *first* distinction is between different grades, or types, of normativity. Several such distinctions, usually borrowed from metaethics, have already been introduced in the jurisprudential debate. Here I want to focus mainly on the distinction between strong (or 'robust', 'full-blooded', 'authoritative') normativity on the one hand, and weak (or 'formal', 'generic') normativity on the other[10]. While it is not easy to state the terms of this distinction in a fully articulate way, the main idea is the following. Weak normativity obtains whenever there is a set of rules, standards etc, against which something can be judged as right or wrong (as correct or incorrect, etc.). It is easy to see that weak normativity is a very common feature of our social world. This is the kind of normativity that is clearly enjoyed by, say, games, languages, fashion, etiquette, maybe literary genres, military strategies, stock-exchanges markets – each of these social practices includes rules (and standards etc.) against which something (a move, an action, a choice of words, etc.) can be judged as right or wrong. Strong normativity is – not surprisingly – more intense and demanding then this. It involves the idea that something (a decision, an action, etc.) is right or wrong not just vis-à-vis some set of rules that happens to be relevant under the circumstances, but rather in an all-things-considered way. Not all agree that this robust normativity can really exist[11]. But assuming that it does, this would be the kind of normativity enjoyed by morality, and perhaps also by prudential considerations. This is the kind of normativity that in principle is able to settle a practical question in a conclusive way – once an argument endowed with strong normativity is brought to bear on a practical matter, tilting in favour of a course of action X, it would not make sense to keep on asking, 'yes, but why should I do X?'. Another way to state this is the following. Weak normativity is *conditional* upon the participation in a certain practice. Strong normativity is *unconditional* – it applies to all of us just as human, or perhaps rational, beings[12].

The *second* distinction, or set of distinctions, falls in the province of reasons. Accordingly, we have *normative* reasons, which justify an action as the (right, rational etc.) thing to do, and *motivational* reasons, which cause an action (Nino 1984, 489-490; Enoch 2011, 15; Himma 2018). To be sure, for the purposes of this essay, we will be concerned with normative, justificatory reasons only. Moreover, there are *complete* reasons and *incomplete* reasons (Raz 1975). A complete reason can be either a single ('atomic, 'operative') reason, or a combination of one such reason and other ('auxiliary') reasons. Either way, once a complete reason has been identified, in principle no further reasons are needed in order to justify the action at stake. An incomplete reason, on the other hand, can justify an action only in conjunction with other ('atomic, 'operative') reasons.

Let's try to combine this reasons-talk with the distinction between degrees of normativity. If something is endowed with strong normativity, it is able to provide

[10] Plunkett and Shapiro (2017, 48-51); Plunkett (2019, 113-115); Enoch (2019, 69-72). A similar distinction (normativity 'in the *reason-implying* sense' vs normativity 'in the *rule-implying* sense') is suggested by Parfit (2011).

[11] According to Copp (2004), for instance, not even morality enjoys this kind of normativity.

[12] As should be clear from the text, by 'unconditional' I hereby do *not* mean 'undefeasible'.

complete reasons. Morality and prudence (i.e., self-interest) are just like that. Moreover, it is quite plausible that morality and prudence are the *only* possible sources of complete reasons (Himma 2018). If something is a complete reason, it necessarily includes a reference either to morality or to prudence (or both). But there's a wrinkle. Whereas morality can *justify* any sort of action (insofar as that action can be shown to be morally required), this does not hold for prudential considerations as well. To wit, an agent A may certainly *justify* her own course of action by invoking prudential considerations (i.e., invoking her own self-interest), but she cannot so *justify* the imposition of duties on other agents – unless it is shown that those other agents have moral reasons to act in accordance to the personal interest of A (Raz 1984, 130). If this is true, as I think it is, it follows that the imposition of duties upon other people can be *justified* (as opposed to *explained*) only on moral grounds. (We will see shortly how this is relevant to our discussion.) On the other hand, if something is endowed with weak normativity it provides only incomplete reasons. In other words, acting upon a reason which is endowed with weak normativity, or justifying a decision upon a set of weakly normative rules, standards etc., is not conclusive. Partaking in a practice which is endowed with weak normativity requires further justification, on moral or prudential grounds (or both).

