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A critical view on the reductionist and interpretative approaches

María Cristina Redondo

1 Introduction

1 The present work proposes a reflection on different ways to understand those legal concepts that delimit, and consequently allow us to identify legal institutions. Conceived in this way, these concepts constitute a subtype within a wider class of concepts that define social institutions in general.[1] Some of these concepts are very specific and identify local existing institutions only in some legal systems such as, for example, an unusual kind of contract or administrative authority. Others are more comprehensive and identify institutions that are part of a long tradition and of which we can find examples in numerous places and historic moments. Examples of concepts of this last type would be the concept of contract, of jurisdictional authority, or the broader case of the concept of law in an objective sense, inasmuch as it outlines a group of norms, i.e., a type of social institution. Certainly, as it will be shown, part of the disagreement is based on the different way in which each position understands concepts in general. In any case, reflecting on these kinds of legal concepts poses an interesting challenge to legal theory because, among many other reasons, what they delimit, i.e., a kind of legal institution, can be considered a type of social or institutional "reality". This type of reality, on the one hand, has as an underlying layer of behavioural practice that is susceptible to being identified from an empiric point of view, and even a naturalist one. However, on the other hand, it is endowed with normative content. That is, it consists of a group of norms that resist being reduced to empirical data. At the same time, the normative content of institutions (i.e., of institutional reality) lends itself to examination and analysis from different points of view – for example, from the perspective of language philosophy, which has amply reflected on the content of linguistic institutions, but undoubtedly, also from the perspective of practical philosophy, be it political or moral. Unfortunately, in the debate over the identification of legal institutions, these different perspectives don`t usually present themselves as complementary, but as approaches that cancel each

other out, and propose the right way to understand, identify and analyze the concepts applicable to such institutions.

2 In the present work I´m interested in doing the following: In the first part, I will consider three existing proposals in legal theory that in appearance, constitute three different ways to understand and identify institutional legal concepts. First, I will take into account the interpretative-justifying view brought forward by the postpositivist theory of Ronald Dworkin. Second, I will consider the descriptive and reductionist view associated with the realist theory of Alf Ross. And lastly, I will reflect on the criterial conception held by a normative kind of legal positivism (I will henceforth refer to this last position as NLP).[2] However, the "analytical" and "metatheoretical" methodological proposal associated with NLP has been widely criticized in contemporary philosophy. According to certain arguments, this theory should not be considered a legitimate option, whether because of the serious error on which it is based, or because of its scarce fecundity. This work does not aim to tackle the general debate on the admissibility of the metatheoretical and analytical statements. In a very circumscribed manner, I will try to demonstrate two things: First, the way in which the analytical and metatheoretical approach of the NLP is feasible, i.e., non reducible to, or translatable in either of the other two approaches; and second, the way NLP is not only possible, but actually relevant from a practical perspective.

3 In the second part of the work I will apply the three previously identified proposals to a specific legal institution. As I will try to show, if Dworkin's and Ross´s proposals constitute different ways to understand, identify, and analyze a legal concept, there is reason to conclude that they deserve some criticism that, on the contrary, does not apply to the NLP proposal. On this foundation, what I am interested in suggesting is that the first two proposals should not be viewed as theories that compete against each other and NLP, offering incompatible ways to understand, identify, and analyze legal concepts. In fact, they are complementary theoretical contributions guided by different methodological objectives and which answer different questions in relation to legal institutions.

2 Diverse conceptions of legal concepts

2.1 Legal concepts in Dworkin's interpretative perspective

4 Ronald Dworkin distinguishes three types of concepts: Criterial concepts, natural kind concepts, and interpretative concepts.[3] According to this author, both criterial concepts and natural kind concepts offer a test for their correct application. In contrast, interpretative concepts do not offer a test, but a normative theory, which is always controversial, about what is the best way to identify and justify that to which it is applied.[4] Regarding criterial concepts, Dworkin holds that the test that they give depends on the existing agreements or conventions in the use of the concept. Regarding natural kind concepts, as is implied by their name, the text for its correct application depends on the essence or natural structure (physical or biological) of the examples or instances of the concept in question. In any case, neither of these two types of concepts are sensible to the values that are attributed to them by the user, unlike interpretative concepts, which are sensible to them, and the reason why their application is always controversial.

5 According to Dworkin, in reference to an institution like the law, for example, we share some degree of different kinds of concepts: a sociological concept, a doctrinal concept, and an aspirational concept. In any case, any legal theory, even when it doesn´t always identify or analyze it explicitly, uses the concept of law. In Dworkin´s opinion, this concept is a doctrinal concept, which works as a moral, interpretative concept.[5]

6 Now, the doctrinal and interpretative concept of law – which all legal theories use and are committed to – consists of a group of very abstract normative principles, which in accordance with the expressed or tacit opinion of the theorist using it, offers the best way to understand and justify the concrete practices and norms of that law. As it was said, this type of concept does not provide a test or procedure to establish examples to which it is applied. That is, it does not offer a group of decisive criteria.[6] The interpretative concept of law is not determined by the linguistic practices in use, and can´t be identified or analyzed without going into a morally compromised debate in relation to the content, which is always controversial of the practice in question. According to Dworkin, in the face of profoundly unjust cases, such as the Nazi law, we could conjecture that it is not possible to identify any justifiable theory.[7] However, when we consider it as profoundly unjust, whatever language we use to identify it, we are making an interpretative decision and choosing among different controversial conceptions.[8] This idea confirms a first general thesis, which is interesting to emphasize here: The discourse that identifies a normative institution (as is the law in this case) is always interpretative and commits to a moral thesis, i.e., a group of principles that justify a way to comprehend the institution.

7 At the same time, according to Dworkin, the theoretical statements that identify a doctrinal, interpretative concept of law are not theses of a semantic, metatheoretical character. In fact, although very "light", they are theses of the same type as any other doctrinal thesis about law and they are translated into concrete legal propositions applicable to individual cases.[9] Consequently, taking a position on a concept, we take a position on the type of data or reasons that are the basis of truth in legal propositions, that is, of the propositions that identify that which is obligatory, forbidden, or allowed according to a specific legal order.[10] This idea confirms a second general thesis that is important to underline here: The discourse that identifies a doctrinal, interpretative concept is always committed to a substantial theoretical thesis according to a specific institution where the conditions of the truth of the propositions identify that which is obligatory, forbidden or allowed.

8 It could be conjectured that Dworkin´s proposal is not relevant with respect to the question posed by this work. In the first place, for example, we can understand that according to Dworkin, the only legal concept that works as an interpretative, moral concept is the general concept of law, and not more specific legal concepts such as that of jurisdiction, republic, family, etc. However, this restriction seems implausible because the law, understood as a practice or an institution, doesn´t seem to be anything but a group of those other, more circumscribed institutions and practices, whose existence, moreover, presupposes the same type of interpretative attitude that underlies law in general. Second, we could understand that Dworkin doesn´t argue over the institutional concept of law such as I am using it in this context, and that this last notion corresponds to what he denominates as a "sociological" concept of law. This sociological concept is criterial and the theory of doctrinal (interpretative) concepts does not pretend to say much about it. In this sense, it would be a mistake to apply

Dworkin's thesis to the doctrinal and interpretative concept of law, as a concept that identifies the institution – which would be a sociological concept of law. In this respect, the considerations that I will propose in this work endorse a conclusion somewhat similar to this. That is, they endorse the need to draw a limit between different types of theoretical approaches (not types of concepts), which far from excluding each other, are instead complementary. However, there are two ideas strongly defended by Dworkin that suggest that the proposal of the doctrinal concept of law is considered in competition with, and viewed as a breakthrough in relation to, what "analytical positivism" dedicates as a "sociological concept".

