The VII Spanish-Finnish Seminar in Legal Theory
“Postpositivism”
University of Alicante, Alicante, Spain
24th - 26th May, 2018

“Positivism and Courts: On Moral Reasoning and Judicial Powers”

Ana Cannilla
PhD Candidate
School of Law
University of Reading

1. Introduction ........................................................................................................................................ 2
2. Positivism ........................................................................................................................................... 2
   2.1 Legal Positivism ............................................................................................................................ 2
   2.2 Normative Positivism ................................................................................................................... 6
3. The Perils of Constitutional Positivism ........................................................................................... 10
   3.1 Dyzenhaus´ critiques .................................................................................................................... 10
   3.2 Positivism and originalism: an ideal pack? .................................................................................. 11
   3.3 Positivism and judicial moral reasoning ....................................................................................... 13
4. Jurisdiction as Firewall .................................................................................................................... 14
   4.1 Three different things .................................................................................................................. 14
   4.2 The desirability of judicial moral reasoning ................................................................................. 15
   4.3 The role of authorities ................................................................................................................. 16
1. Introduction

Critics of judicial review tend to frame their scepticism within arguments that sound very familiar to those of legal positivism, for legal positivists traditionally prefer “a legal system dominated by a legislature to one organized around common law traditions”.\(^1\) In a similar way as critics of judicial review, positivists have been traditionally hostile to judicial moral reasoning (JMR). The reason, the latter claim, is that judges’ role is to apply the law and that law’s sources consist of social facts such as statutes, customs or precedents and not of moral principles.\(^2\) Resorting to moral principles, positivists contend, would mean that judges were usurping the place of legislators. While I agree that the role of judges is to apply the law and not to create it, I argue that both groups should target judicial specific powers instead of JMR.

2. Positivism

2.1 Legal Positivism

That law is a human construction, that is the main contribution of legal positivism to the philosophy of law, which had previously approached law rather as a non-artificial phenomenon well into the 19th century. A good formulation of legal positivism’s distinctive claim is Gardner’s:

“(LP) In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits”.\(^3\)

Some positivists, the so-called exclusive legal positivists, contend that the valid sources of law are social facts, this means acts performed by people. Despite accepting that moral rules may be incorporated into social facts, exclusive positivists claim that moral rules do


\(^{2}\) See Joseph Raz *Between Authority and Interpretation* (OUP 2009) 345: “An adequate account of the dual nature of the law along the suggested lines requires (1) that the content and existence of the law be determined by social sources and (2) that the moral argument for the authority of the law depends on the actual nature of the social sources. It does not require that the social sources take the form of legislation. They can be custom, common law, juristic opinions, and much else”.

\(^{3}\) Gardner Legal Positivism: 5 ½ myths 2001 199.
not validly count as autonomous or independent sources of the law.\textsuperscript{4} Others, the so-called inclusive legal positivists, contend that moral rules can be a valid source of law, particularly in those areas of law where the social facts appear exceedingly indeterminate.\textsuperscript{5}

Regardless of the differences, one methodological core idea is deducible from the above. All of the positivist theories of law, to some extend endorse the “separability thesis”.\textsuperscript{6} The separability thesis states that there is no necessary conceptual connection between law and morality. This means that law and morality are different normative realms which, as I said, may overlap in some degree for some positivists or may not overlap at all for others. Despite differences on this degree, it is clear that positivism contends that the legal validity of acts and rules do not depend on its moral merits. Two relevant consequences follow from this agreement. Firstly, legal validity, the intrasystem validity of any given legal order, is defined by this separation. An act is legally valid whenever it is derived from a social, empirically testable, source and thus, identifying law shall rarely need moral-legal judgement. i.e. an act of Parliament or a court’s ruling, “law in books” or legal conventions or principles as conceded by soft positivism. Secondly, and more importantly, law that is -whether in books or in principles- need not coincide with law that ought to be. A legally valid and thus enforceable act might be immoral; as it is easy to advert to many unfortunate examples.\textsuperscript{7}

But despite the heterogenous literature, positivism still seems to fall short when describing law in real societies. The description or definition of law is not an innocent task. There is a reason, I believe, that philosophers have been unable to come up with a shared concept of law.\textsuperscript{8} The concept of law, differently of the concept of politics, economics or history has straightforward consequences in real life. The determination of

\textsuperscript{4} “All law is source-based […] its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument” in Joseph Raz, \textit{Ethics in the Public Domain: Essays in the Morality of Law and Politics} (OUP 1994) 210-211.

