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Positive Law and Moral Autonomy

14.1 Introduction

The present institutionalist account of law exposes to clear view the 'positive' character of the legal provisions laid down in treaties, constitutions, statutes, acts of delegated rule-making, and also of the decisions of courts. Where precedent is considered a source of law, we may also include the rules and principles derivable from the reasons offered for such decisions. Law's 'positive' character is nothing other than this very characteristic that it is laid down through intentional human acts aimed at regulating human conduct. For *'jus positivum'* means 'law laid down', and 'positive law' is *'jus positivum'* translated into English.

In one of the senses in which people commonly speak of 'the law', or 'the law of this country' (in any particular country), it simply means the whole compendium of such laid-down (or 'posited') legal provisions. Perhaps it would be more accurate to think of this as the whole compendium of laid-down provisions that are valid in and for that country. (They are valid for that country by virtue of criteria that are themselves intrinsic to its legal order viewed as a whole.) The institution-agencies of the legislature, authorized rule-makers belonging to the executive institutions, and members of the judiciary have the task of laying down the various relevant kinds of normative provisions. When they exercise their powers correctly, what they do is valid as law. Whatever is valid as law has to be respected by all those for whom the law is binding, that is all citizens and persons resident within the country in question. Otherwise what they do is either legally wrongful or (in the case of purported exercises of legal power) legally invalid.

The law of states, or of partly autonomous regions or countries within states or of suigeneric trans-national commonwealths such as the EU, or of international associations or organizations, is composed in great measure of positive norms, in this sense of 'positive'. Such positive norms are contained in norm-texts and stored electronically or in printed books and the like. Their physical or electronic embodiment is not a matter requiring explanation in a work of the present kind. The fact that their meaningful content is a set of norms—rules, principles or decisions—is of interest, but has already been explained at some length. It is a matter of institutional fact.

14.2 Explaining the Positive Character of Law

Positivity has sometimes been explained in terms of a political will. It is possessed by rules that are laid down through acts of will of a political superior to political inferiors and are sustained in existence by the will of that same superior, acting personally or through subordinates with delegated powers of command and coercion. However, the historical and contemporary instances that would seem best to approximate to this picture are instances of dictatorship, whether of a charismatic political figure or of an hereditary absolute monarch or autocrat. So far from being particularly central or enlightening examples of law in the sense of the law-state, or democratic constitutional state, federation or confederation, dictatorships exhibit what is only very questionably a legal rather than an arbitrary form of government. Criminal procedures are abused to repress enemies of the regime, and public law either ceases to exist or consists of grants of discretion so vague and general as to be uncheckable in practice. Private law may survive, but in a somewhat shadowy form owing to erosion through corruption and discretionary interventions that weaken confidence in contractual obligations or property rights.

One response to this objection might say that the will of dictators is not the only will that might be at stake. What about the will of the whole people of a democratic country, establishing a constitution and watching over the exercise of public powers by the various organs of state constitutionally established? Or what about the will of the elected representatives of the people in a parliament, in circumstances where parliamentarians acknowledge that they must respect the independence of the judiciary and exercise themselves some supervision of the executive? To the extent that there is some effective co-ordination of action among the constitutional agencies (institution-agencies) that exercise public power, one can reasonably impute a kind of common coherent will to the state itself, or the people of the state as a kind of corporate entity. So the positivity of the law is a matter of its being willed by the state or the people.

This is not in the least objectionable, but it has no explanatory value. A single dominating will, a real psychological will, is perhaps easy enough to detect in the case of a personal dictatorship or a tightly collaborating oligarchy. This can then genuinely be the directing impulse behind all or most state action, and explanation in terms of such a will is in principle illuminating. No such unitary real psychological will exists in a complex institutional order such as one finds in a democratic constitutional state. The will of such a state is a matter of pure imputation, imputation which makes sense in the context of coherent political action and a coherent reading of the law that emerges from such action. This depends on persons who hold institutional office conducting themselves with respect for co-ordinating norms. It also depends on persons who exercise critical observation of office-holders, that is, persons in other branches of government, and in the media and the academic world, concerning themselves with respect for those same

co-ordinating norms—rules and principles of constitutional law, conventions of the constitution, and the like. Office-holders have to be already respecting these constraints before the conditions for intelligibly imputing a concerted will to the state can be realized. But if they are already respecting these constraints, they are already respecting law, so the will that we impute to the state is a consequence, not a cause, of the existence of law in a law-state.

Norm-using rather than norm-giving is the key to the understanding of normative order. Humans are by nature norm-users. They would neither be able to speak, nor to co-ordinate activities at a distance, nor therefore to have any social division of labour, if they were not norm-users. The institutional theory of law can thus give a better and more intelligible account of elaborate bodies of norms such as are found in legal systems than can theories which one way or another become bogged down in postulating 'acts of will' as the basis either of normativity itself or of the positive character of institutional norms. But this is not to say that legislative acts of will, or judicial or executive acts of will, are unimportant. They are enormously important in accounting for the positivity of law, but not at the deepest level for its normative character.

Public law is much concerned with efficient governance coupled with respect for distributive justice. Criminal law upholds through punishment and threats thereof certain moral fundamentals that have to do with securing social peace. Private law upholds the essentials of personal private life and the conditions for some variety of social market economy. Distributive justice, retributive justice, and corrective justice are at the heart of the main divisions of law. But all these are highly controversial subjects. The obvious message to derive from the partisan struggles that preoccupy all democratic systems of government is this. People care deeply about justice, demand that the law expresses a vision of justice, yet disagree about what justice demands. Disagreement of this kind can perhaps be contained within small-scale face-to-face communities, for people may consensually rub along with more or less talked-through compromises between opposed views. Even today, many extended families might be found to give examples of this, as might certain kinds of workplace community like colleges or faculties and departments within some kinds of more traditional university, or partnerships in law or accountancy firms that have not expanded on to a colossal industrial scale. But disagreement cannot usually be handled by tacit compromise in a large-scale society involving the kinds of impersonal trust and impersonal interaction we have considered especially in relation to the conditions of an extensive market economy.[1] How then can it be handled?

