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VSEBINA

V tokratni številki so objavljeni prispevki v angleščini in španščini.
Za slovenske povzetke in ključne besede glej strani 127–132.

TEORIJA MEDNARODNEGA PRAVA

TABLE OF CONTENTS

This issue is composed of papers in English and Spanish. For synopses and key words, see pages 127–132.

REVUSOV FORUM

Pred-konvencije: korak v psihološko pravoslovje?

Razprava z Brunom Celanom

Neposredno potem ko je bil objavljen italijanski izvirnik razprave Bruna Celana z naslovom Pre-convenzioni (*Ragion pratica* 2014/2), smo se pri *Revusu* odločili za njegovo objavo v angleškem prevodu. Pogovori, ki sem jih imel o tej temi z Marcom Brigaglio, pa so spodbudili organizacijo širšega foruma, posvečenega Celanovi razpravi. Brigaglia sam se je prijazno odzval na povabilo, da k forumu prispeva daljšo uvodno študijo. Ta osrednje besedilo umesti v okvire Celanovega opusa z ugotovitvijo, da gre za pomemben (četudi implicitni) preobrat, v katerem je mogoče prepoznati avtorjev prvi korak v »psihološko pravoslovje«.

Revusov forum o pred-konvencijah je razporejen v dve številki *Revusa*. V tej številki so še kritični komentarji Federica Joséja Arene, Dala Smitha in Joséja Juana Moresa. V naslednji številki pa bodo objavljeni prispevki Luísa Duarteja d'Almeide, Rodriga Sáncheza Brigida, Pierluigija Chiassonija, Marca Segattija in Sebastiána Figueroe Rubia – skupaj s Celanovim odgovorom vsem sogovorcem.

Urednik foruma se želim zahvaliti Marcu Segattiju za prevod osrednjega besedila v angleščino, recenzentom in komentatorjem pa za njihovo sodelovanje. Posebna zahvala gre seveda Brunu Celanu, ki je *Revusov* izziv, da se sooči s kritiki, sprejel predano in naklonjeno.

Matija Žgur
Palermo, oktober 2016

DISCUSSION

Pre-conventions: towards a psychological jurisprudence?

A discussion with Bruno Celano

Immediately after the publication of the Italian original of Bruno Celano's paper Pre-convenzioni (*Ragion pratica* 2014/2) we decided to prepare its English translation for publication in *Revus*. My conversations with Marco Brigaglia regarding this project stimulated the organization of a broader critical forum dedicated to Celano's paper. Brigaglia kindly accepted the invitation to contribute a comprehensive introductory study. This underlines the significance of the paper within Celano's larger opus by showing that it constitutes a crucial (though implicit) turn, which may be represented as the author's first step towards a "psychological jurisprudence".

The resulting discussion on pre-conventions is placed in two issues of *Revus*. Whereas the present issue also includes the contributions of Federico José Arena, Dale Smith and José Juan Moreso, the next issue will feature the comments by Luís Duarte d'Almeida, Rodrigo Sánchez Brigido, Pierluigi Chiassoni, Marco Segatti and Sebastián Figueroa Rubio – togheter with Celano's reply to them all.

As the editor of this discussion, I wish to thank Marco Segatti for the English translation, as well as the reviewers and commentators for their participation. Of course, a special thanks goes to Bruno Celano who graciously accepted to confront the challenges presented by the commentators.

Matija Žgur
Palermo, October 2016

Bruno Celano*

Pre-conventions

A fragment of the Background

In this paper I argue that there exist conventions of a peculiar sort which are neither norms nor regularities of behaviour, partaking of both. I proceed as follows. After a brief analysis of the meaning of 'convention', I give some examples of the kind of phenomena I have in mind: bodily skills, know-how, taste and style, *habitus* (P. Bourdieu), "disciplines" (M. Foucault). Then I group some arguments supporting my claim: (i) considerations about the identity conditions of precedents (D. Lewis) and about the projectibility of predicates in inductive inference generally (N. Goodman); (ii) thoughts about rule-following (L. Wittgenstein); (iii) an examination of some of J. R. Searle's ideas about the "Background" of intentionality. I conclude with some remarks about the time-honoured antithesis 'nature' *v.* 'convention'. | The Italian original of this text was published in: *Ragion Pratica* 2014/2: 605–632.

Keywords: convention, custom, rule-following, projectibility (induction), the Background of intentionality

"… because in every one habit [*ethos*; Bekker: *consuetudo*]
is a matter of importance, since it soon becomes a second nature [*physis*]"
Aristotle, *Problemata, XXVIII*

1 INTRODUCTION

I will argue that there are entities that can be plausibly called 'conventions', which are neither mere *de facto* regularities, nor rules (norms), but that – in a sense to be specified – have both the character of *de facto* regularities, as well as a normative character: they are, literally, 'normative facts'. This paper attempts to isolate these entities.

The matter is delicate. Philosophers usually distinguish, and with good reason, between rules and regularities, between facts and norms. In each pair, the two concepts are thought of as mutually exclusive. The distinction is intuitive, and it appears, at first sight at least, incontrovertible. The entities that we are trying to isolate are, mostly, at the edge of our visual field – and delimit it. For this reason, they usually go unnoticed, and to see them we need to try and look at them from the corner of our eyes. (These are only metaphors, of course).

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Usually, whenever we discuss particular moral, legal, or political problems, we distinguish between a *de facto* regularity, and a rule; on the one side we have facts, on the other, norms. We do well to distinguish between them**.** Confusing facts and rules *is*, indeed, a cardinal sin.[1]

The entities that I will discuss are, as I said, conventions. I do not mean to suggest, of course, that what I will try to pin down is the only meaning of 'convention'; nor, even less, the 'true' meaning of the word (whatever that might mean). The term 'convention' has, simply, more than one meaning. For this reason, it is appropriate to begin with an exploration – albeit only amateurish – of its semantic field.

2 THE WORD 'CONVENTION': SOME MEANINGS

As a first approximation, it is safe to say that, in Italian (as well as in similar languages[2]), the semantic field of "convenzione" (the word usually translating 'convention') is divided into two distinct areas. In a first sense, the term refers to an explicit agreement, which is conscious and deliberate, between multiple parties; or, to the result of such an agreement (sometimes, an assembly which is assumed to have the task of reaching an agreement of this kind). In a second sense the term refers instead to social norms, customs, ways of behaving, that are consolidated by tradition. The elements that are common to the two areas are:

(1) The idea of an 'agreement', using this term in a very generic and vague way: a generic '*con-venire*', 'being together', 'going together to the same place (or in the same direction)'. A very sketchy idea, nothing more.

(2) The idea of arbitrariness: a convention might have been (at least partly) different from what it is, without significant changes (with respect to some criterion, more or less precisely defined). When X – a rule, a sign, and so on … – is conventional, it is, within certain limits, immaterial (not necessarily *completely* immaterial) whether X has certain features rather than others; what matters is that those, and not others, are the features that are commonly accepted.

This is, however, only a first approximation. In the semantic field of 'convenzione', one should distinguish between two further areas. On the one hand, there is the idea of an agreement – which can be either explicit or tacit – informed by the "perception of a common interest", in Hume's words;[3] that is, the reasoned pursuit, by each of the parties involved, of their own goals (in this

1 Celano 1994.

2 What I say in this section does not necessarily apply, in unrevised form, also to the English word 'convention' (stemming, of course, from the same Latin root as the Italian 'convenzione').

3 Hume 1975: 257.

case, I will speak of a 'rational explanation', or of a 'train of reasoning' explaining the behavior of the relevant parties; this reasoning, too, may, in turn, be tacit or explicit).[4] On the other hand, the idea of a shared, and established, manner of doing things, a way of thinking or acting, which is not explained by a train of reasoning, be it tacit or explicit.

This distinction produces an ongoing ambiguity in the use of the term. If one emphasizes the agreement-aspect (an agreement explained by a train of reasoning), leaving aside the antithesis 'tacit' *v*. 'explicit', one ends by oscillating between *contract* and *convention*,[5] or by recording a tight connection between *convention* and *custom* (according to some of the many meanings of the word 'custom').[6] But apart from this ambiguity, one should keep in mind the possibility of conventions – both explicit or tacit – that are not explained by a train of reasoning (that is, conventions which are not amenable to a rational explanation).

The semantic field of 'convenzione', in short, is articulated through two axes of differentiation: the antithesis 'rationalizable' (explained by a train of reasoning) *v*. 'non rationalizable', and 'tacit' *v*. 'explicit'.

If we now try to follow the thread of this double articulation, isolating these different conceptual possibilities, we move beyond a mere exploration of the semantic field of the word. Rather, we are engaged in the search for an explanatory redefinition of the term – more precisely, a rational reconstruction of a plurality of different concepts of convention (or 'convenzione'; from now on, I shall use the two terms indifferently).

3 CONVENTION: A FAMILY OF CONCEPTS

If we cross these two axes of differentiation, we obtain a matrix with four boxes, corresponding to four different notions of convention.

The entities that I will try to isolate occupy – but do not exhaust – one of these boxes. The main modern and contemporary theories of conventions occupy one of the remaining boxes. Let us see.

The box which results from the combination of the two traits: 1. ' train of reasoning', and 2. 'explicit' – that is, conventions that are explicit agreements, backed by a train of reasoning – is occupied by phenomena such as contracts, multilateral promises, treaties, and the like. The relevant theories try to account

4 The mere *possibility* of reconstructing the relevant actions as having such a structure is not enough. This would make the notion too generic.

5 This is how one may come to the paradoxical interpretation of Hume as a contractarian (Gauthier 1979).

6 Celano 1995, 2013.

for these phenomena as the product of self-interested behavior by rational agents; in their extreme forms, they explain conventions as agreements that are reached by subjects whose behavior maximizes expected utility. (The crucial problem for these theories is to account for the principle *pacta sunt servanda* in terms of rational choice).

To date, the most influential theories of conventions are those of David Hume[7] and David Lewis.[8] These theories try to account for conventions that are agreements (in the generic sense; see above, sect. 2), backed by a tacit train of reasoning. Hume and Lewis – and, in their wake, others – provide an explanation of conventions as the result of decisions by rational individuals pursuing their own interests, in the absence of an explicit agreement (and in the absence of an authority that enforces it).

There remain, in addition to the two boxes marked by the presence of a train of reasoning (explicit agreements: contract; and tacit agreements: conventions *à la* Hume, or Lewis), two boxes left. Here, I will not deal with explicit agreements that are not backed by a train of reasoning. Social groups usually have explicit conventions that are not, or at least do not seem to be, amenable to rational decisions by the individuals involved.[9] The phenomena that interest me occupy the fourth box: tacit conventions that are not backed by a train of reasoning.

This covers different possibilities. The idea that interests me is this: convergent behavior (behavior which is in 'agreement', in the generic sense indicated above, sect. 2) which is not a biological regularity, and is the result of learning, but which is also automatic: it is spontaneous (unreflective), rapid, fluid, *effortless*.[10] Therefore, it may as well be particularly rigid, mechanical, blind, dumb. Conventions – to use yet another metaphor – that are part of the body, in the flesh, so to speak, and have become as natural as breathing, a 'second nature'.[11]

All of this, of course, stands in need of clarification. I will proceed as follows: in the next section, I will provide some examples of the phenomena I have in

7 Hume 1976.

8 Lewis 1969.

9 Proponents of an inflexible rational choice-based methodological individualism will (implausibly) deny this. But I shall not go here into the controversy between advocates of *homo economicus* and defenders of *homo sociologicus*. It is enough for my purposes that the one indicated in the text is in fact a coherent conceptual possibility – even if the concept turned out to be an empty class.

10 These are, by and large, the traits that D. Kahneman (2011) attributes to the workings of System 1. I say 'by and large' because the workings of System 1 include biological phenomena as well.

11 See – albeit confusedly – Murphy 2007: especially at p. 54: "custom /…/ must be analyzed into two more basic notions, habit and convention" ("customs are habitual conventions and conventional habits: custom naturalizes conventions just as it conventionalizes human nature"). (Here, 'custom' expresses the notion of convention I am interested in). Notice the usual ambiguity between 'custom' and 'convention' (noted in sect. 2, above).

mind. Later on, I will present some arguments supporting the conclusion that there exist, indeed, conventions of the relevant sort, conventions that are 'embodied', and that these are normative facts. The arguments themselves are not mine; but the light in which I present them is, it seems to me, somewhat original – specifically, the idea that these arguments may illuminatingly be viewed as all leading to the same conclusion, and the spelling out of this conclusion.

4 PRE-CONVENTIONS: SOME EXAMPLES

Before going on, however, I should note a difficulty which is implicit in what has been said so far. I said that one of the axes articulating the semantic field of the term 'convention' is the antithesis 'tacit' *v*. 'explicit'. I pointed out that the entities that I am trying to isolate are 'tacit' conventions, 'tacit' in the sense of automatic: regular convergent behavior that, while not a biological regularity (e.g. breathing), is spontaneous, unreflective, fast, fluid, effortless. The difficulty is this: human beings are made in such a way that everything, or almost everything – even the demonstration of Gödel's theorem, or the selection of an efficient allocation of scarce financial resources on a certain market – can, by virtue of a learning process, become automatic. Anything, or almost anything, that can be learnt can become 'second nature'. This fact threatens to undermine our reconstruction. Thus, for example, it is possible that those who follow a convention *à la* Lewis (a tacit agreement supported by a train of reasoning; see above, sect. 3), and for which this convention has become obvious, have a "tacit understanding of it, which they cannot easily articulate to outsiders".[12]

This is an endemic problem when dealing with intentional phenomena. So, for example, each one of us has, in every moment of her life, countless tacit beliefs (I believe, for example, that the apartment that I live in is on the fourth floor); but it is not easy to identify the features that distinguish a belief of this kind from other similar entities, which are in some sense tacitly present in us, but that it would be quite odd to call *beliefs* – such as, for example, the 'belief' that the Earth existed before I was born.[13] Of course, if I were asked whether or not the Earth existed before I was born, I would answer, yes (that is what I'm doing right now), just as I would answer yes if I were asked whether or not I live on the fourth floor. But is this enough to say that 'The Earth existed before I was born' is, and was, the content of a *belief* of mine, albeit a tacit one? If so, there will be no limit to my tacit beliefs (do I have the tacit belief that I am not a worm?). Similarly, returning to the case of those who follow a Lewis-convention which has become for them 'second nature' we can say, of course, that what they

12 Sugden 1998: 379.

13 See in general Lycan 1986. The example is taken from Wittgenstein 1969.

are doing is implementing a train of reasoning that is 'within them', in a tacit and non-articulated way – just as a tacit belief proper. But it is unclear what that might mean, if not that they behave *as if* they were doing this. But this appears to be question begging. When the convention has become 'second nature' what guides their conduct is, in some sense (see below, sect. 6), what they actually *do*.

These considerations show, I think, that it is necessary to distinguish two senses of the adjective 'tacit'. In the first sense, it is used to refer to a tacit belief proper ('I live on the fourth floor'); in the second, it refers to entities that can only improperly be called 'beliefs' ('The Earth existed before I was born'; 'I'm not an earthworm'). Or, returning to our case, one should distinguish between the sense in which a 'train of reasoning' supporting a Lewis-convention can originally – i.e., when the convention comes into existence – be called 'tacit'; and the sense in which it can be called 'tacit' when the convention has become 'second nature'. The entities that interest me are agreements which are 'tacit' in the latter sense. (The crucial point, as we shall see – below, sect. 7 – is that the entities in question are not intentional phenomena).

Let us now consider some examples of the kind of phenomena I have in mind. Not all the things that fall in each of the areas that we shall now review are conventions. But in each of these areas there is room for the conventional.

(4.1) Consider learning a sporting skill such as front crawl.[14] What is *the correct swimming stroke* in front crawl?

Human life is full of things like that: a certain way of walking, of sitting ... these things are not sets of rules. We can certainly, in many such cases, identify or conjecture relevant rules – rules that maybe we cannot formulate. But *the correct stroke* in crawl (not, of course, *a* stroke, a token, but the type), the way of walking we call 'marching' etc., are not, in themselves, sets of rules.

Nor are they, on the other hand, *de facto* regularities. Granted, when one or more individuals swim the crawl, or march, their behaviors are, under some respect, regular. But *the correct stroke* of front crawl, or the way of walking we call 'marching', are precisely the respect under which their behaviors are regular, and what *guides* these behaviors.

The essential point is that these things are abstract entities (not an actual behavior, but its form); but they are *in the body*: those who know how to swim the crawl, or march, have these forms in their body. *The correct stroke* of front crawl or the way of walking we call 'marching' are tacit bodily schemes, which are intermediate between an image (e.g., a mental picture of somebody swimming, or marching) and rule:[15] embodied diagrams that establish what to do, what is the *correct*, the right or proper way to proceed. And in these diagrams,

14 The example is taken from Casey 1998: 208–212.

15 Casey 1998: 211.

or at least in many of them, there is a more or less conspicuous conventional component. Human biology sets the limits, a frame. But within these limits we then indulge our whims; and the limits themselves can, sometimes, be manipulated. What front crawl is, is – in part – an arbitrary agreement (in the generic sense introduced above, sect. 2).[16] Because of this conventional component, these wired-in forms (forms in the body, that is) are, inseparably, both natural (a 'second nature') and cultural[17] (I return below, in sect. 8, to the antithesis 'nature *v*. culture').[18]

The point may be further clarified by recalling familiar experiences, e.g. learning to ride a bike. John Searle provides an illuminating description of this kind of process:

> As the skier gets better he does not internalize the rules better, but rather the rules become progressively irrelevant. The rules do not become 'wired in' as unconscious Intentional contents, but the repeated experiences create physical capacities, presumably realized as neural pathways, that make the rules simply irrelevant. 'Practice makes perfect' not because practice results in a perfect memorization of the rules, but because repeated practice enables the body to take over and the rules to recede into the Background /.../ On my view, *the body takes over* and the skier's Intentionality is concentrated on winning the race.[19]

The central idea is aptly captured by the phrase *the body takes over*. What the body is doing, from now on, is not a mere *de facto* regularity, but something that is in between a norm and a regularity: A way of doing things, the way in which 'one does' this or that.