\textsuperscript{5} I.e. Hart soft positivism accepts Dworkin’s point that vague and highly contested principles of political morality, and not only clear written rules, are part of the law too. Other positivists believe the division is terminological and without theoretical significance see Larry Alexander Was Dworkin an Originalist? Coleman 1982. Hart separation thesis.

\textsuperscript{6} "[T]he existence of law is one thing; its merit or demerit is another. “ Austin, \textit{The Province of Jurisprudence Determined} (1832; ed. W.E. Rumble, Cambridge: Cambridge University Press, 1995), 157.

\textsuperscript{7} In contrast to other disciplines in the social sciences such as economy, sociology or history that, notwithstanding the different and contrasting critical approaches, they don’t seem to have a deep perennial debate on the determination of the object of their inquiry itself.
the concept of law is primarily linked to the determination of legal validity and the whole point of the determination of legal validity is no other than guiding political obligations - even if we distinguish legal validity from legal, political or moral obligation with the finest rigour. In a way, by begging the normative question, positivists might have risked to produce an uncomplete description of law. As in Kipling´s poem The Elephant's Child, positivism has explained what law is; who it involves; where, when or how it can be found but seems to miss an account of why or what law is for in today’s democratic legal systems.

In this sense, legal positivism seems to encounter some difficulties in explaining why subjects of law peacefully partake in legal orders. How is it possible that immoral or unpopular legal rules are obeyed in democratic societies? Without resort to violence, why does a system of social ordination works functionally if the law that ought need not coincide with the law that is? In contemporary democracies, people abide to law mainly to be granted justice, and not to confirm that rules are correctly adjudicated with minor, or with none, moral evaluation. This seems to be particularly true of constitutional democracies, that distinctively claim authority to deploy a set of shared moral and political superior values. Arguably, we should not be too pessimistic about this matter. It would be a very difficult task to keep a legal system working without appealing to whatever moral merit it may possess. Law(s) can be immoral but, most probably, a legal system, as a functional and efficient device that assumes the voluntary subjection of those whose lives aims to order, will necessarily be perceived as mostly moral by those people. Under basic democratic conditions, it would hardly work differently. We know, or we like to think that democracy assumes voluntariness. Thus, in a democratic system, law assumes -and jurisprudences can expect- general voluntary obedience to its rules; and not mere habitual or factual obedience that may be achieved through plain force like positivist tend to see it.

---

9 In contemporary democracies or in working legal systems generally? Can we think of any kind of subject that goes to courts with 0 hopes in improving her situation?
10 Law vs legal system terminology see Besson.
11 Of course, the fact that it is perceived as moral does not mean it is moral.
12 Voluntariness not meaning informed and deep consent but the pretension to action without threat of direct violence.
13 I.e. Kelsen “Legal obligation is not, or not immediately, the behaviour that ought to be. Only the coercive act, functioning as a sanction, ought to be” pure theory
In this vein, Dworkin has famously noted that contemporary positivism cannot supply a successful explanation of what law is, let alone what law ought to be.\(^{14}\) I agree that a thesis by which law is expected to work (whether decently or not) without requirements of morality is too demanding for modern societies. It would be difficult to make a legal systems work on formal source-based law and not on merit-based law, unless, of course, there is some kind of moral merit in a source-based law. As Waldron has put it, without some kind of normative stance the separability thesis and other related features of positivism “look a little odd standing on their own” for today’s liberal democratic communities.\(^{15}\) In regard to the interest of the present thesis, if we are to explain how law works and how law ought to work today, we should give special attention to what makes people obey the law in a democratic context. Obedience and allegiance in a non-violent context comes at a price, a price that probably has more to do with questions of political morality than with questions on aseptic attempts to describe and use law.