9 In fact, Dworkin proposes an ideal division of legal theory into different stages.[11] In the first stage or semantic moment, the theorist should decide if the concept of law works as a criterial concept (such as "singlehood"), as a natural kind concept (such as "water"), or as an interpretative concept (such as "justice"). In other words, Dworkin apparently holds that, in the first stage of reflection on the law, the theorist could decide to analyze and use a purely criterial concept.[12] Now, although Dworkin explicitly admits this possibility, he also holds two theses that exclude it: First, a theory that identifies and analyzes a criterial concept of law, although possible, is not theoretically interesting. Strictly speaking, according to Dworkin, debates and (apparent) disagreements over a criterial concept don´t even pose a theoretical debate, given that they only require theorists to agree on one classification. And certainly, if we don´t agree on the application of the criterial concept, we are either talking about different things, or we are disagreeing about how we should understand them. Second, a theory which holds – as NLP does – that the concept applicable to a social institution such as the law is criterial, not only proposes an uninteresting thesis, it actually places itself in an impossible position. This is because, according to Dworkin, when theorizing on the law (and it is important to remember that the same thing happens with any other normative institution) the commitment to an interpretative, doctrinal concept is not optional or contingent; it is inescapable. In other words, Dworkin´s theory demonstrates that it is impossible to make the sort of inquiry that the analytical method of NLP proposes, without committing to an interpretative concept. Pursuant to the social character of the object of study, be it aware of this or not, any legal theory assumes an interpretative concept. And in fact, the whole discussion that Dworkin raises on the proposal of several legal theories is destined to show this conclusion.[13]

10 It is not easy to conjugate the different theses held by Dworkin. It is also unclear if, and to what degree, several authors who subscribe to the NLP proposal have already accepted that the concept of law that they identify, indeed implies a doctrinal, interpretative theory. In fact, Dworkin argues with several of these authors under the hypothesis that they have already admitted his fundamental criticism and consequently, offer a "doctrinal positivism". That means, a positivism whose pretended semantic and metatheoretical theses are in fact part of a doctrinal/political/moral debate, which is supported by an interpretative concept of the law.[14] In any case, it is not the aim of this work to show how the NLP can answer or has answered Dworkin's challenge. What I will try to show through the example that I will present further on is the following: First, the concepts that identify legal institutions are not necessarily of one single type, they can be criterial or interpretative. In this sense, a debate about which of these two classes – criterial or interpretative – the concepts that identify legal institutions belong to, is based on a false presupposition. Second, criterial concepts allow theorizing in an interesting way from a substantive perspective. In other words,

they are actually relevant premises when it comes to obtaining substantive conclusions, be they of a dogmatic or a moral character. This shows that it is possible to raise theoretical debates on legal institutions without assuming a commitment to an interpretative concept.

2.2 Legal concepts in the realist perspective of Alf Ross

11 Alf Ross proposed a famous analysis of the concept of subjective law and in particular has focused on the one that determines the institution of property. These types of concepts, which apparently refer to legal institutions, don't really designate anything. That is, legal expressions like "owner", "citizen", "private limited company", are devoid of all semantic reference.[15]

12 In this perspective, identifying an institutional legal concept means making the content of the legal norms that constitute it, explicit. For example, the expression "owner" doesn't refer to an individual, property or event of the world, but it works to *replace*, in some occasions, a disjunction of conditioning facts and in others, a conjunction of normative consequences.[16] Specifically, when we say: "The owner is allowed to receive the yields and dispose of them", the word "owner" substitutes and summarizes the disjunction of facts that according to a specific legal system, condition the aforementioned normative consequences (the power of receiving and disposing of the yields). If we did not have this word, we should explicitly mention this disjunction and say, for example: "He/She, who has received something, whether by purchase or by inheritance or by prescription, etc. is allowed to receive the yields and dispose of them". In other cases, institutional words serve to replace the group of foreseeable normative consequences. For example, when we say: "He/She who has received something, whether by purchase, inheritance or prescription is its owner". In this case, we use the word "owner" in place of enumerating the entire list of obligations, prohibitions, and permissions established by the legal system for these types of cases. In other words, saying that someone is an owner makes it possible to express in more concise terms that said person has received something by purchase, inheritance, or prescription and that as a consequence, he/she has: a) permission to receive the yields, b) faculty to transfer the thing received, c) duty to pay certain taxes, etc. In general, according to Alf Ross:

> The concept does not designate any type of phenomenon inserted among the conditioning facts and the conditioned consequences; it is only a medium which enables – more or less precisely – the representation of the content of a group of legal norms.[17]

13 As can be observed, the legal concepts thus understood, don´t identify a *type* or *general class* of institutions (or entities, properties, or institutional facts), but identifies concrete institutions, i.e., groups of current norms in a specific place and time. The legal concepts are only a summary or a brief way of presentation for the norms that configure a specific institution. Unlike what Dworkin proposes, Ross understands that statements that identify an institutional legal concept do not imply but *are* statements about the normative content of one institution. That means, the translatability of statements about institutional legal concepts in statements about duties and concrete rights is even more direct than in Dworkin´s approach. However, the objective of Ross´s analysis when showing this translatability can be considered almost exactly opposed to Dworkin´s. Concretely, this type of analysis would work, in a second instance, to show

that statements about facts, properties, or institutional objects can´t actually be either true or false, given that they don´t describe anything and lack "condition of truth". Moreover, the analysis would reveal that the institutional language has a misleading and ideological function, which far from justifying, the theorist should condemn, as Ross does. For this author, the fact that someone believes in the truth or falsehood of the existence of a reality or an institutional object can only be causally explained as the result or the artefact of mystical beliefs. To sum up, it could be said that a theory like Ross´s is trying to show that the institutional language is supported by a systematic error; by false beliefs in non-existing entities. Beliefs which we should abandon (in the sense that we have enough epistemic justification to do so). In this respect, it should be noted that Alf Ross does not propose the elimination of institutional language, given that he understands that it is instrumentally useful, as we have seen, as a presentation technique. However, from his perspective, the science of law should methodologically only describe empirical facts and not institutional facts.[18] In this view, institutional facts, properties, or entities simply *do not exist*. In that sense, trying to describe or select the most relevant characteristics of this apparent institutional "reality" is an absurd undertaking supported by the false presupposition that there *is* something that can be the object of such description or individuation. Analyzing an institutional legal concept consists of showing how this concept is reduced to a group of existing norms in a specific time and place.

