In defense of a non-positivist *separation thesis* between law and morality[1]

José Manuel Aroso Linhares

When we consider the problem of identifying existent law and the *constituens* of legal content (or, in the words of *Raz*, the problem of "reasoning about what the law is"[2]) from the perspective of a specifically Hartian "foundational conventionalism"[3], there is certainly an answer – the one which confirms *the social fact (source) thesis* – which, in making a claim for the existence conditions of legal normativity, constructs (draws) an authentic *common ground*. And yet, the univocity of this claim – defending the "necessity" of "social facts" (either directly as *determinants* or indirectly as *determinants of the determinants* of the content of Law[4]) – is not sufficient, on the one hand to exclude divisions in the positivist camp – the counterpoint between *determinants* and *determinants of the determinants* (ranging from *strong* to *soft* conventionalism, if not from "ptolomaic" to "pickwickian" positivism[5]) is already an eloquent sign of these divisions! –, and on the other hand, to avoid some troubling borderline issues, whose tentative responses emerge in a challenging *no man's land* between positivism and non-positivism.

My aim in this essay is to explore one of these issues, so that we may understand how a set of allowed answers, conceived of in an explicit conventionalist idiom, establish relevant neighborhood relations with answers or sets of answers presupposing alterna-

---

[1] Paper presented in Washington at the 27th IVR World Congress [*Law, Rationality and Emotions* (Georgetown University 27 July/1 August 2015)/Special Workshop nº 36, "The Normativity of Law", 30 July]. It was written as an integral part of the activities of a research group [("O Direito e o Tempo" – *Law and Time*)/Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra – http://www.ij.fd.uc.pt/index_en.html] and concerns a specific strategic program [the project "Desafios Sociais, Incerteza e Direito" – "Social Challenges, Uncertainty and Law" (UID/DIR/04643/2013)]. The opportunity to present the corresponding working paper in Washington was due to the possibilities generously created by two different institutions: *Fundação Luso-Americana para o Desenvolvimento* – FLAD (http://www.flad.pt/), which subsidized the traveling, and *Fundação para a Ciência e a Tecnologia*– FCT (http://www.fct.pt/), which (in the context of the referred project) covered the registration fee and specific accommodation costs.

[2] "Reasoning about what the law is, reasoning to the conclusion that the content of law is such and such, reasoning whose sole premises are that the law is such and such and whose (…) conclusions merely state the content of existing law…" *Raz*, Postema on Law's Autonomy, in: *id*, Between Authority and Interpretation. On the Theory of Law and Practical Reason, 2009, 376–379.

[3] In *Postema*'s words, A Treatise of Legal Philosophy and General Jurisprudence, vol. 11: Legal Philosophy in the Twentieth Century: the Common Law World, 2011, 484.

[4] I am obviously alluding to *Coleman*'s formulations, introduced in Beyond Inclusive Legal Positivism, Ratio Juris 22 (2009), 359 (384–386), but also to the distinction between *semantic first-order* and *meta-semantic second order* views that he developed in The Architecture of Jurisprudence – I, The Yale Law Journal 121 (2011), 5 (68–72) available at http://www.yalelawjournal.org/pdf/1009_3fnvkd8i.pdf (accessed in May 2012).

[5] In *Dworkin*'s words: see Thirty Years On, in: *id.*, Justice in Robes, 2006, 187 ff.

tive *alien* interpolations – i.e. questions or issues that only a non-conventionalist perspective (as the core of a specific non-positivist understanding of law) seems able to formulate and justify. The sequence I propose – as if mobilizing the possibilities of a plausible (albeit distorted and asymmetrical) *mirror form* – explicitly follows this path, which means beginning with the promised borderline question (or chain of questions) and an initial ensemble of permitted (although not always mutually compliant) responses, respecting the conventionalist point of view (I.), before relating this ensemble to another one, and through the latter to an alternative problem (submitted to the possibilities and claims of a globally different idiom) (II.). A brief conclusion will follow (III.).

I.

The promised borderline issue explores legal practices and discourses by considering the tensions between stability and change, necessity and possibility (-disposability), if not directly the *dogmatic / critique (dogmatically presupposed / critically reflected)* binomial – which means combining two different concerns (and the corresponding selective projections):

(a) the first (a global concern, presumably reflected in the "general" theoretical reconstitution of the "nature" of the law[6]) addresses the practices of "following, determining and fixing" the Rule of Recognition, and these practices in their constitutive connection with the legal (law-identifying and law-applying) officials' internal point of view ("acceptance of the rule of recognition from the internal point of view by officials is a conceptual requirement of the possibility of law"[7]);

(b) the second (a specific concern, eventually projected in particular contingent concepts of law) considers the role which "normative, evaluative or moral facts"[8] are allowed to play in "reasoning about what the law" is or, more precisely, discussing the possibility of particular legal orders in which following, determining and fixing the Rule validates an effective *inclusion* of moral tests or criteria, if not an authentic *incorporation* of moral principles.[9]

---

[6] The *nature/concept* counterpoint is presupposed here in the sense developed by *Raz* in the first three essays included in: *id.*, Between Authority and Interpretation, 2009, 17–125."The general theory of law is universal for it consists of claims about the nature of all law, and of all legal systems, and about the nature of adjudication, legislation, and legal reasoning, wherever they may be, and wherever they might be …" (ibid., 91). A plausible alternative (even though not equivalent in its analytical outcomes) would involve mobilizing *Marmor*'s distinction between "deep conventions" (determining "what law is") and "surface conventions of recognition" ("that are specific to particular legal systems"), see How Law is Like Chess, Legal Theory 12 (2006), 347 (368–369).

[7] *Coleman*, The Practice of Principle. In Defence of a Pragmatist Approach to Legal Theory, 2001, 76.

[8] *Coleman*, The Yale Law Journal 121 (2011), 47, 62.

[9] In this essay I use a map of critical positivism combining *Waluchow*'s formulations (*separation / separabilility*) with *Kramer*'s systematization (distinguishing between *inclusive legal positivism* tout court and *moderate* and *robust "*forms" of *incorporationism*): see *Waluchow*, Legal Positivism, Inclusive versus Exclusive, in: *Craig* (ed.), *Routledge Encyclopedia of Philosophy*, 12 December 2006 – available at http://www.rep.routledge.com.libaccess.lib.mcmaster.ca/article/T064 (accessed in January 2012); *Kramer*, Where Law and Morality Meet, 2004, 2–9.

These projections, in fact, generate different (albeit complementary) questions or chains of questions, which may be exemplified in the following sequences:

(c) Is the intertwining of the Major Rule and officials' practices — the former considered a «form» of "judicial customary Rule" ("existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts")[10], the latter involving a convergence of "repeated behaviors" and "critical reflective attitudes" of "acceptance"[11] – conceivable of (or at least theoretically reconstitutable) as a kind of productive dynamic circle (mobilizing old and new, dogmatically binding presuppositions and irreducible open experiences)? In other words, is it possible to preserve the identity of *the* Rule as an autonomous "propositional entity" (responsible for explicit "systemic-secondary reasons") whilst simultaneously and inextricably treating it as a governing and guiding normative *context* and a factual *correlate* of the convergent social practices (and their reflective attitude of acceptance)? Moreover, if it is possible, does this treatment (whilst highlighting the different dynamics of preservation and change attributed to legally relevant conventions[12]) correspond to a universally necessary feature (an explicit component of the *nature* of law)?

(d) Do the possibilities of sustaining or refuting the tentative conjecture that closes the first sequence (with its claim to universality) significantly change when we introduce the particular (parochial) condition (and the institutional circumstances) of a Rule of Recognition which effectively identifies "moral tests" or "moral correctness" as plausible criteria for legal validity?[13] To be more precise, is the intelligibility of the *nature* of the Rule (as a governing and guiding *context* and as a factual *correlate* of officials' behavior and attitudes) positively or negatively affected when we admit that certain «systems of law» do practice an identification of (legally binding) content which extends (or is manifestly allowed to extend) beyond the limits of *pedigree criteria*? Does the contingent relevance of normative or evaluative facts – or the universal consecration of its possibility (which may be identified with the critical refuting of a strict *separation thesis*) – corroborate the tentative conjecture which relates the experience of the practical circle to the *nature* of *the* Rule, or does it contribute towards falsifying its

---

[10] *Hart,* The Concept of Law, 2nd ed., 1994, 256.

