

Legal Realism as a Positivist Theory of Law

El realismo jurídico como teoría positivista del derecho

Ricardo Guastini

Instituto Tarelo per la filosofia del diritto - Università degli Studi di Genova, Italia

guastini@unige.it

Abstract: Since the Sixties, following Norberto Bobbio, everyone is (or should be) used to distinguish among methodological, theoretical, and ideological legal positivism (LP). By the way, in Italian legal-philosophical literature, LP is often opposed to legal realism (LR). One has to wonder, however: what kind of LP and what kind of LR are we talking about? As to LR, those scholars who oppose realism and positivism have in mind most of all Scandinavian Realism, especially Olivecrona and Ross. As to LP, those scholars who oppose realism and positivism have in mind either the 19th century prevailing theory of law or Kelsen's pure theory. The opposition between LR and the pure theory is sound. Nonetheless, such an opposition does not arise from a supposed anti-positivistic stance of LR. It depends on two non-positivistic theses endorsed by Kelsen: the concept of validity as binding force, and the normative theory of legal science, conceived of a set of deontic (non-factual) sentences echoing valid (i.e., binding) norms. The opposition between LR and 19th century LP is equally sound, but does not hold when referred to contemporary LP, which is mainly conceived of as a methodological (Benthamite) attitude towards the law. LR is an openly positivistic view about the law. To be sure, not all positivist legal scholars are realist, but all realists are ("hard") positivists.

Keywords: methodological legal positivism, theoretical legal positivism, ideological legal positivism, legal realism.

Resumen: Desde los años sesenta del siglo XX, siguiendo a Norberto Bobbio, todo el mundo es (o debería ser) capaz de distinguir entre tres formas de positivismo jurídico (LP): (a) metodológico, (b) teórico, y (c) ideológico. Por cierto, en la literatura iusfilosófica italiana, a menudo se contraponen el LP al realismo jurídico (LR). Sin embargo, ¿de qué tipo de LP y de LR estamos hablando? En cuanto al LR, los iusfilósofos que oponen realismo y positivismo tienen en mente esencialmente el realismo escandinavo, especialmente Olivecrona y Ross. En cuanto al LP, aquellos iusfilósofos que oponen realismo y positivismo tienen en mente, o bien la teoría del derecho dominante en el siglo XIX, o bien la teoría pura de Kelsen. La oposición entre el LR y la teoría pura es fundada. No

obstante, tal oposición no surge de una supuesta postura anti-positivista del LR. Depende más bien de dos tesis no positivistas sostenidas por Kelsen: el concepto de validez como fuerza vinculante, y la teoría normativa de la ciencia jurídica, concebida como un conjunto de oraciones deónticas (no fácticas) que se hacen eco de normas válidas (es decir, vinculantes). La oposición entre el LR y el LP del siglo XIX es igualmente fundada, pero no tiene sentido cuando referida al LP contemporáneo, que consiste principalmente en una actitud metodológica (“Benthamita”) hacia el derecho. El LR es una visión abiertamente positivista del derecho. Sin duda, no todos los juristas positivistas son realistas, pero todos los realistas son positivistas (“duros”).

Palabras clave: positivismo jurídico metodológico, positivismo jurídico teórico, positivismo jurídico ideológico, realismo jurídico.

I. Legal Positivism Analysed

In 1961, the outstanding Italian legal philosopher Norberto Bobbio introduced an unsurpassed analysis of legal positivism (LP).¹ In his view, the phrase “LP” is actually used in juristic literature with different meanings, referring to three different and logically independent doctrines (Bobbio 1961, part II; see also Bobbio 1965, 101 ff.).²

(i) Methodological positivism. In the first place, LP is a methodological attitude, namely a value-free approach to law. The philosophy of (legal) science of LP circumscribes the object of (legal) science to the law as it actually is, excluding any inquiry about the law as it ought to be. Legal cognition is expository, not censorial, jurisprudence.³

In John Austin’s words: «The existence of law is one thing, its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law though we happen to dislike it».⁴

It should be stressed that, according to Bobbio, this methodological attitude is actually shared by modern legal scholars, who are used to distinguish between *jus conditum* and *jus condendum* and consider only *jus conditum* as the appropriate subject of their inquiry – in other words, in his view, the actual work of legal scholars is a purely descriptive enterprise.⁵

At any rate, the positivistic value-free approach to law presupposes a criterion of identification of positive law itself – such a criterion is provided by a theory of law, and this is the second face of LP (or LP *par excellence*).