We shall examine later on (below, sect. 7) Searle's argument. But I should indicate a point of crucial importance now. L. Wittgenstein, as we shall see (below, sect. 6), has shown that similar considerations apply also to that particular kind of human ability that is the mastery and use of concepts, or rule-following.

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16 If these things were rules, we should say that they are 'constitutive conventions'. (This notion has been worked out by Marmor 2009, exploiting Searle's notion of a constitutive rule). But they are, in fact, constitutive conventions which are not rules.

17 Casey 1998: 212.

18 A comment is in order here. As remarked above (see sect. 2), Hume's account is usually regarded as the paradigm case of an account of 'conventions' in the sense of tacit agreements backed by a train of reasoning. Hume's well known example of the two rowers (1976: 490) who mutually adjust the pace of their rowing, however, is an example of the exercise of a physical ability. True, the two rowers' actions are guided, as Hume says, by the perception of a common interest: the two want the boat to proceed, and to proceed as fast and smoothly as it can; and they realize that, in order to accomplish this, they need to synchronize their rhythm. But what they do – synchronizing their actions, that is, their convention – consists in a bodily activity that, in it and of itself, does not – not necessarily – include a train of reasoning. Hume's account has a wider scope than it is usually believed.

19 Searle 1983: 150–151. Italics are mine.

(4.2) G. Ryle[20] famously distinguishes between two kinds of 'knowing', or knowledge: *know-that*, or propositional knowledge; and *know-how*: knowing how to do something, even if you are not able to say which are the rules one should follow in order to do it. The content of 'know-that' is propositional: it can in principle be expressed – even though it is not necessarily conscious – through a declarative clause (a *that-clause*). This may be a descriptive proposition, or a set (possibly, a system) of propositions of this kind; or a rule, a directive, or a set of rules. To 'know-that' is, in this sense, knowledge of a set of propositions.

The basic idea is that 'know-how' is heterogeneous with respect to, and therefore irreducible to 'know-that' – in opposition to the idea that, e.g., to know how to play chess is not different from knowing the rules of chess, and that playing chess is nothing but to be guided by these rules[21] (below, in sect. 6, I will focus, following Wittgenstein, on the apparent simplicity of 'rule-following'). Not only in the sense that it may well happen that I know how to do a certain thing, and I do it, without knowing the rules that I have to follow in order to do it, or without knowing many of the relevant facts – general or specific –, or even having erroneous beliefs thereabout. But also in the sense that, often, those who do not know how to do a certain thing are able to state – they know – the same propositions about what doing such a thing requires, as those who, in addition, know how to do it. So, turning back to the example cited above (the cases discussed in the present section, sub 1), are, in fact, cases of 'know-how'), someone who cannot ride a bicycle may well be able to say the same things about how you go cycling, as someone who can do it ('One must keep in balance', 'You must push one pedal, then the other'). The difference between the two seems to consist precisely in knowing how to ride a bicycle.[22] It may even happen that the former has propositional knowledge which is much more complex and in-depth than the one the latter has (e.g., knowledge of the physical laws that govern the complex processes we call 'cycling'), but does not know how to ride a bicycle (unlike, e.g., a child who has not studied physics). To put it with Searle once again, at some point in the process of learning, *the body takes over*.

The question of whether 'knowing-how' is indeed irreducible to any form of 'knowing-that' is controversial. Proponents of an, as they say, 'intellectualist' account of 'know-how' reject non-reducibility. Proposals for reduction, more or less ingenious, have been numerous. I cannot here adjudicate the merits of this debate. I shall limit myself to two observations.

(A) From a conceptual standpoint, reduction proposals, even though sophisticated (sometimes precisely because too sophisticated), appear implausible.

20 Ryle 1949.
21 Fantl 2012.
22 Fantl 2012.

(B) Recent studies in cognitive psychology[23] tend to corroborate, experimentally, non-reducibility.

Activities that can be the subject of 'know-how' may be of a more or less conventional kind – e.g., to swim front crawl, or to play chess. Which acts constitute 'playing chess' depends on arbitrary (in the sense indicated above, sect. 2) agreements (in the generic sense indicated above, sect. 2).

(4.3) We say of a person that she has style, or that doing this or that is in her style. The same may sometimes be said of groups, variously identified. Style does not so much depend on what one does, but on how – the 'way' in which – one does it. And often it is style that makes the difference: worth – better, worse, admirable, unseemly, etc. – is often a matter of style.

What is style? Taste is a similar phenomenon. Tom has 'good taste' (or 'bad taste'), in general or, more plausibly, in this or that field (wine, cinema, etc.). Maybe Harry has learnt that tasteful people appreciate *x*, *y* and *z* (this or that wine, for example), but when it comes to choosing between new options, which are not already included in the list, he mistakes disastrously: he does not have good taste (a person of good taste would have never preferred *q* over *w*).

Style and (good) taste are notoriously not sets of rules. In two ways: first, purported codifications of style or taste in handbooks or manuals ('The Art of ...') have something hopelessly contrived and cloying. It is not so much that the rules are too complicated to be compressed in a handbook – the very idea of a codification (of style, or taste) betrays a misunderstanding (someone who engages in the project of codification does not understand, in fact, what is at issue; the very idea of reducing style, or taste, to a set of rules betrays a certain lack of style, shows bad taste). Second, someone who has style, or has good taste, does not choose this or that by applying rules but spontaneously (those who follow the manual will be, at most, a boor who tries to pass himself off as a person of good taste). Granted, in the relevant fields (be it wine, cinema, or any other) there may be rules, of various types, that cannot be violated by those who have style, or taste. But style and taste, in themselves, are precisely what exceeds the mere application of rules – or, if you will, they are the right way of applying them.

And this takes us to the other side of the coin. Style and taste are not, as we have just seen, sets of rules. But neither are they, on the other hand, mere *de facto* regularities. Of course, he who has style, or taste, chooses certain things regularly. His is a *disposition* to choose in a certain way. But this is not a disposition of the same kind as, e.g., the disposition to close one's eyes in the presence of a strong light source, or a conditioned reflex. It is a disposition to choose in the *right* way – where, as we have just seen, which way is the right one does not

23 See for example Wallis 2008.

depend (solely) on rules. Therefore, it is a *normative* disposition – again, an embodied norm (*the body takes over*).

And it is plausible, if not obvious, that this territory – who has style, what good taste requires – is also occupied by arbitrary agreements (in the generic sense; above, sect. 2), i.e. conventions.

(4.4) Style and taste are parameters of social differentiation, and of classification and hierarchy within social groups. This idea was developed systematically by P. Bourdieu.[24]

Differences and hierarchies of social class, or of gender, are embodied in styles: one's gestures, posture, or the way one eats, or walks, and so on. "Taste, a class culture turned into nature, that is, *embodied*, helps to shape the class body /.../ the body is the most indisputable materialization of class taste".[25]

In order to account for these phenomena Bourdieu works out the concept of *habitus*. An *habitus* is a set of dispositions (inclinations, tendencies, proclivities), acquired (most of them inculcated when we were children), consolidated, which are "*a way of being*, *a habitual state* (especially of the body)",[26] and operating as "generative schemes":

> principles of the generation and structuring of practices and representations which can be objectively 'regulated' and 'regular' without in any way being the product of obedience to rules.[27]

An *habitus*, therefore, is not a set of rules. Rather, it is a set of dispositions that have been acquired and have now become natural ("history turned into nature"[28]), fixing the *right* way (an embodied norm) to proceed in new circumstances: the "generative principle of regulated improvisations".[29]

(4.5) M. Foucault[30] developed the concept of "disciplinary power". Disciplinary power is a form of power which, according to Foucault, has been a common feature of European society since roughly the eighteenth century (the reliability of Foucault's historic claims does not concern us here), modeling and shaping the bodies on which it is exercised – its correlates are "docile bodies". It works, that is, through continuous, uninterrupted coercion, in the form of indefinitely repeated exercise, and examination; each exercise becomes a phase in a perpetual examination, and *vice versa* each exam is an exercise. Disciplinary power does not seek to bring about the performance of actions, or

24 Bourdieu 1979.
25 Bourdieu 1979: 199.
26 Bourdieu 1977: 214.
27 Bourdieu 1977: 72.
28 Bourdieu 1977: 78.
29 Bourdieu 1977: 78.
30 Foucault 1975: part III.

omissions, via the threat of punitive sanctions in case of breach of directives. Its typical form is, instead, training. In this way, it aims to model the bodies that are its object to the most minute detail, in what they do, in their attitudes, their gestures, their looks, tone of voice, and so on; and this for every moment of the performance of the activities that are so regulated – at its extremes, the entire life of the subject. In barracks, colleges, schools, prisons, hospitals, factories (and, as always, in convents) disciplines transform farmers into soldiers, unruly children into school-kids, criminals into prisoners, sick people into patients, and so on, through uninterrupted training, affecting every detail and every moment of the life of those disciplined. They aim to wire dispositions into bodies that become 'second nature'.

In each of the areas we have reviewed there is room for arbitrary (in the relevant sense, above, sect. 2) and tacit (in the second of the two senses distinguished at the beginning of this section) agreements (in the generic sense; above, sect. 2).[31] I shall call these entities 'pre-conventions'. The term 'pre-conventions' is not used to suggest that these are things that precede, or in some way come before, conventions. Rather, it should be understood in the sense of 'conventions that are first' (or 'come before'): conventions that are mostly in the background of our activities and thoughts, and that, passing usually unnoticed, delimit their spaces.[32]

5 ARGUMENTS (I): INDUCTION, SALIENCE AND PROJECTION

I now turn to a summary presentation (it is, in fact, the evocation of arguments that I assume to be, more or less, already known to the reader) of some arguments that support the view that there exist pre-conventions – more specifically, these arguments show that there is room for the existence of pre-conventions (they 'leave room', or 'open up space', for the latter), and that it is very probable – in fact, obviously true – that this space is not empty. These arguments are different in their content, in their conclusions, and in their conse-

31 It is true that these two senses have not been defined, but merely illustrated (at the beginning of the present section). But, as I said, the problem – which is an hard one, and that I am unable to resolve – of satisfactorily defining them does not specifically concern the phenomena that we are discussing; it affects, rather, the whole domain of intentional phenomena. I hope that a simple illustration is enough.

32 I wish to clarify, once and for all, that there is nothing inherently nice, or good, or just, or holy, in pre-conventions. A pre-convention may well be abhorrent. The fact that a pre-convention is normative does not entail, or in any way imply, that it conforms to justice. It does entail, presumably, that it somehow expresses one or more values. But the connection might be a distorted, a perverted, or a paradoxical one. Or, in any case, it may well be that, in the circumstances, its value is very low, or close to irrelevant.

quences. But they turn out to have similar implications from the point of view that concerns as here.

The first argument is drawn from Lewis' theory of conventions. According to Lewis' account, conventions are solutions to recurring coordination problems: strategic interaction problems, that is, that are characterized by a coincidence (not necessarily complete coincidence) of interests between the parties, and by the availability of a plurality of equilibria, with respect to which the parties are relatively indifferent. Given a recurring coordination problem, a Lewis-convention is a regularity of conduct *R* such that each of the individuals involved prefers to conform to *R*, provided that the others conform to *R* (and, furthermore, each prefers that all the others comply, if the others – including himself – do, too), and this is common knowledge among them. For this reason, all conform to *R* each time the opportunity presents itself: expectations of conformity bring about conformity, and, in turn, conformity brings about expectations of conformity.

Lewis' theory has been amply and fruitfully debated. An overall assessment of its strengths or weaknesses does not concern us here, however. The important point for our purposes is, as we shall see in a moment, a different one (also identified by Lewis himself, and by some of those who discussed his ideas).

The main idea of Lewis' account of convention is captured by what I have elsewhere called the 'dependency condition':[33] when there is a convention (in this specific sense), each of the individuals involved does *A* (an action of a certain kind) in *S* (a recurring situation) because the others do it, because the others do it, because the others do it … (and so on). So, for example, a purely conventional (in this sense) fact is the fact that a given social venue is trendy: each one goes there because she expects to meet the others there, because she expects each one of the others to expect to meet the others there; and each one of them, for this reason, goes there – thus confirming, the others' expectations of meeting the others there. In this sense, we go to this place because we go to this place because we go to this place ...

This is, however, only the pure case. Lewis' approach can be used to mold a plurality of concepts of convention. The dependency clause ('everyone does it because everyone else does') can be understood in several different ways, thus generating a plurality of definitions that capture different phenomena.[34]

It is not necessary to develop this line of inquiry here. The relevant point for our present purposes is this. Definitions *à la* Lewis begin with the clause: 'A certain kind of behavior (performing action *A*) in a recurring situation *S* – i.e., a regularity of conduct *R* – is a convention among the members of the social

33 Celano 1995, 2013.

34 Celano 1995; for a detailed exploration of the main possibilities, see Celano 2013.

group *G* if and only if ...' (as I said, one can proceed in several ways, ending up with different concepts). The relevant problem here is the problem of the identity conditions of *A* and *S* (i.e., *R*); in particular, the conditions for the identification, by the members of *G*, of *A* as a certain *type* of behavior (how can one say that a_1 is a case, an instance, of *A*?), and *S* as the *same* situation that recurs (how can one say that s_1 is a case of *S*?). In virtue of what, that is, do members of *G* recognize a_1, a_2, ... a_n as instances of the same type of behavior, and recognize s_1, s_2, ... s_n as instances of the same type of situation? In short, how do they identify *R*, i.e. how do they determine what counts, now, as doing the same thing they did in the past?[35]

The existence of a Lewis-convention (and generally of a 'convention' in one of the senses defined following this approach) presupposes that the members of *G* have the ability of doing this. What does it consist of?

The problem is, at bottom, how it is possible to *learn* a convention (in particular, a Lewis-convention): "learning by experience", through pattern recognition.[36] It is, generally, the problem of projection from past experience to the present case: what does it mean, here and now, to follow a precedent? What identifies a set of past cases as a set of *precedents*? In short: *which precedent*?[37] And here is Lewis' response:

> [O]f course, we could never be given exactly the same problem twice /.../ We cannot do exactly what we did before. Nothing we could do this time is exactly like what we did before – like it in every respect – because the situations are not exactly alike /.../ Guided by whatever analogy we notice, we tend to follow precedent /.../ There might be alternative analogies. If so, there is room for ambiguity about what would be following precedent and doing what we did before /.../ In fact, there are always innumerable alternative analogies. *Were it not that we happen uniformly to notice some analogies and ignore others /.../ precedents would always be completely ambiguous and worthless.*[38]

Lewis' answer to the question of what justifies one in considering certain behaviors and not others as the proper continuation of *R* – i.e., what counts as 'following suit' with R – is thus: as a matter of fact, we notice the same analogies; and that is what fixes the identity of *R*, disambiguating past cases, and thus enabling us to proceed – to follow precedents. Certain options, and not

35 The problem is formulated very clearly, concerning language, in Millikan 2008, who follows Lewis. See also Canale 2008 and the definition of the problem in Schauer 2008: 23–26. Schauer calls this difficulty "Wittgenstein's problem" in the interpretation of custom. The reason for this reference to Wittgenstein will be clear in what follows. The fact that both Canale and Schauer discuss the problem when dealing with customs, and not conventions, is explained by the usual ambiguity (see above, 3) between the two notions.

36 Sugden 1998: 379.

37 Sugden 1998: 396–397.

38 Lewis 1969: 37–38. Italics are mine.

others, appear to us as 'doing, now, what we have done in the past'. Sugden comments: for Lewis, "all that matters /…/ is that people have concepts" – roughly the same ones for the members of a certain group – "of 'natural' or 'obvious' *patterns*, which allow the concept of 'repeating successful actions' to make sense *to them*".[39]

This fact – the fortunate fact that, for the most part (there is no guarantee for this to happen, and there is no conceptual necessity involved), certain analogies, and not others, appear obvious to us – is not, therefore, a mere regularity: it is also what fixes the identity of *R*, disambiguating past cases, and thus determining what is the *correct* way to behave.[40] It is, in short, a normative fact.

This claim opens up a large space for the possibility of conventions – not, of course, Lewis-conventions (what we are talking about are precisely the facts that make the existence of a Lewis-convention possible), but *pre*-(Lewis-)conventions.

To realize this, we only need to ask a simple question. What fixes the identity of *R* – disambiguating, thus, past cases –, it is said, is the fact that, for the most part, 'we' grasp the same analogies: certain analogies, and not others, appear to 'us' as obvious. But who is the 'we'? Who does the 'us' - or the first person plural - refer to?

Most likely, the fact that 'we' happen to notice the same analogies will depend, in many cases, on traits characteristic of human beings in general: 'we', as members of the human species (features of the species' cognitive apparatus). In other cases, however, we shall be dealing with local regularities: 'we', the members of this or that tribe. (For this to happen, it suffices that the patterns that are recognized as obvious be roughly the same for all members of the group, not necessarily for all human beings.) And this is precisely the space that can be occupied by, more or less arbitrary, agreements (in the generic sense indicated above, sect. 2), which are neither mere rules nor mere regularities, but which partake of both – they guide action, fixing the *correct* way to proceed: pre-conventions.

Lewis' solution can be reformulated (Lewis himself does so) by resorting to the notion of *salience*.[41] The identity of *R* is fixed by the fact that, luckily (if and when that happens; as it has been said, nothing guarantees that it will happen),

39 Sugden 1998: 387.

40 It is worth emphasizing a point that, in light of what I have said so far, should be rather obvious. Here, the question is not whether we should or shouldn't follow *R*, and why (this depends on whether the further conditions specified by a Lewis-type definition are met or not; here, we are assuming that they are). The question is, rather, what counts, each time, as complying with *R*: which action would be following the precedent (doing *the same* thing that we did in the past).

