cognitio

studentisches Forum für Recht und Gesellschaft

Legal Positivism Through the Neo-Kantian Perspective and Constitutional Jurisdiction

RAPHAEL MARCELINO

Citation

MARCELINO, Legal Positivism Through the Neo-Kantian Perspective and Constitutional Jurisdiction, in: cognitio 2023/1.

URL: cognitio-zeitschrift.ch/2023-1/Marcelino

DOI: 10.5281/zenodo.7984929

ISSN: 2624-8417

cognitio

studentisches Forum für Recht und Gesellschaft

Legal Positivism Through the Neo-Kantian Perspective and Constitutional Jurisdiction

RAPHAEL MARCELINO*

Critics of legal positivism claim that this doctrine is no longer adequate to formulate answers to contemporary problems inherent of constitutionalism. This alleged decline of legal positivism has created a space to a neo-constitutionalist discourse, which has experimented great acceptance among constitutional law scholars, lawyers and judges. Given such critical formulations, the objective of this paper is to delineate a specific profile of legal positivism – in a neo-Kantian perspective – and discuss possible contributions and limitations set to address problems faced in contemporary constitutional jurisdiction.

Table of Contents

* PhD in Law from Universidade de São Paulo (USP), Master in Law from Universidade de Brasília (UnB), Professor at Instituto Brasiliense de Direito Público (IDP). raphaelmanunes@gmail.com. I am very grateful for the organization of the 29thWorld Congress of Philosophy of Law and Social Philosophy held in Lucerne, Switzerland, where a first version of this paper was originally presented. The paper, which is now published, is a new version, after many contributions I had the honor to receive.

I. Introduction

As in contemporary works over HANS KELSEN's Pure Theory of Law, legal positivism has been the object of profound considerations on behalf of consolidated authors who scrutinize the modern constitutional law[1]. Among the discussions of legal positivism, relevant questions arise regarding the topicality or further advancement of its main postulates. These questions come about as a matter of harmonizing the time-worn theoretical and practical developments of constitutionalism with legal positivism, ever since HANS KELSEN's main work in the last century. Fundamentally, it is discussed whether there truly is any use in the dichotomy established between natural law and legal positivism as guidance in the comprehension of law, inclusive of its limits and associated sources.

In the current dialectic regarding the abovementioned dichotomy and its pertinence, underlies a pragmatic and ideological matter reaching beyond historic-academic purposes. The scope of such discussion touches upon the limits of performance of the jurisdiction, most notably the constitutional jurisdiction. Within this context, legal positivism features a series of reassessments discussing its potential, as a set of theoretical dogmatic formulations, to resolve modern complex problems which involve the performance of constitutional jurisdiction. The critics to legal positivism argue over the alleged decline of its theoretical set as a legitimate source of solutions to the contemporary constitutional problems. In response, they advocate for a new set of ideas of greater adequacy to our post-war constitutional experience.[2]

Considering these opposing viewpoints, this work is objected at the proper delimitation of a profile characterizing legal positivism, through its neo-Kantian perspective. This characterization is devised to pose its eventual limitations and possibilities as a set of theories oriented at the solution of current constitutional problems faced during the practice of constitutional jurisdiction. Initially, a theoretical delimitation over legal positivism will be made, since one of its profiles – namely legal positivism as an ideology – as opposed to the others, is susceptible to a greater number of objections (II.). It is then sought to define the object and argument of the criticisms, thus debating over the eventual possibilities, or lack thereof, of overcoming this theory set. Moreover, neo-Kantian perspectives regarding legal positivism will be delimited, with the purpose of defining the basis of this work's main analysis (III.). There will be presented inherent discussions over the performance of the contemporary constitutional jurisdiction, under the lenses of legal positivism with a neo-Kantian perspective.

II. Brief observations over legal positivism and its critics

The fundamental epistemological basis for law itself is attributed to utilitarians of the end of the eighteenth century,[3] for they brought about the philosophical questionings that would further sustain law as a different embodiment of the other social sciences. JOHN AUSTIN and JEREMY BENTHAM most notably, at their times, reiterated the necessity of analytically and clearly differing what the legal norm *is* and what it *should be*.[4]

1 E.g: BOBBIO NORBERTO, Jusnaturalismo e positivismo jurídico, São Paulo 2016, p. 111; PAULSON STANLEY L., A ideia central do positivismo jurídico., in: Revista Brasileira de Estudos Políticos 2011/102, p. 101 et seqq., p. 108.

2 BARROSO Luís R./BARCELLOS Ana P. de., O começo da história. A nova interpretação constitucional e o papel dos princípios no direito brasileiro, in: Revista De Direito Administrativo 2003/232, p. 141 et. seqq., p. 147.

3 HART H. L. A, Positivism and the Separation of Law and Morals, in: Harvard Law Review 1958/71, p. 593 et seqq., p. 594.