14 I want to insist on a point which I consider important. Ross's proposal, unlike Dworkin's, doesn't make it possible to infer the content of an institution from the content of the concept that is applied to it, but makes the content of the concept converge directly with the content of a specific institution. This idea is especially problematic because it leads to the confusion of two types of norms and objects of study. If we accept this comparison, it means it is possible to distinguish between the semantic rules of usage of a concept and the legal-political rules of which a specific institution consists. Now, in a context of study different from the legal field, such as zoology, for example, we don't run the risk of assimilating, say, the tigers (the reality of the object of study) with the concept TIGER, whatever may be the conception we have of this type of concept. In other words, there is no risk of confusion between the statements made about the real animals, flesh and bone, already identified as tigers conforming to a type of semantic rules, and the statements about the group of criteria or semantic rules that we follow when we classify them in that way. The confusion is not probable because, among other reasons, the statements in question refer to objects of a very different nature, i.e., the tigers are not groups of rules. Unfortunately, this is precisely the first difficulty that arises in the studies of a legal nature. Here, the object of study (the law) is of the same nature as the concept that allows us to identify it (the concept of law). Setting aside the profound existing differences, both are, depend on, or are expressed in, a group of rules. That explains why the proposal – which in contrast with natural reality would be absurd – that the concept either implies or identifies itself with the object to which it is applied, gains plausibility.

15 The comparison of the semantic rules that constitute and govern the use of a concept to the legal-political rules that the object consists of is implausible, independent from the fact that the study of both types of rules may or may not reduce concepts to a purely empirical character study. The semantic rules establish the correct way to *understand* certain concepts. The legal-political rules establish what is forbidden or

allowed to be deduced or done inside a political community. Certainly, it is possible to establish a relationship between these two types of rules, that is, between the semantic rules which constitute a legal concept and the legal-political rules which constitute a legal institution. In any case, as we will see further on, according to the criterial conception of NLP, this relationship is one of instancing and exemplification: the groups of legal-political rules that conform to each institution are examples or instances of application of a legal concept. In contrast, according to Dworkin, there exists an inferential-argumentative relationship between the content of the concepts and that of the norms that configure the institutions to which they are applied. Lastly, according to Ross, it is a relationship of identity, given that this author directly reduces the content of the legal institutional concepts to the content of the legal institutions, with respect to which such concepts are only a summary and a presentation technique.

16 Using the example that I will present in the second part of the work I will try to show that Ross's proposal is defective in comparison to the proposal of NLP. The latter, first, explains adequately the distinction between an institutional concept and the institutions that exemplify it when they fall into their field of application. Second, it doesn't mistake different classes of institutions: linguistic and legal. Third, it can distinguish between institutional facts whose existence is, in fact, supported by false beliefs and those which aren't.

2.3 Legal concepts in the analytical and metatheoretical perspective of NLP

17 NLP holds that it is possible to identify concepts that define types of legal institutions. For example, specific legal institutions, such as money, the monarchy, property, as well as the more general legal institution that we call "law" or "legal order". A concept, such as it is understood by this position, is a group of distinctive properties where the examples (or at least the paradigmatic examples) that fall into its field of application necessarily satisfy. Thus understood, in fact, a concept constitutes a criterion of identification of that which it defines. Among the authors who adhere to the NLP, there are discrepancies about whether the relevant notes that configure a concept are totally or only partially determined by how words are used in a linguistic practice. But, in any case, such characteristics are considered relevant, essential, interesting, not by virtue of the fact that it is agreed or believed by those who identify the concept, but by virtue of that which is agreed or believed by the participants in the practice that is being considered. According to this position, the theorist who identifies an institutional concept does it from the perspective of the third person. Using a habitual language from Hart's theory, it would be incumbent to say that, in a practical sense, the theorist takes an external perspective, but takes into account the internal perspective of the participants in the relevant practice.

18 From this perspective, the distinction between the content of a concept (e.g., the concept of law, of property, of marriage, etc.) and the content of the institutions, which are examples or instances of application of the concept, becomes vital. Certainly, the content of a legal concept is necessarily connected to the existence of what can be considered examples or instances of it. If we say that there exists a legal system or something that is a legal system, we are applying or using a concept of 'legal system'. However, and in contrast with those who defend the thesis of translatability, it is not

possible to infer conclusions about the normative content of the concrete institutions that fall into its field of application from the content of an institutional concept by itself. Consequently, neither is it possible to infer conclusions about the justification of such content. The identification and analysis of a legal concept is an undertaking which, by virtue of being a hypothesis, refers to the conditions of application of the concept and does not offer either a descriptive or justifying theory of the normative content of the institutions that can be identified through the application of the concept. From this point of view, a legal concept is a linguistic institution endowed with a semantic content that defines a kind of legal institution and refers to concrete legal institutions endowed with legal – political or moral – content.

19 Schematically, according to this position, it is important to stress the following ideas:

20 (i) The distinction between the existence and the content of *linguistic institutions* (concepts or meanings) and the existence and the content of the *legal-political institutions* that we can create, and that we can refer to through the use of the former.

21 A fundamental point of the NLP proposal is that legal institutions presuppose and are built using more basic institutions – linguistic institutions. The idea that legal-political institutions depend on, and would not be possible without, language, has not received a balanced treatment in legal theory. In the history of this discipline, we have moved from conceiving the law on metaphysical foundations that completely ignore its linguistic dependence, to understanding it as a purely linguistic reality. In the vision of NLP it can be said that a relationship of stratification exists between these two types of institutions. This is a point that can be developed here in depth. But the general idea is that a legal-political institution is supported by, and presupposes, language.

22 (ii) An institutional legal concept constitutes an example or specific case of a linguistic institution. It is a linguistic institution that delimits a type of legal institution and whose instances of application are specific examples of legal institutions.

23 It is important to emphasize that, among the institutional concepts on the one hand, and the legal, political, or religious institutions on the other, there is a relationship of exemplification that is not an inferential one; even less one of identity. Between the content of an institutional concept and the existence of a specific institution that falls within its field of application, there is a necessary or constitutive relationship, i.e., the concept establishes a group of criteria that all cases of application necessarily satisfy. If we can´t see the distinction between the linguistic institutions and those legal, political, religious, etc. institutions that we can create and identify with language, it means that we can´t see the distinction between diverse types of normativity. A semantic or conceptual normativity and a 'practical' normativity: legal, political, religious, etc.[19] Not clearly seeing the type of relationship that exists between the concept and that to which it is applied has counterproductive results. On the one hand, it paves the road for the translatability of the norms or reasons of one type (which come from our linguistic institutions) into norms or reasons of the other type (which come from our legal, political, and religious, etc. institutions). On the other hand, it obscures an important fact: Even when they are not possible to translate into statements about the content of the institutions which they allow us to identify, all institutional concepts delimit in a specific way a kind of institution, and consequently, we can reach substantial conclusions about it that are very different from each other, according to how we have identified the concept. In other words, if we don't see the relationship between the content of the concept and the content of the institutions

clearly (be they legal, political, religious, etc.) whose identification the concept makes possible, we are bound not to clearly see the substantial relevance of the concept's content when making assertions and value judgements in relation to the institutions that are already identified on its foundation.