So why do most subjects of law voluntarily submit to a legal system on the first place? Or using Raz’s terminology, how can rules act as reasons for action that pre-empts us from following the reasons that would have genuinely guided our behaviour instead? The answers range widely. From a pragmatist view one can think that the main factor for complying with the established rules is to avoid any kind of sanction - whether privation of freedom, a minor fine or plain social repudiation. Also Raz justifies obedience to law in an instrumental way, namely, whenever the subject would likely better comply with her obligations by following the authority’s directive. Quite differently, Dworkin argues that members of a political association have a moral duty to honour the responsibilities attached to that membership. Similarly, Rawls develops an idea of fair play by which if one accepts the benefits of cohabitation in a political community, then one has to follow certain civic duties with the rest of the members of that community. An interesting intermediate justification of authority is that of deliberative democracy theorist Habermas, for whom law appeals both to social facts and to an ideally consent based legitimacy.

\(^{14}\) See Dworkin 30 Years On and LE chapter 4.

Indeed, all of these are accounts that differently explain obedience to the law. Now, the assumption of voluntariness that all share is not a general descriptive hypothesis. It is a political idea at the very foundation of modern political authority that is raised in opposition to tyranny or arbitrary government. In my opinion, descriptive positivism cannot satisfactorily explain the political meaning of voluntariness in democratic societies. That need not count as an unsurpassable handicap, positivists never meant to give a democratic account of the relation between legal validity and political obligations anyway. However, I think it is relevant to frame the debate of legal validity within democracies, particularly in discussions over the institutional design of democratic regimes.\textsuperscript{16} In a democratic scenario, the nature of authority is not only formal, as positivists have tend to see it. In my opinion, a strictly formal description of authority cannot fully explain how legal and political authorities work today in those societies that we are familiar with. Differently, the nature of authority must rely on other elements that are distinctive of those legal systems we are interested in, namely democratic ones, those in which there is a point in discussing the legitimacy of judicial review. If we are to understand law within a particular political context, a democratic context, we must understand the desiderata or logic of democracy. In this vein, some authors speak of normative positivism, in an attempt to explain the gaps left by descriptive positivist jurisprudence.

2.2 Normative Positivism

In Jeremy Waldron’s opinion, normative positivism is interested in a legal methodology that “is connected with the values that are engaged when citizens deploy it [the law]” since “[T]hey use it also to grasp the desirability of being governed in certain ways rather than other ways”.\textsuperscript{17} In particular, normative positivism is a moral claim stating that it is a desirable ideal for the law to be as much as the positivists describe it. It is “the thesis that the law \textit{ought} to be such that legal decisions can be made without the exercise of moral

\begin{footnotesize}

\end{footnotesize}
judgement”.

In this sense, any moral judgment that takes place in legal-decision making should be “condemned and minimized”. Similarly, Campbell defines ethical positivism as a

“theory that expresses a preference for a certain type of legal system, where [...] there is a set of fairly specific general rules that can be identified and applied without recourse to contentious moral or other speculative matters, a system that it is possible for citizens to understand and follow (no doubt with legal advice in complex areas) and judges to apply without recourse to controversial first-order moral judgments”.

This does not mean that normative positivists defend a kind of jurisprudence that sacralises law and imposes on citizens an unlimited moral duty to obey it, in some sort of radical ideological positivism. Normative positivist are fully aware of Hart’s “sobering truth”:

“[T]he step from the simple form of society, where primary rules of obligation are the only means of social control, into the legal world with its centrally organized legislature, courts, officials, and sanctions brings its solid gains at a certain cost. The gains are those of adaptability to change, certainty, and efficiency, and these are immense; the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not”.

Consequently, normative positivists should not lead us to think that law is good in itself. Law’s value is always instrumental. Its practical faults can indeed outweigh any initial merit. Despite this awareness normative positivists state that, under certain democratic conditions, there are good reasons to keep legal decision-making clear as much as