The *third*, and final, distinction is agent-relative, as it were. By this I mean that discussions about the normativity of law should be attentive to the presence of two different kinds of addressees of legal norms. On the one hand, there is the 'citizen', i.e. the subject whose actions the law purports to regulate in the first place. In this sense, a law against manslaughter purports to prevent 'citizens' from committing manslaughter. On the other hand, there are the law-applying institutions, whose job it is to use legal norms in order to evaluate the actions of the 'citizens' – and to authoritatively attach to those actions the legal consequences mandated by the relevant legal norms. In this sense, a law against manslaughter purports to guide the way in which a law-applying institution should legally evaluate an act of manslaughter, and what legal consequences the law-applying institution is supposed to attach to that act. (For simplicity's sake, hereinafter when I will talk of 'officials' I will mainly refer to courts. But it should be clear that courts are just one kind, albeit paradigmatic, of law-applying institution.)

With the above distinctions in mind, let's now face the question of law's normativity.

3. *The Normativity of Law, Restated*

It is almost a truism that the law affects the practical reasoning of its addressees. Whenever there is a law, there is a sense in which the conduct of its addressees is no longer optional, but obligatory (Hart 1961, 6, 82-91). Law, in other words, is a normative phenomenon – it enjoys some kind of normativity, it provides some kind of reasons for action. But reasons of what kind, exactly? Are there specifically *legal* reasons, and if so, what kind of reasons are those – are they reducible to either moral or prudential reasons, or are they an autonomous kind of reasons altogether?

No doubt, law is normative at least in the weak sense of normativity – it includes a set of rules, standards etc., against which an action or a state of affairs can be evaluated as legally right or wrong (required, forbidden, permitted…). Law generates legal reasons, and legal reasons are at least weakly normative reasons. Accordingly, if

there is a law against manslaughter, I have a legal reason to evaluate manslaughter as legally wrong, which I can do just speaking 'in a technically confined way […] in order to draw attention to what by way of action is "owed" by the subject, that is, may legally be demanded or exacted from him' (Hart 1982, 266). This is all well and good, but of course it's not enough. Quite obviously, something more demanding than this is at stake in the debate on the normativity of law: indeed, we want to know if the law enjoys also normativity in the strong sense – if it generates real, genuine reasons for action. We want to know if legal reasons are more akin to (unconditional) moral and prudential reasons, rather than to the (conditional) reasons generated by games, etiquette, or fashion.

Here is where it is useful to separate the point of view of citizens from the point of view of officials.

3.1. *Citizens*

Let's start with the citizen. In order to substantiate the claim that there are legal reasons, and that these are genuine (autonomous, complete, unconditional…) reasons, it should be the case that the question 'why should I do that?' could be conclusively answered by the sentence 'because it is the law'. Clearly, this is not the case. It is plainly conceivable to keep on asking 'yes, but why should I do what the law says?', and here the answer 'because it is the law' would not be appropriate anymore. If that is true, and I do not see how it cannot be, then we must conclude that the law can only provide the citizen with incomplete (conditional) reasons.

Another argument to the same effect is the following (Enoch 2011, 20). Think of an extremely silly, absurd, or morally evil law – a law that happens to provide no moral and not even prudential reasons for action. Could it reasonably be said that such a law nonetheless provides genuine (robust, unconditional) reasons for action? Plainly not.

In order to qualify as a complete reason, then, a legal reason needs to be combined with a strong normative reason, which can be provided either by morality, or by prudence (or both). That is, the citizen is justified in following the law either out of the belief that the law is morally just, or out of prudential considerations based on the agent's self-interest.

The prudential considerations that can be marshalled in order to do what the law says are well known: fear of coercive sanctions, expectation of benefits and incentives provided by the law, the reputational gains of being considered a good citizen... It is not conceptually flawed, it seems, to point to considerations of this sort in order to justify one's willingness to act in accordance with the law[13].

