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VSEBINA

V tokratni številki so objavljeni prispevki v angleščini, slovenščini, hrvaščini in španščini.

KNJIGE

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Letter to the editors

For a truly realistic theory of law

A realistic doctrine of the sources builds on experience,
but recognises that not all law is positive,
in the sense of "formally established".

(Ross 1958: 101)

Andrej Kristan pointed out to me that, in some of my recent work, a reversal of the commonly established relationship between legislation and adjudication emerges.[1]

Indeed, mainstream theory – a mix of positivism and legal realism – tends to reduce law to legislation, and adjudication to an interpretation of law. Instead, in my recent work, this relationship is reversed: the main function of law is adjudication, while legislation becomes mainly a way to control and limit adjudication.[2]

Andrej asked me to outline briefly the contours of this inversion, which I shall label, self-ironically, a truly realistic theory of law. However, readers should expect neither a sketched nor a fully-fledged theory; in what follows, I shall strive only to show whether it is possible.

1 GENERAL JURISPRUDENCE

First, one has to ask what general jurisprudence (*allgemeine Rechtslehre*) is, or rather: what is it that legal theorists really do? They essentially do two things which are not mutually exclusive; in any single theory, both are present, and their extent is primarily determined by the university environment in which theoreticians work.

1 See Barberis 2015 and Barberis 2016. I thank Andrej for this observation, for which I take full responsibility, even more than for the invitation to contribute to *Revus*.

2 A similar famous reversal is found in Gray 1909: 78-79: "judges' decisions are the *law*, legislation is only the main legal *source*". Cf. also Guastini 2015: 45: "the law is a set of norms in force [...] applied [...] by law-applying agencies".

Those who cultivate jurisprudence as the general part of private or criminal or constitutional law tend to conceive it as a continuation of legal dogmatics on a higher abstraction level, that is, as an analysis of the language used by legal scholars to study and interpret law. This first type of theory has obvious advantages, particularly if compared with a philosophy of law of a more speculative kind. But it tends to overestimate the role of legal dogmatics, central in continental legal culture, and to adopt its cognitive horizon. For example, it adopts ethnocentrism: the tendency to consider the concepts handled by continental legal dogmatics to be universal.

On the other hand, those who cultivate general jurisprudence as a subject in its own right, however, tend to conceive it as a historical and comparative study of both law and those phenomena that have performed the same functions in different ages and cultures. To the tools of logic and language, indispensable in any research, this second type of theory adds those proper to the social sciences, such as history, sociology, political science, economics, including their respective epistemologies. Compared to the first type of approach, this latter is more general, because it aims to give an account of more phenomena, and less abstract, because it distinguishes more carefully between their historical and cultural specificities.

A truly realistic theory of law is primarily a theory of the latter type. It is more general precisely because it focuses upon adjudication: the function of settlement of disputes which is more general than legislation.[3] But it is less abstract because it distinguishes between different shapes and aspects of adjudication, of which statutory interpretation is only one. As we shall see in the next section, this looks like a further extension, in a realistic and evolutionary sense, of legal positivism.

2 POSITIVISM, REALISM, EVOLUTIONISM

The current dominant jurisprudential approach, as has been mentioned, is already an extension, in a realistic sense, of the tradition of theoretical studies called legal positivism.[4] A truly realistic theory is a further extension of this dominant approach in a realist and even evolutionary sense. But in what sense positivist, realist and evolutionist?

3 See Raz (1979: 105): 'the existence of norm-creating institutions, though characteristic of modern legal systems, is not a necessary feature of all legal systems', while 'the existence of certain types of norm-applying institutions is.'

4 Cf. paradigmatically Leiter 2007. A tradition of research connects theories and doctrines linked by historical rather than conceptual associations.

By *legal positivism* I mean the theory of positive, social, and actual law, as such distinct from critical morality as mainly practiced by the millennial natural law tradition. For legal positivists – who started working after the continental codification of law – positive law and positive morality, but also custom and religion, are distinct phenomena and yet connected in a variety of ways depending on the period and the culture. In ancient times, and in non-Western cultures, they often had no names to distinguish between them; in the West and after the codification, however, distinguishing between them becomes essential.

Legal realism is a form of positivism which favours adjudication over legislation. Today, there is no theory of law that does not recognise the judicial production of law, especially in the form of interpretation, often regarded as judicial legislation. A radically realistic theory of law considers adjudication – the resolution of disputes, bringing justice to the parties – to be a function which is more general and essential than legislation, which becomes mainly a way to control the former.

Legal evolutionism is, finally, a further extension of the positivist and realist traditions which criticises creationism, that is, the tendency to attribute phenomena to the will and planning of one or more creators. Biological evolution may, after all, also depend on human acts. Think, for example, about the crossbreeds hybridised by farmers, or about the projects of genetic engineers. However, no one would say that breeders or genetic engineers create life, while it has been said that the world was created by God, or law by the legislator or the judges themselves.

Of course, compared to biology, law depends more on acts of human production. But you cannot reduce law to the mere sum, or to the individual effects, of each of them. Neither legislators nor judges can claim to create law, but only to take part in its production, participating in what North American theorists call the legal process. Law itself is not a mere set of rules, but their system or order. Like all systems, law also has emergent properties properties (see §5), properties additional to those of its individual parts, and determined by the evolution of the relations between them.[5]

3 THE DOCTRINE OF SOURCES

While theorists of the second type identified in §1 deal with the social sources of law, albeit in a sense broader than that theorised by Joseph Raz, the first type deal with the formal sources, those studied by legal dogmatics, especially of the continental kind. After the French Revolution, in particular, this type of

5 The idea, although not the term, dates back to the *System of Logic* (1843) by John Stuart Mill. For an application of the concept to European law, cf. Ferrera 2016: 94.

theory embraced the narrative of the origins of law, and the doctrine of sources typical of continental legal dogmatics.

According to this doctrine, every legal order has a political origin: it is born in a creative act of a constituent power, attributed to the people, who establish the legislative power and, through it, all the other constituted powers. All law is, then, produced by formal sources of a legislative kind – the Constitution, statutes, bylaws – already hierarchically ordered according to the power that produces it. Other sources of law – custom, dogmatics, case-law in civil law systems – are not formal but "cultural", that is, useful only for the purpose of supplementing, commenting, or applying the formal sources.

This doctrine also aims at generality: even common law is, in fact, depicted in this way by English legal positivists. The Norman conquerors of England, as some sort of constituent power *avant la lettre*, instead of legislating directly, would set up royal courts, which have since produced common law. This, in turn, was conceived by English positivists, from Thomas Hobbes onwards, as some sort of judicial legislation, although it, in fact, took place before parliamentary legislation.

A truly realistic theory of law tells a different story and draws different consequences from it. There have always been, in the West, dispute settlement bodies, called to do justice between parties, called referees, judges or courts. The English monarchs, much like the continental ones, only set up new ones, which have prevailed over the other courts in a process of institutional selection. They were, in fact, more efficient, supported by the central government and, in having assigned a decisive role to the jury, even mimicked, in the English case, local justice.

Within this other narrative, legislation has prevailed over other sources of law because it was applied by royal courts, because it was codified and finally because it was legitimised by the democratic ideology of the constituent power. An authentic (cognitive) *theory* of sources, however, does not have to necessarily reproduce the continental (normative) doctrine. Such a theory is obliged to explain the pervasive role played so far by legislation even in common law systems, but also to give an account of the other legal sources actually used by courts. The best approximation to this theory of sources is found in Alf Ross.

4 THE THEORY OF SOURCES

The theory of sources built on the constituent power requires that any rule, to be called juridical, must be produced by a body authorised to do so by a superior rule. This requirement can obviously not hold for the same constituent power without triggering an infinite regress: as such the constituent power must

be conceived of as an original fact, or as a revolutionary act, or as an *extra ordinem* source, or the like. But such a requirement does not by itself explain the judicial application of additional sources: custom, doctrine, case law, implicit norms, foreign norms not expressly incorporated, etc.

As a matter of fact, the theory sketched by Ross in chapter three of *On Law and Justice* (1952/58) lists four main sources of law, of which at least three are not produced by normative authorities authorised by a superior rule and are as such different from statutory law. As Ross himself puts it, '[a] realistic doctrine of the sources builds on experience, but recognises that not all law is positive, in the sense of "formally established".[6]

Here I report Ross's list in reverse order – i.e., from reason or tradition to legislation, through custom and precedent – emphasising the realistic traits of the list, while pointing out its creationist residues. The main realistic feature is the characterisation of sources as simple materials used by judges in adjudication. The creationist residue, however, consists of metaphors applied to such materials by Ross: reason and tradition are treated as raw materials, custom and precedent as semi-finished products, and legislation as the finished product.[7]

The *first* type of source is reason, or rather tradition: a "free" source or simple raw material that the judge can mould as she wishes. It is questionable whether reason or tradition can be labelled as sources as such, given that they were often merely required to prove the legality of other sources, such as custom. It is nonetheless true that, for many centuries, courts or juries, and especially English ones, have produced "free" law of this kind considered to be reasonable, traditional and non-arbitrary because it has been produced by a few royal judges united by a shared culture.

The *second* type of source is legal custom, distinguished with difficulty from non-legal custom. The main distinguishing criteria used are substantive, including compliance with reason and tradition, or formal, such as application by courts. Ross combines the two types of criteria considering customs that emerged in the areas regulated by law, in particular judge-made, to be legal.

The *third* type of source, which originated from the first two, is judicial precedent, which stood out as such when the House of Lords declared itself bound to its own precedents, much like the way in which continental courts were subordinate to codes. Today, even in common law countries, there may be no matter which is not regulated by statutes, but this does not diminish the role

6 See Ross 1958: 100-101. Immediately before this, one can read: 'The term "positivism" is ambiguous. It can mean both "which builds on experience" and "what is formally established".'

7 See Ross 1958: 76-77: 'Metaphorically speaking, we can perhaps say that legislation delivers a finished product, immediately ready for use, while precedent and custom deliver only semi-finished product, which have to be finished by the judge himself, and "reason" produces only certain raw materials from which the judge himself has to fashion the rule he needs.'

of precedent as a source of law. Even the application of law, in fact, produces precedents that are binding for future judges.

The *fourth* and final type of source is legislation itself, a form of law so paradigmatic by now that it almost makes any other form inconceivable, and still so widespread that it must be, in turn, divided at least into constitutional, parliamentary and administrative (or regulatory) legislation. For a truly realistic theory of sources of law, however, it is essential to make a correction, level criticism at and update Ross's 1958 text.

The *correction* stresses that even legislation is never a finished product. As shown by Ross in chapter four on interpretation of *On Law and Justice*, legislation is a product which is somewhat more finished than custom and precedent, but still subject to judicial interpretation. Also, the application of legislation is not necessarily always more predictable than the application of precedent. In fact, its predictability depends on many factors besides legal drafting: the organisation of the judiciary, the political context, the degree of social pluralism, etc.

The *criticism* notes that if the primacy of legislation over adjudication depends on the democratic "dignity" of the first, then it runs the risk of growing dim. After all, already in the nineteenth century, the main type of legislation was not the parliamentary statute, but the code, i.e., an "aristocratic" source, since it is produced by legal scholars. Today, moreover, legislation through parliamentary initiative is a minority compared to the legislation enacted on government's initiative, a type of law which is more technocratic and autocratic than democratic. Not surprisingly then, checks over this type of law are guaranteed not as much by democratic parliaments (which are nowadays often controlled by the executive power itself), but rather by supreme or constitutional courts, which are legitimised only by the enforcement of rights.

The *update*, finally, notes that parliamentary legislation is no longer the supreme source of law. In nation states, legislation is subject to the constitution, which is considered to be true law and not just positive moral, as John Austin thinks, precisely because it too is applied by constitutional and ordinary judges. In many countries, and especially in the European Union, domestic legislation is also subject to the constraints of international law. And the legality of this latter also depends on formal criteria less than it does on its effective enforcement by courts, both domestic and international.

5 THE "CRISIS" OF SOURCES

The reversal of the roles of legislation and adjudication that characterises our truly realistic theory is documented by one last phenomenon: the so-called

"crisis" (of the doctrine) of sources. Produced by the French Revolution and legitimised by the democratic ideology of the constituent power, this doctrine establishes which sources are to be applied by courts and which not. After a failure of experiments, such as the *référé législatif*, it was impossible to prevent judges from interpreting or supplementing these sources. But it was decided that they should apply recognised sources, from which case law itself was excluded.

The mainstream theory of law is still based on this compromise: judges may interpret only sources established by the constituent power or by the legislator. The crisis (of the doctrine) of sources, however, forces us to reconsider this compromise. Great constitutional and international supreme courts, in fact, also bestow on themselves the power to choose their sources. In particular, they promote to the rank of supreme sources normative materials that were not previously considered to be formally legal, and redefine the hierarchical relationships between them and formal sources.[8]

This has happened many times since *Marbury vs. Madison* (1804), and in cases far more doubtful than the US Constitution. European treaties have been interpreted as foundational documents of the European Community; the preambles of some constitutions have been assimilated into the French *bloc de constitutionnalité*; fundamental laws were used as Israel's constitution, etc. The effects of these decisions – an example of the emergent properties of legal systems (cf. §2) – are sometimes still labelled as the crisis of sources, although, overall, constitutional dogmatics has by now taken note of the phenomenon.

However, the most radical legal realism itself, represented by such continental law theorists as Michel Troper and Riccardo Guastini, manifests a curious ambivalence towards the crisis (of the doctrine) of sources. On the one hand, they were amongst the first to have highlighted the phenomenon and often draw the very same conclusions that a truly realistic theory could draw, as we are about to see. On the other hand, they argue that the aforementioned decisions are often little or not motivated at all, and when they are, Troper accuses them of committing a *constitutionalist fallacy*.[9]

There is, in this resistance, a residue of continental formalism; perhaps they both confuse the continental doctrine of sources with an authentic general theory of sources because they are legal theorists of the first type and as such in the wake of Hans Kelsen. Yet Guastini draws from the so-called crisis of sources – in fact, from the mere evolution of their relationships – the same conclusion that a truly realistic theory would draw. Evidently, supreme sources and their hierarchy are fixed in the final instance by constitutional adjudication.[10]

8 This is the gist of the thesis defended in Pino 2011.

9 See Troper 2005.

10 See Guastini 2008: 124-125.

A few more words, in closing, about the fear that a truly realistic theory of law, in spite of its cognitive character, might obliquely legitimate the so-called government of courts.

Firstly, "government of courts" is a contradiction in terms. Adjudication is structurally distinct from government, because adjudication can be exercised only negatively, on someone else's initiative. Accordingly, adjudication can, at best, control someone else's government, and not exercise it in person.

But then, and most importantly, the system of precedents by courts works a bit like Willard Quine's theory of knowledge. On the fringe, or if you want on the high levels of constitutional and international law, there are sometimes spectacular changes caused possibly by a single "big decision". But in the great body of judicial practice, or on the lower floors of civil, criminal and administrative law, changes of a given rule require more decisions to set a precedent and are much slower, gradual and interstitial.

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Carta a los Directores

Para una teoría realmente realista del derecho

Una doctrina realista de las fuentes del derecho se apoya en la experiencia, pero reconoce que no todo el derecho es derecho positivo en el sentido de "formalmente establecido".

(Ross 1963: 98)

Andrej Kristan me ha hecho notar que en algunos de mis recientes trabajos se advierte una inversión de la relación comúnmente instituida entre la legislación y la adjudicación.[1]

En efecto, la teoría *mainstream* –un mix de positivismo y de realismo jurídico– tiende a reducir el derecho a la legislación y la adjudicación a la interpretación de la ley. En los trabajos antes referidos, en cambio, la relación se invierte: la función principal del derecho es la adjudicación, mientras la legislación deviene mayormente en un modo de controlar y limitar a aquella.[2]

Andrej me ha pedido delinear, en pocas páginas, los contornos de esta inversión que, auto-irónicamente, etiqueto *teoría realmente realista del derecho*. Pero no espere el lector de *Revus* una teoría, ni bosquejada ni plenamente desarrollada; en lo que sigue me esforzaré solamente de mostrar tal posibilidad.

1 TEORIA DEL DERECHO

Ante todo, hay que preguntarse ¿qué es una teoría del derecho? (*general jurisprudence*, *allgemeine Rechtslehre*), o mejor: ¿qué hacen realmente los teóricos del derecho? Mi respuesta es que ellos hacen esencialmente dos cosas, que no

1 Véase Barberis 2015 y Barberis 2016. Agradezco a Andrej por esta observación, de la que asumo toda la responsabilidad, y más aún por la invitación a colaborar en *Revus*.

2 Una inversión similar se encuentra notoriamente en Gray, 1909: 78-79: las decisiones de los jueces constituyen *the law*, mientras la legislación es sólo la principal *legal source*. Véase también Guastini (2015: 45): «the law is the set of norms in force [...] applied [...] by law-applying agencies» [«el derecho es un conjunto de normas vigentes [...] aplicadas [...] por los órganos de aplicación jurídica» (*Nota del traductor*)].

son recíprocamente excluyentes y que se encuentran en cada teoría; la medida de la una y de la otra es determinada sobre todo por la organización curricular en las universidades en las que el teórico opera.

Quien cultiva la teoría del derecho como parte general del derecho privado, o penal, o constitucional, tiende a concebirla como una continuación de la dogmática jurídica en un nivel de abstracción más alto: como un análisis del lenguaje utilizado por los juristas para estudiar e interpretar el derecho. Este primer tipo de teoría tiene evidentes ventajas, particularmente si se la confronta con la filosofía del derecho especulativa. Pero tiende a sobrevalorar el papel de la dogmática jurídica, central en la cultura jurídica continental, y a hacer suyo el horizonte cognoscitivo. Por ejemplo, adopta el etnocentrismo: la tendencia a considerar, como universales, los conceptos manejados por la dogmática jurídica continental.

Quien cultiva la teoría del derecho como materia en sí misma, en cambio, tiende a concebirla como un estudio histórico y comparativo del derecho y de los fenómenos que desempeñan las mismas funciones en las distintas épocas y culturas. A los instrumentos de la lógica y de la lingüística, indispensables en cualquier investigación, este segundo tipo de teoría agrega aquellos de las ciencias sociales como la historia, la sociología, la ciencia política, la economía, como también sus respectivas epistemologías. En comparación con el primer modelo teórico, el segundo es más general porque busca dar cuenta de más fenómenos; pero menos abstracto, porque distingue mejor sus especificidades históricas y culturales.

Una teoría realmente realista es predominantemente una teoría del segundo tipo. Es más general precisamente porque está centrada en la adjudicación: el modo de componer las controversias más general de la legislación.[3] Pero a su vez es menos abstracta porque distingue diversas formas y aspectos de la adjudicación, de los cuales la interpretación de las leyes es sólo una de tantas. Como veremos seguidamente, esta teoría se presenta como una ulterior extensión, en el sentido realista y evolucionista, del positivismo jurídico.

2 POSITIVISMO, REALISMO, EVOLUCIONISMO

La teoría del derecho dominante, se ha dicho, es hoy en día una extensión (en sentido realista) de la tradición de estudios teóricos denominada positivis-

3 Véase Raz (1985: 138): «La existencia de instituciones creadoras de normas, aunque características de los sistemas jurídicos modernos, no son un rasgo necesario de todos los sistemas jurídicos; pero la existencia de cierto tipo de instituciones aplicadoras de normas sí lo es».

mo jurídico.[4] Una teoría realmente realista es una ulterior extensión en sentido realista y también evolucionista de la tradición dominante. Pero *positivista*, *realista* y *evolucionista* ¿en qué sentido?

Por *positivismo jurídico* me refiero a la teoría del derecho positivo, social, efectivo, distinto de la moral crítica predominantemente ejercida por la milenaria tradición iusnaturalista. Para los teóricos iuspositivistas (aquellos que comenzaron a operar después de la codificación continental del derecho), derecho positivo y moral positiva, pero también costumbre y religión, son fenómenos distintos aunque conectados en modo diverso según la época y la cultura. En la antigüedad, y en las culturas no occidentales, a menudo ni siquiera existen los nombres para distinguirlos; en Occidente y después de la codificación, en cambio, distinguirlos se ha convertido en algo esencial.

El *realismo jurídico* es la forma de positivismo que privilegia la adjudicación respecto a la legislación. Hoy en día no hay teoría que no reconozca la creación judicial del derecho, especialmente bajo la forma de interpretación, a menudo considerada como legislación judicial. Pero una teoría del derecho radicalmente realista, en cambio, considera a la adjudicación –esto es, la composición de las controversias, la administración de justicia– como una función más general y esencial de la legislación (que deviene sobre todo en un mecanismo para controlar a la primera).

El *evolucionismo jurídico*, por último, es la ulterior extensión de las tradiciones positivista y realista que critica el creacionismo: la tendencia a atribuir los fenómenos a la voluntad y al diseño de uno o varios creadores. También la evolución biológica, después de todo, puede depender de actos humanos: piénsese en los cruces de razas realizados por los ganaderos, o en los proyectos de los ingenieros genéticos. Pero nadie diría que los ganaderos o los ingenieros genéticos crean vida: se dice más bien que el mundo fue creado por Dios, o que el derecho es creado por el legislador o por los mismos jueces.

Ciertamente, comparado con la biología, el derecho depende más de actos de producción humana. Sin embargo, no es posible reducirlo a la mera suma o a los diferentes efectos de cada uno de esos actos. Ni legisladores ni jueces pueden tener la pretensión de crear derecho, sino tan sólo de contribuir a su producción participando en aquello que los teóricos norteamericanos llaman el *legal process*. El derecho mismo no es un mero conjunto de normas, sino su sistema u orden. Y como todos los sistemas, también el derecho tiene propiedades *emergentes* (véase § 5), propiedades adicionales a las de sus partes, determinadas por la evolución de las relaciones entre ellas.[5]

4 Cfr. paradigmáticamente Leiter 2007. Una tradición de investigación conecta teorías o doctrinas ligadas por conexiones que son más históricas que conceptuales.

5 La idea, pero no el término, se remonta al *System of Logic* (1843) de John Stuart Mill. Para una aplicación del concepto al derecho europeo, cfr. Ferrera 2016: 94.

3 DOCTRINA DE LAS FUENTES

Mientras que los teóricos del segundo modelo distinguido en el apartado § 1 se ocupan de las fuentes sociales del derecho, aunque en un sentido más amplio de lo teorizado por Joseph Raz, los del primer tipo se ocupan especialmente de las fuentes formales estudiadas por la dogmática jurídica continental. Después de la Revolución Francesa, en particular, este tipo de teoría ha hecho suya la narración de los orígenes del derecho así como la doctrina de las fuentes, típica de la dogmática jurídica continental.

Según esta doctrina, todo derecho tendría origen político: nacería de un acto creador del poder constituyente, atribuido al pueblo, que instituiría el poder legislativo y, a través de este, a todos los demás poderes constituidos. Todo el derecho, pues, sería producido por fuentes formales de tipo legislativo –constitución, leyes, reglamentos– jerarquizados según el poder que lo produce. Otras fuentes del derecho –costumbre, doctrina, la misma jurisprudencia del *civil law*– serían no formales, sino "culturales": útiles solo para integrar, comentar o aplicar las fuentes formales.

Pero esta doctrina también pretende la generalidad: el *common law*, en efecto, también ha sido caraterizado así por los positivistas jurídicos ingleses. Los conquistadores normandos de Inglaterra, especie de poder constituyente *avant la lettre*, en lugar de legislar directamente habrían instituido cortes regias, que han producido el *common law*. Esto, a su vez, ha sido concebido por los mismos positivistas ingleses, a partir de Thomas Hobbes, como una especie de legislación judicial, aunque de hecho anterior a la legislación del Parlamento.

Una teoría del derecho realmente realista relata una historia diferente y extrae consecuencias diferentes. Siempre ha habido, en Occidente, órganos de composición de controversias, llamados a administrar justicia entre las partes, denominados árbitros, jueces o tribunales. Los monarcas ingleses, como los continentales, sólo instituyeron nuevos órganos que prevalecieron sobre los demás en un proceso de selección institucional. Estos eran más eficientes porque, de hecho, eran apoyados por el poder central, y en el caso inglés emulaban también la justicia local, otorgando un papel decisivo a la judicatura.

En esta otra narración, la legislación ha prevalecido sobre otras fuentes del derecho porque primero fue aplicada por las cortes regias, porque después fue codificada y, por último, porque fue legitimada a través de la ideología democrática del poder constituyente. Una auténtica *teoría* (cognoscitiva) de las fuentes, por otra parte, no debe necesariamente reproducir la doctrina (normativa) continental. Ella está obligada no sólo a explicar el rol penetrante que ha jugado la legislación en los sistemas del *common law*, sino también a dar cuenta de otras fuentes jurídicas efectivamente utilizadas por los tribunales. La mejor aproximación a esta teoría de las fuentes se encuentra en Alf Ross.

4 TEORÍA DE LAS FUENTES

La doctrina de las fuentes construida sobre el poder constituyente pretende que toda norma, para poder decir que es jurídica, haya sido producida por una autoridad normativa habilitada por una norma superior para producirla. Obviamente este requisito no puede valer, sin desencadenar un recurso al infinito, para el mismo poder constituyente (concebido como hecho originario, acto revolucionario, fuente *extra ordinem*, y similares expresiones). Pero este requisito, de hecho, no explica la aplicación judicial de fuentes jurídicas adicionales: costumbre, doctrina, jurisprudencia, normas implícitas, normas extranjeras que no son objeto de reenvío, etc.

De hecho, la teoría esbozada por Ross en el tercer capítulo de *On Law and Justice* (1952; 1958) enumera cuatro principales fuentes del derecho, de las cuales al menos tres *no son* producidas por autoridades normativas habilitadas por una norma superior (y diferentes, por tanto, del derecho legislativo). Lo declara *apertis verbis* el mismo Ross: «A realistic doctrine of the sources builds on experience, but recognises that not all law is positive, in the sense of "formally established"».[6]

A continuación transcribiré el listado de Ross en orden inverso al suyo –esto es, de la razón o tradición a la legislación, pasando por costumbre y precedente– enfatizando los rasgos realistas del listado y señalando los residuos creacionistas. El principal rasgo realista es la caracterización de las fuentes como simples materiales usados por los jueces en la adjudicación. El residuo creacionista, por otro lado, consiste en metáforas aplicadas por Ross a tales materiales: la asimilación de la razón y la tradición como materias primas, de la costumbre y del precedente como productos semi-elaborados, y de la legislación como producto acabado.[7]

El *primer* tipo de fuente es la razón, o más bien la tradición: fuente "libre" o simple materia prima que el juez puede modelar como quiera. Pero es dudoso que la razón o la tradición puedan etiquetarse como fuentes en cuanto tales: a menudo han sido solo requisitos de la legalidad de otras fuentes, como la costumbre. Aunque bien es cierto que, durante largos siglos, los tribunales o juzgados, especialmente ingleses, produjeron un derecho "libre" de este tipo, que fue

6 Véase Ross (1963: 98). Poco antes, en efecto, se lee: «La palabra "positivismo" es ambigua. Puede significar tanto "lo apoyado en la experiencia" como "lo que está formalmente establecido"».

7 Véase Ross (1963: 75): «hablando metafóricamente, podemos quizá decir que la legislación entrega un producto terminado, listo para ser utilizado, mientras el precedente y la costumbre solo entregan productos semi-manufacturados que tienen que ser terminados por el propio juez, y la "razón" solo produce ciertas materias primas a partir de las cuales el propio juez tiene que elaborar las reglas que necesita».

considerado razonable, tradicional y no arbitrario al haber sido producido por unos pocos Jueces Reales unidos por una cultura compartida.

El *segundo* tipo de fuente es la costumbre jurídica, distinguida con dificultades de la costumbre no jurídica. Los principales criterios distintivos adoptados han sido sustanciales, entre los cuales está la conformidad con la razón y la tradición, o puramente formales, como la aplicación por parte de los jueces. Ross combina los dos tipos de criterios considerando como jurídicas a las costumbres formadas en ámbitos regulados por el derecho, de tipo judicial.

El *tercer* tipo de fuente, originado por los dos primeros, es el precedente judicial, que se distinguió de aquellos cuando la *House of Lords* se declaró vinculada a sus propios precedentes, del mismo modo que los jueces continentales estaban subordinados a los códigos. Actualmente, también en los países del *common law*, tal vez no haya materia que no esté regulada por las leyes; sin embargo, esto no reduce el papel del precedente. También la aplicación de la ley, en efecto, produce precedentes vinculantes para los jueces posteriores.

El *cuarto* y último tipo de fuente es la misma legislación: forma de derecho tan paradigmática que vuelve casi inconcebibles a las otras, y sin embargo tan altamente difusa que necesita ser dividida, al menos, en legislación constitucional, parlamentaria y administrativa (o reglamentaria).

Por lo demás, para una teoría realmente realista de las fuentes del derecho es indispensable aportar una corrección, una crítica y una actualización con respecto al texto de Ross, que data de hace casi sesenta años.

La *corrección* subraya que ni siquiera la legislación es un producto acabado en absoluto. Como muestra el mismo Ross en el cuarto capítulo de *On Law and Justice* (sobre la interpretación), la legislación es solo un producto *más* acabado que la costumbre y el precedente, pero también sujeto a interpretación judicial. Esto no significa que la aplicación de la ley sea siempre más previsible que la del precedente. Su previsibilidad depende de muchos factores ulteriores a la elaboración de las leyes: organización de la magistratura, contexto político, grado de pluralismo social, etc.

La *crítica* observa que la primacía de la legislación sobre la adjudicación no puede depender de la "dignidad" democrática de la primera, sin correr el riesgo de oscurecerse. Ya en el siglo XIX, después de todo, el principal tipo de legislación no era la ley parlamentaria sino el código, fuente "aristocrática" producida por juristas. Y hoy en día la legislación de iniciativa parlamentaria es netamente minoritaria en comparación con la legislación de iniciativa del gobierno: el derecho, así, es más tecnocrático y autocrático antes que democrático. No en vano, el control sobre él está garantizado menos en los parlamentos democráticos, a menudo controlados por el ejecutivo, que en los Tribunales Supremos o Constitucionales, legitimados sólo para la tutela de los derechos.

La *actualización*, por último, destaca que la legislación parlamentaria no es la fuente suprema del derecho. En los estados nacionales estará supeditada a la Constitución: considerada auténtico derecho y no moral positiva, como pensaba John Austin, precisamente porque también es aplicada por los jueces, constitucionales y ordinarios. En muchos estados y especialmente en la Unión Europea, además, la legislación interna está sujeta a las limitaciones del derecho internacional. Y también la juridicidad de este depende menos de criterios formales cuanto de su efectiva ejecución por parte de los jueces, tanto internos como internacionales.

5 LA "CRISIS" DE LAS FUENTES

La inversión de roles entre legislación y adjudicación, que caracteriza a la teoría realmente realista, está documentada por un último fenómeno: la llamada "crisis" (de la doctrina) de las fuentes. Producida por la Revolución francesa, y legitimada por la ideología democrática del poder constituyente, dicha doctrina establecía qué fuentes debían aplicarse por los jueces y cuáles no. Tras el fracaso de experimentos como el *référé législatif*, no se pudo impedir que se interpreten o integren las fuentes; pero se estableció que los jueces debían aplicar las fuentes establecidas, de las cuales fue excluida la misma jurisprudencia.

La teoría del derecho *mainstream* todavía se basa en este compromiso: los jueces sólo pueden interpretar las fuentes establecidas por el constituyente o por el legislador. Pero la crisis (de la doctrina) de las fuentes pone en entredicho este compromiso. En efecto, los grandes tribunales supremos, constitucionales e internacionales, se auto-atribuyen también el poder de elegir las fuentes. En particular, estos elevan, al rango de fuentes supremas, a materiales normativos antes no considerados formalmente jurídicos, y re-determinan las relaciones jerárquicas entre éstos y las fuentes formales.[8]

Ello ha ocurrido muchas veces, desde *Marbury vs. Madison* (1804) en adelante, y en casos mucho más dudosos de la constitución federal estadounidense. Tratados europeos han sido interpretados como documentos instituyentes de la Comunidad Europea; preámbulos de constituciones han sido asimilados al *bloc de constitutionnalité* francés; *leyes fundamentales* han sido utilizadas como constitución de Israel, etc. Los efectos de tales decisiones –que constituyen ejemplos de las propiedades emergentes de los sistemas jurídicos (cfr. § 2 *in fine*)– son todavía etiquetados a veces como crisis de las fuentes; pero, en su conjunto, la dogmática constitucional ya ha tomado nota del fenómeno.

Sobre la crisis (de la doctrina) de las fuentes, precisamente el realismo jurídico más radical, representado por teóricos del derecho continentales como

8 Esta es la tesis de fondo de Pino 2011.

Michel Troper y Riccardo Guastini, manifiesta una curiosa ambivalencia. Por un lado, ellos han estado entre los primeros en señalar el fenómeno, y a menudo extraen las mismas consecuencias que podría extraer una teoría realmente realista, como veremos enseguida. Pero, por otro lado, argumentan que estas decisiones a menudo están poco o nada justificadas, y cuando a veces lo están, Troper las acusa de incurrir en la *constitutionalist fallacy*.[9]

Hay, en esta resistencia, un residuo de formalismo continental; como teóricos del derecho del primer tipo, en la estela de Hans Kelsen, quizás ambos intercambian la doctrina continental de las fuentes por una auténtica teoría general de las fuentes. Sin embargo, Guastini extrae de la llamada crisis de las fuentes –en realidad, mera evolución de sus relaciones– la misma conclusión que extraería una teoría realmente realista. Evidentemente, las fuentes supremas, y su jerarquía, se fijarán en última instancia por la adjudicación constitucional.[10]

Para concluir, diré una última cosa acerca del temor que provocaría que una teoría realmente realista del derecho, a pesar de su carácter cognoscitivo, legitime oblicuamente el llamado gobierno de los jueces. "Gobierno de los jueces" es una contradicción de términos. La adjudicación es estructuralmente distinta del gobierno, precisamente porque puede ejercitarse sólo en negativo, a iniciativa de terceros; por consiguiente, puede controlar al máximo el gobierno ajeno, pero no puede ejercerlo en primera persona.

Pero además, y sobre todo, la jurisprudencia de los tribunales funciona un poco como las teorías epistemológicas de Willard Quine. En los márgenes o, si se quiere, en las altas esferas del derecho constitucional e internacional, se dan a veces cambios espectaculares, determinados por una sola "gran decisión". Pero en el gran cuerpo de la práctica judicial, en los pisos inferiores del derecho civil, penal y administrativo, los cambios regulativos requieren de muchas más decisiones para "hacer jurisprudencia", y son mucho más lentos, graduales e intersticiales.

