

## Neil MacCormick's Legal Positivism

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In this paper I will dwell on one of the most important points in MacCormick's thought: his conception of *legal positivism*. The paper will develop in the following way. In the next section I will present my *conceptual definition* of legal positivism. In the second section, in the light of the proposed definition, I will try to reconstruct, in its various phases, the conception of legal positivism advanced by MacCormick. In the final part of the paper I will develop some critical observations on MacCormick's thought.

### **1. A conceptual definition of legal positivism**

In proposing a conceptual definition of legal positivism, I follow the 'concept/conceptions' scheme (used, for instance, by Dworkin 1986, 70-71), in a very peculiar version. This scheme is particularly appropriate in cases in which we are dealing with *essentially contested* notions (Gallie 1955-56, 167-198), that is to say, with notions structurally open to divergent interpretations, i.e., conflicting attributions of meaning. The word 'concept' is used here with reference to the most consolidated part, to the so-called *solid area* (Jori 1985, 277) of a determined notion of common or scientific language.

Naturally no theory, be it scientific or philosophical, can stop at the threshold of the concept, which only represents the shared starting point, the assumptions that are commonly relied on. *Conceptions*, precisely, represent the first stage that knowledge goes through as soon as it breaks away from the solid ground of what is 'deemed certain, to move to the much more slippery terrain of what can be the object of falsifiable conjectures that always run the risk of being confuted. From this point of view, *conceptions* are those assumptions in a given field of experience that offer a preliminary interpretation of a concept, as the first stage of the endeavour to produce a theory in a given field of experience.

Giving a conceptual definition of 'legal positivism' is an operation making it possible to achieve some important results. It is first of all able to give a contextual account, in a more adequate way than other types of definition, both of the unitary elements (precisely at the level of the *concept*), and of the no less important elements of differentiation (at the level of *conceptions*) that are present in legal positivist conceptions.

For instance, in the absence of a unitary conceptual definition, I believe it is more difficult to adequately explain the contextual confluence, in legal positivist theories, of elements of continuity and elements of differentiation; the risk that one runs, in short, is ending up sacrificing one or the other of the two aspects, confusing the level of the concept with that of conceptions, and vice versa. In my opinion, MacCormick makes this mistake (most recently in *Institutions of Law*), insofar as he expresses the belief, in his latest works, that the opposition between legal positivism and natural positivism (an opposition said to derive from a 'two-way-divided universe of jurisprudence'; MacCormick 2007a, 278) is no longer fruitful (MacCormick 1992, 131). He fails to take into account the strong conceptual distinction that instead exists between the two

notions.

The conceptual definition of ‘legal positivism’ (Villa 1999, 25-33) that I propose consists of two theses that, though they are not logically connected, nevertheless *jointly* express the conceptual nucleus of legal positivism in its *full sense*, its *minimal conceptual content* shared by all the conceptions that can entirely be qualified as such in a full sense. The first will be labelled a *thesis on law* (and, therefore, in a sense, an *ontological* thesis), and the second a *thesis on the knowledge of law* (and, therefore, a *methodological* thesis).

According to the first thesis, all the phenomena (firstly the norms) to which the appellative ‘law’ is appropriate invariably constitute instances of *positive law*, and, therefore, of law that historically represents the *normative product* of decisions and/or of human actions that are historically *contingent* from the cultural point of view, and, therefore, more specifically, from the ethical-political point of view.

In agreement with the second thesis (so-called *methodological legal positivism*), for legal scholar ‘taking into account’ positive law is a completely different activity, and clearly one to be kept separate from what is concretized in a stance (of acceptance or otherwise, of justification or otherwise, etc.) towards law itself.