[11] *Coleman*, The Practice of Principle, 2001, 82–83: "The practice consists in a convergence of behavior and an internal point of view. (…) The internal point of view is a necessary element of the practice of a rule of recognition, and is therefore itself an existence condition of the rule. (…) There is no rule of recognition independent of convergent behavior toward which participants take the internal point of view (…). The critical reflective attitude is the internal point of view…".

[12] Different dynamics which are certainly highlighted by *Marmor's* distinction between the "two layers" of "conventional foundations", Legal Theory 12 (2006), 368–369.

[13] "[T]he rule of recognition may incorporate as criteria of legal validity conformity with (…) specific (…) moral principles or substantive values. (…) [As] I have said, in addition to such pedigree matters the rule of recognition may supply tests relating not to the factual content of laws but to their conformity with substantive moral values or principles. (…) [This] interpretivist test (…) [corresponds to] a complex "soft-positivist" form of (…) a criterion (provided by a rule of recognition) (…) identifying principles by their content not by their pedigree. (…) Dworkin would certainly reject my treatment of his interpretive test for legal principles as merely the specific form taken in some legal systems by a conventional rule of recognition whose existence and authority depend on its acceptance by the courts …" *Hart*, The Concept of Law, 2nd ed., 1994, 250, 258, 265, 267. "[M]oral values and principles count among the possible grounds that a legal system might accept for determining the existence and content of valid laws (…), a legal system's rule(s) of recognition [can] contain explicitly moral tests or criteria for the legal validity of (…) legislation …" *Waluchow*, Inclusive Legal Positivism, 1994, 82.

informative content or, at least, to de-characterizing its main elements? In another words, is the convergence (or equilibrium) between the *conventionality thesis*, the *social facts thesis* and the *discretion thesis* – indispensable to the autonomous intelligibility of the Rule (as a secondary rule which supervenes on a practice accepted from an internal point of view) – reinforced or significantly damaged when we admit that the *game* should be played with the addition (if not the overlapping) of an authentic (now positively formulated) *separability thesis* ("legality and morality are only separable, not necessarily separate"[14])?

These examples are sufficient to enable us to understand that whilst the borderline nature of the issue is already present in the simple (global) representation of the *circle* [(a)–(c)], the challenges to the positivist camp (intensifying the neighborhood to the border) are considerably increased with the addition of the self-reflective questions allowed (when not imposed) by the *separability thesis* [(b)–(d)]. However, this increase far from ensures a homogenous experience: when we distinguish between the types of configurations assumed by the defense of the *separability thesis* – ranging from *inclusivism by enactment* (within the limits of *exclusive positivism*) to the most *robust* of the interpretations of *incorporationism*, and including the interim steps attributed to *inclusivism* tout court and the *milder* version of *incorporationism* – and when we relate these different configurations to the thematic core – the role played by officials in the circle of stability and change – it is, in fact, as if the neighborhood on the border of *non-positivism* has moved closer and closer, demanding a more active and complex exercise in resistance and demarcation, an exercise which cumulates (without return!) in *Coleman*'s "thoroughgoing version".[15] Instead of addressing the spectrum of answers that the hypothetical questions (or chains of questions) (c)' and (d) – including (c) alone, and (c)' plus (d) – presumably merit within the positivist camp (the previous rough allusion to the basic positions indicates that this task would be impossible here and now!), I will attempt to reconstitute a global common response or responding trend. Why a responding trend? Without doubt, because the reaction to be considered amounts less to a positive answer than the drawing of a fixed (not-to-be-crossed) red line. Why a global one? Not only because all the heirs of *Hart´*s critical positivism seem to agree on the need for this limit (albeit not always explicitly), but also because the corresponding red line is expected to circumscribe all the plausible answers, both those provoked exclusively by the questions exemplified in (c) [which reject component (b)] and those responding simultaneously to (c) and (d).

What is the responding trend in question? With the help of different indispensable voices (occupying different positions-*visées* in the spectrum of critical positivism), I would say that it has directly to do with the *rule* category, seriously taken as a conventional social communication of a "standard of conduct" making "maximal or minimal use of general classifying words".[16] The limit in question comes precisely from the presupposition that the intelligibility of the rule, even when we are focusing on the recognitional practice of law-applying officials [(a)–(c)] or when we admit that the Major Rule may in some legal experiences validate principles [(b)–(d)], depends on the self-subsistence of these classifying words, i.e. on the claim that (to a greater or lesser

[14] See *Waluchow*, Legal Positivism, Inclusive versus Exclusive, in: *Craig* (ed.), *Routledge Encyclopedia of Philosophy,* 12 December 2006.

[15] This formulation is by *Kramer*, Where Law and Morality Meet, 2004, 31.

[16] *Hart,* The Concept of Law, 2nd ed., 1994, 125–126.

extent) the core normative content of these words is open to rational autonomous treatment, which may (even in "communications by authoritative example") be pursued by abstracting from the particular situations which are expected to be «instances» of those rules (i.e. from concrete cases, whose *classifying labeling* may be the issue under).[17] It is as if the formalist (normativistic) scission between interpretation and application – or at least the possibility of treating the former[18] as the construction of an abstract judgment – has found in *Hart*'s legacy a guarantee of *minimal* (but structural) survival, the *traces* of which can immediately be found in a sequence of different (heterogeneous) devices. I shall allude to four of these devices, which will involve exploring the entire spectrum of critical positivism [(1)–(3) / (4)–(2)].

I begin with two parallel distinctions, exemplarily attributable to the poles or endpoints of such a spectrum (*exclusive positivism* and the *robust version* of i*ncorporationism*) [(1)–(2)]:

(1) the first (again invoking the well-known formulations by *Raz*) corresponds to the major claim that «reasoning about law» (culminating in an autonomous juridical conclusion on the content of law) should be strictly separated from "reasoning according to law" ("reasoning about how legal disputes should be settled according to law"), namely specific judicial reasoning, with its contextualized interpretation[19];

(2) the second (explicitly mobilizing *Coleman*'s proposal)[20] argues that it is conceptually necessary (even when the capacity to impose "contentful criteria of validity"[21] is contingently established in a certain legal system) to distinguish between "what the convention is" and "what the convention requires in a particular case"[22], i.e. between the "content" of the Rule (as a "framework for interaction, coordination, planning, and negotiating"[23] or as a "joint commitment"[24]) and its "extension" (determining "what falls under it" or the possibilities and limits of its concrete "application") – so that we may conclude that only (moral) disagreement about the content is incompatible with the indispensable *thesis of conventionality.* In Coleman`s words:

> "The rule of recognition requires that officials converge in applying relevant moral standards to assess legality, not that they agree on what applying these standards requires in particular cases."[25]

> "Officials can and do disagree (…) about what [the rule] (…) requires of them (…) and this is perfectly compatible with the rule of recognition regulating a conventional practice, and thus with the rule of recognition being a conventional rule."[26]

---

[17] The formulations quoted are evidently by *Hart*, The Concept of Law, 2nd ed., 1994, 125 ff. With regard to *labeling*, see also *Hart,* Positivism and the Separation of Law and Morals, Harvard Law Review 71 (1958), 607.

[18] Or one previous purely cognitive (and, as such, decontextualized) dimension of the first.

[19] *Raz*, in: *id*., Between Authority and Interpretation, 2009, 376–379; see also On the Autonomy of Legal Reasoning, in: *id.*, Ethics in the Public Domain, 1994, 310 ff.

[20] At least when we consider a certain *stage* in his proposal (before the self-critical approach introduced in Ratio Juris 22 (2009), 359 ff., and the reorganization assumed in The Yale Law Journal 121 [2011], 5 ff.).

[21] *Coleman*, Incorporationism, Conventionality, and the Practical Difference Thesis, in: *id.* (ed.), Hart's Postscript. Essays on the Postscript to "The Concept of Law", 2005, 130.

[22] Ibid., 131, note 46.

[23] *Coleman*, The Practice of Principle, 2001, 80 (note 12), 157.