4 HART (fn. 3), p. 594.

A. Legal positivism according to John Austin

Further, AUSTIN would delimit these differences in his work «The province of jurisprudence determined» in 1861: the existence of the law is one object, while its merits or demerits are another completely different object.[5] The discernment of these aspects of law is motivated by the attempt of detaching the normative phenomenon from the subjective aspects of value, inherent to the assessment of a morally sound conception of what the law should be. AUSTIN, as to clarify his thesis, duly poses an argument against Sir William Blackstone. The latter affirms the superiority of the laws of God, in terms of obligation, such that no human laws, trespassing their divine equivalents, would have any validity. AUSTIN argues for the correctness of such thesis *if* the human laws *should not* contradict the laws of God, and thus consider the argument valid. Nonetheless, for AUSTIN, assert no vinculation of the human laws that contradict those of God, is as to «say absolute nonsense».[6]

In his theory, AUSTIN states that law is associated with the notion of authority , which in turn is related to the prerogative of a specified superior entity to deliver a command, linked with a possibility of inflicting harm on the receiver of the command, if it is otherwise unattended. Thus, in this operation, the receiver's conduct would adjust itself to the desire of the commander through fear. Fear, as put by AUSTIN, is a fact of life. However, it is a fundamental element in the construction of legal-normative material, since it is provoked on the receiver of the command and thus defines and adapts the behavior of the agent by the commander, under the possibility of a sanction. [7]

Due to these sequential operations described in the theory of AUSTIN, PAULSON STANLEY classifies this theory as naturalism, once it is based on fundamental material facts – fear and habit – so as to establish a sequence of facts that naturally lead to the creation the typical legal-normative material.[8] Thus, it is unnecessary to stand by valuation concepts of moral nature so that law is properly founded. It is, essentially, the reaffirmation of AUSTIN's argument differing what law *is* and what it *should be*.

B. Legal positivism according to Hans Kelsen

How it could be seen, there lie perceptible differences in the definitions of positivism from AUSTIN and HANS KELSEN. KELSEN's view is classified as legal-normative positivism, whereby he states the impossibility of validating a norm out of a fact. This assertion is justified by the argument that «the objective validity of a norm, which is a reflection of the subjective will of the behavior men ought to attain to, does not follow from the accomplished act, that is, does not follow from the is but from the ought as previously described by an objective norm.»[9] KELSEN, for means of exemplifying his argument, brings the situation of a gangster who orders to hand over a certain amount of money, juxtaposed with an income-tax official posing the same command. Although similar in nature, only one of the two orders is considered legal, namely the official's. The validity occurs due to the legal foundations for the command over the tax law, itself regulated by another higher-order law, and consequently entails the receiver of the command.[10]

5 AUSTIN JOHN, The province of jurisprudence determined, 2nd ed., London 1861, p. 5928.

6 AUSTIN (fn. 5), p. 5959.

7 AUSTIN (fn. 5), p. 2117.

8 PAULSON (fn. 1), p. 109–115.

9 Free translation by the author. Original: «não é do ser fático de um ato de vontade dirigido à conduta de outrem, mas é ainda e apenas de uma norma de dever-ser que deflui a validade – em sentido objetivo – da norma segundo a qual esse outrem se deve conduzir em harmonia com o sentido subjetivo do ato de vontade.», KELSEN HANS, Teoria Pura do Direito, 8th ed., São Paulo 2009, p. 9.

10 KELSEN (fn. 9), p 9.

The foundations of KELSEN' positivism lie not on any other element apart from law itself. The validity of a norm, as he describes, is not upheld by any moral norm or factual situation to serve as potential basis for the normative content in law. The core concept in positivism of KELSEN are basic norms *(Grundnorm)*, from which the other norms are based upon. The base for the validity of a legal norm is a higher-order legal norm – even if it does not prescribe something – as seen by KELSEN. It must be noted that, for the author, a recurrent endless search for the norm of cause-and-effect relation is unnecessary. Thus, a higher-order norm will be considered the fundament of the subsequent inferior norms. Such consideration should be presupposed, for an *imposition* of a structural norm, according to KELSEN, would demand the same verification of the preceding, higher-order norm that granted such ability for the authority.[11]

C. Legal positivism and the challenges of classifications

Legal positivism encompasses an immense degree of heterogeneity within its theories; such aspect applies to the two most common theories, positivism with naturalism and positivism without naturalism – in accordance with PAULSON STANLEY's classification.[12] It is not, though, the object nor scope of this paper to extensively analyze legal positivism under its diverse derivatives and classifications.[13] Due to these various understandings on the subject, it is not only a challenge to elaborate a unified theory of legal positivism, but also a clear evidence of the leading difficulties for the critical analysis upon an unified positivism in wholesome consideration.

For the diverse theories comprising the universe of positivism, it is found possible and necessary the design of a few lines of thought to aid in the task of enclosing and understanding the theories of law following such structure, as well as assist in properly directing the critics. NORBERTO BOBBIO, for such task, references three distinctive aspects of legal positivism, as such: (i) positivism as one's means of approaching the study of law; (ii) positivism as a defined theory or conception of law; (iii) positivism as a legal ideology.[14]

First, as a means of approaching the study of law, legal positivism aims to separate ideal law from real law – that is, by the ideas of AUSTIN, it is sought to analyze law for what it truly *is*, instead of for what it *should be*. Such approach would thus allow an objective analysis of law, regardless of the idealized subjective values that concern the potential forms of legal norms – in other words, regardless of its adequacy or capability to reach a certain objective. Consequently, it is not meant to analyze law as a means of ensuring justice or the overall social well-being, but rather as a series of structured values composed of legal norms. Second, BOBBIO summarizes positivism as a theory being «the particular conception of law that associates the legal phenomenon to the formation of a sovereign power capable of exerting coercion: the State».[15] This definition considers the role of the State with its monopoly over the use of force. Clearly, it is a static ideal of law. Third, legal positivism as an ideology comprises two positions which BOBBIO refers to: (i) the first aims to bring upon a coincidence (or a relevant correlation) between positive law and an ideal of justice, *i.e.* situated law is impartial precisely for it represents the validity of the situated legal norms; and (ii) law, as a set of norms

11 KELSEN (fn. 9), p. 217.

12 PAULSON (fn. 1), p. 102.

13 For the means of illustrating, it must be mentioned that H.L.A HART, in his article «Positivism and the Separation of Laws and Morals» he mentions five different accepted notions about legal positivism, HART (fn. 3), pp. 593–629.