41 See Schelling 1960 and Sugden 1998: 404.

the same traits – roughly – appear salient to 'us' (who? See above); and this makes it the case that they *are* salient (they are salient precisely because they appear to be so to all of 'us') [42]. In this way, it is the same analogies – between present and past cases – that strike us. And this allows 'us' to understand, here and now, what counts as the precedent to be followed.

The problem of learning and practicing (i.e., the activity of complying with) a Lewis-convention – determining what counts as doing the same thing in the same (the same type of) situation – is a special case of the 'new' problem (or 'riddle') of induction.[43]

The so-called 'old' problem of induction was raised by Hume: the possibility of inferring a prediction on the basis of past experience is based on the assumption that, in the future, things will continue to go as they did in the past. What grounds this assumption? It cannot be an empirical thesis – this would simply beg the question – but neither can it be a logical truth, since it is, by definition, contingent.

The 'new' problem of induction is this: why the infinite traits of past experience that we could project onto future experience, we select some (e.g., 'blue', 'green'), while we exclude others without much thought (e.g., 'bleen')?[44] What – if anything – justifies the fact that predictive inferences in which certain predicates occur appear – more or less – plausible, while inferences in which other predicates occur are useless, even though the latter predicates are equally well formed, and the inferences in which they occur have the same form as the plausible ones?

The answer to this question seems to be the following: it is nothing more than a brute matter of fact that certain traits are projectible while others are not; and, therefore, that – even if formally identical – certain inductive inferences are (more or less) good, while others are worthless.

This is a generalized version, covering the entire field of inductive inferences, of the answer that Lewis gives to the problem of the identity conditions of a conventional regularity of conduct.[45] Some predicates appear salient to 'us', and therefore *are* projectible – that is, can *legitimately* be projected. "Projectibility is no more than a kind of salience".[46] What fixes the correct way to build 'our' vision of what will probably happen – the right way to proceed in drawing inferences, based on past experience, about future experience (Lewis: following the

42 If two individuals take as salient different traits, then neither of them is right (this simply follows from the definition of the relevant concept of salience).

43 This is noticed and explained in Sugden 1998: 386–387.

44 Goodman 1983.

45 The order is not chronological. Chronologically, Goodman's argument comes first.

46 Sugden 1998: 404.

precedent, 'doing the same thing') – is a set of matters of fact: 'we' project, or have projected, some traits and not others.

Two observations. (1) This argument, in the same way as Lewis' one, leaves room, opens up space, for the existence of pre-conventions. 'We' project some traits and not others; some traits and not others appear salient to 'us'. Who are 'we'? Once again, which traits are salient – and, therefore, which inferences are legitimate – probably depends, in most cases, on features characteristic of human beings in general ('we' as members of the human species: features proper of the human species' cognitive apparatus). In other cases, however, we shall be dealing with local regularities; with, specifically, more or less arbitrary agreements among particular groups of people ('we' the members of this tribe): pre-conventions.

(2) The fact that Lewis' solution – which specifically regards regularities of conduct in recurrent strategic problems that have a certain structure (namely, coordination problems) – applies, in general, to the entire field of inductive inferences, means that a very large portion of the predicates that we habitually use – i.e., a very significant part of our ('our' must always be understood in light of what has been said above) concepts – are subject to the regimen indicated by Lewis. That is, the identity conditions, and the conditions of use – of understanding and application –, of a very large part of our concepts (those of the objects which are the subject matter of inductive inferences, and their properties), have the same structure as the identity conditions of a regularity of conduct which is a Lewis-convention. In short, our mastery of concepts, or at least a very large and significant proportion of it, has, according to the argument under examination, this structure. And that, *prima facie*, implies a remarkable expansion of the space that could be occupied by pre-conventions. Our conceptual competence – this is the hypothesis – is interwoven (also) with pre-conventions.

With this, however, we have now reached Wittgenstein.

6 ARGUMENTS (II): TO FOLLOW A RULE

Ludwig Wittgenstein famously asks what it is to follow a rule. The core of Wittgenstein's considerations on this issue appears in §§185–242 of *Philosophical Investigations* (1953). §§198–202 contain the climax of the argument.

These pages have been the subject of fierce exegetical controversy, and this is not the place to take an articulated stand on them.[47] I will present the bare bones of what I believe to be Wittgenstein's main conclusions relating to the matter at hand.

47 I follow J. McDowell's interpretation of these passages of Wittgenstein's (see especially McDowell 1979: 60 ff., and 1984: 238–254).

A preliminary point. When he speaks of 'following a rule', in these pages, Wittgenstein is actually talking about the use – the understanding and application – of concepts generally. His arguments and conclusions concern the mastery of concepts as such. His main problem is: what are the identity conditions of a concept? That is, under what conditions, when we say (or think) something about something, are we doing the same thing that we have done in the past – attributing, now, to this thing here, the same property that, in the past, we have attributed to other things?

A concept is, therefore, a rule: the problem is that of its *correct* application. (Or, if we got it *right*.) The correct use consists of the application of *the same* concept. The question is thus: under which conditions a set of cases of alleged application of the same concept can be said to correspond to a rule – that is, to be constituted by a set of cases which are, in fact, cases of *correct* application of that concept? Under what conditions a number of cases is a regularity i.e., the application of a rule? What fixes the identity of a – potentially infinite – series of cases of correct application of a concept?

And Wittgenstein's answer is: a finite set of cases, which we were shown during our training in the use of that concept – in the case of many concepts, when we were children, often in school – and the practice, "use" (Germ. *Gebrauch*), and "habit" (Germ. *Gepflogenheit*) (§§198, 199) which, living together, we have developed.

Now, it is essential to understand that this concept of 'practice', 'use' or 'habit', designates something very peculiar. Not a rule, of course. It designates a set of facts. But it designates a set of facts that fixes the identity of a rule. A set of facts, that is, which is a regularity – or a set of cases that corresponds to a rule (in the relevant sense here, stated above: a concept) – by virtue of itself: literally, a normative fact.

And this set of facts is produced in the course of the growth and upbringing of a person, thanks to the fact that this person *does* many things together with other people. It is only by living together with others, and doing things with them, that this practice is formed – this is the only way we learn to follow the rule 'table', 'ice cream', 'walk', '+ 2', and so on and so forth. This is what Wittgenstein calls a "form of life". (There is nothing idyllic in sharing a form of life; there is nothing edifying in the fact that the basis of our mastery of – the ability to properly use – concepts is the sharing of a form of life. A form of life may include, to be sure, repugnant or unpleasant things.)

Despite the usual oracular style of the author, two quotations from *On Certainty* clarify what has been said so far:

> 139. Not only rules, but also examples [Germ. *Beispiele*] are needed for establishing a practice [Germ. *Praxis*]. Our rules leave loop-holes [Germ. *Hintertüren*] open, and the practice has to speak for itself [Germ. *für sich selbst sprechen*].[48]

Here, the term 'Praxis' means what, above, we called a 'practice': a regularity that "speaks for itself", and on which depends the identity of the rule of which it is the application.

> 204. Giving grounds, however, justifying the evidence, comes to an end; – but the end is not certain propositions' striking us immediately as true, i.e. it is not a kind of *seeing* on our part; it is our *acting*, which lies at the bottom of the language-game.[49]

Here, "language game" means, first of all, correctly (well enough, that is) using – understanding and applying – some concepts.

Two predictable observations. (1) In this case as well (above, sect. 5), 'we' ('our', the first person plural) can have both universal and local scope. All, or almost everyone, of the members of the human species may share certain practices, and, thus, certain concepts. (It may be the case that the mastery of concepts is, or certain aspects of the mastery of concepts are, common to all, because, at some level of abstraction – as a function of common biological, psychological or ethological traits –, all human beings share a certain form of life.) Or it may be practices, and therefore concepts, of our tribe: the particular form of life, which is peculiar to a particular group of human beings, not shared by others. The distinction, which in the abstract is neat, can be, in particular cases, nuanced.

(2) The argument opens up a large space for the possibility of pre-conventions. If the ability humans have to identify, understand and apply concepts has this structure, then it is possible that what fixes the identity of some concepts – especially, local concepts – are arbitrary agreements (in the generic sense indicated above, 2). The use of at least some concepts would be, in the sense which is relevant here, a 'second nature'.[50]

Starting from Wittgenstein's reflections, quite a natural step is to hypothesize that the concepts in our minds are schematic representations of individuals, which fix the paradigmatic traits of the thing (the thing which they are the concept of). These may be either fictitious individuals which display traits from different experiences ('prototypes'), or real individuals, which constitute the paradigm of that thing for us ('The setter that my aunt had is, for me, *the* dog'; 'exemplars'). This is the path that cognitive psychology has in fact taken.[51] The

48 Wittgenstein 1969

49 Wittgenstein 1969.

50 On the mastery of concepts (the ability to use them correctly) as a 'second nature' see McDowell 1994: 123–124.

51 Rosch 1973; 1975. Usually, people relate the theory of prototypes to Wittgenstein's idea that the identity conditions and the conditions of the use of concepts, or at least of many concepts, are not sets of necessary and sufficient conditions, but depend on family resemblances. The

hypothesis is that it is these representations of individual instances that establish what counts as a correct application of the concept to new cases, following the analogies that appear salient to 'us' (above, sect. 5). When we think, we follow precedents. The concept – the rule – is the *ratio decidendi* which is buried in past cases.

7 ARGUMENTS (III): THE BACKGROUND OF INTENTIONALITY

John Searle, following Wittgenstein,[52] elaborates the 'thesis of the Background':

> Intentional phenomena such as meanings, understandings, interpretations, beliefs, desires, and experiences only function within a set of Background capacities that are not themselves intentional /.../ all representations, whether in language, thought, or experience, only succeeds in representing given a set of nonrepresentational capacities. [53]

Or, in other terms, "[i]ntentional states function the way they do only given a presupposed set of Background capacities", a "pre-intentional" Background,[54] which consists in a "set of capacities, abilities, tendencies, habits, dispositions, taken-for-granted presuppositions, and 'know-how' generally".[55] And the Background of intentionality is a territory, which is inhabited by, among other things, more or less arbitrary agreements (agreements – in the generic sense indicated above, sect. 2 – that are embodied), or pre-conventions:

> Part of the Background is common to all cultures. For example, we all walk upright and eat by putting food in our mouths. Such universal phenomena I call the 'deep Background,' but many other Background presuppositions vary from culture to culture. For example, in my culture we eat pigs and cows but not worms and grasshoppers, and we eat at certain times of day and not others. On such matters cultures vary, and I call such features of the Background 'local cultural practices.'[56]

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convergence of this idea and the conclusions stemming from the eule-following arument are apparent.

52 Searle 1992: 177.

53 Searle 1992: 175. Searle puts forward various arguments and considerations in favor of this claim (Searle 1983: ch. 5; 1992: ch. 8); here, I cannot discuss them.

54 Searle 1999: 109.

55 Searle 1999: 107–108. On *know-how* in the Background, see Searle 1983: 143; 1992: 194; and 2010: 155. Remember that 'know-how' is one of the territories that can host pre-conventions, that I have indicated above, at 4.

56 Searle 1999: 109. See also Searle 1983: 143–4; and 1992: 194. In 2010: 155–160, Searle shows that within the Background (but the notion is used here in a wider sense than in the text) one can find elements, which may vary from one community to the other, that impose 'normative constraints', or that in general establish the way in which, in situations of a certain kind, people 'should' behave.

In *The Construction of Social Reality* (1995) Searle provided an extensive discussion of the Background in relation to social rules (specifically, in relation to the problem of the nature and role of the rules which are constitutive of institutional facts),[57] the topic we are interested in here. Let me report the essentials of Searle's account, with some comments.

Institutional facts and activities, Searle argues, depend for their existence and structure on sets of rules. But what is, in causal terms, the explanatory value of these rules? The problem arises out of three considerations.

(1) Normally, the creation of institutional facts is not the result of a set of conscious and deliberate, intentional acts, but occurs unintentionally.[58] (2) Even in cases in which the creation of institutional entities takes place, originally, by means of a complex of conscious, deliberate, intentional acts directed at this purpose (such as, e.g., in the case of the entity 'President of the Italian Republic'), "the subsequent use of the entities in question need not contain the intentionality" by virtue of which they were originally created.[59] (3) The rules of an institution, for the most part, are not coded. Even when they are, "most of us are unaware of these codifications". And finally, even if we are aware, "the codifications are not self-interpreting. We have to know how to interpret or apply the codified rules"[60] (this is a special case of the initial move in Wittgenstein's argument, above, sect. 6: it cannot be a rule, of course, that satisfies this need, as this would produce an infinite regress).

These considerations allow Searle to conclude that, even though the logical structure of institutions is made out of (systems of) rules, those who participate in institutional activities, usually, do not follow these rules, either consciously or unconsciously.[61] Rules, moreover, are not by themselves sufficient to determine what counts as participation in a given institutional activity.[62]

But, given this conclusion, what causal role can be attributed to the rules of an institution in the explanation of the actual behavior of the participants to the institutional activity? It is in order to answer this question that Searle introduces, here, the notion of the Background.

According to Searle, as we know, intentional states only work against a Background of unintentional skills, dispositions, tendencies, whose work is a particular form of "neuropsychological causation".[63] This is true, Searle claims,

57 For a critical presentation of Searle's theory on institutional facts, see Celano 1997.

58 Searle 1995: 125–126.

59 Searle 1995: 126.

60 Searle 1995: 128, 142–143.

61 If we restrict our view to a naïve, pre-Wittgensteinian, picture of what it is to follow a rule, of course.

62 Searle 1995: 127–128, 137.

63 Searle 1995: 129.

also in the case of the participation in institutional activities. Participants develop tendencies, dispositions, skills that, while not intentional, are "sensitive to specific structures of intentionality"; e.g., to systems of rules. In the case of institutional activities, these skills, dispositions, tendencies are "functionally equivalent" to the systems of constitutive rules of the institutions in question, while not containing any representation of them.[64]

This is the crucial step. Here, once again, entities intermediate between rules and regularities, embodied norms (or, if you will, the pineal gland), emerge. Tendencies, dispositions, skills that are in the Background are not intentional in character: they are bodily elements. At the same time, however, they are "sensitive to /.../ structures of intentionality", such as the constitutive rules of an institutional activity; they are "functionally equivalent" to them – which can only mean that they guide conduct, fixing the distinction between *correct* and *incorrect* behavior (i.e., they perform the role of norms).

Thus, Searle concludes,[65] rather than saying, about the participants in an institutional activity, that e.g. 'Tom acts so and so because he is following the rules of the institution', we should usually say: 'Tom behaves so and so because he has a structure that predisposes him to behave in this way', and 'Tom is predisposed to behave in this way because this is the way that *conforms* with the rules of the institution' (the term in italics indicates that what is at issue, here, is not a mere *de facto* regularity: the relevant bodily structure is "functionally equivalent" to the rule: it fixes what counts as *correct* behavior). In an explanation of this kind, the idea of a Background of unintentional skills, tendencies, and dispositions, makes it possible to account, in causal terms, for the explanatory value of the rules of an institution, even when we assume that the participants in the institution are not following rules (either consciously, or unconsciously).[66] *The body takes over*.

8 CONCLUSION: NATURE AND CONVENTION

I conclude with some general remarks. These will be somewhat imprecise and not very strict considerations, because I will make intuitive use of the concept of nature, without specifying its content; and, of course, 'nature' is a term that has multiple meanings, and so we should distinguish.[67] My only aim in

64 Searle 1995: 141–142.

65 Searle 1995: 144.

66 In this paragraph too, 'rule-following' should be understood in a naïve, pre-Wittgensteinian, way. As we have seen, Searle's argument is aimed precisely at demonstrating that rule-following in fact requires, just as Wittgenstein himself claimed (*supra*, 6), 'practice', 'habits' (among these, possibly, the entities that I called 'pre-conventions'); that is, it requires sharing a "form of life".

67 Aristotle, *Metaphysica*: V, 4.

this section is to make explicit the connections between the ideas presented so far – in particular, the claim that there are pre-conventions – and some habitual moves in philosophical conversation.

The antithesis 'nature' *v*. 'convention' is one of the topoi of Western philosophy, beginning with the Sophists. (The antithesis 'nature' *v*. 'culture' is its modern guise. The two antitheses do not overlap perfectly, but it is not important here to try and single out the differences.) Whether a certain thing – language, justice, the political community, logic or arithmetic, and so on – is what it is either 'by nature' (*physei*) or 'by convention' (*nomo*, *kata syntheken*) is one of the typical questions in Western philosophical inquiries. Conflicting traditions (e.g., at least according to some simplistic characterizations, natural law and legal positivism in legal theory, or the Aristotelian tradition and the modern one in political theory) are identified according to which of the alternatives they favor.

The antithesis is, however, a bit too naïve. Not because there is nothing that is unmistakably so by nature (fire burns) or unmistakably so by convention (the fact that the yellow traffic light has a certain meaning; art. 138 of the Italian Constitution; the Treaty of Maastricht). But because the two terms are not mutually exclusive: there are phenomena of great importance for human life which do not fall exclusively in one or the other category, while participating in both.

The entities I have called pre-conventions – embodied conventions that have become 'second nature' – are of this kind. If and when we glimpse at them, against the background of the things which we habitually direct our attention to, we land behind the scenes of the antithesis 'nature' *v*. 'convention' (or 'nature' *v*. 'culture').

I did not argue, and it does not seem likely at all to me, that pre-conventions are the only inhabitants of this territory. This is why I said that the arguments which I reviewed 'leave room', or 'open up space', for pre-conventions. The geography of this area, beyond the naive antithesis, is certainly very complex and varied. Pre-conventions are but a fragment of the Background. But it is here that we may find the conditions allowing us to frame one phenomenon as purely natural, or purely conventional (or cultural).