What has just been said suggests a reflection of a general character on the true meaning of the opposition from the ontological point of view. It is not on the basis of the level of the theory of positive law that the two traditions of scholarship can be clearly differentiated. Within this level there can well be agreement between legal naturalist theories and legal positivist theories of positive law. Furthermore, I believe that for many scholars this agreement exists today, regarding the approach that looks at law as a *social practice*. The problem, instead, is the recognition or otherwise of a further (legal?) level. For this purpose, according to what was said before, it seems to me that the deep sense of the opposition between legal naturalism and legal positivism has a fundamentally meta-ethical nature. By this I mean that the problem is not so much whether to recognize (or not) the existence of a *law* or a *natural right* (one can be a legal naturalist even without this recognition), but rather whether to accept (or not) the thesis of the possibility of an absolute and objective foundation of values (in this case *legal* ones), or at least of some of them, in a transcultural and noncontingent key. In other words, at a meta-ethical level, the opposition is between absolutism (legal naturalism) and relativism (legal positivism). In this connection, it would be interesting to understand clearly which of these two approaches corresponds to the position of the most recent MacCormick. I will return to this point later.

For what specifically regards the methodological level, it is extremely important to realise that my thesis is by no means identical to the one that obliges law scholars to assume a *non-evaluative attitude* in the sphere of their activity, traditionally called – though improperly – *descriptive*. It is one thing to maintain that the positive law scholar must clearly separate the activity of ‘description of positive law’ from what is concretized in a ‘commitment’ towards it; while it is another thing, a completely different one, to maintain that the aforesaid jurist, within his ‘descriptive’ activity, must take up a non-evaluative attitude. These two theses are not logically connected in any way. In other words, maintaining that the description of a given positive law requires taking a nonevaluative attitude means making a further move, namely

interpreting a conceptual assumption, developing a conception starting from an element of a conceptual character.

## 2. A reconstruction of Neil MacCormick's legal positivism

It is not simple to reconstruct MacCormick's conception of legal positivism, because it has developed, not without uncertainties and tensions, through different phases, down to a position that at least in his opinion is not clearly identifiable either as legal positivist or as legal naturalist. However, starting from the many occasions on which MacCormick has grappled in his works with legal positivism, schematizing to the utmost, it is possible to isolate three big phases representing three important 'conceptual interchange points' at which MacCormick has expressed three different positions on legal positivism.

The first phase expresses a convinced defence of the 'legal naturalism/legal positivism opposition'; the second phase constitutes a moment of critical revision, at which the opposition is questioned, but not entirely abandoned; the third phase is marked by abandonment of this opposition and the working out of a conception that rejects this distinction, deeming it not to be significant and fertile from an explanatory point of view. But let us proceed in order, starting from the first phase.

In the *first phase* I refer to *Legal Reasoning and Legal Theory* (MacCormick 1978). In this book MacCormick expresses a very clear-cut position, presenting an almost exclusively methodological version of legal positivism that he substantially limits to some theses on the way in which the legal scholar should approach positive law. However, the premise to what he says is a real 'constant' in MacCormick's thought, and it is the affirmation that 'there is nothing antipositivistic about saying that law is not value free' (MacCormick 1978, 233).

With this affirmation MacCormick means not only that the law of our contemporary legal organizations incorporates values that are contained in legal statements incorporating principles, but also that the acceptance of the content of such principles, expressed by the members of those organizations – or at least by some of them – has a clear *ethical value*, in the sense that these people express adhesion to these contents because they aim to realize states of affairs that they deem 'correct' and/or 'good.'

In my view this is a point that it is absolutely possible to share. MacCormick develops it by extending the notion of acceptance of the legal system that Hart (introducing the *internal point of view* of the participants) certainly considered in too neutral and thin a way. With regard to this, MacCormick says that the point of being a positivist lies in the assertion that one does not have in any sense to share in or endorse values contained inside legal system in order to know that law exists, or what law exists' (MacCormick 1978, 233). In short, one can perfectly well – and perhaps has to – take into account the principles in force in a certain historical-institutional context without for this reason having to accept them; and MacCormick concludes by offering a minimal definition of legal positivism, which characterizes this tradition of scholarship 'minimally as insisting on the genuine distinction between description of a legal system as it is and normative evaluation of the

law which is thus described' (MacCormick 1978, 239-240).