---

18 Jeremy Waldron, ‘Can There Be A Democratic Jurisprudence?’ 167. Also Campbell “ethical” positivism. Similar to what Bobbio calls “weak ideological positivism”.
20 Campbell Prescriptive Legal Positivism: Law, Rights and Democracy 2004 chapter judicial activism
21 Concept of law 202
22 Waldron Normative (or Ethical) Positivism 428. No “positivity-welcomers” ala Gardner 5 ½ myths 199.
23 Waldron Normative (or Ethical) Positivism 430.
24 Are these conditions only limited to formal equality as non-discriminations? Would this be enough? In principle and in terms of legal validity and political obligations I think the answer is yes, not in terms of moral obligations however. For an interesting contrasting view see Julian A Sempil Law, Dignity and the
possible from moral judgment. Some of these reasons have to do with the “desirability of certainty, security of expectation, and knowledge of what legally empowered officials were likely to require” that arise from the aspiration to avoid arbitrariness in government.⁵⁵ Positivism focuses in values such as legal formalism, legal certainty and legal order in favour of a strict view of the separation of powers, a preference on the view of law as a rule-governed activity and thus a preference towards procedural democracy, distinguished by the kind of decision-making processes that can be well regulated and controlled such as legislative procedures and formalist interpretative methods.

An interesting version of normative positivism is Waldron’s proposal of a democratic jurisprudence. In his opinion, descriptive positivism cannot deal satisfactorily with the fact of disagreement in pluralistic societies. There is something missing in descriptive positivism to explain why people comply to law even despite feeling a particular statute might work against one’s interest. Waldron thinks that what is missing is the distinctive desiderata of democratic law, which in his opinion is its public interest:

“[M]odern positivists pay insufficient attention to the public character of law-to the fact that law presents itself not just as a set of commands by the powerful and not just as a set of rules recognized among an elite, but as a set of norms made publicly and issued in the name of the public, norms that ordinary people can in some sense appropriate as their own, qua members of the public.”⁶⁶

Democratic law and democratic authority claim to act and stand in the name of the community and that idea, Waldron argues, makes people respect law’s commands despite not agreeing with them. For law to work, it needs to “purport to promote the public good”.⁷⁷ But as I will elaborate later on, Waldron seems to forget that law includes adjudication, and thus also adjudication needs to purport to promote the public good in order to be a socially sustainable practice, at least in democratic regimes. Furthermore, I

---


⁶⁶ Jeremy Waldron, ‘Can There Be A Democratic Jurisprudence?’, 700-704.

⁷⁷ Waldron DJ 702. Also speaks of a second element in DJ> Generality: “the significance of laws' being in the first instance general norms, not just particular commands.” 704 but I unsure it is significant to DJ.
claim that a method of adjudication that purports and ideally achieves the public good, is
superior to one that does not.28

It is well known that Waldron is interested in democracy as “procedures disciplined at all
times by the principle of political equality” and thus by a jurisprudence that informs the
spirit of law in such way.29 In this vein, he takes what I shall call a ‘procedural turn’ on
Raz’s NJT. Raz´s normal justification thesis, Waldron argues, falls short in those cases
where people disagree about whether sources of law actually satisfy the NJT.30 The NJT
can only work for subjects of law that assume that obedience to a rule is substantially
better for them than opting for disobedience. This means, for example, that one will obey
a rule stating “every person in the queue will get one book from this bookstore” because
one wishes to acquire that one book and would do so without being ruled to do it anyway.
But this does not say too much about the circumstances that are of most interest to law,
those when one wants two books instead of one. So what about the people that do not
assume that following the rule will benefit them, Waldron rightly questions. This situation
seems particularly relevant in cases where there is deep disagreement over a rule, as it
tends to happen in constitutional matters. In this case, Waldron thinks that people who
peacefully obey an authority’s command notwithstanding the fact they think that the
command might be harmful to their interests still do so because they assume that it is
procedurally the best option for them as members of a democratic community. It is
legitimate. Someone queuing at the bookstore line from the previous example will respect
the one-person one-book rule because that is what the majority of the bookstore’s board
decided is in the interest of the bookstore, even if one has good grounds to feel deserves
two books instead and even if one actually deserves two. This procedural turn avoids, at
least to an important extent, the “surrender of judgment” obstacle of Raz’s NJT.31 The
reason, I think, is that the surrender of judgement in this case is limited by one’s moral or