We already know the answer. Decision-making on points of actual or potential disagreement is entrusted to the institutional agencies of government. Legislatures must determine upon general rules, possibly along with statements of general principles that the enacted rules embody, possibly in a way that simply leaves this

[1] Cf J Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) 2–8.

implicit. Ministers and executive agencies must exercise their powers, including powers of rule-making and specific decision-making within constitutional and legislatively ordained limits on their discretion. The courts must decide individual cases according to procedures appropriate to the main domains of law (public, criminal, or private-cum-commercial), and in deciding must interpret enacted rules in order to achieve a just and reasonable application of them. The reasonableness of a reasonable decision-making procedure is not something that could, even in principle, be the subject of rule-making, for it is simply the application of general practical reason to the specific task of institutional decision-making in the context of a body of already posited law. This application of practical reason is expressed in judges' justifying reasons for their decisions.[2] Even when unconvincing or unsatisfactory reasons are given in a particular case, the decision itself remains binding on the parties. Of course, there is every likelihood of its being reversed on appeal if an appeal is launched, or of being overruled in a later decision in a case for which it is cited as a precedent. But it stands in the meantime as a binding decision.

14.3 Moral Controversy and Legal Decision

It is easy to give examples of this process of legal settlement of controversial issues. In March 1994 the *Bundesverfassungsgericht* (German Federal Constitutional Court) handed down a decision calling for more uniform practice among the *Länder* (federal regions) to ensure that a common line was taken by public prosecutors in the various *Länder*, by way of discontinuing prosecutions of individuals for possession of cannabis, in cases where the charge concerned only 'small' quantities, and these were for the individual's own use. This was required to fulfil the constitutional principle of proportionality and apply it fairly throughout the federation.[3] This attempt, still not fully successful, to ensure a common practice throughout the German Republic did not involve an outright decision to decriminalize possession on the ground that statutes prohibiting it infringe guaranteed constitutional liberty. Even so, the decision was highly controversial. Many criticized it as being excessively permissive and seriously wrong from a moral point of view, especially since young people can often be led through soft drugs into an addiction to hard drugs. Others criticized the moral timidity of the decision, as one that failed to grasp the nettle of constitutional liberty one way or the other, and failed to say flatly that personal use of cannabis lay within the citizen's constitutional liberties.

[2] For a full account of this from the point of view of the institutional theory of law, see N MacCormick, *Rhetoric and the Rule of Law* (Oxford: Oxford University Press, 2005), especially chs 2 and 13.

[3] BVerfG E 90, 145 at 151–153. See also L Paoli and C Schäfer, *Drug Consumption and Criminal Prosecution in Germany* (Freiburg: Max Planck Institute for Foreign and International Criminal Law, Research Report, 2005).

However that may be, the underlying moral question in such a case is one that is likely to be controversial. So far as concerns 'soft drugs' like cannabis, or perhaps, if it is 'soft', alcohol, we may all find ourselves wondering whether it is right for humans to resort to such substances. Either it is morally permissible or not, and if it is permissible, a person's indulgence, at least within some limits of moderation, may either belong to the good life or not. Whether it is permissible or not may presumably also be affected by questions of the example the use of drugs or drink may give to the young and impressionable. Or it may be affected by the extent to which a particular culture has or has not developed social practices structuring and socializing use of the substance in question. But (on a certain assumption to be discussed later), it is of the character of morality that each moral agent on whose life the question impinges as a practical issue has to make up her or his own mind on the issue. This calls for reasoning and reflection, for discussing with friends, for taking such advice as he/she thinks right, but each in the end can only come to his/her own conclusion on the issue of the permissibility of drug-use. Furthermore, since there is an issue whether the state ought to prohibit possession or permit it, there is a question for every citizen whether statutes permitting drug use, or prohibiting it under penalties, ought to be in force in the state. There is a further question whether this should be settled as a matter of constitutional right or as a matter of ordinary legislation. (Needless to say, all these are interrelated but distinct questions, with distinct answers.)

One can further dramatize such a matter by reflecting on questions of life or death. Consider the case of Anthony Bland, a victim of the disaster at the Hillsborough football ground in England in 1989, who died in 1993 after several years in a persistent vegetative state. He died because of the discontinuance of the nourishment through tubes that had hitherto sustained him. His persistent vegetative state had been long-enduring, and had been found irreversible owing to the degeneration of his brain-tissue. In this situation, it had been held according to responsible medical opinion that continued medical intervention to prolong Anthony Bland's life was not in his best interest. On these two accounts, the House of Lords held that cessation of feeding and of treatment with antibiotics was lawful.[4] The Lords therefore laid it down that, in future like cases, the same test should be applied, subject to the confirmation by the High Court in each case of the lawfulness of the discontinuance in the light of all prevailing circumstances. The Lords also specifically held that in such a case the patient must not be actively killed, for example by some quick-acting and (necessarily) painless lethal injection. At most, the patient must be let die by discontinuance of the invasive treatment by feeding and the like that no longer served any interest of the patient.