24 It is interesting to note that, once we distinguish the institutional concept from the institutions to which the concept is applied, we can distinguish the statements that refer to the concepts from the statements that refer to such institutions. The former are typical statements that belong to a general theory of law; the latter are doctrinal statements, typical of legal science or dogma. Extending the distinction proposed by Raz between pure legal statements (or *about* the content of the law) and applicative legal statements (or *in accordance to* the law),[20] we can distinguish between pure conceptual statements – or about the content of a concept – and applicative conceptual statements – or in accordance with a concept. In any case, taking again the concept of law as an example, the pure conceptual statements that identify or analyze the content of this concept can be critical when obtaining doctrinal or legal conclusions in a specific case.[21] In other words, conjugated with additional premises such a concept allows us to obtain relevant substantive conclusions about that which is or isn't the law in a specific time and place. However, that doesn't mean that pure conceptual statements about the concept of law are in themselves translatable into doctrinal or judicial statements about the content of the law.

2.4 On the possibility and the relevance of analytical statements

25 Taking a general philosophical perspective it could be argued that Quine has demonstrated the impossibility of drawing a clear separation between analytical statements, *a priori*, and synthetic statements, *posteriori*.[22] According to this position, we should abandon the idea of analyticity, that is, the idea that there are statements whose truth is determined only by considerations *a priori*, relative to the meaning of the statements, and independent from empirical or substantial considerations. I will not reproduce Quine´s powerful arguments here. What I will try to do is make explicit the way it is still possible to admit purely analytic statements without the need to assume the existence of truths that are independent from empirical data or substantial arguments.

26 An argument in favor of this possibility is to note that there are two senses in which we can assert that a statement has analytical or a priori character – a metaphysical sense and a purely epistemic sense.[23] An analytical statement *a priori* in the metaphysical sense is a statement whose truth is necessary by virtue of facts independent from language. An analytical statement *a priori* in the epistemic sense is one whose truth is justified necessarily on the basis of considerations exclusively related to its meaning. The key data for the admission of analytic statements *a priori* in this latter sense are given by the epistemic idea of justification and by the thesis according to which certain statements should be believed, accepted or held as true, i.e., are epistemically justified, on the basis of purely semantic or conceptual premises. In other words, the idea that considerations that are relative to the meaning or to the concepts (which, be it noted, do depend on extra-linguistic empirical data) constitute a sufficient justification to accept or hold the truth of other statements.

27 This point is highly relevant given that, if we don't have an answer that blocks out the general skeptical thesis against the possibility of analytical statements *a priori*, the method that the NLP proposes should be abandoned *ab initio*. In this sense, I will assume that the distinction presented is feasible and that there is a non-metaphysical way of understanding the *a priori* character of the statements that analyze concepts.[24] On this foundation, we notice that the proposal of NLP involves two things. First, an investigation of empirical character and *posteriori*, the tendency to capture the content of general legal concepts actually exists within a specific practice. It is important to highlight that this substantive inquiry refers to (identifies, describes, explains) specific legal practices or institutions. Second, it also involves an analytical inquiry a priori, inasmuch as it tries to establish what presuppositions and consequences are epistemically justified on the basis of identified concepts.[25]

28 Thus characterized, the analytical discourse of NLP is contrasted with those discourses that refer directly to the 'world' or legal 'reality' and obtain substantive conclusions about how that "world" is, or how it *should be*. In a strictly epistemic sense, an analytic discourse of concepts is an "internal" discourse, that is, it is exclusively justified on the basis of considerations relative to the meaning or the content of concepts involved.[26] However, in a practical sense, it is a discourse that is proposed from an "external" point of view, that is, it is not committed to correctness or justification of concrete institutions to which the analyzed concepts apply, nor to the correctness or justification of the beliefs that hold them.[27]

29 Just to mention a few examples of these types of analytical statements: according to Hans Kelsen, one of the necessary characteristics of law is its dynamic nature.[28] We could disagree with this author on whether this is or isn't a trait that is conceptual or necessary to the law. However, that doesn't hinder us from noticing that, in any case, statements such as "If the law is dynamic, then it anticipates mechanisms which regulate its own production" or, "If an institution is legal then there is a mechanism to modify it" are analytic and we are justified in accepting their truth only on the basis of the meaning of "dynamic" in the first case, and on the concept of "law" in the second. In the same way, we can consider the case of Herbert Hart, who emphasized that the law is based on a social rule.[29] Consequently, an analysis of the concept of law in this Hartian perspective allows us to assert that "if something is a legal system, then it isn't supported by a mere habit of obedience". A last example: according to Joseph Raz, the law necessarily purports authority and authority must be understood in terms of exclusive reasons.[30] In this sense, the statement "If something is a legal norm, then it purports to be a reason independent from the content" is justified by virtue of the meaning of the terms involved. These types of assertions – and not those that in fact identify the content of the concepts in question – are analytic in the epistemic sense, identified in the previous point.

30 Certainly, as any other type of statements, the ones that identify or analyze concepts may figure in arguments that justify conclusions of an empirical or practical nature. Precisely because of this, such statements are not passive and may be relevant in dogmatic studies or studies of normative ethics. The fact that a thesis analyzes a concept and its justification as *a priori*, doesn't imply that it can't be part of a theoretical or practical reasoning about substantive empirical or moral questions. However, it does imply that it is not a synonym for, nor can it be translated into, any

empirical or moral substantive thesis, and that we can't infer any conclusion about how the world actually is or should be in and of itself from it.

31 To sum up, a legal metatheory such as NLP, when it identifies a legal concept, proposes in the third person, substantive statements whose truth or falsehood depends on empirical evidence. Specifically, it depends on the practice and self-comprehension of the agents involved in it. In the same way, when it is used to analyze a concept and connect it to other concepts, it establishes strictly semantic connections, whose truth is *justified* only by virtue of the content of the identified concepts. This perspective understands the concepts as a group of properties that can only be considered normative in a strictly semantic sense. From this point of view, the analysis establishes what we must or are authorized to accept as true on the basis of the content of a concept. However, it doesn't allow us to obtain conclusions directly about how, contingently, an institution is, nor about how from a moral standpoint, it should be. In any case, this doesn't mean that the concepts and the analysis proposed are irrelevant, given that they can be conjugated with additional information and entail very different substantive inferences about how institutional reality is or should be.

3 The identification and analysis of a specific concept

32 In this section I will try to show how the three identified proposals shed light on different questions and are not exclusive of one another. At the same time, I will try to highlight how, if interpreted as different ways to understand legal concepts, Alf Ross's and Dworkin's proposals run into certain difficulties that do not affect the NLP approach.

The crime of witchcraft

33 The belief (a false belief, I hope) in the existence of evil supernatural beings with magical powers capable of producing sinister effects has always existed and still exists in our days. Now, it can be said that it was partly this kind of belief that produced a type of institution, whose existence can be fixed between late 1400s and late 1700s, that is paradoxically modern. During these three centuries, in diverse Catholic and Protestant states, ecclesiastical and civil courts captured, prosecuted, tortured, and condemned in different ways, people (in general, women) accused of a specific kind of crime – witchcraft. It can be said that this legal institution was born in 1484 with Innocent VIII's papal bull, in which witchcraft was considered a specific form of heresy. Two German Dominican priests (Heinrich Institor Kramer and Jakob Spreger) were authorized to direct the procedures to detect and eliminate this kind of offense to the values of order, faith and the church.