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9 Véase Troper 2005.

10 Véase Guastini 2008: 124-125.

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Pismo urednicima

Za istinski realističku teoriju prava

Realistička teorija izvora gradi na iskustvu,
no priznaje da sve pravo nije pozitivno
u smislu da je "formalno ustanovljeno".

(Ross 1958: 101)

Andrej Kristan skrenuo mi je pozornost na to da u nekim mojim novijim radovima dolazi do inverzije uobičajeno postavljenog odnosa između zakonodavstva i pravosuđenja.[1]

Naime, mainstream teorija – mješavina pravnog pozitivizma i pravnog realizma – sklona je svoditi pravo na zakonodavstvo, a pravosuđenje na tumačenje zakona. Nasuprot tome, u mojim se gorespomenutim radovima, taj odnos obrće: glavna je funkcija prava pravosuđenje, dok zakonodavstvo postaje uglavnom način nadziranja i ograničavanja pravosuđenja.[2]

Andrej me je zamolio da ukratko izložim konture te inverzije, koju ću, samoironično, nazvati istinski realističkom teorijom prava. No Revusovi čitatelji ne trebaju očekivati ni obrise teorije ni potpuno razrađenu teoriju; u onome što slijedi, samo ću nastojati pokazati je li ona moguća.

1 TEORIJA PRAVA

Prije svega, treba se upitati što je to teorija prava (*general jurisprudence*, *allgemeine Rechtslehre*), ili bolje: što to teoretičari prava doista rade? Oni u osnovi rade dvije stvari, koje se međusobno ne isključuju; u svakoj se teoriji mogu naći obje, a mjera u kojoj se pojavljuju posebice je određena sveučilišnim okružjem u kojem teoretičar djeluje.

1 Vidi Barberis 2015 i Barberis 2016. Andreju zahvaljujem za to opažanje, za koje preuzimam punu odgovornost, čak i više nego za poziv da napišem ovaj rad za *Revus*.

2 Slična se inverzija, općepoznato je, može naći u Gray 1909: 78-79: odluke sudaca su *pravo*, zakonodavstvo je samo glavni *izvor* prava. Usp. također Guastini 2015: 45: "pravo je skup normi na snazi [...] koje primjenjuju [...] organi primjene prava".

Oni koji se bave teorijom prava kao općim dijelom privatnog, kaznenog ili ustavnog prava, skloni su je shvaćati kao produžetak pravne dogmatike na višoj razini apstrakcije: dakle, kao analizu jezika koji pravni znanstvenici koriste za proučavanje i tumačenje prava. Ovaj prvi tip teorije ima očite prednosti, osobito u usporedbi sa spekulativnom filozofijom prava. No takva je teorija sklona precjenjivati – u kontinentalnoeuropskoj pravnoj kulturi središnju – ulogu pravne dogmatike i prihvaćati njezin spoznajni obzor. Ona primjerice prihvaća etnocentrizam: sklonost smatranju univerzalnima pojmova kojima barata kontinentalnoeuropska pravna dogmatika.

Naprotiv, oni koji se bave teorijom prava kao samostalnim predmetom, skloni su je shvaćati kao historijsko i poredbeno proučavanje prava i pojava koje izvršavaju iste funkcije u različitim razdobljima i kulturama. Logičkim i jezičnim oruđima, neizostavnima u bilo kojem istraživanju, ovaj drugi tip teorije dodaje oruđa društvenih znanosti poput povijesti, sociologije, političke znanosti, ekonomije, uključujući njihove epistemologije. U odnosu na prvi tip teorije, drugi je općenitiji, jer nastoji objasniti više pojava, te manje apstraktan, jer bolje razlikuje njihove povijesne i kulturne posebnosti.

Istinski realistička teorija prava pretežno je teorija drugoga tipa. Ona je šira upravo zbog toga što se usredotočuje na pravosuđenje: funkciju rješavanja sporova, koja je općenitija od zakonodavstva.[3] No ona je i manje apstraktna, jer pravi razliku između različitih oblika i aspekata pravosuđenja, od kojih je tumačenje zakona samo jedan. Kao što ćemo uskoro vidjeti, ona se predstavlja kao dodatno realističko i evolucionističko proširenje pravnog pozitivizma.

2 POZITIVIZAM, REALIZAM, EVOLUCIONIZAM

Prevladavajuća teorija prava, kao što je rečeno, već je danas realističko proširenje tradicije teorijskih učenja nazvanih pravni pozitivizam.[4] Istinski realistička teorija prava dodatno je realističko, ali i evolucionističko proširenje prevladavajuće tradicije. No pozitivističko, realističko i evolucionističko u kojem smislu?

Pod *pravnim pozitivizmom* shvaćam teoriju pozitivnog, društvenog, zbiljskog prava, različitu od kritičkog morala koji pretežno prakticira tisućljetna jusnaturalistička tradicija. Za pravne pozitiviste, koji djeluju nakon kontinentalnoeuropskih kodifikacija prava, pozitivno pravo i pozitivni moral, ali i obi-

3 Vidi Raz (1979: 105): "postojanje institucija koje stvaraju pravo, iako karakteristično za moderne pravne sustave, nije nužno obilježje svih pravnih sustava", dok "postojanje nekih tipova institucija koje primjenjuju pravo jest".

4 Usp. paradigmatski Leiter 2007. Tradicija istraživanja koja povezuje teorije ili doktrine više vezane uz historijske negoli pojmovne sveze.

čaj i religija, različite su, premda, ovisno o razdoblju i kulturi, na razne načine povezane pojave. U antici, kao i ne-Zapadnim kulturama, često ne postoje ni nazivi kojima bi se te pojave razlikovale; s druge strane, na Zapadu, i nakon kodifikacije, njihovo razlikovanje postaje ključno.

Pravni realizam inačica je pozitivizma koja pravosuđenje pretpostavlja zakonodavstvu. Danas ne postoji teorija koja ne priznaje sudsku proizvodnju prava, osobito u obliku tumačenja, često smatranu sudskim zakonodavstvom. Radikalno realistička teorija prava smatra pak pravosuđenje – rješavanje sporova, dijeljenje pravde među strankama – općenitijom i bitnijom funkcijom od zakonodavstva, koje postaje prije svega način kontroliranja pravosuđenja.

Naposljetku, *pravni evolucionizam* je ono dodatno proširenje pozitivističke i realističke tradicije koje kritizira kreacionizam: sklonost pripisivanja pojava volji i idejnom nacrtu jednog ili više stvaratelja. Napokon, i biološka evolucija može ovisiti o ljudskim aktima: pomislimo samo na križanja pasmina koja obavljaju uzgajivači ili projekte genetičkih inženjera. No nitko neće reći da uzgajivači i genetički inženjeri stvaraju život: dok se, s druge strane, kaže da je svijet stvorio Bog ili pravo zakonodavac ili sami suci.

Dakako, pravo, u usporedbi s biologijom, više ovisi o aktima ljudske proizvodnje. Međutim, pravo nije moguće svesti na puki zbroj tih akata ili na njihove pojedinačne učinke. Ni zakonodavci ni suci ne mogu polagati pravo na stvaranje prava, nego samo na sudjelovanje u njegovoj proizvodnji, bivajući sudionicima u onome što sjevernoamerički teoretičari nazivaju *legal process*. Sâmo pravo nije puki skup normi, nego njihov sustav ili poredak. Poput svih sustava, i pravo ima *proizlazeća* obilježja (usp. 5. pogl.), tj. obilježja koja su dodatak obilježjima njegovih dijelova, i koja su određena evolucijom međusobnih odnosa tih dijelova.[5]

3 DOKTRINA IZVORA

Dok se teoretičari drugog tipa (vidi 1. pogl.) bave društvenim izvorima prava, premda u širem smislu od onoga koji se zatječe u teoriji Josepha Raza, prvi se tip teoretičara bavi formalnim izvorima prava, proučavanima u okviru – osobito kontinentalnoeuropske – pravne dogmatike. Potonji je tip teorije, napose nakon Francuske revolucije, usvojio narativ podrijetla prava (i doktrinu izvora) svojstven kontinentalnoeuropskoj pravnoj dogmatici.

Prema toj doktrini, svako pravo ima političko podrijetlo: rađa se iz stvaralačkog akta utemeljujuće/ustavotvorne (konstitutivne) vlasti, pripisane narodu, koja ustanovljuje zakonodavnu vlast i, putem nje, sve ostale utemeljene (kon-

5 Ideja, no ne i izraz, potječe iz *System of Logic* (1843.) Johna Stuarta Milla. Za primjenu toga pojma na europsko pravo, usp. Ferrera 2016: 94.

stituirane) vlasti. Dakle, sve je pravo proizvod formalnih izvora zakonodavnog tipa – ustava, zakona, uredbi – već hijerarhijski poredanih s obzirom na vlast koja ih proizvodi. Ostali izvori prava – običaj, doktrina, sama sudska praksa u kontinentalnoeuropskim pravnim sustavima – nisu formalni, nego "kulturni" izvori prava: može ih se koristiti samo za upotpunjavanje, komentiranje ili primjenu formalnih izvora.

Ova doktrina također polaže pravo na općenitost: na taj su način ustvari engleski pravni pozitivisti opisali čak i *common law*. Normanski osvajači Engleske, kao neka vrsta utemeljujuće/ustavotvorne vlasti *avant la lettre*, umjesto neposrednog donošenja zakona, ustanovili su kraljevske sudove, koji su potom proizvodili *common law*. To su pak sami engleski pozitivisti, počevši s Thomasom Hobbesom, shvatili kao svojevrsno sudsko zakonodavstvo, iako je ono zapravo postojalo prije parlamentarnog zakonodavstva.

Istinski realistička teorija prava pripovijeda drugačiju priču te iz nje izvlači drugačije zaključke. Na Zapadu su oduvijek postojali organi za rješavanje sporova, pozvani da dijele pravdu među strankama, te nazivani arbitrima, sucima ili sudovima. Engleski su monarsi, poput onih kontinentalnih, samo ustanovili nove organe, koji su prevladali nad drugima u procesu institucionalne selekcije. Ti su organi, podržani od središnje vlasti, ustvari bili efikasniji, a u slučaju Engleske, s obzirom na pripisivanje poroti odlučujuće uloge, čak su oponašali i lokalno pravosuđe.

U tom drugom narativu, zakonodavstvo je nadvladalo druge izvore prava jer su ga bili primjenjivali kraljevski sudovi, potom jer je bilo kodificirano i, konačno, jer je bilo opravdano putem demokratske ideologije utemeljujuće vlasti. Međutim, autentična (spoznajna) *teorija* izvora ne mora nužno reproducirati (normativnu) kontinentalnoeuropsku doktrinu. Ta je teorija dužna objasniti sveprožimajuću ulogu koju je zakonodavstvo već i dosad imalo u sustavima *common lawa*, ali i uzeti u obzir ostale pravne izvore koje suci koriste. Najpribližniju inačicu te teorije izvora može se pronaći u djelima Alfa Rossa.

4 TEORIJA IZVORA

Prema doktrini izvora izgrađenoj na utemeljujućoj vlasti, svaka norma, da bi je se moglo zvati pravnom, mora bit proizvedena od nekog tijela normativne vlasti ovlaštenog da je proizvede na temelju neke više norme. Taj se zahtjev očito ne može odnositi, a da ne dovede do beskonačnog regresa, na samu utemeljujuću vlast: shvaćenu, prema tome, kao izvorna činjenica, revolucionarni akt, izvor *extra ordinem* i slično. No taj zahtjev zapravo ne objašnjava sudsku primjenu dodatnih izvora: običaja, doktrine, sudske prakse, implicitnih normi, normi drugih pravnih poredaka koje nisu predmetom upućivanja...

Ustvari, teorija koju je Ross skicirao u trećem poglavlju knjige *On Law and Justice* (1952; 1958), popisuje četiri glavna izvora prava, od kojih barem tri *nisu* proizvela tijela normativne vlasti ovlaštena nekom višom normom, i dakle različita od zakonodavnog prava. Kao što *apertis verbis* objašnjava sam Ross: "Realistička doktrina izvora gradi na iskustvu, no priznaje da sve pravo nije pozitivno u smislu da je 'formalno ustanovljeno'".[6]

Rossov popis ovdje izlažem obrnutim slijedom – dakle, od razuma ili tradicije do zakonodavstva, preko običaja i precedenta – ističući realističke crte popisa te ukazujući na kreacionističke ostatke. Glavna realistička crta karakterizacija je izvora jednostavno kao materijala koje suci koriste u pravosuđenju. Kreacionistički se ostatak pak sastoji u metaforama koje Ross koristi u pogledu tih materijala: razum i tradiciju poistovjećuje sa sirovim materijalima, običaj i precedent s poludovršenim proizvodima, a zakonodavstvo s dovršenim proizvodom.[7]

Prvi tip izvora je razum, ili, radije, tradicija: "slobodni" izvor ili jednostavno sirovi materijal koji sudac može oblikovati kako želi. No dvojebno je može li se razum ili tradiciju označavati kao sâme izvore: s obzirom na to da su oni često bili samo pretpostavka pravnosti drugih izvora, poput običaja. Unatoč tome, istina je da su sudovi i porote, posebice engleski, stoljećima proizvodili takovrsno "slobodno" pravo, smatrajući ga razumnim, tradicionalnim i nearbitrarnim jer ga je proizvelo nekoliko kraljevskih sudaca povezanih zajedničkom kulturom.

Drugi je tip izvora pravni običaj, koji se teško razlikuje od nepravnog običaja. Glavni razlikovni kriteriji koji se koriste su supstancijalni, među kojima sukladnost običaja razumu i tradiciji, te formalni, tj. primjena običaja od strane sudaca. Ross kombinira dva navedena tipa kriterija, smatrajući pravnima one običaje koji su nastali u područjima uređenima pravom, osobito sudačkim pravom.

Treći tip izvora, koji je proizašao iz prvih dvaju, sudski je precedent, koji se spomenutim tipovima izvora pridružio kada se House of Lords proglasio obvezanim vlastitim precedentima, kao što su kontinentalnoeuropski suci bili podvrgnuti zakonicima. Danas, čak i u zemljama common lawa, moguće ne postoji materija koja nije uređena zakonima: no to ne umanjuje ulogu precedenta. Čak i primjena zakona ustvari proizvodi precedente obvezujuće za buduće suce.

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6 Tako Ross 1958: 100-101. Nešto prije ustvari kaže: "Izraz 'pozitivizam' je višeznačan. Može značiti i 'ono što gradi na iskustvu' i 'ono što je formalno ustanovljeno'".

7 Vidi Ross 1958: 76-77: "Metaforički govoreći, možda možemo reći da zakonodavstvo isporučuje dovršen proizvod, odmah spreman za uporabu, dok precedent i običaj isporučuju tek poludovršen proizvod, koji treba dovršiti sam sudac, a "razum" proizvodi samo neke sirove materijale iz kojih sudac sam treba izraditi potrebno pravilo".

Konačno, *četvrti* je tip izvora samo zakonodavstvo: sada već tako paradigmatičan oblik prava da čini gotovo nepojmljivim ostale izvore te, u svakom slučaju, toliko raširen da treba razlikovati njegova barem tri podoblika, ustavno zakonodavstvo, parlamentarno zakonodavstvo i upravno (ili uredbeno) zakonodavstvo. Međutim, za istinski realističku teoriju prava nužno je napraviti ispravak, iznijeti kritiku i upotpuniti Rossov tekst iz 1958.

Ispravkom se naglašava da ni zakonodavstvo nije dovršen i potpun proizvod. Kao što to pokazuje sam Ross u četvrtom poglavlju knjige *On Law and Justice*, o tumačenju, zakonodavstvo je samo proizvod *dovršeniji* od običaja i precedenta, ali je i on podložan sudskom tumačenju. Također, nije rečeno da je primjena zakona uvijek predvidljivija od primjene precedenta. Ustvari, njezina predvidljivost ovisi o mnogim čimbenicima onkraj samog sastavljanja normativnih tekstova: naime, o organizaciji sudstva, političkom kontekstu, stupnju društvenog pluralizma...

Kritikom se napominje da se prvenstvo zakonodavstva u odnosu na pravosuđenje, ako se ono opravdava demokratskim "dostojanstvom" zakonodavstva, izlaže opasnosti od zamagljivanja. Najzad, već u devetnaestom stoljeću glavni tip zakonodavstva nije bio parlamentarni zakon, nego zakonik: "aristokratski" izvor, s obzirom na to da su ga proizveli pravni znanstvenici. Nadalje, u današnje je doba broj zakona donesenih na poticaj parlamenta minoran u odnosu na broj zakona donesenih na poticaj vlade: pri čemu je ovo potonje pravo više tehnokratsko i autokratsko nego demokratsko. Stoga ne iznenađuje što nadzor nad tim pravom nije toliko zajamčen demokratskim parlamentima, često kontroliranima od strane izvršne vlasti, koliko vrhovnim ili ustavnim sudovima, koji legitimnost crpe samo iz zaštite temeljnih prava.

Naposljetku, *upotpunjenjem* se ističe da parlamentarno zakonodavstvo nije više vrhovni izvor prava. U nacionalnim pravnim poretcima ono je podređeno ustavu: shvaćenom kao istinsko pravo a ne pozitivni moral, kako je mislio John Austin, navlastito zbog toga što ga primjenjuju i ustavni i redovni (ne-ustavni) sudovi. Osim toga, u mnogim državama, a posebice u Europskoj uniji, unutarnje zakonodavstvo podvrgnuto je i ograničenjima međunarodnog prava. A pravnost međunarodnog prava ne ovisi toliko o formalnim kriterijima koliko o njegovoj stvarnoj primjeni od strane domaćih i međunarodnih sudova.

5 "KRIZA" IZVORA

Inverziju uloga zakonodavstva i pravosuđenja koja odlikuje istinski realističku teoriju prava potvrđuje još jedna pojava: tzv. "kriza" (doktrine) izvora. Proizvedena od strane Francuske revolucije i opravdana demokratskom ideologijom utemeljujuće/ustavotvorne vlasti, ta je doktrina određivala koje izvore

suci trebaju primjenjivati a koje ne. Nakon neuspjeha eksperimenata kao što je *référé législatif*, suce je bilo nemoguće spriječiti da tumače ili upotpunjuju izvore. Međutim, bilo je odlučeno da suci moraju primjenjivati samo ustanovljene izvore, iz kojih je bila isključena sama sudska praksa.

Mainstream teorija prava još se uvijek temelji na sljedećem kompromisu: suci mogu tumačiti isključivo one izvore koje je ustanovio ustavotvorac ili zakonodavac. No kriza (doktrine) izvora u pitanje dovodi čak i ovaj kompromis. Znameniti vrhovni, ustavni i međunarodni sudovi zaravo si pripisuju čak i vlast izbora izvora. Konkretno, na rang vrhovnih izvora uzdižu normativne materijale koje se prije nije smatralo formalno pravnima te nanovo određuju hijerarhijske odnose između njih i formalnih izvora.[8]

To se dogodilo mnogo puta, počevši od odluke *Marbury vs. Madison* (1804.) pa nadalje, i to u slučajevima koji su mnogo dvojbeniji od Ustava SAD-a. Europski su ugovori bili tumačeni kao utemeljujući dokumenti Europske zajednice; preambule ustava bile su asimilirane u francuski *bloc de constitutionnalité*; *fundamental laws* su bili korišteni kao izraelski ustav... Učinke takvih odluka – jedan od primjera proizlazećih obilježja pravnih sustava (usp. 2. pogl. *in fine*) – još se uvijek katkad označava kao kriza izvora: iako je, sve u svemu, ustavna dogmatika ovu pojavu već uzela u obzir.

Međutim, upravo najradikalniji pravni realizam, koji predstavljaju kontinentalnoeuropski teoretičari prava poput Michela Tropera i Riccarda Guastinija, pokazuju neobičnu ambivalentnost u pogledu krize (doktrine) izvora. S jedne strane, oni su među prvima ukazali na ovu pojavu te često iz nje izvode iste zaključke koje bi, kao što ćemo to uskoro vidjeti, mogla izvesti istinski realistička teorija prava. S druge strane, oni napominju da su te odluke često slabo ili nimalo obrazložene, a i kada jesu, Troper ih kritizira zbog *constitutionalist fallacy*.[9]

U tom otporu postoji ostatak kontinentalnoeuropskog formalizma; moguće je da obojica, kao teoretičari prava prvoga tipa, koračajući stopama Hansa Kelsena, kontinentalnoeuropsku doktrinu izvora uzimaju kao autentičnu opću teoriju izvora. Pa ipak, Guastini iz tzv. krize izvora – ustvari, iz samoga razvoja njihovih odnosa – izvodi isti zaključak koji bi izvela i istinski realistička teorija prava. Očito je, vrhovni izvori, i njihova hijerarhija, u konačnici su utvrđeni ustavnim sudovanjem.[10]

Na kraju, nekoliko riječi o strahu da bi istinski realistička teorija prava, unatoč svom kognitivnom karakteru, neizravno opravdavala tzv. vladavinu sudaca.

8 To je bit Pinove (2011) teze.

9 Tako Troper 2005.

10 Vidi Guastini 2008: 124-125.

S jedne strane, sintagma "vladavina sudaca" sama je po sebi proturječna. Pravosuđenje je strukturno različito od prave vladavine zato jer ga se može izvršavati samo negativno, na nečiji poticaj: dakle, ono u najboljem slučaju može nadzirati vladavinu drugih, a ne je izvršavati u prvom licu.

S druge strane, i najvažnije, sudska praksa djeluje ponešto nalik epistemološkim teorijama Willarda Quinea. Na rubovima ili, ako vam je tako draže, na visokim razinama ustavnog i međunarodnog prava, katkad se događaju spektakularne promjene, prouzročene čak i samo jednom "velikom odlukom". No u znatnom dijelu sudačke prakse, ili na nižim razinama građanskog, kaznenog i upravnog prava, promjene pravila zahtijevaju više odluka da bi se "stvorila sudska praksa" te su mnogo sporije, postupnije i međuprostornije.

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S talijanskog jezika preveo
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A legal order's supreme legislative authorities

The first part of this article is about the rules that define a legal order's supreme legislative authority. In this first part, the article also dwells on several distinctions such as those between norms and meta-norms, legislative and customary rules, and constitutive and regulative rules, all with the objective of determining which of these categories the aforementioned rules belong to. The conclusion is that the basic rules defining the supreme legislative authorities of every existing legal order are necessarily constitutive meta-norms and have a customary nature. The second part of this article takes into account the different possible contents of the ultimate rules that define legislative authority. On this basis, four models of legal order and legislative authority are distinguished: those corresponding to absolute authority and to moral authority, and those corresponding to the rule-of-law state and to the constitutional state. In this regard, several considerations are offered that, on the one hand, single out the specific notion of authority accepted within the constitutional state and, on the other, offer a specific critique of the theoretical distinction between constitutive and constituted authority. According to the analysis provided in this article, every authority is a constituted authority. In particular, supreme legislative authorities are constituted by customary constitutive norms that fall beyond the reach of the authorities themselves and do not depend on the decision or will of any particular individual.

Keywords: constitutive rules, constituted authorities, higher-order duties/rights

1 INTRODUCTION

The first part of this article are revolves around the idea of the norms or rules (two terms I will be using interchangeably) on which basis a legal order's supreme legislative authorities are set up. Following Alchourrón and Bulygin, I will assume that a legal order is a sequence of legal systems.[1]

It is therefore in order to clarify how I understand the idea of authority and why I will concentrate on the legislative kind. Legal authorities are agents that have the power to decide for other agents. These decisions are usually made by creating, eliminating, or modifying legal norms, that is, by way of actions that introduce a change in the legal order. However, that need not necessarily be the case. In a strict sense, being a legal authority or exercising legal authority

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1 Alchourrón and Bulygin 1971.

does not presuppose or imply a power to modify the legal order. Authorities seek to guide other agents' behavior while excluding options that restrict their autonomy. In other words, they seek to replace these agents' reasoning in order to decide what they should do on given occasions.

For instance, legal authority is obviously being exercised when a legislator enacts a new constitutional or ordinary statute, when the government pursues a political plan, or when a judge adjudicates a case. But it is also exercised when a police officer gives oral instructions or when an official executes an order without creating any new one. In a nutshell, an authority is someone that is allowed to impose a certain course of action, independently of their capacity to bring about a change in the legal order.

Legal authorities are usually classified as legislative, executive, and judicial, and it is widely accepted that all of them are essential to the existence of a legal order. Even so, legislative authorities enjoy a very special status. First, by definition, legislative authorities are those formally enabled to bring about changes within the law, and dynamicity is a constitutive or *sine qua non* condition of every legal order. Second, in a modern legal order, legislative authority can be said to hold conceptual primacy over executive and judicial authority, in the sense that the concepts of executive and judicial authority cannot be understood without presupposing that of legislative authority. In fact, even if so-called executive and judicial organs are not formally subordinate to legislative ones, they logically presuppose the exercise of legislative authority, whose decisions, by definition, they enforce and apply.[2] Finally, and partly for the reasons just mentioned, legislative authorities reflect and express, in a more direct way than the two other kinds of authority, the deepest moral and political convictions at work in a given society. The way in which a society conceives its legislative authorities is tantamount to the way in which it accepts that power can be exercised over the people. In this sense, in the conception each society assumes of legislative authority lies a key to identifying different kinds of legal orders.

Legislative authorities have many important traits. Here I would like to underscore some of them. An authority can be such *only in a certain domain*. Within that domain, legislative authorities typically enact general, abstract norms (statutes, decrees, etc.) and are always organized hierarchically.[3] So, in every legal order there will always be one or more legislative authorities that are supreme, at least in the two following senses. (1) Within their domain, they are not subordinate to any other legislative authority. That is, any authority other

2 This logical priority would hold even if, from a temporal point of view, a single organ can create and apply a norm at any given moment.

3 Here, the hierarchical relationship is understood as a relation enabling one authority to trump another where conflicts of competence arise. On this matter, see, for example, Ferrer and Rodríguez 2011: 142.

than the supreme one will either depend on it or be a delegated authority. (2) Within their domain, they have the greatest and broadest power to produce a given type of general, abstract norm. This presupposes that the decisions a supreme legislative authority makes in its own domain will prevail over the decisions made by subordinate ones, and that the powers of any other authority will always be narrower than the power of the supreme authority. Supreme authorities cannot delegate any type or amount of power they do not have. In this sense, the limits on a supreme authority are also, *a fortiori*, the limits placed on all subordinate ones.

Every legal order has a set of ultimate norms or rules (two terms I am using interchangeably) by which its supreme legislative authorities are set up. In this article I will try to show that in light of the way these rules frame such authorities, we can distinguish at least four types or models of legal orders. In doing so, I will defend two main ideas. The first one is that the way in which legislative authority is conceived within the constitutional state is qualitatively different from the way in which it is conceived in a rule-of-law state (*Rechtsstaat*). The second one is that, in an important sense, in the constitutional state, as in any other kind of state, there are no constitutional authorities. In other words, I will try to show that the theoretical distinction between constitutional and constituted authorities is, in a relevant sense, deeply misleading. Every authority is *constituted* by the specific rules accepted in a given society.

2 CRITERIA OF VALIDITY[4]

Some very familiar ideas from the theory of legal systems will be taken as given here without being discussed. Among these are the idea that every state is bound to at least one legal order, that a legal order can be seen as a set of norms having a temporal sequence, and that these sets of norms can be understood as a systems.[5] In turn, a set of elements constitutes a system if, and only if, a specific structure emerges out of the relation among those elements.[6]

In this picture, legal systems cannot strictly speaking change, because any change will bring about a new legal system. And yet legal orders do change

4 I will be using expressions like "criteria of validity," "criteria of legality," and "criteria for belonging to a legal system" interchangeably, and in this practice I am following Eugenio Bulygin, who clearly distinguishes between the criteria a legal *system* has to satisfy in order to belong to a legal order and the criteria a *norm* has to satisfy in order to belong to a legal system. Nevertheless, as Bulygin emphasizes, the former criteria partly determine the content of each legal system, and in that sense they also work as criteria for the validity of norms within a legal system. See Bulygin 1991: 265.

5 See Alchourrón and Bulygin 1971. See also, Bulygin 1991.

6 See Caracciolo 1988: 12. See also Caracciolo 1996: 161-176.

over time, whenever a competent authority validly creates, modifies, or repeals a legal norm.

In taking this point of view, I would concentrate on two traits of every legal order. The first is that legal orders are dynamic: They can change over time, and these changes come about by the intentional creation, elimination, or replacement of legal norms; in other words, they result from the exercise of a *legislative* power or authority. The second characteristic of every legal order I will focus on is that the conditions for validly creating, eliminating, or replacing a legal norm (that is, the conditions that constitute legislative power) are set by the legal order itself. That is, a norm is a valid legal norm if, and only if, it satisfies the conditions (or criteria of validity) defined by other norms in the same legal order. A legal order, in other words, can be said to be *auto-poietic*: It regulates its own production.[7] This implies that, at least in one of the senses in which the expression can be used, "criteria of validity" are meta-norms concerning the production of other norms. They establish the conditions that have to be satisfied in order for a change in the legal order to be valid. In other words, they are power-conferring norms under which certain agents or organs may act as legislative authorities, that is, authorities empowered to validly introduce, eliminate, or modify other norms.[8] We will see shortly what kinds of norms these criteria of validity are, but for the time being it will suffice to say that (1) they are meta-norms about the way in which other norms may be produced or eliminated, and (2) they at least establish *who* it is that has the power to introduce, modify, or eliminate norms in the legal order, that is, who the legislative authority is within the legal order.

In regard to these validity criteria, it is important to stress that every legal order necessarily has a set of "ultimate validity criteria," or meta-norms that define the order's "supreme legislative authorities." On the one hand, these ultimate criteria of legal validity are necessarily present in every original legal system belonging to a legal order (that is, the initial system in the sequence that makes up the legal order), for otherwise this original legal system wouldn't be part of a *dynamic* legal order. On the other hand, these ultimate criteria will continue to be in place in every subsequent legal system belonging to the same legal order until they are modified or eliminated.[9] In this way, any change that directly or indirectly meets these ultimate criteria is a valid change within the *same* legal order, while any change in the ultimate criteria of validity is not a change within the legal order, but a change of one order into another. In other

7 See Kelsen 1979: 201-206. This quote corresponds to the Spanish translation of Kelsen 1960.

8 On the subject of meta-norms about the production of legal norms, see, for example, Hart 1961: 91-95. Cf. Guastini 1999: 308-312. I will come back to this point in detail below.

9 On this principle of perdurability (*principio de supervivencia*), see Moreso and Navarro 1992: 125-142.

words, when the basic or ultimate conditions of legal validity are changed, a *new* legal order is brought into being. On this basis, we can say (as many authors do) that the identity and continuity of the legal order depends on the identity and continuity of these ultimate or basic meta-norms that underpin the ultimate legislative authority.[10]

3 THE ULTIMATE CRITERIA OF LEGAL VALIDITY

Before turning to the analysis of what kinds of norms these ultimate norms are, I think it is important to point out that there is more than one ambiguity regarding the expression "ultimate validity criteria."[11]

One of these ambiguities can be appreciated by recalling a couple of ideas that Ricardo Caracciolo has clearly analyzed. To begin with, according to Caracciolo, if a set of norms constitutes a system, it will necessarily have some internal (or intra-systemic) criteria of validity and some external (or extra-systemic) ones. This not a thesis that can be argued here in any detail, so it will be

10 It must be stressed that these "ultimate" meta-norms on the production of other norms are necessarily general norms. That is to say, they do not confer powers on a particular authority or organ, but rather set forth abstract conditions that must be satisfied in order for that body to be empowered. That is so on the conceptual assumption (which will not be discussed here) that a legal order is not only dynamic but also continuous and persistent over time. If the ultimate criteria of validity conferred powers on a particular individual or organ, the legal order would certainly be dynamic, as the authority so established would have the power to create new norms and give rise to new systems. However, once that individual or organ disappears, the legal order would disappear along with it, on the assumption that there would be no general rule that could make it possible to identify *ex ante* who is entitled to succeed to that authority. On the continuity of the legal order, it bears recalling Hart's critique of Austin, highlighting the need for a *general* norm that confers power on the supreme authority. See Hart 1961: 49-76.

11 One such ambiguity, which shall not be discussed here, relates to the distinction that Norberto Bobbio drew between *who* has the power to decide, *how* they are to decide, and *what* can be decided. It should be noted in that regard that, in certain contexts, the expression "norms establishing criteria of validity" refers to all meta-norms establishing some condition for the production of other norms, without distinguishing among norms stating *who* can do that, *how* it must be done, and in regard to *what* subject matter. On this reading, there is no point in discriminating between rules of change and rules of recognition, because both are "norms establishing criteria of validity," that is, conditions for the production of valid norms. In other contexts, by contrast, norms that state *who* has the power to produce valid norms are distinguished from those that establish other conditions of validity with respect to how and over what subject matters competence can be exercised. On this second reading, there is a distinction between rules of change (rules conferring powers on an authority) and rules of recognition, that is, rules establishing *other* conditions of validity. In short, the expression "norms establishing criteria of validity" sometimes makes it impossible to distinguish between rules of recognition and rules of change, placing both in the same category; other times, it refers only to rules of recognition, assuming that power-conferring rules, that is, rules of change, make up an independent category.

taken as correct. But the point is that if a system did not have some external criteria for identifying legal norms, we wouldn't be able to know which norms belong to the system—that is, not without falling into an infinite regress or a vicious circle. To be sure, these external criteria do not properly *belong* to the legal system, and to that extent they are not, strictly speaking, legal norms. They are neither legally valid nor invalid, precisely because they are the basic criteria for identifying valid legal norms.

The second idea I take from Caracciolo is that in every legal system we have to distinguish between dependent (or derivative) norms and independent (or nonderivative) ones. The former belong to the system because they fulfil some of the internal (systemic) criteria of legal validity. The latter—the ultimate norms in a legal system—belong to the system because they satisfy the external (extra-systemic) criteria of validity.