[24] See *Postema*, Legal Philosophy in the Twentieth Century: the Common Law World, 2011, 511 ff.

[25] *Coleman*, Ratio Juris 22 (2009), 376.

[26] *Coleman,* The Practice of Principle, 2001, 157–158.

> "Disagreement about what the rule requires in a particular case is compatible with the rule of recognition being a social convention."[27]

Those first two distinctions [(1) and (2)] are, in fact, crucial to understanding the aforementioned red line (a line drawn under the convergent auspices of the *conventionality* and *social facts theses*, correctly balanced with the *discretion thesis*): on the one hand, in order to acknowledge that the representation of the officials' practical circle [(a) and (c)] will be permitted only if (and to the extent that) it does not affect the autonomous cognitive identification of the legally relevant authoritative materials ("establishing what has been done by the authorities"[28]); on the other hand, in order to confirm that even when we admit the possibility of a rule of recognition embracing moral conditions [(a) plus (b), (c) plus (d)], the only moral disagreements permitted are those concerning application – since the coordinating or cooperation activities which correspond to the content of the Rule are not, in fact, conceivable as "normative facts" ("facts about what is good, right, valuable, just, and fair") but as strict "social facts" ("facts about what legal officials and others say, do, believe and intend"),[29] and facts that necessarily "determine the determinants of legal content".[30]

There are, however, two other complementary devices [(3)–(4)], proceeding (certainly not by chance!) from intermediate, more or less symmetrical, positions-*visées* in the spectrum, both addressing the challenge of the so-called *practical difference thesis* ("legal rules must, in principle, be capable of securing conformity by making a difference to an agent's practical reasoning"[31]) and both contributing to specify the meaning of stability (or stabilizing practices), either when only element a) is admitted or when the proposal involves elements a) plus b):

(3) the first is introduced by *Shapiro* (as a defense of practical difference) in order to reject the arguments of inclusive positivism ("moral rules validated by an inclusive rule of recognition cannot be action guiding in the manner in which legal rules are supposed to be action guiding"[32]) – which means reconstituting the complex relationship between law and morality (necessarily separated when we identify law's content, necessarily

---

[27] *Coleman,* in: *id.* (ed.), Hart's Postscript. Essays on the Postscript to "The Concept of Law", 2005, 131 (note 46).

[28] *Raz,* On the Nature of Law, in: *id.*, Between Authority and Interpretation, 2009, 116.

[29] *Coleman*, The Yale Law Journal 121 (2011), 65.

[30] *Coleman*, Ratio Juris 22 (2009), 384–385, defends the proposition "Necessarily social facts determine the determinants of legal content" as the "core claim" of Inclusive Legal Positivism (ILP). In The Yale Law Journal 121 (2011), 66–67, the exploration of the distinction between semantic and metasemantic levels (situating exclusive and inclusive approaches on different compatible levels) allows him to prefer this (meta-semantic) reformulation of ILP's core thesis: "Only *social facts* determine which facts contribute to the law having the content that it does". This preference is also defended in confront with another plausible formulation, which is: "*Necessarily,* only social facts contribute to the law having the content that it does." The reason is the following: "[W]ith the exception of Hart, I know of no inclusive legal positivist who holds that it is a necessary truth that the determinants of legal content are fixed by social facts. (…) All to my knowledge – and certainly me in particular – introduce inclusive legal positivism as a way of characterizing positivism, not as a necessary truth about law. Again, Hart may be the exception."

[31] *Shapiro*, Law, Morality, and the Guidance of Conduct, Legal Theory, 6 (2000),129.

[32] This formulation, reconstituting *Shapiro*'s arguments, is by *Phillips*, Rescuing Inclusive Legal Positivism from the Charge of Inconsistency, Philosophy Theses, paper 81 (2011), 4 – available at http://digitalarchive.gsu.edu/philosophy_theses/81.

connected when we consider law's claim to a specific legal point of view[33]) and paving the way[34] not only for the identification of social planning with pedigreed norms (indispensable in grasping the old/new dynamics)[35] but also, in particular, for the decisive understanding of law's guidance as *planning* ("the legal rules of a particular system are just the general plans, or plan-like norms")[36], whose "logic" would be violated if a moral "deliberation on the merits" was constitutively allowed;[37]

(4) the second corresponds to the rejection of practical difference (i.e. to the rejection of this difference as an authentic "conceptual claim") justified both by *inclusivism tout court* and *moderate incorporationism*, in a way which reconciles *Waluchow* and *Kramer* (versus *Coleman*) – whilst arguing that compliance with morality or conformity with moral principles should be understood as a "necessary" ("though insufficient") "condition of validity"[38] – and which gives *Kramer* the opportunity to restore the practical difference as a "plurative and partly empirical claim" (confining "moral precepts" as "non source-based norms" to the "domain of exceptionality" of "hard cases")[39] – which, here and now (and still versus *Coleman*), certainly means corroborating the central thesis of *moderate incorporationism* that legal officials' disagreements, even when they are about application, may introduce a significant measure of irregularity into practices and, as such, compromise (sacrifice) not only the efficiency but also the existence of an authentic legal order.[40]

---

[33] *Shapiro*, Legality, 2011, pp. 186–187: "The legal point of view asserts that the norms of the legal system are legitimate and binding and hence that moral questions are to be answered on the basis of those norms. (…). The legal point of view always purports to represent the moral point of view even when it fails to do so."

[34] In a first step, it means indeed paving the way for the expected counterpoint of *amoral legal reasoning/judicial decision making* ("whereas legal reasoning is necessarily amoral, judicial decision making need not be"), ibid., 276.

[35] Ibid.: "The fact that judges routinely rely on moral considerations in such instances simply indicates that they are engaged in further social planning." *Shapiro*, Was Inclusive Legal Positivism Founded on a Mistake?, Ratio Juris, 22 (2009), 334: "The legal requirement that judges look to morality to resolve (…) [hard] cases is a mandate to engage in further social planning. The pedigree-less norms that they eventually apply, then, must be understood as the creation of a new plan/law, not the finding of an old plan/law. For if the old plan/law could only be found through moral reasoning, there would be absolutely no point in having such a plan/law."

[36] *Shapiro*, Ratio Juris, 22 (2009), 329. See specially *id.*, Legality, 2011, 118 ff., 195 et passim.

[37] *Shapiro*, Ratio Juris, 22 (2009), 334. This certainly does not exclude the important *moral aim thesis* (*id*., Legality, 2011, 170 et passim, 213 et passim), precisely arguing that that "the aim of the law is not planning for planning's sake" (ibid., 171), but rather planning "to rectify the moral deficiencies of the circumstances of legality" (ibid., 172).

[38] See very specially *Waluchow*, Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism, Legal Theory, 6 (2000), 45 (81): "We should not fear, along with Shapiro, that inclusive rules will somehow rob legal directives of any practical effect. Inclusive rules of recognition cite compliance with morality, or with specified moral principles as a necessary, though insufficient, condition o validity. In so doing, they permit rules valid under them to make a practical difference."

[39] *Kramer*, Where Law and Morality Meet, 2004, 59–64. "Then we should consider a milder Incorporationist rule of recognition which establishes that moral worthiness is sufficient condition or the status of norms as legal norms in hard cases that cannot be resolved by reference to legal norms from other sources." (ibid., 28).

[40] Ibid., 27–28: "A fairly substantial degree of regularity (…) and smoothness (…) [and a] minimum of cohesion (…) [are] essential not just for the efficiency of the legal regime, but also for its very existence as such. (…). In short, a legal system must pass a certain threshold of regularity in its workings

Beyond their explicit contribution to the static and dynamic of following the Rule (with the acknowledgment of a commitment to stability and continuity, if not to planning or projecting the future), these latter central specifications [(3)–(4)] – in particular the second [(4)]! – are of interest here since they also resist the seductions of *robust incorporationism*, i.e. insofar as they denounce the dangers of a "pronouncement" which, establishing «moral worthiness» as "the *lone* sufficient condition for the status of norms as legal norms"[41], would concede a dangerous (uncontrollable) "elasticity"[42] to recognitional practice – an elasticity which, confronted with the conditions of contemporary plural (fragmented, heterogeneous) societies,[43] would paradoxically prevent a plausible distinction between *content* and *extension* and would condemn us to extreme *casuistry* (as if the Major Rule instructed "officials to handle every case by applying the moral norms that produce the optimal result in the circumstances"[44]). Would this amount to a representation of the concrete problem (and its priority) that would be incompatible with an authentic *conventionality thesis*? I would say so, adding that this incompatibility also threatens to damage the *thesis of separability* (or at least the possibility of an autonomous experience of *juridicalness*[45]) just as, in its extreme form, it also threatens to dispense with the conceptual need for an authentic Rule of Recognition (a tendency that *Coleman*'s remarkable self-critical *course* seems to announce[46]).