(ii) Theoretical positivism. In the second place, LP is a theory of law, namely the theory generally shared by 19th century jurists,⁶ which includes a number of substantive theses, such as the following:

- (a) law is the set of commands enacted by a sovereign authority;
- (b) the binding force of such commands is guaranteed by the threat of sanctions;
- (c) law is a complete and consistent system, in such a way that no gaps and no normative conflicts exist;
- (d) legal interpretation is a cognitive enterprise consisting in ascertaining the will of the legislative authority;
- (e) the application of law is an eminently logical activity consisting in (ascertaining facts and) inferring individual prescriptions from general rules (“All thieves ought to be punished. X is a thief. Hence X is to be punished”).

(iii) Ideological positivism. In the third place, LP is an ideology, that is a normative stance according to which positive law ought to be obeyed – there is a (moral or political) obligation to obey the law. On the footsteps of Hobbes, justice is identified with positive law.

It should be stressed that ideological positivism, understood this way, is no specified (substantive) normative ethics – rather it is a normative (“formal”) meta-ethics, in the sense that it does not command any definite behaviour, but simply commands to comply with the rules issued by legal authorities (whatever their contents may be). Such an attitude – equal and contrary, so to say, to natural law doctrine, as characterized by Bobbio – is called “ethical legalism” or “ethical formalism”.

To be sure, such three positivistic doctrines, although logically independent, share the “no natural law” thesis – no natural law exists, the only existing “law” (properly understood) being positive law, that is, law “posited” by human norm-creating acts. As Uberto Scarpelli said, laws are not “given” to men, but “made” by them (Scarpelli, 1984, and 1989, 461). The legal character of any entity (a fact, a subject, etc.) depends entirely on its being the object of a legal norm that refers to it (Carcaterra 1984, 5).⁷

II. The Opposition between LP and Legal Realism

In Italian legal-philosophical literature, LP is often (or even usually) opposed to legal realism.⁸ One has to wonder, however: what kind of LP and what kind of legal realism are we talking about?

(i) As to legal realism, those scholars who oppose realism and positivism have in mind most of all Scandinavian Realism, especially Olivecrona and Ross (Olivecrona 1971; Ross 1958), completely disregarding American (or Italian, or French) legal realism. This is doubly surprising.

It is true that Olivecrona is a severe critic of LP, but the kind of LP he criticizes is essentially the voluntaristic view about legal norms held by 19th century jurists, such a view being a component of LP understood as a theory of law (in Bobbio's sense).⁹ However, Olivecrona, on the tracks of Hägerström,¹⁰ definitely shares the methodological side of LP – the view according to which science (in general, including legal science) is a *wertfrei* empirical enterprise that has to do only with observable phenomena (Olivecrona 1971, 56).

Ross, in turn, is a strong defender of methodological LP – against Kelsen's concept of validity understood as binding force, that he pictures as a sort of disguised natural law thesis (“quasi-positivism,” Ross 1961), as well as against Hartian “internal point of view” (Ross 1962). Legal science, according to him, is a set of purely descriptive “external” sentences identifying the law in force.¹¹

(ii) As to LP, those scholars who oppose realism and positivism have in mind either the 19th century prevailing theory of law or Kelsen's pure theory.¹²

To be sure, the opposition between legal realism and the pure theory is sound. Nonetheless, such an opposition does not arise from a supposed anti-positivistic stance of legal realists. It depends on two non-positivistic theses endorsed by Kelsen: on the one hand, the concept of validity as binding force (Ross 1961); on the other hand, the normative theory of legal science, conceived of a set of deontic (non-factual) sentences echoing valid (i.e., binding) norms (Ross 1958, 38 ff.).

The opposition between legal realism and 19th century LP is equally sound – especially if one takes into account the radically sceptical view of legal realism about interpretation (Guastini 2011) – but does not hold when referred to contemporary LP.

III. Contemporary LP

Nowadays, in the legal philosophy of the 20th and 21st centuries – since Hart (1958) and Bobbio (1961) – LP is mainly conceived of as a methodological attitude towards the law (Bulygin 2006).¹³ All “classical” positivistic views – as to the very nature of law (viewed as a set of commands backed by the threat of sanctions), the structure of legal systems (assumedly gapless and consistent), and legal interpretation (conceived of as a

merely cognitive enterprise) – are by now mostly dismissed.¹⁴ The main theses, strictly methodological, of contemporary LP (by the way, shared by Kelsen) are the following.