The relation between legal reasons and moral reasons is somewhat more complicated. The point here is that while prudential reasons attach to single legal norms, individually considered, moral reasons may attach either to single legal norms, or to the legal system as a whole. In a nutshell, I can think of the following scenarios in which moral reasons can underpin legal reasons in order to generate a complete justificatory reason for action.

1) The law may simply replicate a moral norm. Here the citizen, as long as she acts morally, is not really 'following the law' – rather she simply does 'what the law

[13] Himma (2018) argues for the even stronger claim that *only* prudential considerations account for the normativity of law.

requires' (Bayón 1991, 692), on grounds that are largely or even entirely independent from the existence of a legal norm.

2) Sometimes there isn't a complete coincidence between a legal norm and a moral norm. For instance, a legal norm can be either under-inclusive or over-inclusive in respect to its background moral justification (Schauer 1991). Or it can be the case that the application of one and the same legal norm is morally justified in some circumstances but not so in other circumstances (Gardner 2010, 427-428; Marmor 2018). In such cases, the legal norm in question may provide a complete reason for action partly on moral grounds and partly on prudential grounds, depending on the relevant circumstances.

3) A law may be morally valuable because it solves a problem of coordination, under which people find themselves in an awkward or even in a harmful situation; or because it enables people, constitutively, to engage in activities that may be valuable to them (contracts, marriages etc.); or because it makes more determinate some general and indeterminate (moral) obligations and reasons.

4) Somewhat more weakly, there can be a prima facie moral reason to comply with a law when such a law belongs to a legal system that is overall just and fair, is endowed with political legitimacy (e.g., because of the democratic credentials of its law-making procedures, or because it recognizes some fundamental rights, it respects the desiderata of the rule of law, etc.), and it is justly administered.

Two final notes are warranted here. Firstly, when I say that sometimes (e.g. the points 1-4 above) a legal reason can be supported by a moral reason I do not mean that in such cases there is always a conclusive argument in favour of following the law. As I have already noted, a complete reason is not necessarily an undefeasible reason. In many circumstances, there can plural and conflicting moral considerations at stake, such that an all-things-considered moral judgement may ultimately dictate the defeat of a morally sound legal reason – either in favour of another morally justified legal reason, or in favour of a purely moral reason.

Secondly, it is of course true that a legal system, in order to exist *qua* legal system, needs to be 'accepted' to some extent by its addressees, namely by the citizens. But, as the argument of this section tries to show, certainly this 'acceptance' need not be a whole-hearted moral 'approval'[14]. In other words, in order for a legal system to exist, all that is needed on the part of the citizens is that the bulk of the relevant population accepts the laws of the system in the weakly normative sense – i.e. actually *uses* the laws of the system – regardless of whether this acceptance is backed by moral approval or just by prudential considerations.

3.2. *Officials*

The normative situation of officials vis-à-vis the law is different, in interesting ways, from the situation of the citizens. I will highlight here three related points, which will progressively mark the relevant differences at stake.

Firstly, officials normally choose their institutional role, whereas citizens normally just happen to be under the jurisdiction of a given legal system. The normative situation of the official resembles, in a sense, the situation of someone who (freely,

[14] This point is notoriously stressed by Hart (1961). For a perspicuous distinction between 'acceptance' and 'approval' of legal norms, see Green (2019).

willingly) decides to participate in a game, whereas the normative situation of the citizen rather resembles the situation of somebody who has to speak a foreign language[15]. Accordingly, whereas it is more likely that citizens follow the law for prudential reasons, by the same token it is more likely that officials follow the law on moral grounds.

Secondly, while citizens (in principle) use the law as a guide for *their own* conduct, officials apply the law *to others*. Moreover, officials are usually under a duty of giving public justification for their law-applying acts. This places an important constraint on the kind of reasons that can be offered in order to justify acts of law-application. Indeed, it is commonly accepted (supra, § 2) that in order to *justify* the imposition of duties and obligations on other people, a merely prudential reason will not do the job. A moral reason is required instead (Raz 1984, 130-131; Nino 1984, 499; Ruiz Manero 1990, 177-179; Bayón 1991, 738). A prudential reason, here, may still be a motivating reason, of course, but it could not work as a justifying reason, on pains of incurring in a pragmatic contradiction.