Abortion is an even more perennial example of an issue of life and death in which the law readily becomes embroiled. In 1938, in England, the surgeon Alec Bourne performed an abortion on a girl of fifteen impregnated by violent rape,

[4] *Airedale NHS Trust* v *Bland* [1993] AC 789; [1993] 1 All ER 821.

and then reported himself to the police. He was prosecuted, but the judge directed the jury to acquit if the Crown had not proved beyond reasonable doubt that the surgeon had acted otherwise than in good faith with a view to protecting the life, understood as the continuing sane and healthy existence, of the girl in question. The law's express prohibition on performing or procuring abortion was, according to the judge, subject to an implied exception of the sort indicated.[5] Mr Bourne was acquitted, and the judge's ruling in the case was somewhat precariously accepted as governing the sound interpretation of abortion law for the three following decades. But a precedent at this level of a High Court trial at first instance was only persuasively binding as an interpretation of the law. Accordingly, the law as stated in *Bourne's* case spoke with an uncertain voice to the medical profession, to women, and to any other concerned citizens. In 1967, to remedy this lack of clarity and provide more finally authoritative legal permissions and prohibitions, the Abortion Act was passed by Parliament on the initiative of David Steel, MP.[6] What was previously somewhat vague, and defeasible because reliant on a single precedent, was made more secure and more determinate, both as to the prohibition of abortion, and as to the precise conditions of the exceptions where it is permissible. The constitutional supremacy of Parliament gave a firmer foundation to the definite rules laid down. As a matter of relative legal clarity at least, the legislative reform has apparently worked since 1967 as a statement of intelligible rules of law. Nevertheless, the abortion issue, in the UK as in other industrial and post-industrial states has remained in the front line of moral controversy. For some, the law now mandates murder, foeticide, and results in annual mass-killing carried out in public hospitals paid for by all taxpayers, who themselves thus become willy-nilly accessories to murder. For others, the issue concerns the moral liberty of women ('A Woman's Right to Choose'), and the law is only a timid half-way house, still illegitimately invading the proper autonomy of women as independent moral agents. Yet others perhaps see the law as a morally satisfactory compromise through balancing of significant principles. Similar controversy proceeds in many states, whether under constitutional banning of abortion, as in Ireland or to a more mitigated degree Germany, or under more permissive legislation, or permissive constitutional interpretation as in Canada, or under conditions of ongoing constitutional debate, as in the United States.

The cases discussed have been chosen for their legal setting, but it is relevant here to reflect also on these problems in their character as moral problems. The controversial character of the cases arises from their moral salience, and they retain this same moral salience even when legal decisions settle the point within the framework of legal-institutional order. To point up the contrast, it is opportune to reflect here on the character of moral deliberation relevant to such problems. What then is the character of deliberation and decision about them when such deliberation is pure moral deliberation?

[5] *R* v *Bourne* [1939] 1 KB 687; [1938] 3 All ER 615.
[6] Subsequently the Rt Hon Sir David Steel, Baron Steel of Aikwood.

14.4 Autonomy in Morality

We return to an earlier-noted assumption about its character. Autonomy, that is, the autonomy of each moral agent, has a special place in defining morality and in accounting for the special character of moral deliberation and decision-making. Each moral agent is a law unto her/himself. More literally, the moral law for each moral agent is that which she or he reasonably judges to determine the right for her/himself. This does not, of course, mean law for herself or himself only, for what is judged to be right has to be so judged universally. If it is right that I consume alcohol, it has to be right that anyone do so; what is permissible for me has to be permissible universally. What is obligatory for me (say, abstention from hard drugs) has to be obligatory universally. (But for me-as-a-what? Is it for me as a human or for me as an adult human that alcohol is permissible? Is it true that even for me as an adult, hard drugs are absolutely prohibited, or only their non-medical use? And so on.) The point here is not to enter into deliberation about what exact conclusion of substance to reach on the mentioned, or any other, questions of morality; it is only to characterise what—upon this conception of morality and moral agency—is essential to moral thought and action as such.

Here, we may distinguish the moral questions of what is universally permissible, obligatory, or prohibited from what are sometimes differentiated as 'ethical' questions about the good life. Even if I am morally at liberty to take alcohol, or perhaps to indulge in some other 'soft' drugs, it would remain a question what part I judge them to have in the good life. Here, autonomy remains, but universality recedes. What is the good life for me is certainly that which I autonomously shape for myself, that for which I take responsibility.[7] Each moral agent then has a life-story of her/his own, and we all write the story of our own lives according to what seems to us the best pattern for the unfolding narrative we make of it. We need not, indeed should not, think it necessary or even permissible, to legislate our view of a good life for anyone else. Parents, teachers, and others do, however, have a duty to help children and young persons to learn the art of autonomous living and of self-disciplined definition and pursuit of the good within the framework of the moral law as they construct this over a lifetime.[8] At the stage of still being under tutelage and even a degree of compulsion by elders, the child remains heteronomous. Autonomy supervenes upon heteronomy as full moral agency comes into being.

This conception of the essentially 'autonomous' character of morality owes a great deal to the moral philosophy of Immanuel Kant.[9] It is itself philosophically controversial. Some would locate morality not in autonomous judgments (if such

[7] Cf, on 'public and private autonomy', J Habermas 'On the Internal Relation between the Rule of Law and Democracy' European Journal of Philosophy 3 (1995) 12–20 at 17–18.

[8] Cf J Nedelsky, 'Reconceiving Autonomy' Yale Journal of Law and Feminism 1 (1989) 7–36.