(i) First, as a matter of course, contemporary positivism denies the existence of so-called natural law (however conceived), assuming law to be a human artefact.¹⁵

There are no norms in the very nature of “things” or human relationships – no norm exists without a human act of normative creation. As Kelsen (echoing W. Dubislav) rightly says: “Kein Imperativ ohne Imperator”, that is, no command without anyone commanding (Kelsen 1965). So-called “natural law” is not law properly understood, but (at most) critical morality (Bobbio 1963, 67; 1965, 179 ff.).¹⁶ Natural law arises from an evident violation of Hume’s principle – no norms can be (logically) derived from factual statements.¹⁷

(ii) Second, LP is a scientific attitude towards the law, grounded on the distinction between expository and censorial jurisprudence – between the law as it actually is and the law as it ought to be (according to some standard of evaluation). Describing the existing law and evaluating it are two different and independent intellectual enterprises. By the way, it is precisely this feature of LP that is currently refused by non-positivist (as well as “soft positivist”) legal scholars – they claim that law cannot even be identified without some kind of moral evaluation.¹⁸

(iii) Third, as a consequence of Hume’s principle, no “objective” (moral or political) obligation to obey the law exists – the knowledge of legal norms does not involve any obligation to obey them. To be sure, obedience is what lawmakers demand, but no binding force, no obligation to obey, is conceptually entailed by the very existence or legal validity of a norm. Obedience presupposes not only cognition, or “recognition” (in Hart’s sense), but also axiological acceptance by the addressees.¹⁹

A perfect characterization of contemporary LP can be read in a paper by von Wright (1985, 380): «The term “legal positivism” embraces a variety of positions among which there is a family resemblance. A common feature of many members of the family is the idea of a sharp separation of Is and Ought. Another is the non-cognitivist view that norms are prescriptions and therefore neither true nor false. As a third we may count the view that norms are “posited”».

All such three features of contemporary LP are shared by LR (Bobbio 1965, 156), which combines an empiricist conception of legal cognition with a sceptical view on interpretation. LR is an openly positivistic view about the law. To be sure, not all positivist legal scholars are realists, but all realists are (“hard”) positivists.²⁰

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Notes

- 1 Se hace alusión al juez en un sentido general, en el entendido de que en el sistema penal acusatorio existe el juez de control y el juez de juicio oral que realizan estos ejercicios de admisibilidad y de valoración de fondo, respectivamente. Estas guías tienen aplicación para la admisión, pero también pueden incidir en la mejor comprensión de los alcances de la prueba para la valoración de fondo.
- 2 Bobbio's distinction was accepted and used by Grzegorzczuk, Michaut, Troper (eds.) 1992, part 2, in a large anthology of positivistic authors.
- 3 «A book of jurisprudence can have but one or the other of two objects: 1. to ascertain what the law is; 2. to ascertain what it ought to be. In the former case it may be styled a book of *expository* jurisprudence; in the latter, a book of *ensorial* jurisprudence: or, in other words, a book on the *art of legislation*» (Bentham 1789, 293 f.). See Troper 1994, 27 ff.
- 4 Austin 1879, I, 220. See also Austin 1879, I, 33 and 176 f. Austin clearly echoes Bentham 1789, 293 f., quoted above. The same attitude is shared by Hans Kelsen too: his "pure theory of law" purportedly responds to «the required separation of legal science from politics» (Kelsen 1934, 3); the pure theory «is being kept free from all the elements foreign to the specific method of a science whose only purpose is the cognition of law [...]. A science has to describe its object as it actually is, not to prescribe as it should be or should not be from the point of view of some specific value judgments. The latter is a problem of politics, and, as such, concerns the art of government, an activity directed at values, not an object of science, directed at reality» (Kelsen 1945, xiv).
- 5 Bobbio 1966, 79. This view is somehow surprising, but Bobbio will change his opinion on the matter. See Bobbio 1970b.
- 6 This is, Bobbio says, LP *stricto sensu*, and this is what is usually meant by "LP" in legal scholars' common language.
- 7 As to Bobbio's own ideas on the matter (Bobbio 1965, 146): first, «facing the clash of ideologies», he declares himself a natural lawyer (*giusnaturalista*), meaning (as far as I can see) that he is an enemy of ideological positivism (no obligation to obey positive law exists) and an advocate of human rights; second, as to the method of legal science, he declares himself definitely positivist; third, as to legal theory, he declares himself neutral,

in the sense that he does not share all the tenets of classical positivistic theory (such as the necessary completeness and consistency of legal systems).

