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Positivism and Communitarianism: Between Human Rights and Democracy*

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Abstract. The author deals with theoretical connections between legal positivism and communitarianism. Such connections prove to be relevant not only for a better understanding of these two trends of thought but also in order to throw light on important philosophical issues like human rights and democracy. Deep links are traced and recognized between the so-called positivism "in action," and especially its ideological thesis, and communitarianism.

Legal positivism is, obviously, a doctrine about law, while communitarianism is a conception of morality. Legal positivism is defended by scholars who tend to be liberal in politics and they fear that some liberal values like tolerance and the free pursuit of truth would be hampered if the tenets of positivism—whatever they are—are rejected. On the other hand, communitarianism was developed precisely as a doctrine which controverts central liberal stands, and it is held by some scholars who seem to be friends of natural law rather than of positivism. Despite this somewhat pragmatical tension, there could logically be positivists about law who are either liberal or communitarian about political morality, as well as non-positivists who are of one or the other persuasion, which is a good indication that the two doctrines operate at different, unrelated, levels.

Therefore, the possibility of significantly connecting these two movements seemed at first hopeless to me. However, when I began to probe more

* I must confess that, when Professor Massimo La Torre invited me to speak at the European University Institute about positivism *and* communitarianism, I felt at first both flattered and puzzled. Flattered because I have written quite extensively about the two subjects and it is always good for an author that there remains some interest in discussing further what one has dealt with. Puzzled because I never dealt with the two topics *together*, and, at first sight, they seemed to me to be so far apart from each other that I envisaged the risk of treating them in a merely juxtaposed way. But the invitation of Professor La Torre to relate both issues proved, after all, to be very wise indeed. This lecture was given at the E.U.I. in Florence on 22 April 1993.

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carefully into possible connections, I discovered that there are indeed such relevant connections, and, moreover, that they throw light on different issues concerning the treatment of human rights and democracy.

I.

Let us begin with legal positivism *in action*. I underscore this "in action" because, as we shall see soon, "legal positivism" is quite a proteic label and perhaps the best way to detect what it centrally covers is to see what an undoubtedly positivist thinker defending an undoubtedly positivist position has to say about some concrete issue of controversy. I propose to direct our attention to Norberto Bobbio and his stand concerning the foundation of human rights.

Bobbio has dealt with this subject in a very provocative essay (Bobbio 1990). There he says that the search for an absolute foundation for human rights is the search for a power which should be irresistible to the mind. However, he thinks that this search is an illusion since it is hampered by obstacles which in fact are quite similar to those which led Hans Kelsen to think that that of justice was an "irrational ideal" (Kelsen 1975). The first obstacle is that "human rights" is too vague an expression, being filled up in quite contrasting ways according to the ideology of the interpreter. Second, the class of human rights is extremely variable throughout history —comprising for instance either an absolute right of property or quite a limited one—which reflects the plurality and relativity of political conceptions which is what in fact grounds some rights like that of freedom of expression or of religion. Furthermore, the class of human rights is, in the third place, extremely heterogeneous, since some of them seem to be unlimited and valid for all persons in all circumstances, while some others, though fundamental, admit restrictions for the sake of other rights or for variations according to social circumstances. Fourth, even rights which may be invoked by the same individuals are sometimes antinomic, like the classic liberties which require abstentions from the state and the new social rights or powers which necessitate positive action which often involves restricting the former liberties.

Bobbio thinks that these four problems obstruct any possibility of finding a common foundation for human rights. But he goes further in thinking that the search itself is a waste of time and energy since it is a myth to think that the hypothetical discovery of an absolute ground for human rights will ensure their materialization: Precisely when scholars thought that they had grasped that foundation human rights were generally ignored, and now that there is growing skepticism about that foundation there has been important progress in their recognition through various seminal international conventions. Bobbio concludes with his quite famous statement

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that now that human rights have been the object of very definite international compacts and declarations, "[. . .] the substantial problem is not so much that of *justifying* them but that of *protecting* them. It is not a philosophical problem but a political one."

Before evaluating this thesis in the light of the communitarian offensive, let us see how it is related to the basic tenets of legal positivism, which Bobbio has defended in some other works. As he himself has contributed much to perceive, the label "legal positivism" refers to quite different positions. Relying heavily on his own contribution, on that of Alf Ross (1958) and on that of Genaro Carrio (1970), I generally find it useful to distinguish between four theses which are generally associated with legal positivism: The first thesis is that of *ethical skepticism*, that is, the idea that there is no rational and intersubjective way to ground basic principles of justice and social morality. The second thesis is that of *legal formalism*, that is, the view that the law is constituted by standards deliberately enacted—i.e., legislation—, and that these standards are complete, consistent and precise, so that they may be applied by judges and others to particular cases without need to resort to their own ideas of justice and morality. The third thesis is the one that Bobbio deems *ideological positivism* and Ross *pseudo-positivism* and which asserts that the law identified exclusively on the basis of some social facts provides ultimate reasons for justifying actions and decisions, reasons which are independent of moral or political considerations. The last thesis is *conceptual positivism*, that is, the stand which sustains that as legal system may be identified and described without the need to evaluate its coincidence or not with ideals of justice and social morality.

It is useful to contrast these theses with those which it is fair to ascribe to the main rival of positivism, that is natural law theory. There are also a variety of natural law views but unlike positivist ones they are not so variegated up to the point of sometimes even being inconsistent with each other, but they belong in a continuum of greater or lesser metaphysical commitment. I shall only mention here what I generally call "minimal natural law"—which is accepted by all the other varieties which add to it further theses. It distinguishes itself by holding two theses: The first one is that principles of justice or social morality may indeed be grounded in an intersubjective manner; the second one is that a set of positive norms which does not accord with these principles cannot be conceived of as a legal system. It is easy to see that this minimal natural law does not oppose all the varieties of positivism, but only those which defend theses one and four, that is, ethical skepticism and conceptual positivism.

Now, if we revise which theses are explicitly defended in common by the main protagonists of the legal positivist movement in different times and places—that is, thinkers like John Austin, Jeremy Bentham, Hans Kelsen, Alf Ross, Norberto Bobbio, Genaro Carrio, Carlos Alchourrón and Eugenio Bulygin—we will find, I believe, that the only one which all of them share is

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thesis number four. There are, of course, many positivists who are ethical skeptics—like Kelsen, Ross and Alchourrón and Bulygin—but there are others who are not—like Austin, Bentham and possibly Hart and Carrio. There are positivists who are legal formalists—like in some sense Kelsen when he rejects the existence of gaps and contradictions in a legal system (though he admits other indeterminacies)—but most of them emphasize the existence of different sources of legal norms and insist on the existence of indeterminacies of different kinds which call for judges and others making evaluative judgements in the application of the legal system. Almost no important positivist thinker—and certainly none of those mentioned above—subscribes in the context of the discussion about the nature of law to the ideological positivist thesis that a legal system which is factually identified and described may by itself provide reasons for justifying actions and decisions. Though most positivists have not dealt much with this subject, when they develop their general theories of law they make scattered remarks to the effect that the fact of identifying a system as legal does not mean that one is justifying applying it for adopting decisions or course of actions. Whether this is so or not may well depend on other sorts of considerations like moral ones.