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Marco Brigaglia*

Rules and norms

Two kinds of normative behaviour

Celano's notion of a "pre-convention" is grounded in the opposition between two allegedly different kinds of normative behaviour: *observing a "rule"* and *conforming to a "norm"*. This opposition plays a central role in Celano's paper, and marks a crucial point in his intellectual trajectory. Nevertheless, it remains largely implicit. In this paper, I try to make it fully explicit, giving a more precise characterisation of both kinds of normative behaviour. I also focus on the importance of distinguishing between them, express some conjectures (or wishes) regarding Celano's future research, and propose a (marginal) criticism.

Keywords: rule-following, rules and habits, norms and normality, fast and slow mental processes

1 INTRODUCTION

There do exist, Celano argues, entities which can be characterised as "normative facts": regularly followed patterns of action (factual regularities) which, as such, constitute standards of correctness (norms). "Pre-conventions" are a peculiar kind of such entities.

Following Celano, a pre-convention is a social structure defined by the following conditions.

(1) Members of a social group G (let us call them "the Gs") behave regularly, performing actions that satisfy a certain action type A, in circumstances that satisfy a certain situation type S. Let us say, in short, that the Gs replicate the behavioural scheme "A in S". In this respect, "A in S" *is a factual regularity* amongst the Gs.

(2) The replication of "A in S" by the Gs is "automatic":[1] it happens without reasoning and deliberate choice, and is, as such, different from and irreducible to the observance of the "rule", or the system of rules, which prescribes the doing of A in S. In doing A in S, therefore, the Gs are not following a rule or a

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1 Celano 2016: 12.

system of rules (at least not in the most familiar sense of "following a rule", see below, § 2.1). In this respect, "A in S" *is not (it does not function as) a rule*.

(3) "A in S" is, nevertheless, not a simple factual regularity. Indeed, for the Gs, it counts as a standard of *correctness*: the Gs consider those concrete actions which, in S, satisfy A to be *correct*, while those which do not to be *incorrect*; and this very fact contributes causally to them replicating A in S. In doing automatically A in S, the Gs can therefore be said to be conforming to the standard of correctness "A in S", even if they are not following the rule which prescribes the doing of A in S. Relying on a terminological difference emerging from Celano's paper, we can express this point by saying that they are conforming to a "norm".[2] "A in S" *is (it does function as) a norm*.

(4) The norm "A in S" is not an innate scheme,[3] a biological invariant (such as a hungry baby's sucking anything sufficiently similar to a woman's breast). It is indeed – in some sense, and in part at least – a contingent (not necessary, arbitrary) social construction.

(5) Finally, I assume (although Celano is not explicit about this point) that, for the existence of a pre-convention, the "dependence condition"[4] should hold: the Gs conform to the norm "A in S" (at least in part) because... the Gs conform to the norm "A in S". (The relation is meant to be a merely *causal* one: the fact that the Gs conform to the norm "A in S" causes the Gs to conform to the norm "A in S".)

Pre-conventions are, thus, normative social structures different from, irreducible to, structures of rules: they are, instead, structures of norms.

Celano further argues that pre-conventions have a pervasive presence in social life: they are part of the background, which other kinds of social practices, including the shared recognition and application of a rule or a system of rules, are necessarily built upon. Our pre-conventions are (part of) the background of our rules.

I have nothing to object to Celano's theses and arguments: I find both fully convincing. I shall rather focus on the distinction – presupposed in the above definition of a pre-convention – between two different kinds of normative (i.e.,

2 In the whole paper, Celano shifts continuously, although not arbitrarily, from the term "norm" to the term "rule": the first is used with reference to "tacit", "automatic" rule-following which identifies a pre-convention, while the second is used with reference to "explicit" rule-following which does not come into play in the case of pre-conventions. The only exceptions are the *Introduction* (Celano 2016: 9–10), where the two terms are used as synonyms; *Argument (II)* (Celano 2016: 24–27) and notes 61 and 66 – which refer to Wittgenstein's remarks on rule-following – where the term "rule" is used, generically, with reference to any kind of rule-following.

3 Celano 2016: 12.

4 Celano 2010a: 183 ff; Celano 2014: 613 ff.

normatively guided) behaviour, observing a rule and conforming to a norm, and the underlying different kinds of normative standards, rules and norms.

The point is clearly critical for the purpose of Celano's paper: it is a definitional property of pre-conventions, distinguishing them from other types of conventions, that they are networks of converging normative behaviours which do not consist in "observing rules", either consciously or unconsciously, but rather in "conforming to norms".

Nevertheless, Celano does not develop a comprehensive and detailed account of how the distinction should be understood. Indeed, he provides various intriguing, yet vague and fragmentary, connotations and examples – observing a rule involves "reasoning", while conforming to a norm is an "automatic", "spontaneous", "fluid and effortless" process; rules are "explicit", "intentional", "propositional", while norms are "tacit", "embodied", "not intentional"; paradigmatic examples of conforming to norms are swimming the front crawl, marching, acting with style, ascribing an entity to a concept, etc. – apparently aiming at suggesting rather than minutely analysing the notions. Even the different ways in which the terms "rules" and "norms" are actually used in the paper are not explicitly introduced.

It is my impression, however, that a more complex and rich design lies in the background. Celano's suggestions implicitly set rather clear and precise criteria for distinguishing between the two kinds of normative behaviour, observing rules and conforming to norms; moreover, based on this distinction, they trace a general account of rule-following, which seems to me to be, albeit sketchy, highly coherent, plausible, and far from obvious. I shall call it the Rules *vs* Norms Framework.

My aim in this article is to provide a systematic reconstruction of the Rules *vs* Norms Framework. I expect it can usefully contribute to the present discussion by helping to better understand, but also to support, Celano's theses, pointing out the solid structure that they rely upon and providing an interpretation of the crucial, yet not completely clear points (as, for instance, the distinction between "explicit" and "tacit" mental states, or the sense in which pre-conventions can be said to be "embodied"). I think, however, that, besides its key role in structuring the arguments put forward in *Pre-conventions*, the Rules *vs* Norms Framework deserves, on its own, to be made explicit: it, as such, constitutes one of the paper's main achievements, and marks a decisive step in Celano's intellectual trajectory, pointing at very promising paths for his future work.

In section 2, I shall propose my reconstruction of the Rules *vs* Norms Framework. In section 3, I shall focus on its importance and foreseeable (and desirable) applications, and introduce a methodological issue, advancing a (marginal) criticism of Celano's jargon.

2 THE RULES VS. NORMS FRAMEWORK

The above definition of a pre-convention presupposes the distinction between two kinds of normative behaviour. By "normative behaviour" I mean any action satisfying some standard of correctness and performed under its guidance or control, considered together with and categorised with reference to the mental process leading to its execution. I include in the notion not only external, "bodily" actions, but also "mental" actions, such as the ascription of a meaning to a sentence, the ascription of an entity to a concept, the drawing of a conclusion from an inference, and so on.[5]

Emphasising Celano's use of the terms "rules" and "norms", I shall call the first kind (the absence of which characterises a pre-convention) "*rule*-guided behaviour" or "explicit" rule-following (hereafter, R-behaviour), and the second (the occurrence of which characterises a pre-convention) "*norm*-conforming behaviour" or "tacit" rule-following (hereafter, N-behaviour).

2.1 "Explicit" rules and rule-guided behaviour

R-behaviour is a process characterised by the following properties: (1) it develops in *more than one step*; (2) it is *explicit*; (3) it is (comparatively) *slow* and *effortful*. Let us examine them in some detail.

(1) *More than one step*

Let us use provisionally the term "rule" to indicate any representation of an action type A in a situation type S which a concrete action has to satisfy in order to be correct; in other words, any model setting the features of correct action.

The agent consciously experiences R-behaviour as a process developing in more than one step. We can sketchily summarise and describe these steps as *rule formulation*, *reasoning*, *decision* and *observance*.

Rule formulation. The agent comes to the mental representation of an action type A in a situation type S, satisfied by the circumstances she actually faces, conceiving it as the rule to be followed, the model setting the features of the correct action to be done in the actual situation. In other words, the agent comes to believe that the right thing to do presently is to follow the rule which prescribes the doing of A in S (i.e., to act in a way that satisfies the represented action type).[6] The rule is, moreover, somehow *linguistically structured*: the agent has in mind (already formed or immediately available) an expression of both A and S in natural language terms ("Stop at a red light", "Add two to the last number of

5 The distinction between rules and norms, as meant by Celano, regards, in fact, both kinds of actions. See Celano 2016: 13, 20–24, 25–27.

6 In more technical words: she conceives the rule as a "conclusively valid" reason for action.

the sequence"), or in another shared symbolic code. In short, the agent comes to the (mental) formulation of the rule to be followed.

Reasoning. The agent uses the rule to discriminate between two alternative courses of action, both believed to be possible: to follow or not to follow the rule (i.e., to act or not to act in a way that satisfies the represented action type). In order to make a choice, she compares then the options, weighing the pros and cons: a more or less articulated "(practical) reasoning" in a very wide sense of the term (it may be nothing more than a flash on a few imagined scenarios, or an accurate selection and balance of the most plausible ones; it could confirm the validity of the rule, or lead her to begin a new process of reasoning in search of another rule, etc.).

Decision and observance. The agent finally comes to the decision to follow the rule and effectively follows it (i.e., she decides to perform presently a certain action because it satisfies the action type A that should be performed in the situation type S, satisfied by the circumstances she actually faces, and her decision effectively leads her to perform it).[7]

(2) *Explicit*

Given its structure, R-behaviour can also be said to be a threefold "explicit" process guided by a threefold "explicit" standard of correctness.

The rule guiding R-behaviour can, in fact, be said to be "explicit" in three different senses: because it is *conscious*, because it is (mentally) *formulated*, and because it *functions as a reason*.

(a) *Explicit as "conscious"*. During the process, the agent has *conscious access* to the rule. This is not to be meant only in the sense that she somehow consciously feels that she is acting appropriately (as we shall soon see, such a feeling could also be present in N-behaviour). What is peculiar to R-behaviour is, rather, that the agent has, during the process, a conscious mental representation of the features of a possible action in a possible situation (i.e., a conscious mental representation of an action *type* A in a situation *type* S), which a concrete action has to satisfy in order to be correct, and she consciously fits her actual behaviour with that representation. She consciously "looks with the mind's eye", so to speak, at the model for her action, and consciously conforms to it.

(b) *Explicit as "(mentally) formulated"*. The agent has in mind, already formed or immediately available, an expression of both A and S in natural lan-

7 There is something worth noticing here. R-behaviour presupposes the respective ascription of the action to be performed and the actual situation to the action type A and the situation type S represented by the rule. Such subsumptive judgments, however, can be made "tacitly", i.e., without any explicit reference to and reasoning about the application of rules which define what counts as a correct instance of A and S: a case of N-behaviour. We shall return to this crucial point later (§ 2.3).

guage terms, or in another shared symbolic code. She is, therefore, ready to communicate in an abstract, descriptive way the features that make her action correct.

(c) *Explicit as "functioning as a reason"*.[8] The rule does not operate through the automatic production of the prescribed action. It is, instead, the starting point of a conscious mental comparison between different options (i.e., a more or less articulated reasoning), which could, in principle, lead to the decision both to follow and not to follow the rule. Using Searle's words,[9] there is a *gap* in the process: the agent stops her acting and "looks" at the rule, holds it for a while in theoretical space, imaging and balancing the courses of action discriminated by it, taking eventually into account reasons for and against, sometimes starting a new process which can lead to the identification of another rule, etc. In short, the rule functions properly as a *reason for action*.[10]

Being guided by a threefold explicit rule, R-behaviour can correspondingly also be said to be an "explicit" process in three different senses: transparent, discursive, ratiocinative. It is "transparent" because it is guided by a consciously accessed ("visible") rule. It is "discursive" because it is guided by a rule which is already formulated in an "inner discourse" and ready to be formulated in a public discourse. It is "ratiocinative" because it involves reasoning, in which the rule functions properly as a reason.

(3) *Slow and effortful*

R-behaviour is also consciously perceived as a (comparatively) *slow* and *effortful* process: the steps through which it develops take some time and the reasoning requires some mental effort, more time and more effort than what is needed for an automatic reaction; moreover, the conscious decision to follow the rule can be costly and even painful. Such an introspective appearance of slowness and effort is strictly correlated with behavioural features, external signs perceptible by an observer: the action is not fluent, there is a perceptible gap, a kind of hesitation preceding acting, and sometimes unskilful execution; prior to and possibly during the action, the agent shows signs of mental concentration (and sometimes of stress or even pain).

8 Here, I follow, with some adjustments, the sense of "explicit" proposed in Cummins 1986.

9 Searle 2001: 14 f., 61 ff.

10 In the above definition of R-behaviour, the first form of explicitness – the property of being mentally accessed – is implied by the other two but does not imply them: in order to be *consciously* formulated and *consciously* used as a reason, the rule must be consciously accessed; but we can otherwise imagine cases in which the rule, even if it is consciously accessed, is not formulated and/or not used as a reason. We can also speculate that the mental formulation of a rule or its use in reasoning could occur in an unconscious form as well. I shall discuss odd cases such as these later on in § 2.3.

2.2 Norms and norm-conforming behaviour

R-behaviour develops in more than one step, is threefold explicit (transparent, discursive, ratiocinative), is slow and effortful. By contrast, N-behaviour (1) develops in *one single step*, (2) is threefold *tacit* (opaque, dumb, automatic), (3) is *fast* and *effortless*.

(1) *One step*

The agent consciously experiences N-behaviour as developing in one single step, the automatic, spontaneous performance of an action: facing circumstances satisfying a situation type S, the agent immediately, without any conscious deliberation and decision, acts in a way that satisfies an action type A. The action, however, is not accidental, but responds to a general disposition: facing S, the agent regularly does or has the impulse to do A. In short, the agent tends to spontaneously replicate the scheme "A in S".

But this is not enough. The disposition underlying cases of N-behaviour is, indeed, something more than a factual regularity: it has, differently from other kinds of automatic actions, a *normative* character. Firstly, the agent, being able to discern those concrete behaviours which, in S, satisfy A and those which deviate from A, has the disposition to feel, or judge intuitively, that the former are *correct* (appropriate, right) and the latter *incorrect* (inappropriate, wrong). Secondly, these very normative feelings or judgments contribute to the replication of "A in S": if the agent, facing S, deviated from A, she would have a feeling of wrongness which would cause her to adjust her behaviour until it satisfies A; if, instead, she conformed to A, the action would proceed fluently, eventually accompanied by a feeling of appropriateness. In short, the agent tends to act spontaneously in a way that is (or better yet: that the same agent would consider to be) correct, because this is (it would be considered to be) the correct way of acting.[11]

11 According to Celano, both N-behaviour and other kinds of behavioural patterns, such as innate or acquired reflexes, instincts and habits, are dispositions to act spontaneously in certain ways given certain conditions; but N-behaviour, unlike these other kinds of automatic actions, is the disposition to act in the *right* way (Celano 2016: 17–18). I assume that Celano here refers, more precisely, to the disposition to act in a way that *the very agent* would *intuitively* consider to be correct (if, in order to have a case of N-behaviour, the disposition to act in a way that *some observer* – or the very agent *after* ex-post *reasoning* – would consider to be correct were sufficient, the difference between N-behaviour and other kinds of automatic actions would make little sense: every automatic action would count as N-behaviour if it were rationalised *ex post*!). In the case of a pre-convention, however, the judgment cannot be considered to be merely subjective, because it is, by definition, shared by other members of the group (for A in S to be the content of a pre-convention, A should count amongst members of the group as the right action to be done in S).

(2) *Tacit*

Given its structure, N-behaviour appears to be the outcome of some internal mechanism which controls (i) the spontaneous identification (of tokens) of both A and S, (ii) the spontaneous replication of A when S is obtained, and (iii) the intuitive judgment that those concrete behaviours which, in S, satisfy A are correct and those which deviate from A are incorrect, with (iii) being, in some way, a contributory condition of (ii).

We could also describe this mechanism by saying that the agent's behaviour is guided by a mental representation of the scheme "A in S", which is "functionally analogous" to a rule: it functions as a model setting the features of the correct action. But, differently from a rule guiding R-behaviour, such a rule-like scheme is "tacit" (implicit, inexplicit) in three different senses: it is *unconscious*, it is *unformulated*, it *does not function as a reason*. Correspondingly, N-behaviour appears to be a threefold "tacit" process: opaque, dumb, not ratiocinative or automatic. Let us try to clarify the point.

(a) *Tacit as "unconscious"*. The agent has *no conscious access* to the scheme she conforms to. This is not to mean that the action and its normative character are completely unperceived. The action is consciously performed, and the agent could also feel that she acts appropriately; she could even think that her ability to act and her feeling of appropriateness depend on some rule-like scheme deeply encoded in her mind. But, she cannot be said to be looking at it "with the mind's eye". She has, at least during the process, no conscious mental representation at all of a possible action A in a possible situation S as the action to be performed. Consequently, she does not consciously fit her behaviour with any model: she just directly acts in the correct way. For this very reason, N-behaviour can be said to be an "opaque" process: during the process, the scheme that the agent conforms to remains, as such, "invisible" to her.

(A point should be clarified. She who conforms to a norm can be said to have conscious access to it somehow: she is able to conform to the norm and recognise the correctness of her action.[12] But she is not able to consciously discern the features that render it correct, keep them in mind and use them as a model. In order to distinguish between these two different forms of access, we can talk of "intellectual" (or "analytical" or "abstract") access for the form in which rules are accessed, and of "non-intellectual" (or "synthetic" or "concrete") access for the form in which norms are accessed.)

(b) *Tacit as "(mentally) unformulated"*. The implemented scheme, by consequence, remains also unformulated: during the process, the agent does not have in mind an expression in natural language terms (or in another shared symbolic

12 In our discussions, Celano strongly stressed that a norm can also be said to be "accessed", but in a different form from that in which a rule is accessed.

code) of both A and S. She is, therefore, not ready, or perhaps not able at all, to communicate in an abstract, descriptive way the features that make her action correct.[13] She is only ready to indicate by ostension a concrete exemplar of correct behaviour. In this sense, N-behaviour appears to be a "dumb" process.