It follows that when we speak of the ultimate criteria of legal validity or the ultimate meta-norms constituting the supreme legislative authority, it is not clear whether we are referring to some ultimate independent norms belonging to the system or some external or extra-systemic norms. This ambiguity is unavoidable because, for different reasons, every legal system has to have both: some *external* internal criteria of legal validity and some *internal* ones. On the one hand, as Caracciolo has shown, the former are necessary if we are to avoid circularity or an infinite regress in identifying legal norms. On the other hand, if we concede that every legal system is part of a *dynamic* legal order, we must also concede that it necessarily contains some internal criteria of legal validity, that is, some meta-norms establishing the conditions under which it is possible to make valid changes within the order. As we have seen, these meta-norms have to at least establish *who* it is that holds legislative authority within the order, for otherwise the order could not be described as dynamic.

In light of that background, there are two senses in which criteria of legal validity can be described as "ultimate":

(1) In the first sense we have what might be called ultimate$_1$ *systemic* criteria. These are independent meta-norms about the production of legal norms. They belong in every legal system and establish the basic legal conditions for identifying any derivative or dependent legal norm. Among the things they do, they must at least establish *who* it is that holds supreme legislative authority.

(2) In the second sense we have ultimate$_2$ *extra*-systemic criteria. They are not necessarily norms, and if they are, they will neither be valid nor invalid legal norms. They are not created by any legal authority, and they establish the basic conditions for identifying a legal order's independent or nonderivative legal norms. That is, they are criteria in virtue of which some norms can be identified as the ultimate$_1$ valid norms within a legal system.

Having said that, there is a point that needs to be stressed: As much as validity criteria of the first kind can constitute a legal system's basic or final norms, they are not necessarily the ultimate criteria of legal validity. For, as Caracciolo has shown, these ultimate$_1$ norms presuppose further external criteria of validity.

Now, apart from these two kinds of validity criteria (internal and external), a legal system can contain other criteria of legal validity that are not ultimate in either of these two senses. These criteria of validity will be derivative or dependent meta-norms that take part in the system insofar as they have been created in conformity with some ultimate$_1$ systemic norms, and so in accordance with ultimate$_2$ extra-systematic criteria of legal validity.

There is also a further reason why this ambiguity ought to be pointed out. As is usually recognized, the identity and continuity of every dynamic legal order is tied to the identity and continuity of its ultimate criteria of legal validity. If the ultimate criteria, change we will have a new original legal system, giving rise to a different legal order. Accordingly, if the ambiguity is not detected, it won't be clear whether the identity and continuity of a legal order depend on some ultimate$_1$ internal norms or some ultimate$_2$ external factors. Let us set this question aside for the moment and return to it later.

4 THE ULTIMATE NORMS OF AN EXISTING LEGAL ORDER

To the extent that our concern is with legal orders in actual existence, if we want identify the kinds of norms that count as the ultimate meta-norms making up the supreme legislative authority, we will have to take into account a contrast between legislated and customary norms.

According to John Gardner, legislative norms have three related traits as follows:[12] (a) They have an author; (b) they are created intentionally; and (c) they express their content explicitly, whether in an oral or a written formulation. Strictly speaking, this means that every legislative norm necessarily presupposes another norm or set of norms, namely, those which constitute the legislator (the author) that creates it. And, to the extent that this legislator is not a supreme one, they also presuppose the ultimate norms constituting the supreme authority. In short, legislative norms cannot exist in isolation. They exist only in relation to another norm or set of norms. This is why many authors emphasize that legislative norms exist only within a system of norms. It would be conceptually impossible to have something like a legislative extra-systematic

12 The contrast I am setting up draws on Gardner's approach but does not coincide with it. See Gardner 2012: 54-88.

norm, for that would contradict its own terms. According to Gardner, legislative norms stand in contrast to customary norms, which unlike the former (a) do not have any specific author; (b) are not created intentionally (they may result from multiple intentional actions, but these actions are not deliberately aimed at creating a customary norm); and (c) do not have any expressed form. In this sense, customary norms do not presuppose any competent authority, and their existence does not necessarily require other norms. This means that there can exist social norms independently of any system.

In other words, a customary norm does not depend for its existence on any other norm. On this basis, the extra-systemic existence of a customary norm has to be distinguished from its legal validity, that is, from the fact of its belonging to a legal system. Stated otherwise, the *empirical* or *factual* existence of a customary norm, which is always extra-systemic, has to be distinguished from its *legal* existence, which is always relative and internal to a legal system, that is, it depends on the conditions established by the legal order to which the system belongs.

At any rate, and quite interestingly, if we proceed from these distinctions between legislative and customary norms, we will get a very clear answer to the initial question regarding the kind of norm with which to identify the ultimate meta-norms that shape the supreme authority of the legal order. Whichever sense of "ultimate" we are thinking of (ultimate$_1$ or ultimate$_2$), these kinds of ultimate meta-norms or "criteria of legal validity" cannot be legislative. The very idea of an ultimate legislative norm is a contradiction in terms. Every legislative norm necessarily presupposes a further norm, and for this reason cannot be ultimate. Therefore, the ultimate norms that constitute the supreme legislative authority and ensure the dynamicity of every legal order must be social or customary norms. This is a necessary conclusion, since customary norms are the only kinds of norms that can exist without presupposing other norms.

There are in this regard different positions that we find in legal theory. Many authors, for instance, assert that a legal order's basic meta-norms are internal, systemic norms. Applying what was argued earlier, these norms should have to be characterized as ultimate$_1$ within a legal system, and as belonging to it in virtue of the external, extra-systemic fact that they are accepted and followed by the social group. In such acceptance and practice would lie the extra-systemic, ultimate$_2$ criteria that, according to Caracciolo, every legal system presupposes. This position should be ascribed to those who reject the idea that legal orders are based on external or extra-systemic *rules*.[13] On this view, we only need to recognize certain external facts in virtue of which some contents are accepted as ultimate$_1$ conditions of legal validity; included among these conditions are those that establish the supreme legislative authorities.

13 An example is Guastini 1999: 380, as well as Guastini 2001: 2-3.

In any case, it should be clear that, even though these ultimate$_1$ conditions of legal validity are internal to the system, they are always unexpressed norms, and any intent to express them will be either a more or less successful intent to iterate the already accepted norms or a true or false description of them. In other words, ultimate$_1$ conditions of validity must be customary, unexpressed norms—the only kinds that do not presuppose any other norms.

Set in contrast to this position is also a second one that legal scholars subscribe to. On this view, the basic meta-norms constituting a legal order's supreme legislative authority are themselves legislative norms. Specifically, they would be norms written into in a constitutional charter. Once again, if we accept the analysis offered here, we can easily appreciate why this position is wrong, for there are two important facts it fails to recognize. For one thing, it fails to see that the idea of an "ultimate legislative norm" is, for the reasons just stated, a contradiction in terms. In whichever of the two senses we use the word *ultimate*, a legislative norm cannot be ultimate, and an ultimate norm can never be legislative. For another thing, this position is self-defeating, because in accepting that the first constitutional *law* is the basic (or ultimate) *valid* norm of the legal order, one thereby also accepts that there must be a further norm (by hypothesis an external one) constituting the authority that laid down that first constitutional law. Otherwise, we wouldn't consider the first constitution as *valid* law. On this view, in short, we would have to accept that constitutional laws necessarily presuppose some ultimate$_2$, extra-systemic norms, which can only be customary norms.

A partial conclusion we can draw at this point is that every existing legal order contains some ultimate (or basic) norms which constitute the supreme legislative authority, and that these norms, whether understood as internal or external, are always unwritten social norms. This amounts to saying that the constitutional power which creates a legal order's supreme authority is always the power of the social group that accepts certain meta-norms about who has the legislative power to create, eliminate, or modify valid legal norms.[14]

5 THE ULTIMATE NORMS ON LEGISLATIVE AUTHORITY AND THE RULE OF RECOGNITION

The idea that a legal system's ultimate (internal or external) norms are necessarily social rules recalls H. L. A. Hart's thesis regarding the rule of recognition. It must therefore be pointed out from the outset that the norms I am referring

14 This idea is consistent with John Searle's thesis regarding the construction of so-called social reality. This is a question we will be returning to shortly.

to do not necessarily coincide with Hart's rule of recognition.[15] This can be appreciated in the first place by noting that if the Hartian classification of rules were to be applied to the ultimate meta-norms I am talking about, that is, to the power-conferring rules constituting a legal order's supreme legislative authority, these would have to be characterized as rules of change. The interesting point here is that there may be certain kinds of legal orders—purely dynamic legal orders—whose ultimate rules of recognition establish only one condition of legal validity, namely, that a norm has been enacted by a certain individual or organ. In this case, contingently, the rule of recognition is a power-conferring rule, that is, a rule of change.

Apart from these kinds of cases, it is important to see that, given the dynamic character of every legal order, among the ultimate conditions of legal validity we will always find those establishing *who* it is that may make changes to the legal order, that is, who the supreme legislative authority is. When the will of this authority is not the only sufficient condition of legal validity, or when it is subordinate to the fulfillment of other necessary conditions, it is possible to distinguish two kind of norms: those that identify the authority, and those that identify the other necessary or sufficient conditions of legal validity. In other words, it is possible to distinguish rules of change and rules of recognition.

In any case, insofar as these are the ultimate rules in the legal order, they must be customary rules. They exist if, and only if, they are accepted and practiced in the social group. In this respect, the relevant attitude on which depends the existence of the ultimate rules of change does not necessarily lie in the official acceptance of rules of recognition, as Hart would have it. Perhaps, the relevant attitude is that of a more or less restricted group. For instance, the acceptance of the judges and citizens, or that of judges of a special kind: a constitutional court. It may also be that the crucial acceptance needed in order for these ultimate rules to be recognized as enforceable is that of a totally different group—perhaps the international community, the armed forces, a dominant social class, or the very same legislative authorities constituted by the rules—while the organs entrusted with applying the law only conform to these power-conferring rules. To be sure, in order for these customary power-conferring norms to exist, they have to be practiced and applied by designated organs, but these organs need not accept such norms.

In a nutshell, in contrast to Hartian rules of recognition, the ultimate criteria of validity identifying a legal order's supreme legislative authority are not duty-imposing rules.[16] Moreover, if the rules of recognition regulate any behavior, it would not be the behavior of law-applying officials: They would regulate the be-

15 See Hart 1961: 97-107.

16 According to a standard interpretation of Hart's view, the rule of recognition requires officials to apply the rules identified by the criteria of validity included in it. See Raz 1975: 146.

havior of the supreme legislator. As we will see, even if the "limits" imposed on the supreme legislative authority can be understood as duty-imposing rules, it should be clear that these duties regulate the way in which general valid norms can be created or changed, not the way in which they should be recognized and applied. Therefore, a plausible speculation is that, in Hartian terms, the rules I am referring do not correspond to those he classifies as rules of recognition. They rather correspond to those that regulate that supreme legislator:[17] They are the rules that are needed to warrant the continuity and persistence of a legal order.[18]

6 POWER-CONFERRING AND REGULATIVE META-NORMS

There is an important question that still needs a precise answer: What kinds of norms exactly are those meta-norms that confer supreme legislative power in a legal order? Legal theorists divide into two camps in that regard: Some construe these as constitutive norms, others as regulative norms. The view I will be defending here is twofold: On the one hand, assuming that the difference between constitutive and regulative norms is tenable and significant, I would argue that every legal order's basic power-conferring norms are customary norms having a constitutive nature; on the other hand, however, this kind of constitutive norm can exist only when some regulative norms are in force.

There are different ways in which the meta-norms on the production of legal norms can be classified. According to Guastini, for instance, they should be distinguished into two classes: *senso stretto* and *senso lato* (according as they are broadly or strictly understood). The former class includes those meat-norms establishing (1) who has the power to create, modify, or eliminate legal norms, i.e., the meta-norms that create competent legislative authorities, and (2) the procedure through which a given power is to be exercised. In the latter class we should distinguish meta-norms establishing (3) the areas or classes of acts in which legislative power may be exercised and (4) the negative and positive "limits" on the normative contents the competent authority is empowered to set.[19]

It is not easy to identify what kind these meta-norms are that frame the supreme legislative authority. It seems clear that those belonging to group (1) are

17 See Hart 1961: 72-76.

18 It is important to note that the supreme legislative authority does not have to be concentrated in a single organ or official called the legislator. In many contemporary legal orders this supreme legislative competence is shared by a congress or parliament and a special court or group of judges.

19 See Guastini 2006: 88-93.

constitutive norms. However, it is not clear if meta-norms establishing procedural conditions and those establishing substantive negative or positive "limits" on authority should be characterized as constitutive or regulative. Hart, for instance, argues that any kind of "limit" concerning the supreme authority should be understood not as an authentic duty but as a lack or absence of power.[20] If we follow a contemporary scholar like Luigi Ferrajoli, by contrast, there are certain kind of "limits" that can only be understood as genuine duties of the supreme authority.[21]

In my view, the important thing is to note that there is no general, correct answer to this question. It is a contingent matter whether these "limiting" ultimate norms are accepted by the relevant group as framing a sheer absence of power or as establishing an authentic duty. In the first case, they will be seen as part of the norms that define the authority or the type of institutional result they may produce, such as certain kinds of bills, statutes, or decrees. In that case, an authority's failure to respect normative "limits" is not tied to any criticism or reprobation.[22] Strictly speaking, the "limits" imposed are only necessary conditions for producing a normative result. A failure to observe these "limits" will imply that the result being sought has no legal existence: It is either null or subject to nullification. In the second case, by contrast, the "limits" are conceived as categorical requirements applying to the authority regardless of whether they can also be a necessary condition for producing a valid result.[23] In short, if Hart is right to distinguish between power-conferring from duty-imposing rules on the basis of the different normative consequences they establish (invalidity and sanctions, respectively), we should conclude, *contra* Hart, that there are societies where some "limits," even those that bind the supreme legislative authority, are accepted as genuine duties, ones whose violation is connected with reprobation and/or redressive sanctions.

In light of these two possibilities, we can see that there are certain "limit"-imposing norms which cannot be understood as norms that merely define the scope of a given power. I am referring to those norms that oblige an authority to act. Under these norms, the behavior of an already constituted authority is no longer optional. They rule out a free decision by the authority because, on their basis, the act of exercising the power in question is no longer discretionary. An

20 See Hart 1961: 68.

21 See Ferrajoli 2007: 92.

22 On the difference between norms that establish essential or constitutive conditions for the valid exercise of power and norms that impose a duty, see Hart 1961: 27-35.

23 Unlike nullity—which is part of the rules establishing essential conditions or constitutive limits for the legal existence or validity of the results that certain actions are aimed at producing—the relative sanctions are not necessarily part of the duty-imposing norms that regulate certain actions. In that regard, see Hart 1961: 34-35.

abstract example of such kinds of meta-norms on the production of legal norms can be found in those programmatic constitutional principles under which Parliament or Congress is charged with enacting certain norms on a given subject matter or with pursuing a given policy objective. For instance, Article 30 of the Italian Constitution affords full legal and social protections to children born out of wedlock. A quite concrete example would be an administrative law establishing that the authority responsible for security in a university building has to set out an evacuation procedure in the event of fire. These norms can only be interpreted as duty-imposing. Even if the "limits" imposed by these norms are not respected—i.e. the authority in question omits to set forth the appropriate rules—such an omission cannot be interpreted as an intended normative result. This description would be complete nonsense precisely because an omission is not a result that can be invalidated. In this case, the norms the authority fails to comply with do not state conditions for bringing about a valid normative result. They instead state the normative results required from the authority. For this reason, lack of compliance can be appropriately described as an act of disobedience or as a violation of a norm.

It is particularly interesting to note that even supreme authorities can be subject to some ultimate duty-imposing norms. In legal orders where that is the case, the ultimate regulative norms "limiting" the supreme authorities contribute to determining how the authority is framed or conceived of within a given society. These norms are not only materially superior to any other norm enacted by any kind of authority, but also have primacy over any other norm from a logical or conceptual point of view.[24] Being subject to these duties is a constitutive or essential feature of the supreme authority. However, given that these ultimate regulative meta-norms do not spell out a lack of power, the legal norms enacted in violation of them can still be valid or have legal existence. Furthermore, their validity can be challenged and, all things considered, they can be deemed conclusively invalid.[25] As we will see, this is the case in the constitutional model of legal order where the supreme legislative authority is conceived of as subject to a set of duty imposing meta-norms.

24 In the language of Riccardo Guastini, these duty-imposing meta-norms would be said to stand in a structural or formal relation of *hierarchy* relative to the other norms. See Guastini 1997: 470. In my opinion, however, it is misleading to speak of "structural or formal hierarchy." It is appropriate to instead distinguish between the structural or formal relation among these norms and the relation of primacy that can be established when the norms conflict: The latter is a hierarchical relation, the former is not.

25 Luigi Ferrajoli, for example, distinguishes between the effectiveness and the validity of norms, and does so precisely to underscore that norms which violate substantive duties of a higher order are not valid in a legal order. See Ferrajoli 1989: 348-356.

6.1 A brief digression on different kinds of norms: constitutive versus regulative

As we have just seen, the negative and positive "limits" on legislative power can be seen either as fragments of power-conferring norms that constitute legislative authority or as regulative norms presupposed by the same power-conferring norms. It is convenient to take a brief pause at this point and reflect on the relation between constitutive and regulative norms.

Following John Searle, the existence of states, legal orders, legislators, legal norms, and so on, can be cited as an example of so-called "institutional facts" or "social reality."[26] One of Searle's most important contributions has been his analysis of the mechanism through which a social group gives rise to this kind of "reality." In his view, this mechanism consists in the acceptance of a constitutive rule having the following structure: "In context C, X counts as Y." In addition to that, Searle distinguishes between constitutive and regulative rules. There has been a lot of discussion about the possibility of reducing constitutive rules to regulative ones. But this is not the time to enter into that discussion.

The point to be emphasized here is instead that the constitutive rules or norms Searle is primarily thinking of seem not to be intelligible independently of any regulative ones.[27] Take, for instance, a favorite example of Searle's, that of money. The accepted constitutive norm says: "In circumstances C, the piece of paper P counts as money M." This kind of constitutive rule exists as a customary social practice. That a given piece of paper functions or counts as a means by which to pay for something is a fact constructed and maintained through a social group's beliefs and behaviors. In other words, the constitutive rule of money exists if, and only if, as a matter of fact, in the appropriate circumstances C, the piece of paper P effectively counts as money, that is, as a means by which to pay for something.

This means that the constitutive rule of money would not exist unless, in the relevant social group, there also exist some regulative rules—that is, unless some rules are in force like "It is permitted (for citizens) to pay debts with this kind of piece of paper P" or "It is obligatory (for the government) to accept this kind of piece of paper P as a means for discharging debts." For this reason, we can say that even if, from a theoretical point of view, it could be useful and justified to distinguish between two kinds of norms, in order for a constitutive rule to exist *as a social rule*, it is necessary that some appropriate customary regula-

26 See Searle 1995.

27 To be precise, according to Searle, "Constitutive rules constitute (and also *regulate*) and acctivity …" (my emphasis). Cf. Searle 1969: 34.

tive rules also exist. The two kinds of rules are interconnected.[28] The existence of the constitutive social rule of money seems to be only an epiphenomenon of the existence of some regulative rules permitting, prohibiting, or requiring certain types of conduct.

The relation between constitutive and regulative norms has been deeply discussed among philosophers. An example of this debate can be seen in the still vivid disagreement among legal philosophers regarding the constitutive or regulative status of Hart's rule of recognition. Be that as it may, the only point I would like to make in this regard is that if we concede that in every existing legal order there is an ultimate social rule of recognition regulating the behavior of law-applying officials, we are thereby also conceding that (1) in every existing legal order there is an ultimate social rule constituting legislative authority, and (2) the two kinds of rules (those conferring legislative power and those regulating the recognition and application of valid norms) are interconnected, however different they may be. We wouldn't have something like a supreme legislative authority if there were no rule of recognition, that is, if there were no group of judges recognizing some persons as the supreme legislative authorities; at the same time, however, to the extent that judges are understood as law-applying authorities in a *dynamic* order, the existence of a rule of recognition presupposes that there be some "supreme legislative authorities" authorized to create the valid norms that judges recognize as binding. And this is true even if the two powers (the power to create norms and the power to recognize and apply them) are concentrated in the same organ or individual.

6.2 Two kinds of constitutive norms, two kinds of social reality: the unintentional and the intentional creation of social reality

As we have seen, sticking to the example of money, money exists and will continue to exist so long as we accept a constitutive rule under which "In certain circumstances C, some piece of paper or metal counts as money." I now want to emphasize that if something, like money, is part of a living, existing social reality, its existence is based on an accepted and practiced constitutive rule, that is, on a customary, social rule we may not even be aware of. I stress this point because—alongside these kinds of constitutive norms whose exist-

28 It should be clear that I am not claiming, as Searle does, that constitutive rules are themselves regulative rules. For instance, I am not claiming that a rule that constitutes a legislative or judiciary authority at the same time *regulates* its behavior (either permitting or requiring it to exercise the conferred authority). I am instead saying that there can exist a social rule constituting a legislative or judiciary authority only if some other regulative rules are in force that do not necessary guide the constituted authority's behavior. For instance, we cannot say that there is a social rule constituting authority (A) unless some agent (B) is obliged to obey (A). The regulative rule regulates the actions of the *agent*, not those of the authority.

ence is equivalent to, and indistinguishable from, the effective existence of the institutional facts or entities they constitute—there are also constitutive norms of another kind, namely, *legislative* constitutive norms, whose existence is itself part of the social reality but which, insofar as they can be ineffective, only guarantee a sort of "formal" but not effective existence of the institutional facts or entities they aim to create.[29]

Contrary to Searle's view, it seems plausible to acknowledge that different examples of social reality are the result of collective *unintentional* actions. No doubt, there is no shortage of examples of collective *intentional* actions, as when an orchestra plays a sonata or a legislator enacts some statute.[30] But it is also true that, individually or collectively, we can do things we do not intend to do. That is precisely the case with social rules, be they regulative or constitutive. Customary rules are the kind of thing we create unintentionally, that is, without a specific intention to create a customary rule. In my view, that we can create and maintain institutional facts or entities in a nondeliberate way is something Searle implicitly recognizes when he concedes that some social institutions—always the result of accepting constitutive rules—are even more solid and enduring when the people who generate and sustain those institutional facts or entities are not even aware that *they* are the ones generating and sustaining them through their attitudes and behavior.[31]

Of course, when we become aware of the mechanism through which we bring about different types of institutional facts or entities, we can use that mechanism intentionally to create new such facts or entities. We can intentionally constitute some "social agents," "organs," or "legislative authorities" that, in turn, and under certain conditions, can intentionally create other specific constitutive norms. In other words, we can intentionally reproduce the social world by deliberately enacting new constitutive norms. To be sure, such new constitutive norms are not spontaneous customary ones. They are legislative norms whose existence or validity depends on the fact that the created "organs" or "legislative authorities" satisfy the conditions established for creating them successfully.

This possibility requires a distinction between two significant kinds of social reality (two kinds of institutional facts) that can be termed *effective* and *formal* social reality. Legislative norms, whether constitutive or regulative, are necessarily part of the formal social reality, and it is contingent that they become

29 Even if connected, these two senses of constitutive rules do not coincide with those analyzed in Roversi 2012, 1251-92. This is not the place to discuss the multiple distinctions between constitutive rules that have been proposed and their relation to regulative rules.

30 See Gardner 2012: 65-74.

31 See Searle 2010: 107-108.

an effective social reality. For instance, in Argentina, the legislative norm that constitutes the popular juries has been valid—i.e., has existed as a formal institutional fact—since 1853, when it was enacted. However, it was comparatively recently that these juries were actually summoned and became an effective social reality. So it is important to mark this sort of division within the so-called social reality. Legislative constitutive norms are examples of a *formal* social reality through which we aim to create an *effective* social reality. Unfortunately, we do not always succeed in doing so. In the same way, multiple other examples of legal institutions—among which legal duties, rights, and powers—only have a *formal* existence, not an effective one.

In light of the foregoing discussion, we appreciate the ambiguity of expressions like "the existence of an institutional fact," "social reality," or "constitutive rule." In some cases, constitutive rules, like many other examples of social reality, are unintentionally created customary rules: They exist as an effective social practice. In other cases, constitutive rules are deliberately created norms that can be said to be "existent" or "valid" just because they have been properly enacted by the legislative authorities authorized to create them. The social entities of the first kind exist within a group because certain beliefs, attitudes, and behaviors prevail within the group. By contrast, social entities of the second kind will exist or be valid even when they fail to win acceptance within the group in question. They exist not because they are accepted but because the conditions for creating them have been satisfied. As the example of popular juries in Argentina shows, legislative constitutive norms may bring about valid, or formally existent, yet ineffective authorities. By contrast, when these meta-norms succeed in constituting an effective *de facto* authority, they become customary norms as well, that is, norms actually accepted and followed by the group. If this was not the case, the authority they intend to constitute would not exist as an effective *de facto* authority.

At this point we can draw three further partial conclusions. First, every actually existing legal order (by definition a *dynamic* order) is based on some meta-norms that define the supreme power to enact norms. Which is to say that every existing legal order is based on some constitutive norms that define the supreme legislative authority. Second, these basic constitutive norms cannot be created by a further authority. Which is to say that they cannot be legislative but must be customary or social norms. And third, the existence of these social norms that constitute the supreme authority presupposes that certain regulative norms be in force. Among others things, the social norms that constitute the supreme legislative authority presuppose the existence of a customary norm imposing the duty to recognize that authority, and hence to apply the norms enacted by it.

7 FOUR MODELS OF LEGAL ORDERS AND LEGISLATIVE AUTHORITY

The ultimate meta-norms constituting a legal order's supreme legislative authority express the political conception effectively accepted within a given society. In what follows I will present four models of a legal order based on four different ways in which the ultimate meta-norms about the production of legal norms constitute the supreme legislative authority. These models are not exhaustive: They show only some of the possible ways in which legislative authority can be conceived.

7.1 The model of absolute authority

On the first conception—call it the model of "absolute authority"—a legal order's basic meta-norms consist entirely of constitutive rules that place the creation of any other norm or meta-norm in the hands of the authority they constitute, and this includes those norms that govern the authority's own institutional behavior. This means that, on this model, the basic constitutive norms do not impose any regulative requirement among the conditions for an authority to count as such. The conditions for becoming an authority can be biological, historical, economic, and so on, but they cannot include a requirement that any kind of duty-imposing rule be accepted, much less obeyed.

This kind of authority certainly can limit itself by establishing different kinds of restrictions on its own behavior or even by pledging to exercise its authority, that is, by creating programmatic norms. However, because all legal norms, except the rules that constitute them, depend on the will of that authority, the same authority may also exercise the option of ridding itself of those restrictions. In other words, on this model, legal norms imposing any kind of duty are always derived and legislated by a constituted authority, whether subordinate or supreme.

The legal systems corresponding to this model may accept the model either explicitly or implicitly by way of legislative norms. They may do so, for example, by way of a constitution expressly providing that the supreme authority is not bound to either accept or actually comply with any normative restriction. It must be remembered, however, that when a society is effectively governed by this model of authority, that is not in virtue of a legislative norm but rather in virtue of those (independent or extra-systemic) rules that are actually accepted.[32] In this case, these basic rules impose what Hart calls a model of "con-

32 Recall here that there are two possible ways of interpreting the meta-norms that define the supreme authority: These can be understood as either intra-systemic or extra-systemic norms. Under no circumstance, however, can they be legislated norms.

tinuing omnipotence."[33] In other words, they constitute an authority whose sovereignty cannot at any time be limited. As noted, the supreme authority in this type of legal order could decide to limit itself, but it cannot impose those limitations on its successors, who enjoy the same unlimited power that previous and subsequent supreme authorities likewise detain. In short, the central characteristic of this kind of authority, under the accepted meta-norms that define it, is that it is not subject to regulative rules.

7.2 The model of moral authority

On the very opposite end of the spectrum is what could be described as the *moral* conception of authority. On this view, the supreme authority is constituted by a meta-norm which, among the conditions for that authority to qualify as such, includes the requirement that the authority both accept and respect certain regulative rules. Thus, an authority cannot be such unless it complies with certain duties. Only a just authority is an authority. This means that the norms imposing those duties are not created by the authority itself. On the contrary, they are preconditions that must be met in order for any body to become an authority and exercise authority. They are norms of a higher order that are presupposed by the meta-norms that define the authority in question. On this view, in other words, the rules constituting the authority are not independent of the regulative rules to which the authority is subject. Not only can the authority not rid itself of these regulative limits but, as a matter of fact, it cannot choose to flout them, for if it did it would by assumption cease to act as an authority.

Interestingly, if the authority decided to make legislatively explicit the legal norms it is subject to, it would only be reiterating the presupposed duties it is already bound by. As much as this explicitness may certainly be very valuable from a strategic, political, or symbolic point of view, the model does not depend on such legislated norms. If the meta-norms that are indeed accepted made up a moral conception of authority, the authorities could only formally promulgate or abrogate the regulative duties or norms that limit them. However, they would lack the power to introduce them in the legal order or eliminate them from that order.[34]

In this case, the basic meta-norms foreshadow a type of authority which, unlike the previous one, exemplifies a model of "continuing subjection." In contrast to the paradigm of absolute authority—on which the supreme authority retains its omnipotence at all times and cannot limit its successors—this model establishes an authority that is subject to permanent limits it cannot remove, either for itself or for its successors.

33 See Hart 1961: 146.

34 On the concept of formal derogation, see Alchourrón and Bulygin 1991: 393-407.

7.3 The rule-of-law model of authority

Between these two extreme conceptions, there are two intermediate views. One of them is usually associated with the so-called rule-of-law state (*Rechtsstaat*). In this case, the legal order's basic meta-norms (whether conceived as extra-systemic criteria or as independent norms) constitute a supreme authority with limited power. On this model, in other words, different kinds of conditions are imposed, whether for becoming an authority or for exercising the conferred power. As much as these conditions certainly *could* be accepted as regulative limits, that is not, under this model, mandatory. Strictly speaking, all these conditions are seen as a mere absence of power, that is, as guidelines delimiting the power the authority always exercises with discretion and absolute freedom.

A legal system that adheres to this conception of authority will very likely contain legislated norms explicitly stating the limits by which every authority is directly or indirectly bound,[35] such as a formal, written constitution. However, as previously noted, it is important not to confuse these legislated norms, created by a supreme authority, with the social norms constituting the supreme authority. These two types of norms may be substantially identical because the supreme authorities may pass constitutional laws reiterating the content of the social norms by which the selfsame authorities are constituted. Even so, the difference between these norms remains crucial. The supreme authority could strike out the constitutional norms it itself enacts, but it cannot strike out the social norms that constitute it. This is true of all types of authorities: No authority has the power to revoke the limits imposed by the constitutive social norms that confer the power at its disposal. On the absolute authority model, the supreme authority can lift all its limits merely because, by virtue of the social rules by which it is constituted, those limits are fully dependent on it. This authority is, conceptually, an unlimited authority. In this case, by contrast, in virtue of the rules that define the supreme authority, its power is conceptually subject to the satisfaction of certain positive or negative restrictions. In other words, the actions of this type of authority are valid only to the extent that it meets certain conditions.

Assuming that this is the kind of model in force, as against the moral authority model, if the supreme authority did not respect the limits by which it is bound, its behavior would not strictly amount to an act of *disobedience*: It would merely be a null or annullable act which fails to produce the desired effects. Moreover, if the authority decided to repeal the constitutional provisions

35 Recall that the supreme authorities have the highest normative power (the power that trumps all others in the hierarchy). For this reason, the constitutive limits imposed on the supreme authorities are, *a fortiori*, also limits imposed on all its subordinate authorities.

setting forth limitations, that behavior would amount to a mere act of formal repeal. Clearly, the exception is the case of a revolutionary act that *in point of fact* changes the model or acknowledges a change that has already taken place.

7.4 The constitutional model of authority

The last model of authority that could be incorporated in a legal system is the so-called constitutional state. In this case, the basic meta-norms configuring the supreme authority confer not only limited powers on the authority itself but will also confer rights on its addressees. It follows that the supreme authority is subject to correlative duties. Under the meta-norms that configure this model, individuals are entitled to so-called "fundamental" rights. Among other things, this means that those rights do not depend on the authority but, on the contrary, impose restrictions on its behavior. Those rights and duties are the contents of higher-order norms. They are presupposed by the norms that constitute the supreme authority and are accepted by the authority itself. Arguably, under this paradigm, the authority is viewed as holding not only a position of competence—a set of powers—but also a bundle of positive and negative normative positions (a set of rights, immunities, and privileges, while also being subject to duties and areas of noncompetence) correlative to another bundle held by those who are subject to that authority.[36] As stated earlier, being an authority or having authority can be analyzed in terms of the relationship established between those who *exercise* authority and those over whom authority is *exercised*. What is interesting to note in this regard is that, insofar as the limits on the supreme authority depend on their addressees' fundamental rights, they cannot be understood only as an absence of power but must also be understood as the content of authentic duties.

As with any other model, the supreme authority set up under the constitutional state cannot rid itself of the limits or features by which it is defined; if it did, it would cease to be an authority under that paradigm. What is peculiar about this type of authority is that its defining features include its being limited not only by higher-order norms restricting its powers, but also by duties and prohibitions regarding the manner, content, and/or circumstances under which those powers can be exercised. Specifically, that authority is duty-bound in all cases where its addressees hold a fundamental right.

It does not follow from what has been said so far that the supreme authority necessarily respects the limits imposed by the fundamental individual rights. The only thing that follows is that the duty to respect those rights is part of the conception of authority under this paradigm. No authority can hold itself out

36 In characterizing the different normative positions which pertain to individuals who are rights-holders, and which correlate to those positions the authority finds itself in with regard to those individuals, it is useful to refer to Hohfeld 1969.

as such while denying these normative limits. If it did, it would be presenting itself not as an authority but merely as a power-holder. This last characteristic is important because it makes it possible to distinguish this conception of authority from that which I have referred to as the "moral" conception. On the present model, an authority is not necessarily just. Being an authority only implies acceptance of the duty to respect the fundamental rights ascribed to its addressees. It does not imply actual compliance. At the same time, as previously stated, these rights are fundamental precisely because they are conceived as constitutive and indefeasible limits of every authority. Accordingly, all exercise of authority under this paradigm is conceptually tied to the claim that such exercise is compliant with these higher-order duties/rights.