Focusing on these dangers (and the corresponding denunciation) provides the cue to cross the border, if not to move beyond the mirror. However, the defense of *non positivism* which awaits us there (also as a rejection of the *conventionality and discretion theses*) is significantly different from what might be expected after diving into the positivist camp, since it defends a *separation thesis* between law and morality.

II.

Crossing the border, we will continue to consider legal discourses (i.e. discourses explicitly or implicitly assuming a claim to juridical relevance) from the main challenges of stability and change. This means, on the one hand, continuing to pursue the core themes associated with practical circularity [*supra*, I. (a)] and the *inclusion* and *incorporation* of principles [*supra*, 1. (b)]: whereas the first theme experiences the relationship between presupposed stabilized normativity and concrete problem-solving as a matter of praxis – a praxis of stabilization and realization not only involving different interpretive communities (of jurists and non jurists), but also interchanging and overlapping the constitutive functions of guiding and guide-following, specifying (deter-

---

if it is to exist as a legal system at all. Above that threshold, the system will be functional or efficient in a greater or lesser extent. Below that threshold, however, it will be nonexistent – that is, nonexistent as a legal system – rather than merely inefficient."

[41] Ibid., 28–29, in every case (not only in hard cases).

[42] Ibid., 26.

[43] Ibid., 30: "Perhaps those problems can remain within manageable limits in a very small and static and highly homogeneous social unit, where moral attitudes are widely shared."

[44] Ibid., 29.

[45] Ibid., 28–29: "In a regime where judges and other officials adhere to the robust version of the Incorporationist Rule of Recognition, their ostensible law-ascertaining activities will very likely partake of too little regularity to be properly classifiable as law-ascertaining."

[46] See *Coleman*, Ratio Juris 22 (2009), 383 ff.

mining) and transforming (developing), the second theme considers the role which (autonomously conceived) principles are allowed to play in this circle, or as an expression of this circle (as authentic components of an effective law in action). On the other hand, it means submitting both themes (and their plausible integrated whole) to the potentialities of an alternative idiom, whose mobilization (in the promised mirror form) corresponds to an exploration of a parallel ensemble of resources and questions, categories of intelligibility and ways of responding.

In order to immediately identify this idiom, it is indispensablel to allude to a decisive counterpoint between:

- a global conception of the *praxis* (or the *practical worlds*) – seriously taken as a kind of *reflexive horizon* and, as such, presupposing an explicit legacy and an unmistakable agenda (which we may acknowledge by invoking a certain non analytical "rehabilitation of practical philosophy"[47]);[48]
- the specific experience of Law's practical world, this latter claiming autonomy or independence of resources-*artifacts* which (also on the meta-dogmatic critical-reflexive level cultivated by legal theory or legal philosophy) is certainly incompatible

---

[47] Citing the famous collective work organized by *Riedel*, Rehabilitierung der praktischen Philosophie, 2 vol., 1972–1974.

[48] I mean the legacy (the challenge) of a discourse of *constitutive immanence*, developing an internal perspective on *praxis* (and its foundational, regulative and constitutive moments), a discourse whose conditions only became possible in the second half of the 20th century, whilst combining (overlapping) the modern acquisition of *intentional-cultural subjectivity* with a practical-existential experience of *historicity* (as a radical *constitutive historicity*) – the former making us responsible for the authorship-*inventio* of our practical worlds (their goals and values), the latter submitting this *invention* to indispensable self-reflexive differentiations concerning the factors and conditions, but also the different dynamics and varying degrees of vulnerability to contingence (with the possibility of introducing a constitutive dialectic equilibrium between *societas* and *communitas*). On the latter counterpoint between *societas* and *communitas*, see *Aroso Linhares*, Law in/as Literature as an Alternative Humanistic Discourse: the Unavoidable Resistance to Legal Scientific Pragmatism or The Fertile Promise of a Communitas Without Law?, in: *Wojciechowski/Juchacz/Cern* (eds.), Legal Rules, Moral Norms and Democratic Principles, 2013, 257 (265–268). I would only point out here that this counterpoint concerns the possibility of distinguishing two cultural projects for collective identity, which are also two irreducible typical faces of a certain *teleological turn* (both responding to present circumstances and both addressing the claims of pluralism, fragmentation, difference). Thus the *society project* may be the one which assumes that all subjective needs, ends and interests, treated as preference claims, are basically equivalent (i not quantitative commensurable), which means also imposing the exclusive answer of a possible set of hierarchizing decisions (but also the social-political artifact that collectively legitimizes these decisions). Thus the so-called *community project* may open up our experience (and our opportunities for practical deliberation) to consideration of an integrative horizon of shared practical commitments and responsibilities, in order to sustain (and explore) an insurmountable dualism between *subjective goals* and *human goods*, and between *ends* and *values* – or at least to reveal the importance of "non-commensurable" ("qualitatively distinct and separate") *ultimate ends*, each pursued "for its own sake" (demanding, as such, a set of plausible specifications) [The formulations quoted are from *Martha Nussbaum*, Virtue Ethics: A Misleading Category?, The Journal of Ethics, 3 (1999), 182–183.]. When we understand *communitas* as a project or as an interpretative enterprise, we are certainly freeing its context from the need for ontological (or onto-anthropological) a-historical representation, which means reinventing its experience, assuming (for once) the plenitude of its symbolic-cultural attributes: not only revealing a determinant bond with an explicit experience of *historicity* but also recognizing the *positive* circularity that makes this experience possible, so that this communitarian project (clearly incompatible with an abstract predetermination) may always inescapably (and simul-

with the passive reception or tranquil assimilation of (or even a pure, more or less arbitrary, choice between) the possibilities globally inscribed in (or permitted by) this horizon.[49]

This perfunctory allusion (inscribing the idiom in question within the possibilities of *Castanheira Neves*'s jurisprudentialism[50]) is certainly indispensable to experiencing legal validity (or law as an order of validity) in its inextricable constitutive connection with problem-solving practices (in a way that we shall soon consider!), as it is sufficient to understand that the reconstitution and defense of a plausible internal normative perspective (which can guide this experience) is not easily satisfied with the mere rethinking of a *subject/subject* practical rationality, instead claiming an autonomously institutionalized (specifically juridical) expression of this rationality[51] (an expression that may essentially be identified with *system/ problem* dialectics, as we shall also see).

1.

These combined claims, in fact, guide us to *an* experience of practical *circularity* (in its juridical relevance) which, since it is always taken as *constitutive historicity*, significantly rejects the mediation of the Major Rule (either as a reconstructive resource or a relevant category of intelligibility).

1) It rejects it in the first place because the circular roles of *context* and *correlate* – guiding, framing and precipitating (or objectifying) the so-called recognitional activities (and the corresponding interactions between officials and non-officials, jurists and non-jurists) – are here (both) explicitly attributed to an order-*ordinans* of *trans-subjective (communitarian) validity* – fully understood as the assumption of a material (self-transcendentally disposable) axiological compromise – if not directly played by the projection of a (culturally identifiable) intention of validity.[52]

---

taneously) offer itself either as the foundational *context* or the reinvented *correlate* (the correlate-*ordinans*) of a changeable stabilizing *praxis*. What kind of *praxis*? A historically open *praxis*, which may only aspire to be recognized as a plausible (and valid) actualization of the project's intentions when submitting them to specific contexts or to pragmatically or rhetorically precise situations (i.e., when constituting and transforming these intentions).