[9] Expressed with particular clarity in H J Paton, *The Moral Law: Kant's Groundwork of the Metaphysic of Morals* (London: Hutchinson, 1981) 36, 86–88.

exist at all) but primarily in the practice of a community. Others would locate it in a sense of virtue and of the particular virtues, perhaps as these have been transmitted in a particular tradition. Others regard moral thought as primarily an interpretative way of thinking, making the best sense of a common world-view rather as aesthetics seeks to interpret and make best sense of an artistic tradition. Some again would adhere to realism, claiming that moral judgment concerns real qualities of acts and objects independent of our deliberation or will. A possible rider to this is that such moral qualities are capable of being recognized through what is sometimes called 'intuition' when we confront them in life's practical dilemmas.

The realist line of thought can give space to autonomy, but in a sense somewhat different from the Kantian. For what is then in issue is a reinterpretation of autonomy. In Kantian thought the idea of the moral agent as autonomous is taken to be a ('transcendental') presupposition of the very possibility of moral thought as practical reason. Realism accommodates it not as a precondition but as a special moral value or virtue, that of being willing and able to take responsibility for a definition and pursuit of the good life, coupled with self-discipline in adhering to one's own conception of one's moral duties and rights.[10] The duty to act conscientiously, however, is itself a moral duty independent of our willing it, and one's interpretation or conception of duties and rights can be a misinterpretation or misconception, however firmly held.[11]

For present purposes, the difference between the Kantian and this realist version of autonomy is not important. On the former view, the truth about autonomy is a matter of meta-ethics, or even of the metaphysics of morals; it is presupposed by the very possibility of moral thought. On the latter view, the autonomy of moral agents is not an independent presupposition for all moral thought, but itself one fundamental moral truth. It is the truth that we can and ought to exercise self-discipline and must each act upon our own reflective understanding of moral duty and moral right, as well as taking responsibility for our own idea of the good life, and for trying to pursue this idea through the opportunities and contingencies of life that we happen to confront. Autonomy is on the former view metaphysically, but on the latter view morally, fundamental to our moral life. In either case, it goes to the heart of what it is to be a (fully) moral agent.

Let us take this conclusion to be true, on one or other of the grounds that can be offered for it. In either case, it reveals what is surely the core idea of 'autonomy'. Autonomy is a quality of persons, that is of conscious acting subjects, who shape their will according to reasonable judgments based on the information derived through external and internal senses and gained in discussion with others or from reading and reflecting. By that rational will they construct and act upon conclusions concerning duties and rights that are inherently universalizable.

[10] J Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) chs 1–3.
[11] Cf A Donagan, *The Theory of Morality* (Chicago, Ill: University of Chicago Press, 1979).

To apply the term 'autonomy' in any other setting will involve either an extension of this sense of the term, or the devising of a distinct concept to which the term ambiguously applies (but here, to avoid ambiguity, it would be better to use a different term). The extended use would be apt in cases of collective or corporate bodies to which it seems proper to impute some kind of decision-making and law-making power analogous to that which we stipulate in the case of the conscious rational agent who is also a biological human being. Given certain institutional arrangements, we can reasonably impute common decisions to all sorts of organized bodies like clubs, trade unions, sporting associations, commercial companies, partnerships, families sometimes, universities, churches, states,[12] and we can ask how far such decision-making is autonomous, how far subordinate to some extraneous or superior regulation.

Heteronomy is defined by simple negation. Where there is will, or decision-making capability, but where the rule to which the will submits is set by an extraneous or alien will, there heteronomy prevails. Where one person acts upon another's taking responsibility for the rightness of the action ('Well, if you say so, I have no choice about the matter') there is no autonomous action by the ostensible agent, though there may be by the other party. If I give up smoking, not because I reflectively decide that it is right or good to do so, but because of pressure exercised by family and peer-group, or because of some enforced unavailability of tobacco, or under pressure of a legal ban on smoking in enclosed public spaces, the resultant state (my not smoking) may be on some view better than the former, but no moral credit belongs to me for this.

To sum up on this characterization of morality, deliberation and decision as moral deliberation and decision are autonomous. One must come to a conclusion on the best view one can form of all the evidence, and in the light of the whole range of one's moral commitments and beliefs. One must bring these together into the kind of consistent and coherent set of practical principles that it befits a rational agent to possess. None of us is likely to achieve this unaided, and indeed each of us has reason to seek the views of others in framing a conclusion. Moral views on such issues impinge on other people, so one should hear their views. Most of the moral position of each of us has emerged through a taking of individual responsibility for a body of moral opinion and tradition initially acquired heteronomously, and continuing reflection on the quality of our principles therefore engages critical reflection upon inherited tradition. This again gives reason for co-reflection with others reared in the same or kindred traditions, as well as critical co-reflection with others from other traditions. Above all, the insight that one is oneself autonomous entails recognition of the like autonomy of every other, hence the equality of all moral agents as such. Any moral co-ordination of moral opinions can then only come about through the reaching of common but

[12] Cf R Dworkin, 'Constititutionalism and Democracy' European Journal of Philosophy 3 (1995) 2–11 at 3–5, on 'two concepts of collective action'.

independently endorsed conclusions, and this implies a readiness to engage in fully open and non-coercive co-deliberation with others. That is, moral deliberation morally ought to proceed through 'discourse' and can never proceed in a non-discursive way, by recourse to power-play, rhetorical tricks, or the like.[13]

An essentially discursive character, therefore, as well as an autonomous one, is crucial to moral thought, and to morality as such. Moral deliberation involves a discourse of equals, seeking some common answer to what is for all the same set of questions, to which, however, no one can lay down the answers with conclusive authority for any other consistently with sustaining the essential character of moral thought.