34 The treaty that these priests wrote, the *Malleus Maleficarum,* was reissued 34 times with more than 35,000 printed copies.[31] It can be considered a manual, and at the same time, a code of witchcraft, which during most of the institution's history, served as a guide to the jurisdictional, religious, and secular authorities who applied this institution. In this sense, the *Malleus Maleficarum* is a clear example of what underlines a realist legal theory when it holds the creative nature of legal doctrine and source of law. In fact, this work proposed a detailed reflection about the nature of witchcraft, as well as a group of specific norms that judges had to apply to those people who were accused of this type

of heresy. Thus, on the one hand, the text identified a series of conditions that allow one to determine if a person is, or isn't a witch, and on the other hand, a series of deontic consequences applicable on the basis of such ascertainment. Contemporarily, besides the substantive norms pertaining to witchcraft, the book establishes rules about the competent judge, distinguishes diverse stages of prosecution for witchcraft according to the type of case, and specifically delimits thirteen ways in which this kind of prosecution can end. What I want to focus on in this context is that according to what I have held so far, taking into account the practice of this institution, it would be possible to identify the "concept" of witchcraft using the three approaches discussed so far: Ross's, Dworkin's, and the one proposed by NLP.

3.1 The application of Ross's perspective

35 Applying Alf Ross's thesis, to identify the concept of witchcraft we should proceed as with any other institutional notion. First, we should say that certainly witches (understood as natural or supernatural beings) don't exist. Whoever believes in such a thing has a magical belief that contradicts and ignores what science teaches us. Now, according to this approach, the existence of witchcraft as an institutional reality is likewise inadmissible. To admit this kind of institutional entity would be an error based on those magical beliefs; scientifically unjustified. To sum up, the belief that the institutional concept of 'witch' refers to something that is exemplified or instanced in the world is also systematically false, given that it is based on the admission of entities that don't exist. In this respect, as we have seen, Ross's analysis suggests reducing the concept and the institutional reality of witchcraft to a group of rules that was applied in a specific time and place. From this perspective, saying that 'S' is a witch means that 'S' satisfies certain conditions and, precisely because of that, certain deontic consequences will follow. Specifically, according to the *Malleus Maleficarum*, if a person 'S':

a) Is seriously suspected of having performed acts invoking the devil, and after questioning, refuses to confess and recant, or having recanted, recidivates in such acts.
b) Is suspected of having performed violent acts invoking the devil, and after questioning, does not recant.
c) Is denounced for having performed acts by influence of the devil and is stubborn or fugitive.
d) Is captured flagrantly committing an act under the influence of the devil.
e) Confesses to have performed acts by influence of the devil, and does not repent.
f) Confesses to have performed acts by influence of the devil, repents and then recidivates.
g) Is denounced and there is evidence, through legitimate witnesses, that he/she has performed acts under the influence of the devil.

36 'S' is a witch, and consequently,

h) Must be submitted to purification.
i) Must be submitted to questioning (torture).
j) Must be excommunicated and if the case requires it, stripped of her privileges.
k) She may be, at the will of the judge, condemned to stand at the doors of a church or to perform certain pilgrimages.
l) Must be submitted to perpetual imprisonment, fed only with bread and water.

m) Must be sent to the secular branch (executed by fire, in a public square, outside the church, on a non-festive day).[32]

37 The way that Ross understands this type of legal concept gives rise to some critical considerations. Specifically, following Ross´s strategy, a witch is someone who satisfies some of the listed conditions (in the group a-g) and to whom the foretold consequences apply (in the group h-m). In this sense, as we have seen, this proposal removes the distinction between the general institutional concept of "witch" or witchcraft, and the contingency contained within this example, of this institution having a specific time and place. However, these two things are different, and it is convenient to separate them. In fact, it is possible to have an example of a kind of institution in a social group, without said group having a general concept corresponding to it.[33] Of course this is impossible if we assume Ross´s proposal where the concept is nothing but the content of a specific institution enforced in a specific time and place. At the same time, when we make this comparison, the general concept that allows us to identify the existence of examples of institutions of the *same* type is hidden from view.

38 In his 1951 work, Ross associates the acceptance of entities as properties of institutional facts, to the acceptance of entities as properties of merely apparent facts, generated by primitive superstitions. Specifically, Alf Ross compares our belief that under certain circumstances there are certain facts or institutional properties, to the belief of members of a primitive tribe where under certain circumstances an individual becomes *tû-tû*.[34] In this analogy, he equates the acceptance and justification of statements referring to entities or institutional properties, which can be perfectly explained on empirical foundations compatible with our scientific knowledge, with the acceptance and justification of statements referring to entities of a magical nature, whose admission can be considered systematically false, and that should be rejected. In contrast to what Ross suggests, according to NLP, legal-political institutions are part of a "social reality" whose existence depends effectively on the beliefs and attitudes of the members of that social group. Having said that, the fact that these beliefs can be true or false, or that the attitudes of the members of the group can be morally commendable or not, is irrelevant to the purpose of the existence and identity of a specific institution, because they depend on the content of such beliefs and attitudes, but not of their truth or their moral merit. In the literature that has been written on the subject, some contrasting positions can be found with respect to the relevance of truth or falsehood of the constitutive beliefs of social institutions. According to Searle, the fact that certain institutions are based on false beliefs can make them even more solid and lasting.[35] However, it is possible to conjecture that institutions that are based on false beliefs, such as certain types of slavery, the crime of witchcraft, or monarchy by divine right, to quote some examples, will disappear when the falsehood of the beliefs they are based on is demonstrated.

39 In any case, once we accept the existence of a social, non-natural reality, it is important not to mistake the admission of, say, the existence of the institution of "witchcraft" and institutional objects such as 'witches' (inasmuch as the conditions foreseen by the corresponding legal norms are satisfied), with the admission of the existence of a natural or supernatural existence of beings that, by virtue of a pact with the devil, eat up children, cause plagues, famines, and other wonders. The theory of institutional reality tries to underline that there are good reasons to accept the former, but in no case does it suggest that there are reasons to accept the latter.

40 Bearing these considerations in mind, it can be said that Ross's theses are supported by some false implicit reasoning. In the first place, as we have shown, his proposal is based on an improper analogy. Specifically, bearing in mind some similarities between magical beliefs and beliefs in normative institutions, it suggests that, as we must reject the former, we must also reject the latter. However, there are some very relevant differences between these two kinds of beliefs. To mention one of fundamental value: The latter, and not the former, can be reasonably justified in compatible terms with scientific knowledge. In fact, from certain moral, political, and economic beliefs and preferences, we can intentionally design and accept, for example, a specific kind of constitutional control or a new kind of commercial society. In such a case, the "existence" of this kind of state or commercial society is not based on any kind of superstitious belief or taboo. In this sense, it is misleading to establish an analogy between the admission of a magical reality and that of an institutional reality. If we accept the analogy, we wouldn't be in a condition to understand, for example, the huge amount of epistemic effort that is dedicated to the latter in comparison to the former. In other words, we couldn't understand the existence of multiple theories that inquire about the processes through which institutional reality emerges, is reinforced, and destroyed. Second, from this improper analogy, Ross makes an improper generalization or, it could be said, commits a fallacy of composition. His analysis of an institution such as *tû-tû*, of the Noît-cif tribe – which is based on systematically false beliefs and which is similar to the witchcraft of the 15th and 18th centuries – suggests that all the institutions are of the same kind. Again, appreciating the contrast between institutions such as *tû-tû* or witchcraft and other institutions such as control of constitutionality, commercial societies, or disability pension, allows us to become aware of the fact that social institutions are not all of the same type. Some may be based on mystical ideas and as Ross states with respect to *tû-tû,* produce fear and terror.[36] Others, however, may be founded on illustrated beliefs and have effects of exactly the opposite denotation.

