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LAW AS INSTITUTION

by

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I wish to dedicate this book to my sister,
Adriana La Torre

Preface

This book – which is the result of several years of research, discussion, writing and re-writing – consists of three parts and eight chapters. The first part is given by the two first chapters introducing the issue of validity and facticity in law. The second part (Chapters 3, 4 and 5) is the core of this study and tries to present a theory based on a specific view about language and social practice. The third part deal with the issue of value judgments and views about morality and consists of Chapters 6 and 7. Chapter 8 should finally serve as epilogue.

In the first chapter a discussion is started about the relationship between law and power, seen as a presupposition for an assessment of the nature of law. As a matter of fact, as has been remarked, "general theories of law struggle to do justice to the multiple dualities of the law".[1] Indeed, law has a "dual nature": it is a fact, but it also a norm, a sort of ideal entity. Law is sanction, but it is also discourse. It is effectivity, or facticity, but it is also a vehicle of principles among which the central one is justice. But this duality is not only a phenomenological, or a matter of justification and implementation as two separate moments. It is an ontological quality too, and it is there from the beginning, from the moment where law "springs" as a distinct experience and practice. Here we are then confronted with the question of power.

Law without power (some would say without "sanction" or "force") is not even conceivable or definable, This is so because law is a portion of reality which at the same time produces reality (conducts). Law is the power of doing things that "hold" in society. But at the same time this power should not exceed given limits and has to follow certain criteria, and the law is there to check power, to constrain it. Power and law are thus inextricably related. This is the reason why legal theory and philosophy are first of all theories about the relationship between law and power. So that there are theories which defend the primacy of law over power, and other ones which reverse the role of law, and consider this as instrumental to power. In Chapter 1 the former are played against the latter, to consider their relative merits and deficiencies. Legal positivism and natural law are here really the issue, the one stressing facticity, the other appealing to ideality. Constitutionalism and the rule of law in this sense indeed are a development of the modern natural law tradition.

[1] J. Raz, *Between Authority and Interpretation*, Oxford 2009, p. 1.

Chapter 2 concludes the first part of the book by considering an alternative view about the relationship between power and law. Here the main approach discussed is Hans Kelsen's "pure theory". As a matter of fact, Kelsen presents his own theory as a solution to the controversy, in so far as power is reconceptualised as an order of rules, a legal order, or more simply as "law". In this sense, the opposition between law and power dissolves. However, such dissolution is only apparent, since on the one side the law is conceived as based on coercion and facticity and on the other hand whatever effective law is ennobled as "valid" system of law.

In the second part of the book there is a shift towards a consideration of the law as a phenomenon possibly concerned with language. Once traditional explanatory strategies are seen as unsatisfactory, and nevertheless law is accepted as being a social fact, there is the possibility of addressing this fact as somehow analogically linked with a system of language. This is attempted in Chapters 3 and 4. Here there is first an analysis of theories of linguistic meaning, their limits and merits and their possible consequences for the explanation of human action and for the concept of law. Several theories of meaning are assessed and finally the so-called use theory is outlined as the most convincing (though with some important caveats) and as the closest to the legal point of view. Actually the use theory thinks of "use" in terms very similar to legal notion of "custom" or "customary law". For the use theory in a sense language is the same as "customary law". However, "custom" here is not mere regularity, but eminently a normative game and a special room for action, a play of giving and asking for reasons. Recent developments in philosophy and in philosophy of law, especially rational pragmatism, discourse theory and inferentialism, seem to largely support this view.

Once assessed the "use theory" as the most reliable approach to language meaning, in Chapter 4 there is the attempt to build a bridge between such theory and the traditional institutionalist theories of law. These are reviewed and then supplemented through the neo-institutionalism more recently defended by Neil MacCormick and Ota Weinberger. Neo-institutionalism is then shown to be the most promising approach to cope with the ontology of law, though some reform in the standard theory is proposed to render more plausible and less circular the definition given of what an "institution" means and is. In particular, constitutive rules or "declarations" cannot kept outside an institutionalist perspective, though they cannot be said to produce directly "institutional facts" or better the scope of action which the "institution" consists of. They are rather "conditions" to be prescribed in understanding and performing a piece of conduct. This is why a definition of "institution" is advanced whereby constitutive rules are integrated with a notion of efficacy and effective performance.

Chapter 5 resumes the discussion of the relationship between law and power, while power is now conceptualized through the notion of institution. Kelsen's solution thus appears more promising, if however power is no longer related to facticity or coercion or sanction, but rather to institutional facts and institutions.