As a consequence, when officials justify their law-applying decisions, they necessarily resort to, or at least presuppose, a moral point of view. The legal reasons provided by the legal system in force are, in this case, backed by moral reasons. This, I should add, does not belong to the semantics but rather to the pragmatics of justificatory discourse – it works just like a conversational implicature. And of course, nothing assures that officials sincerely endorse the moral reasons they invoke or presuppose in the process of justifying an act of law-application. As a matter of fact, of course, an act of law-application can be *motivated* by prudential, opportunistic reasons. But the crucial point, here, is that such reasons cannot be validly, explicitly invoked to *justify* an act of law-application[16]. The legal reasons that justify an act of law-application can ultimately be grounded upon moral reasons only.

Differently put, it is part of the 'grammar' (or, more accurately, of the pragmatics) of the justificatory discourse of law-applying institutions that an applicative decision is presented not only as *correct* as a matter of sheer positive law ('in a technically confined way' as Hart would have it) but also as *right* – by which I mean that that decision is presented as following from the right way to see (i.e., to interpret, to reconstruct, to make sense of) the law. And this 'rightness' cannot be a merely 'technical' matter: it necessarily involves assumptions on the values – the functions, the point – that the social practice 'law' is supposed to pursue. In other words, it involves a moral stance towards the law.

Sometimes – most of times, even – this is just a silent assumption of adjudication. Sometimes officials might not even be clear-minded about this. (Just as much, when we use a language we might not be completely aware of the rules of that language, neither can we always articulate them in full.) But as soon as this assumption is brought to light or is explicitly avowed, it becomes clear that it is moral in nature.

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[15] By this analogy I mean that while one can choose to speak a language for many different reasons (including aesthetic reasons, or sentimental reasons), an overwhelming reason for so doing is the sheer need to communicate in an effective way – which, I take it, is a prudential reason.

[16] To borrow a felicitous phrase from MacCormick (1978, 14-15), in such cases 'insincerity is an evident possibility. […] But insincerity is even more revealing than sincerity'. See also Raz (1984, 130); Bayón (1991, 738).

Thirdly, and obviously enough, while citizens are usually confronted just with individual laws (traffic rules, tax regulations…), officials entertain a much more complicated relation with the law. Their approach to the law is usually more 'systemic' in character. In other words, prior to the sheer application of a law to a case, officials can face, and usually do face, complex questions of validity, of interpretation, and of applicability of the law in question. Again, as soon as questions such as these make their way into the (publicly avowed) justification of a law-applying decision, judges cannot treat them *only* on the basis of legal reasons, and neither can they make reference to prudential reasons to this concern – the treatment of matters like these will ultimately, but necessarily, make reference to moral reasons. Think, to make just one example, about the choice of an interpretive methodology: it seems quite clear that the choice among textualist arguments, intentionalist/originalist arguments, functional arguments, law-and-economics arguments, moral-reading arguments, and so on and so forth, cannot be based only upon strictly legal reasons; on the contrary, it involves value-choices of a moral and political kind on the part of the officials (Pino 2104, 204; Gizbert-Studnicki 2015). And think also of the various ways in which legal arguments are intertwined with moral arguments – for instance, in the context of analogical reasoning, or in distinguishing a precedent, or in the identification of a general principle of the law (Waldron 2006; 2008, 51).

I think that what has been said so far is enough to establish the following interim conclusions. As far as the problem of the normativity of law is concerned, officials are in a importantly different position vis-à-vis the citizens. Moreover, as far as the *justification* of legal decision is concerned, officials need to supplement whatever legal reasons the law gives them with moral reasons.