Kelsen seems to be an exception because of his doctrine of the "basic norm": As is known, this norm is an epistemic hypothesis which may be predicated of any system of efficacious positive rules, and once predicated of them it has the implication of granting them validity or binding force. Thus, it seems—and so Kelsen has often been interpreted—that through the expedient of presupposing a basic norm for it we can conclude that any system backed by coercion is binding upon its subjects and, therefore, that their decisions based on it are justified. But this interpretation simply misses the elementary point that the adoption of the basic norm in legal reasoning in order to conceive of as normative propositions—e.g., *whoever commits murder should be punished with prison*—what otherwise would be mere facts—e.g., the fact that somebody with power issued the words "whoever commits murder [. . .]"—is *hypothetical,* that it gets into legal reasoning after not being categorically asserted but being just presupposed in the same way as axioms are by geometers in order to infer some theorems. That hypothetical character of the basic norm transmits itself of course to the ascription of validity to positive legal norms. And that means that those norms so conceived to be valid cannot serve as reasons for justifying decisions since hypothetical reasons cannot ground actual decisions. This accords perfectly well with the fact that Kelsen seems always to have in mind scholarly legal thinking when formulating his idea of the basic norm. He does not focus on the judicial task, since judges cannot adopt decisions on the basis of mere presuppositions. They must categorically assume the validity of the norms on the basis of which they justify their decisions and this requires something other than the hypothetical basic norm (something else which Kelsen eludes

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characterizing). Following the analogy, judges should be for Kelsen like physicists or, better, engineers facing the axioms of the geometers: They should categorically assume their truth in order to act on their basis.

Whatever their positions with regard to these three theses, all the important legal positivist thinkers adhere to the thesis of conceptual positivism: That is to say that the legal system of a society can be identified and described on the basis of certain factual circumstances and without any need to evaluate its coincidence or not with principles of justice and social morality. This means that they think that the concept of law is purely descriptive: Its use in propositions does not commit the user to certain values and the meaning of those propositions can be exhausted by pointing out to space-temporal circumstances. Of course, if this thesis is distinguished from that of ideological positivism the identification of a legal rule does not imply at all that somebody is justified in acting on the basis of that rule. What is the use, therefore, of this descriptive concept of law? According to positivists, it reflects the distinction between the *law that is* and the *law that ought to be*, it makes possible a value-free knowledge of the law and of its connection with other social phenomena, and it even helps evaluation by allowing us to distinguish whether the values which we adopt are materialized in current systems.

However, I have alleged elsewhere (Nino 1985; 1989) that these arguments are either circular or are only valid for some kinds of discourses about law and not necessarily for others. But the most important thing is that these arguments presuppose that there is *only one* concept of law in the manner of a conceptual essentialism that most positivists are so intent on rejecting. If we reject essentialism about concepts—that is, the idea that concepts are true or false according to whether they reflect or not underlying structures of reality—and if we conceive of them, in the conventionalist manner, as tools for classifying phenomena taking into account analogies or differences, there is no reason whatsoever for not accepting that there may be *a plurality of concepts of law*. Many of these concepts may be purely descriptive and many may be normative or evaluative, and there may even be mixed concepts of law. Some of them may be useful in one context of discourse and some others useful in some other discursive contexts, or in none at all. There are underlying conditions which have to do with the goals of each type of discourse in which the concept of law is used—the practical discourse of judges and lawyers, the normative discourse of legal scholars, the descriptive discourse of legal sociologists, anthropologists, and historians—which may make useful one or other concept of law.

If this is so, the whole dispute between natural lawyers and legal positivists—centered in the second thesis of natural law and the fourth thesis of legal positivism—becomes vacuous and spurious once conceptual essentialism is rejected. This is not perceived by authors like Dworkin who

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assumes wrongly that positivists adopt a normative concept of law—not as those standards which are in fact accepted by bodies like the courts but as those standards which the courts *should* accept—and proceeds automatically to reduce positivism to the ideological stand—which results from the combination of identifying law on the basis of some facts and assuming that law provides reasons for justifying actions.

This is I think a fair account of what is the status of the controversy around legal positivism when the work of its spokesmen remains in the domain of that rather *inert* discipline which is the so-called "general theory of law" (later on I shall have a word or two to say about this discipline). But when legal positivists concern themselves, as Bobbio has done in so many valuable works, with normative issues—be they about the law or under the law—their positivism generally acquires a quite different configuration. This is the natural consequence of the inoffensiveness of legal positivism when it is defended as a conceptual position: It may only be relevant within a context of discourse which deals with definitions which are themselves neutral to descriptive or normative stands. When the discourse deals with more substantive and controverted matters and a participant in it takes what is understood to be a legal positivist position, this must mean that he is being positivist in some of the other senses, that is, some of the senses which refer to positions which are not shared by all legal positivists.

That legal positivism acquires in these more substantive contexts of discourse a more "meaty" embodiment is shown clearly in the work of Bobbio just cited: Ethical skepticism comes quite clearly to the surface in his references to the vagueness, ambiguity, *et cetera* of the concept of human rights which makes it impossible to look for an absolute foundation of what it denotes and to the lack of relevance that anyway such a foundation would have. Moreover, the *factum* of law becomes directly relevant for justifying actions and decisions, as ideological positivism propounds, in the allusion to the recognition of human rights in positive conventions as making unnecessary the task of giving reasons for them.

Thus, the ethical skepticism and the ideological positivism which cannot be necessarily associated with legal positivism when it is defended in the context of discussion about the nature of law often emerge when positivism is put "in action" in order to argue about more substantial theoretical or practical issues. This occurs despite the fact that when positivists are shown some of the implications of grounding decisions not on values but on mere spatio-temporal facts, they often retreat to a more comfortable merely conceptual stand.

However, what drives positivists like Bobbio to adopt these less generally shared theses when confronted with substantial problems is understandable and quite compelling. The invocation of absolute values recalls religious fanaticism or political absolutism which lead to intolerance. On the other hand, if decisions were conceived as radically ungroundable once the former

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alternative is rejected, the phantom of arbitrariness and naked power would haunt us. Once tolerance and a scientific view of the world lead us to reject objective ideals as the source of arrangements like those involved in the recognition of human rights, it seems that we need to rely on something like the factum of their positive acceptance as a way of putting an end to deliberation about whether they should or should not be respected. Skepticism about objective values seems to lead, at least pragmatically, to something like the ideological positivist stand of conceiving of positive law as generating reasons for action and decision.

II.

What I would like to focus on here, however, is the confrontation between this sort of positivism "in action" and some implications of communitarianism. I think that to analyze this confrontation would also draw attention to some weakness of even the more inert varieties of legal positivism.

I wish to call your attention to how a thesis like that of Bobbio fares when it is confronted with some theoretical developments which emphasize the relativization of human rights to historical or cultural contexts. For instance Abdullahi Ahmed An-Na'im defends the need for a cross-cultural approach in defining the international standards of human rights which takes into account the fact of cultural and religious variations like that of Islamic peoples who do not consider that following the Qur'an in cutting off the hand of a thief, under certain circumstances, constitutes cruel, inhuman or degrading punishment as defined in international conventions (An-Na'im 1992).