This leads to a third feature of moral thought that almost inevitably supervenes upon the other two. Moral opinions can be controversial. Since each of us confronts moral questions as an autonomous agent, nobody's answer is conclusive for anyone else. Given the complexity of practical life, perhaps an ever-increasing complexity, there is no *a priori* guarantee that all human beings, or even all human beings who come much into contact with each other, can come to identical conclusions in moral deliberation. In practice, as is obvious every day, conscientious and reasonable people thinking rationally and reasonably about moral issues do come to different and mutually incompatible, sometimes sharply opposed, conclusions. Issues about drugs, about euthanasia, and about abortion are no more than especially vivid illustrations of this. So we may conclude about morality: morality is intrinsically autonomous; and in consequence it is also both discursive and controversial.

14.5 Of Law: Institutionality, Authoritativeness, Heteronomy

Now let us go back to remarking that the problems most recently under discussion did in fact come from legal decisions, in Germany, in England, and in the United Kingdom respectively. The cannabis decision, the decision about the PVS patient, the decisions about abortion, were all decisions by legal institutions—a constitutional court, a highest-instance civil court, a criminal court of first instance, a parliament. From this follows another fact: that the decisions, taken as they were by legal agencies within their legal competence, were authoritative and (within a certain range) conclusive. The point of legal institutions is exactly that they exist, inter alia, to settle disputable practical issues in an authoritative way for all persons who fall under their jurisdiction or legislative competence.

Previous reflection on the character of moral deliberation reveals a positive value that may accordingly be ascribed from a moral point of view to legal institutions endowed with exactly the features of being institutional and authoritative

[13] Cf R Alexy, *Theory of Legal Argumentation* (trans R Adler and N MacCormick) (Oxford: Clarendon Press, 1988) 114–135, 193–194.

that we are now contemplating. For it may be necessary to live by some common public standards that are settled and determinate for all of us even while they remain highly controversial, or at least always open to controversy, at the level of pure moral debate. Issues of the kind here discussed, and many similar issues, are not subjects of moral consensus among contemporary citizens of contemporary states. Yet for purposes of social life in complex societies they are issues upon which it seems necessary to have some determinate common norm of public action.

Where there are publicly-licensed medical practitioners and publicly-licensed, usually also publicly-financed, hospitals, it must be a question what is required or permitted in the way of therapeutic practice, especially where the boundary between therapy, permitting death, causing death, or actively killing comes into question. And if there is a rule against the taking of human life, there must necessarily be a threshold rule saying when protected life begins, and with what consequences.

Hence the fact of moral controversy does not mandate avoidance of any common rule. To refrain from adopting any common rule is not a non-answer, but is one of the controversial answers to the question what rule to have, namely the answer in favour of a permissive approach to the issue in question. What the law's institutions can do is that which moral deliberation cannot itself achieve. They can lay down a common rule in relatively determinate terms, and where the rule first enunciated is insufficiently clear, there are legal practices of reasoning and interpretation that can further clarify, further determine, the law. At least for individuals, the practice of law-application can produce almost incontestable clarity at the level of an individual norm. In the *Bland* case, for example, one can say confidently that the medical and nursing personnel in whose care Mr Bland was placed had an absolutely clear declaration of the things it was their legal duty to do. If afterwards they had been prosecuted for doing them (and an attempt was made to that end), they surely had a conclusive answer to any legal indictment we can imagine. Almost the same can be said of other doctors and nurses in the meantime charged with the care of other patients who have suffered brain injuries and degenerated into an irreversible condition of PVS.

Not all legal determinations are necessarily as determinate as that. The Federal German cannabis decision said only that prosecutors' discretion should be applied to abstain from prosecuting persons found in possession of 'small' quantities of hashish or cannabis. This lays down one common rule for all the *Länder* where previously there were several conflicting practices between different ones of them; but clearly it is not yet fully determinate. This is the kind of ruling that clearly has to be further concretized in subsequent decision-making at appropriate levels. It has indeed taken some time, and several decisions in several *Länder*, to establish (still not with absolute clarity) what the line is between small amounts for own use, and larger ones for presumed uses of illicit commerce. However determinate, all case-law is to a degree defeasible—highest courts can always, and occasionally

do, review or vary their own precedents.[14] (In the USA, the Supreme Court is in the process of pulling back from its own earlier rather extensive decisions about the permissibility of abortion during the first trimester of pregnancy, for example, and for the moment a degree of indeterminacy appears to prevail.) Quite apart from such review, there can always be fresh legislation altering previous legal understandings and calling in turn for new acts of interpretation in the process of further judicial application of law.

Despite all that, it remains the case that the law has institutions for establishing common rules and for rendering them progressively more and more determinate. This 'progressive concretization of norms', as Kelsen noted, reaches its maximum of determinateness when it comes to the individual norm of decision issued by a court of law to or in respect of an individual person or determinate group or set of persons.[15] It is of the character of legal institutions that their decisions have a necessarily authoritative character within the framework of the law. Sometimes, as with a first-instance court, which is subject to appeals, or with a legislature whose enactments are subject to constitutional review, this authority is provisional and defeasible upon proper challenge. But it is of the character of legal institutions that for any given line of decision and review or appeal there is some institution that has a final authority upon the given question. Then, internally to its own institutional activities, though not at the level of legal-scientific or juristic debate and criticism, the law simply admits of no other authoritative answer than that which has been given. Whoever ought to, or wishes to, or has no choice but to, act in accordance with law has to act in accordance with the determination given by the relevant institution, for it is conclusive as to the law for the time being.