[49] Possibilities which, as we know, range from topical-rhetorical discourses to new hermeneutics philosophy and from communitarian narrativism to Deconstruction – all explicit reinventions of *phronêsis*, with their heterogenous *Zurück-zu-Aristoteles*, but also different, often incompatible, experiences of the *return to communitas* or *to a communitarin context*. I have briefly explored this map: see *Aroso Linhares*, Phronêsis und Tertialität: Die Behandlung des Neuen als Kern des "geworfenen Entwurfs" des Rechts, in: *Philipps/Bengez* (eds.), Von der Spezifikation zum Schluss: Rhetorisches, topisches und plausibles Schließen in Normen- und Regelsystemen, 2013, 39 (41–44, 46–51).

[50] I propose a synthesis of *Castanheira Neves*' *jurisprudentialism* (with the main bibliographical references) in one of the sections of *José de Sousa e Brito*, 20th-Century Legal Philosophy in Portugal, in: *Pattaro/Roversi* (eds.), Legal Philosophy in the Twentieth Century: The *Civil Law* World, 2016, 516–519.

[51] Which means refusing the possibility of a previous (pre-juridical) definitive discussion and choice between global conceptions of the *practical world* (a choice whose alternatives and results should somehow be pre-determined *without law*, i.e. abstracting from its specific experience).

[52] *Castanheira Neves*, O direito interrogado pelo tempo presente na perspectiva do futuro, in: *Nunes/Coutinho* (ed.), O direito e o futuro. O futuro do direito, 2008, 56–65; *id.*, O direito como validade, Revista de legislação e de jurisprudência, nº 3984 (January–February 2014), 154–175.

2) It also rejects it because the sequence of (more or less equivalent) scissions that we have attributed to the positivist camp (all indispensable to the model of *social rules*) – that is, scissions between reasoning *about law* and *according to law*, *law-identifying* and *law-applying* practices, the rule *content* and *extension*, *decontextualized* and *contextualized* law-interpretation activities – are here decisively replaced by a dialectical intertwining of *dogmatic stabilization practices* (objectifying validity as *normativity* in an open, multi-dimensional or multi-layered legal system) and *realization or adjudicative respondere practices* (answering the novelty of concrete *controversy* with an adjudicative *prudential* mediation or assimilation).

3) Whilst objectifying validity in a multi-layered *system*[53] with several different (not methodologically equivalent) *strata* – normative principles (considered as *jus* and *foundational warrants*), statutes, precedents-*exempla*, doctrinal criteria (and standards), and legal reality (the latter as a constitutive experience of *law in action*) – and whilst assuming an incessant dynamic (open to regressive re-composition, if not a permanent beginning, determined precisely by the methodological priority of the concrete problem), the praxis of stabilization in question and the normativity it generates are not only incompatible with a normativistic modus for conceiving of universality or universability but also irreducible to a systemic reconstruction centering on the social rule category – which means that they do not allow for a reflexive reconstitution which would treat the *rule* or its «uses» of "general classifying words"[54] (claiming a certain concept of *general ruling* or *rational universality*) as the only pattern of comparability permitted by law. On the contrary, these practices claim a reflexive (methodological) experience capable of distinguishing between, on the one hand, *foundational warrants* and *criteria*[55] – which means disrupting the traditional continuum between *principles* and *norms*[56]! – and, on the other hand, different kinds of *criteria* (statutory, dogmatic, jurisdictional criteria)[57] – which means, for example, treating *judicial rulings* as full concrete adjudica-

---

[53] *Castanheira Neves*, Metodologia Jurídica. Problemas Fundamentais, 1995, 78–81, 152–157, 188–196, 278–283 and *id.*, A unidade de sistema jurídico: o seu problema e o seu sentido (1981), in: *id.*, Digesta, vol. II, 1995, 95 ff.

[54] *Hart*, The Concept of Law, 2nd ed., 1994, 125–126.

[55] A foundational warrant (*fundamento*) is a *rationale* which gives specific intelligibility or an autonomous sense to a certain field or domain of practice (mainly identifying the commitments that constitute this field): the *rationale* justifies a plausible conclusion, even though it does not propose a solution or a type of solution (i.e. it does not free us from the discursive effort, which is indispensable to reaching the solution). The rule or criterion is an available ("technical") device or apparatus, which can be immediately mobilized ("convened") to resolve a given problem and (or) provides a plausible scheme for finding the corresponding solution (albeit requiring a discursive effort in concretization or realization). The normative principles (extended by some doctrinal models that constitutively specify and reinvent those principles) should be methodologically treated as foundational warrants or rationales. Statutes, judge-made law and all the other dogmatic models are (or should be assumed as) *criteria.*

[56] See the development proposed in *Aroso Linhares*, Na "coroa de fumo" da teoria dos princípios: poderá um tratamento dos princípios como normas servir-nos de guia?, in: *Correia/Machado/Loureiro* (eds.), Estudos em Homenagem ao Prof. Doutor José Joaquim Gomes Canotilho, vol. III: Direitos e interconstitucionalidade: entre dignidade e cosmopolitismo, 2012, 395 ff.

[57] Not forgetting that this means attributing different presumptions of *bindingness* or normative force to the strata of the legal system, all of which are, in fact, treated as (explicit or implicit) rebuttable presumptions (whose refutation determines a particular burden of contra-argumentation), with principles (as warrants) benefitting from a presumption of *communitarian validity*, statutes (as criteria) from

tive decisions, inseparable from the case and from a specific *context of realization* (and also from an explicit *analogical rationality*).[58]

2.

This allusion to the legal system as a normative plural objectification of a substantive axiological commitment is sufficient to enable us to understand why – already exploring the negative counterpoint to the second sequence of questions [*supra*, I (d)] – it may be said that the juridically relevant incorporation of principles (considering only their content or their substantive merits) is here neither *necessarily* rejected (as the positivist *separation thesis* claims) nor simply admitted as a *contingent* possibility (as the positivist *separability thesis* defends), given that both alternatives concern strictly law-identifying practices. It is instead celebrated as an indispensable constitutive feature of the practical world of law, in a way which not only rejects the possibility of a static self-subsistent problem of law-identification (separated from the dynamics of concrete adjudication), but also assumes an alternative normative-phenomenological understanding of the *sources* problem, the latter based on an irreducible constitutive (generative) tension between an *axiological moment* (experienced in the *values/principles* dialectics) and a *material moment* (integrating social-historical reality as an ensemble of conditioning factors).[59] In fact, the convergence of these elements opens up unique opportunities for institutionalization, which are inaccessible when we consider the global possibilities of practical discourse.[60] One of these opportunities is precisely the one which (rejecting both a concept of principles *as ratio* and *as intentio*[61]) tests out principles as authentic

---

a presumption of *political-constitutional pedigree* or *authority-potestas*, legal dogmatic models (as warrants or criteria) from a presumption of *rationality* or *rational conclusiveness* and, last but not least, precedents-*exempla* (as criteria) from a singularly contextualized presumption of *correctness (justeza)*. See: *Castanheira Neves*, Metodologia jurídica, 1995, 154 ff.; *id.* in: *id.*, Digesta, vol. II, 1995, 82–90; *Bronze*, Lições de Introdução ao Direito, 2nd ed., 2006, 627 ff. and *Aroso Linhares*, Validade comunitária e contextos de realização. Anotações em espelho sobre a concepção jurisprudencialista do sistema, Revista da Faculdade de Direito da Universidade Lusófona do Porto 1 (2012), 58 ff.

[58] See *Aroso Linhares/Gaudêncio*, The Portuguese Experience of Judge-Made Law and the Possibility of Prospective Intentions and Effects, in: Steiner (ed.), Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions 2015, 185 ff.

[59] For *Castanheira Neves*, the problematic of the *sources of Law* can only be correctly understood by considering the construction of law as a true *constitutive* process, with different consequent (successive) moments – the *material moment*, the *validity moment*, the *constitutive moment* and the *objectivation moment*: see *id.*, Fontes de direito, in: *id.*, Digesta, vol. 2, 1995, 56 ff. In the same sense, see *Bronze*, Lições de Introdução ao Direito, 2nd ed., 2006, 715 ff.