Two further observations are required in order to pave the way for the critical observations that will follow in the next two sections. The first is that MacCormick, in this first phase of his thought, on one side identifies the cognitive discourse of the legal scholar as a 'merely descriptive' discourse, and on the other side, he does not distinguish, among these discourses, those expressing a commitment towards positive law and those expressing other kinds of evaluative appreciations. In this way it is rightfully inscribed in that conception that in some of my papers I have called *descriptivist* (Villa 1999, 90-95), a conception that is an alternative to the constructivist one, which MacCormick embraces in quite a clear-cut way in his latest works.

The second observation is that in the background to this definition there lies, very correctly in my opinion, a meta-ethical option of a markedly non-cognitivist character, which I considered in the preceding section (in a relativistic version) as the most plausible justification of a legal positivist conception. According to the 'early MacCormick', on the basis of ultimate values (of whatever type they are, and, therefore, also of those contained in legal principles) there are dispositions of the will and affective attitudes not further justifiable through reasons. It does not seem to me at all by chance, I will add, that this first definition of legal positivism – which in MacCormick's thought expresses the greatest distance between legal positivism and legal naturalism – is accompanied by a meta-ethical option of a noncognitivist character, precisely signalling the close connection that exists between the two options.

In the *second phase* I include the works published by MacCormick in the 1980s and in particular *H.L.A. Hart* (MacCormick 1981) and *An Institutional Theory of Law* (MacCormick and Weinberger 1986).

In the work on Hart, alongside the methodological definition of legal positivism (which he had already given previously and which he here reaffirms), MacCormick places the ontological one too, which bases law exclusively on social practices. In this connection, he gives a definition that includes both the thesis of law as a human product and that of the absence of a necessary connection between law and morality (but the two theses are not clearly connected to one another). In this sense, according to MacCormick, legal positivism expresses the thesis that 'all laws owe their origin and existence to human practice and decision concerned with the government of a society, and... they have no necessary correlation with the precepts of an ideal morality' (MacCormick 1981, 6 ff).

In *An Institutional Theory of Law* MacCormick further specifies the thesis about legal positivism that I have called *ontological*. He presents, as the 'first tenet of positivism', the thesis that 'the existence of laws is not dependent on their satisfying any particular moral values of universal application to all legal systems' (MacCormick and Weinberger 1986, 128), which, according to him, can be derived from Austin's well-known affirmation that 'the existence of a law is one thing, its merits or demerits another.' Here again, one can notice the presence of that confusion between ontological level and methodological level that I pointed out in the previous section. The fact is that Austin's thesis would be all right as a *methodological thesis*.

Secondly, MacCormick derives from the 'first tenet' a 'second tenet of

positivism', which is substantially the *social thesis*, according to which 'the existence of laws depends upon their being established through the decisions of human beings in society' (MacCormick and Weinberger 1986, 129). Actually, as I will observe later, the 'second tenet' logically has priority over the first one. It is precisely from the thesis that law depends on contingent social practices that it is possible to derive the thesis that the existence of law does not depend on the satisfaction of universal moral values, and not vice versa.

In this second phase, however, taking a critical attitude to Hart, MacCormick further reaffirms the thesis that moral values enter into our legal systems, precisely because inside them there are principles serving to realize moral values. The recognition of this presence now begins to worry MacCormick, because it throws serious doubts (in my opinion unjustified, as I will say afterwards) on the 'first tenet' of legal positivism, according to which the existence of law would not depend on moral reasons. MacCormick resolves them once again, provisionally, jumping from the ontological level to the methodological one: the fact that the members of the legal community express moral preferences does not imply that the scholar too has to do it in his 'descriptive' activity. Incidentally, looking carefully at the matter, one can observe that these are two different issues: one thing is the issue of the connection (necessary or otherwise) between law and ethics; another thing is the issue of what the methodological attitude of the legal scholar has to be.

In general, in this second phase it is the whole thesis of the opposition between legal naturalism and legal positivism that starts to lose weight and importance in MacCormick's thought. In *An Institutional Theory of Law*, as an argument against this opposition, he uses the fact that in Great Britain today something can only become compulsory by law if it can be justified through reasonable value judgments. According to MacCormick, recognizing this brings legal positivism very close to contemporary legal naturalism, for instance in Finnis' version, even though an important point of dissent remains: namely, the issue of the absoluteness and objectivity of values, on which however MacCormick does not dwell (and this in itself can be interpreted as a sign of another element of doubt regarding his previous positivistic formulation).