I have said that the point of view of officials is mainly systemic, whereas the citizen is confronted with laws severally, as it were. Accordingly, from the point of view of the official's justificatory discourse, the application of *a* law is justified insofar as that law belongs to a (morally justified) legal system. In this case, the legal reasons provided by one single law are interwoven with the moral reasons provided by a (morally justified) legal system[17]. From the point of view of the officials, the application of a law, L, is justified by the (ultimately moral) reasons provided by the legal system, and not by the moral worth of L itself – were officials to apply L only because they deem it morally valuable, they would not be engaged in (morally justified) legal reasoning, but rather in sheer moral reasoning (Nino 1984, 500-501; Ruiz Manero 1990, 179).

So, from the point of view of officials, the question of the normativity of law ultimately boils down to the relation between the officials and the legal system or, as we might as well say, between the officials and the rule of recognition[18].

Again, we must be careful in distinguishing the motivational features from the justificatory features of the rule of recognition. From the *motivational* point of view, it is safe to assume that *normally*, officials adopt a certain rule of recognition because it

[17] By contrast, remember that from the point of view of the citizen moral reasons normally attach directly to single laws (supra, § 3.1)

[18] In this sense, the rule of recognition compounds the officials' 'legal ideology' – a concept I borrow from Ross (1958, 75-76): 'legal' or 'normative' ideology 'consists of directives which do not directly concern the manner in which a legal dispute is to be settled but indicate the way in which a judge shall proceed in order to discover the directive or directives decisive for the question at issue'.

reflects their fundamental ideals of political legitimacy. Normally, then, officials are committed to a rule of recognition on moral grounds. The 'normalcy' qualification repeatedly introduced above is intended to embrace the not entirely unrealistic case of officials acting upon purely prudential grounds – e.g. because they expect to get a nice pay slip, to gain social standing, or because they act upon strategic or merely conformist considerations (Bayón 1991, 735; Schauer 1998). And it is even conceptually possible that *all* officials follow the rule of recognition only for prudential reasons. There is no reason to rule out such possibility nor does it affect the theoretical picture that has been drawn here. It is *reasonable* to assume, anyway, that – as far as motivating reasons are concerned – the bulk of officials adhere to the legal system on moral and political grounds.

But when it comes to *justificatory* reasons, on the other hand, the rule of recognition can only be the object of moral approval. And this is so for the 'eliminatory' argument that we have already mentioned: since *a*) the rule of recognition is the ultimate foundation for the law-applying acts performed by officials; since *b*) those acts involve the imposition of duties on third parties; and since *c*) the imposition of duties on third parties cannot be justified by purely prudential reasons; it follows that *d*) only moral reasons can ultimately justify the use of a rule of recognition. In other words, from the justificatory point of view a mere official 'acceptance' of the rule of recognition is not enough – its 'approval' is required instead[19].

Of course, from the fact that the officials' approval of the rule of recognition is necessarily grounded on moral reasons, does not follow that all officials have *the same* moral reasons for so doing. Indeed, it is entirely possible that different officials endorse the rule of recognition for different moral reasons – some officials may endorse the rule of recognition for democratic reasons, while others may appeal to rule-of-law reasons, and so on and so forth. And it is easy to see that those background moral values put some pressure on the actual shape of the rule of recognition. Not only it is the case that different officials may adhere to the same rule of recognition on different moral grounds – they may also have partly different rules of recognition, because each official will probably try to mould the rule of recognition in light of her preferred moral values.

For sure, while each official will try to mould the rule of recognition as closely as possible to her own moral and political preferences, it is clear that each official on her own part is not entirely free to choose her preferred rule of recognition no matter how disconnected from the actual practice. Every single official is integrated in an overall institutional structure that results from a historical process, and from power relations deeply entrenched in the relevant society. So, in normal circumstances each official will strive for a compromise between her fundamental ideals of political legitimacy and the legal order as it results from the prevailing practice of all the other officials (see Green 1999, 39, 40; Waldron 2009, 333-334). This compromise is normally attained, at the most basic level, at the level of the individuation of a set of undisputed sources of law, while at the same time enjoying a wide margin of discretion as far as the interpretation of those sources is concerned – it is exactly at *this* juncture that the main value-conflicts among officials are bound to emerge (Kramer 1999, 135-146; Pino 2020).