(c) *Tacit as "not functioning as a reason"*. The scheme is automatically implemented, leaving no room for a previous check on whether the action to be performed is or is not the right one to take, no room for thinking whether to act or not to act conforming to the scheme, weighing the reasons for and against. Facing S, the agent just does A spontaneously, without any reasoning. In this sense, the scheme "A in S" does not function properly as a reason, and N-behaviour appears not to be a ratiocinative, but an automatic process.[14]

It is precisely in virtue of their being "tacit", in the sense above described, that the schemes underlying cases of N-behaviour can also be said to be "embodied":[15] because they manifest themselves *directly* through the performance ("embodiment", concrete execution) of correct actions, without the intermediation of conscious mental activities, such as reasoning and decision-making, explicitly representing them as models to be followed. On the other hand, it is precisely in virtue of their being based on "tacit" schemes that cases of N-behaviour can be said to be "normative facts":[16] because the standard according to which they count as correct is accessed *directly* in their concrete, factual execution (the measure of their correctness lies in their very factual instantiation).

(3) *Fast and effortless*

N-behaviour is also perceived as a (comparatively) *fast* and *effortless* process: the agent acts immediately without thinking about it, and the action requires less mental effort than the effort needed for reasoning and conscious control. Such introspective appearance is strictly correlated with behavioural features: fluency, lack of hesitation, no sign of mental concentration.[17]

13 Celano 2016: 13.

14 Celano does not define explicitly what a norm being tacit amounts to. He only stresses that it is the same sense in which we can be said to "tacitly" believe a proposition which is not stored in our memory as true, but which we would nevertheless immediately and effortlessly recognise as obviously true, without any conscious reasoning. This sense should be distinguished from that in which we can be said to "tacitly believe" propositions stored in our memory as true when they are not presently thought (Celano 2016: 13–14). It should be noted that, in this second sense, rules can also be said to be "tacitly believed" if they are stored in memory as valid rules and can, as such, be recalled.

15 Celano 2016: 12, 14–15, 18–19, 27, 29.

16 Celano 2016: 9, 12–13, 22, 25.

17 Note that the intuitive judgment of correctness underlying N-behaviour is also a case of N-behaviour: a mental action automatically performed under the guidance or control of the same norm, responding to a general disposition. What I have said above about N-behaviour

Following Celano, we can use the term "norm" to indicate tacit rule-like schemes underlying cases of N-behaviour (hence its name: *norm*-conforming behaviour). We can use the term "rule" in two senses: more generally, as a commonsensical term indicating any model setting the features of correct actions; and more specifically, as a technical term indicating only explicit models guiding R-behaviour (hence its name: *rule*-guided behaviour). I shall occasionally refer to the scheme A in S as the "content" of rules or norms.

2.3 Dynamics of rules and norms

This is, however, only a first approximation on the opposition between R- and N-behaviour, rules and norms, as it emerges in Celano's paper. Three further clarifications will deepen our understanding of the notions, making their relation more dynamic than it has so far appeared.

(1) R-behaviour and N-behaviour should not be thought of as mutually exclusive mental processes in two senses.

First, they can operate together as a network of interconnected processes determining the same action. Let us take a swimming training as an example. The trainer gives the athletes their first task of the day: "2000 m of front crawl". The athletes understand his utterance as establishing a rule and, having it in mind, after ritually protesting against such a boring task and its ritual, inflexible reiteration, start swimming: a case of R-behaviour. But, in swimming, they do not follow a set of rules specifying which precise sequence of movements instantiates a front crawl stroke; they just replicate it automatically, with the underlying disposition to have a feeling of wrongness in the case of incorrect performance, and possibly a feeling of appropriateness in the case of correct performance: a case of N-behaviour. Furthermore (Celano argues, following Wittgenstein), *any* instance of R-behaviour is necessarily interconnected with, must rely upon, some form of N-behaviour: to avoid infinite regress, there must necessarily be, at some point, an understanding of the concepts appearing in a rule, which does not consist in following other rules specifying their meaning, but which consists in an automatic (and shared) discrimination between cases which do constitute a token (i.e., a *correct* application) of the concept and cases which do not. In short, all rules necessarily rely on a background of norms. Let us call this "tacit normative background".

Second, one and the same scheme "A in S" could function for one and the same agent at different moments either as a rule or as a norm. Think, for example, about a Lewis convention: the relevant behaviour, Celano says, can ini-

applies, therefore, to this judgment as well: when judging a concrete instance of A in S as correct or incorrect, the agent neither compares it to some consciously accessed model nor reasons about it, but directly (intuitively) recognises it as correct or incorrect; moreover, she is not ready to verbalise the reasons supporting her judgment.

tially be performed under the guidance of proper reasoning (R-behaviour) and then become automatic (N-behaviour);[18] but, the agent could, at some moment, be able to stop the habit and make again explicit the rule she follows (again R-behaviour). In other words, one and the same scheme "A in S" for one and the same agent can be subject to a "functional shift" from rule to norm and *vice versa*. A behavioural pattern, initially performed under the explicit guidance of a rule, and reiterated over and over, becomes tacit with the passing of time without losing its normative character: a rule is turned into a norm (this is exactly what acquiring an ability amounts to). The agent, having internalised A in S as a norm, suspends its automatic application, makes its content explicit trough introspection, deliberates about it and finally decides to conform: a norm is turned into a rule (this is exactly what taking a critical stance on our own habits and prejudices amounts to). But, we should be aware of a crucial point. There will be cases in which the functional shift from norm to rule and from rule to norm can occur freely: some of our norms can be made explicit, and some of our rules can become tacit. We can, however, imagine that in other cases, given the structural or contingent limitations of our mind, the shift cannot take place. Some rules cannot be turned into norms: we cannot automatise some behavioural patterns that we otherwise recognise and follow as explicit rules (because they are "too complicated", because they are "too counter-intuitive", and so on). And some norms cannot be turned into rules: we cannot make explicit some of the norms we conform to (i.e., we cannot consciously access and formulate their content, and sometimes we cannot even suspend their automatic application). Let us call them "the *deep* normative background":[19] the part of our tacit normative background which we can neither make explicit nor describe nor consciously access (in the "intellectual" form), but which we can only directly apply and recognise in its correct applications (i.e., we can only access it in the "non-intellectual" form).

(2) So far, we have drawn a sharp distinction between R- and N-behaviour on the basis of a set of opposed properties: more than one step/one step, explicit/tacit (transparent/opaque, discursive/dumb, ratiocinative/automatic), slow/fast, effortful/effortless. However, this sharp distinction between R- and N-behaviour does not exhaust the possibility of the same properties being combined. In fact, we can easily imagine cases of normative behaviour which share the properties of both R and N-behaviour.

Let us consider, for instance, the following pattern. The agent does A in S; in her doing A in S, she does not consciously fit her action with a consciously accessed model; nevertheless, her behaviour is normative (she has the disposition to regard as correct those actions which, in S, satisfy A and as incorrect

18 Celano 2016: 13.

19 See Searle's "deep unconscious" (Searle 2004: 241 f.).

those which do not, and this disposition contributes causally to her doing A in S): these are properties of N-behaviour. Her action, however, is neither fast nor effortless: facing S, she hesitates before doing A, showing signs of mental effort, which are properties of R-behaviour. Let us think about a different pattern. The agent does A in S spontaneously, having no doubt about what to do, and acts fast and effortlessly. This seems to be a clear case of N-behaviour. She, however, consciously accesses the rule which prescribes the doing of A in S, and observes it intentionally, which are properties of R-behaviour. It is not difficult to imagine more examples of "hybrid" combinations.[20]

Given this varied landscape, the sharply differentiated R- and N-behaviour can be better conceived as *paradigms*: they show, in the clearest way, the sense in which a normative behaviour and the underlying standard of correctness can be said to be "explicit" or "tacit", and offer an approximate grid for distinguishing and classifying non-paradigmatic cases in virtue of their reputed similarity with either of the two paradigms.

Let us return to our first example. Let us suppose that, in some cases, if asked, the agent can immediately make explicit her mental processes: she can consciously access the scheme she has conformed to, she can even express it in an abstract way, reaffirm her decision to conform and possibly recall the reasons supporting her decision (deeply engaged in a discussion, I stop at a red light; no one is coming; I go a step further, then I stop; although I have paid no attention to my reasoning, I can immediately say that I was inclining to violate the rule, but then I decided to conform). This type of case appear to be very close to paradigmatic R-behaviour. It shares, first, the same behavioural features of slowness and effort; second, the agent is immediately ready to make explicit the scheme she has conformed to, although, during her acting, she had no conscious access to it. The agent, we could suppose, followed a rule which, albeit not consciously accessed, was just on the "fringe of consciousness": it seems appropriate to talk of "opaque" R-behaviour. (The example is not arbitrary. In fact, Celano seems to admit the possibility of a behaviour being guided by a rule, which is not, however, consciously accessed: a case of "opaque" R-behaviour?).[21]

Let us suppose that, in other cases, the agent cannot at all, or cannot easily, make the scheme explicit. Let us imagine, for instance, a swimmer who knew

20 Let us consider the following cases. The agent is guided by a conscious and quite precise mental picture of an action (she has, for instance, a detailed picture of how her fingers should move in a correct front crawl stroke), but she is not able to verbalise it. The agent is guided by a mental picture which functions as an exemplar which a concrete action has to be sufficiently similar to in order to be correct, but she is not able to discern which of its features are relevant criteria for "sufficient" similarity. In reproducing a melody, the agent is guided by a very precise auditory image of it which she can mentally represent at will, but she does not know any notation system for communicating it in an abstract way. And so on.

21 Celano 2016: 16.

how to swim a perfect front crawl stroke. After a few months long break, she takes up swimming again and tries to repeat the perfect stroke, but fails. She continues trying over and over until she succeeds. During her trying, she had no explicit rule in mind and was guided only by her feelings of appropriateness or wrongness. After she succeeds, she is not able at all to describe the perfect stroke in an abstract way, she is only able to perform it again and state with (for a non-expert athlete, astonishing) certainty that *it is the perfect stroke*. This case is far from paradigmatic R-behaviour. The rule was neither explicit nor on the fringe of consciousness, and it, therefore, seems more appropriate to talk about a norm, a norm still stored in the mind and susceptible to recalling, but provisionally unavailable (i.e., inaccessible even in the "non-intellectual" form). This is a case of "slow & effortful" N-behaviour.

But, let us imagine now a performing artist in search of a new figure. After having tried different and unsatisfactory ones, she finally finds the "right" solution. During her search, she had no explicit rule in mind and was guided only by her feelings of appropriateness or wrongness. After she finds the right solution, she is neither able at all to describe it in an abstract way nor to explain why it is the right one, she is only able to perform it again and repeat that *it is the right figure*. It seems odd to say that, in so doing, she has followed a norm which set that precise solution as the right one. The solution is genuinely new and is probably not the only one that would have been approved. It seems more appropriate to say that the artist has tried to fit the performed figure with a set of indeterminate normative standards, which appear to be very similar to norms, because they are neither formulated nor otherwise consciously accessed, and because they control intuitive judgments of correctness. This is another yet different case of "slow & effortful" N-behaviour. (This example is not arbitrary either. In proposing "acting with style" as an example of N-behaviour,[22] Celano seems to admit implicitly the possibility that N-behaviour might be effortful. Although acting with style does not amount to following a set of explicit rules, it is not always a matter of finding immediately the right solution either: sometimes it requires a series of tries, which are not guided by explicit rules, but by sound intuitions.)

However, other cases are more difficult to relate either to paradigmatic R-behaviour or to paradigmatic N-behaviour: they seem to fall within the domain of indistinction between the two. Let us return to the odd case introduced above. The agent acts fast and effortlessly, but she follows intentionally a consciously accessed rule or at least she can make the rule immediately explicit, expressing it and reaffirming her decision to conform. The teacher, for instance, orders the student to stand up and she spontaneously conforms. If asked, however, the student immediately explains that she stood up because the teacher

22 Celano 2016: 17–18.

ordered her to stand up and she ought to obey such an order. It seems natural to think that she was following a rule which is either consciously accessed or "just on the fringe of consciousness". Should we interpret the case as "fast & effortless" R-behaviour? At the same time, however, it seems appropriate to say that the student has conformed to a norm (she has the "habit of obeying" teacher's orders). Should we rather say that it is a case of "transparent" N-behaviour?

(3) This way of framing the opposition between R- and N-behaviour, rules and norms – regarding them as paradigms setting a grid for intuitively classifying different types of non-paradigmatic cases of normative behaviour in a range of similarity – can appear quite unsatisfactory. A better account should, to some degree, make explicit the criteria of similarity, the core features, if any, of R- and N-behaviour, in virtue of which non-paradigmatic cases should be ascribed to either of the two concepts. Such criteria should be capable of clearly framing at least the most important, if not all, non-paradigmatic cases which, like our last example, seem to fall within the domain of indistinction. Well, I think that such criteria are latent in the paper and can be drawn with little effort.

In describing norms, Celano refers fleetingly to the distinction – made famous by D. Kahneman's recent book *Thinking, Fast and Slow* – between two different "systems" in the mind, which operate by producing mental processes with different introspective and behavioural features: System 1 produces automatic, quick and effortless mental processes, with "no sense of voluntary control", and System 2 produces slow and effortful mental processes, involving "the subjective experience of agency, choice and concentration".[23] Kahneman's model, which has clearly influenced Celano's notions, also suggests a particularly appropriate way of improving the opposition between R- and N-behaviour, rules and norms, so as to better frame their interaction and the "hybrid" cases exposed above.

Let us assume that paradigmatic R- and N-behaviours are realised (produced, implemented) by different types of physical (neural) structures, regardless of what their differences may be (different types of neural circuits, different types of computational patterns, etc.). Let us call them R-structure and N-structure respectively. R-structure is something akin to Kahneman's System 2: it operates slowly and effortfully in producing normative behaviours which are explicit or which are such that they become explicit if they become the focus of conscious attention (they can also develop on a preconscious level, "just on the fringe of consciousness"). N-structure is something akin to Kahneman's System 1: it operates fast and effortlessly in producing tacit normative behaviours, and is, as such, incapable of making these behaviours explicit. These are essential features of R- and N-structures, the way in which they necessarily function in virtue of their physical constitution.

23 Kahneman 2011: 20 f.

Let us try to use this sketchy framework for explaining the dynamics of rules and norms that we have encountered above. The functional shift from norm to rule can be explained as the construction, on a previously existing N-structure, of an R-structure of the same content which can inhibit and overrule it. The functional shift from rule to norm can be explained as the construction, on the basis of a previous R-structure, of an N-structure of the same content which can gradually interpose, substitute or even borrow it. The phenomenon of "the *deep* normative background" can be explained as the physical impossibility of R-structures with certain contents (certain contents – so-called "sub-doxastic representations" – cannot, as such, become explicit). "Opaque" R-behaviour can be explained as an R-structure functioning on a preconscious level ("just on the fringe of consciousness"). The first case of "slow & effortful" N-behaviour can be explained as a conscious attempt to re-activate a latent N-structure, while the second as a conscious search for a solution, which fits satisfactorily with an underlying set of indeterminate N-structures. The last and most problematical example ("fast & effortless" R-behaviour or "transparent" N-behaviour?) can be explained by assuming the coexistence of interconnected N- and R-structures of the same content: the first produces the behaviour automatically and the second permits the agent to make the behaviour immediately explicit. And so on.

This account of the opposition between R- and N-behaviour allows us to interpret with ease further connotations of rules and norms given by Celano in his paper. Rules, he says, are "intentional" (and "propositional"), but can nevertheless be unconscious (and, I assume, can *function* unconsciously), while norms are "non-intentional" (and "non-propositional").[24] Taking the "intentionality" of rules for granted, Celano does not explain how it should be understood. He clearly does not refer to a wide sense of "intentionality", taken as the capacity of the mind-brain to represent the world (in this wide sense, a norm could also be said to be "intentional"). More specifically, "intentionality" is taken plausibly as the capability of the mind-brain to represent the world *explicitly*. An explicit rule is "intentional" in this sense because it involves an explicit (consciously accessed, mentally formulated, functioning as a reason) mental representation of a state of affairs A in S (the content of the rule). But, Celano admits the possibility of unconscious rules. In which sense can unconscious rules be said to be intentional as well? Because, in virtue of the R-structure which realises them, they *can* be made explicit: R-structures are capable of producing explicit representations, and unconscious rules are also realised by R-structures. Conversely, a norm can be said to be "non-intentional" because, in virtue of the N-structure which realises it, it *cannot* be made explicit: N-structures are not capable of producing

24 Celano 2016: 27–29 (rules are "intentional", while norms are "non-intentional"); Celano 2016: 16 (being "propositional" is a distinctive feature of rules).

explicit representations.[25] In the same way, we can also interpret Celano's further statement that a rule is "propositional", while a norm is "non-propositional" if we take "propositionality" as a kind of intentionality: intentional content is "propositional" if it can be expressed in a *that*-clause. (In § 3.4, I shall return to the notion of "propositionality" in the context of Celano's paper.)

This, I hope, is a faithful reconstruction of the complex framework emerging from Celano's *Pre-conventions*. In sum, it includes: (1) a list of interrelated properties (explicit, slow & effortful *vs.* tacit, fast & effortless) setting a general grid for distinguishing, representing and classifying not only "paradigmatic" R- and N-behaviours, but also "hybrid", slightly more differentiated kinds of normative behaviour; (2) a sketchy outline of rule-following as a dynamic and hierarchically ordered network of automatic N-behaviours, eventually sustaining emergent, more or less ratiocinative episodes of R-behaviour; (3) an explorative hypothesis about the underlying mental architecture, conceived as a dynamic and hierarchically ordered network of N- and R-structures (taken as different types of neural structures, regardless of what their differences may be). Overall, it is a general account of rule-following based on the opposition between rules and norms, R- and N-behaviour. I shall shortly refer to it as the "Rules *vs.* Norms Framework".