[60] As if the horizon corresponding to this global discourse was condemned to aporetically reveal or express some of the main challenges of present-day practical philosophy, namely those which correspond to the *intentional unity/plurality*, *dogmatic presupposition/ critical reinvention* binomials.

[61] Whilst principles as *ratio* correspond to the normativistic *general principles of law* obtained through a logical operation of *concentration* (as a process of "quantitative simplification", if not as a discovery-*Auffindung* of a plausible logical *center*), principles as *intentio* correspond to an experience of the principles conceived of as pre-juridical moral or communitarian regulative intentions, which become constitutively binding only through authoritarian (statutory or judicial) decisions. I have developed this counterpoint and its different origins and legacies in: in: *Correia/Machado/Loureiro* (eds.), Estudos em Homenagem ao Prof. Doutor José Joaquim Gomes Canotilho, vol. III: Direitos e interconstitucionalidade: entre dignidade e cosmopolitismo, 2012, 395 ff.

jus (as specifically juridical warrants which are also autonomous *law in force*),[62] in the certainty that this experimentation – with the indispensable mediation of a normatively productive *iuris-prudentia* as *jurists' law (Juristenrecht)*[63] – establishes a constitutive connection between *principles* and *legal reality* (a connection which should involve a plurality of canons and institutional situations, simultaneously stabilized and reinvented by different jurists' and non-jurists' "interpretative communities"[64]). These systemic cross-references and the irreducible novelty of concrete *problem-solving* ensure a permanent process of constitution-determination-transformation and, with this, a very special «practical consonance» between the principles which are invoked as guiding trans-subjective commitments (if not projects for *being* or *being-with-Others*) and the "normative-concrete content" which corresponds to the realization of these commitments (and which is inseparable from the *novum* which juridically relevant controversies introduce).[65]

3.

However, the identification of the *present* idiom would not be complete without clarifying how this treatment of *circularity* (between the practices of dogmatic stabilization and concrete problem-solving) – giving normative principles the institutionalized identity of an immediate (original) fully juridical *normans*, whilst persisting in understanding Law as a *matter of practice(s)* (in an explicit rejection of natural-law's universalist cognitivism) – may be said to correspond to an authentic *non-positivist separation thesis* between *law and morality.*

1) The methodological level that we have focused on so far certainly gives us one indispensable basic clue: highlighting the *system/problem dialectics* as an autonomous *subject/subject* rationality – whilst arguing that the concrete incorporation and experimentation with systemic reasons (involving principles and diverse types of criteria) gives jurisdictional adjudication an autonomous *judicative* identity (responsible for an always fully juridical response) – in fact means ensuring an explicit methodic unity and the reflexive reconstitution of this unity, the latter restoring *interpretatio* to its fully normative (*not* hermeneutical) "integral sense" of "law's realization"[66] as well as rejecting the (strong) discretion thesis (and the structuring counterpoint between easy and hard cases).[67]

2) A second step is, however, indispensable in order to understand that the expansion of the participant point of view which corresponds to the challenges of jurisprudential-

---

[62] Ibid., 412–421.

[63] Integrating the reciprocally constitutive contributions of judicial jurisprudence and legal doctrine, without neglecting a plausible dialogue with meta-dogmatic legal discourses.

[64] I have developed this understanding of legal reality (invoking simultaneously *Fish* and *Bernard S. Jackson*) in: Revista da Faculdade de Direito da Universidade Lusófona do Porto 1 (2012), cit., 64–68.

[65] *Castanheira Neves*, Metodologia jurídica, 1995, 203–204.

[66] An "integral sense" which is incompatible with any methodologically plausible splits between interpretation and application, interpretation and the filling of gaps: see *Castanheira Neves*, O actual problema metodológico da interpretação jurídica, 2003, 45 ff.

[67] I have developed this defense of a methodological unity (rejecting the *easy/hard* binomial) in: O binómio casos fáceis/casos difíceis e a categoria de inteligibilidade sistema jurídico. Um contraponto indispensável no mapa do discurso jurídico contemporâneo?, 2016.

ism (as an internal committed normative perspective, submitting both dogmatic and meta-dogmatic levels[68]) explores a constitutive link between the *practical world* and the *subject/subject* rationality – that is, between the historical-cultural invention generating the former and the dialogical-conversational dynamics structuring the latter – which is incompatible with the aim of the "general philosophical enquiry" justified by *Hart*'s legacy, this one concerning the *data* integrating the concept of law and/or the nature of law and involving, as such, the detached judgments of an external (albeit moderate, and in this sense also normative) point of view.[69] The internal committed perspective which we should attribute to jurisprudentialism in fact supports the alternative aim of considering the problem of *sense* or *sense claims* – so that it may be possible to understand *juridicalness* as intention (*idea* or *archetype*) and to celebrate the corresponding *aspiration* or *claim to perfection* whilst simultaneously evaluating (if not accounting for) the degree of success and failure achieved through (or with) intention-following practices.[70]

3) In order to distinguish the intentions of the present *agenda,* not only from the ambitions of natural law theory but also from those which, in the process developed by *Fuller*, have attempted (and continue to attempt) to identify law's immanent or implicit morality, it is still necessary to add that rejection of the *conventionality thesis* corresponds here to a consideration of the intention of substantive validity, sustained by a decisive claim to autonomy and a no less decisive *argument of historical continuity*, all significantly experienced as performative guiding elements of a *non universal* (culturally plausible and civilizationally molded) answer to the *universal* (anthropologically necessary) problem of the institutionalization of a *social order*.[71] In fact, this latter point helps us to understand what was said previously about the incorporation of principles: since this incorporation is considered a necessary dimension of the practical world of law (and not simply conceived of as a contingent possibility, verified in certain legal orders), the necessity in question only gains full meaning (a very specific, relative meaning!) when it is explicitly made compatible not only with the experience of the constitutive historicity of principles (as open human acquisitions) but also, and without paradox, with the defense of the *non-necessary* (fully cultural) identity of law itself. The *necessity* in question – considering principles as *practical commitments* and as normative expressions of a project-*proicere*[72] – is, in fact, exclusively related to a certain response to the problem of *common life* – i.e. to a *certain* practice of law which, as a spe-

---

[68] In a sense which should not, however, be confused with Dworkin's *interpretivist* defense of a *doctrinal concept*: I have explored the differences in: O direito como mundo prático autónomo: "equívocos" e possibilidades. Relatório com a perspectiva, o tema, os conteúdos programáticos e as opções pedagógicas de um seminário de segundo ciclo em Filosofia do direito, 2013, 107 ff., 116 ff.

[69] The text quotes formulations by *Postema* (in his eloquent reconstitution of "Hart's Hermeneutics"): Legal Philosophy in the Twentieth Century: the Common Law World, 2011, 285 ff.

[70] The affinities and differences in relation to *Nigel Simmonds*'s archetype *(as an intrinsic moral idea)* are also explored explicitly in: O direito como mundo prático autónomo: "equívocos" e possibilidades. Relatório com a perspectiva, o tema, os conteúdos programáticos e as opções pedagógicas de um seminário de segundo ciclo em Filosofia do direito, 2013, 114–126.

[71] This is one of the most fruitful and challenging lessons of *Castanheira Neves*'s philosophy of law: see, in particular, two key essays – Coordenadas de uma reflexão sobre o problema universal do direito ou as condições da emergência do direito como direito and O problema da universalidade do direito ou o direito hoje, na diferença e no encontro humano-dialogante das culturas (both now included in: Digesta, vol. 3º, 2008, 9 ff., 101 ff.).