As regards the *third and last phase*, which covers the period from the 1990s to the present, I will primarily use the works *Natural Law and the Separation of Law and Morals* (MacCormick 1992), *The Ideal and the Actual of Law and Society* (MacCormick 1997b) and, of course, *Institutions of Law* (2007a).

In this third phase MacCormick's thought becomes much more complex and hence requires more marked summarisation: I will therefore simply highlight some fundamental profiles of the conception of legal positivism recently expressed by MacCormick.

A *first profile* is characterized by the fact that in the most recent years in MacCormick there is much more marked attention to the issue of legal knowledge, and therefore of the possible cognitive value of the activity of legal scholars. The recognition of the importance of such qualification blends with adherence to a constructivist model of knowledge. MacCormick associates the conception of epistemological constructivism, applied to the study of law, with that of an investigation that *rationaly reconstructs* what would otherwise be the

‘multiform chaos’ of legal experience, imposing an order on it (MacCormick 2005, 134-135). The general idea that he communicates through these affirmations is that scholars ‘reinterpret phenomena as parts of a coherent and well-ordered whole’ (MacCormick 2005, 134). What we would see, if we observed without a ‘background theory’, would be a ‘chaotic flux of activity and process’.

A *second profile* is that of the role of values and value judgments within legal knowledge. Here it is important to distinguish three different issues, which MacCormick tends to confuse but which are not logically connected.

A *first issue* is that of the moral value possibly attributable to positive law, in relation to the fact that law, in MacCormick’s opinion, has a moral meaning for officials and for at least a part (those that express full acceptance) of the members of the given legal community. MacCormick reaffirms this rather clearly in *Institutions of Law*, when he radically contests the idea that ‘law or its doctrinal exposition can be in any interesting sense ‘value free’ (MacCormick 2007a, 304). The fact that he does not, however, appropriately distinguish, in that context, between ‘law’ and its ‘doctrinal exposure’, introduces an element of conceptual confusion that is destined to be of weight in the continuation of his analysis.

In any case, in these affirmations one perceives the influence of the thought of Finnis and Dworkin, but it is above all Finnis and his thesis of *focal meaning* of law (Finnis 1980, 12-18) that influences MacCormick’s positions. What happens is that MacCormick’s previous theses are further corroborated by the appeal to some theses by Finnis on *focal meaning*, a thesis that supplants, in MacCormick’s theory, Hart’s *central case*. According to Finnis (and MacCormick), some examples of human activities are ‘more central’ examples than others, because they better exemplify the values towards which the enterprise is oriented, and therefore only the theory that produces the most attractive account of what has value for human beings, within that given practice, can give true knowledge of that field of experience.

In more specific terms, for Finnis (and MacCormick), the explanation of what counts as law depends on the adoption of a point of view on what count as good examples, central ones, from the point of view of value, of the kind considered; and this implies having a vision of those goods towards which the practice in question is directed. On this subject MacCormick says that ‘laws, like other social institutions, are fully intelligible only by reference to the ends or values they ought to realize, and thus by reference to the intentions that those who participate in making or implementing them must at least purport to have. This does not entail any acceptance of substantive moral criteria as criteria of legal validity, but it does involve acknowledging the moral quality of the relevant ends and values, namely justice and the public good’ (MacCormick 1992, 113). One of the most important values (an absolute value?) of law is that of *legality* (which can be considered as a part of moral good), destined to remain stable in time, while other legal values can be the object of clashes and disputes. This presupposes that the participants have a ‘sense of good’, and, therefore, the ability to formulate judgments on what is good for them. In other words, the activities of the various subjects that operate within the legal system can only be justified on condition that some reasonable conception of justice is implied by

their own activities. One cannot sincerely participate in the legal enterprise without having an orientation towards these values. In MacCormick's words, 'a certain pretension to justice, that is, a purported aspiration to achieve justice...is necessarily evinced in the very act of law-making in the context of a law-state' (MacCormick 2007a, 276).