3 SOME COMMENTS ABOUT THE RULES VS. NORMS FRAMEWORK

In the previous section, I have proposed a systematic reconstruction of the Rules *vs.* Norms Framework. In this section, I shall further argue that the Framework is the core of Celano's *Pre-conventions*: it is the keystone of his argument; it is, in its own right, one of the paper's main achievements; it marks a decisive step in Celano's work, pointing at new and promising developments.

3.1 Rules and norms in *Pre-conventions*

First, the Rules *vs.* Norms Framework plays a crucial role in Celano's argument.

The very notion of a pre-convention and its originality depend on the opposition between rules and norms, R- and N-behaviour. On the one hand,

25 This interpretation of the notion of intentionality is strictly analogous to J. R. Searle's "Connection Principle" (Searle 2004: 243 ff.). According to it, "intentionality" denotes, firstly, the way in which *conscious* mental states represent the world; "intentional" states are, firstly, therefore, conscious mental states. But, secondly, "intentional" can also be said to be any unconscious mental state produced by a physical structure capable of producing the same state in a conscious form. This reference to Searle is particularly appropriate: in distinguishing between rules and norms as intentional and non-intentional standards of correctness, Celano relies precisely on Searle's "Background abilities" (Celano 2016: 27–29).

pre-conventions are actually nothing but a network of N-behaviours shared by (most) members of a group G, the Gs, and characterised by the "dependence condition": "A in S" is (functions as) a norm for (most) Gs, and what causes "A in S" to become a "norm" for a G is the fact that "A in S" is already a norm for (most) Gs. The concept of pre-convention depends, therefore, on the concept of N-behaviour, which is defined by the differences between it and the more familiar R-behaviour. (Pre-conventions are just a peculiar network of N-behaviours. We can indeed imagine kinds of N-behaviour with different origins and structures: for example, "natural" N-behaviours, norms we have an innate inclination to conform to, or "idiosyncratic" N-behaviours, norms acquired through experience, but not generally shared by the groups that we are members of.) On the other hand, the reason for the originality of Celano's pre-conventions is precisely the account he gives of their structure. Celano's pre-conventions and Marmor's "deep conventions"[26] refer basically to the same phenomena. What Celano adds is a different way of explaining them. They cannot be represented, unless metaphorically, as a network of processes, not even unconscious processes, consisting in the application of shared rules or systems of rules (what I have called "R-behaviour"). They must be represented as a network of processes of a very different kind, not ratiocinative but automatic, and nevertheless normative (what I have called "N-behaviour").

But the opposition between R- and N-behaviour is fully intelligible precisely in the light of, and it gains its theoretical strength in virtue of, the entire implicit account it relies upon: the Rules *vs.* Norms Framework.

3.2 Rules and norms beyond *Pre-conventions*

The importance of the Rules *vs.* Norms Framework, it seems to me, goes beyond the scope of *Pre-conventions*. As I hope to have shown, it traces a comprehensive account of rule-following which – although it cannot as yet be considered a complete theory, but rather an outline needing to be improved, deepened, detailed – is, at this stage, coherent, well-structured, intuitively sound. Moreover, its whole design – although arrived at by developing and linking together well-known ideas – seems to me far from trivial.

Let me briefly dwell on this last point. In drawing his concepts, Celano follows two main patterns. The starting point is the idea – based on Wittgenstein's remarks on rule-following interpreted in terms of Searle's "Background abilities" – that our normative practices cannot be exhaustively represented, unless metaphorically, as the acceptance and observance of systems of rules. A relevant part of our normative practices is controlled by "norms", i.e., schemes which are relevantly different from rules because they are *tacit* (not explicitly

26 Marmor 2009: 58–78.

represented), but which are also "functionally equivalent"[27] to rules because they operate as standards of correctness. Such schemes, given their very nature, are opaque and remain in the background. At the same time, they make up the ground on which our rules necessarily rest: a tacit yet necessarily presupposed background underlying our explicit normative practices. Then, in order to shed more light on the nature of norms, Celano resorts to the distinction, made famous by D. Kahneman, between slow and fast mental processes:[28] while rules are taken as explicit mental representations underlying slow, ratiocinative, transparent rule-following (what I have called "R-behaviour"), norms are taken as tacit schemes underlying a kind of fast, automatic, blind rule-following (what I have called "N-behaviour"). Thus, rules and norms, and with them the tacit background, are openly framed in *psychological* terms, as different mental structures involved in different mental processes, defined and distinguished on the basis of both their introspective and behavioural properties. So here it is, in its core, the Rules *vs.* Norms Framework: a psychological account of rule-following focused on the distinction between slow, ratiocinative, transparent R-behaviour and fast, automatic, blind N-behaviour.

The idea that our normative practices rely necessarily on a tacit background appears often in Celano's previous works.[29] But the psychological account provided by the Rules *vs.* Norms Framework is a plain novelty, and marks a proper turn in his way of framing problems: psychology has taken centre stage, as far as I know, for the first time.[30]

In spite of the growing fortunes of naturalisation programmes, the use of psychological frameworks in accounting for rules and rule-following dynamics is surely not – at least not yet – mainstream amongst scholars in legal philosophy. But, to my knowledge, some aspects of Celano's Framework – especially its focus on the normativity of fully automatic behaviours and the above outline of the mental processes leading to their execution – are not common even in that part of psychological literature on rule-following which is easily accessible to non-specialists.[31]

27 Celano 2016: 27–29, referring to Searle 1995: 125–147.

28 Celano 2016: nt. 10 (quoting Kahneman 2011).

29 See, for instance, Celano 2005 and Celano 2013: esp. 104–111.

30 Such a psychological insight acquires, in *Pre-conventions*, quasi-phenomenological traits. In order to explain what conforming to a norm amounts to, Celano resorts largely to examples which aim to recall and roughly analyse the subjective experience of "embodied" norms. This line of inquiry – which I have tried to emphasise in discussing cases of "odd" normative behaviour which do not fit with the paradigmatic R- and N-behaviours (see § 2.3) – plays a not so negligible role in Celano's paper: the intuitive soundness of the idea of norms as embodied standards of correctness relies largely on the illuminating examples he provides.

31 A relevant exception that I am aware of is the "dual" theory of rule-following recently proposed by the legal philosopher Bartosz Brożek (see Brożek 2013: 44–52). Moving, like Celano, from Wittgenstein's insights, Brożek indeed distinguishes between two kinds of rules and

In summary, the Rules *vs.* Norms Framework can be considered, in its own right, a valuable and significant achievement of Celano's *Pre-conventions*, for it provides a sketchy yet coherent, well-structured, plausible and, in some respects, unusual account of rule-following. Being openly framed in psychological terms, it also represents a turn in Celano's work. This turn, I believe, deserves to be deepened by improving the Framework through the adoption of more, and more fine-grained, psychological concepts and models.[32]

3.3 Further developments

Finally and most importantly, the Rules *vs.* Norms Framework also traces a very promising path to the further development of some of Celano's old theses and other traditional issues in legal and moral philosophy.

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rule-following. We have, on the one hand, "rudimentary" rules and rule-following (or "rule-observing practices") and, on the other hand, "abstract" rules and rule-following (or "rule-guided behaviours"). Brożek's rudimentary rules and rule-following correspond quite well to Celano's norms and the tacit kind of rule-following I call "norm-conforming behaviour" (more precisely, they correspond to the socially shared norms underlying pre-conventions). Rudimentary rules are "independent of language" and "followed unconsciously", and rudimentary rule-following is "a 'blind' process, almost a reaction", which nevertheless has a normative dimension. Brożek's abstract rules and rule-following correspond to Celano's rules and the explicit kind of rule-following I call (using the same expression Brożek resorts to) "rule-guided behaviour". Abstract rules are "formulated in language" and "followed consciously", and abstract rule-following involves "considering different courses of action, weighing rules for and against incompatible ways of conduct and, ultimately, [...] reasoned decisions as to which rule should be followed". On the basis of this account, Brożek provides a reconstruction of the interaction between rudimentary and abstract rules, which is very close to the one emerging from Celano's paper. For example, abstract rules depend on "existing systems of rudimentary rules" much like the way in which Celano's rules rely on a background of norms. With the passing of time, they can turn into rudimentary rules exactly the way in which Celano's rules can turn into norms. Finally, Brożek argues that *imitation* – taken as the automatic, unreasoned identification and replication ("embodiment") of patterns of conduct performed by others – is the fundamental mechanism involved in rudimentary rule-following. I am sure that Celano would find this hypothesis intriguing.

32 For example, it would be interesting to conjugate the notions of R- and N-behaviour with J. Haidt and F. Bjorklund's "social intuitionism" (Haidt & Bjorklund 2008). Above all, the possibility of an automatic *ex post* and "ideological" justification should be taken into account. The agent acts in a way which she intuitively considers to be correct, having in mind a rule which justifies her action. But, in reality, she does not follow that rule, but a very different norm which she is completely unaware of, and which she cannot openly recognise. For instance, Mr Smith reports to the ticket inspector in a bus that a passenger, clearly an immigrant, has not validated his ticket, firmly convinced that he has done the right thing by denouncing a cheater. But, his action and his feeling of appropriateness have not been related, as he believes, to the fact that he has denounced a cheater, but to the fact that he has denounced a cheater who is also an immigrant. In fact, he has never had even the slightest impulse to denounce a cheater unless the cheater looked like an immigrant! Mr Smith has automatically produced an "ideological" justification for his action, which covers a xenophobic norm deeply encoded in his mind.

These are two of Celano's main theses which could be usefully reframed by taking into account the Rules *vs.* Norms Framework:

(1) Celano's version of natural law theory, "transcendental" natural law,[33] roughly taken as a set of very undetermined (and conflicting) principles presupposed by our normative practices: the "minimal content" of natural law. The tacit normative background is made of contingent norms, which rest upon, Celano says, "natural" frameworks. Such natural normative frameworks are a plausible interpretation of the principles which define Celano's "minimal content" of natural law. It would be interesting (a) to improve the Rules *vs.* Norms Framework by refining and supporting the idea of a natural normative background and by speculating about its possible contents on the basis of the many available theories of moral innatism,[34] and (b) to use this refined Framework to account for the constraints on moral and legal reasoning supposedly exercised by the natural normative background.

(2) Celano's version of particularism.[35] The reasonable (correct) application of a rule, Celano argues, necessarily presupposes a distinction between "normal cases", which the rule applies to, and "exceptional cases", which the rule does not apply to. And this distinction cannot be thought of as defined by other rules: it is a matter of norms. It would be interesting (a) to improve the Rules *vs.* Norms Framework with a detailed psychological account of how norms and rules interact in defeasible reasoning, and (b) to develop Celano's particularism along the lines of this refined Framework.

Let us also consider some classic topics in legal theory, such as the debate about the concept of law. The network of normative practices of which law consists cannot fully be represented, unless metaphorically, as the acceptance and reasoned construction of systems of explicit rules. There is an underlying level of tacit normative concerns (Schmitt's "*konkrete Ordnung*"), and a continuous shift of our practices from one level to another, and sometimes a dramatic disconnection between the two (the space between Hart's social rules and social habits is neither empty nor static). The Rules *vs.* Norms Framework offers a promising grid for better representing this complex dynamics, and an even more promising one if enriched with more fine-grained psychological concepts and models.[36] Let us take a look at the notion of authority. Authority, taken as legitimate power, is often defined as the capacity of positing valid rules, existing in virtue of a structure of reasons. Roughly, (a) Y recognises the authority of X if

33 Celano 2005.

34 For example, I know (through personal communication) that Celano is very intrigued by and has already explored de Waal's theory of the innate basis of moral attitudes, which humans allegedly share with other animals (see de Waal 1996).

35 See, for instance, Celano 2002 and Celano 2012.

36 For a very sketchy and explorative attempt in this direction, see Brigaglia 2011: esp. 311 ff.

Y believes that the very fact that X prescribes the doing of A in S is, normally, a sufficient reason for concluding that, in S, A ought to be done (i.e., for concluding that the rule "A ought to be done in S" is valid); and (b) Y recognises the authority of X on the basis of further reasons (i.e., a "justification" of X's authority). Such kinds of definitions "rationalise" authority, reducing its dynamics to a train of explicit processes and completely missing the tacit ones which are part of the ordinary use of the concept (e.g., automatic obedience, automatic signs of submission, automatic acceptance of someone's authority, and so on) and the interaction between the two (e.g., the mutual influence of the habit of obeying and the explicit belief in a duty to obey; or the role that, in reasoning about the validity of a rule prescribed by an authority, may be played by the unconscious check of the content of the rule on the basis of tacit normative standards). Once again, the Rules *vs.* Norms Framework provides a promising grid for an account of authority as a normative phenomenon capable of adequately modelling such complex dynamics.

I both predict and wish to see Celano pursue his "psychological turn", developing, following the path traced, more fine-grained psychological models of rule-following based on the distinction between rules and norms, and using the same to shed new light on traditional topics in legal and moral philosophy.

3.4 A methodological issue

Important merits of the Rules *vs.* Norms Framework are its intuitive soundness and its neutrality with regard to their explanation on a neural or computational level. Both merits depend on the specific way in which the opposition between R- and N-behaviour is framed.

Let me roughly distinguish between three different kinds of properties that we can refer to in conceptualising a type of behaviour. The first ones concern the way in which a particular behaviour is subjectively experienced by the agent. These I have occasionally called "introspective" properties. The second ones concern a particular behaviour's external signs perceptible by an observer. These I have called "behavioural" properties. But introspective and behavioural properties are usually thought of as corresponding to (depending on, supervening upon) properties of a very different kind: neural or computational features of the physical structures which are supposed to produce the behaviour (e.g., the distribution of the relevant neural networks, activation patterns, digital or analogue information processing, and so on). Let us call them "inner" properties.

The notions of R- and N-behaviour have been defined by referring only to either actual or dispositional introspective (explicit *vs.* tacit) and behavioural (slow & effortful *vs.* fast & effortless) properties. And very apparent ones: a conscious experience framed in terms very close to a *commonsensical* psychol-

ogy that everyone is able to use, reducing unusual concepts requiring special philosophical competence to minimum; and external signs *easily* perceptible by a *common* observer without the help of special scientific expertise and technical instruments (such features as blood pressure or pupillary response). Furthermore, no hypothesis has been advanced about the inner properties of the physical structures which produce R- and N-behaviour. This is not to be taken as excluding introspective and behavioural properties, which characterise R- and N-behaviour, corresponding to (depending on, supervening upon) relevantly different inner properties. We have indeed assumed that they do (§ 2.3). But, we have carefully avoided committing ourselves to a precise theory about what exactly such inner properties are. They have been treated as completely opaque and have, as such, not played a part in discriminating cases of R- from cases of N-behaviour: a particular behaviour counts as an instance of R- or N-behaviour depending on its (actual or dispositional) introspective and behavioural properties, which are assumed to supervene upon certain inner properties, *regardless of what they may be*.

From being thus defined, the notions of R- and N-behaviour, rules and norms, gain a strong intuitive soundness. And this is not a minor virtue for notions which, albeit drawn in psychological terms, are meant to be used not by professional psychologists or neuroscientists, but by legal and moral thinkers. Every attempt at refining them should take this into consideration, balancing between the value of a more precise neuropsychological account and the advantage of easy accessibility.[37]

Moreover, the notions of R- and N-behaviour, rules and norms, do not imply any hypothesis about the inner properties of the structures which realise them. They can, in this sense, be said to remain neutral about the matter. This also seems to me to be a virtue: it is not easy, not to say impossible, for a non-trained student to gain mastery over the enormous and rapidly growing tools and materials of the neuro- and cognitive sciences necessary to support in a serious way hypotheses about the inner properties of a particular behavioural process. It is better to remain modestly silent as much as possible.

In this regard, the only criticism I have to level at Celano regards his jargon in general and his relaxed use of the concept of "propositionality" in particular.

According to Celano, as we have already seen, rules are "propositional", while norms are "non-propositional". A "propositional" rule can, moreover, also be "unconscious"[38] (I assume that the idea of an "unconscious rule" includes the possibility of it producing a behaviour without being consciously accessed). Let us call it the "propositionality thesis" (P-thesis). Celano does not explain how the P-thesis is to be understood, taking it for granted. His only suggestion is that

37 For this methodological argument, see Brigaglia 2015.

38 Celano 2016: 16.

to be "propositional" is to be "expressible in a *that*-clause".[39] I have proposed above, in § 2.3, a possible interpretation of the P-thesis which is fully congruent with the other features attributed to rules and norms: "propositionality" is a kind of "intentionality", and a rule is "intentional" in the sense that it is stored in the mind in such a way that it can be made explicit, while a norm is not. The problem is that, given the vagueness of Celano's suggestions and the different available accounts of the concept of "proposition" (one of the most obscure and contested in contemporary philosophy), this interpretation of the P-thesis is far from obvious. Other interpretations come easily to mind.[40]

According to one of them, a standard of correctness counts as "propositional" if it is realised by a string of mental symbols somehow encoded in our brain, which shares the same syntactical, semantic and functional properties of the explicit rule "If S, then A ought to be done". In other words, a standard of correctness counts as "propositional" if it is something akin to an explicit rule in a supposed "language of thought". Let us talk of "L-rules". The interpretation of the P-thesis in terms of L-rules is not odd at all: it is perhaps the most obvious for students more familiar with the language of cognitive sciences than with that of analytical philosophy, and can appear natural in a context so deeply impregnated with psychological approaches as Celano's paper. But the interpretation of the P-thesis in terms of L-rules risks upsetting his framework.

Let us consider two theses about L-rules. (1) Fast and effortless tacit normative behaviours are, at least in some cases, the output of the unconscious, automatic and very quick mental computation of L-rules. (2) Some L-rules, called "sub-doxastic" or "sub-personal", are so structured that they cannot be made explicit. Together, these two theses draw a possible (and far from unusual) explanation of the phenomena that Celano is concerned with: fast, tacit, inaccessible normative behaviour. Let us call it the "L-rules explanation".