The third part of the book develops and tries to make explicit the normative side of the idea of law as institution. Here in Chapter 6 there is first a summing up of

meaning theories and of their implications for a conception of normative language. Special attention is devoted to the "speech acts" theory. After that in Chapter 7 an attempt is made to apply the results obtained in Chapters 3 and 6 to meta-ethics and the study of morality and moral sentences. Meta-ethical doctrines are reviewed and criticized by focusing then to the issue of universalizability. At the end of the chapter a definition of the moral point of view is advanced. In this chapter – which is of special importance to the argument of my research – moral doctrines are assessed at the meta-theoretical level and a particular attention is given to "discourse theory" approaches.

The "institution" of institutionalist doctrines usually claims to be self-sufficient. This in the book is seen as a deficiency. The law in particular has an ideal side which a Wittgensteinian notion of institutional fact seems not to be able to grasp. However, Wittgenstein himself by referring when speaking of an institution to its "Witz", its "point" or "sense", points out that we need a content and ideal side. This need to be explicitly thematized, and this is Chapter 7's main task.

Finally, Chapter 8 concludes summing up what the neo-institutionalist approach defended would imply as for the relationship between law and morality. Here different approaches are reviewed and discussed. The outcome is a partial endorsement of a discourse theory approach. Institutionalism, old and new, to make sense of the ideal side of law, of its dual nature, cannot maintain morality outside the precinct of legal practice. In this sense, institutionalism – to be faithful to its own notion of institution – cannot keep faith to legal positivism. Institutionalism needs – this might be a conclusion – morality and a theory of morality to render justice to the concept of law we adopt from the internal point of view. But the morality theory searched for cannot be a Platonist one, distant from practice, and imposed upon it, or even one that could believe to derive practice from one or a few basic principles in a logicist mood. Law's own ontology (and practice) is normative and therefore requires to be explained an idealist perspective as well. A moderate meta-ethical cognitivism will be the way out from the realist dumbness of legal positivism. And a moderate cognitivism rooted in the pragmatics of legal discourse will have as a consequence a defence of a moderate connection between law and morality: a connection more "practical" than just "conceptual".

In short, this book springs from the need to go beyond Neil MacCormick's and Ota Weinberger's institutional theory of law. The need is to trace back the lines of the theoretical tradition of legal institutionalism, to see how much of it has stood the test of time and more modern developments in legal theory, and link these "residues" (which are considerable) with a new version of legal institutionalism that has been gaining ground in recent years. In this book I try to link together those two formidable pieces of research, the "old" and the "new" institutionalism, and to render their philosophical bases explicit, specifically as far as the philosophy of language is concerned. In this area my aim is to outline the connections between theory of meaning, theory of the norm and theory of legal validity. To this end I put to the test some of the most debated theories of meaning, reaching the conclusion that institutionalist legal theory can be better "founded" if an equally institutionalist theory of language (a "use theory") is adopted.

The stimulating character of neo-institutionalism derives – I believe – from the fact that it makes possible to adopt an institutional perspective without having to accept the heavy holistic and essentialist presuppositions which were at the bottom of the "old" institutionalism. It accepts, for instance, the concept of a "rule", and makes it rather a constitutive element of institutions. And by introducing the idea of "rule" into the walls of "institutions" it render these permeable to individual reflection and criticism. Rules, as matter of fact, whenever they are not conceived as mere regularities or scientific laws, imply what Hart calls a "reflective attitude"; and reflection cannot but be exercised by individuals. Neo-institutionalism thus allows for individualism, which is the starting point of modernity and of what Jürgen Habermas calls "post-conventional morality". Here, therefore, institutions are not meant to resuscitate the socialization of the "ancient" passing through the integration of individuals in a community supposedly primordial and the adhesion to effective models of action considered as fully constitutive of individual ethical conduct.

Nor would the new kind of institutionalism I defends follow any dream of ontological excellence of collective social entities, though ascribing to the institution a proper existential dimension. Between organicism (and the celebration of *Volksgeist*) and empiricist reductionism (and the acknowledgment only of "brute facts") it marks a third way. In particular, challenging and extremely promising is the possibility offered by neo-institutionalism of connecting a notion of institution with a moderately cognitivist approach to ethics, so to avoid the strong moralism and objectivism usually connected to institutionalist views, such as those for instance of Georges Renard, Rudolf Smend or Arnold Gehlen. This actually is my main objective in this book: to conjugate an institutional legal theory with a (moderate) cognitivist meta-ethics, to land into a procedural and deliberative concept of political action.