*A second and different issue* is the strictly methodological one linked to what, in this situation of 'evaluative contamination', the jurist's attitude towards his object should be. Here the question is: must this attitude in turn be evaluative or not?

Unfortunately, we are forced to observe that the later MacCormick's answer to this question is not at all clear. He oscillates within a spectrum of positions which has, at one extreme, the thesis of the persistent non-evaluative dimension of the discourses of legal scholars (even in a situation in which among legal materials there are values and value judgments), and, at the other extreme, the thesis that evaluative contamination of the object would seem to require further evaluative commitments for them. But let us proceed in order.

First of all, the common presupposition of this analysis by the 'later MacCormick' is that the activity of scholars represents a sort of *second line* in relation to the activity of professional participants (MacCormick 2007a, 5-6); an activity that, however, is 'inside the system' (we are talking about *observers from within*), and that therefore requires a certain degree of *engagement*. What MacCormick suggests here, in short, is a sort of *mixture* between *detached description* and *value oriented activity*.

Setting out from this common starting point, in his latest works MacCormick has made a certain number of affirmations that are not entirely consistent with one another. I spoke, above, of two extremes of a spectrum of positions. On one side, there are some affirmations that maintain that nothing changes in the attitude of neutrality with which the law scholar should present himself, even if he is forced 'to have dealings with values.' From this point of view he says (in MacCormick 1997b) that the values discussed are always 'imputed to law' as its values, and not appreciated by the scientist as his own (MacCormick 1997b, 15 ff). The scholar, it is true, should opt for the 'best set of values' that can be imputed to law, but should not commit himself to these values himself. Undoubtedly, in this way the scholar, precisely because he is engaged in his activity, would also show an orientation towards a value; but it would be a 'truth value' and not a practical value.

Subsequently, however, MacCormick seems markedly to attenuate the force of these affirmations, above all because he comes up against the problem of the richness and possible incoherence and contestability of the materials evaluated that the scholar deals with. The presence of these elements would require of the scholar a critical account, selection and rectification of the material investigated. In MacCormick's words:

It is undoubtedly controversial what function should be ascribed to law in general or to particular laws...Failure to confront and account openly for value involved, and to defend one's own proposals as to what the relevant values are, may confer on work about law an apparently greater objectivity than if a proper openness were practiced. But it is this concealment of value-orientation, not its open avowal, that it is ideological in a sinister sense. (MacCormick 2007a, 305).

A *third issue* is that of the way in which, at the meta-ethical level, we should look on the question of the justification of these values and these value judgments. For me, this is a crucial point, seeing that I have characterised legal positivism, from the meta-ethical point of view, as a relativistic conception. In this case too, MacCormick's thought is rather changeable and not very perspicuous. Indeed, he frankly says at one point (MacCormick 2005), that this is an 'open problem.' He clearly affirms, it is true (I would almost say 'unfortunately'), that he has renounced non-Humean cognitivism, but admits at this point that he has the onus of providing an alternative explanation (MacCormick 2005, 30).

Here I do not understand clearly what type of position he wants to maintain regarding this issue. I will simply endeavour to put order in some affirmations of his. He clearly denies that for some fundamental value judgments we can speak of 'self-evident values' (MacCormick 1992, 125-129); a situation of this kind would create serious obstacles to the principle of tolerance. However, on various occasions, he does not rule out the possibility that in some ethical and legal controversies there can be 'correct answers', even if we fail to find them (MacCormick 1996, 166-167).

A *third and last profile* concerns MacCormick's (definitive?) position on legal positivism and on the 'legal positivism/legal naturalism' opposition. What remains of the original opposition in the later MacCormick?

Examining his affirmations in *Institutions of Law*, we would say that almost nothing is left. In this context, MacCormick challenges a pillar of legal positivism, affirming that 'provisions which are unjustifiable by reference to any reasonable moral argument should not be considered valid as laws'. What he substantially means here is that if the normative content of a given disposition cannot be justified by one of the possible conceptions of justice (for instance from the point of view of human rights) which can be advanced by reasonable people, then this content could not be considered as *legal* (MacCormick 2007a, 242).