As another example of an even more relativist view of human rights, we may mention Rhoda E. Howard's position expressed in assertions like the following: "[. . .] Human rights is, to repeat, one particular conception of human dignity and social justice. It is not synonymous, despite their joining in the Universal Declaration of Human Rights, with human dignity. All societies and all social and political philosophies have conceptions of human dignity. Some of these—especially those rooted in the view that nation, "people," community, or family must take precedence over the individual —are radically at odds with the idea of human rights. The recent tendency to substitute collective rights for human rights in international debate, or to assume that the two types of rights can exist compatibly, fails to note this crucial difference" (Howard 1992).

These are statements by jurists and anthropologists who resist being completely silenced in their different interpretation or even denial of human rights by the factum of their recognition by international conventions. But these statements are being supported by an increasingly popular philosophical conception, which re-enacts old qualms about the liberal conception of rights. I refer, of course, to communitarianism.

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In recent years, the liberal conception of rights has been put into question by philosophers who exhibit an acute intellectual sophistication: Charles Taylor (1985), Alasdair MacIntyre (1981), Michael Sandel (1982), and in part Michael Walzer (1983), Bernard Williams (1985), Stuart Hampshire (1983) and Susan Wolf (1982). The influence of Hegel is noticeable in many of these philosophers—through their insistence on the social character of humans and on the connection between morality and the customs of each society. But behind Hegel also looms the figure of Aristotle, since many of these communitarian philosophers also defend a conception of the good related to a teleological vision of human nature and reflected in a set of virtues.

One of the contributions of the communitarian trend consists in giving a picture of liberalism which is sometimes clearer than that provided by liberals themselves. In this way, MacIntyre, for instance, puts forward the following distinguishing features of liberalism, mainly in the Kantian variant. First, the idea that morality is mainly composed of rules which would be accepted by any rational individual under ideal circumstances. Second, the requirement that these rules should be neutral with regard to the interests of individuals. Third, the demand that moral rules should be also neutral with regard to conceptions of the good individuals may hold. Finally, the requirement that moral rules should be applied equally to all individual human beings regardless of their social context.

Communitarianism objects to each one of these assumptions of liberalism and it does so after proposing a diagnosis of the common source of so many philosophical mistakes. Charles Taylor, for instance, locates that source in an "atomist" conception of individuals according to which they are self-sufficient regardless of their social environment. Sandel expands the argument maintaining that Kantian liberalism assumes an outlook of moral agents as constant along time, disconnected thus from their own varying desires and interests, free from the causal flux which affects those desires and interests, mutually separated, and isolated from the social context. MacIntyre in his turn maintains that the abandonment of a teleological conception of human nature seriously disrupted moral discourse, since it now lacks the element which constituted the bridge between factual propositions about actual human behavior and moral rules which have a normative character.

These authors maintain that only an impoverished conception of the moral person, such as that referred to above, allows liberalism to sustain its distinctive thesis about the independence of justice and human rights from a conception of what is good in life. Liberal neutrality about the ideals of virtue or of human excellence is achieved at the expense of adhering to a view of human agents as noumenal entities which not only lack a distinctive telos, but also possess an identity which is not dependent on their own desires, on

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their relationship with other individuals, and on their insertion in a specific social environment.

Therefore, liberals are being accused of endorsing a social morality centered on human rights without realizing that they require a conception of the good, as is shown in cases like conflicts of rights which can only be solved by resorting to such a conception. Alternatively, liberals are also being accused of smuggling in a hidden conception of the good despite their pretense of neutrality. The conception of the good which liberals are said to endorse implicitly is the same as that of utilitarianism in the prevailing version: The satisfaction of desires or preferences of individuals whatever their content. This conception of the good is, in its turn, put into question by communitarians: They say that its apparent plausibility derives from a confusion between the satisfaction of desires and pleasure (which, despite being a good, cannot be the only one). The object of some desires and preferences may be to obtain pleasure and sometimes the satisfaction of desires causes pleasure; but not all desires have as their object the achievement of pleasure and not every satisfaction of desires is pleasurable. If we disconnect in this way desires and preferences from pleasure, the idea that a satisfaction of a preference regardless of its content is something valuable in itself loses plausibility. If each one of us desires something only in so far as we believe it to be valuable — in some or other sense —, it does not appear reasonable to assign objective value to the satisfaction of desires regardless of the value of that which is desired.

Charles Taylor intends to show, in almost syllogistic fashion, how liberal thinking contradicts itself when it assumes there is a set of individual rights which have primacy over other normative relations (these relations which are subaltern to rights include even the duty of being loyal to a society or state, since for liberalism this should be based on consent given within the framework of those rights). Taylor's reasoning runs as follows: (1) The ascription of rights depends on the recognition of certain capacities, like expressing opinions, developing a spiritual life, feeling pleasure and pain, etc. The liberal may want to block this move putting forth the case of children and the comatose, but they would have to desist as soon they are asked why rights are not also ascribed to trees or clouds; then they must admit that in the case of children the potential capacity is relevant, and in the case of the comatose either rights are relevant or are ascribed for special reasons; (2) It is not enough for ascribing rights to recognize certain capacities. These should be considered *valuable* so as to be differentiated from others which are not the grounds of rights; (3) If something is valuable there is a duty to preserve and to expand it, materializing the conditions on which that materialization or expansion depends; (4) The majority if not all the capacities on which the ascription of rights depends are conditioned to membership in a society; they require tools like language, conceptual schemes and institutions which are inherently social. Liberalism may pretend to block this move also either

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through the limitation of the relevant capacities to that of feeling pleasure or pain, or through the limitation of associative relationships to those based on consent, like the family. But the capacity of sentience seems to be insufficient to ground a broad set of rights, which in any case can only be reduced to an ample capacity to choose plans of life, and the consensual associations do not seem to be sufficient for developing the relevant capacities.

The conclusion of this reasoning is, of course, that the ascription of the rights presupposes the duty to preserve the links of community which make possible the development of the valuable capacities which underlie rights. Liberalism would contradict itself when it gives to rights primacy over the duties related to the preservation of society which makes the former possible.

MacIntyre arrives at the same conclusion with light variations in the premises: The rules which ascribe rights are justified on the basis of certain goods; these goods are internal to changing social practices. Thus, moral evaluation is subject to the traditions and practices of each society. This author recognized that this may be dangerous, since it restricts the capacity of criticism of social institutions and practices; but he contends that the dissociation between morality and social practices which underlies liberalism is also dangerous since it neutralizes all motivation to be moral.