28 In this vein, while normative positivist are right to criticize Dworkin’s argument that JMJ is necessarily
a good thing for law, they are wrong to think that JMJ is necessarily bad too.
29 Waldron, ‘Can There Be A Democratic Jurisprudence?’ 680.
30 Jeremy Waldron, Law and Disagreement (OUP 1999) 101. This critic is shared by Dworkin and I agree
with Dworkin that inclusive positivism is wrong in stating that morality is only a social convention.
Democratic positivism should be careful with this point if claims to be aware of the fact of disagreement>
disagreement is not an agreement thus not a convention. See Dworkin, Ronald ‘Thirty Years On’ (2002)
31 Joseph Raz Between Authority and Interpretation (Oxford University Press, 2009) 142 ‘we follow reason,
and thus exercise our judgment by accepting, through our judgment, the binding force of acts (promises,
directives) that pre-empt our freedom to act for some of the background reasons’.
political preferences about the democratic system. This means that a procedural NJT pre-empts one’s judgment on the substantial content of the rule, but not on its procedural legitimacy, which is, in my own opinion at any rate, pretty much all we can aim at under ‘the circumstances of politics’. Following from the bookstore example, people that have good reasons to disagree on the one-person one-book rule will still judge it fair procedurally, institutionally. Judgments of the public good thus, are not surrendered completely.

But despite this normative or political stance that aims at providing positivism with a legitimacy framework, anti-positivists have not found relief to their fears of a positivist understanding of law. In the next section, I will analyse some of these critics in constitutional law.

3. The Perils of Constitutional Positivism

3.1 Dyzenhaus´ critiques

David Dyzenhaus has probably advanced the most severe critiques against positivism. He has accused positivist of being “destructive of healthy legal practice” to the extent

32 A good example is the Catalan’s Parliament sessions 6th & 7th September 2017 passing Referendum Act and Transition Act in violation of the chamber’s regulation. Even pro-referendum people revolted against it. The expression ‘the circumstances of politics’ is an analogy of Rawls’ circumstances of justice in Waldron, Law and Disagreement 102: “Consider the idea of ‘the circumstances of politics’, an idea adapted from John Rawls’s discussion of ‘the circumstances of justice’. The circumstances of justice are those aspects of the human condition, such as moderate scarcity and the limited altruism of individuals, which make justice as a virtue and a practice both possible and necessary. We may say, along similar lines, that the felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be, are the circumstances of politics.”

33 Reference justice vs legitimacy in reasonable pluralism.

34 This does not mean, at any rate, that there is a moral duty to defer to correct procedural decisions whether majoritarian or countermajoritarian. Moral, legal and political duties are different. Ultimately, it remains to one’s one belief and risk to follow immoral rules, so I agree ala Dworkin that in the private moral dimension “You’d Better Believe it” but this is not very convenient for law.

35 Compare to Scott Shapiro “abide to democratic authority is not a violation of moral autonomy but an act of respect towards self-govern and the process in his Legality (HUP 2011) 437-439.

36 He has been more tough with some version of positivism that with others. He sets “conceptual positivists” aside like Bentham, Hart and Raz, together with “leftwing neo-benthamists” like Griffith, and also “constitutional positivists” like Waldron and Goldsworthy. Who is then left to be a political positivist for Dyzenhaus? Originalists? See Dyzenhaus The Incoherence of Constitutional Positivism in Grant Huscroft (ed), Expounding the Constitution: Essays in Constitutional Theory (CUP 2008) 138-160.

that he has held positivism accountable of “collaboration in an authoritarian political project”.38 The reason is that, in Dyzenhaus opinion, “positivism says that judges should apply only those values and norms that have been explicitly incorporated into the law by statute” independently of its moral merits.39 In particular regard to judicial review, he has stated that “positivism cannot supply a foundation for judicial review since it is politically committed to minimising the role of judges in legal order”.40 Dyzenhaus agrees with Dworkin’s view that the debate on judicial review and constitutional interpretation turns on the political point of legal order, which is, I agree, achieving justice. “Is the point of law to be an effective instrument of the powerful”, he asks, “or is it to ensure that political power is exercised in accordance with principles of legality?”41 But Dyzenhaus pushes Dworkin’s contest against positivism one step further arguing that “the cost for contemporary positivists of resisting this attempt is an unwitting collaboration in an authoritarian political project of which they should want no part”.42