[72] This *proïcere* is neither a *plan* in the onto-teleological pre-modern sense nor a *programme* in terms of its modern finalistic intelligibility, but a historically constitutive (circularly reinvented) *form of life*

cific way of creating communitarian meanings (following a persistent, albeit permanently reinvented, *claim to autonomy*), is significantly *inscribed* in the deployment of what may be called the *Idea of Europe* (or the *heritage* of Western civilization).[73] Even though this is certainly not the *occasio* to explore the specificity of this *claim to autonomy,* it is relevant to add that this claim is certainly inseparable from an *artefactus* whose acquisition is due to Roman *civitas* (and to its decisive "rise of the Jurists").[74] This *artefactus* is indeed the *case-controversy*: considered as the *prius* and perspective of a *new* practical world, culminating, as such, in the experience of a unique, microscopically conceived experience of comparability-*tribuere* (assured not only by the adjudicator-*third* but also by the *tertium comparationis* of a coherent *corpus* of *warrants* and *criteria*). It is this experience which opens up the path to an unmistakable process of fighting for recognition,[75] unmistakable since it is concerned with the insti-

---

(presupposing the treatment of *communitas*, in its juridical relevance, as a *self-transcendentally* conceived *artefactus*). In the words of *Heidegger*, referring to this pre-modern sense, "[d]as Entwerfen hat nichts zu tun mit einem Sichverhalten zu einem ausgedachten Plan, gemäß dem das Dasein sein Sein einrichtet, sondern als Dasein hat es sich je schon entworfen und ist, solange es ist, entwerfend" (Sein und Zeit, 18th ed., 2001, 145).

[73] This acknowledgment enables us to understand why every problematized conscious attempt to *universalize* such an experience (accomplished under the aegis of *cosmopolitanism about justice*) faces insurmountable difficulties, condemning us to a differentiated spectrum of more or less persuasive *weak answers*. However, more relevant than this diagnosis is the alternative it opens up: rejecting the plausibility of a meta-discursive equidistant perspective in this context in fact means accepting the challenge of a horizontal inter-discursive counterpoint between *internal* perspectives (if not exploring the possibilities of *translation*), and it is precisely the *mapping* of this counterpoint (with the reflexive concentration, if not reduction of complexity it demands) that enables us to distinguish *one* (necessary) problem – the problem which emerges from the *need* to institutionalise a social order – and *two* different kinds of culturally plausible (major) *answering axes.* Moreover, this is achieved with the first axis enacting a *response* (to this problem) which develops law as an *autonomous practical world*, whilst the second finds the required *response* in a kind of practical (holistic) *continnum*. This is a *continnum* in which morality, religion, shared narratives and other social criteria are experienced as constitutively inseparable and *law* is not a specific *identifiable* (separable) voice (determined by an explicit claim to autonomy) but the only effective institutionalizing regulative (if not coercive projection) of the content (a selective content!) of this *continnum.* Which *institutionalization* is this? The one we *name* when invoking the culturally unique normative nucleus of the Islamic order, Hindu *dharma,* Jewish *halakhah* or indigenous *beehaz'aanii*.

[74] In fact, the emergence of law's cultural project needed more than the Aristotelian secularization of *praxis* and the (relative) emancipation of *phronêsis*. It needed a specific problem of inter-subjectivity to be invented which, distinguishing the juridical specifications of *phronêsis* from those which would be assumed through ethics, morality, philosophy and politics, could free the experience and treatment of controversies *related to past events* from its holistic *continuum* (and create a *new world* of significations and discourses and also a new specification of communitarian validity).

[75] The key to understanding this is certainly provided by the argument of *continuity* previously cited. It is an argument which claims that the invention of law (as an autonomous practical world) in republican *civitas* – which created the "name" *humanitas* (and its *intention of validity*) as a context and as a correlate of a concrete praxis of *respondere* (a *respondere* which presupposes the cultural *artefactum* of a specific kind of *problem*; cf. *Heidegger*, Über den Humanismus, 1947, 19: "Unter ihrem Namen wird die Humanitas zum ersten Mal bedacht und erstrebt.") – should be considered (and reconstituted reflexively) in our present circumstances as the bright initium (the first significant expression or step) of a cultural-practical project, a project-proicere whose pursuit (institutionalizing an authentic form of life) has played (and is still destined to play) an indisputable role in constructing European identity, see *Aroso Linhares*, Law's Cultural Project and the Claim to Universality or the Equivocalities of a Familiar Debate*,* International Journal for the Semiotics of Law 25 (2012), 489 ff. Why an argument of *con-*

tutionalization of an experience of *dignitas*, which (with the unsuspected help of *Waldron*), may be considered genuinely or intrinsically juridical (an "intrinsic", *non contingent*, "legal idea"[76]), as the "dignity of rank or status" of an autonomous and responsible (inter-subjectively relativized) subject-person who, (implicitly or explicitly) invoking the same order of *warrants* and *criteria* and simultaneously addressing the other party and the impartial third, demands a hearing, i.e. expects a rationally *judicative* treatment of the controversy.

When the *experience of the problem-controversy* and the *recognition of the subject-person* are reconstituted in this way, as two genetically *indistinguishable* components – to the point of concluding that it is this *inseparability* that allows us to differentiate or autonomise this experience (of the problem) and this recognition (of the subject) in terms of their *strict juridical relevance* (as if we were identifying the meaning and limits that the *practical world* of law imposes on them[77] and, as such, feeding the *work in*

---

tinuity (if not iterability)? Obviously because it admits that some major signs or traces recognizable in this initial step – even though permanently recreated and transformed (and as such inscribed-immersed in a productive circle of construction, reproduction and realization) – persist as more or less explicitly constitutive features of identity in the subsequent trajectory, significantly experienced as performative elements of a non universal) answer. It is precisely this tension between persistence and change that enables us to understand why the critical-reflexive deciphering of such signs or traces should simultaneously (and without paradox) be conceived of here as an exploration of difference (even though not necessarily différance). It would not, in fact, be possible to experience the continuity of the claim for an autonomous law – questioning, as radically as possible, the plausibility of its contemporary pursuit (with its inseparable links to Europe's heritage) – if we were allowed to forget the differently demanding cultural and social environments which, as essential contexts for its realization, have (en)framed its project (and, as such, characterizing the successive steps in its trajectory). Concerning these steps, we may add that the specific attention paid to the complex organisation of the different contexts of realization (and the way in which they intertwine with the projected communitarian meanings) certainly does not exclude the reflexive need to concentrate their features within a sequence of broader historical cycles or stages (that may be used as integrative open references). This means recognizing that the ultimate permitted exercise in concentration will obviously be the one which distinguishes three other plausible stages and their corresponding arcs from the initial jurisprudential Roman Isolierung: the first corresponding to the stabilization of an (axiological and hermeneutical) translation of the mediaeval respublica Christiana, the second emerging from the irreversible turn in modernity (and Enlightenment) acquisitions, and the third exposing the legacy of the second and the impressive return of the rationalizing possibilities enshrined in the first to address the paradoxical contemporary challenges of homogenizing globalization and self-celebrating plurality (if not incommensurability).

[76] *Waldron*, How Law Protects Dignity: the 2011 David Williams Lecture at the University of Cambridge, available (as working paper no. 11–83) in Public Law & Legal Theory Research Paper Series (New York University School Of Law), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1973341## (accessed in February 2013), pp. 4–5: "When you hear my definition, the sense in which law inherently promotes dignity begins to become apparent. For it is easy to get the impression from the way I set this out of a person appearing on their own behalf before a public tribunal (say) and demanding to be listened to, demanding indeed that their view of things be taken account of before any public decision is made (for example, any public decision about what is to be done with them). This is evidently a legal idea, and it is arguably non-contingently so—in the sense that it is not a matter of the law-maker having just decided to promote dignity (…). Dignity seems to hook up in obvious ways with juridical ideas about hearings and due process and status to sue."

[77] On account of this inseparability – on account of the relevance conferred on a microscopically experienced *thirdness* – this is precisely the specification of *human dignity* which law´s cultural project invented *as its own* (even though in its initial consecration this meant exploring an implacably *closed* circle of inter-subjectivity) and which has been continuously pursued and permanently reinvented (not only *expanded* in its circle!) as an indispensable identifying claim.

progress of a *contextualized* practical-cultural quest[78]!) – we have at last the *key* to understanding (and defending!) the promised *separation thesis*: the thesis which, *beyond the mirror* (and without excluding convergences and overlaps), treats *law* and *morality,* or more exactly, *law* and *moralities – moralities* which may range from *positive conventional substantive morality* or *ethicity* (consecrating the particularism of *mores* and traditions) to a *critical (tendentially universal and procedural) political* morality (celebrating the cultural-neutral quality of modern or Enlightenment acquisitions)[79] – as distinct languages or different sets of «occasions» for the "creation of meaning" (if not as practical-existential resources), with different leading problems and unmistakably distinct understandings of communitarian *validity* (determining, as such, experiences and concepts of autonomy and responsibility that are *not to be* reciprocally *confounded*).