14 BOBBIO (fn. 1), p. 130.

15 Free translation by the author, original: «aquela concepção particular do direito que liga o fenômeno jurídico à formação de um poder soberano capaz de exercer a coação: o Estado», BOBBIO (fn. 1), p. 134.

devised by the authority which holds the monopoly of force, has a relevant subordinative purpose – independently of the possible coincidence between its content with any moral value – since it represents the achievement of desirable objective, that is: order, peace and legal justice.[16]

D. Criticisms of legal positivism in brief notes

The main arguments against legal positivism concern its ideological notion. Obviously, these arguments do not necessarily disqualify, for example, the contributions of positivists as supporters of the existence of autonomy in law as a science with objects, principles and a methodology of its own with respect to other social sciences. For this work, it is possible to enumerate some particular instances of the arguments formulated against legal positivism – most notably those in the scope of constitutional jurisdiction.

The first instance is regarding the notion that legal positivism would have incurred on a false perception of reality, by ignoring the existence of moral values in law. With an argument based on normative realism of the early twentieth century, it is assumed that the conception of a normative structure lacking any moral values would incur on a disconnection from reality, wherein the latter moral values are necessarily present and constantly embodied. [17] The second instance concerns the fact that such comprehension of law as a legal objective norm impaired of any moral values from a tenacious, coherent and hermetic system would have resulted in the false understanding of the judge/interpreter of the law as merely an automaton using logical and deductive thinking; thinking that would further be applied to a real case through the legal norms created by the respective superior authority.[18] This criticism is – inappropriately, one may say – founded on the known words of MONTESQUIEU, where it is stated that judges are but «the mouth which enunciates the words of the law, an inanimate being which cannot qualify, from the law, neither its force nor its austerity».[19] The third instance refers to the legal positivism theorists allegedly not addressing adequately the problematic gaps in law – or, as put by HART, regions of the penumbra. These are regions which lack suitable normative solutions through the use of deductive and logical thinking of laws in the lens of positivism. Precisely, there is the difficulty (and supposed lack of suitable answers) to resolve the so-called hard cases, those in which there lies more than one possible solution to the problem. Finally, an assessment is found regarding the argument of *horror*, where legal positivism, in attempting to outrun any aspect of moral value, could be used as a means of practicing atrocities, such as those performed by the German national-socialism.[20] In effect, this criticism is based on the argument that legal positivism would be the packing for any product – be it positive or negative.

These assessments about legal positivism, within constitutional jurisdiction, are frequently introduced so as to defend the emergence of a new, post-twentieth century, constitutional order based on neo-constitutionalism. The proposition of neo-constitutionalism, in the context of legal positivism overcoming moral values, is summarized by LUIS PRIETO SANCHÍS: «More principles than rules; more weighting than admittance; omnipresence of the constitution in all legal areas and in all minimally relevant conflicts instead of exempt spaces in favor of the legislative or regulatory options; legal omnipresence instead of the ordinary legislator's autonomy; and finally, the coexistence of a plural constellation of val-

16 BOBBIO (fn. 1), p. 137.

17 BARROSO/BARCELLOS (fn. 2), p. 8.

18 Barroso Luís R., Fundamentos Teóricos e Filosóficos do Novo Direito Constitucional Brasileiro, in: Revista da EMERJ 2001/4, p. 11 et seqq., p. 20

19 MONTESQUIEU, Do Espírito das Leis, São Paulo 2006, p. 172.

20 BARROSO/BARCELLOS (fn. 2), p. 9.

ues, possibly and biasedly contradictory, in place of an ideological homogeneity gravitating around a handful of self-coherent principles and mainly around the successive legislative options»[21].

Considering the reasonable assessments against legal positivism, as well as weighing the neo-constitutionalist intention of overcoming its main postulates, it is reasonable to argue whether legal positivism could have been depleted of its content, after a series of historical, social and constitutional experiences along time, most evidently after the two world wars. Along with these happenings, and considering the void left by its concealment, it is reasonable to question whether it should be thought to formulate alternatives to legal positivism (as brought by neo-constitutionalism) to ponder over the role of the current constitutional jurisdiction.

III. A few versions of neo-Kantian positivism

To address the necessary analysis of the problem as outlined previously, it will be presented the neo-Kantian perspective of legal positivism and the respective conceptions of where constitutional jurisdiction should act.

It is unheard of any disagreements regarding the influence of KANT over HANS KELSEN. Nonetheless, there are relevant divergences with respect to the degrees and matters of similarity between the positivism of KELSEN and the theory of law of KANT. In accordance, STANLEY PAULSON argues for the Kantian nature of the argument upon which are based on the writings of 1920 and those of the beginning of 1930 from HANS KELSEN.[22]

The basis of the Kantian moral set are, nonetheless, put apart from the Pure Theory of Law, since there evidently is no space for the arguments of KANT's theory concerning the categorical imperative as a fundamental norm of its moral perspective. One of the main pretensions in the work of KELSEN is the development of a dogmatic framework that aims to separate law from any external element – as a pure description – mainly from any argument coming from jusnaturalism. For STANLEY PAULSON, the main influence of KANT over KELSEN is not the moral theory, but knowledge theory instead. Accordingly, KELSEN's work would be classified as a theory of legal cognition and legal knowledge – although there is the infamous chapter VIII from the Pure Theory of Law.[23] In KANT's conception of cognition, he doesn't refer himself specifically to the object of knowledge and under analysis, but mainly as to how objects are known; how it is possible a pure, *a priori*, knowledge of an object, that is, independent of any empirical attitude. Such pure, *a priori*, knowledge composes the core of the purported transcendental arguments. [24]