Normally, this is no mere theoretical conclusiveness. States are political entities, that is, their constitutional order is sustained by power-relations, ultimately including relations of brute coercive power. They are highly organized and can dispose of power quite effectively. Where law is state-law, it has the backing of state power (though also, where a state is a law-state, it is legitimated by, and restricted in its use of power by, law as normative order; and all states have some minimal aspiration to be credible in the guise of the law-state). There are other settings in which law belongs, such as supra-statal communities or unions (particularly the EU, increasingly also the UN), churches, national and international sporting associations, commercial and educational corporations, trades unions. These also dispose of forms of power, psychological, social, or economic, but usually they have access to physical force (if at all) only through, and by permission of or with the support of, some state.

Hence it is usually the case that legal determinations are not merely institutional and authoritative in a purely normative sense. They also have the backing of

[14] On defeasibility, see MacCormick, *Rhetoric and the Rule of Law* ch 12.

[15] Kelsen, *Pure Theory of Law* 237: 'This process, in which the law keeps renewing itself, as it were, proceeds from the general (abstract) to the individual (concrete); it is a process of increasing individualization and concretization'.

some form of power that bears significantly on vital interests of the persons to whom legal determinations are addressed. Two significant conclusions follow. First, each addressee of law normally has some reason to comply; secondly, each knows that the same is presumptively true of the great majority of other addressees of the law, and each can accordingly form reasonably reliable expectations of others' conduct. This is because ordinary social experience gives people in all sorts of contexts and settings reasonably well-founded views of the general likelihood that others will act upon the reasons that the law gives them for acting.

Further to this, in settled situations there may well be a general acceptance that the law as laid down is on the whole reasonable. This will lead to the law's being backed by customary norms and practices according to which one ought to accord respect to the law's demands and to the constitutional order that lies behind them. Thus to any reflection on the power of the law and to any expectations of general conformity is added a normative conception of the ultimate foundations of the law. This resides in popular attitudes of support for a society's established way of organizing itself and going about its business. The weight of moral opinion as well as of coercive force and common expectations swings also behind the law's determinations. It is no wonder that so many people have such deep reservations about open disobedience to law in normal circumstances. It is a routine part of everyday morality to hold that law and order should be respected.

Yet it remains the case that there is a moral price to be paid for the utility of law as institutional establishment of common norms for conduct in society. That is, that law as well as being institutional and authoritative, indeed, precisely because it is so, is heteronomous. That is, it confronts each moral agent with categorical requirements in the form of duties, obligations, and prohibitions that purport to bind the agent regardless of the agent's own rational will as an autonomous moral being. The law's demands to the autonomous agent purport to bind the agent in a heteronomous way. Law is (in this sense) heteronomous, as well as authoritative and institutional; it thus stands in clear conceptual contrast to morality, which is autonomous, discursive, and controversial.

Thus understood, there is a clear conceptual distinction between the moral and the legal. It is a distinction that can be made clear only upon a conception of morality that holds it as essentially engaging the autonomy of each moral agent. Such a conception of morality can be based upon meta-ethical theses about the necessary presuppositions of morality (or, even, on a 'metaphysic of morals'), or on some normative moral account of autonomy as itself a fundamental moral principle available to moral intuition or established in some other way.

Of course there are other conceptions of morality that do not treat autonomy as foundational to it. On the one hand, we may think of conventional, or 'positive' morality,[16] consisting of a set of opinions that are commonly held in some

[16] 'Positive morality', in the sense of an actually current popular moral code, was a concept used by John Austin in *The Province of Jurisprudence Determined* (ed W E Rumble) (Cambridge: Cambridge

community on what are commonly regarded as moral issues concerning honesty, sexual continence, and mutual respect, and goodwill, and the like. This might take us back to where we started, thinking of conventions about queuing, for example. Whoever follows conventions in an unthinking and uncritical way is to that extent acting heteronomously. The problem comes when doubts arise or competing interpretations emerge of similar conventional norms. This challenges one either to develop some form of institutional authority to settle issues or forces one into the reflective mode of autonomous morality after all—one takes responsibility for one's own interpretation of the convention in question.

On the other hand, one may have an authority-based conception of morality, as sometimes can be found in the case of religious conceptions of morality. Where the authority is that of a sacred text, the Koran or the Bible, for example, there remains even for the most fundamentalist believer the need sometimes to come to a conclusion about the proper interpretation of a key passage in the text. Thereupon one falls back either on one's own interpretation or on that of a teacher. Where, as in Roman Catholic Christianity, the Pope speaking *ex cathedra* on a matter of faith and morals is held to be infallible, there is no possible competition between rival teachers. But one has now moved beyond convention into what is plainly a form of institutional normative order, a kind of positive law, grounded in the will and wisdom of God intimated through his supreme representative on earth. To a believer, it is then a positive law explication of the divine law. To a believer, such a law must be superior in authority and binding force to any merely human institutional normative order. The one autonomous choice concerns whether to embrace or reject such belief. Here, there is a contrast of content but not of form with state-law.

14.6 Mitigating the Contrast: Relative Heteronomy of Law

The argument so far faces an objection derivable from Kant's own theory of law. Kant takes account of the fact that the autonomous moral agent would face a potentially chaotic social existing of competing norms. For such an agent, says Kant, the first act of rational self-legislation would consist of submission to a social contract establishing a constitutional state along with others. Since that state is thus mandated by moral reason, the rational agent's autonomous will in relation to 'external conduct' must be willingly subordinated to the will of the law-giver expressed in a constitutional legislative process, the constitution being one to which the agent ought to submit for the reasons mentioned.[17]

University Press, 1995) ch 2. It was developed and applied in contrast to 'critical morality' by H L A Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963) 17–24.

[17] I Kant, *The Metaphysical Elements of Justice* (trans John Ladd) (Indianapolis: Bobbs-Merrill, 1965) 71 (Part II, Section 42).