From this point of view, the supreme authority is conceptually linked to two kinds of limits: On the one hand are those limits which set out a lack of power, and failing to comply with which normatively entails the nullity/annulment of the results sought by the authority; on the other hand are those limits which correspond to fundamental individual rights (correlative to duties imposed on the authorities), and disregarding which normatively warrants a justified criticism.[37] As we have seen, the latter limits are regulative requirements which the authority in question *accepts*, but which it could disregard without ceasing to act as a competent authority, given that compliance with them is not a condition for its competence. This caveat thus calls for a distinction between two ways in which the norms created by this type of authority can be said to be "valid." Because the authority could neglect to effectively comply with the regulative limits (rights/duties) it proclaims to accept, the norms produced within the limits of its competence are only valid *pro tanto*, and all things considered they could fail to be *conclusively* valid. Specifically, that will prove to be the case whenever the norms in question frustrate the rights/duties whose acceptance defines this kind of authority.[38]

8 SOME CONSIDERATIONS ON THE CONSTITUTIONAL MODEL OF AUTHORITY

Many contemporary legal systems are characterized by their explicit adherence to the model of authority based on the constitutional rule of law. They do so by way of legislated norms, that is, by enacting a formal constitution or a set of norms having a constitutional status (and which are incorrectly considered

37 On the notion of obligation, see Hart 1961: 84-86.

38 This point cannot be developed in any depth except to note that the distinction between *pro tanto* and conclusive validity does not correlate with the distinction between formal and substantive requirements.

to be the legal order's ultimate norms). These fundamental laws explicitly state the conditions that must be satisfied in order for supreme legislative power to be held and exercised, and among these conditions is the requirement that the constituted authority accept a set of negative and positive duties by which it is bound. In that sense, these systems attempt to explicitly state the conditions for the validity of its legal norms, and to that end they necessarily appeal to two different types of norms. On the one hand are those norms that expressly delimit the scope of the aforementioned supreme legislative power. These are *constitutive* norms, and failure to comply with them—which could not be described as "violating" them—necessarily entails the nullity of the intended results. On the other hand are those norms that regulate conferred power. These are *prescriptive* norms, and failure to comply with them does not deprive their results of legal existence. As with all regulative rules that impose permissions, prohibitions, or obligations, their violation warrants reproach or even entails a redressive duty. Nevertheless, given that *acceptance* of these regulative norms is a constitutive condition of authority, even if that is not made explicit, their violation justifies the subsequent annulment of the existing results.

Therefore, on this legal model, although the norms that regulate the supreme legislative authority are not constitutive norms, they are constitutively relevant. In general, the conditions they impose are rigidly protected by legislated norms having a constitutional nature, in that they are understood as being completely beyond the reach of the authority's power, or as amendable only by way of special procedures. The existence of these special procedures, and/or the explicit recognition of the impossibility of modifying these conditions, can be seen to indicate that this kind of authority is at least partly aware of what, in reality, is true of any authority, namely, that it is subject to a set of constitutive conditions which the authority itself does not have the power to change. On the constitutional model, in other words, the supreme legislative authority seems to be aware that its "being an authority" is not a natural property but rather a status that is always constituted by prior acceptance of norms that do not depend on the authority itself (strictly speaking, by acceptance of meta-norms that confer power under certain factual or normative conditions).

Laws having a constitutional status are no doubt documents of crucial political importance, so much so that, as we have seen, according to some authors, they would render further social basic norms redundant.[39] However, from the analysis presented in this work, the kind of error made in taking these positions should be clear. There are two possibilities, and neither seems satisfactory. The first is that these positions disregard that the validity of a constitutional law necessarily presupposes some other norm that confers the power for its valid enact-

39 As discussed, this position can be attributed to Riccardo Guastini. Another example can be found in Waldron 2009.

ment. If we are to avoid a vicious circle, this latter norm cannot be issued by the same authority that creates constitutional laws, and if we are to avoid an infinite regress, they cannot be created by a subsequent authority, either. The second possibility is that such positions take a highly controversial view that turns out to be self-contradictory. According to this view, even when constitutional laws are legislated norms, they are neither valid nor invalid. Formal constitutions or, in general, laws having a constitutional status would become extra-systemic laws.[40] Unfortunately, as we know, the idea of an extra-systemic legislated norm is a contradiction in terms.

An additional argument showing why norms on the supreme authority cannot be characterized as "extra-systemic" when included in so-called constitutional laws is as follows: That these pieces of constitutional legislation identify the supreme legislative authority and establish ultimate criteria of validity is only contingently true, and will be so to the extent that such constitutional laws correctly replicate the content of those criteria that are in fact accepted. The existing model of legislative authority depends on the paradigm that is effectively in force, and not on the one declared to be so by the competent authority. In this regard, as noted, any linguistic formulation of the meta-norms that define and regulate an existing legal order's supreme authority will be a valid or invalid norm *in* the system, or it will be a descriptive statement whose truth or falsity will depend on the content of the meta-norms that are in fact in force. In short, the norms that constitute a legal order's supreme authorities are *social* rules, not explicitly enacted ones. And this fact remains unchanged even when the same authorities enact "constitutional" laws attempting to make the content of such norms explicit.

By appreciating that the basic constitutive rules of any legal order in force are customary, we can explain why their content falls beyond the will of the constituted authority. This is something similar to what Luigi Ferrajoli terms "the realm of the undecidable."[41] In fact, the content of these rules, as with all customary rules, can change only unintentionally: Such change cannot result from an intentional decision.[42]

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40 For example, according to Riccardo Guastini, "the concept of validity is simply inapplicable to constitutions. A constitution is neither valid nor invalid" (my translation). See Guastini 2006: 103. The same view can be found in Guastini 2006a: 10. In this regard it should be emphasized that, even though Guastini quotes Caracciolo and borrows from him the expression "independent norm" to refer to the constitution, he does so by attributing a different meaning to this expression. According to Caracciolo, independent norms are ones that are valid within the system by virtue of extra-systemic criteria. According to Guastini, "independent," "supreme," or "sovereign" norms are extra-systemic and are neither valid nor invalid.

41 See Ferrajoli 2011: 15-53. Consequently, according to Ferrajoli, the idea of sovereign authority should be abandoned or radically reinterpreted. See Ferrajoli 2007: 854.

42 On what cannot be done intentionally, see Williams 1973: 136-151.

On this analysis, the claim that the constitutional legal order sets up a new paradigm as compared with the rule-of-law state is in a sense unquestionable. On the constitutional model there are two kinds or categories of legal norms: the ordinary ones introduced through the exercise of legislative authority, and the higher-order norms that constitute the supreme legislative authority and regulate its behavior. In turn, in order to account for the higher-order meta-norms of the constitutional paradigm, we have to distinguish between two types of norms, which should not be confused even though they are necessarily related: On the one hand are norms that confer power and establish the conditions for its successful exercise (constitutive norms in a strict sense); on the other hand are those norms that establish regulative requirements. One thing that could cause these two types of norms to be confused is that, on this model, *accepting* (albeit not complying with) a set of regulative norms is a constitutive feature of authority: It is part of its defining conditions.

In short, unlike the case of the rule-of-law state, legislative authority on the constitutional paradigm is conceived in such a way as to require the concept of regulative higher-order meta-norm or higher-order obligation. These duty-imposing norms are those that establish the fundamental rights/duties that are presupposed by the constituted legislative authority. Certainly, the specific content of the norms that regulate the behavior of the authorities (i.e., the content of fundamental rights/duties) is not something the model can establish. This content is relative to each legal order and depends on the specific rules that are accepted at a given time and place.

As noted, this model could be presented differently, that is, by laying emphasis on the necessary flip side of the higher-order duties by which every authority is bound. In this case, we could say that under the constitutive rules of this paradigm, every individual is defined as necessarily bound by certain rights (powers, claims, immunities, privileges) that cannot be renounced, meaning that they are inalienable. This idea enables us to account for another essential feature of this type of legal order. Which is to say that these orders are not merely dynamic: They do not consist only of norms issued by competent legislative authorities but also of all norms that, without any intervention by an authority, can be directly derived from the fundamental rights/duties. Even so, it should be clear that on this model of a legal order, the only criterion for making *changes* by which to introduce a new system in the sequence that makes up the legal order still lies in the will of the authority. This is so even when that will is limited by the higher-order rights/duties that prevail whenever the will of the authority collides with them.

Another notion the present account helps to clarify is that of fundamental rights, whose acceptance is constitutive of legal authority. These fundamental rights cannot lie (or cannot just lie) in the content of legislated norms, even

when these norms are protected and guaranteed by way of special reform processes. The status of these fundamental rights/duties is given above all by accepted social rules whose content the legislative authority can contribute to establishing, maintaining, or modifying, but which it cannot create or repeal at will. The act of introducing fundamental rights/duties having a constitutional status (thus attempting to prevent the system's authorities from changing them) can be viewed as a more or less effective attempt to influence the causal process aimed at preserving the basic social rules that are accepted. If these basic regulative limits (i.e., the fundamental rights) were only the content of legislative norms, deliberately created by a legislative authority, they would not constitute limits on that legislative authority; on the contrary, they would *depend* on it, as is the case within the rule-of-law model of authority.

The latter argument makes plain that the mere presence of rigid and protected constitutional texts recognizing so-called fundamental rights/duties in no way presupposes or implies that the constitutional model of the legal order is in force. The basic rules that are in fact accepted can, within certain limits, empower certain authorities to specify the content of fundamental rights/duties. However, whether or not these authorities are subject to these higher-order duties, or whether or not individuals are entitled to certain inalienable rights, will depend on the basic social rules that are actually followed, not on what the formally enacted laws say, not even if they are termed "constitutional" or "fundamental."

What the authorities *can* do intentionally is change or repeal constitutional charters or ordinary laws that contain a specific model of authority. In such cases we have two possibilities. If the constitutional model is indeed in force, the repeal of legislated norms enshrining fundamental rights/duties will constitute a violation of effective social rules, and will in that sense be seen as an illegitimate or unjustified move. The alternative is that, in repealing these legislated norms, the authorities are merely making explicit a change that is already taking place. In this case, we would indeed find ourselves before a new model of authority and of the legal order, not by virtue of the repeal per se, but because the repeal reveals a change in basic social rules that is already underway.

As we have seen, formal constitutions or norms referred to as "constitutional" are typically present in states that follow this model. But that need not be the case. What defines this type of legal order is the constituted authority's explicit recognition of two things: Its constituted nature and normative limitations. On this new paradigm, "being an authority" could be said to be a normative position in two different senses. In a first sense, it is such because, as with all remaining cases, "being an authority" is a property attributed by *power-conferring* norms, regardless of the kind of authority or its scope. In a second sense, it is a

normative position because, in this specific case, the authority is constitutively subordinate to the acceptance of a set of *regulative* norms.

From this point of view, a novelty of the constitutional legal order lies precisely in the fact that the supreme legislative authority accepts and conceives of itself as an authority that is limited by the higher-order norms that justify its existence and do not depend on the authority itself. Even more emphatically, the constitutional model could be said to presuppose a sort of judicialization of the supreme legislative authority: Just as a court creates new norms—but at the same time also identifies and interprets the general norms which it is deemed to be bound by, and which justify the individual norms it creates—so, on the constitutional model, the supreme legislative authorities also present themselves as performing these two functions. For on the one hand they create norms that are addressed at individuals who are subject to its authority, but at the same time they make explicit and interpret the norms that justify their existence and guide the exercise of their authority. These characteristics explain why, when this kind of authority identifies fundamental rights/duties having a constitutional status, it views itself as recognizing its *preexisting* limits, and not as creating rights/duties *ex nihilo*.

It is true that not all conceptions of authority are aware of the fact that "being an authority" is a normative property, one that ultimately depends on socially accepted norms. However, it is an unchallenged tenet among legal theorists that the existence of authorities is part of a social reality constructed through the acceptance of constitutive rules. In that sense, it is interesting to observe, among other things, that this reveals the misleading, if not incorrect, character of an already classic distinction bearing on this issue, namely, the distinction, and contrast, between constituent and constituted authorities. Many differences can certainly be established among various types of authorities, but once it has been noted that the status of "authority" depends completely on the rules that are accepted within a social group, we could tolerate the distinction only if, at the same time, we make explicit something that it tends to hide: that so-called "constituent" authorities are not *alternative to* constituted ones but are themselves constituted authorities. Regardless of which model is accepted, if we concede that authorities exist only as part of the socially constructed reality, the notion of a constituent authority must be abandoned for reasons of coherence, given that the only constituent power of *authorities* (or any other example of institutional reality) is the social group to the extent that it accepts certain constitutive rules.

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Defeasibility, norms and exceptions: normalcy model

The paper discusses the notion of defeasibility and focuses specifically on defeasible (moral and legal) norms. First, it delineates a robust notion of the phenomenon of defeasibility, which poses a serious problem for both moral and legal theory. It does this by laying out the conditions and desiderata that a model of defeasibility should be able to meet. It further focuses on a specific model of defeasibility that utilises the notion of normal conditions (normalcy) to expound the robust notion of defeasibility. It argues that this model fails in its attempt to do this, particularly since it presupposes further pertinent norms and we have reasons to doubt if these are defeasible. It thus does not allow defeasibility to go "all the way down" in the normative domain and limits it merely to a feature of some sort of mid-level norm. In conclusion, it draws lessons from this and positions defeasibility models within a more general pluralistic approach to norms.

Keywords: exceptions, normalcy, normal conditions, moral norms, legal norms, pluralism

1 INTRODUCTION

The concept of defeasibility, especially in the legal and moral domains, has become an increasingly popular point of discussion in the last couple of decades.[1] Defeasibility is a multi-faceted concept which is used in different senses and can be related to various subjects. There are several open questions or dimensions in relation to it. First, there are a number of candidates for being defeasible, amongst them concepts, norms, norm formulations, rules, standards, principles, laws, generalisations, ideals, reasoning, facts, opinions, statements, decisions, regulations, kinds, etc.[2] For the purposes of this paper, I shall focus my attention on defeasible norms, with a prospect that what will be established will in general be transposable, in a more or less direct way, to other defeasible phenomena in close proximity (principles, rules). Next, there are several important open questions and diverging views about the origins, nature, and scope of defeasibility. And finally, there is the question about the consequences of defeasibility for the theoretical aspects of the given normative domain, as

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1 Ferrer Beltrán & Ratti 2012; Guastini 2012; Hooker & Little 2000; Lance, Potrč & Strahovnik 2009.

2 Chiassoni 2012: 162; Lance and Little 2007.

well as for normative practice. Answers to these questions vary in the debate with deep theoretical disagreements on almost all the said aspects.

I shall proceed in the following way. After examining briefly some general considerations of defeasibility, I delineate a robust notion of defeasibility in relation to the notion of exception. This notion represents a serious problem for any theory of defeasibility and defeasible norms, including those formulated within moral and legal theory. In delineating the notion, I put forward a number of conditions and/or desiderata that a model of defeasibility should meet (§2). In §3, I focus specifically on a model of defeasibility that utilises notions of normal conditions and normalcy to expound my robust notion of defeasibility. After presenting examples of a normalcy-based model in the fields of both legal and moral norms, I go on to argue that this model fails in its attempt to do this, particularly since it presupposes further pertinent norms and we have reasons to doubt if these are defeasible. It thus does not allow defeasibility to go "all the way down" in the normative domain and limits it merely to a feature of some sort of mid-level norm. In conclusion, (§4) some lessons from this debate are discussed and briefly related to the traditional pluralistic model of norms.

2 DEFEASIBLE NORMS AND EXCEPTIONS: CONDITIONS AND DESIDERATA

The debate about defeasibility can be situated within a more general debate about the relationship between general principles and particular cases, which has been present in philosophy since its early beginnings.[3] These discussions

3 In Plato's dialogue *Statesman*, we can follow a debate between Socrates and a young stranger from Elea about what defines a good statesman, one that would regulate public affairs justly. The dialogue also moves to the question of whether it is possible to rule and govern without laws. The stranger, in trying to defend the affirmative answer to this question, proposes the idea that it is better that a "royal man" governs instead of laws, since "[l]aw can never issue an injunction binding on all which really embodies what is best for each: it cannot prescribe with perfect accuracy what is good and right for each member of the community at any one time. The differences of human personality, the variety of men's activities and the inevitable unsettlement attending all human experience make it impossible for any art whatsoever to issue unqualified rules holding good on all questions at all times". He continues by arguing that the one who governs will probably be unable to avoid any general law being put forward, and so one "will lay down laws in general form for the majority, roughly meeting the cases of individuals . . . under average circumstances". Nonetheless, both Socrates and the stranger agree that, if exceptions to these general norms were to emerge, it would be unwise, unjust, or even ridiculous not to correct such cases (Plato *Statesman*: 294a–b, quoted in Schauer 2012: 78). A similar proposal can be found in Aristotle's *Nicomachean Ethics*. "The reason [i.e., that justice and equity are not quite the same thing, and that equity can be seen as a correction of legal justice; n. VS] is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it

focus on the relationship between general norms on the one hand, and particularities or exceptions on the other, but frequently such understandings of exceptions are not radical enough since exceptions are understood to be mere side effects of underspecified or incomplete norms, which could in principle be somehow avoided.[4] But, as I seek to claim, genuine, robust defeasibility understood to be a "serious problem" goes beyond this and includes genuine exceptions, which are not such that they could already be properly explicitly included in a general norm or fully specified in advance and thus in principle avoided.[5]

To get an initial grip on the concept of defeasibility, it is common and useful to relate it to the concept of an exception in general or to the presence of (the possibility) of exceptional cases in particular, i.e. cases which, on the one hand, fall under a certain norm or rule, but which, at the same time, have unbefitting normative consequences which we tend to exclude these cases from falling under the mentioned norm or rule. Along these lines, Brożek claims that a "rule of the form A => B is defeasible iff it is possible that although A obtains, B does not follow."[6] The notion of an exception or an exceptional case, as opposed to normal cases, is thus one of the hallmarks of defeasibility.

What do we in fact mean when we say that, e.g., a certain norm, rule, reasoning or concept is genuinely defeasible? We must add some further amendments to the initial grasp of the concept as described above. I put forward these amendments in the form or conditions or desiderata, which will, at the same time, serve as a guide in constructing or evaluating a theory of defeasibility. Proceeding this way, I do not claim that all of the conditions and desiderata must necessarily be met in a straightforward way; another option is to propose a suitable accommodation of a given condition or desideratum.

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is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of the practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission – to say what the legislator himself would have said had he been present and would have put his law if he had known" (Aristotle *NE*: 1137a-b).

4 Dworkin (1977: 24–25), amongst others, maintains such an optimistic view: "Of course a rule may have exceptions. ... However, an accurate statement of the rule would take [these exceptions] into account, and any that [it] did not would be incomplete. If the list of exceptions is very large, it would be too clumsy to repeat them each time the rule is cited; there is, however, no reason in theory why they should not all be added on, and the more there are, the more accurate is the statement of the rule".

5 I do not want to deny that there are some who would claim that what defeasibility boils down to is precisely such a phenomenon. My debate is framed in the discursive space of views that do allow for and in fact support a more robust notion of defeasibility and genuine exceptions. Cf. Chapman 1998: 448; Celano 2012.

6 Brożek 2014.

(I) First, an exception must in a sense be a "genuine" exception, meaning that the exception is not merely a consequence of an initially poorly specified norm.[7] The defeasibility of norms is in this way not merely due to their incorrect, imprecise, or vague formulation that could in principle be resolved or more clearly spelled out on demand. A model must allow for genuine exceptions which cannot be specified in advance (*genuine exceptions condition*).

(II) Second, defeasible norms are not to be associated merely with some kind of "rule of thumb" norms, which we can use most of the time, but which we are also able, if required, to specify and turn into exceptionless norms. If defeasible norms were associated with just this type of norms and exceptions to them, they would neither be a particularly interesting phenomenon nor would they pose a serious problem. Defeasible norms must in this sense be fundamental, full-fledged norms and such that, after them, judgment takes over (as opposed to other norms) (*fundamentality condition*).

(III) Third, a set of possible exceptions must in principle be open, meaning that we can never specify all the possible exceptions to a norm and, in turn, round the set off. If that were the case, then these exhaustively specified exceptions could be built into the norm itself and the norm would cease to be defeasible (*open-endedness condition*).

(IV) Fourth, a defeasible norm remains the same and retains its normative power even when we are able to find an exception to it. In this sense, it "survives" the exception and can hold in all further, non-exceptional cases. Being prepared to abandon or modify a norm when we encounter an exception would make the phenomenon of defeasibility fairly empty. Thus, a model of defeasibility must be such that it leaves the initial norm intact when we come across an exception to it. A defeasible norm must survive beyond the point of arriving at an exception and remain the same norm as before an exception was identified (*identity condition*).

(V) Fifth, a defeasible norm must be able to remain in "normative space" even in the case of an exception and can shed light on the nature of the exceptional case or can indirectly influence the final normative solution. A defeasible norm must be such that it has a possible normative pull even in exceptional cases (*possible relevance condition*).

(VI) Sixth, defeasibility must go "all the way down" in the normative field and include the most basic norms for a given domain (*basicity condition*).

(VII) And lastly, a model of defeasibility must preferably be able to cover or accommodate the legal domain, morality and other normative domains,

7 Celano (2012: 281) labells such exceptions as "true exceptions" (as opposed to merely *prima facie* exceptions) and elaborates this concept in the following way: "For a case to qualify as a true exception it must not be already provided for in a reasonably detailed and precise 'unless ...' clause attached to the norm".

including – although not being limited to – epistemology, aesthetics,[8] social conventions, and etiquette (*generality desiderata*). The paper focuses primarily on moral and legal norms, hoping that the discussion in hand will at least start paving the way for a more general discussion of defeasible norms that I will have to leave for some other occasion.

Some of these points about the conditions stated above can briefly be demonstrated with a rather simplified example of a supposedly defeasible moral norm N expressed as: "N: Causing pain is morally wrong". For this norm to be defeasible, (i) it must allow for exceptions, i.e., cases of causing pain which are not morally wrong, or in which pain is not wrongdoing (e.g., cases of justified medical treatment where pain is unavoidable or cases of causing pain as part of sports activities); (ii) these exceptions must be genuine exceptions in the sense that they are not merely a matter of an imprecise, rule of thumb formulation of the underlying fundamental norm N* (e.g., "The unwarranted causing of pain is morally wrong."); (iii) the set of possible exceptions must be open in the sense that we cannot reformulate the norm otherwise so as to include all the exceptions (e.g., "N**: Causing pain is morally wrong except in cases in which this is part of a justified medical procedure or athletic achievement."); (iv) the initial norm N must remain the same and must retain its normative power even after stumbling upon an exceptional case in the sense that the next time a paradigmatic case of pain-causing pops up it will still render our judgement about its wrongness warranted; and (v) the norm N must remain part of normative space and must influence our judgment indirectly (e.g., if there were two options available for the performance of a given medical procedure, both involving pain, although one substantially less than the other, then N would still be part of our judgment about which one is morally optimal).

There are several models of defeasibility which try to capture the core of its facets related to exceptions as revealed above (e.g., utilising the notions of indeterminacy, vagueness, open-texture, etc.). One of the most prominent models is the one that focuses on the notion of normalcy. I shall now turn to this model to see how it helps to elaborate the understanding of defeasible norms and if it meets the said conditions and desiderata.

3 DEFEASIBILITY AND NORMALCY

One way to spell out the defeasible nature of a given norm is to state that it only holds in normal conditions or in normal circumstances.[9] Besides utilising the notion of normalcy, authors sometimes talk of "privileged conditions", "typ-

8 Cf. Strahovnik 2004.

9 Celano 2012: 285–287.

ical conditions",[10] "what standardly, or normally happens",[11] "paradigmatic"[12] cases or central cases. The basic idea behind all of them is the same. A given norm applies only within a set of normal circumstances, which are such that they cannot be explicitly fully stated and included in the norm as such. Such a proposal seems to be well in line with the above highlighted connection between defeasible norms and genuine exceptions, since exceptions represent exactly those cases which fall outside the scope of normal conditions.

In what follows, I shall first focus more closely on two particular models of defeasible norms that employ such a normalcy condition. The first model is proposed by Bruno Celano and is aimed at norms in general, although it concerns mostly legal norms and originates from within the debate about legal defeasibility. The second model is proposed by Mark Lance and Margaret Little primarily for the domain of moral norms, but this model could also be transposed to norms in general. These models are supposedly complementary and Celano explicitly appeals to the latter model as a supplement to his own proposal.

Celano puts forward his proposal as part of his defence of limited particularism[13] concerning norms. He begins with considering potential response strategies to the possibility of conflicting norms and therefore the need to allow for an "exception" with respect to at least one norm involved in this conflict. First, he rejects the specificationist approach, which proposes that, when norms conflict with each other, all "we have to do is specify (that is, suitably restrict the domain of application of) at least one of the norms, or the relevant norm, so that, thanks to the inclusion of further conditions within its antecedent [...] the conflict – or

10 Lance and Little 2007; 2008.

11 Celano 2012: 284.

12 Celano 2012: 286.

13 For readers unfamiliar with the debate between generalism and particularism, this is a brief recapitulation of the main views and concepts. Particularism regarding a given normative domain (e.g., morality) is a view characterised by a negative attitude towards principles, norms and rules. Moral particularism can thus be associated with a simple thesis that there are no moral principles or with a more elaborate claim that 'the possibility of moral thought and judgment does not depend on the provision of a suitable supply of moral principles' (Dancy 2004: 73). Moral thought need not consist in the application of moral principles to cases, and the morally perfect person is not to be regarded as a person of principle. The opposite view is generalism claiming that the moral status of an action is determined by its falling under a general moral principle or rule. Parallel to this debate, atomism and holism (also labelled as contextualism) are views about reasons. Atomism claims that reasons are context insensitive, meaning that they always function (count for or against) in the same way. Holism, on the other hand, claims that reasons are context sensitive, that they can vary in their relevance and strength, and that they can additionally be combined with each other in ways that go beyond a mere addition model (e.g., two reasons which would separately count for a given action, can – if present together – represent a reason against it. Particularism is usually combined with holism and generalism with atomism.

the unsatisfactory verdict – eventually vanishes".[14] What we seem to be doing is enriching, refining, qualifying and grasping the subtleties of the initial norm, thus treating it as defeasible. But the problem lies, first, in the implausibility of insisting that we are still dealing with the same initial norm even after many amendments have been made and exceptions recognised. Second, there is the danger of an in-principle impossibility of specifying all the exceptions.

> Achieving a fully specified 'all things considered' norm, thereby ruling out the possibility of further, unspecified exceptions (apart from those already built into the norm itself) would require us to be in a position to draw a list of all potentially relevant properties of the kind mentioned. And this, we have seen, is misconceived.[15]

Celano also rejects a similar approach to defeasibility which regards exceptions as always already implicitly included or provided for by a norm. A given norm is thus just a sort of shorthand for a more complex norm that lies in the background and can – if needed – be brought to the foreground. But this approach fails for the same reasons since it understands exceptions not as true exceptions – not as real "holes" in the norm – but as some sort of *prima facie* exceptions that allow for the filling in of the holes.

According to Celano, one must thus accept a moderate sort of particularism in order to do justice to (the possibility of) conflicts of norms and genuine exceptions. In line with this, he proposes an understanding of norms as defeasible conditionals supplemented by a "normalcy condition". The reason why this position is labelled as moderately particularistic – as opposed to radical particularism – is the so-called normative flatness worry. The leading idea is that radical particularism cannot properly account for the thought that some considerations are more central than others, in the sense that we recognise some reasons are "normally" relevant and more central than others.[16] The normalcy

14 Celano 2012: 270.

15 Celano 2012: 276.

16 The "moral flatness" worry was raised in moral theory by several authors (McNaughton and Rawling 2000: 273; Crisp 2000: 36; Bakhurst 2000: 167; McKeever and Ridge 2006: 4; Celano 2012: 283) and can be summarised in the following way. Given the holism of reasons, a set of morally relevant features of an action is open, which means that any feature could be morally relevant and can stand as a reason for or against an action. Furthermore – given the particularistic thesis – this set of features cannot be ordered by general principles. But why does morality seem to be nevertheless ordered? Why do we think that morally central features very often have to do with, e.g., causing pain and suffering, sincerity, honesty, keeping promises, benevolence, dignity, etc.? All that moral particularism can say is that some features are often more relevant than others and that is all. It cannot capture the idea of them being "central" in a way to morality. The moral landscape painted by particularism is flat. In order to avoid this charge, particularism must offer us "some way to distinguish those considerations which normally and regularly do provide reasons of a certain valence (e.g. pain) from those that normally and regularly do not provide reasons (e.g. shoelace colour). For absent some such distinction, particularism threatens to flatten the moral landscape by suggesting that

condition is thus supposed to work both ways, i.e., allow and account for the possibility of genuine exceptions, as well as provide some sort of "basic patterns" in the normative domain. Here is the core of Celano's proposal:

> Norms are defeasible conditionals liable to true exceptions, i.e. conditionals such that the consequence follows, when the antecedent is satisfied, under normal circumstances only. The crux of the matter is, of course, how is the qualification 'normally' ('in normal circumstances', etc.), to be understood? Here, it seems, normalcy includes, but does not boil down to, the notion of what happens, or holds, 'in most circumstances'.[17]

He is well aware that this proposal is not without problems. Nevertheless, he leaves it open and appeals to the work of Lance and Little as it provides more details for such a model of normalcy.

I shall now turn to the Lance and Little model (addressing specifically moral norms or principles, although similar considerations could be put forward for norms in general). Lance and Little are primarily concerned with the functioning of reasons in general, and with the variability of moral reasons in particular. They employ the notion of privileged conditions, in which a given reason 'behaves normally', as opposed to conditions which are not privileged and in which a reason can change its moral relevance.[18] The model is committed to deep moral contextualism: the right- or wrong-doing, and good- or bad-making features of actions vary in contexts in ways that preclude codification by exceptionless principles. A full-fledged recognition of exceptions to moral generalisations does not mean that the picture of morality that one must accept is entirely free from any important kind of generalities. The sharp divide between generalism and particularism results in the following consequence: their respective views about the nature of explanation are either too strict or too narrow. According to these views, genuine explanatory reasons must be governed by universal exceptionless principles.

An alternative model of explanation figuring defeasible norms and exceptions is offered, a model that covers non-moral ground as well. The features of such acts as promise-keeping, lying, inflicting pain or being kind are the building blocks of everyday morality that entertain an intimate connection with their moral import (as core moral reasons that can de-flatten the moral normative

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insofar as they might provide reasons all considerations are on par" (McKeever and Ridge 2006: 45). If we try to isolate the fundamental worry, we can recapitulate it in the following manner. The moral non-flatness requirement says that any moral theory must somehow account for the fact that some considerations or features of acts are more central to morality than others. Amongst particularists, Dancy as its prominent defender put forward a proposal that introduces the notion of a default reason to deal with the flatness worry (cf. Dancy 2000: 137; Dancy 2004: 112–113).

17 Celano 2012: 285.

18 They defend the model in a series of papers, Lance & Little 2005; 2006; 2007; 2008.

landscape). They are genuine explanatory features of the moral status of acts and may be captured within defeasible generalisations. Defeasible norms (e.g., "Defeasibly, lying is wrong", Defeasibly, killing is wrong" or "Defeasibly, causing pain is wrong") are introduced through the notion of privileged conditions. A more general formulation of such principles is:

> "Defeasibly, for all actions x: if x is A, then x is wrong/you ought not to do x."
>
> or
>
> "In privileged conditions, for all actions x: if x is A, then x is wrong/you ought not to do x."

This model thus argues that some features of acts can entertain an intimate connection with their moral import and are genuinely explanatory of the moral status of acts, although it allows for exceptions.[19] The singling out of a connection between a particular descriptive feature of such acts as "causing pain" and the negative moral import of this feature which is neither necessarily universal nor pervasive nor usual can be done by saying that, defeasibly, causing pain is wrongdoing.

When a defeasible generalisation faces an exception, something has gone off course – the context has relevantly changed in respect to privileged conditions, and our moral understanding must track this. There are several types of such defeasibility dynamics, such as the paradigm/riff, justificatory dependence, and idealisation/approximation.[20] Moral understanding is the understanding of the structure of moral privilege and exceptions. One must understand the nature of a certain feature in privileged conditions, and when outside such a context, the

19 The same holds in other areas as well. For example, the non-moral generalisation "Fish eggs develop into fish" is a defeasible generalisation. It is not that most fish eggs develop into fish (quite the opposite is true since most of them end up as food for other animals). Something else is captured by this particular generality. One should read it as follows: "Defeasibly, fish eggs develop into fish" or "In privileged conditions, fish eggs develop into fish", where privileged conditions are defined as conditions that are particularly revealing of the nature of the thing in question or of a broader part of reality in which the thing is known (Lance and Little 2008: 62).

20 There are cases in which a defeasible generalisation tracks paradigm cases, which are, in this sense, privileged. This is the case with, e.g., "Defeasibly, chairs are things we sit on", and there are riffs of this paradigm as in the case of ornamental chairs. The moral case would be the case of pain as defeasibly wrongdoing, but it would not be so in the case of athletic achievement. In other cases, there is a justificatory mutual dependence of privileged and non-privileged cases in the sense that we must appeal to privileged cases in order to explain and understand what is going on in a non-privileged case (e.g., lying and lying as part of the Diplomacy game; pleasure and sadistic pleasure). And lastly, there could be an idealisation-approximation relation, as in the case of the ideal gas law $pV = nRT$ and the actual behaviour of actual gases. The example of similarly defeasible moral is the norm that in the Kingdom of Ends (full information, genuine autonomy, basic trust) people are owed the truth. (Lance and Little 2008: 64–73).

relation of the last context to the first one, the compensatory moves required, and the acceptability of various deviations.[21]

It seems that this model of defeasible norms gives us what we are looking for, i.e., a model of norms that would allow for genuine exceptions and, at the same time, de-flatten a given normative landscape. Now, I want to mount a challenge to this model of normalcy. This proposal of defeasible norms either fails to de-flatten the normative landscape or succeeds in this task, but only at the expense of positing more basic and plausibly indefeasible norms. I shall not pursue the first horn of this dilemma, although there are arguments that cast serious doubts about the success of this proposal in this regard.[22] What I want to do is to initially grant that the model succeeds in de-flattening the normative landscape, i.e., in making a distinction between core and other marginal reasons, and consequently finding a sufficient number of so-called defeasible reasons and norms that would function as basic normative building-blocks.