KELSEN, in the Pure Theory of Law, aimed to answer the question of whether it would be possible to comprehend positive law as an object of knowledge, independent of any external element – a methodology that Kant would have used in relation to pure, *a priori*, knowledge. To reach his work's main purpose, KELSEN investigated the same transcendental arguments from KANT, within his

21 Free translation by the author, original: «Mais princípios que regras; mais ponderação que subsunção; onipresença da Constituição em todas as áreas jurídicas e em todos os conflitos minimamente relevantes, em lugar de espaços isentos em favor da opção legislativa ou regulamentadora; onipotência judicial em lugar de autonomia do legislador ordinário; e por último, coexistência de uma constelação plural de valores, as vezes tendencialmente contraditórios, em lugar da homogeneidade ideológica em torno a um punhado de princípios coerentes entre si e em torno, sobretudo, às sucessivas opções legislative»; SANCHÍS LUÍS PRIETO, Justicia Constitucional y Derechos Fundamentales, Madrid 2014, p. 117.

22 PAULSON (fn. 1), p. 312.

23 PAULSON (fn. 1), p. 313.

24 KANT IMANNUEL, A Crítica da Razão Pura, 4th ed., São Paulo 2015, p. 46.

respective theory of knowledge. For the means of enabling the detachment of law from any elements external to its own sphere – as did KANT in relation to pure, *a priori* knowledge – the identification of the ultimate foundational element was needed, for the validity of law on its own. Accordingly, it was found necessary to have base norms (*Grundnorm*).

To establish validation criteria dissociated from any external element, KELSEN uses the concept of imputation – concept which he puts parallel to the idea of causality in nature.[25] The logic behind it would concern the following rationale: «It is not said, in the rule of law, how it is said in natural law: when A is, "is" B, but rather when A is, B "ought" to be, even if, occasionally, it effectively is not. The reason following such difference of connection between elements in the rule of law and the natural law is the description of the connection by a legal authority (that is, a norm featured as a product of an act of will) in the former law, where the latter need not any intervention of such kind.»[26]

As explained by STANLEY PAULSON, normative imputation is an idea integrated with the transcendental argument, in such way that the reasoning to reach a base norm would unveil as follows: (i) the legal norms are given and known; (ii) the holistic perception of legal norms is possible solely if the class of the normative imputation is previously assumed (a transcendental premise); (iii) thus, the class of the normative imputation is previously assumed.

As KANT did when concerning the theory of knowledge, the last fundamental element of validity in the Pure Theory of Law is an assumption; this structure separates the theory from any elements external to the base norms themselves – independent of any moral values, regardless of how expensive or important they may be in a society. The legal norm, if in accordance with its higher-order norms in the structure of normative imputation, will lead naturally to its last criterion, namely the base norm (*Grundnorm*) from which it originated.

Nonetheless, such reasoning does not imply on completely ignorance of the relations between law and morals, as opposers claim. What essentially is meant to achieve, as posed by its supporters, is that moral laws are not validation criteria for the rule of law. Therefore, it follows that the obedience to the established law – lawful and valid by the normative system – is constrictive, albeit one may consider the norm unfair or morally incorrect. In addition, NORBERTO BOBBIO states it is not correct to attribute to positivism the advent of the moral obligation to follow positive laws. Within this correction, he argues «it is neither jusnaturalist nor positivist to assume the moral obligation of following positive laws, since it derives from the earliest realization, as early as the philosophy of law, that no legal order is to be hold solely on the obedience as result of fear for the respective penalty».[27]

25 With respect to this, he further clarifies: «The analogy lies of the circumstance of the first question, in its legal propositions, having an entirely parallel function to the principle of causality in the natural laws, with which natural science describes its object», KELSEN (fn. 9), p. 86.

26 Free translation by the author. Original*:* «Na proposição jurídica não se diz, como na lei natural, que, quando A é, B é, mas que, quando A é, B deve ser, mesmo quando B, porventura, efetivamente não seja. O ser o significado da cópula ou ligação dos elementos na proposição jurídica diferente do da ligação dos elementos na lei natural resulta da circunstância de a ligação na proposição jurídica ser produzida através de uma norma estabelecida pela autoridade jurídica – através de um ato de vontade, portanto –, enquanto que a ligação de causa e efeito, que na lei natural se afirma, é independente de qualquer intervenção dessa espécie.», KELSEN (fn. 9), p. 86.

27 Free translation by the author. Original: «assumir a obrigação moral de obedecer a leis positivas não é nem jusnaturalista nem positivista, porque deriva da constatação, tão antiga como a filosofia do direito, de que nenhum ordenamento jurídico pode sustentar-se

JEREMY WALDRON[28] provides relevant notes on the topic, with respect to the scope of his particular (and controversial) review of positivism through the neo-Kantian perspective. WALDRON puts, as a fact of life, the existence of disagreements regarding the different concepts of justice. As a whole, these different concepts directly imply on different positions of certain important aspects of human life inside a community. Upon these existing disagreements, it is necessary to develop a process, through which the community where the members under disagreement can reach an overall verdict regarding a specific situation.[29] As a consequence, the core of the rule of law is built on the possibility of enacting an uniform and effective positioning within the scope of a specific community. Hence, the rule of law, as JEREMY WALDRON underlines, is not merely a principle regulating the abiding of authorities and citizens to the application and obedience of the law, regardless of their personal interests; it is, moreover, the application and obedience of the law despite any particular considerations of the law being inequitable, morally wrong or even politically mistaken.[30] The view of WALDRON, undoubtedly, is in perfect resonance with what the supporters of legal positivism as an ideology – adopting the classification of NORBERTO BOBBIO – defend in general terms. It is controversial, indeed, that this assertion would conform to kantian philosophy.