This allows us to distinguish the following aspects of the communitarian program: In the first place, the derivation of the principles of justice and rights from a certain conception of the good. Second, a conception of the good in which the social dimension is central and even dominant. Third, a relativization of the rights and duties of individuals to their particular attachments to other individuals and to the particular features and traditions of their society. Finally, a dependency of moral *criticism* on moral *practice* as it is manifested in the traditions, conventions and institutions of each society. Even when we cannot proceed further here in order to see how different thinkers link together these aspects of the communitarian conception of rights (see Nino 1991b), I think that what I said is enough to perceive that the pivotal element is the thesis that conceptions of the good prevail over principles of rights and that plausible conceptions both include as central membership in society and other smaller groups and are developed through the practice carried out within the society and those groups.

Of course, this communitarian vision of rights fully backs the more concrete concerns about the impact of social context on rights, and therefore about their cultural conditionality, voiced moderately, as we saw before, by authors like An-Na'im and in a more radical way by scholars like Howard.

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III.

When a positivist in action like Bobbio confronts positions like those of the authors just cited, An-Na'im and Howard, of course he must be troubled. They do not think that the question of the recognition and extent of human rights is settled just because they are part of international conventions. They either would like those conventions to be modified or interpreted in ways which perhaps Bobbio might dispute. Moreover, they do not think that the question of justification is behind us and we should face only the question of protection. They would argue that the question of whether to protect the thief whose hand is going to be cut off depends on the question of whether it is justifiable to ban such punishment as degrading, inhuman or cruel. Of course, if they rely on philosophical communitarianism as that of Taylor or MacIntyre they would back their statements in the way we saw in the last section. And that will go to the heart of the question of justification, i.e., they would offer a justification of human rights such that their recognition and scope would depend on conceptions of the good embedded in social practices.

Therefore, communitarianism seems to confront positivism in action. But what is the nature of this confrontation? Is it due to the fact that positivism has an underlying connection—as many have thought—with liberalism and it is merely getting the blows that communitarianism directs to the latter position? I do not think so. The nature of the confrontation seems to be more superficial and contingent. Positivism in action seems a position which wants to foreclose a certain quest and communitarianism is an answer to that quest, which presupposes of course the need of it.

The quest that the ideological positivism which emerges when substantial issues are discussed wants to foreclose is the quest for reasons beyond positive legal norms: Those positive legal norms *are* the reasons we need for decisions and it is both unnecessary and impossible to look for further reasons beyond law, that is, in morality. Communitarianism aims, instead, to provide those further reasons through a certain view of morality.

If positivism in action clashes with communitarianism in the particular field of the international recognition of human rights, it is just because the relevant positive laws have a liberal inspiration. Thus, positivists conclude that they provide reasons for action not because of the liberal morality behind these laws but because of their positivity, whereas communitarians may well doubt the justificatory force of those conventions since they think that their positivity does not preclude the weakness of the putative reasons generated by the liberal moral principles behind them. If the international conventions were to absorb the communitarian offensive and provide major leeways in the balance and scope of human rights according to social context, the dispute would be between the positivist in action and the liberal, and not the communitarian.

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Moreover, I think that positivism in action has many things in common with communitarianism. There is a superficial way of making them converge. This consists in observing that authors like Bobbio end up by adopting a conventionalist meta-ethical stand which seems to be part also of the communitarian movement. In effect, in other work on the subject on the foundation of human rights, Bobbio defends the idea that rather than seeking absolute grounds for those rights we must conform ourselves with the wide consensus that their international recognition shows that exists around them in the world of today. But I prefer not to rely on this addition of Bobbio to the legal positivist thesis that the positive enactment of human rights makes the task of justifying them superfluous. This is for several reasons: First, because, the moral conventionalist thesis seems to be incompatible with the last statement about the superfluousness of justification (the former thesis provides a justification which is independent of the positivity of the recognition of human rights, since there can be positive recognition without consensus and vice versa). Second, because this moral conventionalism seems to be idiosyncratic of Bobbio and not shared by other positivists when dealing with substantial issues. Third, because that moral conventionalism is rather weak in the crude way presented by Bobbio, and it is vulnerable to the emergence of dissenters like the communitarian ones. Even when the dissenters did not emerge, the possibility that they do throws doubt about any moral view based on crude consensus.

Therefore, what I want is to trace deeper links between positivism in action, and especially its ideological thesis, and communitarianism. The links must thus be established between the latter view of morality and the thesis that positive law by itself—whether backed or not by moral consensus—provides reasons for justifying actions and decisions. If we could trace such links perhaps we may throw doubts about the supposed association between positivism and liberalism which float in the air of so many analyses.

IV.

The first association which I want to establish between the two positions is that, though the cases which I alluded to in order to exemplify them—Bobbio's view of human rights, on the one hand, and An-Na'im and Howard's view of the same subject and the general philosophical conception of philosophers like Taylor, Sandel, or MacIntyre, on the other, present quite amiable faces, both positivism in action which acquires ideological undertones and communitarianism may also show us quite frightful countenances.

In the case of ideological positivism, all of us know how the doctrine that whoever has the coercive power to make a social group obey certain prescriptions acquires legitimacy to issue them and is the recipient of the

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corresponding duty to abide by them of the people was used to justify extreme authoritarian regimes, like the Nazi or Fascist ones. This resulted in an endorsement of might and force and a glorification of success. As Alf Ross says (1958), this doctine may be influenced by Hegel's dictum that whatever is real is rational and vice versa. Of course, this does not mean that only ideological positivism is used to legitimize authoritarian regimes like Nazism. Different varieties of natural law theory—like those based on the "nature of things"—have been used for the same ignoble purpose. But it is clear that the doctrine that positive law whatever its content provides reasons for justifying actions and decisions constitutes the most direct and easy way conceivable to justify an authoritarian regime while it is in force. Even Bobbio's way of defending highly valuable covenants on human rights may be used straightforwardly for abhorrent purposes if those covenants were replaced by others which established obnoxious arrangements (imagine the international covenants which would have ensued if Hitler had succeeded in conquering Europe and what results the application of Bobbio's arguments to them would have had).

But in order not to look for remote or hypothetical examples, let me illustrate the grim face of ideological positivism with the case of Argentina. Since 1865, and especially since 1930 on until 1984, each time that there was a *coup d'état* in Argentina the Supreme Court recognized the power of the *de facto* regime to issue valid laws and the obligation of the population and officials to obey and to apply them on the basis that that regime had acquired the control of the coercive power of the State and was able to impose order on society. This recognition of legitimacy was at the beginning quite restricted, mostly to issuing executive decrees, but with time the power to enact legislation and even to modify and to suspend the Constitution was recognized on the mere basis of the *factum* of positive law. Genaro Carrio noted the logical oddity that we shall comment on later involved in the passage from physical to normative power incurred in these judicial decisions (Carrio 1973). In 1984, the Argentine Supreme Court changed its doctrine on the basis that the validity of the law was a normative predicate which could only be applied to those enacted democratically, so that only when the *de facto* laws were explicitly or implicitly ratified or not rejected by democratic bodies could they acquire validity. But the Supreme Court expanded by President Menem went back in 1990 to its old doctrine of clearly positivist inspiration (it said that whatever are our "affective or ideological attitudes" concerning military regimes we must recognize as a fact that they are able to enact valid laws; see Nino 1985, 1992).