Let us suppose that we interpret the P-thesis in terms of L-rules. Given that norms are supposed to be non-propositional, N-behaviour cannot be explained in terms of L-rules. Accepting Celano's framework commits us, therefore, to rejecting the L-rules explanation, at least as far as N-behaviour is concerned: N-behaviour cannot be explained as the outcome of the quick computation of

39 Celano 2016: 16.

40 In a very wide sense, at least the norms which are not part of the deep normative background can be expressed in a *that*-clause which describes their content. I can, for example, say that a swimmer conforms to a norm, according to which "The hand ought to enter into the water finger-tips first, lengthening forward in front of the same shoulder with the middle finger pointing the way to the far end of the pool" (from: http://www.swimsmooth.com/catch.html). It is, however, clear that this is not what Celano is concerned about. In saying that a rule is "propositional", he clearly does not refer to the mere possibility that an observer describes the content of the rule, but specifically to the way in which the rule is represented by the agent when she is guided by it (swimming automatically, the swimmer is not trying to fit her movements with that description!).

sub-doxastic L-rules; it must be the product of some different structure. In this way, the very notions of N-behaviour and norms turn out to be conceptually linked to a very demanding thesis about the inner properties of the physical structures which realise them. Both intuitiveness and neutrality get lost.

The problem is marginal in the paper. Another interpretation of the concept of propositionality is available – one which is fully coherent with the whole framework. It underlies, however, important methodological issues. It is highly desirable that the theory of normativity should embrace more, and more fine-grained, psychological concepts and models in order to bridge the gap between old-fashioned metaethics on the one hand, and contemporary moral and social psychology, or even neuro-ethics on the other. But, first, a tremendous amount of grammatical work is required, a careful reframing of the conceptual vocabulary, while paying careful attention to clearly defining key terms, which, in this paradigm shift, can have relevant yet subtle and unperceived semantic changes. Second, as has above been shown, an effort is required to frame our theses in order to avoid unnecessary implications on levels we are not able to manage.

4 CONCLUSIONS

In writing *Pre-conventions*, Celano has tried to show that not all standards of correctness are (function as) explicit rules, and that not all normative behaviours (and especially conventional behaviours) can plausibly be thought of as guided by explicit rules. There are standards of correctness, norms, which exist only in their concrete application, and normative behaviours which are the direct and not reflected execution of the correct action. This aim has been, I maintain, fully achieved. But, as I hope to have shown, Celano has arrived at an additional result, which has probably not been intended. He has implicitly set a general account of rule-following based on the distinction between rules and norms. This account, although susceptible to improvement by adopting more fine-grained psychological concepts and models, is on the right track with respect to both its content and its form. I look forward to its future applications.

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Embodied conventions

Some comments on their social dimension and intentionality

In these brief comments on Bruno Celano's "Pre-conventions. A Fragment of the Background", I propose further thoughts on what, following Celano's analysis, I call embodied conventions. I begin with a number of remarks on Celano's philosophical method. Then I claim, first, that the social dimension of conventionality remains obscure in his account of embodied conventions, and, second, that his account of pre-conventions (embodied conventions that are in the Background) is still imprecise due to the ambiguity of the notion of the Background.

Keywords: philosophical method, social dimension, Background

1 INTRODUCTION

I have been kindly invited by the editors of *Revus* to comment on Bruno Celano's article "Pre-conventions. A Fragment of the Background". As always, Celano's analysis is illuminating and encourages the reader to think further about the issue in hand. In this text, I only intend to indicate some paths that, to my mind, should be explored in order to complete or improve our understanding of the phenomena pointed to by Celano.

My comments are divided into three parts. First, I discuss briefly Celano's indirect remarks on the philosophical method (or, at least, on the method he uses to examine "pre-conventions"). Second, I introduce what I take to be Celano's key claims regarding embodied conventions. I then propose a number of observations on Celano's analysis, focusing only on two aspects. On the one hand, I argue that his explanation of embodied conventions needs to be further developed in order to account for the social dimension of conventionality. On the other hand, I argue that the relationship between the unintentionality of embodied conventions and the Background is still imprecise, and that this renders the notion of pre-conventions unstable.[1]

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1 Below, in section 3, I explain the use of the label "embodied conventions" instead of "pre-conventions".

2 ON METHOD

The method of analytic philosophy is an intricate matter. I had a difficult time trying to figure out how I should proceed while doing legal philosophy if I were to follow the analytical method. There are some commonplaces, such as the use of formal logic or the concern for the meaning of words and concepts, but it has not been easy to translate those commonplaces into everyday philosophical activity. In Celano's article there are some suggestions as to how this translation might be carried out. I would like to be clear here, though – nowhere in his article does Celano explicitly introduce what he thinks the method of philosophy is, be it analytic or not. Instead, he makes disseminated remarks about the endeavour he has undertaken. It is based on such remarks that I attribute a philosophical method to Celano.[2]

From this methodological perspective, Celano's proposal on embodied conventions is a mixture of an analysis of the meaning of the word "convention" and an analysis of the traits that characterise the particular phenomenon he is interested in.[3] The procedure, as I understand it, is organised into three main steps. First, we should explore the current meaning of the word ("its semantic field"). Second, we should unfold the logical possibilities of that meaning, even if they are not covered by word usage.[4] Third, we should analyse these logical possibilities in order to capture the key traits (initially identified extensionally, i.e., by way of examples) of the phenomenon. The result of this procedure is not a recommendation or guide to the correct usage of the word, nor is it a proposal on the necessary and sufficient properties that define the concept or the phenomenon. Instead, I would say that this procedure purports to provide philosophical insight into a phenomenon by pointing out some of its key traits and by associating it with a family of meanings that the word bears. This procedure seeks to illuminate or shed new light on a phenomenon, taking as a starting point the way in which our language captures it, even if only roughly.[5]

I take this method to be suggestive and promising, even if it is difficult to establish its success criteria. For instance, would the fact that the actual meaning of a word is not the one described by the philosopher count as an objection?

2 If this is the case, you may wonder why use a word as heavy as "method" to describe his procedure. Well, in what follows, by "method" I understand just a procedure, a planned way of doing something.

3 Celano uses this same method for his analysis of another, closer phenomenon. See, for instance, Celano 2010 [1995]: 175 on "custom" (*consuetudine*).

4 In this step, "we are engaged in the search for an explanatory redefinition of the term – more precisely, a rational reconstruction of a plurality of different concepts of convention." Celano 2016: 11.

5 Celano's endeavour does not finish with a conceptual analysis of pre-conventions. Indeed, his insight into pre-conventions seeks to afford a new explanation of a philosophical puzzle: rule-following.

Or, would the fact that some traits of a phenomenon do not fit with the actual meaning of the word be an objection? Are the key traits necessary conditions or only typical properties of a phenomenon?[6] More generally, how can we determine which philosophical result is the correct one? Actually, it seems to me that, behind this method, there is indeed a challenge to the last question I have posed. There is no such thing as scorekeeping in philosophy. There are certainly some minimum standards, but once they are satisfied, there is no one and only correct result. Philosophical activity, in this view, is like a torch illuminating a diffused area rather than a laser pointing at one single spot. My aim here is just to dig into this diffused area.

3 DISTINGUISHING CONVENTIONS

According to Celano, the word "convention", even if ambiguous, has a typical meaning characterised by two elements – agreement and arbitrariness.[7] Agreement, widely understood as "going together", can be either "amenable to a rational explanation" or not.[8] Besides, agreements can be explicit or tacit.[9] These elements delimit the semantic field of "convention". Subjecting these varieties of agreement to logical analysis, we find four possible combinations, all of which may adequately be called conventions. Celano is interested in the phenomenon that instantiates one of these possibilities, namely cases of tacit agreement not subject to rationalisation. Using a widely known jargon of the philosophy of mind, we may call those tacit agreements that are amenable to rationalisation – *cognitive conventions*, and those that are not – *embodied conventions*.[10] Lewisian coordination conventions are examples of cognitive conventions. Celano claims that activities such as swimming the front crawl, identifying salient solutions to coordination problems or recognising instances of a concept are examples of embodied conventions. Embodied conventions are characterised by the fact that certain correct ways of doing things have been wired in the bodies of

6 This introduces a further source of complexity: How shall we distinguish between a descriptive and a theoretical claim about a phenomenon?

7 Incidentally, I am not certain that the way in which Celano defines arbitrariness captures its typical meaning when associated with conventions. There are conventions whose content is not immaterial, such as colours and subject matters represented in religious art. It seems to me that the arbitrariness of conventions is a closer relative to another meaning, namely "the result of an act of will of a human being". I have argued so in Arena 2011.

8 To be "amenable to a rational explanation" means that the agreement is the result of "reasoned pursuit, by each of the parties involved, of their own goal". Celano 2016: 11.

9 See Celano 2016: 13–14 for a discussion of the distinction between tacit and explicit.

10 "Cognitive" and "embodied" are usually used to distinguish between two different theories of mind. See Shapiro 2011.

the people involved. They are instances of convergent automatic, unreflective, spontaneous behaviour which is not a biological regularity (such as breathing).

To quote Celano, "those who know how to swim the crawl, or march, have these forms in their body. *The correct stroke* of front crawl or the way of walking we call 'marching' are tacit bodily schemes. /…/ Human biology sets the limits, a frame. But within these limits we then indulge our whims; and the limits themselves can, sometimes, be manipulated. What front crawl is, is – in part – an arbitrary agreement (in the generic sense introduced above, sect. 2). Because of this conventional component, these wired-in forms (forms in the body, that is) are, inseparably, both natural (a 'second nature') and cultural."[11] Some of these non-rationalisable tacit agreements are the conditions of some rationalisable activities, which are otherwise impossible to carry out. In such cases, embodied conventions are part ("a fragment") of what John Searle calls the "Background".[12]

Embodied conventions, thus, have a distinctive structure: they are embodied norms, which means that they are normative facts. Facts, because they are in the body. Normative, because they fix the distinction between correct and incorrect behaviour.

The argument about how some embodied regularities may become normative facts is, of course, one of the more challenging proposals of the article. Nonetheless, here I focus on Celano's claims about the existence of conventional phenomena that are not captured by the notion of cognitive conventions. Even though I agree in general with his insight, I believe that there are some aspects of embodied conventions that do remain obscure and others that lack precision. In the following two sections, I propose moving the philosophical torch in order to cast light on some areas of the phenomenon.

Before moving ahead, a terminological clarification is in order. Irrespective of the fact that Celano, at one point, defines pre-conventions as "conventions that are mostly in the Background of our activities and thoughts, and that, passing usually unnoticed, delimit their spaces",[13] it seems to me that, from the examples put forward, it follows that not all embodied conventions are a fragment of the Background. The examples given, such as conventions that establish how to swim the crawl or how to march, are, to my mind, on the surface.[14] Indeed, near the end, Celano offers a definition by specification: "embodied conventions that have become 'second nature'".[15] This is why I use "embodied convention" to refer to the general phenomenon pointed to by Celano, and save

11 Celano 2016: 14–15.

12 See Searle 1995: 127–147.

13 Celano 2016: 19.

14 On the distinction between background and surface activities more follows below.

15 Celano 2016: 30.

"pre-convention" for those embodied conventions, if any, that are a fragment of the Background. I do have something more to say about embodied conventions and the Background in section five of this paper.

4 THE SOCIAL DIMENSION OF CONVENTIONS

Let us start with the meaning of words. There seems to be a further ambiguity in the semantic field of "conventional". We have the disposition to call certain activities "conventional" even if we would not say that there is a "convention" which imposes them; "conventional" does not always mean "of or pertaining to a convention".

We would say that the fact that in Argentina we lie on a bed while sleeping is conventional, but there is no convention concerning this fact. It is conventional because we can see that in other places people lie on the ground, so it is not something imposed by nature, but something chosen by people. It is in this sense that it is conventional. But it is not a convention in the sense that it is something that we do together.

Maybe this ambiguity is obscured by the fact that the distinction between nature and convention is not a distinction between two complementary sets. To be non-natural, it is sufficient for a fact to be the result of an act of a human being. For instance, imagine a shipwreck survivor on an isolated island wanting to cultivate some grain. Once she has finished ploughing the field, we say that the arrangement is non-natural because the length of plough lines and the distance between them have been decided and carried out by her and not nature. This is the only meaning ("non-natural") that we would appeal to if we were to say that her activity is conventional. Yet, we would not say that her actions either followed or were imposed by a convention. When conventional is tied to a convention, the activities of an isolated human being cannot be conventional. These considerations also apply to embodied activities. For instance, our survivor could walk through the forest always following a path that she herself has formed and that particular path could be wired in her body, but we would not call that a convention. The same goes for swimming. An isolated swimmer who has embodied a certain kind of stroke does not follow a convention, regardless of the fact that we could say that the way in which he slides over water is conventional (non-natural).

Moreover, labelling as conventional the activity both of an isolated human being and of many people, even if convergent, when there is no relationship between them would remain outside the semantic field of convention.

There are many cases in which some activity has been wired-in, embodied, in a number of people, but we would not say that the activity is conventional

(at least in more than the "non-natural" sense). For instance, imagine a person who, driving to work, takes the same route every day. This activity seems to be wired in her body to the point that, at some other times, when she wants to go to other places, she automatically takes that same route even if it is not the right one. In Argentina, we use the expression "man is an animal of habit" to describe this kind of error. It is a non-natural activity because the choice of route is not imposed by nature; there is more than one route available, but it only happens that she takes exactly that one. Now imagine that some colleagues of hers live in the same housing block and that all of them take the same route every day while driving to work, and also imagine that all of them have this activity embodied, wired-in. Nonetheless, we would not call their activity of taking the same route to work a convention, because each of them does the activity individually. There must be something else besides embodiment and convergence for a convention to exist.

The realm of conventions is the realm of social activities. Conventions bridge individuals who are otherwise isolated. Even if the idea of embodiment may throw light on some conventional phenomena, it leaves unexplained the way in which conventions glue the activities of people onto each other. This aspect is certainly captured by the notion of cognitive conventions. In the effort made by proponents of cognitive conventions to explain agreement as a train of reasoning we may find the effort of finding an explanation of how individuals get tied to conventions. This is, it seems to me, one of the main roles that common knowledge or the condition of dependence is designed to play in Lewisian conventions.

This social dimension of convention has most certainly been acknowledged by Celano in his previous works where he deals with what here I have called cognitive conventions.[16] However, to my mind, this aspect remains obscure in his presentation of embodied conventions, and more has to be said in order to rule out cases of isolated or merely convergent embodied activities.

5 EMBODIMENT, INTENTIONALITY AND THE BACKGROUND

Let us grant that there are embodied conventions, i.e., regularities of behaviour that are, irrespective of the fact that they are the result of learning, spontaneous or unreflective ("they are not backed by a train of reasoning") and that glue, in some way, individuals to social activities. I have saved the term "preconvention" to name embodied conventions that, according to Celano, "come before", in the sense that they mostly lie behind our activities and thoughts.

16 See, for instance, Celano 2010 [1995]: 183–187.

Celano claims that pre-conventions are a fragment of what, following Searle's thesis, he calls the Background.

This is not the place to discuss Searle's thesis on the Background. However, it seems to me that some of its flaws translate into Celano's explanation of pre-conventions. According to Searle, as Celano reminds us, intentional states, such as beliefs or desires, "function the way they do only given a presupposed set of Background capacities that are not just intentional states".[17] We need the help of some unintentional capacities so as to be able to have intentional states.[18]

Even if this idea seems plausible, Searle's examples are confusing. On the one hand, he proposes the example of language: "If you consider the sentence 'Cut the grass!' you know that this is to be interpreted differently from 'Cut the cake!' If somebody tells me to cut the cake and I run over it with a lawn mower or they tell me to cut the grass and I rush and stab it with a knife, there is a very ordinary sense in which I did not do what I was told to do. Yet nothing in the literal meaning of those sentences blocks wrong interpretations. In each case we understand the verb differently, even though its literal meaning is constant, because in each case our interpretation depends on our Background abilities".[19]

On the other hand, as quoted by Celano, Searle proposes the example of cultural practices: "We all walk upright and eat by putting food in our mouths. Such universal phenomena I call the 'deep Background,' but many other Background presuppositions vary from culture to culture. For example, in my culture we eat pigs and cows but not worms and grasshoppers, and we eat at certain times of day and not others."[20]

It seems to me that these examples render the idea of the Background ambiguous and therefore the expression "comes before" may mean different things. On the one hand, the embodiment of an activity may free some cognitive capacity and, in doing so, allows us to perform that and other activities at the same time. For instance, it is very difficult for a learner driver to operate the car radio while driving. But once the driving activity has been wired-in, he can do both activities easily. The driver now possesses a set of intentional states, such as the desire to listen to a certain radio station and the belief that by tuning in the

17 Searle 1999: 109.

18 I take Celano to be adhering to Searle's definition of Intentionality as "that property of many mental states and events by which they are directed at or about or of objects and states of affairs in the world." Searle 1983: 1. Accordingly, my understanding is that he also distinguishes intentionality from consciousness and intention. Let us recall Searle's cautionary remark: "The obvious pun on 'Intentionality' and 'intention' suggests that intentions in the ordinary sense have some special role in the theory of Intentionality; but on my account intending to do something is just one form of Intentionality along with beliefs, hope, fear, desire and lots of other." Searle 1983: 3.

19 Searle 1995: 130–131.

20 Searle 1999: 109.

radio he will be able to do so. And he also has the unintentional ability to drive the car. One explanation of the whole situation is that some cognitive capacity has been freed by the embodiment of the activity. However, here the relationship between a "Background" and surface activity is not one of dependence. We can indeed operate the radio without driving (more importantly, that would be safer!). In other words, driving the car "comes before" operating the radio just in a temporal sense.[21] This also seems to be the case in Searle's examples about how, what and when we eat.