Indeed, I seek principally to fill an embarrassing gap: the lack in of a definition of "institution". Once in possession of this concept, it is then applied to the thorny topic of the binding force of law, a point that institutionalists have largely neglected. Eventually, my claim is that the notion of institution prepares the ground for a redefinition of the concept of power. To do so it is obviously necessary to take a third factor into account as well as law and power: "society".

It is important to stress that my legal theoretical project needs a cognitivist meta-ethics as a preparation to his conclusive step: a reassessment of the disputed relationship between law and morality. Here it is made clear how institutionalism does not preclude a reflective and critical morality and thus both connects and separates the legal and the moral domain. On the other side the concept of law I develop from an institutional perspective, rejecting as this does the imperativist background and the prescritivism present even in recent more refined versions of normativism (such as those by Kelsen, Ross and Hart), leaves open the field for an antiauthoritarian and deliberative conception of the body politic. For instance, a prescriptivist theory of law cannot solve the dramatic contradiction between a rule which grants rights (freedoms and powers in the end) and the same rule seen as essentially imperative and hence as a restriction of human capacities of agency.

Rights have been the other recurrent subject in my research. In my book *Disavventure del diritto soggettivo* (Giuffrè, Milano 1996) I strongly criticized the reductionist strategy of conceiving rights as a mirror of commands and obligations. My attempt there was to re-conceptualise rights first as thick concepts which cannot be submitted to an empiricist and logicist treatment such as the one proposed by Alf Ross in his famous "Tû-Tû" article. Rights are not vehicles to be taken to any destination. There is in them a thick cultural and political core. Moreover, they are mostly powers, not pale reflexes of other more fundamental deontic operators. The triad of traditional deontic operators cannot – this was my claim – offer an intelligent account of rights' conceptual structure. Rights indeed have a permanent problem with legal positivism which tries to tame them through a reductionist strategy. On the contrary, institutionalism, especially in the shape given to it in this book, focussing on constitutive rules as the basic rules of a legal system and, moreover, having of the rule a concept of a device that enlarges and does not reduce human chances of action, can perfectly accept rights as products of normative propositions. To take rights seriously, to calmly accept their particular ontology and their intricate logical structure, another, different theory of law is needed: this – I believe – is neo-institutionalism.

This work bases and is a development of my *Norme, istituzioni, valori* (Laterza, Bari 1999). It re-elaborates on this previous monograph, trying to make of my theoretical proposal a more integrated and convincing case. And it would not have been conceived and carried on without the inspiring research project of two masters of legal theory, Professors Ota Weinberger and Neil MacCormick, who have both sadly passed away last year. I learned so much from them and I owe such a lot to their intelligence, scholarship and friendship that they may be said in a sense sort of co-authors of my work. The following pages are also meant as a tribute to the memory of these two great scholars.

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Part I
Law and Power

Chapter 1
Two Opposing Conceptions

1.1 Preliminary

There is a direct connection between law and politics in so far as legal actions and decisions contribute to collective practice.[1] Controversy governs the nature of this connection however. In legal and political theory, two chief ways of understanding the relationship between law and power traditionally emerge. According to the first conception, more widespread (particularly in the modern epoch), law is an expression of power, its instrument and issue. According to the second, less widespread, conception, law is the source of, or prerequisite for, or limit on power. This opposition is well recognized by many of the more aware writers on legal theory.

Hans Kelsen, for instance, in his *Der soziologische und der juristische Staatsbegriff*, considers a series of legal doctrines according to whether they posit the State as prerequisite (*Voraussetzung*) for law or vice versa. Norberto Bobbio, dealing specifically with the relation between the two concepts of power and law, said the following: "The general theories of law and State can be differentiated into two great categories according to whether they assert the primacy of power over norm, or conversely of norm over power".[2] I shall seek below to illustrate some examples of these two divergent ways of conceiving the relationship between law and power. I make no claims to completeness or even adequacy in my treatment of the theme, aiming more to introduce arguments and lead up to considerations relevant for a critique of the prescriptivist conception of law. What interests me here is not so much a classification of ways of conceiving the relation between law and

[1] C. S. Nino, *Derecho, moral y política. Una revisión de la teoría general del derecho*, Barcelona 1994, pp. 147–148.