Although autonomy and freely determined will lie fundamental for the determination of the agent's behavior, KANT equally considers that citizens, once distant from their state of nature, should enter the civil condition – that is, the political state. In the outlook of the state of nature, the moral conduct of the agent is autonomously determined, in accordance with the freely attained categorical imperative. However, individual free action, for KANT, assumes the establishment of a universal norm, which consequently results in the need to respect the freedom of other individuals, which equally dispose of the autonomy to formulate their respective conduct as well.[31]

Particularly, when concerning property rights and occupancy, there is a tension in the kantian conception of the individual autonomy under the political state; it is inherent to the discussion of property right the need that other non-proprietary citizens respect the right of the owner. In face of the postulatable right of the owner, how is it possible, then, to ensure the unilateral will, as a validated and legitimate source of moral norm of conduct, to result in a legal norm to which all other non-proprietary citizens should abide by?

According to KANT, such unilateral will is capable of assuring an unrestricted and respectable external acquisition solely to the point where there actually exists a unified, *a priori*, will; categorically, where there is the union of will of all members eligible to enter practical relations with each other.[32] In this sphere, KANT reassures that the will possessing the capability to validate the right of the proprietary is an *a priori universal* or *omnilateral will*, and thus characterized as the true, legislative will, «since solely on the principle of will it is possible the agreement between the individual active free-will with the will of all, and thus rights overall, as well as mine and thine, externally»[33]

confiando apenas na obediência arrancada com o temor da sanção», BOBBIO (fn. 1), p 142–143.

28 WALDRON JEREMY, The Dignity of Legislation, Cambridge 1999, p. 36–62.

29 WALDRON (fn. 28), p. 37.

30 WALDRON (fn. 28), p. 37.

31 In a summary of his principle of autonomy, KANT explains: «The principle of autonomy is therefore to choose only in such a way that the maxims of choice in the will itself are simultaneously included as universal law», KANT IMMANUEL, Fundamentação da metafísica dos costumes e outros escritos, São Paulo 2002, p. 70.

32 KANT IMMANUEL, Princípios Metafísicos da Doutrina do Direito, São Paulo 2014, p. 71.

33 Free translation by the author. Original: «pois somente segundo esse princípio da vontade é

KANT further clarifies, as a matter of political state, the need to legitimate the right of property: «The rational title of the acquisition is found only within the idea of a united, a priori, will of all (necessarily united), as indispensable condition (conditio sine qua non); unilateral will cannot impose, on others, an obligation to them otherwise nonexistent. Though, the condition of an effectively and universally united will is the civil state. Therefore, the acquisition of an external object can be originally accomplished through the idea of a political state, i. e. considering the object itself and its process of execution, but before becoming effective (on the contrary, it would be a derived acquisition), thus only temporarily».[34]

According to KANT, it is necessary the creation of a set of universally constituted laws, in the civil state, in order to reach a legal state. The civil state, in this context, could then be understood as a state of the individuals from the people in relation with each other, which, under reciprocal influence amongst themselves, need a legal state based on an uniting will, a *constitution*, in order to attain their respective rights[35]. The Kantian notion of a civil state involves, actually, a repercussion of the system of rights itself. Indeed, to implement rights and legal obligations, with effect and under requisition in the scope of a society, it is necessary to implement the civil state, from the legislating activity arising from the united will. This need is introduced due to the fact that «before establishing a legal public state, all men, nations and isolated states must never be safe from the violence amongst them, for it is a direct implication of the right of anyone to do whatever they deem fair regardless of the of the opinion of others».[36]

It is plausible to assume, according to the Kantian theory, that the civil state is an exact measure of the union of the «omnilateral» will, which in turn would arise from the hands of a legislating will. In that sense, and concerning the existing tension between the state of nature and the civil state, Jeremy Waldron affirms: «In general, people are entitled to assume in the state of nature that their external freedom will be limited only to the extent necessary to harmonize their freedom with that of everyone else in accordance with a universal law (24:231); and it is no clear how a unilaterally imposed obligation fits into that picture. What is needed, in other words, is 'a will that is omnilateral' (51:263) rather than unilateral; and that, Kant seems to be implying, is unavailable in the state of nature. It is secured only through the legislative will of the state.»[37]

The Kantian conception – neo-Kantian conception, according to WALDRON – considers the range of divergences, among free and autonomously considered citizens, regarding opposing moral values. Nonetheless, the decision of acting according to one's autonomously considered concept of law, independently of any other rule as put by the

possível a concordância do arbítrio livre de cada um com a liberdade de qualquer um, portanto um direito em geral, e assim também um meu e teu externo», KANT (fn. 32), p. 72.

34 Free translation by the author, original: «O título racional da aquisição somente pode ser encontrado, no entanto, na ideia de uma vontade de todos unificada a priori (a ser unificada necessariamente), a qual é aqui sem mais pressuposta, como condição indispensável (conditio sine qua non); pois não se pode por vontade unilateral impor a outros uma obrigação que eles não teriam por si de outra forma. – Mas o estado de uma vontade efetivamente unificada de maneira universal no intuito da legislação é o estado civil. Portanto, algo externo pode ser adquirido originariamente tão somente em conformidade com a ideia de um estado civil, i. é, em vista dele e de sua efetivação, mas antes de sua efetividade (pois, do contrário, a aquisição seria derivada), portanto apenas provisoriamente», KANT (fn. 32), p. 72.