41 Certainly, the criticism that I have just mentioned of Ross´s position could easily be avoided. But, in order to do that, it is necessary to abandon the idea that this author's statements offer a strategy for the identification of a legal concept and understand them as the proposal of a method to describe or make the normative content of a specific institution explicit.

3.2 The application of Dworkin's perspective

42 In Dworkin's perspective, the theorist who tries to identify the concept of a "witch" or "witchcraft" has to concentrate not only on a specific example, but on different examples of this kind of institution in order to propose a group of principles from the first-person perspective that justify the best version of the concept that can be offered. As we know, according to the methodological perspective of this author, and contrary to the perspective of realist positivism, it is plausible to admit the *existence* of institutions, and normative facts and properties, and certainly, all of them must be considered social constructs. That is, Dworkin and NLP agree on this point. However, in contrast to the latter, according to Dworkin, with respect to "social reality", it is not possible to adopt an "external" point of view in a practical sense.[37] Identifying the concept of "witchcraft" implies offering a normative theory that, in some measure,

justifies it. Consequently, and in the same degree, it implies committing to the values that this kind of institution embodies.[38]

43 A Dworkian exercise in connection to the crime of witchcraft can be found in the first part of the *Malleus Maleficarum* manual, where the authors introduce themselves as trying to offer "the right understanding of the Canon" and thus, when facing the existing disagreements about it, hold that the correct way to understand it is as a form of heresy that ultimately represents "an offense to the Divine Majesty". In other parts of the text they assert that the value in question is the sacredness of the Church and also of the natural order. In any case, there is no doubt that the readings that they offer respond to the aim of justifying this kind of institution and that they are performing the same type of interpretative exercise proposed by Dworkin when he argues about whether courtesy is a form of respect for people, or if the law is or isn't a way to enforce individual moral rights. Such an exercise is performed normally by jurists and we could consider it to be highly interesting.

44 However, with respect to Dworkin's proposal, it is possible to note the following critical considerations. First, as the example taken from the *Malleus Maleficarum* shows, offering a theory that makes witchcraft intelligible from the first-person perspective isn't an obstacle to identifying, in parallel, a criterial concept that according to the beliefs of the participants of the practice, delimits this kind of institution. In fact, Kramer and Sprenger do both things. On the one hand, they hold that the values that justify the persecution of the crime of witchcraft are divine majesty, the sacredness of the church, and natural order. At the same time, they pause to try to show in some depth what their most distinctive characteristics are. In the opinion of these authors, such as is understood by the relevant community, (i) witchcraft necessarily supposes a pact with the devil. Likewise, given that everybody admits that the devil cannot operate causally on material bodies, it follows that (ii) the work of witchcraft is causally ascribable to the witch and not to the devil. On the other hand, taking into account that the devil cannot operate unless someone voluntarily lends themselves to carry out his purposes, it also follows that (iii) the responsibility of the act of witchcraft is imputable to the witch and not to the devil. Finally, they reveal that according to the doctrine, the effects produced by witchcraft are not fictitious or fantastic effects, like those that give rise to other types of heresies, but rather empirical, real effects. In other words, (iv) an act of witchcraft always produces a change in the world.

45 It is important to emphasize that, even when a criterial concept can be considered the fruit of an agreement or a convention of the participants of a certain practice, its identification is not. It is possible to err in the identification of a group of criteria that define an institution according to the practice. The task of identification of the criterial concept of witchcraft is clearly substantive, inasmuch as it tries to capture the characteristics that witchcraft effectively has in the eyes of the participants. Likewise, it is controvertible, as is shown by the debate in Kramer and Sprenger's work, in which they present the opinion of those who understand that it is possible that witches act without the devil's intervention, or that the effects that they cause could be only fictitious and not real.

46 To sum up, as Joseph Raz has demonstrated about the concept of law,[39] it is possible to argue that with respect to social institutions in general, nothing hinders our ability to identify a criterial concept at the same time as an "interpretative" concept. Consequently, it does not seem justified to accept that the concepts that are applicable

to social institutions have to be necessarily conceived as 'interpretative' concepts, in the sense that Dworkin confers this term. Unlike an interpretative concept, the criterial concept says nothing about the moral value of a specific group of norms (i.e., an institution), nor about the conditions of truth of the propositions that identify and apply them. In spite of this, a criterial concept is always relevant from a practical standpoint, and not only from a descriptive sociological perspective, nor guided by a merely taxonomic interest. For example, if we adopt the criterial concept identified by Kramer and Sprenger, a person that claims publicly that the devil exists and the choice to ally with him, but that has not given place to any material result that could be understood as brokered by the devil, according to the requirement (iv) of the definition of these authors could not be considered a witch. Such a person may, perhaps, be considered as an author of another type of heresy, or imputed for advocating witchcraft, but not for being a witch. This conclusion may be decisive in a doctrinal, jurisprudential, or moral argument about the normative qualification of an action and is partially justified on the basis of the criterial concept of "witch" previously identified. This denies the thesis of the practical irrelevance of the concept understood in this sense.

47 Furthermore, the example of witchcraft allows us to argue explicitly against an interpretative conception of legal concepts. Institutions like witchcraft are based on systematically false beliefs of the participants who justify them. In these types of cases, by hypothesis, the theorist has reasons – necessarily "external" reasons with respect to the beliefs of the participants – to argue that the institution in question lacks an appropriate justification. Dworkin certainly admits that this type of situations can be verified. However, the answer that emerges from his position is disconcerting.

48 Applying this author's approach, a scholar who refers to social institutions finds him or herself inescapably in an interpretative argument and makes decisions that force him or her to some degree, to morally commit to a justification of these institutions. However, if this is the case, the theorist cannot consistently, i.e., without falling into a pragmatical contradiction, assert that *all* theories that are susceptible to justifying the type of institution to which he or she refers, are based on false beliefs, or similarly, that *none* allow themselves to be adequately justified. This is because adopting an interpretative approach and participating in a debate about an interpretative concept does not consist simply of accepting values or having an attitude morally committed in the abstract; it is offering a theory in the first-person perspective which to some extent makes intelligible or justifies the type of institution that is being argued about. In other words, it is doing something (offering reasons to justify the type of institution or make it intelligible) that, in cases as the one indicated, contrasts with our argument (that there are no reasons to justify that kind of institution or make it intelligible). Consequently, in these kinds of cases referring to institutions based on systematically false beliefs, Dworkin's proposal can be reduced to absurdity – assuming it leads inevitably to a pragmatic contradiction. That is because it is not possible to adopt an interpretative attitude with respect to that type of institution and at the same time argue that it lacks *all* possible justification, which is what the theorist has reasons so argue in the type of case that was analyzed.