But it seems that this is so only at a cost of reducing this distinction to a distinction between basic and derivative reasons, and thus seemingly limiting defeasibility to the level of mid-axiom norms. In particular, the proposed model seems to collapse to a model according to which a given consideration together with normal (privileged) conditions delimits a central and apparently invariable reason and appeals to a more basic norm which has full explanatory power, or in which normal (privileged) conditions include reference to further reasons and

21 Lance and Little 2008: 64–68.

22 McKeever and Ridge (2006: 60–72) put forward quite a forceful argument in this direction. First, one can label reasons capturable in defeasible generalisations as paradigmatic reasons and others as non-paradigmatic. The argument assumes that the best way to capture the paradigmatic vs. non-paradigmatic distinction is via an explanatory asymmetry account of this distinction employed by Little and Lance. Cases that fall outside privileged conditions are explanatorily dependent on how a particular consideration functions in a normal case when the conditions are privileged. By contrast, there is no such dependence going the other way. E.g., pain is normally bad or a reason against an act, but this is not the case when, e.g., pain is constitutive of athletic challenge and accomplishment where it shifts its polarity (Lance and Little 2006: 319). One must understand that normally pain is something bad in order to understand how it functions in the case of athletics, and not the other way around. It seems that the proposed model is useful only for the reason that we have one valence in privileged conditions and the opposite valence in non-privileged conditions. But the proposed model is not successful with reasons that sometimes lack moral relevance. "For it will be true of any consideration whose status as a reason can sometimes be defeated that we can adequately understand why it is not a reason here only if we understand how it can be a reason elsewhere. For to understand why something is not F here we must in general have some idea of how it can be F elsewhere if it can. If this is enough for a consideration to qualify as an instance of asymmetric reasons then any consideration whose status as a reason can ever be defeated will qualify as an instance of asymmetric reasons, and that makes the distinction far less interesting than it first appeared." (McKeever and Ridge 2007: 67). It further seems that some core reasons might be non-paradigmatic, and that not all peripheral reasons need to be non-paradigmatic.

norms. For instance, it is not merely lying or telling someone something untrue which is normatively central from a moral standpoint, but honesty, sincerity and deception are. The intermediate conclusion is thus that the normalcy-based model of defeasible norms enables one to explain or justify an exception to the initial norm as an exception only by appealing to some further pertinent norm. If one looks closer at the examples proposed by Lance and Little, it does indeed seem that this is the case.

For example, in relation to a norm that lying is defeasibly or in normal circumstances wrong the model refers to examples in which lying is not wrongdoing (e.g., in circumstances of playing the Diplomacy game or in circumstances when a Nazi officer bullies you into revealing the location of his next targeted victim). The way in which these cases can be understood is that privileged conditions are those that do a lot of both normative and explanatory work in respect of why lying is wrongdoing in "normal" cases, but not in the mentioned ones. This is so since the space of privileged conditions is further shaped with basic moral considerations, consisting of such notions as consent, fidelity, justice, honesty and the like. And it is this large chunk, including invariant moral reasons and norms, which pops up in an explanation of the moral status of a certain feature and, in turn, of the whole act. This then just transposes the question whether these background basic normative considerations are defeasible or not.

If we look more closely at some of the mentioned examples, this worry becomes apparent. In the case of lying, the model claims that "intentionally telling a falsehood" is not wrong "when done to Nazi guards, to whom the *truth is not owed*",[23] or it is not wrong because a particular person is "*not worthy of the truth*" since "part of what it means to take something to be a person […] is to understand the creature as belonging to a kind that defeasibly *has a claim on our honesty*. Situations in which one takes something to be a person but not *worthy of honesty* are inherently riffs, as it were, on the standard theme of person."[24]

Thus, in such cases, one can plausibly claim that what actually functions as a reason in this and other cases is a combination of certain features of action and privileged conditions, which make reference to some further, more basic reasons and seemingly indefeasible norms. But are these pertinent norms which are appealed to in explaining or justifying exceptions to the original norms themselves defeasible? Admittedly, our appealing to norms has to stop somewhere, with judgment taking up the slack. But the normalcy model of defeasibility must then provide further reasons for these more basic norms to also be defeasible and for them to be part of the same normalcy model, i.e., for their defeasibility to also be explained and elaborated by appealing to normal conditions.

23 Little 2001: 34, emphasis mine.

24 Lance and Little 2007: 153, emphasis mine.

Lance and Little anticipate the objection raised above. They reply that this rising to a higher level of abstraction (e.g., from lying to honesty, or form causing pain to cruelty) might seemingly offer us a more stable ground and order when it comes to the invariability and indefeasibility of reasons and norms. They respond by claiming that, (i) in making this move, one loses something important, namely the intimate connection that lying itself has to moral wrongness, that "being a lie" is the main driving force behind such an action being wrong; and (ii) that, even on a higher or thick moral level, the normative domain is full of exceptions, which are revealed in statements such as "it hurts so good" or "sometimes you must be cruel to be kind". Therefore, even seemingly indefeasible considerations, such as cruelty or honesty, are not invariant moral reasons and might figure only in defeasible norms.

This first point is crucial to all attempts that combine variability with moral generalities, since they must convince us that what functions as a moral reason in a given case is really variable and that the rest of what a moral principle refers to is not a part of this reason. As far as the intimate connection between simple moral reasons and the rightness or wrongness of acts is concerned, we must ask ourselves what does the explanatory work. Maybe we often cite such things as "telling a lie" or "keeping one's word" as reasons, but if privileged conditions for such considerations encompass such things as honesty, sincerity and fidelity, the question of their role is justified. When privileged conditions change into non-privileged ones, these considerations are exactly those that we employ in our explanation of why a case is deviant or defective in relation to the standard one. And it further seems that they do not simply function as enablers and disablers of initial reasons, but are employed as basic reasons themselves.

Regarding the second point, most of such talk must be understood to be metaphorical. If we must sometimes be "cruel to be kind", then it is most probably not the cruelty itself that makes our action kind or be the ground of its moral rightness. Let us imagine a more detailed case. Let us say that I have to give my friend an honest opinion about her project or action, and that I know that it would be painful for her to hear, but, on the other hand, it would spare her the frustration in the long run. In this sense, I shall be cruel to her or brutally honest, but, at the same time, this is the only way of convincing her to give up some actions and maybe spare her the future disappointment and pain. In this sense, we can say that I have to be "cruel to be kind". Nevertheless, the "cruelty" here involved is not a reason that contributes to the moral rightness of my action. If there was a way of convincing my friend that was not cruel but just "plainly kind", then it would be morally wrong, even horrible to pick the first option. We can never be cruel just to be cruel and get away with it morally. Another way to respond to a case such as this would be to claim that the question of the role of cruelty simply does not arise at all since this is not a case of

cruelty. The situation is similar with respect to the "it hurts so good" statement that Lance and Little appeal to and other similar cases.

All this reduces the proposal to understand defeasibility in terms of normalcy to a point when the model allegedly must accept at least some basic, indefeasible norms. Given the examples above, one can conclude that the "normalcy" approach does not go "all the way down" in the normative domain. In the end, it allegedly presupposes at least some basic, invariable and indefeasible norms effective in the background of the normative domain, serving as a line of demarcation between normal circumstances or privileged conditions on the one hand, and exceptional or unprivileged ones on the other. In this way, the model does not meet either the fundamentality condition or the basicity condition.[25]

4 DEFEASIBLE NORMS AND PLURALISM

Such models of defeasibility as those developed by, e.g., Celano, Tur,[26] and Lance and Little are attractive models, but their limits are manifested in the fact that the defeasible norms which they propose have to be understood against a normative background of basic reasons that we appeal to in deciding what the relevant case is or in our interpretations of a given norm and the normalcy of the conditions. It seems that, irrespective of the way in which we work out the defeasibility structures of defeasible norms, their models must appeal to some wider set of basic (moral, legal, etc.) considerations related to norms which reside in the background and illuminate the exceptions. Normalcy-based defeasibility is thus limited to surface or mid-level norms only. In §2, I have put forward a number of conditions and desiderata for a model of genuine defeasibility. Then, I have presented a model based on the notion of normalcy, and have shown that it fails to meet some of them and that defeasibility within it does not reach "all the way down" in the normative domain, and nor does it include the most basic norms.

One lesson to learn from this is that one can plausibly proceed by developing an account of defeasibility which explicitly includes an appeal to a wider

25 In this discussion, I have mostly focused on moral norms, but the same applies to defeasible legal norms. One possible way out of this conundrum is proposed by Guastini (2012). For Guastini, both defeasibility and axiological gaps are related to axiological judgments made by interpreters of norms. Furthermore, defeasibility is not a special feature of legal principles or norms; defeasibility is not an objective property of norms which is already there before we start to interpret them. Our axiological judgments employed in interpretation are thus neither the consequence of some objective defeasibility of the rule itself nor a genuine, interpretation-independent normative gap, but the origin or cause of interpretative defeasibility. This, in the end, includes some basic, indefeasible reasons and norms, such as justice. Cf. Strahovnik 2012; 2013.

26 Tur 2001.

set of an evaluative, axiological or normative background of basic normative considerations. In the domain of moral normativity, such a model is proposed by moral pluralism understood in the following way. Traditional moral pluralism[27] builds on the notion of basic moral reasons which can be captured by general, indefeasible norms (e.g., principles specifying *prima facie* duties). Together with what is morally relevant in a given situation *prima facie* duties jointly determine the moral status of an action. A final assessment of an actual duty requires careful consideration, the weighing of reasons and seeing how they fit together (judgment).

There has been quite a lot of controversy over just how exactly we could understand the notion of *prima facie* duty proposed by W. D. Ross and the mentioned relation between *prima facie* duty and an actual duty. One of the more plausible suggestions or interpretations is that in terms of basic moral reasons that we shall employ here. According to this understanding, basic *prima facie* duties (Ross's famous list of seven duties includes: fidelity, gratitude, reparation, beneficence, justice, self-improvement and non-maleficence) are best understood to be basic moral reasons or considerations that are always morally relevant and count for or against an action. Given their thick moral descriptions, they seem indefeasible. Besides this basic list, Ross also employs so-called derivative or complex *prima facie* duties. My suggestion is that we could understand these derivative *prima facie* duties to represent derivative moral reasons and to be prime candidates for mid-level defeasible norms that we often employ in our ordinary moral thought. Let us have a look at an example. Ross claims that duties, such as obeying the laws of one's county, are derivative, comprising one or more basic *prima facie* duties; in the case of the mentioned duty these are a *prima facie* duty of gratitude for the goods that an individual receives from his or her country, a *prima facie* duty of fidelity emerging out of an implicit agreement of living with others in the same country by some shared rules and a *prima facie* duty of benevolence since obeying laws contributes to the common good.[28] The same applies to our *prima facie* duty not to lie or to keep the promises we have given. Both are grounded in the basic *prima facie* duty of fidelity. Ross also refers to such derivative *prima facie* duties as *media axiomata* that represent a helpful way of applying general moral norms related to *prima facie* duties in particular types of situations.[29] What we have here is a model of defeasible norms which is explicit about the normative background consisting of basic, indefeasible norms. The claim is not that these basic norms cannot come into conflict (allowing for conflict between norms that cannot be resolved by appealing to some further meta-principle is one of the key posits of pluralism)

27 Ross 1930; 1939.

28 Ross 1930: 27–28.

29 Ross 1939: 190.

and that occasionally we are faced with exceptions to *prima facie* duties, but that these exceptions are related to a dimension of a given *prima facie* duty ending up also being an actual, final duty.

This model is thus similar to the normalcy-based approaches that I have investigated, although it does differ from them in that it explicitly recognises basic indefeasible norms, which explicitly limits normalcy-based defeasibility to the mid-level of the normative domain. Accordingly, one way to look at the arguments presented above is that they aim to collapse normalcy-based approaches to a more general pluralist approach, claiming that defeasibility is a feature of basic or fundamental norms and that we do not need indefeasible norms within such a model.

In more general terms, we can thus distinguish between two fundamentally different views about the possibility of "codification" of a given normative domain. On the one hand, there is generalism, which combines the possibility of codification and a deductive model of normative thought, and, on the other. particularism, which rejects the possibility of (the complete) codification of a given domain of normativity. The pluralist approach seems to sit between these two approaches. Within the latter, normalcy-based defeasibility can be interpreted as a consequence of the structure of normative pluralism and the norms within it, and is plausibly understood in relation to an indefeasible normative and axiological background which stands in relation to particular cases of judgment.

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Vojko Strahovnik*

Uklonljivost, norme in izjeme: model normalnosti

Članek se ukvarja s pojmom uklonljivosti, s posebnim ozirom na uklonljivost moralnih in pravnih norm. Na začetku začrtamo grob oris pojava uklonljivosti, ki je zahteven izziv tako za moralno kot tudi za pravno teorijo. Opozorimo na pogoje in primerjalne prednosti, ki naj bi jih izpolnjeval oz. imel model uklonljivosti. Nadalje se v članku osredotočimo na svojstven model uklonljivosti, ki uporablja pojem normalnih pogojev (normalnosti) da bi zajel omenjeni pojem uklonljivosti norm. Trdimo, da temu modelu pri tem spodleti, posebej z vidika predpostavke nadaljnjih pomembnih norm, za katere imamo upravičene razloge za dvom, da so prav tako uklonljive. Tako ta model ne dopušča, da bi uklonljivost segala do samih temeljev zadevnega normativnega področja in omeji značilnost uklonljivosti na norme na srednji ravni. V zaključku poudarimo nekaj naukov te razprave in jih umestimo v širše polje pluralističnega pristopa k normam.

Ključne besede: uklonljivost, izjeme, normalnost, normalni pogoji, moralne norme, pravne norme, pluralizem.

1 UVOD

Pojem uklonljivosti, posebej na področju moralnosti in pravnosti, postaja v zadnjih desetletjih vse bolj pomemben predmet zanimanja in razprav.[1] Uklonljivost je raznolik pojem, ki ga rabimo v raznovrstnih pomenih in ga povezujemo z različnimi predmeti. Tem njegovim raznovrstnim razsežnostim pritiče tudi več odprtih vprašanj. Najprej, gre za vprašanje po tem, kaj je uklonljivo, pri čemer lahko govorimo o pojmih, normah, oblikovanostih norm, pravilih merilih, načelih, zakonih, posplošitvah, idealih, razlogovanjih, dejstvih, mnenjih, izjavah, odločitvah, predpisih, vrstah ipd.[2] Za namene tega članka se bom osredotočil na uklonljive norme, v upanju, da bo vsaj del ugotovitev v splošnem mogoče bolj ali manj neposredno prenesti tudi na druge uklonljive pojave v njihovi bližini (pravila, načela). Nadalje, obstaja več pomembnih odprtih vprašanj glede izvora, bistva in obsega uklonljivosti. In ne nazadnje, pomembno je vprašanje o posledicah uklonljivosti tako za teoretične razsežnosti izbranega

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1 Ferrer Beltrán & Ratti 2012; Guastini 2012; Hooker & Little 2000; Lance, Potrč & Strahovnik 2009.

2 Chiassoni 2012: 162; Lance in Little 2007.

normativnega področja kakor tudi za samo normativno prakso. Odgovori na ta vprašanja se v razpravi razlikujejo in glede večine omenjenih vidikov nahajamo temeljna teoretska nestrinjanja.

Nadaljevanje sledi takole. Po hitrem pregledu nekaj splošnih premislekov o uklonljivosti v nadaljevanju začrtam odporno pojmovanje uklonljivosti, ki je tesno povezano s pojmom izjeme. Takšno pojmovanje pomeni posebej zahteven problem za vsako teorijo uklonljivosti in uklonljivih norm, vključno s temi, ki so oblikovane za moralno in pravno teorijo. Ob začrtanju takšnega razumevanja je podan niz pogojev/zahtev in primerjalnih prednosti, ki naj bi jim to zadostilo (§ 2). V 3. razdelku se posebej osredotočim na model uklonljivosti, ki gradi na pojmu normalnosti in normalnih pogojev, da bi zajel odporen pojem uklonljivosti. Predstavitvi primera tega modela za polji pravnih in moralnih norm sledi argumentacija, da takšen model pri tem ni uspešen, posebej zato, ker predpostavlja nadaljnje pomembne norme, pri katerih imamo upravičene razloge za dvom, da so prav tako uklonljive. Tako ta model ne dopušča, da bi uklonljivost segala do samih temeljev zadevnega normativnega področja, in omeji značilnost uklonljivosti na norme na srednji ravni. V zaključku (§ 4) izpostavim nekaj naukov te razprave in jih umestim v širše polje pluralističnega pristopa k normam.

2 UKLONLJIVE NORME IN IZJEME: POGOJI IN PREDNOSTI

Razprava o uklonljivosti se umešča v splošnejšo razpravo o odnosu med splošnimi načeli in posameznimi primeri, ki je v filozofiji prisotna že od njenih zgodnjih začetkov.[3] Ta razprava se osredotoča na odnos med splošnimi norma-

3 V Platonovem dialogu Država lahko sledimo dialogu med Sokratom in mladim tujcem iz Elee o tem, kar opredeljuje dobrega državnika, ki javne zadeve opravlja pravično. Razprava se dotakne tudi vprašanja, ali je možno vladati brez zakonov. Tujec, ki poskuša zagovarjati pritrdilen odgovor na to vprašanje, predlaga pogled, da je bolje, če vladajo kraljevski možje, ne pa zakoni, ker »zakon nikoli ne bo mogel naenkrat zaobjeti tega, kar je najimenitnejše in najpravičnejše za vse, in ukazovati tega, kar je najboljše. Nepodobnost med ljudmi in (njihovimi) dejavnostmi ter dejstvo, da tako rekoč nikoli nobena od človeških stvari ne miruje, ne dopuščajo, da bi katerakoli veščina tako rekoč v čemerkoli kadarkoli izrekala kakšno enostavno (pravilo), ki bi veljalo za vse primere in za ves čas.« Nadaljuje s trditvijo, da se bo vladajoči najverjetneje težko izognil postavitvi splošnih zakonov in tako jih bo postavil »za množico in za večino primerov ter predpisal zakon nekako tako, da bo veljal za posameznike na splošno in v grobih obrisih, najsi (zakone) zapisuje ali pa jih postavlja na osnovi nezapisanih, domovinskih običajev«, toda tako Sokrat kot tujec se strinjata, da če se pojavijo izjeme k tem splošnim zakonom, ne bi bilo niti modro niti pravično, celo nesmiselno, da v tem primerih splošnih zakonov ne bi dopolnili (*Država* 294a–b, navedeno v Schauer 2012: 78). Podoben predlog najdemo tudi v Aristotelovi *Nikomahovi etiki*. »Vzrok temu [tj. da blagohotnost in pravičnost nista povsem eno in isto, ampak blagohotnost lahko razumemo kot nadrejeno pravičnosti oz. kot korekcijo konvencionalne pravičnosti] je dejstvo, da je vsak zakon splošnega

mi na eni strani in posamičnostmi oz. izjemami na drugi, toda v njenem okviru razumevanje samih izjem pogosto ni dovolj korenito, saj se izjeme razumejo kot zgolj obrobna posledica ne dovolj dorečenih ali opredeljenih norm; kot nekaj, čemur bi se načeloma lahko tudi izognili.[4] Toda, vsaj tako bom zagovarjal, pristna in odporna uklonljivost, ki jo razumemo kot zahteven problem, sega onkraj tega ter vključuje pristne izjeme, ki niso takšne, da bi jih bilo mogoče že ustrezno izrecno vključiti v splošne norme ali pa jih že vnaprej v popolnosti izpostaviti ter bi se jim tako lahko načeloma tudi izognili.[5]

Pojem uklonljivosti za izhodiščno razumevanje pogosto in uporabno povezujejo s pojmom izjeme, posebej z možnostjo prisotnosti izjemnih primerov, tj. primerov, ki po eni strani spadajo pod določeno normo ali pravilo, hkrati pa imajo neželene ali neustrezne normativne posledice, glede na katere jih potem izključimo iz obsega omenjene norme ali pravila. V skladu s takšnim pogledom Brožek trdi, da je »pravilo oblike A => B uklonljivo, če in samo če je možno, da čeprav A obstaja/velja, B ne sledi«.[6] Ideja izjem in izjemnih okoliščin je tako eden izmed znakov uklonljivosti.

Kaj pravzaprav mislimo s tem, ko na primer zatrdimo, da je določena norma, pravilo, sklepanje ali pojem pristno uklonljiv? K začrtanemu začetnemu razumevanju moramo dodati še nekaj dopolnil. Ta dopolnila bom podal v obliki pogojev in prednosti, ki bodo hkrati tudi vodila pri gradnji in vrednotenju teorije uklonljivosti. S tem ne trdim, da mora biti neposredno zadoščeno prav vsem pogojem ali da mora imeti teorija vse prednosti. Druga možnost je, da je teorija uklonljivosti zmožna ustrezno prilagoditi omenjene vidike.

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značaja, konkretni primeri pa so takšni, da jih ni mogoče vselej zaobseči z nekim splošnim določilom. Kjer pa so potrebna splošna določila, ki pa ne morejo vsega povsem pravilno zajeti, se zakon tako prilagodi, da upošteva večino primerov, čeprav se zaveda, da so pri tem možne tudi napake. Vendar zavoljo tega zakon ni nič manj pravilen; zakaj napaka ni v zakonu in tudi ne v zakonodaji, ampak v sami naravi stvari. Takšno je pač obilje tega, kar se v življenju lahko dogodi. Kadar zakon nekaj na splošno določa, v danih okoliščinah pa se zgodi nekaj, kar v splošnem določilu ni predvideno, tedaj je pravilno, da se popravi pomanjkljivost, kjer nas je zakonodajavec pustil na cedilu, tako kot bi jo bil popravil tudi sam zakonodajavec in sprejel ustrezno določilo v svoj zakon, če bi bil navzoč in če bi vedel za ta konkretni primer«. (Aristotel *NE*: 1137a-b).

4 Med drugimi Dworkin zastopa tak optimistični pogled: »Seveda imajo lahko pravila tudi izjeme ... Toda natančna formulacija pravila bi [te izjeme] vzela v račun in vsaka, ki jih ne bi, ne bi bila zaključena. Če je seznam izjem zelo dolg, bi jih bilo preveč okorno ponavljati vsakokrat, ko omenimo pravilo. Vseeno pa ni nobenih teoretičnih razlogov, zakaj jih ne bi mogli dodati pravilu, in več ko dodamo izjem, bolj natančna je formulacija pravila.« Dworkin (1977: 24–25).

5 Ne želim zanikati, da nekateri ne trdijo, da je omenjeni pojav prav to, kar zadeva uklonljivost. Moja razprava je zasnovana v okviru pogledov, ki dopuščajo in dejansko tudi zagovarjajo bolj odporno razumevanje uklonljivosti in pristnih izjem. Prim. Chapman 1998: 448; Celano 2012.

6 Brožek 2014.

(I) Prvič, izjema mora biti »pristna izjema«, kar pomeni, da ne sme biti zgolj posledica začetno slabo formulirane norme.[7] Uklonljivost normam tako ne nastopi zgolj zaradi njihovega nepravilnega, nenatančnega ali nejasnega formuliranja, ki bi lahko načeloma bilo tudi bolj jasno. Model uklonljivosti bi moral dopuščati pristne izjeme, ki jih ne moremo izrecno izpostaviti vnaprej (*pogoj pristnih izjem*).

(II) Drugič, uklonljivih norm ne smemo istovetiti zgolj z nekakšnimi pravili »čez palec«, ki jih lahko uporabljamo večino časa, a smo jih po drugi strani – če je to potrebno – pripravljeni tudi podrobneje opredeliti in jih spremeniti v brezizjemne norme. Če so uklonljive norme povezane zgolj s takšno vrsto pravil, potem ne bi predstavljale posebej zanimivega in težkega vprašanja. Uklonljive norme morajo biti v tem smislu osnovne, polnokrvne norme, na podlagi katerih potem oblikujemo sodbe (*pogoj osnovnosti*).

(III) Tretjič, nabor oz. množica možnih izjem mora biti v načelu odprta, kar pomeni, da ne moremo nikdar izpostaviti prav vseh izjem in na ta način zapreti te množice. Če bi se slednje zgodilo, potem bi te taksativno naštete izjeme lahko vgradili v normo samo in na ta način ne bi bila več uklonljiva (*pogoj odprtosti*).

(IV) Četrtič, uklonljiva norma ostane enaka in ohrani svojo normativno moč tudi v primeru, ko ji najdemo izjemo. V tem smislu »preživi« to izjemo in velja za vse nadaljnje, neizjemne primere. Če bi bili pripravljeni opustiti ali spremeniti norme v primerih, ko najdemo izjemo, potem bi to precej izpraznilo pojem uklonljivosti. Torej mora biti model uklonljivosti tak, da ohranja izvorno normo nedotaknjeno, ko naredimo izjemo. Uklonljiva norma mora preživeti onkraj te točke izjeme in ostati enaka norma kot prej (*pogoj identitete*).

(V) Petič, uklonljiva norma mora biti takšna, da lahko ostane del »normativnega prostora« tudi v primeru izjeme in lahko osvetli bistvo izjemnega primera ali pa posredno vpliva na celostno normativno določitev primera. Uklonljiva norma mora torej biti takšna, da lahko ima moč tudi v primeru izjeme (*pogoj možne pomembnosti*).

(VI) Model uklonljivosti mora biti tak, da uklonljivost sega vse do temeljev normativne domene in vključuje tudi najbolj temeljne norme (*pogoj temeljnosti*).

(VII) In nazadnje, model uklonljivosti naj bi bil takšen, da bi lahko prilagodil tako pravno področje kakor tudi moralnost ter preostala normativna področja, vključno s spoznavno teorijo, estetiko, družbenimi normami in bontonom (zahteva splošnosti). Članek se sicer osredotoča na moralne in pravne norme,

7 Celano (2012: 281) takšne izjeme označi kot »prave oz. resnične izjeme« (v nasprotju z zgolj *prima facie* izjemami) in ta pojem razloži na naslednji način: »Da bi bil primer resnična izjema, mora biti tak, da ga ne moremo že vnaprej zajeti v dostavku 'razen če …' k začetni normi«.

stremi pa k temu, da bi to lahko bil tudi prvi korak k utiranju poti za bolj splošno razpravo, ki pa jo moramo pustiti ob robu za drugo priložnost.

Nekatere izmed teh točk v zvezi z navedenimi pogoji lahko kratko ponazorimo z – zelo verjetno preveč poenostavljenim – primerom domnevno uklonljive moralne norme, ki jo lahko izrazimo kot N: Povzročanje bolečine je moralno napačno. Da bi bila ta norma uklonljiva, mora (i) dovoljevati izjeme, tj. primere povzročanja bolečine, kjer to ni moralno napačno oz. v katerih povzročanje bolečine ne prispeva k moralni napačnosti dejanj (npr. v primeru upravičenega zdravljenja, kjer se bolečini ne da izogniti, ali za bolečino kot del športnih dejavnosti); (ii) te izjeme so pristne izjeme v smislu, da ne gre le za nenatančno oblikovano pravilo čez palec, ki bi nadomeščalo bolj osnovo in natančno normo (npr. N*: Neupravičeno povzročanje bolečine je moralno napačno.«); (iii) nabor možnih izjem je odprt v smislu, da ne moremo drugače preoblikovati izhodiščne norme na način, da bi vključevala vse izjeme (npr. N**: Povzročanje bolečin je moralno napačno, razen v primerih, ko je del upravičenih medicinskih posegov ali športnih dejavnosti.«); (iv) izhodiščna norma mora ostati enaka in mora ohraniti svojo normativno moč tudi v primeru izjeme in bo tako naslednjič, ko se pojavi običajen primer povzročanja bolečine, temu določila tak normativni status; (v) norma N lahko ostane del normativnega prostora in lahko vpliva na našo presojo na posreden način (npr. če imamo na voljo dve enako učinkoviti možnosti za določen medicinski poseg, ki bi obe vključevali bolečino, vendar ena bistveno blažjo, bi bila N še vedno vključena v našo moralno presojo o moralno najboljši izbiri).

Obstaja več modelov uklonljivosti, ki poskušajo zajeti jedro njenih zgoraj izpostavljenih vidikov, povezanih z izjemami (npr. modeli, ki se sklicujejo na pojme nedoločenosti, nejasnosti, odprte teksture itd.). Eden najbolj uveljavljenih je model, ki se osredotoča na vidik normalnosti oz. običajnosti. V nadaljevanju se posvetimo temu modelu in pretresemo, kako nam pomaga razviti razumevanje uklonljivih norm in ali zadosti zgoraj podanim pogojem in zahtevam.

3 UKLONLJIVOST IN NORMALNOST

Eden izmed načinov, kako izpostaviti uklonljivo naravo norme, je, da zatrdimo, da norma velja le v normalnih pogojih oz. v normalnih okoliščinah.[8] Poleg pojma normalnost avtorji mestoma govorijo tudi o »privilegiranih pogojih«, »tipičnih pogojih«[9], o tem, »kar se običajno ali načeloma dogodi«,[10] o

8 Celano 2012: 285–287.

9 Lance in Little 2007; 2008.

10 Celano 2012: 284.

»paradigmatskih«[11] ali osrednjih primerih. Jedrna ideja je pri teh predlogih enaka – posamezna norma je takšna, da velja le za niz normalnih okoliščin, ki pa so takšne, da jih ne moremo izrecno določiti in v celoti vključiti v normo samo. Takšen predlog se zdi skladen z opisanim odnosom med uklonljivimi normami in pristnimi izjemami, saj so izjeme ravno tisti primeri, ki izpadejo iz obsega normalnih pogojev.

V nadaljevanju se ožje osredotočimo na dva konkretna modela uklonljivih norm, ki se sklicujeta na takšen pogoj normalnosti. Prvi je model Bruna Celana, ki sicer meri na norme na splošno, a izvira iz razprave o pravni uklonljivosti. Drugi model je predlog Marka Lancea in Margaret Little, ki sta ga prvenstveno oblikovala za moralne norme, vendar ga lahko posplošimo tudi na preostale norme. Modela sta skladna med seboj in Celano posebej poudari tudi, da je zadnji model dopolnitev njegovega predloga.

Celano predstavi svoj model kot del zagovora omejenega partikularizma[12] glede norm. Ta zagovor začne s premisleki o možnih strategijah odziva na primere norm, ki so med seboj v konfliktu, zato moramo pri tem narediti izjemo vsaj glede ene izmed vpletenih norm. Najprej zavrne t. i. specifikacijski pristop; ta predlaga, da vsakič, ko si pravne norme nasprotujejo, je vse, »kar moramo storiti, to, da specificiramo (tj. ustrezno omejimo domeno rabe) vsaj eno izmed vpletenih norm, tako da bo – na način vključitve dodatnih pogojev v njen prorek oz. antecedens – to nasprotje ali pa neustrezen zaključek na koncu koncev izginil«.[13] Zdi se, da na ta način bogatimo, dodelamo, izpilimo, omejimo ali zajamemo prefinjenost prvotne norme ter jo tako razumemo kot uklonljivo. Toda prava težava je že v predpostavki, da gre še vedno za isto, začetno normo tudi po tem, ko prepoznamo vse te izjeme in dopolnitve. Nadaljnja težava je nevarnost, da nikoli ne bomo mogli določiti prav vseh izjem.

11 Celano 2012: 286.

12 Za bralce, ki razprave med generalizmom in partikularizmom ne poznajo podrobneje, je tukaj kratek povzetek poglavitnih idej in pojmov. Partikularizem za izbrano normativno področje, npr. moralnost, je pogled, ki zavrača načela, norme in pravila. Tako ga lahko povezujemo s preprosto tezo, da ni nobenih moralnih pravil, ali pa z bolj pretanjeno tezo, da sama »možnost moralne misli in presoje ni odvisna od zagotovitve ustreznega nabora moralnih načel« (Dancy 2004: 73). Moralna misel ne sestoji iz uporabe moralnih načel na primerih in moralne osebe ne povezujemo nujno z načelnostjo. Nasproten pogled je generalizem, ki trdi, da moralni status dejanja določa moralno načelo ali pravilo. Vzporedno s to razpravo nahajamo razliko med atomizmom in holizmom (tudi kontekstualizem) glede razlogov. Atomizem razlogov trdi, da razlogi niso občutljivi za kontekst, kar pomeni, da vedno delujejo na enak način (govorijo v prid ali proti dejanju). Holizem po drugi strani trdi, da so razlogi občutljivi za kontekst in lahko spreminjajo svojo pomembnost in moč ter se nadalje spajajo z drugimi razlogi na način, ki presega golo seštevanje (npr. dva razloga, ki vsak zase govorita v prid določenemu dejanju, a lahko – ko sta prisotna skupaj – pomenita razlog proti dejanju). Omenjeni pogledi so običajno združeni v dveh zavojih, atomizem z generalizmom in holizem s partikularizmom.

13 Celano 2012: 270.

»Da bi dosegli v celoti specificirano, celostno normo in s tem izključili možnost kakršnih koli nadaljnjih, neopredeljenih izjem (poleg tistih, ki smo jih že vgradili v normo samo), bi od nas zahtevalo, da smo zmožni sestaviti seznam vseh morebitnih pomembnih lastnosti te vrste. To pa je, kot smo videli, zgolj naša zmotna predstava«.[14]

Celano prav tako zavrne podoben pristop k uklonljivosti norm, ki izjeme razume kot že implicitno vsebovane v sami normi. Dana izhodiščna norma je tako zgolj neke vrste bližnjica za bolj zamotano normo, ki je v njenem ozadju in ki jo – če je treba – lahko izpostavimo. Toda tudi temu predlogu spodleti zaradi podobnih razlogov, kajti izjem ne razume kot pristnih izjem, kot pravih »lukenj« v sami normi, ampak zgolj kot nekakšne *prima facie* izjeme, ki dovoljujejo zapolnitev lukenj v normi.

Celano trdi, da moramo zato sprejeti partikularizem določene vrste, da bi lahko prilagodili možnost konflikta med normami, in pristnih izjem. V skladu s tem predlaga razumevanje norm kot uklonljivih pogojnikov, ki jih dopolnimo s »pogojem normalnosti«. Razlog, zakaj je to stališče opredeljeno kot zmerni partikularizem – v nasprotju s skrajnim partikularizmom –, je v t. i. težavi normativne splošnosti. Glavna ideja je v tem, da skrajni partikularizem ne zmore prilagoditi ali pojasniti misli, da so nekateri premisleki bolj osrednji kot pa drugi, v smislu, da nekatere razloge razumemo kot bolj običajno pomembne in osrednje kot pa druge.[15] Pogoj normalnosti naj bi tako opravljal dvojno delo, tj. dovoljeval možnost pristnih izjem, hkrati pa zagotavljal določene vrste »osnovnih vzorcev« za normativno področje. Tukaj je jedro Celanovega predloga:

Norme so uklonljivi pogojniki, ki so lahko podvrženi pristnim izjemam, tj. pogojniki, iz katerih ob izpolnjenem proreku posledice sledijo zgolj v normalnih okoliščinah.