35 KANT (fn. 32), p. 125.

36 Free translation by the author. Original: «antes de ser constituído um estado legal público, homens, povos e Estado isolados jamais podem estar seguros contra a violência de uns contra os outros, e, na verdade, com base no direito próprio de cada um fazer o que lhe parece justo e bom e não depender nisso da opinião do outro», KANT (fn. 32), p. 126.

37 WALDRON (fn. 28), pp. 53–54.

higher legislating will, seems incompatible with the kantian notion of a civil state.

Based on this, JEREMY WALDRON defends the following formulation of the kantian doctrine concerning the legal norms: if there are arguments to consider a certain society as needing only a single perspective concerning a subject – one which all members of such society must respect, at least regarding the external interactions – then there must be a means of identifying such perspective of the community and a respective foundational element to justify the adhesion to that judgement, irrespective of what one may argue for its correction.[38]

IV. The constitutional jurisdiction under the neo-Kantian perspective

Following these brief remarks over some neo-Kantian perspectives on positivism, it is necessary to return to the criticisms made previously in order to outline the constitutional jurisdiction in the light of the theoretical positions under consideration.

Initially, there need not to make any remarks over the purported argument of *horror*, which itself is intended at attributing the normative basis to legal positivism for the horrors of national-socialism. It is an inadequate judgement, from both the theoretical and historical sense. HANS KELSEN himself, for he was Jewish, suffered from Nazi persecution while in Germany.[39] After that he converted himself to Catholicism, and later to Protestantism.

Relevant to the assertion that legal positivism, indistinctly recognizes the legal judges as (erroneously) mere tools of applications of the law – or automata – it may suffice to mention, as said Hart, that AUSTIN, precursor of the earliest versions of legal positivism at his time, could not be accounted for such misconception. Moreover, AUSTIN not only considered regions of «penumbra» within the legal system, but further considered the possibility of judges exerting the typical legislative tasks under these conditions.[40]

It may be noticed that such assessment, in strict terms, is an inappropriate extension of the argument used by MONTESQUIEU, in his notorious work *The Spirit of the Laws*. MONTESQUIEU, as a matter of fact, expressly defends the actions of the judge a**s** *bouche de la loi*. However, he never intended to promote an accurate analysis of the legal hermeneutics. In his work *The Spirit of the Laws*, MONTESQUIEU bases his theory over the subject matter, on the concept of freedom, by itself consisting of «*the right to do all that the laws grant*». Particularly, it is possible to find a certain approximation with the concept of civil state, as found in the kantian percep-

38 WALDRON (fn. 28), p. 62.

39 So as to outline a response to that comment, BOBBIO states: «Finally, regarding the relation between the ideology of legal positivism and a dictatorship, it is curious the ease with which the ethical postulates of positivism may be forgotten – the legality principle, the order as the main objective of the State, certainty as the value of law – which were elaborated in the eighteenth century by the liberal philosophy of MONTESQUIEU and Kant, to build a barrier against despotism, in other words, as the restraint to the desires of the prince, as a defense of individual freedom against the enormous power of the Executive Power, as an assurance for equality in treatment against privileges. In Italy, during the period of fascist dictatorship, resistance to free will was conducted by jurists in name of the ethical postulates of legal positivism, along the unprecedented defense of legal justice against alleged substantial justice, which was, in that moment, disrupting liberal order and the certainty principle», BOBBIO (fn. 1), p. 144.

40 With respect to this, HART clarifies: «It would be easy to show that Austin was guiltless of this error; only an entire misconception of what analytical jurisprudence is and why he thought it important has led to the view that he, or any other analyst, believed that law was a closed logical system in which judges deduced their decisions from premises. On the contrary, he was very much alive to the character of language, to its vagueness or open character; he thought that in the penumbral judges must necessarily legislate (…)», HART H. L. A., Positivism and the Separation of Law and Morals, in: Harvard Law Review 1958/71, p. 593 et seqq., p. 608–609.

tion, which, in turn, is also based on the concept of freedom.[41]

The concern of MONTESQUIEU is reasonably more pragmatic when evaluating the formulation of a proposal to structure the State so as to prevent the misuse of power from its holders, including the judges in the *ancient régime*. Particularly, he alludes to the legislative, executive and jurisdictional functions – without precisely alluding to the tripartite model as the only means to assure stability during the exercise of power – and demonstrates the commitment of these divisions behaving autonomously, within a balanced condition and with mutual independency. Respectively, he acknowledges that if the same body of the judiciary, as the body executing the law, attributed to itself all the power of the legislator, the citizen would be annihilated. That is, he defends, «all would be lost, if the same man, or same body of principal men, or nobles or of the commons, exerted these three powers: that of creating laws, that of executing public resolutions, and that of judging crimes and private quarrels.»[42]

The independence of the three powers, as maintained by MONTESQUIEU, does not comprehend an insurmountable separation amongst them, as a matter of delimiting their mutual sovereignty. Differently, the author does not allude to the need of defining a means of control; for example, in face of the three powers, it would be seen the executive power to constraint certain motions of the legislative, under peril of the latter becoming a despotic power. Likewise, despite this assumption, the executive power is never to be mistaken with the legislative and enact general and abstract laws on its place, under penalty of incurring misfeasance. Such mutual control, thus, must be achieved in such manner to prevent the accumulation of a more than one function within the scope of an institution. More specifically, when concerning the judiciary, there rises the notorious conception – erroneously attributed to classic positivism – that judges are but «the mouth which enunciates the words of the law, an inanimate being which cannot qualify, from the law, neither its force nor its austerity».[43]

With regards to the relation between morals and the law, and outlining the assessment over the consideration of moral values for the means of applying law, it is necessary to cover the arguments of JEREMY WALDRON relating to his concept of legislation and its position in the constitutional jurisdiction. When defending legislation, WALDRON demonstrates the inadequacy of the vague judgement over positivism – as previously discussed – concerning its ineptitude towards the comprehension of existing morals values in the legal norm. Differently, WALDRON precisely demonstrates the effective existence of a handful of concepts of justice in each respective society. In his reasoning, the moral perspectives of the constituting citizens of a society are indeed valid and legitimate, and should be taken into measure when considering the definition of the overall preponderating stand of the society.