Communitarianism may also develop in a quite unattractive way, even though none of the authors mentioned promotes that development. Despite the appeal of its realist vision of man, of the value of family and social links as grounds for special rights and duties, of the connection between values and social practices, each one of the distinguishing marks of communitarianism

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may generate, when it is developed in all its implications, a different aspect of a totalitarian vision of society.

The primacy of the good over individual rights allows for the justification of perfectionist policies which intends to impose ideals of excellence or personal virtue, even when individuals do not perceive them and thus do not subscribe to them. In effect, if rights are the only means to satisfy a certain conception of the good, why not prescind from them when that conception of the good may be more efficaciously materialized through other routes? Here it is also possible to allude to the example of Argentina, where military governments, backed by conservative sectors of the Catholic Church, had the invariable policy of coercing citizens into supposed ideals of virtue even with regard to private life. Thus, films and publications were censored even for adult exhibitions, deviant sexual behavior was persecuted, and even the ways in which people dressed or had their hair cut were overseen.

The idea that the social dimension is dominant in the conception of the good may lead one to justify sacrifices of individuals for the sake of promoting the well-being of society or the State conceived of in holistic terms. The glorification of particular links with social groups, like the family or the Nation, may serve as ground for collectivist, tribalist or nationalist attitudes which underlie many of the conflicts that humanity must endure, and which have come lately to the surface in Eastern and Western Europe. Here it is also useful to allude to the example of Argentina during military regimes: The so-called "dirty war against subversion," which led to the disappearance, death and torture of thousands of people, often unrelated to left-wing subversion, was carried out under the "doctrine of national security," which is a holistic conception based on the good of the "national being," the interests of whom were held to prevail over those of individuals, and were interpreted in a privileged way by certain groups like the armed forces or the Church. In a more circumscribed dimension, the idea that the primary good is that of associations like the family, to whom the rights of individuals must cede, was resorted to at that time by the Argentine Supreme Court in order to allow a kidney transplant from a girl to her brother, notwithstanding that because being a minor it was doubtful whether she had validly consented to it.

Lastly, the dependence of criticism on moral practice which is also one of the main aspects of communitarianism may lead to a conservative relativism that, on the one hand, is inept for solving conflicts among those who appeal to different traditions or conventions, and, on the other hand, does not permit the evaluations of those traditions and conventions in the context of a society, since the evaluation would presuppose social practices without counting with independent principles to discriminate between them. To give an extreme example again taken from the last dictatorship in Argentina: The military authorities of the Province of Cordoba prohibited the teaching

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of modern mathematics in schools, under the idea that it would train students in a degree of abstraction which could later on be expanded in other fields of thought, and thus, when applied to the political and moral realm, would create the risk of making people prone to criticize the traditions and conventions which define the national being (I am sorry for these rather truculent examples, but I think that it is important for those who nurture the germ of these outlooks in the midst of safe, liberal, havens to be aware of what sort of fire it is they are playing with).

Consequently, these two ugly faces which ideological positivism and communitarianism may present, instead of the noble faces of Bobbio or An-Na'im, may combine together to legitimize abhorrent regimes: Ideological positivism may justify their authoritarian origin, and communitarianism their totalitarian content.

V.

The second connection between the two positions which I want to mention is rather like the other side of the coin with regard to the former one: It has to do with some coincidence between vague but legitimate preoccupations which make plausible both legal positivism and communitarianism in their best versions. I mentioned earlier what are those preoccupations of positivism: The subjectivity and arbitrariness of decisions which affect social relationships if the factum of positive law were not held to bind those decisions and if they were thought to be either unavoidably radically groundless or grounded on non-graspable moral invocations. The terror of ideological positivists materializes in the image of a judge who leaves aside a clear text of the law and takes a decision which cannot be derived from a reasonable interpretation of it, either alleging that a decision against the law is as good as one according to it or invoking *his* moral values to disqualify the law and to decide directly according to those values. This is the terror of moralism.

If one digs deep into the concerns of many communitarians, I think that *some* of them (of course, not others which have to do with their perception that liberalism does not take into account ideals like patriotism, fraternity, personal commitments, etc.) are of a similar tenor. They think that liberalism, mainly in its Kantian variety, lends itself to subjective and arbitrary moral conclusions. This is so, first, because the accusation of Hegel against Kant that formal structures of practical reasoning are not enough for determining substantive moral conclusions still stands, and any pretension to derive those results must imply arbitrary logical jumps. Constraints like universability cannot avoid adopting opposite principles as long as we are committed to apply them universally, and the conception of noumenal beings which are abstracted from particular interests, conceptions of the good held by them and social circumstances are "too slender a basis" (to use

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Rawls' own expression that communitarians would like to use not only against Kant but also against himself) to derive univocal moral principles. But, secondly and more important, liberalism seems to imply an individualist moral epistemology in which some "enlightened" individuals may come to the conclusion of what morality requires on the basis of assumptions of practical reasoning, even when those requirements apply to faraway people in time, space and customs, without regard to the collective practices of the people concerned themselves which result from their own experiences and struggles.

Thus, one strand of communitarianism is distinctively worried about the epistemic elitism which it perceives in liberalism. For instance, Michael Walzer (1981) inveighs against the new " philosopher-kings" who try to influence mainly judges and mainly in the exercise of judicial review about what is the true set of rights enshrined in the Constitution whatever the experience of the people in their political practices. This concern about elitism is not necessarily shared by ideological legal positivism. But elitism presupposes the wider phenomenon of subjectivism and arbitrariness and here is where the minds of one and the others meet. Therefore, when a typical morally inspired judge of the North American Supreme Court nullifies a statute on the basis that it violates the right of privacy—as in "Griswold"—the positivist and the communitarian may both complain in chorus: The positivist because she does not see that right consecrated within the four corners of the Constitution, the communitarians because they do not see that right to emerge as derived from a conception of the good embedded in the social practice of the relevant community. But they coincide not only in their complaints but in the fear that Justices are imposing arbitrarily their own subjective views of social morality on the rest of the community. I would conjoin the object of their respective fears under the label "liberal moralism."

What I would like to argue next is that, though this concern of both ideological positivists and communitarians about the subjectivity and arbitrariness involved in liberal moralism is quite justified, they give to it two different wrong solutions because of another feature they have in common. This time what they share is a serious philosophical misconception which explains why these positions may degenerate into obnoxious moral and political stands.

VI.

Let us begin with how ideological positivism, as manifested by positivism in action, incurs the philosophical misconception which I am imputing to both views.

There is an easy way to begin the diagnosis of what is wrong with ideological positivism: It just commits the so-called "naturalistic fallacy," that is, the fallacy of trying to derive norms of values from mere factual

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circumstances, or, perhaps more precisely, to try to justify decisions on the basis of facts which are compatible with either them or the opposite ones. Ideological positivism just believes that it is possible to justify a decision like "Peter should go to jail for having committed murder" by citing a description of a certain fact like "Legislator L has prescribed that those who commit murder should go to jail." But it is possible to assert sincerely the latter proposition and to adopt a contrary decision concerning Peter, the murderer, without incurring a logical or pragmatical contradiction. That shows that the descriptive proposition in question does not express a sufficient reason for the decision, that is, it is not irrational to accept it and not to decide to send Peter the murderer to jail when one could have done that.