The argument in this form goes well beyond the points mentioned in the preceding section. There, it was suggested that a moral reasoner ought to acknowledge the factual situation constituted by a legal order as one that gives her or him strong moral reasons for going along with the law in many circumstances. Notoriously, Kant, in the course of elaborating 'laws of freedom', brought himself to conclusions about the absoluteness of a person's obligations toward state and law that go beyond anything that any mere legal positivism has ever begun to endorse. This is a sad end for a transcendentalist natural law theory to drive itself to. It is also quite unnecessary. To see why, we need to differentiate the theory of actual positive law from a theory of ideal positive law.

Actual systems of positive law in contemporary states result from politics and even from warfare. They enshrine and to a degree presuppose economic arrangements and structures of economic power that many people from their autonomous moral perspective find it impossible to endorse fully or unconditionally. Not all that is enforced as law satisfies even elementary requirements of justice. The constructing of principles of justice in the moral sense is for each of us anyway a matter for our own autonomous judgment. There is plenty of evidence that this implies not merely the already noted inherent possibility of controversy, but an actual and widespread state of deep-seated dissensus over issues of justice in most contemporary political societies. The prevalence of party politics in democratic states is but one index of this. The attempt to enforce consensus of a kind through one-party states so often repeated in the twentieth century always exacerbated dissent while momentarily masking it.

In this state of affairs, to assert any plain or simple categorical obligation to enter a political community and autonomously to endorse *ab initio* whatever is passed as (or passes for) law therein seems to go beyond anything that can be warranted by rational deliberation or discourse. There plainly are strong reasons of principle for one to uphold one's membership in the legal-political society in which one happens to be, or to seek out one and acquire membership in it. There plainly are strong reasons of principle to grant at the very least a high prima facie respect for that society's constitutional norms and derived obligations at the level of substantive civil and criminal law. But, to say the very least, the question of the nature and weight of countervailing principles in general and in particular contexts is a controversial one. Arguments for a yet more anarchical view at least deserve a respectful hearing in any pure moral discourse.[18]

The character and incidence of any obligation to obey the law is then a question upon which the sovereign judgment of each moral agent must be brought to bear for autonomous decision. Judgments about the weight attaching to any such prima facie obligation will vary according to the context of different states and politico-legal orders. There can be no theorem of the metaphysics of morals that

[18] Cf Z Bankowski, *Living Lawfully: love in law and law in love* (Dordrecht: Kluwer Academic, 2001) 13–26.

settles the matter a priori. Each of us who advances a view of the character of this opposition stakes out a position in the contestable ground of moral discourse. While this does not absolve anyone from forming an honest and well-reflected view of the answer to the question, and trying to get it right, each has to acknowledge the illegitimacy of enforced *moral* assent to one among the contested answers. This is the very fact that we allude to in acknowledging the heteronomous character of the moral agent face-to-face with authoritatively issued legal norms.

The other side of this, though, is that we can envisage a position that many reflective people might hold in quite a variety of states. This is the position of autonomously committing oneself to upholding the constitution and constitutional processes, and therefore to giving legal obligations arising under it an at least qualified endorsement. Jeremy Bentham's dictum that, faced with bad laws, we ought to 'obey punctually, but censure freely'[19] is not so far from Kant's position after all. It encourages us to engage in active legal criticism and law-reform activity as normally preferable to violent resistance or futile refusal to obey. Someone who takes this line might view legal obligation as leaving intact a kind of relative autonomy. For it is acknowledged that there are autonomous moral reasons for obedience, even while consent to the content of the obligation is only qualified, or even absent. (Consider the conscientious objector to abortion who is nevertheless willing to endorse an obligation to go along with legislative decisions democratically taken, yet who at the same time campaigns vigorously against the use of tax revenues to finance abortion clinics). This person's position would also therefore be relatively heteronomous. All the more would the law present only heteronomous motives to anyone whose considered judgment accorded less than that degree of endorsement to his/her state as currently constituted.

Unless it seemed possible to construct a substantive argument within a moral discourse to prove that even a weak endorsement of law and the state is rationally untenable, it would have to be conceded that people living under law are at best relatively heteronomous, hence relatively autonomous also. It does not seem possible to do so. But there remains a conceptual distinction between law and morality.

14.7 Doubting the Contrast: Interpretation and Argumentation in Law

Another doubt may now be raised about the contrast drawn between the moral and the legal. I have said that law's point is to render common and determinate societally that which is interpersonally controversial in the perspective of autonomous morality. Law does this by laying down rules. But the rules are not

[19] J Bentham, *A Comment on the Commentaries and A Fragment on Government* (ed J H Burns and H L A Hart) (London: Athlone Press, 1977) 399.

self-applying. The law therefore also has law-applying agencies, in the form of police, prosecutors, judges, juries. Law-applying practices enable citizens to take claims to courts where, assisted by counsel, they explain their claims in the light of rules and precedents, and explain the interpretation of the rules and precedents under which their claim is justified. Their opponents can, like accused persons in criminal cases, raise objection to claims or accusations on the ground either of factual untruth or unprovability, or of misinterpretation of the rules or precedents to which reference has been made.