Besides, MacCormick himself affirms that nowadays he moves in the orbit of a nonpositivist or at all events post-positivist position (MacCormick 2007a, 278). I believe it can be said that in his position today there are aspects related to legal positivism and aspects related to legal naturalism, but there is no longer a clear and recognizable opposition between the two traditions of scholarship. The dichotomy between legal positivism and legal naturalism does not reveal any important truth for him, an expression, as it is, of a thesis that prefigures a 'two-way-divided universe of jurisprudence' (MacCormick 2007a, 278), something which in his opinion it is no longer possible to share.

### 3. Some critical observations on value judgments

There would be a great deal to say, in the sphere of critical comments, on MacCormick's positions regarding all the issues raised, but unfortunately there is insufficient space for going into greater depth and detail. Hence, I will limit myself to some schematic observations. My comments will concern two themes: the theme of legal value judgments and the theme of the conception of legal positivism.



As regards the *first theme*, that of the relationship between value judgments and legal knowledge, I can only reaffirm what I said in the preceding section. MacCormick seems uncertain about the type of strategy to be undertaken in order to face this delicate problem, torn as he is between the desire to satisfy two opposite demands: recognizing, in the legal field too, the characteristic of objectivity that should characterise all cognitive discourses, objectivity that by and large he continues to link to the paradigm of ‘non-evaluative description’; and that of the presence in law of evaluative materials that are certainly not secondary (for instance, the principles that introduce fundamental rights), which would require of the observer a certain degree of evaluative commitment. It is a tension that remains unresolved, at least in my opinion.

For my part, I think that MacCormick could have been more daring, seeking in constructivism (Putnam, Goodman, Hesse) the epistemological resources in order to recognize how it is possible today to challenge the principle of value-freedom of knowledge from a general point of view, and also to put into question, but in a different and stronger sense, the principle of value-freedom of legal knowledge. In my opinion, this recognition implies two different theses. It first of all implies, from a general point of view, the removal of a methodological prohibition, the one issued by the value-freedom principle.

This first result could be dubbed the ‘minimal thesis on value-judgments.’ What this thesis amounts to so far is, *negatively*, only that there are no persuasive epistemological reasons which could support the presence of this prohibition. But the possible *positive* presence of value judgments, in one or the other domain of knowledge, is something that must be ascertained or argued afresh, with the intervention of different arguments. In other words, in order to get a further, and more important, result (and this represents my second thesis), i.e., that of arguing in favour of *the necessary presence of value judgments in legal knowledge*, we must build a much more complex and articulated argument.

It is not possible here to present this argument in detail (for a more detailed analysis, see Villa 1997, 447-477). I can only briefly sum it up. In the field of legal experience, as in that of all human sciences, the subject already contains values and value judgments. Even values, as far as they are objects of knowledge, have to be approached in a constructivist fashion; this means that they have to be selectively reconstructed and interpreted, in the light of a given conceptual framework. In other words, even values have to be carved up by the active intervention of legal knowledge: and this may require jurists choosing a privileged interpretation of their semantic content, establishing hierarchical priorities between them, highlighting some features of them, leaving other features in the darkness, etc. Think, for instance, of the complex situation in which jurists find themselves when the objects of their investigation are the evaluative content of the constitutional principles of a charter society. In these cases, their difficult task could be that of settling conflicts between different principles, or of deciding which of them is more relevant from an ethical point of view, or of balancing their different weight; and this could be done either for knowledge’s sake, or also for justifying or supporting some concrete decision by the courts. In any case, it should be clear that legal values (like values in general) are not equipped with self-identifying labels.

On this basis, we can in the end draw the final conclusion of the argument, i.e., that this interpretive and selective work, which, under the constructivist epistemological image, is needed by jurists in order to get adequate knowledge of these values, cannot suitably be done without requiring them to formulate *second order value judgments* (that is, value judgments referring to values), aiming to express the best possible appreciation of those values which are already present inside the legal system. Putting it very schematically, here the methodological slogan to be coined should be this: ‘you need values for dealing with values’.