The same holds for much that we expound on the descriptive content of the concept of legislator. For instance if we assume a further premise to the effect that a legislator is whoever may in fact issue prescriptions and be generally obeyed by the members of the group of addressees, perhaps because there is a social practice of obeying him or a class of persons with certain features to which he belongs, or perhaps because he has the actual capacity of putting in action a coercive apparatus to sanction non-compliers. All this may be added, and still it is not irrational to accept this description of the situation and to decide nevertheless not to comply with the prescription of the legislator by not punishing Peter.

Things are different if in the concept of legislator a normative or evaluative feature were included, as the feature that he is a legitimate authority, or somebody who should be obeyed, or somebody whose prescriptions have binding or obligatory force, or are valid in that sense. This difference will of course be spurious if all these properties were in the end reduced to spatio-temporal facts of the sort mentioned in the above paragraph. In this case, again the addition of these assumptions would not make the description to express a sufficient reason to act in a certain way. But if the properties in question were given by norms or value-judgements which were not accepted because of certain spatio-temporal facts and the conditions of their truth or existence were not reducible to those facts, now it would seem that there is some sort of inconsistency, at least under the clause that other things are equal, if one accepted that legislator L has prescribed p, that legislator L ought to be obeyed and that, nevertheless, p ought not to be done.

Therefore, ideological positivism commits some sort of logical error when assuming that a description of the issuing and observance of prescriptions, the conditions of existence of which are exhausted by some spatio-temporal facts constitutes by itself a sufficient reason for justifying decisions.

But this is still a quite superficial account of the mistake the ideological positivist commits. This is so because I think that the naturalist fallacy is not a proper fallacy in a logical sense. The impression that it is comes, I think, from the assumption that when it is said that a norm is derived from a factual description sometimes by norm is understood a prescription, that is, the

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act of formulating a normative-judgement with the intention that the formulation is taken as part of the reason to act on the part of the addressee (see my "Razones y prescripciones" in Nino 1985). It is clear that a prescription so conceived cannot derive from a descriptive proposition just because it is an act which cannot derive from any proposition whatsoever! But the content or the justification of a decision is not a prescription in this sense. It is a normative proposition which differs from others simply because it resorts to deontic predicates for qualifying action. Therefore, there is nothing *a priori* which would prevent them from deriving from purely descriptions of spatio-temporal facts.

In fact, I believe that the naturalistic fallacy is no more than a simple *non sequitur* given by the fact that there is no relevant connection between the predicates of the premises and those of the conclusion (like in "1.—All men are mortal. 2.—Socrates is a man. 3.—Therefore, Socrates is a philosopher").

This means that once the charge of logical fallacy is left aside, a deeper explanation is needed of why there is no relevant connection between the facts of issuing prescriptions by those in charge of power in a society and the bindingness of those prescriptions, given the fact that many sensible people have thought that there is indeed such connection.

I think that that explanation is provided by pointing out that ideological positivism misconceives the nature of legal discourse. It conceives of that discourse as an *insular* one, when in fact it is only part of a wider and integrated practical discourse which aims at determining moral reasons, that is, reasons which are accepted autonomously and that have other features like universability, generality, finality, *et cetera*. For me, it is crucial that we get right the nature of justificatory discourse, since all the ultimate intersubjective reasons we have for acting or deciding one way or the other in matters which may affect other people are those which we can infer from the assumptions of our social practice of giving reasons to each other (Nino 1991b, ch. 3; Nino 1989).

If ideological positivism were right, as perhaps it is right with regard to different cultures with quite diverse modalities of justificatory discourse, to say that some prescriptions have been enacted by those who have control of the coercive apparatus of society would put an end to all possible discussion and it would be irrational to accept that fact and to deny that one should act consequently. But this is not so, as we already saw. In legal discourse to say that some standard is *legal* is itself a reason, and not merely a description of a neutral fact, for accepting it and acting as it prescribes. This is what I think that Dworkin (1986) implies by his observation that disputes about what the law provides cannot be merely semantic or factual. But the reason for acting and deciding which consists in ascribing legal character to a certain standard cannot, ultimately, be in and of itself a legal reason. It must be an extra-legal reason, a reason which does not rely on authority and which thus, given some specificity of content, amounts to a moral reason.

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The same can be shown if we ask ourselves how we can detect what standards operate as legal ones in practical reasoning. The plausible answers do not rely, as Kelsen proposed, on their content, but on the fact that they are accepted because they have been enacted by certain distinctive authorities. That is to say, the reasons why they are accepted in certain tokens of practical reasoning is what distinguishes legal standards from other standards accepted also in practical reasoning. But those reasons of acceptance of legal standards have a distinctive structure: They cannot consist in the mere description that they have been prescribed by certain authorities since this, as we saw, is compatible with not accepting the standards and, therefore, does not constitute a reason at all. Such a reason must consist in the description of the fact that somebody prescribed something plus a proposition to the effect that that body is legitimate in the manner that we saw previously. Given the fact that the latter proposition cannot be a description of a further fact of prescription, but should be a norm autonomously accepted, a moral norm, in the identification of legal norms, moral norms intervene. We identify legal norms in practical reasons for the fact that they are being derived in that reasoning from moral norms.

The dependence of legal discourse on wider moral discourse manifests itself in many ways. Mainly it emerges in critical cases in which the authority of the issuer of a legal prescription is put in question, like, for instance, in the case of usurpation of who was normally taken to be the ultimate authority, or when there is a conflict between different basic sources, or when a conflict between international and domestic law ensues, or when there are problems of interpretations which cannot be settled by legal standards since they are themselves affected by problems of interpretation. There are concepts, like that of *validity*, which serve as bridges between legal discourse and the wider justificatory discourse: To say that a law is valid is to say that it passes the tests of that wider discourse and that thus there are moral reasons for observing it. I have argued elsewhere that the effort of legal theorists to define these concepts in a way which they are made to operate without connection with the wider moral discourse led these theorists to many puzzles about problems like the contradiction of laws of different levels or the problem of reforming the very law which establishes how other laws and itself should be reforming. This is so because it becomes impossible to absorb in the reconstructed concept the features that they have when they are spontaneously used in order to connect legal discourse with the wider moral one.

It is here where there is a relevant connection between conceptual and ideological positivisms, as distinguished in the first section: Conceptual positivism defines the basic legal concepts without taking into account the immersion of legal discourse within the wider moral one: This happens, as we saw at the beginning with the very concept of law and here we saw that it occurs with the concept of validity. Even when conceptual positivism does

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not assert or presuppose with this that legal discourse is insular, it is hard to see what would be the use of those concepts in justificatory contexts if it were not in the attempt to develop an autonomous legal discourse. Therefore, while conceptual positivism is in itself inert and innocuous, it provides the tools for positivism in action, which turns itself ideological.