[2] N. Bobbio, *Kelsen e il potere giuridico*, in *Ricerche politiche*, ed. by M. Bovero, Milano 1982, p. 3. Cf. also H. J. Wolff, *Verwaltungsrecht*, 8th ed., vol. 1, München 1971, § 25, where the German scholar refers to the constant dualism of *veritas* and *auctoritas* or of *ratio* and *voluntas*. Western legal reasoning reformulates the opposition between law and power in terms of two distinct but also competing principles that derive from "legal sources", but are both extra-legislative and beyond custom.

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power as the preliminaries for singling out one particular way of conceiving the phenomenon of law for discussion.

The point is not to provide the solution to a "chicken-and-egg" problem (which came first?), but to conceptualize a tension that is always present in legal experience. This tension is that between the unavailability and the instrumentalization of the law by the holders of political power, and by subjects capable of exercising pressures of various types, as holders of extra-legal, material or psychological, force. All this obviously involves referring back to the structure of legal argumentation, and specifically to what is to be regarded as a legally valid argument. Accordingly, the question of the relationship between law and power is by no means otiose, or a simply a matter of sterile academic debate.

The opposition mentioned above between two views of the relationship between law and power runs through the whole history of political and legal thought. Classical Greek thought gives us illustrious examples of each conception. The Sophists' thought generally asserts that the law is a means for the stronger to dominate the weaker. Nonetheless, in *Gorgias* Plato makes Kallikles say that the positive laws are a creation of the weaker to neutralize the natural superiority of the stronger.[3] Pericles, in Xenophon's *Memorabilia*, maintains that law is everything that the sovereign power has laid down as obligatory: "All that the sovereign in a polity prescribes by deliberating what ought to be done, all that is called law"[4] and there is the well-known "argument of Thrasymachus" in the first book of Plato's *Republic*, according to which positive law and justice coincide with the interest of the stronger.[5]

The Sophists' "realistic" approach was opposed by Stoic thought, which instead generally upheld the primacy of law over power. This conception was taken over into Roman political and legal thought, largely influenced by Stoicism. A noted example is Cicero's work, according to which law as positive command is merely a "popular" or "vulgar" notion,[6] while there is a true law, that is right reason, conform to nature, grasped by everyone, permanent, eternal: "est quidem vera lex recta ratio naturae congruens, diffusa in omnes, constans, sempiterna".[7] Aristotle, who like the Sophists upheld a realist conception and therefore distanced himself from the Stoics' rationalistic natural-law approach, based nonetheless political power, the constitution of a people, its *politeia*, on the existence of a body of laws. In a famous passage, the Stagirite says this: "Where the laws have no authority, there is no constitution. The law ought to be supreme over all, and the magistracies should judge of particulars, and only this should be considered a constitution".[8]

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[3]See *Gorgia*, 483b.

[4]*Memorabilia*, II, 43–44. Cf. P. Koller, *Theorie des Rechts. Eine Einführung*, 2nd ed., Wien 1997, pp. 38ff.

[5]See *Res publica*, 338c.

[6]See *De Legibus*, I, vi, 19.

[7]*De Re Publica*, III, xxii, 33.

[8]*Politics*, ed. by S. Everson, English trans. by J. Barnes, Cambridge 1988, 1292a, pp. 32–35.

In the Middle Ages the opposition is represented on one side by the Thomist doctrine, for which the *lex aeterna* is eminently rational, and not arbitrary, will. On the other side, we find the highly voluntaristic Occamist doctrine for which the moral law is above any criterion of rationality and consists in the pure command of God. Occam holds that evil is nothing but conduct contrary to what one is obliged to comply with (the formula taken up by Hobbes). Obviously, in both doctrines the relationship between law and power is reinterpreted in ethical and theological terms as the relation existing between the just (law in the ethical sense) and divine activity (power in the theological sense).

According to Aquinas, the just (which is the rational) in a certain sense preexists the divine power, or better, the divine will cannot wish anything but the just (rational). According to Occam, by contrast, the just is the product of the arbitrary divine will. The two formulae lead to two distinct outcomes. The first asserts, in line with Occam's commentary on Peter Lombard's *Sentences*, that if God had prescribed theft and murder, the acts denoted by these terms would cease to be thefts and murders, since their meaning is not absolutely given, but is rather the outcome of divine intelligence and resolve, "quia ista nomina significant tales actus non absolute: sed connotando vel dando intelligere, quod faciens tales actus per praeceptum divinum obligatur ad oppositum".[9] On the other hand, Gabriel Biel, taking up an expression of Gregory of Rimini's, maintains that an action which is just according to reason is so, even if God does not exist or does not wish it (which actually are both said an absurd assumption): "Nam si per impossibile Deus non esset, qui est ratio divina, aut ratio illa divina esset errans, adhuc si quis ageret contra rectam rationem angelicam, vel humanam, aut aliam aliquam, si qua esset, peccaret".[10] This indeed is a formulation that paves the way to the later modern natural law based more on human (individual) rights than on divine authority.