49 The considerations presented here do not presume to deny the interest that may lie in the identification of those principles that, in the opinion of those who propose them, provide the best justification for a type of institution. In other words, they do not

presume to deny the interest of an interpretative theory such as the one Dworkin proposes. What they attempt to show is that it does not seem adequate to conceive this proposal as an undertaking of a conceptual character. The identification of an interpretative concept such as it is understood by Dworkin does not compete with, nor does it replace the identification of criterial concept. Likewise, identifying a criterial concept that delimits a kind of social institution, does not imply nor require the assumption of an interpretative theory, i.e., it does not imply nor require an interpretative "concept" such as was understood by Dworkin. In contrast, if we assume that Dworkin's interpretative theory is indeed a way to understand and identify institutional concepts, it can be concluded that the proposal of NLP is in a better position. First, the identification and conceptual analysis proposed by NLP does not detract sense nor importance from the offer of justification theories with respect to any institution. It is a task that is independent from, and compatible with, the analysis that NLP proposes. In this sense, this position does not prescribe abstaining methodologically from participating in debates of political or moral philosophy as the ones proposed by Dworkin, but it just does not allow such debates as examples of identification and conceptual analysis. Second, the NLP method allows us to distinguish and express something that Dworkin's theory cannot distinguish nor express. Specifically, the NLP approach allows us to identify examples of a type of institution without implying a justifying judgement. Thus, it allows us, without falling into a contradiction, to identify an institution, and at the same time argue that we don't have, in relation to it, an adequate, intelligible, or true theory that is capable of justifying it. This possibility, unavailable in Dworkin's theory, involves placing oneself – in a practical or evaluative sense – in an external point of view regarding the beliefs that support and justify the type of institution in question.

4 Final considerations

50 Throughout this work I have referred to three positions that present themselves as different ways to understand, identify, and analyze certain kinds of legal concepts. In this respect, I have shown that if Alf Ross's and Ronald Dworkin's theses were in fact, as the present themselves to be, strongly critical and mutually exclusive with respect to the NLP approach, they would deserve to be challenged by virtue of the difficulties they pose. However, it can be said that for each of these positions, the legal concepts to which they refer, are groups of rules or principles of a different kind: semantic rules – according to NLP, rules of a specific legal system – according to Alf Ross's realist proposal, and political-moral principles – according to Ronald Dworkin's interpretative approach. As I have tried to show, identifying each of these kinds of norms is a different type of undertaking. On this foundation, the suggestion is that it does not seem appropriate to understand these positions as involving the same type of operation – the identification and analysis of legal concepts. In fact, the first effectively leads to identifying the content of a general concept, the second, to identifying the content of a legal institution enforced in a specific time and place, the third, the content of a justification theory of a type of institution. In other words, the three positions refer to different objects and are guided by different objectives. In this sense, they are not comparable with each other.

BIBLIOGRAPHY

Arriagada Caceres, M.B. (2018). Tres problemas de Atria sobre los conceptos jurídicos ilustrados en el concepto de derecho subjetivo. *Revista chilena de derecho*, *45*(1), 7-31.

Atria, F. (2016). *La forma del derecho*. Madrid, Spain: Marcial Pons.

Barberis, M. (2004). *Una breve storia della filosofia del diritto*. Bologna, Italy: Il Mulino.

Bix, B. (1993). *Law, Language, and Legal Determinacy*. Oxford, England: Clarendon Press.

Boghossian, P.A. (2008). *Content and Justification. Philosophical Papers.* Oxford, England: Oxford University Press.

Dworkin, R. (1986). *Law's Empire*. London, England: Fontana Press.

Dworkin, R. (1996). Objectivity and Truth: You'd Better Believe it. *Philosophy and Public Affairs*, *25*(2), 87-139.

Dworkin, R. (2006). *Justice in Robes*. Cambridge, Mass.: Harvard University Press.

Hart, H.L.A. (1994) *The Concept of Law*. Oxford, England: Clarendon Press (Original work published 1961)

Iglesias, M. (1999). *El problema de la discreción judicial. Una aproximación al conocimiento jurídico*. Madrid, Spain: Centro de Estudios Políticos y Constitucionales.

Kelsen, H. (1979). *Teoría pura del derecho* (R.J. Vernengo, Trans.). Ciudad de México, Mexico: UNAM. (Original work published 1960)

Kramer, H.I. & Sprenger, J. (1928). *The Malleus Maleficarum* (Rv. Montague Summers, Trans.). (Original work published 1486-1487). Available at: http://www.malleusmaleficarum.org/downloads/MalleusAcrobat.pdf.

Lifante Vidal, I. (1999). *La interpretación jurídica en la teoría del derecho contemporánea*. Madrid, Spain: Centro de Estudios Políticos y Constitucionales.

MacCormick, N. (1998). Norms, Institutions and Institutional Facts. *Law and Philosophy, 17*, 310-345.

Mindus, P. (2009). *A Real Mind. The Life and Work of Axel Hägerström.* Dordrecht, The Netherlands: Springer.

Narváez, M. (2002-2003). Enunciados filosóficos vs. enunciados teóricos. El caso de la textura abierta del derecho. *Analisi e diritto 2002-2003*, pp. 211-240.

Nino, C.S. (1984). *Introducción al análisis del derecho* (2nd ed.). Buenos Aires, Argentina: Astrea.

Quine, W.V.O (1961). *From A Logical Point of View* (2nd ed.). New York, NY: Harper & Row. (Original work published 1953)

Raz, J. (1970). *The Concept of a Legal System*, Oxford, England: Oxford University Press.

Raz, J. (1979). *The Authority of Law*. Oxford, England: Oxford University Press.

Raz, J. (1998). Two Views of the Nature of the Theory of Law. *Legal Theory, 4*, 249-282.

Raz, J. (2009). Can There be a Theory of Law. In *Between Authority and Interpretation* (pp. 17-46). Oxford, England: Oxford University Press.

Redondo, M. C. (2018). El método y el objeto de la teoría jurídica. La ambigüedad interno-externo. *Análisis Filosófico*, *XXXVIII*(2), 115-156.

Ross, A. (1957). Tû-tû. *Harvard Law Review*, *70*(5), 812-825. (Original work published 1951)

Ross, A. (1994). *Sobre el derecho y la justicia* (G.R. Carrió, Trans.) (5a. ed). Buenos Aires, Argentina: Eudeba. (Original work published 1958)

Roversi, C. (2012). *Costituire. Uno studio di onlogia giuridica*. Torino, Italy: Giappichelli.

Searle, J. (1995). *The Construction of Social Reality*. London, England: Penguin Books.

Searle, J. (2010). *Making the Social World. The Structure of Human Civilization*. Oxford, England: Oxford University Press.

Winch, P. (1990). *The Idea of a Social Science and its Relation to Philosophy* (2nd ed.). London, England: Routledge. (Original work published 1958)

NOTES

1. In this context, institutions can be understood as groups of rules that depend on the acceptance of a social group. Cf. Searle 1995: 27-29. Or, similarly, as a group of rules that correspond to a social practice. Cf. MacCormick 1998: 306 ff. As will be shown throughout the work, it is important to maintain a clear distinction between institutions or legal rules and institutions or linguistic/semantic rules.