Returning, now, to MacCormick’s theses, I find it impossible to accept his argument serving to save the neutrality of the cognitive discourses of jurists, according to which there would be a difference between value judgments of a scientific character (for instance directed towards the value of truth) and value judgments of an ethical character. As a matter of fact, some legal philosophers (see, for instance, Dickson 2001, 32-33) advance this type of argument. It amounts to saying that we should distinguish between *committed value judgments*, coming from inside a given legal system, and *neutral evaluations*, coming from the outside, which are close to traditional scientific values (truth, simplicity, etc.). To sum up, the latter express judgments of the relevance and importance of the phenomena to be investigated, but do not imply, after all, any kind of ethical appreciation.

It seems to me that here again we end up peeping into the old demarcationist position of traditional positivism, according to which ethical evaluations always imply adopting an internal position and taking a stand in favour of – or against – the given legal system. From this point of view, evaluating ethically is always a step in the practical process of justifying or of ‘accepting/refuting’ something. The external location, on the contrary, is that which is at the disposal of the scientist (or ‘para-scientist’) who neutrally describes phenomena (even normative phenomena).

To this position, I respond with two kinds of criticism. With the first one, I point out that there is no logical or conceptual connection between adopting an internal or committed position and expressing ethical value judgments. It is perfectly possible, that is, to stand outside the legal system, and, therefore, to adopt an uncommitted point of view, and to be almost forced to express ethical value judgments in order to reach a better understanding of the value-laden material contained in that legal system.

With the second criticism, I raise many doubts on the distinction between ‘ethical’ and ‘merely evaluative’, which seems to me quite *ad hoc*, that is, drawn only for the reason of saving legal knowledge from the intrusion of strong value judgments. I do not think that it is possible to draw a clear line, of a qualitative character, between different value judgments with specific regard to their content; I believe, on the contrary, as I will show in a moment, that a viable distinction should only regard the function of value judgments. To strengthen this point, it can be useful to make reference to Putnam’s thinking. According to Putnam, all values are *in the same boat*; he says very forcefully that ‘if values seem a bit suspect from a narrowly scientific point of view, they have, at the very least, a lot of “companions in guilt”: justification, coherence, simplicity, reference, truth, and so on, all exhibit the same problems that goodness and kindness do, from an epistemological point of view’; and he concludes that ‘we should recognize that all values, including cognitive ones,

derive their authority from our idea of human flourishing and our idea of reason' (Putnam 1981, 140-141).

Of course, taking up this position in the legal field, a position which is openly critical of the principle of value-freedom, requires a series of specification and distinctions that it is not possible to make here. One, however, seems particularly important to me, and I want to mention it. I am talking about the distinction between *value judgments exhibiting a cognitive function*, whose task is that of contributing to a better understanding of a given legal system; and *value judgments exhibiting a strong creative function*, whose task is to import values from the outside, in order to change the legal system in the direction of the protection of ethical values or of the pursuit of political ends, values and ends which should not be considered at the moment as part of the system. But, of course, these 'membership judgments' have always a constructive character, in the sense that they do not neutrally describe values or ends as something autonomously existing in reality, like pieces of the 'furniture of the universe'.

On the contrary, value judgments having a cognitive function (as long as they are introduced with the goal of getting a better knowledge of a given legal system) cannot come freely from the outside as the result of a completely discretionary intervention of the jurist, perhaps coloured by strong political or ideological motivations.

I would like to add, lastly, that, according to what I have just said, the position that I have tried to defend on this point cannot at all be qualified as that of a paleo-positivist or a disguised legal naturalist. My approach remains firmly, I believe, in the legal positivist camp, because, among other reasons, it appreciates and protects, to the highest possible degree, one of the most important features that legal positivism has ever attributed to the operations performed by jurists (something which MacCormick too has openly recognised and that remains the residual component of his legal positivism), namely, that one of the most important tasks of jurists is that of giving an objective knowledge of positive law, a knowledge that is independent both of its moral acceptance or refusal, and of its ideological manipulation. I would like to stress again, at the end of this section, that the difference between a positivist and a naturalist no longer lies in the fact that the former thinks that positive law can be described without expressing value judgments, and the latter thinks that positive can only be so described. The difference lies, on the contrary, in the kind of justification that legal positivism and legal naturalism think, respectively, can be offered of these kinds of judgments. Here, the alternative is between *objective* (legal naturalism) and *relative* (legal positivism) justifications, i.e., between a justification which founds itself on objective values and a justification which rests on values that are only contingently valid, i.e., valid relatively to a given context.