As far as legal theory in the strictest sense is concerned, the contrast in the Middle Ages is between a conception that picks up Ulpian's fragment in the Digest, according to which what is liked by the king that is law, *quod principi placuit legis habet vigorem*, and hence the imperial tradition of a power above its own law, and those viewes that give expression to the typically feudal need to limit central power. The latter line of thought was particularly lively in England, given the particular historical and social situation in that country. Rudolph von Gneist, in his classic study on English administrative law, cites an old maxim of the English courts that is revelatory of the Anglo-Saxon way of understanding the relationship between law and power and according to which law is the greatest patrimony and inheritance of kings and the one over which the sime title of king is based: "La loi est le plus haute inheritance, que le roy ad; car par la ley il meme et tautes ses sujets sont rules, et si la ley ne fuit, nul roy, et nul inheritance sera".[11] And Bracton, the great theorist of English

[9]Cited from the appendix to G. Fassò, *La legge della ragione*, Bologna 1966, p. 276.

[10]G. Fassò, *Op. cit.*, pp. 283–284.

[11]See R. von Gneist, *Englisches Verwaltungsrecht*, vol. 1, Berlin 1897, p. 454.

medieval constitutionalism, asserted: "The king must not be under man but under God and the law because law makes the king".[12]

1.2 The Law as Expression of Power. "Analytical Jurisprudence" and Legal Positivism

1.2.1 The modern era opened with a fierce, somewhat dark vision of the legal phenomenon: "Recht ist Gewalt", law is violence – as Martin Luther said.[13] As a result of the legitimacy crisis of that era, provoked by religion wars and the discovery of cultural pluralism, there was a growing tendency to sceptical views and a multiplication of doctrines that detached law from normative ideas and in the end reduced it to basic material force. Law is here seen as a product of power and not vice versa. One of the most authoritative upholders of the doctrine that law is based on power in the early modern period – as is well known – is Thomas Hobbes. He takes up the Occamist view that evil is equivalent to what is prohibited by God's will, and applies it to ethics and to law. The just and the unjust are for Hobbes exclusively determined by the commands or prohibitions of whoever holds supreme power in a community. "Accordingly", we read in *De Cive*, "it belongs to the same chief power to make some common rules for all men, and to declare them publicly, by which every man may know what may be called his, what another's, what just, what good, what evil; that is summarily, what is to be done, what to be avoided in our common course of life".[14]

The civil laws, which for Hobbes define the just and the unjust, are conceived of as commands of the supreme power. Thus, ethics is subordinate to positive law, and this to political power. "Those rules and measures are usually called civil laws, or the laws of the city, as being the commands of him who hath the supreme power in the city. And the *civil laws* (what we may define them) are nothing else but *laws of the State*, because they are the commands of whoever in the State holds the supreme power. And the civil laws (to define them) are nothing but the commands of him who hath the chief authority in the city, for direction of the future actions of his citizens".[15] The definition given in *Leviathan* does not vary greatly from the one in *De Cive*: "Civil Law, is to every Subject, those Rules, which the Commonwealth hath Commanded him, by Word, Writing, or other sufficient Sign of the Will, to make use of, for the Distinction of Right, and Wrong; that is to say, of what is contrary, and what is not contrary, to the Rule".[16] Similarly, in *Behemoth* we read

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[12] H. Bracton, *De legibus et consuetudinibus Angliae*, vol. 2, ed. by G. E. Woodbine, 1968, p. 33.

[13] M. Luther, *Tischreden*, ed. by K. Aland, Stuttgart 1981, p. 207 (§ 497).

[14] T. Hobbes, *De Cive*, VI, 9, in *English Works of Thomas Hobbes*, ed. by Sir William Molesworth, vol. 2, Aalen 1966, p. 77.

[15] Ibid.

[16] T. Hobbes, *Leviathan*, ed. by C. B. Macpherson, Harmondsworth 1982, Part II, Chapter XXVI, p. 312.