In particular, Dyzenhaus describes constitutional positivism as a family of positions in legal and political theory that “include critics of judicial activism and academics who advocate an enhanced role for legislatures in constitutional interpretation and a diminished role for judges [who] tend to see originalism […] as a way of disciplining judges in order to confine their activism and diminish their role in legal order”.43 The argument, it may be said, is that given the value of certainty and security for positivists, the fact of constitutional indeterminacy pushes the quest of legitimacy towards originalism or textualism.44

3.2 Positivism and originalism: an ideal pack?

In my opinion, however, there is not at all a necessary link between positivism and originalism nor textualism in adjudication. Originalism and positivism do not come in a

38 Dyzenhaus Why Positivism is Authoritarian 112.
41 Dyzenhaus The Incoherence 158
42 Dyzenhaus Why Positivism Is Authoritarian
43 Dyzenhaus The Incoherence 138.
44 See i.e. “Legal positivism and originalism go together and cannot be pried out” in Legal Positivism and Originalist Interpretation, 2015.
package deal. Positivism, whether descriptive or normative, is a theory of law. Originalism and textualism are, differently, theories of adjudication. Indeed, formalism in adjudication can be based on a positivist account of law.\textsuperscript{45} But so can an openly anti-formalist theory as realism.\textsuperscript{46} There is no intrinsic incoherency is these options. One can endorse a positivist raw description of law – that law is mainly what officials do – and still claim that officials can do contrasting different things when applying the law, including to detach as much as possible from any statutory interpretations that lead to unfair results\textsuperscript{47}, to include legal principles in grey areas of law\textsuperscript{48} or to resort to morality in hard cases.\textsuperscript{49}

Moreover, originalism faces two serious limits. The first one has to do with the possibilities of originalism. The second one with the political stance of originalism. First, when a text mainly states vague principles – as in the case of constitutions-, a theory of adjudication that resorts to plain-text interpretation or to one single legislative intention is a fallacy and self-defeating. When indeterminacy is so high, descriptive positivism loses its point. If there is high disagreement at the level of the source thesis, then we can be prepared to expect that positive law does not include the answer to particular case. Whether we consider morality and politics extra or intra legal arguments, the solution of hard cases will need resort to these domains.\textsuperscript{50} In this sense, originalist courts are no less activist or political than their no-originalist counterparts. It just does not seem plausible, or at least no more plausible than the interpretivist Dworkinian one right answer thesis, to consider that constitutional judges can find the one “authorially-intended meaning” of an aggregation of former MPs.

\textsuperscript{45} Larry Alexander op. cit. “So originalism is nothing more than the corollary of the legal positivist’s claim that law consists of norms chosen by human authorities” 5. In my opinion, in this paper Alexander fails to explain the leap from positivism to originalism, limiting to hold that when the authors of law are the authority to create law, then “it seems natural to assume that the law mean what their authors intended them to mean”. I don’t find this natural at all. Legislators cannot foresee all particular cases so cannot intend laws to mean with exactitude nothing else than a general rule. If the “natural” point of interpretation is this, then we should ideally have MPs [and their spirits once they passed away!] act as judges.

\textsuperscript{46} See Brian Leiter, "Legal Realism and Legal Positivism Reconsidered" in his Naturalizing Jurisprudence (Oxford University Press 2007).

\textsuperscript{47} This is, i.e., the CLS proposal.

\textsuperscript{48} Hart inclusive positivism

\textsuperscript{49} Raz hard cases solved from morality.

\textsuperscript{50} Raz/Dworkin in constitutional interpretation
Secondly, and more importantly, originalism does not truly question the distribution of political power that gives normative foundation to positivism. Positivism focuses in values like legal formalism, legal certainty or separation of powers precisely because positivists are worried that people that have not been elected as legislators might end-up modifying sui generi the rules that govern public life. Positivism is concerned with the perils of a juristocracy or a government of the judges. Originalism, as a theory that upholds the ideal that judges safeguard an allegedly true meaning of the constitution, seems closer to an anti-positivist or Dworkinian view of law and adjudication than to what positivists have in mind. Originalism thus, does not successfully offer a solution to the problem of judicial supremacy.