The more these processes are probed, the more it can be argued that law always falls short of having a fully determinate character. At least at the level of general rules, and of the rulings on law laid down in precedents that we rely on to provide narrower but still general rules, the point is well-taken. There are always 'leeways' of interpretation around almost any rule one can imagine, and it has been the distinctive gift of Critical Legal Studies to jurisprudence in recent years to have issued so many salutary reminders of the difficulty we have in ever coming up with a rule so clear that no problem of interpretation can be imagined for any context of its application.[20] Even so, the contrast with morality remains worth drawing. Autonomous morality admits of no authoritative texts; law in a certain sense consists of a set of authoritative texts (statutes, or 'rule-texts', and law reports or 'precedent-texts'). These texts are commonly acknowledged as authoritative repositories of binding law. Though they have to be interpreted to be applied, they are a fixed starting-point for interpretative deliberation. While we must fully admit their lack of perfect determinacy, we must also admit their relative determinacy as common points of departure for different persons, by contrast with the radical interpersonal indeterminacy of pure moral reasoning.

We should recall also the other feature of legal processes that was considered above. Legal processes conclude in the issuance of 'individual norms'. Having heard claims or accusations, and evidence in support of their factual grounding, and debate about interpretation of relevant texts, the judge pronounces a decision, and issues orders to individuals to give effect to it (or issues declarations of their particular rights in a given matter). These individualized norms of law can even occasionally themselves give rise to problems of interpretation, but in that case one goes back to the court for further orders, and so on. In the end, the concrete legal right emerging from a legal process can be wholly determinate for practical purposes. By contrast, even where two or more people agree fully about all the moral principles applicable to a given problem, they may come to quite disparate conclusions about their duly weighted application to the case in hand. (This does not say, of course, that each moral agent for her/himself does not come to a quite determinate conclusion. Each can and should, and often does. It is not these

[20] S C Levinson and S Mailloux, *Interpreting Law and Literature* (Evanston, Ill: Northwestern University Press, 1988); D Kennedy *A Critique of Adjudication* (Cambridge, Ma: Harvard University Press, 1997); M Kelman, *A Guide to Critical Legal Studies* (Cambridge, Ma: Harvard University Press, 1987).

conclusions that are indeterminate, but the interpersonal conclusion as to the right or wrong of the matter.)

It might be counter-argued that the interpretative element in legal reasoning elides the difference between it and moral reasoning.[21] Now certainly it is the case that interpretative reasoning in law (and other elements in legal reasoning) form one special part of practical reasoning, and hence there is much in common between legal reasoning and moral reasoning. The attempt to do justice in the legal forum, but always justice-according-to-law, must clearly come under the guidance of some conception of justice which is always a moral, or morally defensible, conception of justice. As such, it need not be considered perfect or ideal justice, even from the point of view of the engaged legal reasoner. Thus the law as it emerges from the interpretative process addresses its demands to us subject to a 'claim of correctness',[22] making claims about the practical and moral justifiability of the duties or other legal relations it asserts. Hence it addresses us with full respect for our autonomy.

That legal reasoning is a sub-species of practical reasoning, and hence either strongly analogous to, or even a specialized form of, moral reasoning, is true. The intrinsic arguability of law is one of its salient features.[23] The cases that were discussed earlier make this very vividly clear. To decide whether or not it is legal to permit a PVS patient to die; or to procure an abortion; or to prosecute those who possess small quantities of cannabis for their own use; is clearly to take a decision which has great moral significance. To produce justifying reasons for one's decision, although these include legal norms and precedents, requires one to interpret the norms and precedents in the light of background principles and values, hence the interpretative reasoning is also in part moral reasoning. The judges in all the cases I mentioned are obviously wrestling with issues that are highly charged morally, and the reasons finally given include substantial moral elements alongside more technically legal ones. Moreover, the final utterance of the decision as a satisfactorily justified decision is an act by a moral agent who must be presumed to be satisfied that it is morally justifiable to proceed to decision on the basis of the reasons given.

All this is highly important, and a necessary corrective to a merely narrow legalism. Yet it does not resolve the distinction between the legal and the moral. If anything, it exacerbates it. Let us indeed insist that the judge or other authoritative interpreter of law is her- or himself a moral agent who must take moral

[21] A case for this could be based on R Dworkin, *Law's Empire* (Cambridge, Ma: Belknap Press, 1986) or, indeed on MacCormick, *Rhetoric and the Rule of Law* (Oxford: Oxford University Press, 2005).

[22] R Alexy, *Theory of Legal Argumentation* 214–220 on the claim to correctness; R Alexy, *The Argument from Injustice: a reply to legal positivism* (trans B Litschewski Paulson and S Paulson) (Oxford: Clarendon Press, 2002) applies the 'claim to correctness' argument in support of the thesis that extreme injustice is incompatible with law.

[23] MacCormick, *Rhetoric and the Rule of Law*, ch 2.

responsibility for the interpretative decision she/he issues,[24] and for the concrete decision between parties that it supports. But the more we insist on this, the more we underline the risk of disagreement from the point of view of those whom the decision addresses directly or indirectly. We come back to the problem of the conscientious dissenter. Whatever a court decides about the rights of the PVS patient or about the legitimacy or otherwise of abortion in a given setting, that decision speaks with the authority of law to the whole audience, assenters and dissenters alike. Hence there is always a possible moral point of view from which the law governs conduct in a purely heteronomous way, and this possible point of view is an actual one for many persons in any actual human society.

This consideration in fact justifies a more rather than less legalistic approach to legal decision-making. The more we take legal decision-making to be a public matter drawing on public sources, the less we force agents into the position of having to knuckle under the moral decisions of particular judges and other legal officials. That may in fact show better respect for autonomy than an excessively moralized approach to legal reasoning in concrete cases. In any event, the problem of autonomy is *the* moral problem. Law, by virtue of the way in which it addresses the moral agent *ab extra* is always at least relatively heteronomous. That is why law and morality are conceptually distinct.

[24] M J Detmold, *The Unity of Law and Morality* (London: Routledge and Kegan Paul, 1984).