2. Two clarifications should be made: First, when we speak of NLP, we refer to the type of legal positivism that does not reduce the law to purely empirical data, but conceives of it as a group of normative content. Second, it must be highlighted that not all authors who assume this position argue exactly the same thesis with respect to legal concepts. For example, authors like Joseph Raz, Herbert Hart, and Eugenio Bulygin argue different positions about legal concepts, but all of them contrast their position with those proposed by Dworkin and Ross. In this sense, what I will say in this work is valid in general for these positivist, normativist positions, even when they disagree with each other about some specific theses related to legal concepts.

3. Cf. Dworkin 2006: 9-12; Dworkin 2011: 158-163.

4. In connection with this, see, for example, Iglesias 1999: 136-141.

5. Cf. Dworkin 1986: 87 and Dworkin 2006: 12.

6. Cf. Dworkin 2011: 161.

7. The example about Nazi law can be seen in Dworkin 1986: 104-108.

8. Cf. Dworkin 1986: 108.

9. In this respect, it is possible to refer to the analysis proposed by Lifante Vidal 1999: 284-296.

10. Cf. Dworkin 1986: 90.

11. Cf. Dworkin 2006: 9-21.

12. Cf. Dworkin 2006: 19-20.

13. Cf. Dworkin 2006: 226-240.

14. Cf. Dworkin 2006: 235-240.

15. Cf. Ross 1957: 818. It is important to highlight that I am not trying to identify a general theory of legal concepts in the thought of Alf Ross. I am referring to his theses

on the concepts of '*tû-tû*', which the author analyzes in his famous 1951 essay and which constitute a continuation of the critique to the legal concepts that was initiated by Hägerstöm in the Scandinavian context. Ross´s approach – which, like Olivecrona´s, is not purely critical, but also constructive – is proposed in legal literature as a paradigmatic example of a realist and reductionist approach to institutional concepts. See, for example, Nino´s chapter about "the basic concepts of the law" in Nino 1984: 209-216. See also Roversi 2012: 103-118. Regarding the initial position of Hägerström, see Mindus 2009: 157, and Barberis 2004: 118, 122.

16. Cf. Ross 1957: 819-821.

17. Cf. Ross 1958/1994: 168.

18. Ross 1958/1994: 39.

19. This lack of distinction leads to another type of reduction, which is equally confusing. I am talking about the idea that a study of following of linguistic rules (such as the one offered by Wittgenstein, for example) would be directly applicable to the analysis of, or enough for understanding, the following of legal rules. In connection to this, see Bix 1993: 36-62.

20. Raz 1970: 49-50 and Raz 1979: 62.

21. As a way to illustrate this, it is interesting to mention the example proposed by Atria, in which it is possible to see the substantial conclusions that can be reached with respect to a case, in particular when the concept of law proposed by Herbert Hart is adopted. Cf. Atria 2016: 66-72. This author, however, confuses the fact that the concept can enter into practical reasoning and contribute to determining its conclusion (idea which is applicable to Hart's concept, as to any other concept) with the thesis that the content of the concept is already compromised and allows in and of itself to infer statements about the content of the institution (idea which is applicable to Dworkin's interpretative concepts, but not to the criterial concepts such as they are understood by NLP). An analytical criticism to Atria can be found in Arraigada Cáceres 2018: 7-31.

22. Quine 1961: 20-37.

23. Boghossian 2008: cap. 9.

24. A different way to understand the distinction between *a priori* and *a posteriori* discourses, but compatible with the proposal of NLP can be found in Narváez 2002-2003: 211-223.

25. It can be said that the practical interest of the metatheoretical analysis depends on the truth of the statements that identify the analyzed concepts. That is, the analysis of concepts which do not capture, or capture incorrectly, those effectively used in a specific time and place would seem unproductive. However, in an epistemic sense, an inquiry can be unobjectionable even when the conclusion is reached that it is scarcely useful because it is supported by false premises or because, it intentionally analyzes concepts that are not used in any practice.

26. I make use of the notion of internal discourse here in the sense that is employed by Peter Winch, when he argues that this type of discourse does not refer to empirical events but to contents of meaning. Cf. Winch 1990: 111-120.

27. With respect to these two meanings, the expressions "internal point of view" and "external point of view" see Redondo 2018:122-23.

28. Kelsen 1979: 205.

29. Hart 1994: 51-60.

30. Raz 1979: 28-34.

31. Kramer & Sprenger 1486-1487 (Italian translation of 2003).

32. Cf. Kramer & Sprenger 2003.

33. See Raz 2009: 37-41.

34. Cf. Ross 1957: 812-813.

35. Searle 1995: 118; Searle 2010: 107-8.

36. Cf. Ross 1957: 812.

37. Dworkin 1986: 76-86; Dworkin 1996: 87-139.

38. It is important to highlight that it is possible for an interpretative-normative theory to not have the necessary objective (as Dworkin presupposes) of making intelligible or identifying the values in a specific kind of institution. In reality, it could have the exact opposite objective: to remove intelligibility and highlight the defects that a type of institution embodies. In this last case, it would be a clearly normative theory, committed to values, but not committed to the type of institution to which it is being referred.

39. Cf. Raz 1998: 249-282.

ABSTRACTS

This paper proposes a reflection on specific kinds of legal concepts: those that delimit and allow us to identify legal institutions. In the first part, three proposals that are presented as competitive visions of these kinds of institutional concepts are taken into account: First is Ronald Dworkin's interpretative-justifying conception; second is the reductionist conception associated with the realistic theory of Alf Ross; finally, the criterial conception supported by a normative legal positivism. In the second part of the work, these three proposals are applied to a specific legal institution: the crime of witchcraft. The paper has two fundamental objectives: On the one hand, to show that the analytical and metatheoretical approach of normative legal positivism is not reducible to any of the other two and, in turn, relevant from a practical point of view. On the other hand, to show that the presentation of the considered proposals as if they were competing approaches to institutional concepts is misleading. They don't talk about the same thing. They are guided by different methodological objectives and, above all, answer different questions concerning legal institutions.

Institucionalni pojmi. Kritika redukcionističnega in interpretativističnega stališča. Predmet te razprave so institucionalni prvani pojmo, tj. pojmi, ki služijo prepoznavi in zamejitvi pravnih institucij. V prvem delu članka so predstavljeni trije različni pogledi na tovrstne institucionalne pojme: Dworkinovo interpretativno-utemeljevalno pojmovanje, redukcionistično pojmovanje povezano z Rossovo realistično teorijo prava in kriterijsko pojmovanje, ki je značilno za normativni pravni pozitivizem. V drugem delu članka to vsa tri pojmovanja uporabljena v pojasnitev iste pravne institucije, in sicer kaznivega dejanja čarovništva. Avtorica ima ob tem dva cilja. Po eni strani želi pokazati, da je analitični in meta-teoretični pristop normativnega pravnega pozitivizma praktično pomemben in obenem nezvedljiv na katero od drugih dveh pojmovanj. Po drugi strani opozarja, da je razumevanje omenjenih treh pristopov kot alternativ zavajajoče. Omenjeni pristopi namreč ne delijo istega predmeta, vodijo jih različnih metodološki cilji, predvsem pa so vprašanja o pravnih institucijah, na katera odgovarjajo, različna.

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