3.3 Positivism and Judicial Moral Reasoning

As I have said, originalism and positivism do not go hand with hand as naturally as some hold. That said, it is true that normative positivists are uncomfortable with judicial moral reasoning in general and thus might search for interpretative methods guided by statutes more than principles. From the standpoint I am defending here, however, I am not uncomfortable with judicial activism itself, I am uncomfortable with judicial review all together. Just as a positivist is someone that distinguishes law from morality, but that does not mean that a positivist cannot favour progressive [or morally good] laws, a normative positivist is someone that aims at an institutional design that facilitates a differentiated roles in dealing with legal and moral disagreements, but that does not mean that a normative positivist cannot favour progressive judges and progressive interpretations of the law. So, if i.e. a legal system happens to contain a practice of strong judicial review, I will prefer, as someone who “takes rights seriously”, a court that is close to some progressive living-tree statutory adjudication theory, even if I am aware of its limited effects in transforming the social reality and if, as an institutional designer, I prefer that the last say on the protection of rights lays in parliament.

In conclusion, it is not surprising that Dyzenhaus and others fear that positivism can lead to authoritarianism if they takes for positivism that judges should obey anything enacted by parliament and that political positivists do not want a “culture of human rights”\(^{51}\) and prefer originalist or textualist interpretations instead. But I am doubtful this is exactly

\(^{51}\) Dyzenhaus The incoherence 151.
what positivists, particularly democratic positivists, promote. Besides that accusation, however, anti-positivists are very reasonable in their anxiety on the idea and consequences that positivists take judicial moral reasoning is wicked by default. Positivists are right that indeterminacy, and its consequent unavoidable amount of JMR, raises some questions of legitimacy, but neither indeterminacy nor JMR mean illegitimacy of adjudication by default. Dyzenhaus is concerned that if judges do not follow principles or if they do not enjoy enough freedom to avoid immoral statutes, then judgments may result in unjustified injustices. I agree with this risk and I share Dyzenhaus’ sympathy with alternative non-formalist adjudication. This is different, however, from committing to strong judicial review.

4. Jurisdiction as Firewall

4.1. Three different things

So far, I have argued that a theory of law in democratic societies needs to take into account the desiderata of democracy. I have then argued that the desiderata of democracy, even if understood as a procedural o majoritarian democracy, is not close to a system of mere judges as mouthpieces. My aim now is to defend that a democratic jurisprudence that counts on judges to reason morally is compatible with a positive theory of law and with a radical critic against judicial review. As I said before, normative positivism is a theory of law, while interpretativism is a theory of adjudication. Judicial review, we may add, is a theory of institutional design. The separability thesis, I argue, might have different things to say in each of these domains.

Before we have seen how positivism prefers an ideal legal system where rules can be identified, followed and applied without resort to moral judgment. In Waldron’s opinion normative positivism “is the thesis that the law ought to be such that legal decisions can be made without the exercise of moral judgement”. That would indeed makes things easy, and probably many anti-positivists would share this wish had anyone believed in its plausibility. But that ideal not only sets the expectations a too tall order, it sets law in a different defining universe. Actually, Waldron is well aware that “legal decision-making

52 Waldron, Law and Disagreement 167.
itself takes on a moral or political character”, in his own terms.\textsuperscript{53} He just seems to find this a terribly unsatisfactory element of law to be minimized as much as possible. But I am doubtful this is the most felicitous way to envisage an unavoidable critical aspect of the law. Moreover, there are good reasons for legal decision-making to enjoy that character, ranging from the right to be judged by one’s equal (and this probably includes someone not deprived from the ability to reason morally) or the benefits from applying flexible and proportionate tests in adjudication. A different question is, in my opinion, what tasks we should endeavour unelected moral reasoners to deal with. My concern, thus, is not so much with judicial moral reasoning but with specific judicial power(s).