As regards the *second theme*, that of MacCormick's general conception of legal positivism, my personal impression is that the most solid and consistent position among those expressed by him is by and large the original one, though in a context dominated by epistemological and theoretical premises of a traditional kind. This being the case, my personal preference would be for affirmation of a *clear conceptual opposition* between legal positivism and legal naturalism, accompanied by epistemological and theoretical premises that are more up-to-date than those expressed by MacCormick in *Legal Reasoning and*

*Legal Theory.*

In any case, I want briefly to recapitulate the criticisms I have already made of the positions expressed by MacCormick in his early works. This series of criticisms concerns, as a matter of fact, the phase in which he accepts, more or less fully, the opposition between legal positivism and legal naturalism, because on the subsequent phases I have previously expressed my criticisms.

The *first criticism* is that he fails at all events to make a clear distinction between the level of concept and the level of conceptions, and therefore does not show precise awareness of what remains stable in legal positivism and what is subject to change.

The *second criticism*, connected to the first one, is that in MacCormick's thought there is no distinction between the two different ontological and methodological levels of the definition of legal positivism. This gap produces those logical jumps that I have already spoken of and to which I will not return. But even remaining on the ontological level, it is not clearly specified that the thesis that logically has priority, of the two that he brings into play, is the *social thesis*, and, hence, that from it that there derives, as an implication, the thesis of the separability between law and morality. A further proof of this misunderstanding is given by the fact that, fearing (without reason) that the thesis that certain moral values penetrate into law can challenge the thesis of separability, he tries to resolve the difficulty by jumping from the ontological level to the methodological level: thus, he maintains that the fact that the members of the legal community express moral preferences does not imply that the scholar has to do this too. As I have said, however, these are two different issues: one thing is the issue of the connection (necessary or otherwise) between law and morality, while another thing is the issue of what the methodological attitude of the legal scholar has to be. It seems to me that on the first issue the *inclusive* versions of legal positivism (Waluchow 1994) have many arrows in their sheaths, and are able to show that the reference of a given legal organization to certain values as an integral part of positive law is, by and large, a contingent element, which depends on the criteria of recognition accepted inside that legal system.

The *third criticism* is linked to the fact that MacCormick fails to stress that the true crucial element on which to found the opposition, at the ontological level, between legal positivism and legal naturalism is set at the meta-ethical level and concerns the distinction between absolutism and relativism. Besides, the proof of the importance for MacCormick himself of this type of meta-ethical justification is given by the fact that the phase in which he abandons the non-cognitivist meta-ethical premises coincides with the phase in which he seriously starts to challenge the significance and importance of the opposition between these two traditions of scholarship.

The last criticism, already mentioned several times, concerns the methodological level of the definition. MacCormick fails to distinguish the *conceptual thesis*, crucial for each legal positivist, which consists of the distinction between 'describing positive law' and 'taking a stand on it', from the *thesis concerning the level of conceptions*, a thesis that some – but certainly not

all – positivist scholars stress, according to which cognitive discourse has to be rigorously non-evaluative in any case. Failure to recognise this distinction causes further problems for his theory; and in this case too, not by chance, as soon as his trust in the non-evaluative character of the cognitive discourses of legal scholars starts to waver, his taking side with legal positivism starts to waver too.

By way of conclusion, over and above these specific critical comments, I can only reaffirm that MacCormick's conception remains a fundamental turning point in contemporary analytical legal theory, or, perhaps, as one might also say, in contemporary analytical legal positivism, considering that MacCormick's position, at least from the methodological point of view, can still be placed in the field of legal positivism.

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