I take this to be, by and large, also Hart's view on the subject. While reluctant to investigate the reasons officials may have for practicing a certain rule of recognition, Hart eventually conceded that those reasons *include also* the fact that other officials

[19] On 'acceptance' and 'approval', see supra, fn 14 and corresponding text.

practice a certain rule of recognition (Hart 1994, 255, 267). This sounds plausible enough. Indeed, it is obviously true that the sheer *fact* of an existing practice (legal or otherwise) is not *per se* a reason to participate in that practice – the existence of a social practice, as such, only provides *incomplete* reasons (supra, § 2). But it is equally true that, *if* an agent wants to take part in a certain legal practice, *then* she'd better play by the existing rules – even with a view to reinterpreting them, pressing for their reform, and so on. And in *this* sense it is true, indeed almost trivially true, that among the reasons a judge might have to 'play along' in the legal practice there is also the fact that the other relevant actors concur in the same practice[20].

In the end, then, convergence on by and large the same rule of recognition by various officials will be the result of something like an 'overlapping consensus': officials may well have partly different views on the legitimacy of the existing legal order, but they converge on some fundamental features of the existing practice – namely, a set of sources of law. Would not such a basic convergence obtain, it would be difficult indeed to talk of an existing legal system.

Accordingly, the rule of recognition is not entirely a datum for those who practice it; rather, it is constantly subject to change, and negotiation, because the existing practice is constantly under the pressure of competing ideals of legitimacy among officials[21]. Indeed, one can view some long-standing debates, such as the debate between 'formalist' and 'pragmatist' approaches to statutory interpretation, or between 'originalist', 'textualist', and 'living-tree' approaches to constitutional interpretation, exactly in this way – as attempts at implementing (and asserting the superiority of) partly different rules of recognitions (Alexander and Schauer 2009, 181-187; Pino 2011).

Let me recap the main upshots of the argument of the last two sub-sections.

As far as *motivational* reasons are concerned, it is conceptually possible that *all* citizens follow the law only for prudential reasons (in something like the sheeplike society deplored by Hart [1961, 117]). It is also conceptually possible that *all* officials follow the law and the rule of recognition of a legal system only for prudential reasons. It is conceptually possible that no official has a moral reason to follow the law in force in the relevant jurisdiction, or no moral view on the subject. Admittedly, from an empirical point of view this is quite an implausible occurrence – and yet, it is coherently conceivable. From an empirical point of view, it is quite plausible that a number of citizens as well as a number of officials follow the law because they believe it is endowed with moral legitimacy (call it 'the legal point of view': Raz 1975, 170-177; Shapiro 2011, 186-188), along with a number of citizens and a number of officials that play along the legal game just on prudential grounds. More accurately, in a credible legal system we should expect citizens to follow *some laws* on moral grounds, while following *some other laws* on prudential grounds. And, to some extent, the same goes for officials too.

As far as *justificatory* reasons are concerned, on the other hand, matters are slightly different. From the point of view of the citizen, it is perfectly fine to *justify*

[20] See Hart (1959, 168): 'it will *usually* be pointless to assess the validity of a rule […] by reference to rules of recognition […] which are not accepted by others in fact, or are not likely to be observed in the future'.

[21] Such competing moral and political ideals are also sensitive to the variable circumstances of the relevant social and political environment, of course.

one's attitude toward the law either on moral grounds, or on prudential grounds – or both. And it is conceptually possible that all citizens shamelessly justify their attitude towards the law only on prudential grounds (i.e., it is conceivable that no single citizen entertains the legal point of view, not even insincerely). Things are different from the point of view of officials, though. When officials discharge their law-applying duties, they by necessity adopt the 'legal point of view', i.e. they avowedly state – or at least must assume – that the application of the law is morally legitimate and that their law-applying acts are ultimately justified by moral reasons. And of course, it is entirely possible that officials are insincere in avowing their moral stance towards the law.

4. *Jurisprudential Implications*

By way of conclusion, let me quickly mention some jurisprudential implications of the argument so far.