WALDRON, however, argues that the core of the question lies exactly on what should be done regarding the dissonance in society about moral perspectives, upon the need of creating a universally mandatory and concise system of legal norms, to which all members of such society should abide to. In this scope, WALDRON specifies «the dignity of legislation»: the legislating will would represent exactly the means of resolving disa-

41 KANT (fn. 32), p. 125.

42 Free translation by the author, original: «tudo estaria perdido se o mesmo homem, ou o mesmo corpo dos principais, ou o dos nobres, ou o do povo, exercesse estes três poderes: o de criar as leis, o de executar as resoluções públicas e o de julgar os crimes e as querelas dos particulares», MONTESQUIEU (fn. 19), p. 166.

43 Free translation by the author, original: «a boca que pronuncia as palavras da lei, seres inanimados que desta lei não podem moderar nem a força e nem o rigor». MONTESQUIEU (fn. 19), p. 172.

greements, thus composing a legitimate general norm in the scope of that community, independent of any particular moral positioning of its members.

Such perception is the center of the critique which WALDRON elaborates over the concept of the judicial review. It is understood, by the author, that the constitutional jurisdiction would be an inadequate *locus* for the resolution of dissents, when considering the existence of divergences on the moral viewpoints of members comprising a certain society. «It [judicial review] does not, as it is often claimed, provide a way for a society to focus clearly on the real issues at stake when citizens disagree about rights; on the contrary, it distracts them with side-issues about precedent, texts, and interpretation. And it is politically illegitimate, so far as democratic values are concerned: By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights».[44] Furthermore, WALDRON evaluates that the legislative may effectively leave gaps, which by themselves are unfinished regions related to the adoption of a definite viewpoint about moral questions or relevant political decisions. These gaps – or penumbras, as stated by Hart – must feature a decision defining the general positioning of the community in that situation, regardless of the political or moral opinions of its members.

Indeed, when elaborating a statute of right, a Bill of Rights, the existence of such gaps and divergences on topics regulated by this statute will not prevent its formulation and edition. That is, there will exist ultimate disagreements on the existing gaps. When discussing the legal means of settling a dissent in the scope of constitutional jurisdiction, there are arguments based upon the use of possible hermeneutic techniques. Generally, it will be sought to extract the final viewpoint through logical and deductive reasoning; in the case of a problem lacking a resolution within this methodology, it will be sought after other and diverse arguments, eventually external to the legal system, in order to reach a conclusion yet to be found by society in the matter of democratic proceedings. In these circumstances, the normative power of judges is made more apparent.

Due to their open classification, principles are employed as part of the legal argumentation to establish a moral or political assessment, which society should have as the prevailing viewpoint. It is used the balancing method (instead of subsumption) as the conclusive technique to compare values which are mostly contradictory, so as to justify the advantage of one over the other within the specifics of that decision. Paraphrasing the above excerpt of LUIS PRIETO SANCHÍS, principles are deemed omnipresent for the specific objective of lessening or suppressing the autonomy of the legislator, thus resulting in the prevalence of reason above personal perspectives in the elaboration of a political decision.

Upon the opposition, it is essential to adequately discuss the overall role of constitutional jurisdiction in order to resolve a dissent. Accordingly, it must be understood that the judicial review process comprises the exercise of political power, essentially. It is then reasonably possible that the constitutional jurisdiction is simply enacting an assessment of political or moral nature, through the majority of judges composing a certain jurisdictional body.

Aiming to base his arguments of democratic legitimacy, WALDRON uses elements from his political-philosophical conceptions, such as "political equality", "autonomy" and "free will/right to be heard".[45] For WALDRON – it

44 WALDRON JEREMY, The Core of the Case Against Judicial Review, in: The Yale Law Journal 2006/115, p. 1346 et seqq., p. 1353.

45 «In politics, the most familiar process-related reasons are those based on political equality and the democratic right to vote, the right to have

is possible to conclude – the politically correct decision (or democratically appropriate, depending on the lens) is that taken with democratic freedom under consideration. In view of these arguments, WALDRON draws that the judicial review is not the adequate method for the solution of disagreements over rights. In political terms, the legislator would be the most appropriate figure to issue a view, due to such position's alignment to the moral values necessary to assign democratic legitimacy. Secondly, one must consider there are relevant elements to sustain the performance of constitutional jurisdiction in favor of constitutionally defended rights reserved to minorities. In other terms, there lies the apprehension that the indistinct attribution – to the composing majority – of the privilege on deciding over any possible dissent may, effectively, lead to the systematic violation of the fundamental rights of minorities. Under these circumstances, the constitutional jurisdiction would serve as important counterweight to the power of decision of the majority, in order to prevent the potentially harmful consequences of the «tyranny of the masses».