14 Celano 2012: 276.

15 Izziv »moralne splošnosti« je izpostavilo več avtorjev (McNaughton in Rawling 2000: 273; Crisp 2000: 36; Bakhurst 2000: 167; McKeever in Ridge 2006: 4; Celano 2012: 283) in ga lahko povzamemo na naslednji način. Glede na holizem razlogov je množica moralno pomembnih značilnosti dejanj načeloma odprta, tako da je lahko moralno pomembna katerakoli značilnost dejanja in pomeni razlog za dejanje ali proti njemu. Nadalje, glede na tezo partikularizma te množice ne moremo zajeti v nabor splošnih načel. Zakaj se potem moralnost vseeno zdi tako urejena? Zakaj menimo, da so moralno osrednje značilnosti povezane npr. s povzročanjem bolečine in trpljenjem, iskrenostjo, poštenostjo, držanjem obljub, dobrotnostjo, dostojanstvom itd.? Vse, kar lahko partikularizem odgovori, je to, da so nekatere značilnosti pač pomembne pogosteje kot druge, in tako ne zmore ujeti te zamisli »osrednjosti« za moralnost. Zato je moralna pokrajina splošćena. Da bi se lahko izvil iz te zanke, mora partikularizem ponuditi »neki način, da lahko razlikujemo med značilnostmi, ki običajno in redno pomenijo razloge določene usmerjenosti (npr. bolečina), in drugimi, ki običajno in redno ne pomenijo razlogov (npr. barva vezalk). Kajti brez takšnega razlikovanja partikularizem splošči moralno pokrajino na način, da predlaga, da so vse te značilnosti – če lahko pomenijo razloge – na isti ravni.« (McKeever in Ridge 2006: 45). Osrednjo težavo lahko povzamemo na naslednji način. Zahteve moralne nesploščenosti: vsaka moralna teorija mora na neki način prilagoditi dejstvo, da so nekatere značilnosti naših dejanj moralno bolj osrednje kot druge. Dancy kot zagovornik partikularizma na ta izziv poda odgovor tako, da predlaga uvedbo pojma privzetega (cf. Dancy 2000: 137; Dancy 2004: 112–113).

> Osrednje vprašanje je seveda, kako lahko razumemo to omejitev 'normalno' (normalne okoliščine ipd.). Zdi se, da v tem primeru normalnost vključuje (ni pa nujno omejena zgolj na to), kar drži 'v večini primerov'.[16]

Celano se zaveda, da takšen predlog vzbuja tudi številne pomisleke, ampak pušča ta vprašanja odprta in se hkrati sklicuje tudi na model Lancea in Littlove za več podrobnosti takšnega modela normalnosti.

Zdaj se bomo posvetili temu modelu, ki se sicer prvenstveno osredotoča na moralne norme in načela, lahko pa te premisleke podamo tudi za norme na splošno. Lance in Littlova pozornost najprej namenita delovanju razlogov, posebej spremenljivosti moralnih razlogov. Hkrati vpeljeta pojem privilegiranih pogojev, v katerih se določen razlog »obnaša normalno«, v nasprotju s pogoji, ki niso privilegirani in v katerih lahko spreminja svojo pomembnost.[17] Ta model je tako zavezan globokemu moralnemu kontekstualizmu, tj. stališču, da se značilnosti dejanj, glede na katere jih lahko označujemo kot moralno pravilna ali napačna, dobra ali slaba, s kontekstom spreminjajo na način, ki ga ni mogoče z upraviljenjem zajeti v nabor brezizjemnih načel. Vendar takšno pripoznanje izjem k moralnim splošnostim še ne pomeni, da moramo sprejeti tudi podobo moralnosti kot povsem prosto kakršnihkoli splošnosti. Globoko zarezana vrzel med generalizmom in partikularizmom je posledica preveč strogega in ozkega pogleda na naravo razlage. Glede na takšen pogled morajo biti pristnorazlagalni razlogi takšni, da jih obvladujejo obča brezizjemna načela.

Zato ponudita drugačen model razlage, ki vključuje uklonljive norme in izjeme in ki ga lahko razumemo tudi izven področja moralnosti. Npr. značilnosti dejanja, kot so držanje obljub, laganje, povzročanje bolečine ali prijaznost, so temeljni gradniki običajne moralnosti, ki so intimno povezane z njihovo moralno pomembnostjo (kot temeljni moralni razlogi so v vlogi razploščitve pokrajine moralne normativnosti). Hkrati so to pristno razlagalne značilnosti moralnega statusa dejanj, ki jih lahko zajamemo v uklonljive splošnosti. Uklonljive norme, npr. »Laž je uklonljivo moralno napačna (oz. Uklonljivo, laž je moralno napačna)« ali »Povzročanje bolečine je uklonljivo moralno napačno«, lahko vpeljemo prek pojma privilegiranih pogojev. Bolj splošna oblika takšnih načel je tako naslednja:

> »Uklonljivo in za vsa dejanja x, če je dejanje x A, potem je x moralno napačen oz. ne smemo storiti x.«
>
> ali
>
> »V privilegiranih pogojih in za vsa dejanja x: če je dejanje x A, potem je x moralno napačno oz. ne smemo storiti x.«

16 Celano 2012: 285.

17 Takšen model predstavita in zagovarjata v nizu člankov (Lance in Little 2005; 2006; 2007; 2008).

Ta model tako zatrjuje, da so izbrane značilnosti dejanj takšne, da so tesno povezane z njihovim moralnim prispevkom, in so tudi pristno razlagalne za moralni status dejanj, čeprav so dovoljene izjeme.[18] Če želimo izpostaviti povezavo med določeno opisno značilnostjo dejanj, kot je npr. povzročanje bolečine, in negativnim moralnim prispevkom te značilnosti, ki ni niti nujno obči niti prevladujoč ali celo običajen, potem lahko to zatrdimo na način, da je povzročanje bolečine uklonljivo takšno, da prispeva k moralni napačnosti dejanja.

Ko se uklonljiva splošnost sreča z izjemo, se je nekaj pomembnega spremenilo, tj. kontekst se je odmaknil od privilegiranih pogojev in naše moralno razumevanje mora slediti tem spremembam. Govorimo lahko o več vrstah takšnih uklonljivih sprememb, kot npr. paradigma/odklon, upravičenjska odvisnost, zglednost/približek.[19] Moralno razumevanje je tako razumevanje privilegiranosti in izjem. Najprej moramo razumeti to, kako je značilnost povezana s privilegiranimi pogoji oz. kakšna je njena narava v takih pogojih in kakšna je nato v primeru izjeme, kakšna je povezava med prvim in drugim kontekstom, kakšne prilagoditve so potrebne in kakšni odkloni so sprejemljivi.[20]

Zdi se, da nam takšen model uklonljivosti ponuja to, kar iščemo, tj. model norm, ki dovoljujejo pristne izjeme in hkrati razploščijo normativno pokrajino. V nadaljevanju pa bomo opisali izziv za ta model. Temu modelu uklonljivih norm bodisi ne uspe razploščiti normativne pokrajine bodisi je pri tem sicer uspešen, ampak zgolj na način, ki predpostavlja bolj temeljne in zelo verjetno neuklonljive norme. Tu se prvi veji dileme ne bomo posvečali, naj omenimo le, da so bili podani prepričljivi argumenti v njeno podporo.[21] Želimo izhodiščno

18 Podobno velja tudi za druga področja. Npr. nemoralna splošnost »Ribje ikre se razvijejo v ribe« je uklonljiva splošnost. Ne gre za to, da bi se večina ribjih iker razvila v ribe (pravzaprav je res ravno nasprotno, saj jih večina postane hrana drugih živali). V tej splošnosti je zajeto nekaj drugega in brati jo moramo kot »Uklonljivo, ribje ikre se razvijejo v ribe« ali »V privilegiranih pogojih se ribje ikre razvijejo v ribe«, pri čemer so privilegirani pogoji opredeljeni kot pogoji, ki so še posebej pomenljivi glede narave same stvari (ribjih iker) in širšega odseka stvarnosti, kamor stvar umeščamo (Lance in Little 2008: 62).

19 So primeri, v katerih uklonljive splošnosti sledijo paradigmatskim primerom, ki so v tem smislu privilegirani, kot je to v primeru »Uklonljivo so stoli namenjeni sedenju«, in kot odklon od te osrednje teme lahko razumemo okrasne stole. Moralni primer je primer bolečine kot uklonljivo slabe, vendar ne v primeru športnega dosežka. V drugih primerih se lahko upremo na razlagalno odvisnost med privilegiranimi in neprivilegiranimi pogoji, v smislu, da se moramo sklicevati na privilegirane primere, da bi lahko razložili in razumeli, kaj se dogaja v neprivilegiranih primerih (npr. laž in laž v primeru igre Lažnivec ter užitek in sadistični užitek). In nazadnje, lahko gre za odnos med vzornostjo in približkom, kot je to v primeru idealnega plina in zakona $pv = nrt$ ter dejanskega obnašanja realnih plinov, ali v primeru, da v kraljestvu ciljev (polna informiranost, pristna avtonomija, temeljno zaupanje) ljudem dolgujemo resnico (Lance in Little 2008: 64–73).

20 Lance in Little 2008: 64–68.

21 Sean McKeever in Michael Ridge predstavita več prepričljivih argumentov v tem smeri (McKeever in Ridge 2006: 60–72). Najprej, razloge, ki jih lahko zajamemo v uklonljive splošnosti, poimenujeta paradigmatični razlogi in preostale razloge neparadigmatični razlogi.

dopustiti, da temu modelu uspe razploščiti normativno pokrajino, tj. zarisati razliko med temeljnimi in obrobnimi razlogi ter da najti zadosti takšnih uklonljivih norm, ki tvorijo osnovne normativne gradnike.

Toda zdi se, da mu to uspe zgolj na način, da to razlikovanje zvede na razlikovanje med temeljnimi in izpeljanimi razlogi ter tako omeji uklonljivost na raven norm oz. aksiomov srednje ravni. Podrobneje, predlagani model se pretvori v model, glede na katerega določena značilnost skupaj z normalnimi (privilegiranimi) pogoji zameji določen temeljni in dozdevno nespremenljiv razlog ter se s tem sklicuje na bolj osnovno normo, ki ima razlagalno moč in se nanjo sklicujejo tudi normalni (privilegirani) pogoji. Npr. ni zgolj laganje oz. govorjenje neresnice to, kar je normativno osrednje s stališča moralnosti, ampak so to iskrenost, poštenost in prevara. Vmesni sklep je tako, da modelu uklonljivih norm, utemeljenem na normalnosti, uspe razložiti oz. upravičiti izjemo k prvotni normi zgolj na način, da se sklicuje na določeno nadaljnjo normo. Če pobližje pogledamo primere, ki jih podata Lance in Littlova, se nam ta pogled potrdi.

Npr. v povezavi z lažjo kot uklonljivo, v normalnih pogojih moralno napačno, se ta model sklicuje na primere, v katerih laž ni moralno napačna oz. prispeva k moralni napačnosti dejanja. Med drugim gre za primere laganja v igri Lažnivec ali ko nas nacistični zločinec ustrahuje, da mu izdamo, kje je njegova naslednja žrtev. Vendar lahko te primere razumemo le tako, da opravijo veliko normativnega in razlagalnega dela v povezavi s tem, zakaj je laž moralno napačna v normalnem primeru, ne pa v omenjenih. Tako je zato, ker je prostor privilegiranih pogojev tak, da ga oblikujejo bolj temeljni moralni premisleki, kot so pristanek, zvestoba, pravičnost, iskrenost in podobno. In tako je ta večji kos, ki vključuje nespremenljive moralne razloga in norme, tisti, ki nastopa v razlaga moralnega statusa določene značilnosti in s tem tudi celotnega dejanja.

Argument predpostavlja, da je najboljši način razumevanja te razlike razlaga prek razlagalne asimetrije, ki jo uporabita tudi Littlova in Lance. Primeri, ki stojijo zunaj privilegiranih pogojev, so razlagalno odvisni od tega, kako določena značilnost deluje v okviru pogojev, ko so ti privilegirani. V nasprotni smeri ni takšne odvisnosti. Npr. bolečina je običajno razlog proti dejanju, vendar ne, ko je del športnega izziva in dosežka, ko zaobrne polarnost (Lance in Little 2006: 319). Najprej moramo razumeti, kako je običajno bolečina nekaj slabega, da lahko razumemo, kako deluje v primeru športnega dosežka, ne pa tudi obratno. Zdi se, da je tako ta model uspešen le za primere, ki imajo določeno valenco v privilegiranih pogojih ter nasprotno valenco v neprivilegiranih, ne pa tudi za razloge, ki jim včasih valenca sploh umanjka. »Kajti potem bo res za vse premisleke, katerih status je kdaj lahko uklonjen, da lahko ustrezno razumemo, zakaj niso razlog tu, le tako, da razumemo, zakaj in kako so razlog drugje. Kajti, da bi razumeli, zakaj nekaj ni F tukaj, moramo v splošnem imeti dojem tega, kako je lahko – če sploh – F drugje. Če je to dovolj, da nekaj štejemo kot primer asimetričnega razloga, potem se vsak premislek, katerega status je lahko kdaj uklonjen, šteje kot primer asimetričnega razloga, in to dela razlikovanje precej manj zanimivo, kot se je obetalo na začetku.« (McKeever in Ridge 2007: 67). Nadalje, zdi se, da so nekateri jedrni razlogi lahko neparadigmatični, na drugi strani pa tudi, da ni nujno, da so vsi obrobni razlogi neparadigmatični.

Tu se zdaj zastavi vprašanje o uklonljivosti ter temeljnih moralnih premislekih, ki se nahajajo v ozadju.

Če nekaj omenjenih primerov pogledamo še pobližje, se ta pomislek jasno razkrije. V primeru laganja ta model trdi, da »namerno izrekanje neresnice« ni napačno, »ko to storimo nacističnim zločincem, katerim *resnice ne dolgujemo*«,[22] ali pa ni moralno napačno v zvezi z osebo, »ki ni *vredna resnice*«, kajti »del tega, kaj pomeni pripoznati nekoga kot osebo […] pomeni pripoznavati jo kot nekoga, ki uklonljivo ima *zahtevo, da smo do nje iskreni*. Situacije, v katerih nekoga pripoznavamo kot osebo, ampak kot takšno, da ni *vredna iskrenosti*, so v svojem bistvu odkloni od prepoznavne teme osebe.«[23]

Tako lahko za te primere smiselno rečemo, da je to, kar dejansko igra vlogo razloga, sestav določenih značilnosti dejanj in privilegiranih pogojev, ki pa se nadalje sklicujejo na bolj temeljne razloge in dozdevno neuklonljive norme. Torej na to, ali so te norme, ki razlagajo in upravičujejo izjeme k prvotnim normam, tudi same uklonljive. Seveda se mora sklicevanje na norme na eni točki ustaviti in preostalo delo opravi naša presoja. Toda model uklonljivosti, ki gradi na normalnosti, mora ponuditi dodatne razloge oz. argumente, da so tudi te temeljne norme uklonljive in da tudi te sledijo enakemu modelu uklonljivosti, torej da lahko tudi njihovo uklonljivost razložimo in utemeljimo s sklicevanjem na normalne pogoje.

Lance in Littlova vnaprej predvidita naš zgornji ugovor. Njun odgovor je, da nam takšen dvig na višjo raven splošnosti (npr. od laganja kot izrekanja neresnice do iskrenosti ali od povzročanja bolečine do krutosti) dozdevno zagotovi nekoliko trdnejše temelje, kar zadeva nespremenljivost in neuklonljivost razlogov in norm. Njun odziv je dvojen; (i) s tem korakom dviga na višjo raven izgubimo nekaj pomembnega, in sicer tesno povezanost med npr. laganjem in moralno napačnostjo v smislu, da je »biti laž« poglaviten razlog, zakaj je dejanje napačno; (ii) tudi ta višja, bolj debela raven normativnega področja je takšna, da je polna izjem, ki jih razkrivajo izjave, kot sta »tako zelo dobro boli« ali »včasih moraš biti krut, da si prijazen«. Tako tudi domnevno neuklonljivi premisleki, kot sta krutost ali iskrenost, niso nespremenljivi razlogi in ji lahko zajamemo zgolj v uklonljive norme.

Prva točka je ključna za vse poskuse združevanja spremenljivosti in moralnih splošnosti, saj nas morajo prepričati, da je to, kar igra vlogo razloga v določenem primeru, zares spremenljivo in da vse drugo, na kar se morebitno moralno načelo nanaša, ni del tega razloga. Glede tesne povezave med izbranim preprostim moralnim razlogom in moralno pravilnostjo ter napačnostjo dejanj se moramo vprašati, kaj opravlja razlagalno delo. Morda se resda pogosto sklicujemo na značilnosti, kot sta »laganje« ali »držanje obljube«, kot razloge, toda

22 Little 2001: 34 (poudarek V. S.).

23 Lance in Little 2007: 153 (poudarek V. S.).

če so privilegirani pogoji takšni, da kot premisleke vsebujejo stvari, kot so poštenost, iskrenost in zvestoba, potem se lahko vprašamo po njihovi vlogi. Ko se privilegirani pogoji spremenijo v neprivilegirane, so prav to tisti premisleki, na katere se sklicujemo v naši razlagi, zakaj je primer odklonski ali popačen glede na običajnega. In nadalje se zdi, da ti premisleki ne igrajo zgolj vloge omogočevalcev ali onemogočevalcev prvotnega razloga, ampak se nanje sklicujemo kot na same razloge.

Glede druge točke; večino takšnega govora moramo razumeti metaforično. Če moramo ob priložnosti »biti kruti, da bi bili prijazni«, v tem primeru zelo verjetno krutost ni tista, ki stori dejanje prijazno ali moralno pravilno. Zamislimo si nekoliko bolj določen primer. Npr. prijateljici moram podati iskreno mnenje o njenem projektu ali dejavnosti in vem, da bo to moje mnenje zanjo boleče, ampak da ji bo hkrati dolgoročno tudi prihranilo številna razočaranja in težave. V tem smislu bom do nje krut oz. kruto iskren, vendar je to hkrati edini način, da jo od tega odvrnem oz. prepričam, da opusti načrte, ki zanjo ne bodo prinesli nič dobrega, ter jih prihranim razočaranje in bolečine. Prav v tem smislu lahko rečemo, da »moram biti krut, da bi bil prijazen«. Kljub temu pa »krutost«, ki je tukaj vključena, ni razlog, ki prispeva k moralni pravilnosti mojega dejanja. Če bi bil hkrati na voljo tudi drug, nekrut oz. zgolj prijazen način, da jo prepričam v isto, potem bi bilo pravzaprav moralno napačno, celo grozljivo, če bi izbral prvi način. Zdi se, da nikoli ne moremo biti kruti samo zato, da bi bili kruti, in bi bilo to moralno sprejemljivo. Še drug način, kako se odzvati na zgornji primer, pa je ta, da takšnih dejanj sploh na razumemo kot primere krutosti. Enako tudi za »tako zelo dobro boli« in druge podobne primere, ki jih navedeta Lance in Littlova.

Vse to ta predlog razumevanja uklonljivosti v okvirih normalnosti zvede na točko, kjer se zdi, da mora tak model sprejeti vsaj nekatere temeljne, neuklonljive norme. Glede na zgornje primere lahko sklenemo, da pristop »normalnosti« ne sega vse do temeljev normativne domene. Na koncu se izkaže, da so vsaj nekatere temeljne, nespremenljive in neuklonljive norme, ki delujejo v ozadju normativnega področja in označujejo mejo med normalnimi okoliščinami oz. privilegiranimi pogoji na eni strani ter izjemnimi in neprivilegiranimi na drugi. Na ta način ne zadosti pogojema temeljnosti in osnovnosti.[24]

24 V razpravi sem se prvenstveno osredotočil na moralne norme, ampak podobno velja tudi za pravne norme. Eno izmed rešitev takšne zagate je predlagal Guastini (2012). V okviru te rešitve so uklonljivosti in vrednostne praznine tesno povezane z vrednostnimi sodbami razlagalca norm. Nadalje, uklonljivost ni posebna značilnost pravnih načel ali norm; ni objektivna lastnost teh norm, ampak se vzpostavi šele z razlago. Vrednostne sodbe razlagalcev tako niso posledica določene objektivne uklonljivosti norme same ali pa pristne normativne vrzeli, ki bi bila neodvisna od razlage, ampak so izvor oz. vzrok razlagalne uklonljivosti. Ta navsezadnje vsebuje določene temeljne, neuklonljive razloge in norme, kot je npr. pravičnost. Prim. Strahovnik 2012; 2013.

4 UKLONLJIVE NORME IN PLURALIZEM

Modeli uklonljivosti, kot so jih razvili npr. Celano, Tur[25] ter Lance in Little, so zanimivi, vendar se kot njihova omejitev razkrije to, da uklonljive norme razumejo na normativnem ozadju temeljnih razlogov, na katere se sklicujemo, ko presojamo o določenem primeru oz. o razlagi določene norme in normalnosti pogojev. Zdi se, da se mora takšen model ne glede na to, kako določimo uklonljive strukture uklonljivih norm, sklicevati na določeno širšo množico temeljnih (pravnih, moralnih ...) premislekov, povezanih z normami, ki so v ozadju in osvetljujejo izjeme. Uklonljivost, ki temelji na normalnosti, je tako omejena na površinske norme ali na norme na srednji ravni. V § 2 smo predstavili nabor pogojev in prednosti, ki jim mora zadostiti model pristne uklonljivosti. Nato smo predstavili model, ki temelji na pojmu normalnosti, ter pokazali, da ne more zadostiti nekaterim izmed njih in da v njegovem okviru uklonljivost ne sega do samega dna normativnih področij in ne vključuje najbolj temeljnih norm.

Eden izmed naukov na podlagi tega je lahko, da model uklonljivosti začnemo razvijati tako, da izrecno vključuje sklicevanje na širšo množico vrednostnega ali normativnega ozadja s temeljnimi normativnimi premisleki. Za področje moralne normativnosti takšen model pomeni moralni pluralizem, ki ga lahko razumemo na naslednji način. Tradicionalni moralni pluralizem[26] gradi na temeljnih moralnih razlogih, ki jih lahko zajamemo v splošne, neuklonljive norme, npr. v načela, ki opredeljujejo *prima facie* dolžnosti. Te skupaj z moralno pomembnimi značilnostmi izbrane situacije določajo moralni status dejanja. Ob tem so za končno določitev naše dejanske dolžnosti seveda pomembni pozoren premislek in tehtanje razlogov ter videnje, kako se ujemajo (sodba).

Številne razprave se ukvarjajo z vprašanjem, kako ustrezno razumeti pojem *prima facie* dolžnosti, ki ga je predlagal W. D. Ross, in kako razumemo odnos med *prima facie* in dejansko dolžnostjo. Ena bolj prepričljivih razlag se opira na pojem temeljnega moralnega razloga in uporabili jo bomo tudi tukaj. Glede na takšno razumevanje *prima facie* dolžnosti (Rossov seznam takšnih dolžnosti vključuje zvestobo, hvaležnost, popravo, dobrotnost oz. blagohotnost, pravičnost, neškodovanje in samoizboljšanje) jih razumemo kot temeljne moralne razloge oz. premisleke, ki so vedno moralno pomembni in govorijo v prid ali proti dejanju. Glede na njihov širok moralni opis se zdijo neuklonljive. Poleg tega temeljnega seznama je Ross vpeljal tudi t. i. izpeljane ali sestavljene *prima facie* dolžnosti. Naš predlog gre v smeri, da lahko te izpeljane *prima facie* dolžnosti razumemo kot te, ki pomenijo uklonljive razloge in so tako kandidati za uklonljive norme na srednji ravni, ki jih pogosto uporabljamo v naši moralni

25 Tur 2001.

26 Ross 1930; 1939.

misli. Poglejmo si primer. Ross je trdil, da je dolžnost spoštovani zakone države izpeljana dolžnost, ki sestoji iz ene ali več temeljnih *prima facie* dolžnosti, v tem primeru iz *prima facie* dolžnosti hvaležnosti za dobra, ki jih prejmemo od države, *prima facie* dolžnosti zvestobe, ki izhaja iz neizrecne zaveze glede skupnega življenja z drugimi v državi in skupnih pravil, ter *prima facie* dolžnosti dobrotnosti, saj spoštovanje zakonov prispeva k skupnemu dobru.[27] Podobno velja za *prima facie* dolžnosti, da ne lažemo ali da držimo svoje obljube. Obe temeljita na temeljni *prima facie* dolžnosti zvestobe. Ross takšne izpeljane *prima facie* dolžnosti opredeli tudi kot *media axiomata*, ki so uporaben način, kako splošne moralne norme temeljnih *prima facie* dolžnosti uporabimo v konkretnih primerih.[28] Tako smo zdaj zarisali model uklonljivih norm, ki izrecno pripoznava normativno ozadje, sestavljeno iz temeljnih, neuklonljivih norm. Pri tem pa ne trdimo, da si te temeljne norme ne morejo nasprotovati (pripoznanje, da lahko najdemo konflikt med temeljnimi normami, ki ga ne moremo razrešiti s sklicevanjem na kakšno nadaljnjo, metanormo, je eden izmed stebrov pluralizma) in da moramo dopustiti tudi izjeme glede temeljnih *prima facie* dolžnosti, toda v tem primeru so izjeme povezane s tem, da ni nujno, da temeljna *prima facie* dolžnost določa tudi našo končno, dejansko dolžnost.

Ta model je torej podoben pristopom, ki temeljijo na normalnosti in ki smo jih obravnavali zgoraj, vendar se od njih razlikuje po tem, da izrecno priznava temeljne, neuklonljive norme in izrecno omejuje uklonljivost na temelju normalnosti na norme na srednji ravni normativnih področij. Eden izmed možnih pogledov na zgornje argumente je tako, da je njihov namen zvesti modele normalnosti na bolj splošen pluralistični pristop, pri čemer pa opustijo tezo, da je uklonljivost značilnost temeljnih norm in da v okviru tega modela ne potrebujemo nobene predpostavke neuklonljivih norm.

V splošnem lahko tako razločimo dva temeljno različna pogleda na možnost upraviljenja določenega normativnega področja, in sicer ne eni strani generalizem, ki združuje upraviljenje in deduktivni model normativne misli, ter na drugi strani partikularizem, ki zavrača možnost (celostnega) upraviljenja polja normativnosti. Pluralistični pristop se nahaja v vmesnem območju.

V njegovem okviru lahko modele uklonljivosti, ki temeljijo na normalnosti, razumemo kot posledico pluralistične normativne strukture in norm v tej strukturi, prav tako pa ga razumemo kot v odnosu do neuklonljivega normativnega in vrednostnega ozadja, ki je povezano z posameznimi sodbami.

27 Ross 1930: 27–28.

28 Ross 1939: 190.

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Pierluigi Chiassoni*

Legal interpretation without truth

The paper purports to provide an analytical treatment of the truth and legal interpretation issue. In the first part, it lays down a conceptual apparatus meant to capture the main aspects of the legal interpretation phenomenon, with particular attention paid to the several kinds of linguistic outputs (interpretive sentences in a broad sense) resulting from interpretive activities (in a broad sense). In the second part, it recalls three different notions of truth (empirical truth, pragmatic truth, and systemic truth), focussing, so far as systemic truth is concerned, on the difference between deductive and rhetorical normative systems. In the third, and last, part, it shows in which ways the phenomenon of legal interpretation encompasses truth-apt entities, leaving the choice between austere and liberal alethic pluralism to the reader. A few, final remarks address the formalism/scepticism problem.

Keywords: legal interpretation, truth, interpretive sentence, interpretive formalism, interpretive scepticism

1 THE HAUNTING PROBLEM

My aim in this paper is to provide an exploration—in every respect, a very tentative one—of the connections between legal interpretation and truth. The problem I wish to deal with, a problem that haunts so much work in the field, can be conveyed, roughly speaking, by the following question: Has truth anything to do with legal interpretation? Or, perhaps in more precise terms: Is there any room for truth in legal interpretation, and, if so, where is it?

It goes without saying that any fruitful attempt to deal with this problem requires a careful clarification of the key terms of the inquiry. As a consequence, my paper will be divided into three parts. The first part will be devoted to working out a network of concepts capable of capturing the several aspects of the complex social phenomenon that is usually referred to by the phrase "legal interpretation" in its broadest meaning (§ 2). The second part will identify a few notions of truth that seem suitable to be employed in relation to legal interpretation (§ 3). The third, and last, part, profiting from the conceptual frameworks laid down in the two previous parts, will come to a few conclusions, in my view not totally inaccurate, if only for understanding's sake, about the problem of truth in legal interpretation (§ 4).[1]

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1 On this issue, see, e.g., Patterson 1996, Diciotti 1999, and Sucar 2008.

2 A CONCEPTUAL FRAMEWORK FOR LEGAL INTERPRETATION

Whatever we mean by the phrase legal interpretation, the process-outcome ambiguity of the word interpretation makes it necessary to draw a basic distinction, namely, between legal interpretation as an activity performed by an individual interpreter at a certain time and place (interpretation activity), on the one side, and legal interpretation as the outcome, product, or output of a corresponding interpretation activity (interpretation outcome), on the other.[2]

To be sure, the distinction may look like a piece of utter triviality. Nonetheless, it is worthwhile making it. Indeed, it suggests a few, in my view not wholly idle, considerations.

(1) Whenever we enquire into the place of truth in the field of legal interpretation, it is reasonable to maintain that the predicate "true," when used as a tool of qualification (that is to say, as a qualification adjective, not as a classificatory one), can be properly applied to ("fits") interpretation outcomes, while it does not apply to interpretation activities.[3] More precisely, it is reasonable to hold that "true" is a predicate appropriate to interpretation outcomes conceived as discourse entities, namely, to certain sentences that are typically written down in legal documents, such as juristic essays, judicial opinions, and documents provided by attornies in a trial.

(2) Provided the predicate "true," as a qualification device, applies to interpretation outcomes as discourse entities, it must be recalled that, from the standpoint of the linguistic uses of jurists and legal philosophers, there are different, and even heterogeneous, kinds of interpretation activity and, accordingly, of interpretation outcomes. I think that, on the whole, juristic usages can be accurately captured by singling out three kinds of "interpretation activities," namely, (a) interpretation activities in a proper sense and practically oriented (fulfilling a practical function); (b) interpretation activities in a proper sense and theoretically oriented (fulfilling a theoretical or cognitive function); and (c) interpretation activities in an improper sense.

2 This distinction is a key point in Giovanni Tarello's theory of legal interpretation. See Tarello 1980: 39-42. See also Guastini 2011: 149ff.

3 Consider the difference between saying "X is true interpretation," "X is a true piece of interpretation," "X is truly interpretation" (classificatory use of "true"), on the one hand, and saying, instead, "Interpretation X is true" (qualifying use of "true"). In the former uses, *true* is tantamount to "genuine," "authentic," "real." In the second use, something that is "true" is something that is "correct" according to some presupposed standards of correctness. This point I will come back to in § 2.

2.1 Practically oriented interpretation in a proper sense

The activities of "legal interpretation" of this kind can be regarded as activities of interpretation in a proper sense for the following reason. As we shall see in a moment, the agents who perform them can properly be said to be "interpreting the law." Furthermore, they are practically oriented, because such interpreting is immediately aimed at solving some practical *quid iuris* problem of "what is the law that applies to this issue?" They accordingly belong in the sphere of practical (ethical) commitments and decision-making.

There are, in my view, two varieties of such activities. These are the activities of textual interpretation and meta-textual interpretation.

2.1.1 Textual interpretation

Textual interpretation consists in translating authoritative legal texts ("legal provisions," "legal norms" in a preinterpretive sense, or "rule-formulations," like constitutional or statutory clauses) into legal norms, or, more precisely, into explicit legal norms. The outcomes of textual interpretation activities are interpretive sentences. These are sentences of the standard form

(IS1) "Legal provision Y expresses norm N1",

(IS2) "Legal provision Y means N1", or

(IS3) "The meaning-content of provision Y is N1"

or sentences in the less elliptical, more precise form

(IS4) "According to the (all things considered) correct interpretive code IC_j and the (all things considered) correct combination of interpretive resources CIR_j, the legally correct meaning-content of provision LP_i is N1"

where N1 is a sentence that amounts to the explicit norm the interpreter presents and defends as the legally correct translation of Y as to some real or imaginary case.[4]

2.1.2 Meta-textual interpretation

Meta-textual interpretation, contrariwise, encompasses a wide range of heterogeneous activities. These interpretive activities are meta-textual since they either precede or presuppose textual interpretation activities. Among the several sorts of outcomes of meta-textual interpretations, it seems worthwhile to consider the following: (1) integration sentences, (2) institutional-status sen-

4 On translation, see, e.g., Haas 1962. On translation and legal interpretation, see the accurate review essay Mazzarese 1998.

tences, (3) gap-identification sentences, (4) antinomy-identification sentences, and, finally, (5) hierarchy-sentences.

Integration sentences come in the standard form

(IGS1) "Implicit norm N_j (also) belongs to the normative set LS_i",
(IGS2) "Norm N_j is an implicit component of the normative set LS_i", or
(IGS3) "The normative set LS_i also includes the implicit norm N_j"

or in the less elliptical, more precise form

(IGS4) "According to the (all things considered) correct integration code IGC_j, the normative set LS_i (also) includes the implicit norm N_j" or
(IGS5) "According to the (all things considered) correct integration code IGC_j, norm N_j counts as an implicit element of the normative set LS_i"

where N_j represents a norm that is implicit because (i) it is not explicit, that is to say, it is neither presented nor defended as the meaning of any individual legal provision (negative condition), but (ii) it is the outcome of applying some integration technique (like analogical reasoning, reasoning a contrario, reasoning a fortiori, reasoning from the nature of things, or reasoning from general or fundamental principles) to a previously identified set of explicit and/or implicit norms (positive condition).[5] Integration sentences typically show up in two sorts of reasoning: on the one hand reasonings that are meant to "bring to the light," or "dig out," the full components of a given normative set, e.g., "the full system" of constitutional laws on freedom of expression; on the other hand reasonings that are meant to fill some previously identified gap in the law.