To summarize, ideological positivism misconceives legal discourse, because it sees it as autonomous and insular, when in fact it is dependent on and it is part of a wider moral discourse. In this misconception of legal discourse, ideological positivism views it as substituting moral discourse. The attempted substitution ascribes to the supposed "legal reasons" some of the features of moral ones, like finality, but not others, like generality and universability. Of course, the attempt of substitution fails since basic discourses are not transformed and replaced at will but are the most fundamental aspect of whole cultures, if not of all cultures. Curiously enough, positivism which seems to be so respectful of the *facta* behind some norms ignores the very basic fact of how normative discourse is constituted in our culture.

VII.

I believe that communitarianism incurs in essentially the same mistake as ideological positivism of misapprehending the nature of our justificatory discourse, for much of that misapprehension has here some other particularities.

One of the aspects of our social practice of moral discussion is that it allows us to criticize any social institution or practice, including, of course, itself—as is done by the very communitarian authors. This is because, as we saw before, arguments of authority religious, legal or *conventional* are never final and conclusive within our practice of giving reasons to each other. All authority should be justified on the basis of principles which are not themselves accepted on the basis of authority. This, of course, applies to traditions and conventions. Therefore, communitarians are wrong in thinking that some social traditions or conventions may be exempted from moral criticism, as may be shown immediately as soon as they point out to any real example of a convention or tradition which would be so immunized from critical appraisal.

Secondly, it is not true that the post-Enlightenment practice of moral discussion, the assumptions of which we all, including communitarians, share, pretends to allow for the derivation of rights without a previous conception of the good. As I tried to show elsewhere (Nino 1991b, ch. 5), the practice of giving reasons to each other presupposes the value of acting on the basis of reasons freely accepted and this constitutes the value of autonomy, in the Kantian sense. From this general value of moral autonomy, which refers to the value of acting on the basis of any moral principle freely

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accepted, may be inferred the more specific and unrestrained value of personal autonomy, which refers to the value of acting on the basis of self-referential moral principles and ideals (acting which unlike that based on interpersonal moral principles cannot be restricted for the sake of preserving the autonomy of others). Therefore, the liberalism implicit in our practice of moral discussion is not entirely neutral towards conceptions of the good, as communitarians object, but it presupposes the good of autonomy. Now, it is true that autonomy is a special kind of good: It involves the permission to each person to search freely for other goods, even some which may be antagonistic to the very good of autonomy (which is nevertheless realized when that other "good" has been achieved freely by the very person concerned). Communitarians are wrong in asserting that liberals who rely on assumptions of our practice of moral discussion intend to derive rights out of the blue without any conception of the good, and are doubly wrong when they introduce, contravening those assumptions, supposed goods which preclude that of autonomy. Of course, autonomy requires some pre-conditions which allow people to choose and materialize their own conception of the good and personal ideals; among those pre-conditions there is, of course, the membership of social groups: But if that membership is valued just because it is an instrument of autonomy, it should be made as voluntary as possible in order not to frustrate the good which it serves.

Of course, our practice of moral discourse does not only assume the value of autonomy, which is not fully acknowledged by communitarians. It also assumes the requirement of impartiality which qualifies the former value. When we discuss with each other we try to determine which is the principle which an ideal arbiter would accept in order to solve the conflict. This includes the requirements of generality and universability, since we do not think that impartial principles may make differences on the basis of circumstances identified by proper names or definite descriptions or those which are applied differently to cases which do not differ in properties taken into account by those very principles. This is what commits us to apply the same principles we apply to ourselves to faraway peoples in time and space, at least if it is not shown that they differ in circumstances which those principles make relevant. Contrary to what Rhonda Howard asserts in the passage quoted earlier, we do not think that the mere fact of living in Africa, for instance, gives somebody a different moral status, though some circumstances like starvation, ignorance, illness, etc. may make a difference to the implications of general and universal principles. Communitarians are never clear about what are the principles of their traditions that they refuse to apply to others and why. In a less philosophical context, An-Na'im alleges, as we saw, that the punishment prescribed by the Qu'ran should not be applied to non-Muslims, but the general principle cannot surely be that everybody should be treated according to the principles in which she believes (when these are intersubjective principles), since in that case

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somebody who did not believe in property could not be punished for theft at all!

Of course, the assumptions of autonomy and impartiality implicit in the social practice of moral discourse lead to a certain conception of the person, according to which the identity of a person does not depend on the ends she chooses or the wishes she happens to have, the identity of each person is separable from that of each other, and that identity is not affected by her membership of one or other social group. It is no use for communitarians to make fun of this conception as unrealistic considering all we know of actual people, since this conception is not anthropological but normative: It is just an abstraction of the normative requirements of autonomy and impartiality and determines what sort of reasons we can give to others are valid and what are not. For instance, the idea of separation of persons involved in this conception does not deny that persons are deeply attached to each other and the good of others may be central for the interests of each of us; it only implies that we cannot give as sole reason for harming the autonomy of somebody that this serves to grant greater autonomy to others.

In sum, like ideological positivists, communitarians contradict their own main tenet: In this case, that main tenet is to take into account social practices in the derivation of moral principles. But they do not consider the assumptions of the very practice of moral discussion that we all share. It is not logically possible both to criticize our culture for features of its practice of moral discussion—like autonomy and universal impartiality—, and to advocate taking into account cultural specificity. It just happens that the specificity of our culture is not to take into account cultural specificities in making basic moral judgements!

Of course, this way of shooting communitarianism with its own weapon does not involve adopting that weapon ourselves. The argument in favor of extending human rights universally is that the fact of being Muslim or of living in Iran is not a relevant property for distinguishing people with regard to the enjoyment of those rights; it is not the fact that justificatory discourse of our culture relies on universal impartiality. This means that somebody like An-Na'im could not retort that, as the assumptions of the discourse of *his* culture admits that cultural diversity makes a moral difference, he is justified in concluding that some penalties are not degrading when applied to Muslims and they are when applied to other people. What he would be saying would not be intelligible to us, since that would be something different from the perfectly reasonable description that Muslims consider those penalties not to be degrading; he would be saying that they *are not* degrading for the mere fact that the person to whom they are applied happens to be Muslim. Still this might make sense to us if what is implied is that everybody should be treated according to his own moral or religious ideas; however, as we saw, this cannot be what it is meant, besides the fact that this judgement itself does not seem to be relative to some religious or

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moral affiliation. Perhaps, the statement that basic moral judgements should vary with cultural specificity may be intelligible to those with a different conceptual apparatus from that involved in our culture; but perhaps it is intelligible to no-one since it infringes on some non-variable requirement of practical thinking.

Though communitarianism incurs the same mistake as ideological positivism of misconceiving the nature of justificatory discourse, the misconception runs this time in the opposite direction to that of the former case: I said that ideological positivism treats legal discourse as if it were the whole of moral discourse, and not a mere specialized part of it. Well, communitarianism treats the whole of moral discourse as if it were its legal province: It conceives of it as one in which one may conclude that what is permitted or prohibited may vary according to borders which are given by social conventions and traditions.

VIII.