III.

In a *limit*-situation such as our own, are there significant gains in considering the circular relationship between *law's (stabilized) normativity* and *legally relevant (determining and transforming) practices* from the perspective of this *non-positivist separation thesis* and its unequivocal rejection of the *conventionality thesis* (but also its fully juridical understanding of principles as *jus*)? I would say there are. The inclusivist and incor-

---

[78] To understand the *argument of continuity* (and the productive intertwining that this argument attributes to the different historical cycles), it is in fact essential to allude to the outlines of a certain dialectical counterpoint. This is the counterpoint which emerges when we distinguish the *core* of law's project – identified as a continuous attempt to institutionalize a specific kind of *intersubjectivity* (between *relativized*, *comparable* and *limited* spheres of *autonomy* and *responsibility* and the corresponding *masks* of subjects-*persons*) – from the different cultural, political and economic *environments* in which this tentative institutionalization has been (and continues to be) pursued – and where we may recognize a situated context of questions and problems (conditioning the criteria and the balance of *comparability*, whilst still able to identify the autonomous sense of "this" specific *comparability* as an unmistakable task of *ius suum cuique tribuere*). Defending this *argument of continuity* means, in fact, concluding that, even though the heritage of modern *societas* should undoubtedly be qualified as a dimension of the *institutional environment* of our present *quest for law* (with decisive acquisitions such as *rule of law*, human rights, separation of powers, exclusion of arbitrariness, social certainty, tolerance, respect, solidarity, protection against violence, freedom from want), we should equally be able to argue that law's cultural project (in its practical identity) is *irreducible* to this *environment.* This evidently means avoiding the shortcomings of all answers which *reduce* law's cultural project to one of its major cycles (or which at least consider that the relevant autonomy of law began with modernity's "decentring of world conceptions" and "perspectives" and the consolidation of the Enlightenment). The quoted formulations are evidently by *Habermas*, Theorie des kommunikativen Handelns, 1981, vol. I, 164 ff., 441 ff., 455–460, volume II, 179 ff., 209 ff., 225–227, 270 ff., 413 ff., 571–593.

[79] In the words of *Habermas* (distinguishing between *procedural morality* and *substantive ethicity*), but also (simultaneously!) in the words of *Hart* and *Waldron* (underlining-clarifying a distinction which was introduced by Austin and made habitual through the dialogue with utilitarianism). See *Habermas*, Vom pragmatischen, ethischen und moralischen Gebrauch der praktischen Vernunft, in: *id.*, Erläuterung zur Diskursethik, 1991, 100 ff.; *Hart*, Law, Liberty and Morality, Press, 1963, 17 (20): "positive morality [as] the morality actually accepted and shared by a given social group"/"critical morality [referring to] the general moral principles used in the criticism of actual social institutions including positive morality"; *Waldron*, Particular Values and Critical Morality, California Law Review, 77 (1989), 561 (561–563, 582, 587): "the moral culture of a particular community [as a] (…) body of distinctive mores, norms, and standards/a critical [reflective] (…) general account of what a society must be like if it is to accommodate the sort of beings we are."

porationist *separability thesis* certainly allows for a stimulating self-reflexive reinvention of the *heart of a mature legal system* (as an articulation of primary and secondary rules). Whilst defending the compatibility of Law's content with every answer consecrated by (unequivocally *convergent*) *social facts* (following, determining and effectively fixing the Rule of recognition, or the commitments of the cooperative enterprise), it nevertheless preserves an a-culturally conceived claim to universality, not only endowing legal theoretical and legal philosophical enquiry with a detached (moderately exterior) judgment of *necessity* (addressing the Major Rule or its «substitutes») but also depriving juridicalness of any practical-cultural specific or intrinsic (non contingent) sense claim – which means concluding that the attribution-integration or rejection of these claims (as plausible *validity limits* addressing juridically relevant authoritative decisions) depends entirely on the conceptual relevance (positive or negative, respectively) of a *moral perspective* and the invention-institutionalisation of the human world that this is able to offer.

Is this intellectual exercise on the "nature" of law – notwithstanding the infinite analytical possibilities deployed by its self-reflection (a self-reflection powerfully anchored in the internal aspect of rules) – capable of satisfying the needs of our present practical-existential situation? I would say it is not, which means resolutely opening the door to a consideration of the tension between *stability* and *change* (as an explicit counterpoint between *dogmatic* and *critique*) within the possibilities of a *subject/subject practical philosophy.* With this second path [*supra*, 2.], the reflexive possibilities explore a *constitutive immanence* deprived of any claim to universality, since it is consciously *bounded* to a specific cultural-civilizational way of conceiving and experiencing the practical world of law.[80] Is this (consciously thematized) *bindingness* a significant advantage when contemplating a response to the perplexities of our present circumstances? I believe it is. In fact, the strength of the second path comes from the full historical-cultural contextualization of law's acquisitions, if not from the opportunity to make the dynamics of these acquisitions correspond to an effective *argument of continuity* and to the *claim for autonomy* which this argument clarifies. It is as if the strength of the dynamic in question emerges, without paradox, from its fragility, i.e. from the need to no longer consider law (*this* law) as a necessary implication of *sociability,* but only as one of the possible answers to its problem. Why is there no paradox? Simply because the *commitments* which normatively objectify these acquisitions are still (or will be) capable of binding us – without disrupting this experience of *continuity* (but rather helping to renew it!) – only when (and to the extent that) they are submitted to a permanent critical (institutionalized) reconstruction. *Critical thinking does not undermine normativity; it supports it.*[81] In fact, this support does not exclude (but instead demands, almost always without a safety net!) the most radical philosophical interpellation, the one which enquires whether the *form of life* institutionalized through law *is* or *is not* capable of enduring (and being reinvented) in our present experience of plurality and fragmentation – i.e. under fire from alternative *promises of integration* (pursued *outside law*), if not rom the direct challenges of an intense celebration of *singu-*

[80] Identifying law's institutionalising response as a cultural-practical one does not only mean celebrating its integrative (communitarian) vocation but, in particular, recognising a specific way of constituting and performing substantive communitarian meaning (irreducible, as such, to other plausible constructions of *praxis* and practical rationality and certainly to other forms of collective identity).

[81] *Joseph William Singer*, Critical Normativity, Law and Critique 20 (2009), 29.

larity and *incomparability* (forcing us into a *quest for the humanitas* or *dignitas of man* developed beyond the *limits of humanism* or the already known forms of humanism).[82] Is this exploration of law as a culturally and civilisationally constructed *internal* way of conceiving and experiencing *humanitas* and *phronêsis* not just another way (possibly more congruent with our present context) of responding to the challenge that *Raz* eloquently formulated, whilst arguing (following in the footsteps of *Hart*) that "the major task of legal theory" is "to advance our understanding of society by helping us understand how people understand themselves"? We should not forget that *Raz* here presupposes that "the concept of law" should be taken seriously as "part of our culture and our traditions" ("a concept used by people to understand themselves").[83]

José Manuel Aroso Linhares,
Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra,
E-Mail: linhares@fd.uc.pt.

[82] I have partially addressed these questions in a sequence of dialogues with *Levinas* and *Derrida*. See: *Aroso Linhares,* Autotranscendentalidade, desconstrução e responsabilidade infinita. Os enigmas de "Force de loi", in *Figueiredo Dias/Gomes Canotilho/Faria Costa* (eds.), Ars iudicandi. Estudos em homenagem ao Prof. Doutor António Castanheira Neves, vol. I, 2007, 551 ff.; *id.,* O *dito* do direito e o *dizer* da justiça. Diálogos com Levinas e Derrida, Themis – Revista da Faculdade de Direito da Universidade Nova de Lisboa, 14 (2007), 5 ff.; *id.*, Dekonstruktion als philosophische (gegenphilosophische) Reflexion über das Recht. Betrachtungen zu Derrida, ARSP 93 (2007), 39 ff.

[83] *Raz*, Authority, Law and Morality, in: *id.*, Ethics in the Public Domain, 1994, 237.