Institutional-status sentences are classificatory sentences concerning the institutional value or institutional function of previously identified legal provisions, explicit norms, or implicit norms. They are quite common in legal discourse and come, for instance, in the following forms:

(ISS1) "Provision Y is a principle-provision (i.e., it is suitable to express legal principles),"
(ISS2) "Norm N1 is (tantamount to) a supreme constitutional principle,"
(ISS3) "Norm N2 is a defeasible rule of conduct,"
(ISS4) "Norm N3 is a lex specialis," etc.

5 To be sure, integration sentences usually come as part of broader discourses where reasons are offered for them. An example would be as follows: "Norm N_j is an implicit component of the normative set LS_i since it can be derived from N_i, which surely belongs to it, by means of the proper integration technique IT_o".

Institutional-status sentences are typically used, for instance, in reasonings devoted to solving some previously identified antinomy. It must be noticed that they are interpretive sentences according to the notion of interpretation as ascription of sense or value to some previously identified object. They ascribe sense or value according to some presupposed, and previously selected, juristic doctrine ("theory"). Accordingly, their general form is, roughly, as follows:

(ISS5) "According to the (all things considered) correct juristic theory JT_j, provision LP_i / norm N_j counts as F in normative set LS_i".

Gap-identification sentences concern the existence of normative gaps in the law. They state that there is a gap in the law, usually amounting to the absence of any explicit norm for the case at hand. Their standard form is

(GIS1) "Case C_j (say, the opening of wine bars within two hundred meters of a high school) is not regulated by any explicit norm of the relevant legal set LS_i"

or, in a less elliptical way,

(GIS2) "According to the correct textual interpretation of the set of relevant legal provisions LP_j, case C_j is not regulated by any explicit norm."

Antinomy-identification sentences concern the existence of some antinomy, or normative conflict, in the law. They state that there is an incompatibility between two norms that, by hypothesis, are both prima facie relevant to the case at hand. Their standard form is

(AIS1) "Norm N1 is incompatible with norm N2 in relation to case C_j"

or, in a less elliptical way,

(AIS2) "According to the correct textual interpretation of the set of relevant legal provisions LP_j, norm N1 is incompatible with norm N2 in relation to case C_j",

when the two norms involved are explicit, or, more generally,

(AIS2) "According to the correct way of identifying the set of prima facie relevant legal norms, norm N1 is incompatible with norm N2 in relation to case C_j".

Hierarchy-sentences, finally, concern the ranking that obtains between two (or more) previously identified norms. In the most usual form, they state which of two norms, if any, is superior to—takes precedence over, prevails upon, is more valuable than—the other. Their standard form is

(HS) "From the standpoint of the correct hierarchy criterion HC_j, norm N1 is superior to/inferior to/on a par with norm N2."[6]

The correctness of the hierarchy criterion employed depends on the purpose in view of which the mutual ranking of two or more norms must be established.

2.2 Theoretically oriented interpretation in a proper sense

The activities of interpretation in a proper sense—because their performance by an agent properly amounts to "interpreting the law"—that are theoretically oriented are not performed for the immediate purpose of either deciding the case at hand, as it befits judges, or suggesting how it should be decided, as it befits jurists and lawyers.

Rather, they aim to provide information about the hermeneutic capacity of individual legal provisions, that is to say, about the meanings they can bear. They accordingly do not have a practical, decision-making or ethical commitment character. Their outcomes may be properly conceived as conjectural sentences. It seems worthwhile to distinguish three varieties of conjectural sentences corresponding to as many varieties of conjectural interpretation activity broadly conceived: (a) sentences of purely methodological conjecture (methodological-conjecture sentences), which are the outputs of methodological conjectural interpretation; (b) sentences of axiological conjecture (axiological-conjecture sentences), which are the outputs of axiological conjectural interpretation; and finally (c) creative sentences, which are the outputs of creative conjectural interpretation.[7] As we shall see in a moment, the first kind delineates the methodological frame for the meaning of a given provision; the second kind the axiological frame; and the third, and last, kind the methodological innovation frame.

Methodological-conjecture sentences outline the methodological frame for the meanings of legal provisions. They identify, in other terms, the set of alternative meanings into which one and the same legal provision can be translated on the basis of the different interpretive methods (techniques, directives, ca-

6 For instance, "From the standpoint of the proper hierarchy criterion of axiological value (AV), norm P1, being a supreme fundamental principle, is superior to norm P2, which is an ordinary constitutional principle."

7 The term *creative interpretation* is sometimes used to refer to a radical instance of (in my terminology) textual interpretation, where the interpreter translates a legal provision into a norm that does not belong to its methodological frame of meanings (see, e.g., Guastini 2011: 141–142). In my view, it is one thing to "invent" a new meaning for a legal provision; it is another to apply that provision with that new meaning for the practical purpose of deciding the case at hand. This is why I present creative interpretation as a form of conjectural, theoretically oriented interpretation in the proper sense, and not as an extreme variety of textual, practically oriented interpretation.

nons) which, by hypothesis, actually belong to the methodological tradition of the relevant legal culture of the time.[8]

"Methodological frame" sentences are the output of a complex activity having the character of a hermeneutical experiment.[9] On the basis of data drawn from legal experience, the experiment purports to investigate the hermeneutical capacity of a given provision by means of an experimental process consisting of five steps: (1) identifying the interpretive methods (directives, techniques, canons) belonging to the methodological tradition of the legal culture, taking into account both juristic writings and judicial opinions; (2) identifying interpretive codes as possible, alternative combinations of the different methods available; (3) identifying, for each of the interpretive codes previously identified, the set of related interpretive resources, namely, the data necessary to make the directives in the code work, examples being linguistic conventions, parliamentary reports, juristic theories about legal concepts and institutions, judicial opinions, legal principles, sets of norms and principles selected from the macro-system of existing positive law, and moral, political, and legal philosophies; (4) conjecturally interpreting the legal provision according to each of the several codes and corresponding sets of interpretive resources; and (5) formulating the methodological sentence that constitutes the final result of the preceding operations. Methodological-conjecture sentences can be represented by means of a disjunctive and hypothetical form as follows:

> (MCS) "Legal provision LP_i expresses either norm N1, if it is being interpreted according to the interpretive code IC1 and the interpretive resource set IR1, or norm N2, if it is being interpreted according to the interpretive code IC2 and interpretive resource set IR2, or norm ..."[10]

8 Clearly, the present notion of methodological conjectural interpretation represents an attempt to take seriously, and consider the theoretical potentialities of, Kelsen's idea of "scientific interpretation." See Kelsen 1960: chap. VIII.

9 A hermeneutical experiment can be regarded as a form of mental experiment. On mental experiments, see, e.g., Buzzoni 2004: esp. 124–126, 265 ss. See also Brown and Fehige 2011.

10 Perhaps an example may help. Suppose the methodological tradition makes three interpretive directives available to interpreters in relation to legal provision LP_i: the literal-original meaning, the actual intention of the historical legislator, and coherence with supreme constitutional principles. By way of experiment, six interpretive codes may be considered: purely literal, purely intentional, letter-intention, letter-coherence, intention-coherence, and letter-intention-coherence. Corresponding to each code is at least one set of interpretive resources; but, of course, there may be more than one—for instance, the coherence directive, in interpreting LP_i, may be used by taking into account alternative sets of supreme constitutional principles. As a consequence, the methodological conjectural meaning of LP_i is tantamount to the several alternative meanings into which it can be translated on the basis of the six codes with their corresponding interpretive resource sets. It is worth recalling that here the interpreter is performing a purely methodological conjecture, without taking into account the axiological outlooks that may affect the social and cultural viability of certain

Axiological-conjecture sentences outline the axiological frame for the meanings of legal provisions. They identify, in other terms, the set of alternative meanings into which one and the same legal provision can be translated on the basis of the axiological outlooks about the law and legal interpretation (ideologies, philosophies of justice, normative theories of the state and the legal order, normative theories about the "proper" role of judges, etc.): These are outlooks which, by hypothesis, are present in the legal culture of the time, and particular attention will be paid to the ones that, as a matter of social fact, are dominant or influential.

Methodological-conjecture sentences, as we have seen, simply pay attention to methodological devices, without considering the substantive correctness, or the cultural acceptability, of the interpretive outcomes they identify. Contrariwise, axiological sentences also take account of this further aspect, giving it pride of place in the inquiry. Indeed, the idea of an axiological conjectural interpretation mirrors what in my opinion is quite sensible view that the basic ingredients of textual interpretation, as it were, are of two sorts: values and rhetorical techniques. Values (axiological outlooks) intervene both in the selection of the proper set of interpretive directives and in the selection of the proper arrangement of interpretive resources. The experimental machine of axiological conjectural interpretation amounts to a five-step process as follows. (1) The first step is devoted to identifying the axiological outlooks that are influential (even if by a *succès de scandale*) in the legal culture of the time. (2) The second step consists in identifying axiologically correct interpretive codes, that is to say, the codes that, according to each of the several influential axiological outlooks, interpreters must employ in order to interpret the law correctly. (3) The third step consists in identifying the axiologically correct sets of interpretive resources corresponding to each axiologically correct code. (4) The fourth step is devoted to conjecturally interpreting a given legal provision on the basis of the several axiologically correct codes and related sets of interpretive resources. (5) The fifth, and last, step is devoted to formulating the axiological sentence that constitutes the final result of the previous operations. As in the case of methodological sentences, this can be represented by means of a disjunctive and hypothetical form as follows:

> (ACS) "Legal provision LP_i expresses either norm N1, if it is being interpreted according to the axiologically correct interpretive code ACIC1 and the related interpretive resources set ACIR1, or norm N2, if it is being interpreted according to the axiologically correct interpretive code ACIC2 and the related interpretive resources set ACIR2, or norm ..."[11]

methodologically viable outcomes. As we shall see, this further condition distinguishes axiological conjectural interpretation, making it a more realistic and useful enterprise.

11 Here, too, an example may perhaps be of some use. Suppose an interpreter discovers that there are two influential axiological outlooks in society *S*, say, a majoritarian conception of

Finally, creative sentences identify new possible meanings for legal provisions. These meanings are new, since, by hypothesis, (i) they do not belong to the methodological or axiological frame of meanings of the legal provision at stake, and yet (ii) they can be identified and argued for on the grounds of some new interpretive method and a related set of interpretive resources.[12] For this reason, we can understand creative sentences as accounting for a frame of meanings depending on methodological innovation or, in other terms, a creative conjecture. The standard form of a creative sentence runs roughly as follows:

(CCS) "If legal provision LP_i is interpreted according to the new method M_j and the related set of interpretive resources R_j, it will express norm N_j, which represents a new meaning for LP_i".

2.3 Interpretation in an improper sense

Lastly, activities of "interpretation in an improper sense" are such that an agent who performs them does not, properly speaking, really "interpret the law." Indeed, these are activities by which somebody (i) describes how others have interpreted a certain piece of law, or (ii) makes predictions about how others will interpret it, or (iii) formulates prescriptions about the way others should interpret it. Following Giovanni Tarello, I will call these activities interpretation-detection, interpretation-prediction, and interpretation-prescription, respectively,[13] amounting to (i) descriptions of past interpretive outcomes, (ii) predictions of future interpretive outcomes, and (iii) prescriptions (or recommendations) about how to interpret legal texts.

2.3.1 Interpretation-detection

The outcome of activities of interpretation-detection of legal provisions consists in detection sentences. Singular detection sentences describe individual acts of textual interpretation of legal provisions. They may be represented as follows:

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constitutional democracy and a liberal conception. She may also discover that each of the two outlooks is committed to a certain interpretive code, say, a literal-intentional code and a literal-coherence code. She will proceed on this basis to conjecture the axiological frame of meaning of each of the several constitutional provisions.

12 Consider, for instance, an interpreter conjecturing which new meanings constitutional provisions could be translated into, and instead of using the traditional, axiologically approved methods of literal and intentional interpretation, they were interpreted according to a "moral reading" method. Clearly, here I am interested in a rational notion of creative interpretation, namely, one related to the possibility of arguing for the new meanings that have been set forth. Whimsical creations are, at least in principle, outside of the scope of the legal interpretation game as we know it.

13 Tarello 1980: chap. II.

(SDS) "In judicial decision JD_i, provision Y was interpreted by judge J_i (e.g., the Court of Appeals of Yellow Falls) as expressing norm N1."

General detection sentences, contrariwise, purport to describe past interpretive trends. They may be represented as follows:

(GDS) "Over the past time period T_i (e.g., from 1980 to the present), judges J_o (e.g., the country's appellate judges, the county courts, the justices of the highest court) have always interpreted provision Y to mean norm N1."

2.3.2 Interpretation-prediction

The outcome of activities of interpretation-prediction of legal provisions consists in predictive sentences. Singular predictive sentences predict individual acts of textual interpretation of legal provisions. They may be represented as follows:

(SPS) "When case C_i comes up before judge J_i (e.g., the Court of Appeals of Yellow Falls), provision Y in that case will n-probably (e.g., with a likelihood of more than 50 percent) be interpreted as expressing norm N1."

General predictive sentences, contrariwise, purport to predict future interpretive trends. They may be represented as follows:

(GPS) "In the future time period F_o (e.g., over the next two years), judges J_o (e.g., the country's appellate judges) will n-probably (e.g., with a likelihood of more than 50 percent) interpret provision Y to mean norm N1 in cases C."

2.3.3 Interpretation-prescription

Finally, the outcome of activities of interpretation-prescription of legal provisions consists in prescriptive sentences. Singular prescriptive sentences concern individual acts of textual interpretation. They may be represented as follows:

(SPRS) "Provision Y is to be interpreted by judge J_i (e.g., the Court of Appeals of Yellow Falls) as expressing norm N1 in deciding case C_i".

General prescriptive sentences instead concern classes of interpretation acts. For example,

(GPRS) "Provision Y is to be interpreted by judges J_o (e.g., the country's appellate judges) as expressing norm N1 in every type-C case."

According to the interpreter's institutional role, prescriptive sentences may have either an imperative character (think of the highest court issuing any such

prescription to a lower court) or the character of advice or a recommendation, as in the case of juristic prescriptive sentences.[14]

2.4 Taking stock

Apparently, when jurists and legal philosophers claim that there are, or there can be, interpretations that are "true" (or "false"), they think only of some of the different kinds of interpretation outcomes I have considered above. If I am right, they usually have in mind those interpretive outcomes I have here conceived as interpretive sentences and integration sentences. They accordingly seem to have in mind the outputs of practically oriented activities of interpretation in a proper sense, in the textual and meta-textual varieties.[15] These are the items whose truth they care about. So, in the views of some jurists and legal philosophers, interpretive sentences and integration sentences are truth-apt entities. Are they right? Which truth do they have in mind when they make such claims? Which truth may be suitable to such sentences? Which truth-conditions make them true? In order to provide an answer to these questions, a brief incursion into the territory of truth is in order.

3 THREE NOTIONS OF TRUTH

In the opening passage of his farewell lecture, What Is Justice? Hans Kelsen recalls a scene from the Gospel of John (18:38):

> When Jesus of Nazareth was brought before Pilate and admitted that he was a king, he said: "It was for this that I was born, and for this that I came to the world, to give testimony for truth." Whereupon Pilate asked: "What is truth?" The Roman Procurator did not expect, and Jesus did not give, an answer to this question; for to give testimony for truth was not the essence of his divine mission as the Messianic King. He was born to give testimony for justice, the justice to be realized in the Kingdom of God, and for this justice he died on the cross.[16]

14 The set of notions in the text represents a radical revisitation of Chiassoni 1999: 21 ss, Chiassoni 2011: chap. II, and Chiassoni 2014.

15 Ronald Dworkin sees "propositions of law" as entities able to be either true or false. Dworkin's "propositions of law" are, however, not genuine normative propositions (which, as commonly understood in legal theory since Kelsen, "describe" norms); they are rather sentences expressing *norms* ("normative claims"): individual or general norms, explicit or implicit norms, proposed, invoked, used, or applied as "true" in connection with a legal system. The nature of such "propositions" is, more precisely, that of norms identified by means of constructive interpretation. Indeed, Dworkin makes it clear that "[a]ccording to law as integrity, propositions of law are true if they figure or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice" (Dworkin 1986: 4–5, 225; see also Dworkin 2006: 14–15).

16 Kelsen 1957: 1.

In his report of the evangelic scene, Kelsen reminds us that the word truth can be used in many different ways. As a consequence, it would be possible to adopt, to begin with, a reductionist strategy as to the problem "truth and legal interpretation." Indeed, if truth is being understood as one of the names for justice, the problem of whether interpretations can be "true" becomes the problem of whether they can be "just," or "in accordance with justice." Furthermore, if, following Kelsen, we also endorse a nonobjectivist and noncognitivist metaethical outlook, the problem of truth in legal interpretation totally changes its character. From being, at least apparently, an epistemic problem, it turns into a practical issue: It becomes, more precisely, the problem of taking sides within a field characterized by a plurality of competing political, legal, and moral views, a field that is typically rife with conflicts of material and spiritual interests between individuals and groups engaged in a never-ending search for their own social happiness under conditions of scarcity.

Of course, we may opt for not embracing the reductionist strategy suggested by Kelsen's passage. If we do so, a further option immediately comes up. This is the option between two varieties of alethic pluralism: austere alethic pluralism and broad alethic pluralism. Austere alethic pluralism contemplates two notions of truth: empirical truth and analytic truth. Broad alethic pluralism, contrariwise, contemplates four notions of truth: besides empirical truth and analytic truth, it also considers pragmatic truth and systemic truth. If, in a purely experimental and tentative way, we decide to adopt a position of broad alethic pluralism, and leave analytic truth aside, we may contemplate three notions of truth that, at least prima facie, can be considered fit to be applied in the field of legal interpretation. These are: (1) empirical truth, (2) pragmatic truth, and (3) systemic truth.[17]

3.1 Empirical truth

Empirical truth is epistemic correctness (epistemic adequacy) in connection with experience.

We may consider three kinds of discourse-entities as being uncontroversially apt for empirical truth: (1) singular descriptive sentences, (2) singular predictive sentences, and (3) theoretical sentences.

Singular descriptive sentences are the outcome either of observing or experiencing some actual individual event, fact, state of affairs, behaviour, etc., or of

17 Of course, as discourse entities, interpretation outcomes are apt for analytic truth and falsity, for they can be tautological or self-contradictory. Austere alethic pluralism is the mark of logical positivism and empiricist epistemology. See, e.g., Ayer 1952, and von Wright 1951. On (broad) alethic pluralism, see, e.g.: Pedersen and Wright 2012: "'Pluralism about truth' names the thesis that there is more than one way of being true". See also Pedersen and Wright 2013, Wright 2001, Wright 2013, and Lynch 2001.

remembering some individual event, fact, state of affairs, behaviour, etc., that has been observed or experienced in the past. Singular descriptive sentences accordingly have a direct link with experience: They refer to singular facts or events in time and space that have been observed or experienced by the agent who formulates them, for instance, the number of participants at meeting C ("The Glorious Friends of Pink Whales") in T_i (January 2, 2011) at L_i (Winter Springs); the behaviour of Y in T_j, L_j; the colour of X's robe in T_o, L_o; the organoleptic properties of the wine in bottle B in T_p, L_p; the 1944 eruption of the Vesuvius; etc. They are true (E-true) if, and only if, things are (were) indeed as they say they are (were).[18] Of course—ruling out at once any form of scepticism, idealism, and post-modernism—it is assumed that the things—events, states of affairs, acts, etc.—acting as truth-makers do exist independently of the beliefs, preferences, and interpretations of those who formulate descriptive sentences.

Singular predictive sentences are the outcome of anticipatory cognitive inquiries based on information acquired from experience, and stating that something will (probably) be the case.[19]

Theoretical sentences, contrariwise, include physical laws, maxims of experience, general descriptive sentences, sentences purporting to explain how complex phenomena are, etc.[20] They have no direct relation to experience. In fact, the truth of these sentences depends directly on their agreement ("coherence") with other linguistic entities (i.e., with a determined set of singular descriptive sentences), and only in a mediated way on experience.[21]

Concerning singular descriptive sentences, empirical truth consists in the agreement, or correspondence ("fit"), between the sentence in question ("words"), on the one hand, and experience ("the world"), on the other. As concerns singular predictive sentences, empirical truth consists (a), ex ante or at the moment of their formulation, in their being adequately supported by true descriptive and theoretical sentences and (b), ex post, in their agreement with the way experience turned out to be.[22] Lastly, as concerns theoretical sentences,

18 In the words of Aristotle, "Saying of what that is that it isn't, or of what it is not that it is, is false [...] saying of what that is that it is, or of what is not that it is not, is true" (Aristotle, *Metaphysics*, as quoted in Marconi 2007: 6).

19 See von Wright 1951: 13–15.

20 Physical law: "Water boils at 100°C"; rule of experience: "Murderers always go back to the scene of the crime"; general descriptive sentence: "Ravens are black"; explanatory sentence for a complex phenomenon: "The law is made up of norms."

21 From this perspective, then, the notion of truth as coherence and the notion of truth as correspondence do not represent the cores of two opposed and irreconcilable theories of truth. The opposition arises whenever the idea of coherence is part of an idealistic conception of truth. On this point, see, e.g., Quine 1987: 212 ss.

22 This is not the place to take up the problem of "contingent futures" and the truth of predictive sentences at the moment they are issued. MacFarlane 2003 appears to argue for the double possibility I consider in the text. See also von Wright 1951: 13–15.

empirical truth depends on their agreement ("coherence") with other sentences, on the "fit" between "their words" and "other words," which include some empirically true singular descriptive sentences.

3.2 Pragmatic truth

Pragmatic truth is instrumental correctness (instrumental adequacy) in connection with a previously defined set of goals. Attention should be drawn here to two heterogeneous groups of discourse entities that can be considered to be apt for pragmatic truth: On the one hand are theoretical sentences belonging to the realm of empirical knowledge and scientific research; on the other hand are what might be termed practical sentences belonging to the realm of normative ethics in the broadest sense of the expression.

With regard to theoretical sentences, empirical thesis ("claims") and (pieces of) scientific theories are true if, and only if, they "work" successfully as tools for improving the human condition: as pieces of information that help improve situations, remove obstacles, or dissipate uncertainties. The success of an empirical claim or a scientific theory is measured against the reliability of the forecasts it can suggest to agents in connection with their existential goals.[23]

With regard to practical sentences (norms, principles, ethical value judgments, etc.), the pragmatist notion of truth is bound up with consequentialist ethics.[24] Any practical sentence (a moral judgment, a judicial ruling, a general norm of behaviour, a legal principle) is pragmatically true (P-true) if, and only if, it is instrumentally adequate in view of some set of goals which has been previously identified as being ethically valuable. For instance, the singular moral judgment "It is fair to overthrow the tyrant Titus" is pragmatically true (P-true) if, and only if, by hypothesis, overthrowing the tyrant Titus will have consequences that are ethically more favourable (valuable) than unfavourable (nonvaluable)—provided, for instance, that such overthrowing will maximize the goal of people's happiness, and that goal is our selected, privileged goal. Likewise, the general norm of political morality "Tyrants ought to be overthrown" is pragmatically true (P-true) if, and only if, (a) it is a reliable prediction that from the adoption and constant enforcement of this norm situations will follow that will procure, for instance, the widest political freedom for the largest number of people, and (b) this outcome is assumed to be morally valuable and deserving to

23 According to John Dewey, ideas and theories are true if they are "instrumental to an active reorganization of the given environment, to a removal of some specific trouble and perplexity [...]. The hypothesis that works is the *true* one" (Dewey, *Reconstruction in Philosophy* (1920), as quoted in Davidson 2005: 8 n. 3). Burgess and Burgess (2011: 3) characterize the "Pragmatist or utility theory" of truth, among "traditional theories," as claiming that a "belief is true iff it is useful in practice."

24 On the notion of consequentialist ethics, see, for instance, Lecaldano 1996: 115 ss.

be achieved ahead of any other outcome. Clearly, when used in connection with practical sentences like the ones I have just considered, the pragmatist notion of truth (P-truth) promotes the rational evaluation of norms and ethical value judgments, that is to say, their evaluation from the standpoint of instrumental, means- ends rationality.

3.3 Systemic truth

Systemic truth is truth within a system: It is, more precisely, correctness (part-to-whole adequacy) in connection with a previously identified system.

Systems are sets of interrelated items (ideas, beliefs, sentences, symbolic formulae, etc.). With regard to normative systems (i.e., systems including norms of behaviour), and for the purpose of the present inquiry, it seems useful to distinguish two basic types: deductive normative systems and rhetorical normative systems.

A deductive normative system is a set of sentences

(1) that is composed of the totality of the logical consequences of a finite set of axioms, forming the axiomatic basis of the system;

(2) whose axiomatic basis is made up of norms that connect generic cases to normative solutions in some universe of discourse (like "Every human being has a right to free speech," "No search or seizure shall be allowed without a judicial warrant," or "Congress shall make no law respecting an establishment of religion").[25]

Any deductive system is identified by two closed sets of items: The set of original or primitive norms (axioms) and the set of transformation rules, consisting in rules of deductive inference. There are accordingly two kinds of sentences within any deductive normative system as here understood: original or primitive sentences, on the one hand, and nonoriginal or derivative sentences, on the other. Axioms and transformation rules are the original sentences of the system. They are set by stipulation: They are accordingly entities apt for pragmatic truth (P-true entities). Nonoriginal sentences are the derivative norms of the system; they are systemically true (S-true) if, and only if, they derive from axioms in accordance with the system's transformation rules. Provided that axioms are syntactic entities and transformation rules are rules of deductive inference, the systemic truth of derivative sentences in deductive systems is tantamount to genetic formal correctness, which is independent of the meaning of the expressions.

A rhetorical normative system, contrariwise, is a set of sentences

25 For this notion of a normative system I have drawn inspiration from the idea of an axiomatic system set forth in Alchourrón and Bulygin 1971: chap. IV.

(1) that is composed of the totality of the rhetorical consequences (in a sense I shall clarify in a moment) of a finite set of axioms forming the system's axiomatic basis;

(2) whose axiomatic basis is made up of a finite set of supreme normative provisions, namely, of a closed set of authoritative, fixed sentences that are assumed, by their interpreters and users, to be apt for expressing the system's supreme norms (such as "Individuals have inviolable rights," "No person shall be deprived of life, liberty, or property without due process of law," "No religion shall be established by law," "Individual privacy shall be protected," and "Each individual shall be granted a fair amount of primary goods").[26]

The distinction between original or primitive sentences, on the one side, and nonoriginal or derivative sentences, on the other—a distinction we encountered while dealing with deductive systems—holds for rhetorical systems as well. There are nonetheless a few, quite substantial differences that mark them off from the former.

First, the original sentences of a rhetorical system are not norms but norm-formulations: They are in fact supreme provisions (axioms) and transformation-rule provisions. I have just made clear what I mean by the supreme provisions of a rhetorical system. Turning to transformation-rule provisions, these are sentences that are assumed, by their interpreters and users, to be apt for expressing the system's transformation rules. In turn, transformation rules establish the criteria for identifying (what I shall call) the rhetorical consequences of the system's supreme provisions. Notice that the identification of transformation rules on the basis of transformation-rule provisions is necessarily entrusted to the interpreters and users of the system. Indeed, there is no such thing as a self-interpreting provision. This in turn means (a) that the transformation (translation) of transformation-provisions into transformation-rules ultimately depends on discretionary, though not necessarily arbitrary, choices by the interpreters, and (b) that such choices will typically be affected by practical considerations (ethical principles, concern for values and outcomes, sensitivity to material interests, etc.).

Second, rhetorical systems work on the basis of two basic kinds of transformation-rules: interpretive directives and integration directives.

Interpretive directives are instructions about the proper ways of translating supreme provisions into the system's explicit, supreme norms, such as "Supreme provisions shall be construed in accordance with the conventional meaning of

26 For the model of a rhetorical normative system I have drawn inspiration both from Leibniz's idea of a "model code" and from Kelsen's notion of a "static normative system." Leibniz 1667: §§ 7, 22, 23, 24, 25 (on Leibniz as a lawyer, see Tarello 1976: 133–40). Kelsen 1945: 112. Both models, it goes without saying, have been stuffed with a generous and spicy dose of sceptical interpretivism.

their expressions," or "... according to the nature of things," or "... as expressing a coherent set of supreme norms," or "... as expressing a set of efficient, wealth--maximizing, supreme norms," or "... in accordance with their authors' original intent," and so forth.

Integration directives, by contrast, are instructions about the proper ways of identifying the implicit norms of the rhetorical system: They may include such directives as "Similar cases shall be treated alike," "Different cases shall be treated differently," and "Norms of detail are instances of wider background principles."

Clearly, these rules are not rules of deductive inference. The consequences they bring to the fore are not a matter of strict derivation from original sentences working as premises. They are "consequences," insofar as they can be presented, and justified, as the outcomes of interpretation and integration activities from previously identified provisions or explicit or implicit norms.

Third, nonoriginal or derivative sentences are explicit or implicit norms that represent the rhetorical consequences of the system's original sentences (supreme normative provisions and transformation-rule provisions). It may be worthwhile emphasizing that a rhetorical system's nonoriginal or derivative sentences encompass five kinds of items:

(1) explicit interpretation-directives and explicit integration-directives, which are as many translations (transformations, or "reformulations") of transformation-rule provisions;

(2) implicit interpretation-directives and implicit integration-directives, as identified by the interpreters on the basis of previously identified explicit transformation directives;

(3) explicit supreme norms;

(4) implicit supreme norms; and

(5) implicit norms of detail. These, in turn, include two sets: the set of implicit norms immediately derived from explicit and/or implicit supreme norms by way of concretization or specification (first-order implicit norms of detail); the set of implicit norms derived from combinations of supreme norms and previously identified implicit norms of detail (second-, third-, ... n-order implicit norms of detail).[27]

27 An example (freely drawn from Alexy 2002) may help understand what I mean in the text. Given the supreme norm "The social status of convicted people having duly served their sentence shall be protected," and given the implicit norm of detail "No television documentary shall be broadcast in the imminence of the discharge of a convicted person having served a thirty-year prison sentence," a further, second-order implicit norm of detail can be identified—e.g., by analogical reasoning—claiming that "No review essay shall be published in any magazine in the imminence of the discharge of a convicted person having served a thirty-year prison sentence."

Supreme provisions and transformation-rule provisions are a matter of stipulation. They are stipulated by the authority that enacts them. Accordingly, since they are texts waiting to be (properly) interpreted, they are entities which are apt both for pragmatic truth (P-true) and for systemic truth (S-true), only in an indirect, mediated way, namely, depending on the pragmatic or systemic truth of the supreme explicit norms and the explicit interpretation-directives and integration-directives into which they can be translated. Pragmatic truth and systemic truth also work as implicit supreme norms and implicit norms of detail alike.

Supreme norms are systemically true (S-true) if, but only if, they cohere with each other according to a criterion of reasonable coherence. Such a criterion allows for incoherencies among supreme norms, provided they can be settled in reasoned ways—for instance, on the basis of reasonable hierarchies in relation to different classes of cases as suggested in Robert Alexy's theory of balancing.

Norms of detail are systemically true (S-true) if, but only if, they cohere with supreme norms—and with other norms of detail as well, if necessary. There are—it is worthwhile noticing—at least five ways in which "coherence" may be understood in a rhetorical normative system by its interpreters and users: (1) coherence as material derivation; (2) coherence as logical consistency; (3) coherence as instrumental adequacy; (4) coherence as teleological adequacy; and, finally, (5) coherence as axiological adequacy.

With regard to the relationships between derivative norms of detail and supreme norms, the five notions of coherence work as follows.

A derivative norm of detail satisfies the requirement of coherence as material derivation if, and only if, it "takes its content" from the content of some supreme norm, so as to represent a specification or concretization of that norm.

A derivative norm of detail satisfies the requirement of coherence as logical consistency if, and only if, it is not logically incompatible, whether by contradiction or opposition, with any supreme explicit or implicit norm.

A derivative norm of detail satisfies the requirement of coherence as instrumental adequacy if, and only if, the behaviour it prescribes or the state of affairs it constitutes or promotes are (the most) efficient means for achieving the goals set in supreme norms.

A derivative norm of detail satisfies the requirement of coherence as teleological adequacy if, and only if, it fosters a goal that is compatible with the goals fostered by supreme norms.

Finally, a derivative norm satisfies the requirement of coherence as axiological adequacy if, and only if, it respects the same scale of values that is endorsed in the supreme norms.[28]

28 See Chiassoni 2011: chap. IV. Some forms of coherence considered in the text are clearly of a pragmatic type. In such cases, systemic truth is pragmatic truth in relation to a certain

The systemic truth of norms in rhetorical systems, to conclude, is not formal but material correctness: It is material coherence (consistency, adequacy), which is, and can be, measured on the basis of the meaning of the norms that are being compared.

3.4 Taking stock

Having thus travelled across the province of truth, it is time to consider briefly what we have seen.

Clearly, empirical truth, pragmatic truth, and systemic truth represent heterogeneous criteria of evaluation, which are fit for heterogeneous entities.

Pragmatic truth is tied to instrumental, means-ends rationality.

Systemic truth, so far as rhetorical normative systems are concerned, is material correctness (material adequacy) in connection with supreme norms and transformation rules, the identification of which is necessarily entrusted, as we have seen, to the discretion, ethical preferences, and worldviews entertained by the interpreters and users of the system.

In light of the preceding points, broad alethic pluralism, that is to say, broad pluralism concerning the notion of truth, seems to endorse, all things considered, an unnecessarily inflationist account of truth. An austere pluralist, who will only accept empirical and analytic truth, may query why should we talk about "pragmatic truth" and "systemic truth" when we can instead resort to comfortable expressions like "instrumental correctness," "material correctness," and "material coherence," which provide clearer and more straightforward ways to refer to those evaluation criteria.

I will not adjudicate who is right in the dispute, although I think the austere pluralist does have a good case.[29] In fact, any such adjudication would be

rhetorical-normative system. Roughly in the same vein as Dworkin, Michael Lynch (2001: 736, 737, 738) characterizes the truth of "propositions of law" not in terms of correspondence with an independent, objective reality ("it is unlikely that they are true in virtue of referential relations with mind-independent objects and properties"), but in terms of coherence ("we think that a proposition of law is true when it coheres with its immediate grounds and with the grounds of propositions inferentially connected to it. In short, legal truth consists in coherence with the body of law"), and, more precisely, following Crispin Wright's idea of "superassertibility," in terms of "supercoherence" ("Thus perhaps what makes a proposition of law true is that it durably or continually coheres with the body of law [...]. In short, juridical truth might turn out to be realized by 'supercoherence' with the body of law, where a proposition can fail to have this property even if it coheres with the law in the short run, or coheres with judicial decisions that are later overturned"). The idea that truth, in the realm of ethics, is truth "as coherence" is endorsed by Quine 1978 (1981: 63): "Science, thanks to its links with observation, retains some title to a correspondence theory of truth; but a coherence theory is evidently the lot of ethics." It is also adopted by Dorsey 2006.