What about the legitimate preoccupation of both positivists and communitarians that liberal moralism leads to the subjectivity, arbitrariness, and elitism of some people—scholars, judges, leaders of powerful countries, heads of international agencies—who would impose universally and uniformly their "moral inspiration" about the proper extent, balance and application of human rights, without taking into account the experiences, wishes, and practices of the very peoples concerned?

I think that what is being raised here is not an ontological but an epistemic concern and that it should be tackled in its own terms. That is, the legitimate preoccupation put forth is not about whether human rights are universal but how we know what human rights are there, what is the proper balance between them when they are in conflict, which are the duties which correspond to them, what acts in what circumstances infringe on those duties, *et cetera*.

My own view is that the exercise of the very practice of moral discussion by the people concerned with a conflict or controversy and the consensus which is reached as a result of that exercise have epistemic power for indicating what is the right solution for intersubjective moral problems as those mentioned about the extent of human rights. I believe that if all the people involved in a conflict about the scope of different rights and about which acts violate them deliberate and reach a certain agreement about the conflict there is a strong likelihood that his would be the solution that an impartial arbitrator would have reached.

Elsewhere (Nino 1991a), I have argued that this epistemic value extends, though in a diminished way, to a democratic process which substitutes the original practice of moral discussion, unanimous consensus by majority rule, when a time for adopting a certain solution must be settled and there is

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a need for not giving veto power to a minority in favor of the status quo. This epistemic value of the democratic process—the basis of which I cannot explain here—does not involve infallibility but only more confiability than any other method for taking collective decisions, it is relative to the satisfaction of certain conditions and to the degree of its satisfaction, and it applies in general to the overall results of the democratic process and not to each one of its decisions (so that there is a reason to accept each one, even when one is sure that a specific one of them is wrong, if the likelihood of having right solutions is to be maximized).

I think that this resort to democracy about the extent, balance, and modes of violations of human rights is what prevents the elitism, subjectivism and arbitrariness which positivists like Bobbio and communitarians perceive behind liberal moralism. In the national sphere, except when the preconditions for the value of the democratic process, which constitute a kind of *a priori* rights, are in danger, the determination of the scope and weight of rights should be left to the democratic practice of the people and should not be tampered with *dicta* from an aristocratic bench. In the international sphere, external pressures may be much needed for reaching acceptable degrees of respect of human dignity, but those pressures, when possible, should be rather directed to make sure that the people concerned discuss and negotiate among themselves about which duties are to be fulfilled in support of human rights and which acts infringe on it, rather than intervening directly to impose standards of behavior. I think that the model of external humanitarian intervention is more the one going on in South Africa rather than what was done in the Gulf war.

This public deliberation about the extent of human rights and the range of their violations is probably what An-Na'im has in mind when referring in his works to internal and external exchanges, quite apart from the relativist way in which he puts it. In fact his example of cruel, degrading and inhuman punishment illustrates so perfectly well my point that it is worth dwelling briefly on it before ending this paper.

I have problems with the example of the penalty of cutting off the hands of thieves because in other works (see, e.g., Nino 1983) I advanced a theory of punishment which does not seem to exclude it. That theory is based on the requirements that punishment should be a rational means of social protection (which requires that it should be an efficacious and economic way of preventing less harms than those involved in it) and that it should be consented to by the individual on whom it is imposed (which requires that the individual commits voluntarily an act knowing that the liability to punishment is a necessary normative consequence of that act, however much he might hope that it would not be actually imposed). I have excluded the possibility of justifying capital punishment, not only because the requisites of efficacy and economy are hardly met in this case according to empirical accounts, but mainly because the consent of the individual cannot justify

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excluding him from the community of public deliberation which is the source of all justification. But this rationale does not apply to mutilations like those ordered by the Qu'ran. So how can I deal satisfactorily with this punishment, that many, including me, find abhorrent?

The first thing to notice is that our feeling of abhorrency towards these mutilations may well be matched by possible similar feelings of other people towards our usual punishments: We cannot discard that people from far-away tribes, accustomed to more direct chastisements, may have the same chilling feelings when observing our prison system, with all its grimness, discipline, and bureaucratic coldness. How can this be explained without falling in relativism about the principles for justifying punishment.

I think that principles that the ones that I have defended leave enough leeway as to allow for different solutions adopting through the democratic practice of the people concerned. First, the requirement of prudential protection of society depends on the preferences and feelings of people in different ways. If in one society most people feel much more aggrieved and humiliated by some sort of deprivation than by another, the harm involved in the former may be uneconomical, in the sense that the same beneficial results may perhaps be achieved with the lesser harm, while in another society the calculus may be the opposite because of the different feelings of people. Besides, if people in a certain society prefer mutilation to jail, when in another society the general preference goes the other way, this also affects the calculus of the efficaciousness of punishment. Second, there is a non-moral feeling of abhorrency which varies from society to society and laws imposing punishment, as any other laws, should respect this: If in a certain society people abhor eating dogs or rats, while in other social groups this is taken as a treat, this should be taken into account in legal measures. The idea of officially mutilating or flogging a human being may provoke in a society this sort of non-moral feelings of abhorrency, the same as in another society may be provoked by the idea of people being locked in state cells; these varying social feelings should be respected according to non-varying principles for justifying punishment. These varying preference and feelings which affect the justification of imposing specific penalities, even accepting invariable requirements for that justification, are best processed in a participatory deliberation in which all the people concerned may express them (as well as to estimate whether there are typical situations in which the consent of the individuals to liability to punishment is vitiated because they are subject to unequal social conditioning).

This may give some satisfaction to An-Na'im's concern about the variability of the idea of degrading, cruel or inhuman punishment. However, the satisfaction should be quite limited, since in the particular example he gives the support of the penalty by the democratic process is rather dubious: First, most countries in which this kind of punishment is applied are not precisely models of democracy. Second, even if they were, they are theocratic

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countries in which collective decisions—like those imposing those punishments—are taken on the basis of ideals of personal excellence, infringing on personal autonomy. Third, laws about what punishments to impose cannot be based on those ideals of excellence of religious inspiration not only because that infringes on personal autonomy but also because democracy has only epistemic value with regard to intersubjective ideals, the validity of which is based on impartiality and not on other authority, like a religious one. It is quite probable that, if the societies in which hand-cutting is now seen as acceptable punishment became, as they should, more democratic and secular, their attitude towards this kind of punishment would change (as occurred in other predominantly Muslim countries which underwent the process of democratization and secularization).

At any rate, I think that this combination between an objective interpersonal morality, as the provider of ultimate reasons for action, based on the assumptions of the practice of moral deliberation, and the epistemic value which accrues to the varying results of the democratic process absorbs what is legitimate of the concerns of positivists and communitarians, avoiding their implications which may lead to endorsing totalitarian schemes. As ideological positivists aspire, some legal enactments provide reasons for action, though this applies only to the democratic ones and the reasons they provide are rather reasons to believe that there are reasons to act. As communitarians emphasize the scope, balance, patterns of violation of rights are determined by social practice, though not any practice would do: It must be a practice of collective deliberation, complying with pre-conditions—some of which constitute *a priori* rights—and aiming at discovering the extent of universal moral principles involved in justification.

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