For positivists, law is a social fact. Or, more accurately, the existence of law is ultimately grounded in some set of social facts – in a social practice. But social facts are just that: facts. The existence of a certain social practice, by itself, is not a reason to engage in that practice, and neither it ensures, by itself, that that practice is morally justified (think to the practice of slavery, or to the practice of gladiator games). Accordingly, while social facts ensure the 'existence conditions' of law, they cannot ensure its 'justification conditions'[22].

To my mind, this premise necessarily affects the structure of some central concepts in jurisprudence – and in legal discourse at large. I will mention just two of them, which bear directly on the topic of this essay.

The first is the concept of a legal norm. We use to say that the law comprises norms and that legal systems are normative systems. But of course one may wonder if a legal norm is a norm in the strong normative sense, or rather in the weak normative sense (supra, § 2). If a legal norm is a norm in the strong sense, then a legal norm prescribes something that (really) ought to be done[23]. On the other hand, if a legal norm is a norm in the weak sense, then it just sets criteria of *legal* correctness and incorrectness: a legal norm just signals what is right and what is wrong as far as the law is concerned. I think that legal positivists are necessarily committed to the idea that legal norms enjoy normativity only in the weak sense. Legal norms, as we have seen, just provide legal reasons, and legal reasons are only weak normative reasons. A legal norm may become a norm also in the strong sense only if it is backed by other reasons, namely by moral or prudential reasons.

By the same token, a legal system is a normative system in just this weakly normative sense: it is an array of (weakly normative) legal norms[24].

The second is the concept of legal validity. If, according to legal positivism, law is only a weakly normative phenomenon, if legal norms enjoy only weak normativity, it follows that legal validity is tantamount to 'existence': to say that a norm is legally valid

[22] As Gardner (2001, 23, 36) aptly puts it, the positivist social sources thesis is 'normatively inert'.

[23] Like I have already pointed out, a norm in the strong normative sense can still be a defeasible norm – it can be ultimately defeated by other legal or moral norms.

[24] The point in the text replies to the argument by Redondo (2019, 65) according to which only under the thesis that legal reasons are genuine (i.e. strongly normative) reasons it is possible to preserve the idea that law is a normative phenomenon.

means only that that norm exists in (i.e., belongs to) the relevant legal system. Legal validity, in other words, is nothing more than 'membership' in a legal system[25]. To say that a law is valid simply means that that norm has been correctly produced under the secondary rules of the relevant legal system – it says nothing on the reasons a citizen may have to obey that norm, and it says nothing even on the reasons an official may have to apply that norm. It is not always the case that a valid legal norm has (legally) to be applied, and by the same token it may well be the case that an invalid norm has (legally) to be applied (for some examples, see Waluchow 1994, 65-66, 77; Moreso 1997, 108 ff; Pino 2011, 278-279). I do not see any conceptual gain in stuffing the concept of legal validity with 'binding force', 'moral justification', and some such. At best, this would be a way to solve, with a definitional move, the question of the moral legitimacy of the law.

One final point. As far as I can see, nothing in the argument that I have developed in this essay entails a rejection of legal positivism's separability thesis. Quite to the contrary, the stance that I am defending is actually *required* by the separability thesis, because it assumes that the existence of the law is a morally inert fact – and as a consequence, legal validity is not tantamount to moral value, as well as moral value is not determinative of legal validity. The sheer existence of the law is not a reason to obey the law, not even for law-applying officials. This, of course, is just one possible way to articulate the separability thesis. But it is my contention that this is the more qualifying way to understand the import of the separability thesis for the project of legal positivism, precisely for its 'political' relevance in view of preserving the possibility of moral criticism of the law and of moral vigilance on the law (Pino 2014).

And *this* basic understanding of the separability thesis, and of its political import, are not affected by the idea that the justificatory discourse of law-applying officials requires at least the pretention of there being moral reasons to apply the law.

[25] Not surprisingly, this was exactly Hart's conception of legal validity. See Raz (1981, 311: 'validity for him [*viz*., for Hart] indicates just membership in a system established in a certain way. It has little to do with binding normative force'); Lamond (2013, 113).

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