4.2 The Desirability of Judicial Moral Reasoning

As Dworkin has famously argued, moral judgment in adjudication is not only unavoidable but also highly desirable. I am persuaded, together with many others, that the unavoidability argument is largely sound.\textsuperscript{54} My concerns linger, however, with the desirability component. In my opinion, the desirability of moral judgment depends on the role that an authority plays.\textsuperscript{55} In this sense, why is it desirable that a mother exercises moral judgment when commanding her daughter to make her homework? Why is it desirable that judges exercise moral judgment in legally deciding a case? The answer lies in the prior justification of social practices (such as parenting or judging) and jurisdictions (one’s child’s homework or one’s right to get damages), for there are good reasons for authorities to have some tasks or roles but not others (one has no jurisdiction over one’s child intimacy and judges have no jurisdiction over one’s political preferences). We do not want machines rising children in place of mothers nor computers adjudicating cases in place of judges. So I am convinced of the extremely valuable fact for democratic societies that authorities, and not only subjects, still happen to enjoy moral agency and to exercise moral judgement. Indeed, the role of ordinary courts is to solve a particular case with the instruments they have and, faced with gaps and indeterminacies, to be creative

\textsuperscript{53} Waldron, \textit{Law and Disagreement} 166.

\textsuperscript{54} Except for negative positivists like Coleman, most scholars share this.

\textsuperscript{55} Here I am using “authority” in reference to judges, institutions or public administrations and not to \textit{law} itself. My concern has to do with the legitimacy of judicial moral reasoning and of judicial review as instruments by which someone imposes a decision against someone else, in the name of the community and with coercive force. I share Coleman’s observation that an “ordinary notion of authority […] is a relationship primarily between or among persons” while Raz’s involves “a relationship between reasons and persons”, Jules Coleman, ‘Beyond Exclusive Legal Positivism’ (unpublished manuscript, Yale University) 18 cited in Scott Hershovitz, ‘The Role of Authority’ 11 Philosophers’ Imprint 1.11.
according to a range of statutory interpretation methods. It seems a bit unrealistic to say, like i.e. Coleman does, that law includes only positive law and that when a certain case is not solvable within the available positive laws, then judges should decline to take on the responsibility of adjudicating and instead defer to political decision-makers.\textsuperscript{56} This position indeed aims to offer a highly respectful and deferent treatment to citizen’s self-government hopes, but I think it would probably be a quite upsetting and counterproductive practice.

4.3 The Role of Authorities

Throughout this section I have claimed that the idea of accepting and valuing some levels of judicial discretion does not equal accepting and valuing judicial supremacy. The fact that courts need to exercise judicial discretion in the resolution of a legal case does not mean that courts need to exercise a strong control of legislative acts. In this vein, I argue that in those realms where an authority has jurisdiction, moral judgment is not only unavoidable but also desirable. Contrarily, when there are no good reasons to endow an authority with a role that unavoidably involves moral judgment, then moral judgment from that authority in that role is undesirable.

Before we decide on the benefits and perils of judicial moral reasoning, we should decide on the role that we wish to assign to courts and to legislatures in constitutional decision-making. The assignment is not innocent for “roles have normative attributes”, as Hershovitz has observed in discussing Raz’s service conception of authority.\textsuperscript{57} This means that before attributing power to an authority, and before justifying the way in which authority exercises power, we should first decide on the justification of that power as a social practice in the democratic polity.\textsuperscript{58} Surely, critics of judicial review should not take for granted the illegitimacy of courts as moral reasoners. But similarly, defenders of judicial review should not take for granted the merits of judges as moral guardians of the constitution.\textsuperscript{59}

\textsuperscript{57} Scott Hershovitz, ‘The Role of Authority’ (March 2011) 11 Philosophers’ Imprint 1, 12.
\textsuperscript{58} Usually judicial review but also other powers i.e. Spanish reform in 2015 for Constitutional Court to judge and execute proceedings directly without prior proceeding in criminal or civil court.
\textsuperscript{59} A different -and in my view secondary- question, is which authority is in better institutional conditions to reason morally. See Dyzenhaus and Waldron’s contributions to the Symposium in ICON, Volume 7, Number 1, 2009, and their chapters in Hucroft (n 48).
The point of the matter is, in my view, what role we want for each institution. The matter of judicial review is a matter of jurisdiction. But this, of course, is another conversation. While I will not elaborate on the democratic credentials of parliament or on the value of voting here, it is important for my argument to remind that there are good reasons of political morality for relying in public representatives for the task of legislating. In a democratic polity, we hope for a separation of public powers not only for the benefits of division of labour but also, or mainly, for the benefits of a division of power that is representative of our political preferences. To what extend our political preferences have to do with the case that moral questions should be ultimately solved through legislatures and not through judicial decision-making processes is a topic for another day.

---