29 For a defence of "broad pluralism" concerning truth, on the basis of a property or function shared by the different notions, see, for instance, Lynch 2011, and Pedersen and Wright 2012: § 4.1.

idle. Indeed, whatever view we accept about truth, the point that is worthwhile emphasizing is the following: There are clear and relevant differences between the notions of empirical truth (epistemic correctness in relation to experience), pragmatic truth (instrumental correctness in relation to a previously defined set of valuable goals), and systemic truth (holistic, formal, or material, correctness in connection with a previously identified system). Keeping this in mind, we can at last turn to the problem from which I started.

4 WHICH TRUTH IN LEGAL INTERPRETATION?

Let us recall the problem: Has truth anything to do with legal interpretation? Is there any room for truth in legal interpretation, and, if so, where is it?

We are now in a position to outline a solution. In fact, the preceding analysis seems to have deprived the problem "truth in legal interpretation" of any momentousness. Now it seems to lie bare like a dissected flower on a botanist's table, definitely stripped of any beauty and mystery. Let's take advantage of this painful dissection in order to fix a few points.

1. Empirical truth is suitable—there seems to be no room for doubt—to the outcomes of the activities consisting in interpretation-detection: Detection sentences, whether singular o general, being genuine descriptive sentences, are apt to be empirically true or false.

2. The outcomes of the activity of interpretation-prediction, in turn, are apt to be assessed in terms of both pragmatic truth and empirical truth. A prediction sentence is empirically true ex ante if it appears well justified on the basis of the information available at the time of its formulation, and ex post whenever the prediction is being confirmed by the behaviour of the interpreters it refers to (see § 3.1. above). It is also pragmatically true insofar as, by virtue of its presumable epistemic correctness, it is useful in obtaining (what are regarded as) valuable results, such as preventing lawsuits doomed to failure, preventing unnecessary waste of resources, suggesting reasonable transactions, and suggesting successful judicial strategies.

3. The outcomes of the activity of prescription-interpretation, provided they are normative entities (interpretative prescriptions), are not apt for empirical truth. Instead, they are apt both for pragmatic truth (instrumental correctness in relation to valuable ethical-normative goals), and for systemic truth (material correctness in relation to a legal system).[30]

4. The outcomes of the activity of conjectural interpretation, in the two varieties of methodological and axiological conjecture, are, to be sure, apt for pra-

30 This conclusion may sound to some as a *petitio principii*. I will come back to this point at the end of the article.

gmatic truth. Indeed, they can be P-true sentences, insofar as the information they provide concerning the hermeneutic scope (or "frame") of a legal provision is in fact useful in getting to (what are being regarded as) valuable results, such as advantageous amendments to a legal text, successful legal argumentation, or a fairness-promoting judicial overruling.

Are conjectural sentences also apt for empirical truth? Here I think the answer cannot be straightforward. We could start by saying that conjectural sentences are discourse entities apt for experimental truth. Indeed, as we have seen, they are the outcome of hermeneutical experiments, which, as I said, are a species of thought experiments. Now, the truth of a sentence that represents the result of a thought experiment depends on two factors: First, the data on which basis the experiment has been performed must be empirically true; second, the calculations the inquirer has performed on the basis of those data must be correct. Accordingly, experimental truth is a matter of agreement with both experience and reason, for calculations belong to reason. If we understand experimental truth in this way, conjectural sentences are in fact apt for it. On the one hand, conjectural sentences can satisfy the empirical truth requirement. Indeed, the data about the methodological tradition, the axiological outlooks, and the corresponding sets of interpretive resources that the conjectural interpreter makes use of in his inquiry are apt for empirical truth. On the other hand, conjectural sentences can also satisfy the exact calculation requirement. The use of interpretive directives is not an interpreter's absolute discretion game. Contrariwise, interpretive directives—once they have been duly precisified—call for methodical application that, from a structural point of view, is like a calculus (the output of which can also be given the form of a deductive piece of reasoning). Accordingly, conjectural interpreters may go wrong; and it is always possible for other members of the legal culture to control whether they have used the several interpretive codes and related sets of interpretive resources in a technically proper way, that is, whether they did, or did not, make any mistake in calculating hermeneutical outputs in interpreting a legal provision on the basis of a certain interpretive code and a certain set of interpretive resources.

5. The outcomes of the activity of creative interpretation are apt for pragmatic truth. In particular, they are P-true whenever the new understanding that they supply, on the basis of some new interpretive method, appears to be useful in obtaining (what are being regarded as) valuable results, such as effecting a significant change in the law in force without changing the wording of its authoritative sources (the legal provisions).

6. Finally, turning to the outcomes of the activities of textual and metatextual interpretation, surely they are apt neither for empirical truth nor for experimental truth. That is because they are practical, decision-making entities, which either establish what the legally correct meaning of a provision is or point to the

legally correct place for a principle within the system, or they set the legally proper way of filling up a gap, and so on. Obviously, they are apt for both pragmatic and systemic truth.

As concerns the problem of the relation between legal interpretation and truth, it thus seems that we may come to the following conclusions, not prima facie unreasonable.

First. If we take a stance of broad alethic pluralism, the entire province of "legal interpretation" in the broadest sense of the phrase turns out to be a truth--apt province. It must be emphasized, however, that such a province is not apt for one and the same kind of truth. Rather, different truth-apt entities are apt for different kinds of truth, depending on whether they are detection-sentences, prediction-sentences, conjectural sentences, prescription sentences, interpretive sentences, integration sentences, normative-status sentences, gap-identification sentences, antinomy-identification sentences, or hierarchy sentences.

Second. If, contrariwise, we take a stance of austere alethic pluralism, centred on the dualism of empirical and analytic truth, the room that remains for truth in the realm of legal interpretation is tantamount to the room for empirical truth. It concerns detection and prediction sentences, on the one side, and methodological and axiological sentences, on the other—these latter with the qualifications I mentioned a moment ago in dealing with experimental truth.

As I have pointed out before, all these sentences, are the outcomes of interpretation activities in either an improper sense of the term or in a proper but theoretically oriented sense of the term (see § 2 above). As a consequence, from the standpoint of austere alethic pluralism, it seems necessary to reach a quite dim conclusion: that there is actually no room for truth when proper, practically oriented interpretation is at stake. Indeed, as we have seen, the outcomes of textual and metatextual interpretation are not entities apt for empirical truth. Accordingly, from this perspective, the province of legal interpretation (proper) is, properly speaking, a province without truth.

Third. There seems to be no mystery as to the proper theoretical way of understanding and settling the problem of truth in legal interpretation, once the several possible stances that may be taken as to the issue are brought to the fore—for instance, once we set about dealing with the issue on the basis of the distinction between broad and austere alethic pluralism.

I must consider one final point before concluding.

Problems and disputes may show up concerning which outcomes of which legal interpretation activities (broadly conceived) are apt for which kind of truth.

There has been a well-known debate for years about the proper way of understanding the "nature" of legal interpretation—and more precisely, in the ter-

minology I have set out here, the nature of textual interpretation as usually performed by judges. It is commonplace to distinguish three groups of competitors in the debate: the integral cognitivists ("legal formalists"); the noncognitivists ("sceptics," "legal realists"); and the middlemen, represented by moderate cognitivists.

Integral cognitivists claim textual interpretation by judges always to be a matter of objective knowledge: Interpreting, they say, is tantamount to grasping the true meaning of the laws as to their application to individual cases.[31]

Moderate cognitivists, by contrast, claim that there are cases where the judicial interpretation of legal provisions is, and can be, a matter of objective knowledge ("easy cases"), but there are also cases where this activity cannot be a matter of objective knowledge, and must instead be a matter of decision and evaluation ("hard cases"). This would be so, they claim, for the following reasons. Legal provisions are sentences in a natural language; sentences in a natural language have an objective meaning, which is provided to them by linguistic conventions; unfortunately, linguistic conventions may run out under the pressure of individual cases; in such situations, linguistic indeterminacy comes up, in the form of linguistic ambiguity and vagueness, and it can be cured only by means of judicial discretion. Such indeterminacy, however, is moderate, not radical: It is not the case that legal provisions, being sentences in a natural language, prove indeterminate all the way through, i.e., in every possible situation; there are in fact situations where they prove to be determinate; indeed, if that were not the case, natural languages would be utterly pointless as a means of human communication. As a consequence—moderate cognitivists would conclude—the noncognitivists, who claim legal provisions to be radically indeterminate, are wrong.[32]

In this paper I have taken sides with noncognitivists. I have claimed that interpretive sentences, being the outcomes of the textual the interpretation of legal provisions, are never apt for empirical truth. As you may remember, I have done so for several reasons. It is time, by way of conclusion, briefly to recall and put them in perhaps a clearer form, also by way of a reply to the argument of the moderate cognitivists.[33]

First, I have suggested that textual interpretation is, and cannot be but, a decision-making, practically oriented, value-laden, ideologically compromised activity. Otherwise, it would be tantamount to interpretation-detection or to conjectural interpretation. Indeed, when judges say, for instance, that legal provision LP_i means N1 as to the regulation of case C_i, they neither simply detect

31 On interpretive cognitivism in Western legal thought, see, e.g., Chiassoni 2009: chap. IV.

32 For an accurate defence of moderate cognitivism, see Sucar 2008: chap. 1, § 2, and pp. 362–75.

33 I have set forth more arguments for interpretive noncognitivism in the following papers: Chiassoni 2010, Chiassoni 2012a, Chiassoni 2012b, and Chiassoni 2015.

that LP_i has in fact been given such a meaning, nor do they simply conjecture that LP_i can bear such a meaning. Rather, they establish—select, adopt, defend—that meaning as the legally correct meaning of LP_i for the purpose of deciding case C_i.

Second, textual interpretation takes place, and is in fact a key practice, within those sophisticated, complex specimens of rhetorical normative systems that are "our" legal systems.[34]

Third, legal provisions are not self-interpreting devices: They need (authorized) interpreters to transform them into norms to be applied to individual cases, on the basis of some discrete sets of interpretive directives that legal interpreters have to necessarily select and subscribe to.

Fourth, the fact that legal provisions are sentences in a natural language does not in itself prove that their legally correct meaning is tantamount to their conventional linguistic meaning: Moderate cognitivists, who make such a claim, incur in a clear logical fallacy (*a posse ad esse non valet consequentia*).[35]

Fifth, in sophisticated rhetorical systems like our legal systems, legal indeterminacy is not tantamount to linguistic indeterminacy (be it syntactic or semantic, or owed to the failure of pragmatic-enrichment criteria): It is in fact a methodological and axiological indeterminacy, moving beyond the boundaries of linguistic indeterminacy.

Sixth, as a consequence, moderate cognitivists, in their philosophical-linguistic argument for the moderate indeterminacy of legal provisions, provide an account of judicial interpretation in our legal systems that is misleading and, all things considered, wrong.

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34 Properly speaking, our legal orders have a dual nature: They are at the same time both dynamic-formal systems, in what concerns the production of authoritative legal texts, and static-rhetorical systems, in what concerns the identification of explicit and implicit norms, together with their relative institutional value. They also show up as deductive micro-systems, whenever jurists also undertake the task of systematization along the lines of Alchourrón and Bulygin.

35 Furthermore, if moderate cognitivists maintained that the conventional linguistic meaning is the legally correct meaning in virtue of a legal convention, their claim would be contingent on individual legal experiences, and thus be false as a universal claim.

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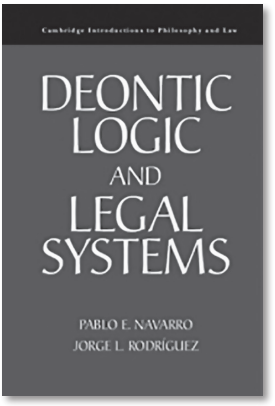
Jan Woleński*

How deontic logic contributes to the analysis of legal systems

Book review of *Deontic logic and legal systems* by Pablo E. Navarro and Jorge L. Rodríguez (Cambridge UP, 2014)



The book under review consists of two parts closely related to its title: I Introduction to Deontic Logic, II Logic and Legal Systems. Each part is divided into chapters. Part I brings the following units: 1. The Language of Logic and the Possibility of Deontic Logic; 2. Paradoxes and Shortcomings of Logic; 3. Norm-propositions, Conditional Norms, and Defeasibility, and Part II the following: 4. Legal Systems and Legal Validity; 5. Legal Indeterminacy: Normative Gaps and Conflicts of Norms; 6. Legal Dynamics. Generally speaking, the reader might expect that the chapters of Part II use (or apply) the formal tools of deontic logic to analyse selected topics concerning legal systems.

Deontic logic is a branch of so-called philosophical logic. Although the concept of philosophical logic is fuzzy, a variety of modal logic in a wide sense (alethic modal logic, epistemic logic, doxastic logic, deontic logic, etc.) unquestionably falls within its scope. Accordingly, I consider some of the worries put forward by authors (section 1.5) concerning the possibility of deontic logic to be mistaken. The situation was clearly different 50 years ago, when Peter Geach deliberated over some interpretative questions concerning normative utterances. However, as it appears today, in 2014, deontic logic is well-defined both syntactically and semantically, and has explicit metalogical properties. It belongs to so-called non-normal modal systems. In other words, it lacks the axiom (*) $\blacksquare A \Rightarrow A$, where the symbol $\blacksquare$ refers to a necessity-like operator (e.g., "is alethically necessary", "knows that", "is true", "is obligatory", etc.). It is perhaps interesting to observe that (*) is valid only for a limited number of necessity-like operators, in particular operators expressing alethic necessity and truth, but not for "know that" (unless the classical definition of knowledge as justified true belief is adopted) or "it is obligatory that". This observation goes against the claim made by the authors that (*) (and its dual, namely the formula $A \Rightarrow \blacktriangle A$, where the symbol $\blacktriangle$ refers to possibility-like operators) holds true for "most interpretations of modal concepts" (Navarro and Rodríguez 2014: 24). In fact, these axioms are exceptionally valid.

Although Part I is comprehensive and contains many interesting observations and comparisons, the way in which deontic logic is introduced by the authors raises some doubts. They begin (after a rudimentary presentation of parts of non-modal logic, that is, propositional calculus, predicate logic and syllogistic) with observations about analogies between deontic operators ("it is obligatory", "it is permitted", etc.), alethic modalities ("it is necessary", "it is possible", etc.) and quantifiers ("for any", "there is"), and show the way in which these settings can be shaped by the traditional square of oppositions. In fact, this logical diagram

produces something which can be considered to be the minimal (or initial) portion of deontic logical dependencies. However, it is unclear which system Navarro and Rodríguez consider to be basic deontic logic. They mention a few proposals, and finally decide that the system called *KD* is basic. However, it does not settle the problem whether basic deontic logic has the axiom *Ot* (where *t* is a propositional tautology) or *Pt*. The first formula means that tautologies are obligatory, while the second that tautologies are permitted. Sometimes these formulas are expressed by $O(A \vee \neg A)$ and $P(A \vee \neg A)$ respectively. This, however, can lead to misunderstandings because it automatically directs attention to the principle of the excluded middle. Now, the formula *Ot*, and, *a fortiori*, $O(A \vee \neg A)$ means that something is obligatory. Therefore, the formula is valid in a world in which obligations exist, but not in an anarchistic reality in which everything is permitted. On the other hand, one can prove that the formula $\neg Pt$ is always contradictory and that makes the formula *Pt* valid on purely logical grounds. If we have a clear account of basic deontic logic, we can define its various extensions. Although the authors show various possibilities (Navarro and Rodríguez 2014: 30–33), I believe that their considerations are, to some extent, incomplete.

The other problem concerns the scope of modal logic and, *a fortiori*, deontic logic. To begin with alethic modal logic, we have the following situation. Propositional calculus serves as basic logic. Then modal operators are added. Thus, any modal logic appears to be an extension of propositional calculus. Similarly, we could begin with predicate calculus and obtain its modal extensions. Now, if we look at the semantics of alethic modal logic, the accessibility relation associated with the system *K* has no special conditions of reflexivity, symmetry, etc. Similar considerations concern deontic logic. For instance, the accessibility relation for its semantics is nonreflexive (it is related to the axiom (*)). The question is whether such conditions are logical or extralogical. Note that logic, in a strict sense, does not distinguish any extralogical content. If so, special constraints on the accessibility relation are not purely logical. One could reply, however, that the same concerns the assumption of bivalence or admitting only non-empty individual constants. Moreover, such facts are fixed in metalogic, not logic itself. A moral derived from this short discussion seems to be that the border between the logical and the extralogical is vague to some extent, and must be settled by a convention (which was already observed by Tarski in the 1930s).

Nevertheless, the question remains of how liberal such a convention might be. Why does this issue matter? Even if we agree that the deontic counterparts of *K*, *S4* or *S5* are systems of logic in the proper sense, what about the conditional obligations formalised by the formula *O*(A/B), where the symbol / means "provided that" (*B* is obligatory provided that condition *A* is obtained)? Is / a logical constant or not? Define *P′* (its declared meaning is "strongly permitted" or "permitted with respect to a free-choice") as $P'(A \vee B) \Leftrightarrow P(A \wedge B)$. Is *P′* a logical or extralogical concept? On the one hand, it is a logical concept due to its definition in purely logical terms (provided, of course, that *P* expresses a logical constant). On the other hand, however, having permission captured by *P′* seems to deal with a special situation. It is unclear to me when (it concerns some cases) Navarro and Rodríguez speak about purely logical issues, and when about applying logical notions to extralogical topics. Take, for instance, the problem of defeasibility, a highly favoured problem of today. Let us assume that we have a prohibition *F* of, for example, killing people. However, there is an exception, namely killing someone in self-defence. We say that the prohibition in question is defeasible in accordance with the given exception. However, we have a very simple device to describe this situation without any need to appeal to defeasibility. It is sufficient to use predicate calculus and say that the prohibition "for any *x*, *x* is prohibited from killing any other person" be interpreted in such a way that the scope of the universal quantifier is restricted (first-order logic or propositional logic with quantifiers allows so-called restricted quantification).

The authors address several considerations of controversial problems of deontic logic. I have already made mention of conditional obligations and permissions expressed by *P′*. The paradoxes of deontic logic, iterations of deontic modalities, as in the formula $OO(A \Rightarrow B)$, or mixed formulas, such as $A \Rightarrow OB$, are further examples. Let me refer to the paradoxes. When Alf Ross in-

vented the paradox captured by the formula $OA \Rightarrow O(A \vee B)$, it was considered to have plagued the logic of normative discourse. Today, due to possible world semantics, it is clear that Ross's paradox is apparent and the authors share this view. It should be added that obeying the consequence of explicit obligations is not sufficient for conforming to Grice-like maxims. For obligations, the following rule is applicable: 'Obeying duties must consist in conforming to the most generally accessible obligations, unless otherwise allowed,' while for questions: 'An answer to a question must be logically equivalent to *datum quaestionis*.' Let me also mention that because *B* in Ross's paradox is arbitrary, we can have either $OA \Rightarrow O(A \vee B)$ or $OA \Rightarrow O(A \vee \neg B)$. Now, given that formula *A* is equivalent to the conjunction $(A \vee B) \wedge (A \vee \neg B)$, we have a simple argument that Ross's paradox is apparent. The authors rightly observe that the Good Samaritan paradox poses a more serious challenge. However, it should be added that this paradox essentially depends on allowing formulas of the $A \Rightarrow OB$ type. Of course, I do not claim that the way out consists in excluding mixed formulas. My intention is rather to point out that we need some syntactic decisions to perform formalizations of deontic logic.

The authors devote much attention to the relations between deontic propositions and norms. In fact, the first stage of the development of the logic of normative discourse is dominated by this issue. The so-called Jørgensen dilemma, which is extensively discussed by Navarro and Rodríguez (2014: 50–61), concerns the relations between deontic sentences, norms and norm-propositions. Unfortunately, the problem raised by Jørgensen is not reconstructed properly in the book. He observed that there are imperative inferences which look as though they are logically correct, but, because norms are neither true nor false, normative reasoning cannot be formally justified as having no proper semantic basis.[2] Hence, various attempts to build the logic of norms have been made. The authors, following Carlos Alchourrón and Eugenio Bulygin, consider the logic of norms (or normative propositions) to be necessary for grounding deontic logic. My proposal to solve this problem is radical—a non-linguistic theory of norms.[3] The very idea of the logic of norms presupposes that norms are linguistic utterances. In my view, norms are decisions expressed by deontic (first-person or impersonal) sentences. In fact, the non-lingustic theory of norms is similar to the expressive conception of norms proposed by Alchourrón and Bulygin,[4] although the former does not treat norms as linguistic entities. Hence, deontic logic is the only logic of normative discourse. There is an *experimentum crucis* for the controversy over the logic of norms, namely the problem of permissive norms. Alchourrón, Bulygin, Rodríguez and Navarro maintain that such norms exist. On the other hand, the non-linguistic theory of norms rejects this view.[5] In order to legitimise normative inferences, one should either accept the view that norms are true or false (this view must face several epistemological and ontological problems) or abandon seeing norms as linguistic items and stay with deontic sentences as the basic units of normative discourse. I do not deny that several notions, such as the concept of competence, require fairly complicated investigations in terms of obligation, prohibition and (weak) permission, but my working hypothesis is that such treatment is possible. Let me add that Alchourrón's attempt to operate with the abstract notion of logical consequence (mentioned in Navarro and Rodríguez 2014: 64) fails, because the said properties of *Cn* (i.e., inclusion, idempotence and monotonicity) do not generate any logic.

Part II is surprising given the fact that almost nothing from the formal machinery developed in Part I is employed in the analysis of concrete legal topics. Consequently, if the reader's expectations are different (see the beginning of the review in hand), they are likely to be disappointed. This observation is not intended to underestimate the authors' treatment of legal validity, gaps and conflicts in legal systems or legal dynamics, because they are interesting and inspiring. However, this part of the book raises the question of how far deontic logic can be used in legal theory. I have no answer to this question. Does Part II of

2 Jørgensen 1937.

3 See Woleński 1982: 66-73 for a more detailed account.

4 Alchourrón and Bulygin 1981.

5 See Opałek and Woleński 1973, 1986 and 1991.

Navarro and Rodríguez's book motivate a scepticism of sorts, one perhaps not actually intended by the authors? Or could perhaps one relatively easily supplement Part II by a closer application of deontic logic to the classical problems of jurisprudence?

Let me illustrate the point by an example. The authors deny that we can define a legal system as a set of consequences of explicitly stated (enacted) obligations. The example they give is as follows. Let A = {*OA*, *O*¬*A*, *OB*} and B = {*OA*, *O*¬*A*, *O*¬*B*} be two sets of initial normative bases. Since *Cn*A = *Cn*B, both systems are equivalent, although they are mutually inconsistent. The authors conclude that so-called dynamic normative systems cannot be defined by *Cn*, because such a definition entails that we have only one momentary system (Navarro and Rodriguez 2014: 214–232). However, this conclusion seems erroneous. The sets *Cn*A and *Cn*B are actually (and trivially) equivalent due to their internal inconsistency. We can only say that the hierarchical order of normative systems exceeds standard logical tools. But this was to be expected. Once again, the expressive power of deontic logic for an analysis of legal systems is still an open problem. Additionally, the tradition of ordinary language philosophy offers an alternative to investigations employing formal tools. The two perspectives should certainly not be viewed as disjoint, because several reasons support their mutual complementarity.

I shall finish with two general observations. First, the book contains several historical notes. Unfortunately, these are too limited and incomplete. The reader should be informed that the dichotomy of *is* and *ought* appeared already in Aristotle's *De Interpretatione* (since reviews are not monographs I skip more detailed bibliographical details; this concerns also contemporary authors). An even more serious historical flaw is omitting Hume as the inventor of Hume's guillotine (which is both the origin of the claim that the formula $A \Rightarrow OA$ is not valid in deontic logic and an inspiration for the above mentioned formula (*)). Poincaré should have also been included as the first author who observed that an imperative conclusion can be derived from a set *X*, provided that *X* contains at least one imperative. Jerzy Kalinowski elaborated on the first system of deontic (or normative) logic independently of Georg H. von Wright. I am pleased that my name is mentioned, but am surprised that the authors neglected to refer to the work of Kazimierz Opałek, Kazimierz Świrydowicz, Jerzy Wróblewski, Zdzisław Ziemba and Zygmunt Ziembiński (many of them have been published in English, German, French or Italian). This attitude diminishes attempts at international collaboration in the field of legal philosophy. Second and last, I have some concerns over whether the book under review should have been published in the Cambridge Introductions to Philosophy and Law book series. Its content is more advanced rather than introductory, particularly Part I, and requires a considerable degree of logical maturity not frequently possessed by lawyers, including those specialised in legal philosophy. However, the book at hand should generate considerable interest with everyone professionally interested in the relations between logic and law.

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Synopsis

Mauro Barberis

For a truly realistic theory of law

SLO. | *Za resnično realistični nauk o pravu.* Avtor tu obravnava možnosti resnično realističnega nauka o pravu, ki naj bi imel naslednje značilnosti. Prvič, biti bi moral splošnejši od obstoječih naukov, da bi bil uporaben tako v povezavi s *common law* kot s kontinentalnim pravom. Posledično bi moral obrniti v pozitivističnih naukih običajno vzpostavljeno razmerje med zakonodajo in razsojanjem. V zgodovinopisju, pa tudi na področju primerjalnopravnih študij, od katerih se nauk o pravu razlikuje le po višji stopnji abstraktnosti, razsojanje velja za osrednji del prava, medtem ko je zakonodaja le eden od mnogih (in morda niti ne eden od najuspešnejših) načinov, da se razsojanju postavi meje in da se ga nadzoruje. En primer razlagalne moči resnično realističnega nauka o pravu izhaja iz tako imenovane krize pravnih virov: zakonodaja vzpostavlja sodnike, ti pa so na koncu tisti, ki vzpostavljajo hierarhijo pravnih virov in položaj same zakonodaje v tej hierarhiji.

Ključne besede: pravni realizem, zakonodaja, razsojanje

ENG. | A truly realistic theory of law – the possibility of which is examined in this work – should have the following characteristics. It should be more general than current theories, that is, be both common law and civil law; in consequence, it should invert the relationship, commonly instituted by positivist theories, between legislation and adjudication. Both in historiography and in legal comparison, of which legal theory is an extension to a higher level of abstraction, adjudication is the central moment of the legal process, while legislation can be seen as one of the many attempts, and perhaps not even the most successful, to limit and control adjudication. An example of the explanatory capacity of a truly realistic theory is the so-called crisis of sources: legislation institutes judges, but they are, ultimately, those who set the hierarchy of sources and the hierarchical position of legislation itself.

Keywords: legal realism, legislation, adjudication

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Synopsis

Cristina Redondo

A legal order's supreme legislative authorities

SLO. | *Najvišje pravodajne oblasti pravnega reda*. Prvi del razprave je namenjen pravilom, ki opredeljujejo najvišje pravodajne oblasti nekega pravnega reda. Avtorica ob tem obravnava več ločnic – od tiste med normami in metanormami do tiste med zakonskimi in običajnimi pravili ali pa med konstitutivnimi in regulativnimi pravili – vse z namenom, da ugotovi, v katere kategorije spadajo pravila, ki opredeljujejo najvišje pravodajne oblasti. Izkaže se, da so osnovna pravila, ki opredeljujejo najvišje pravodajne oblasti katerega koli pravnega reda, nujno konstitutivne metanorme, ki imajo naravo običaja. Drugi del razprave je obravnava možne vsebinske razlike med pravili, ki v različnih pravnih redih opredeljujejo najvišje pravodajne oblasti. Avtorica na tej podlagi razloči štiri vzore pravnega reda in pravodajne oblasti: eden od teh ustreza absolutni oblasti, drugi moralni oblasti, tretji vladavini prava in četrti ustavni državi. Avtorica nato podrobneje označi pojem oblasti, ki ustreza vzoru ustavne države, posebej pa kritizira še teoretično razlikovanje med ustanovno (ali konstitutivno) oblastjo na eni strani in ustanovljeno (ali konstituirano) oblastjo na drugi. Sama v razpravi sklene, da je vsakršna oblast ustanovljena (ali konstituirana) oblast. Najvišje pravodajne oblasti so ustanovljene s konstitutivnimi pravili, ki imajo naravo običaja, ustanovljenim oblastem niso dosegljiva, obenem pa so neodvisna od odločitev ali volje katerega koli posameznika.

Ključne besede: konstitutivna pravila, konstituirana oblast, dolžnosti/pravice višjega reda

ENG. | The first part of this article is about the rules that define a legal order's supreme legislative authority. In this first part, the article also dwells on several distinctions such as those between norms and meta-norms, legislative and customary rules, and constitutive and regulative rules, all with the objective of determining which of these categories the aforementioned rules belong to. The conclusion is that the basic rules defining the supreme legislative authorities of every existing legal order are necessarily constitutive meta-norms and have a customary nature. The second part of this article takes into account the different possible contents of the ultimate rules that define legislative authority. On this basis, four models of legal order and legislative authority are distinguished: those corresponding to absolute authority and to moral authority, and those corresponding to the rule-of-law state and to the constitutional state. In this regard, several considerations are offered that, on the one hand, single out the specific notion of authority accepted within the constitutional state and, on the other, offer a specific critique of the theoretical distinction between constitutive and constituted authority. According to the analysis provided in this article, every authority is a constituted authority. In particular, supreme legislative authorities are constituted by customary constitutive norms that fall beyond the reach of the authorities themselves and do not depend on the decision or will of any particular individual.

Keywords: constitutive rules, constituted authorities, higher-order duties/rights

and the intentional creation of social reality. — 7. Four models of legal orders and legislative authority. — 7.1. *The model of absolute authority.* — 7.2. *The model of moral authority.* — 7.3. *The rule-of-law model of authority.* — 7.4. *The constitutional model of authority.* — 8. Some considerations on the constitutional model of authority.

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Synopsis

Vojko Strahovnik

Defeasibility, norms and exceptions: normalcy model

SLO. | *Uklonljivost, norme in izjeme: model normalnosti.* Članek se ukvarja s pojmom uklonljivosti, s posebnim ozirom na uklonljivost moralnih in pravnih norm. Na začetku začrtamo grob oris pojava uklonljivosti, ki je zahteven izziv tako za moralno kot tudi za pravno teorijo. Opozorimo na pogoje in primerjalne prednosti, ki naj bi jih izpolnjeval oz. imel model uklonljivosti. Nadalje se v članku osredotočimo na svojstven model uklonljivosti, ki uporablja pojem normalnih pogojev (normalnosti) da bi zajel omenjeni pojem uklonljivosti norm. Trdimo, da temu modelu pri tem spodleti, posebej z vidika predpostavke nadaljnjih pomembnih norm, za katere imamo upravičene razloge za dvom, da so prav tako uklonljive. Tako ta model ne dopušča, da bi uklonljivost segala do samih temeljev zadevnega normativnega področja in omeji značilnost uklonljivosti na norme na srednji ravni. V zaključku poudarimo nekaj naukov te razprave in jih umestimo v širše polje pluralističnega pristopa k normam.

Ključne besede: uklonljivost, izjeme, normalnost, normalni pogoji, moralne norme, pravne norme, pluralizem

ENG. | The paper discusses the notion of defeasibility and focuses specifically on defeasible (moral and legal) norms. First, it delineates a robust notion of the phenomenon of defeasibility, which poses a serious problem for both moral and legal theory. It does this by laying out the conditions and desiderata that a model of defeasibility should be able to meet. It further focuses on a specific model of defeasibility that utilises the notion of normal conditions (normalcy) to expound the robust notion of defeasibility. It argues that this model fails in its attempt to do this, particularly since it presupposes further pertinent norms and we have reasons to doubt if these are defeasible. It thus does not allow defeasibility to go "all the way down" in the normative domain and limits it merely to a feature of some sort of mid-level norm. In conclusion, it draws lessons from this and positions defeasibility models within a more general pluralistic approach to norms.

Keywords: exceptions, normalcy, normal conditions, moral norms, legal norms, pluralism

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Synopsis

Pierluigi Chiassoni

Legal interpretation without truth

SLOV. | *Pravna razlaga brez resnice.* Avtor ponuja analitično obravnavo vprašanja povezave med resničnostjo in pravnim razlaganjem. V prvem delu razprave predstavi pojmovna orodja, ki omogočajo opredelitev glavnih pojavnih značilnosti pravne razlage. Posebna pozornost je pri tem namenjena več vrstam jezikovnih izdelkov (razlagalnih stavkov v širšem pomenu besede) te pravne dejavnosti (v širšem pomenu). V drugem delu razprave pa avtor opozori na tri pojme resničnosti (izkustveno resničnost, pragmatično resničnost in sistemsko resničnost), pri čemer se v zvezi s sistemsko resničnostjo osredotoči na razliko med deduktivnimi in retoričnimi normativnimi sistemi. V tretjem, tj. zadnjem delu razprave avtor pokaže, na kakšen način zaobjame pojav pravnega razlaganja resničnostno zaznamovane danosti, bralcu pa prepusti odločitev o izbiri med strogim in liberalnim pluralizmom resničnosti. Nekaj končnih opozoril je namenjenih dvodelbi formalizem/skepticizem.

Ključne besede: pravna interpretacija, resničnost, razlagalni stavki, razlagalni formalizem, razlagalni skepticizem

ENG. | The paper purports to provide an analytical treatment of the truth and legal interpretation issue. In the first part, it lays down a conceptual apparatus meant to capture the main aspects of the legal interpretation phenomenon, with particular attention paid to the several kinds of linguistic outputs (interpretive sentences in a broad sense) resulting from interpretive activities (in a broad sense). In the second part, it recalls three different notions of truth (empirical truth, pragmatic truth, and systemic truth), focussing, so far as systemic truth is concerned, on the difference between deductive and rhetorical normative systems. In the third, and last, part, it shows in which ways the phenomenon of legal interpretation encompasses truth-apt entities, leaving the choice between austere and liberal alethic pluralism to the reader. A few, final remarks address the formalism/scepticism problem.

Keywords: legal interpretation, truth, interpretive sentence, interpretive formalism, interpretive scepticism

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Synopsis

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How deontic logic contributes to the analysis of legal systems

Book review of *Deontic logic and legal systems* by Pablo E. Navarro and Jorge L. Rodríguez (Cambridge: Cambridge University Press 2014)

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