Although the argument regarding the defense for minorities is known, JEREMY WALDRON brings certain assessments of important nature within this premise. It must be questioned whether it is possible that the judiciary would actually act on the defense of minorities by going against the majority. In response to such question, ROBERT DAHL responds – along with empirical foundations gathered in the north-american constitutional experience – that the court performs its legal power, in most cases, in accordance with the political leadership which has the political power. In addition, he emphasizes the role that the Supreme Court plays in the scope of the dominating political alliance.[46]

ROBERT DAHL sought to deconstruct the common understanding that constitutional courts operate in favour of defending the rights of minorities, which are allegedly oppressed by the tyranny of the masses; differently, DAHL's analysis indicates that with well-established political forces, the Supreme Court operates according to the overall majority viewpoint. In his argument he emphasizes the impossibility of the Court affecting the course of national politics. Respectively, if the Court aims to exercise public politics by itself without any substantial political support, it incurs on disasters, as seen on the known case of Dred Scott vs. Sandford. JEREMY WALDRON follows the same reasoning as ROBERT DAHL, by declaring the lack of actions that can be taken by the constitutional jurisdiction with regards to a certain minority group if there is no backing from any section of society for such minority.[47]

Hence, even though there is, indeed, the need to consider the rights of minorities, the judicial review is not to be used – paraphrasing JEREMY WALDRON – as a *Trojan Horse* in order to attribute the legitimacy of exercise of ideological forefront.[48] Naturally, although one may consider the existence of dysfunctionalities in the scope of legislative activities – including but not limited to political corruption, racism and other prejudices against minorities – WALDRON does not acknowledge, in the area of the judicial review, the necessary democratic legitimacy to justify political and moral decisions of judges superimposing those introduced through democratic processes, which featured the political participation of citizens or their representatives.

one's voice counted even when others disagree with what one says.», WALDRON (fn. 44), p. 1373.

46 DAHL ROBERT, Decision-making in a democracy: the Supreme Court as a national policy-maker, in: Journal of Public Law. Role of the Supreme Court Symposium 1957/1, p. 279 et seqq., p. 239.

47 WALDRON (fn. 44), p. 1404.

48 WALDRON (fn. 44), p. 1406.

V. Conclusion

Since the earliest forms of legal positivism, as developed by AUSTIN and BENTHAM and reaching through the cornerstone of HANS KELSEN's work, as well as in modern times, various and significant reviews have contemplated theoretical accomplishments, epistemological postulates and ideological viewpoints of this theory. Such proceedings, on its own, reveal that legal positivism and the Pure Theory of Law deal not with antique objects from a museum for mere contemplation and reverence.

Differently, it is important to perceive the dynamic and continuous evolution of its postulates, so as to gather – within a constant comparison – the most relevant contributions, even if for the elaboration of necessary counterarguments. From this nature, legal science thus develops itself. Through this premise it was presented a series of reviews of legal positivism under the analysis of neo-Kantian perspectives from contemporary authors.

As explained above (III), though immediately evident, the dialogue between KANT and KELSEN is not wholesomely understood when touching upon its extension and content. Certainly, there are matters of divergence and of convergence as well, not only amongst the authors themselves, but also among the reviews as seen in this work. It was thus aimed to present divergent viewpoints about the neo-Kantian perspective of legal positivism, along with a series of remarks about eventual intersecting.

Evidently, it is not sought to defend the existence of a perfect convergence of arguments and perspectives of analysis and hypothesis; these were developed in periods of different social, historical and epistemological contexts, and therefore with diverse concerns and characteristic problems. It is necessary to accentuate that the current work aspired not to achieve an academic analysis on the specific purpose of comparing distinct perspectives; rather it was intended to pursue a theoretical systematization in order to allow the analysis of a innate – though not modern – problem of our time.

The problem on the activity limits of the constitutional jurisdiction clearly was not among the objects of the works of KANT. Contrarily, KELSEN had the opportunity to assess the subject, though in an absolutely different context from that of nowadays; a context most notably different when concerning the acts of courts in the definition of the most prominent questions over fundamental rights. As a note of Kelsen's biography, it is important to notice that he was constitutional judge in the First Austrian Republic (during the interwar period). Kelsen had the opportunity to develop, in practice, his own perspective regarding law-application, with which he stablished somehow relations to law-making power.[49]

Nonetheless, the relevance and pertinence of these theorists are undoubtful for the discussion regarding the problem about the constitutional jurisdiction.

For the discussion and analysis of this premise, it was exposed a series of the most frequent critiques over the idea of legal positivism presenting answers or paths to answers. These critiques, as mentioned earlier, defend the overcoming of legal positivism as the framework capable of resolving problems of current relevance, for a new theoretical cornerstone (one which is in course of development, argue its supporters), consubstantated on neo-constitutionalism. Moreover, it was intended to address the assessments over the neo-Kantian perspective of legal positivism, more importantly from the works of JEREMY WALDRON. Namely, these assessments are more properly situated in the ideological sense of legal positivism. In addition, it was aimed not only to epistemologically evaluate the validity of positivist

49 TECHET PÉTER, Hans Kelsen's Pure Theory of Law as Critique of the «Authoritarian» Understanding of Law and Jurisprudence, in: Belgrade Law Review 2022/70, p. 77 et. seqq., p. 89.

postulates, but mainly to defend an ideological perspective related to the distribution of political power, emphasizing the constitutional jurisdiction as the main institutional entity in the moral/political forefront.

In the ideological scope (adopting the classification of BOBBIO), based on the neo-Kantian version, it was sought to present the arguments that led to the following conclusion: legal positivism is not overcome, but rather introduces new pathways to guide the debate with respect to the constitutional jurisdiction, to the extent of the Democratic State.