- 8 See, e.g., Pattaro 1966, 1971, 1972, 1984, 2018; Jori 1987. This is a mostly “domestic” issue; not only domestic, however: see Leiter 2007, 59 ff.
- 9 Olivecrona 1971, ch. 1 and 2.
- 10 Hägerström 1953.
- 11 See Ross 1961. The Italian reception of Ross’s *On Law and Justice* was by and large conditioned by a mistranslation. In the original Danish edition of his book Ross uses two different words for validity (understood as bindingness) and being in force respectively; unfortunately, both words were translated in English by “validity” and in Italian (translating from English) by “validità” (Ross 1965). This circumstance gave rise, in the Italian literature, to the idea of the existence of a special realistic concept of validity (namely, validity confused with effectiveness), that in fact does not exist. However, the first one to misunderstand Ross in this way, because of the same mistranslation, was Hart 1959. See Eng 2011; Holtermann 2017. A correct Spanish translation, by Carrió (who had read Ross 1961), can be found in Ross 1997, where “validity” is translated with “vigencia” (being in force).
- 12 See, e.g., Pattaro 1982.
- 13 With the remarkable exception, in Italian literature, of Scarpelli 1965, who defended a form of “political” positivism. In his view, juristic operations – such as ascertaining the validity of norms, interpreting legal materials, and so forth – do not amount to “expository jurisprudence”, the value-free knowledge of the law in force. Rather, they are practical operations using and applying, not simply describing, the law. Legal cognition is a committed enterprise – committed, namely, to the acceptance of the legal system in force. Juristic operations presuppose the “internal point of view” (in Hart’s sense). Thus, juristic sentences – in particular, validity-judgments, where validity is conceived of as binding force – are “internal” statements, that presuppose the acceptance of the “fundamental principle” (Kelsen’s basic norm, Hart’s rule of recognition) of the legal system at hand. By the way, according to Scarpelli, the acceptance of a legal system and/or its fundamental principle cannot be justified by the principle of effectiveness (whatever effective legal system is valid). This is so since no norm or normative attitude can be derived from facts (Hume’s guillotine) – acceptance depends on a political decision. In this sense, Scarpelli’s positivism is “political” (and ideological) in nature: law (not the law as such, but only a legal order politically just) deserves obedience.
- 14 Kelsen maintains the classical positivistic views about completeness and consistency of legal systems, but he does not share at all the other mentioned positivistic tenets. In his view, legal norms are not “backed” by sanctions; rather, the use of force is their very content (see Bobbio 1970b, 101 ff.). Moreover, in his view, interpretation (namely, “authentic” interpretation) is a volitional, not a cognitive, act. See Troper 1994, ch. 4 and 5; Troper 2001, 69 ff.; Chiassoni 2012, 2013b.

- 15 This formulation of the no-natural-law thesis is not equivalent to the so-called “social sources thesis”. From the standpoint of legal positivism, that law is (or stems from) some kind of social fact is a matter of course. But the “social sources thesis” is a quite unhappy way to state this point. This is so for at least two reasons. On the one hand, such a thesis suggests (or seems to suggest) law to be a set of “social rules” (in Hart’s parlance), that is, customary rules – on the contrary, with the exception of international law, modern (state) law is essentially a set of “posited” rules, issued by some sort of “sovereign” authority. On the other hand, the “social sources” thesis looks compatible with a form of the natural law doctrine, namely, the doctrine of the so-called “variable natural law”, according to which law does not stem (only) from voluntary human acts, but (also) flows spontaneously from “society”, “social relationships”, “social conscience”, “Volksgeist”, or the like, and changes accordingly over time.
- 16 To be sure, according to Bobbio, natural law, after all, is no specific critical morality or normative ethics, but a peculiar meta-ethics – a second order discourse about ethics, namely a cognitivist, objectivist, meta-ethics (Bobbio 1963, 67). Namely, a “normative” meta-ethics concerning the proper way of justifying substantive ethical theses (whatever ethical thesis indeed), assuming “nature” – a completely indeterminate concept – as a source of norms. This is the only common element of a great deal of competing critical moralities (one claiming natural equality among men, another one maintaining inequality; one claiming private property to be a natural state of affairs, another one maintaining common property to be the natural condition of mankind; one requiring obedience to political power, another one justifying the right to resistance; and so forth).
- 17 By the way, this does not imply that a norm cannot be logically entailed by other norms. This is simply meant to underline that deducing is not deciding; thus, an entailed norm comes to “legal existence,” that is, acquires membership in a legal system, only when it is actually “posited” by a law-creating agency.
- 18 In contemporary Italian literature, this tenet of LP is under attack, in particular, by several constitutional lawyers. See, e.g., Matteucci 1963; Zagrebelsky 1992, 2008; Baldassarre 2005; Modugno 2008. On the relationships between LP and “new-constitutionalism”, see Comanducci 2009 and 2010, 115 ff., 251 ff.
- 19 «According to the non-cognitive view, acceptance is constitutive» of binding force (Ross 1968, 61).
- 20 Cf. Millard 2008; Jiménez Cano 2008, 147 ff.

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