On the other hand, there are activities that could not be performed if we were not equipped with certain unintentional capacities. In order to be able to communicate with each other using language, we need certain background presumptions to be in place, as in the example of literal meaning. In such cases, the relationship between Background and surface activity is one of dependence in the sense that the activity could not be performed without the Background. In such cases, the activity "comes before" when it is an unintentional condition of possibility.[22]

Therefore, an activity can be embodied and, as a consequence, may free some cognitive capacity without, at the same time, it being the condition of possibility of another activity. Furthermore, while it seems easier to see how an embodied convention can be in the Background in the first sense, it is more difficult to see how it can be in the Background in the second sense. Take, for instance, the supposed pre-convention of identifying salient options within coordination conventions and think of the coordination problem regarding the question of who should call back first when telephone lines have been unexpectedly cut off. In what sense is this embodied? Once a convention has been in place for a while, we could say that people have the activity that solves the problem wired-in, e.g., redialling if you are the one who initially made the call, waiting otherwise. It has become an automatic, irreflexive, spontaneous activity. At the beginning, it might have been a cognitive convention, but now it is an embodied one. However, it is only the surface coordination convention itself that has been embodied and not the background convention regarding the way in which salient options are to be identified. The bodily movements that we see are only those of someone redialling (or waiting).

There does, however, remain a sense in which we could still say that a pre-convention has been embodied and that it is different from the embodiment of a surface activity. Given that the brain is part of the body, we could say that the

21 Here, I am not saying that the only way of doing two things at the same time is if one is embodied.

22 Besides "being first" and "coming before", Celano also uses a spatial metaphor: pre-conventions "delimit the space" of some activities. There is a sense in which driving delimits the space of radio operation while driving (e.g., we can usually use only one hand). I am not sure whether this sense supports Celano's conceptual claims.

activity has been embodied in the neuronal circuits of the brain. The brain has learned how to identify salient options and it does so in an irreflexive spontaneous way. I do not know if Celano would accept this brain version of embodiment, but it seems to me that this sense eliminates the difference between cognitive and embodied conventions. Furthermore, cognitive conventions would all be embodied conventions, at least if the train of reasoning were to be thought of as a neuronal state of our brain.

To sum up, either we understand being in the Background as the freeing of cognitive capacity and so embodied conventions can, in this case, be, contingently, in the Background facilitating some activities; or we understand being in the Background as being a condition of possibility of some activities, but then cognitive conventions are also embodied conventions.

6 CLOSING REMARKS

In these comments, I have focused mainly on the way in which Celano expands the concept of convention by unveiling the possibility of a new kind. Celano's article has, thus, thrown new light on a phenomenon that has so far remained poorly illuminated, namely the existence of some conventions that are embodied, wired in people's bodies. These conventions are constituted by agreements not amenable to a train of reasoning. I find these claims convincing regardless of them being in need of further development. There are many other arguments and philosophical proposals in Celano's article that I have not considered here.

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A New Type of Convention?

Some Remarks on Bruno Celano's Pre-conventions

In "Pre-conventions: A fragment of the Background", Bruno Celano argues for the existence and philosophical significance of what he calls "pre-conventions" – a type of convention distinct from those hitherto discussed in the literature, and which transcends a number of orthodox philosophical distinctions. In these comments, I suggest that Celano may have shown that there is a distinct type of convention governing judgments of style or taste. If so, we may learn some important lessons (e.g. concerning the relationship between conventions and rules) by examining this new type of convention. However, I express doubts about whether the broader ambitions of Celano's paper are fulfilled. I contend that pre-conventions are not as common as he suggests, and are not present in some of the other examples he gives. I also express doubts about whether he is right to suggest that there is a distinct type of convention that renders possible the development of conventions of the sort which David Lewis was interested in.

Keywords: Bruno Celano, pre-conventions, conventions, David Lewis

In a fascinating and wide-ranging paper, Bruno Celano argues for the existence and philosophical significance of what he calls "pre-conventions" – a type of convention distinct from those hitherto discussed in the literature, and which transcends a number of orthodox distinctions. Pre-conventions, says Celano, differ from both rules and *de facto* regularities, while possessing features of each.[1] Similarly, they transcend the fact/norm and nature/convention distinctions – they are "normative facts" which have features of both the natural and the conventional.[2]

The term "pre-convention" might be thought to describe something that is not itself a convention, but (in some sense) comes before genuine conventions. However, Celano is clear that this is not what he is claiming. Pre-conventions are, he says, genuine conventions.[3] Indeed, he suggests that they are, in a sense, *primary*. As we shall see, he claims that they make possible the existence of cer-

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1 Celano 2016: 9.

2 Celano 2016: 9 and 30 (respectively).

3 If so, how can they transcend the nature/convention distinction, as Celano claims? I take it that the thought is that pre-conventions are genuine conventions, but possess features of the natural, and so help show that "nature" and "convention" are not mutually exclusive categories. See Celano 2016: 30.

tain other conventions. More generally, while they typically remain unnoticed in the background, pre-conventions delimit the space in which other conventions operate, by shaping our very activities and thoughts.[4]

Celano distinguishes pre-conventions from other types of convention on the basis that pre-conventions are not amenable to "rational explanation", in the sense that there is no "'train of reasoning' explaining the behaviour of the relevant parties."[5] In other words, pre-conventions do not involve "… the reasoned pursuit, by each of the parties involved, of their own goals".[6] This characterisation of pre-conventions is not entirely perspicuous, but it appears that Celano has in mind a contrast with views such as David Lewis' claim that a convention is a way of satisfying people's higher-order preferences in the face of a recurring coordination problem.[7] Pre-conventions involve a shared way of doing things, but not one that can be traced back to an attempt by individuals to develop strategies to satisfy their higher-order preferences.

However, at times, Celano characterises pre-conventions somewhat differently. For example, he describes them as involving convergent behaviour "… which is not a biological regularity, and is the result of learning, but which is also automatic: it is spontaneous (unreflective), rapid, fluid, *effortless*."[8] He also refers to them as conventions that "… become as natural as breathing, a 'second nature'."[9] If this is intended to distinguish pre-conventions from Lewis-type conventions, then it strikes me as a mis-step. As Celano acknowledges, the following of a Lewis-type convention can also become "second nature", and his attempt to show how this differs from the way in which pre-conventions are second nature returns us to the idea that the former, but not the latter, is supported by a "train of reasoning".[10]

Before proceeding, I should say something about the ambitions of Celano's article. At times, his aim appears to be relatively modest (e.g. to show that there is "space" for the existence of pre-conventions, and "that this space is not empty"[11]). However, at other times, he makes much bolder claims about the

4 Celano 2016: 19.

5 Celano 2016: 11.

6 Celano 2016: 10. See also Celano 2016: 12 (referring to conventions that are amenable to rational explanation as "… the result of decisions by rational individuals pursuing their own interests, in the absence of an explicit agreement …").

7 Lewis 1969. Celano refers to both Lewis and Hume (Celano 2016: 12) but, for simplicity, I will refer to these as "Lewis-type conventions".

8 Celano 2016: 12 (footnote omitted, emphasis in original).

9 Celano 2016: 12.

10 Celano 2016: 14. At least, I take this to be Celano's point. Read another way, he fails to distinguish pre-conventions from Lewis-type conventions, because he acknowledges that the latter, too, can be "tacit" in the sense in which he is interested.

11 Celano 2016: 19.

philosophical significance of pre-conventions. Some of those claims concern the role that pre-conventions play in our lives. For example, he suggests that pre-conventions make the existence of Lewis-type conventions possible.[12] In Section 5 of his article, he argues that induction requires judgments of salience that may be based on pre-conventions. And, in Section 6, he flags the possibility that pre-conventions underlie what he regards as the best account of concept acquisition and use.

Celano also suggests that the existence of pre-conventions calls into question several philosophical orthodoxies. I mentioned earlier that he thinks that their existence challenges some basic distinctions, such as the fact/norm and nature/convention distinctions. And, if he is right about the existence and nature of pre-conventions, we must reject some widely held views about conventions – e.g. that they are necessarily a type of rule.[13] As already noted, Celano claims that pre-conventions are distinct from both rules and mere *de facto* regularities.

I will not be able to explore all these issues here.[14] Instead, I will focus on two of Celano's central claims. The first is that pre-conventions are neither rules nor mere regularities of behaviour; the second is that pre-conventions are needed for the existence of Lewis-type conventions. In the course of examining these two claims, I will also consider whether pre-conventions do in fact exist.

To a significant extent, Celano elucidates the concept of a pre-convention via examples. However, many of these examples (e.g. soldiers marching or people playing chess) appear to involve Lewis-type conventions, since they involve the following of rules and are amenable to rational explanation. In the case of playing chess, for example, Marmor suggests that there is a *reason* for the relevant conventions – namely, to satisfy our desire to play a competitive, intellectual board game.[15] Those conventions also take the form of rules (the rules of chess).

12 Celano 2016: 22.

13 See, e.g., Marmor 2009: 1–2. Marmor interprets Lewis as denying that all conventions are rules (at 15–16), but perhaps the better reading is that Lewis claims that some conventions are penumbral, rather than central, instances of rules: see Lewis 1969: 104–105. I think that Celano would go further, and deny that some conventions are even penumbral instances of rules.

14 In particular, I cannot discuss properly Celano's suggestion that pre-conventions underlie the best account of concept acquisition and use (which he takes to be an internalist, Wittgensteinian account). However, let me very briefly note that, if we instead endorse an externalist account (and I have expressed sympathy for such an account elsewhere: Smith 2012: 90–95), then the role, if any, that pre-conventions play in this context will be much more limited.

15 Marmor 2009: 41. Marmor claims that the relevant conventions are "constitutive" conventions, not coordination conventions of the sort Lewis was interested in. (See Marmor 2009: 31 regarding this distinction.) I take it, though, that pre-conventions are to be contrasted with both coordination and constitutive conventions.

Celano seeks to challenge this thought by pointing out that the activities in question can be internalised, in the sense of being performed automatically or unreflectively or as a matter of second nature. Indeed, they may be a matter of know-how – someone may know how to march, or play chess well, without being able to express that knowledge in propositional form – and, Celano contends, know-how is not reducible to a set of rules.[16]

However, care needs to be taken in analysing these examples. It is plausible that playing chess well involves both abiding by certain conventions and a certain know-how that cannot be reduced to a set of rules. However, it does not follow that the conventions can be equated with that know-how, so as to entitle us to say that *the conventions* are not reducible to a set of rules. Indeed, it is tempting to say that the conventions of chess are (by and large) confined to the rules of chess, and that the know-how involved in being able to play chess well is non-conventional. For one thing, that know-how need not involve any form of agreement, even in Celano's extended sense of "agreement".[17] We can imagine a community in which only one person possesses that know-how; everyone else plays chess poorly.

That said, another of Celano's examples – concerning judgments of style or taste – is less easily dismissed. If we leave aside taste in, say, ice cream, and focus instead on, say, clothing or art, then it is plausible to suggest that there is a conventional aspect to judgments of style or taste. It is also plausible to suggest that these judgments are, in part, matters of know-how, rather than knowing-that. As Celano points out, attempts to reduce matters of style or taste to a set of propositions, such as one might find in a handbook or how-to guide, are typically inadequate and may themselves display a lack of style or taste.[18] Here, we seem to have a subject-matter that is governed (in part) by conventions and yet cannot adequately be reduced to a set of rules. Moreover, it is more difficult than in the case of chess to separate the conventional aspect of the practice of making judgments of style or taste from the aspect of the practice that is irreducible to rules. Indeed, it may be part of the relevant conventions that one must possess a certain attitude, of not trying to reduce judgments of style or taste to a set of rules to be followed. (This may itself amount to a rule, but it entails that *other* conventions governing judgments of style or taste are *not* reducible to rules.)

I put the point tentatively, because there are several objections that would need to be addressed before we could confidently conclude that judgments of style or taste are governed by conventions that are irreducible to rules. For example, it would need to be explained how a breach of the conventions govern-

16 Celano 2016: 16–17.

17 Celano claims that all conventions involve agreement, but he uses the word "agreement" very broadly: Celano 2016: 5.

18 Celano 2016: 17.

ing judgments of style or taste warrants, or is taken to warrant, criticism if those conventions are not rules.[19] Nevertheless, if these objections can be met, then Celano has succeeded in identifying a type of convention that is not reducible to rules, and so differs importantly from both coordination and constitutive conventions. This would represent a significant contribution to our understanding of the nature of conventions.

However, it would not suffice to fulfil Celano's broader ambitions. I have suggested that the phenomenon he has identified is less common than he claims. It does not extend to other of his examples, such as playing chess or marching.[20] Nor have we yet been given any reason to think that this new type of convention is necessary for the existence of Lewis-type conventions or that, more generally, it shapes the boundaries of our activities and thought.

To obtain a better sense of whether these broader ambitions can be fulfilled, let us consider Celano's discussion of the relationship between pre-conventions and Lewis-type conventions. He points out that, to follow a Lewis-type convention, one must identify both the action that is required and the situations in which that action is required.[21] Determining whether a convention applies to a particular situation typically requires one to ascertain whether that situation is relevantly similar to past situations in which the convention applied (what Lewis calls "precedents"). However, as Lewis points out, no two situations are exactly the same, and so there are always multiple ways in which we could draw analogies or dis-analogies between the present situation and a precedent. Nevertheless, we tend to draw analogies in more or less the same way, and this enables precedents to guide our behaviour. As Lewis puts it, "[w]ere it not that we happen uniformly to notice some analogies and ignore others /…/ precedents would always be completely ambiguous and worthless."[22]

Celano suggests that our tendency to all draw the *same* analogy is often due to the existence of a pre-convention. While sometimes the drawing of the same

19 See Marmor 2009: 16 for a similar objection, albeit in a different context.

20 An anonymous referee suggested that, once it is conceded that there may be a distinctive type of convention governing judgments of style or taste, we must revisit the suggestion that there is no room for pre-conventions when it comes to playing chess. Consider card games such as poker, which appear (for Celano's purposes) to be relevantly similar to chess: we might think that professional poker players share a certain style that is both conventional and irreducible to rules. I do not know whether this is true, but – if such conventions exist – they would appear to be separable from playing the game itself (or even from playing the game well: as noted earlier, the know-how involved in playing the game well could conceivably be possessed by only one person). If so, their presence is, at most, a contingent feature of some instances of playing a card game, or chess. This might, however, suggest that judgments of style or taste, and the distinctive type of convention that may underlie those judgments, are more prevalent than first appears.

21 Celano 2016: 20–21.

22 Lewis 1969: 37–38 (quoted in Celano 2016: 21).

analogy may be hardwired into all human beings, in other cases it depends on "… more or less arbitrary, agreements /…/ which are neither mere rules nor mere regularities, but which partake of both – they guide action, fixing the *correct* way to proceed: pre-conventions."[23] These pre-conventions facilitate the regularity of behaviour among members of the relevant group that is necessary for a Lewis-type convention to exist, and hence render Lewis-type conventions possible.

It is important to recognise that the issue here concerns how Lewis-type conventions are established, not how they are maintained once they are established. Consider Lewis's example of a convention governing who should call back when a phone call is cut off. As he points out, once we have enough precedents (i.e. past situations where this coordination problem has been solved), we can identify a rule governing the situation.[24] However, initially, where we have only a limited number of precedents, no unique rule can be identified. For example, perhaps A and B have faced this situation only once before, and that was a case where A placed the initial call. In that case, it was A who rang back after the call was cut off. Now imagine that, this time, it was B who called A. Should B call A back (on the basis that, in the earlier precedent, it was the person who placed the initial call who rang the other person back) or should A call B (on the basis that it was A who called back last time)? Lewis suggests that it just happens to be the case that we tend to answer this question in the same way (in this example, we draw the former analogy, not the latter).[25] Celano can be understood as suggesting that this convergence amounts to a pre-convention – not a rule, but something more than a mere regularity of behaviour – which makes the development of the Lewis-type convention possible. However, for the reason Lewis gives, if pre-conventions are needed, it is only at the formative stage of the development of the Lewis-type convention.[26]

Of course, if pre-conventions are needed at *any* stage in the development of a Lewis-type convention, then identifying this fact is a major contribution of Celano's paper. However, *are* they needed? It might be suggested that positing the existence of pre-conventions helps make sense of how Lewis-type conventions come about.[27] In particular, one might think, it advances our understand-

23 Celano 2016: 22 (emphasis in original).

24 Lewis 1969: 39–40.

25 Lewis 1969: 37–38.

26 Celano might contest this on the basis that, even at a later stage, identifying the relevant rule, and following it, depends on pre-conventions. This would be part of a broader view that rule-following in general requires pre-conventions. I cannot assess that view here, beyond noting that Celano is right to suggest that it stands or falls with his views about concept acquisition and use (concerning which, see above fn. 14).

27 Though cf. Marmor 2009: 21 (suggesting that a philosophical account of conventions should not speculate about how conventions, as a matter of historical fact, emerge).

ing of this process further than the suggestion that it just happens to be the case that we tend to draw the same analogies.

I am not sure, however, that positing the existence of pre-conventions advances our understanding all that far. In this context, a pre-convention amounts to a tacit agreement about how to proceed, in circumstances where it was open to us to proceed differently (by drawing different analogies between situations).[28] Given the broad sense of "agreement" used by Celano, positing such an agreement may not take us very far beyond the suggestion that we all just happen to draw the same analogies in the early stages of developing a Lewis-type convention.

Celano might insist that the key point is that the tacit agreement underlying the development of a Lewis-type convention is not amenable to rational explanation. (Recall that this is meant to be the hallmark of a pre-convention). However, it is not clear that this is true. If achieving convergence on which situations are analogous is necessary for a Lewis-type convention to become established, then achieving that convergence is clearly in the interests of the relevant parties.[29] Celano might respond that the parties are not consciously pursuing their interests, but rather acting automatically, as a matter of "second nature". However, as noted above, it is doubtful whether this is sufficient to distinguish pre-conventions from Lewis-type conventions.

Where does this leave us? Celano may have shown that there is a distinct type of convention governing judgments of style or taste. If so, we can learn some important lessons (e.g. concerning the relationship between conventions and rules) by examining this new type of convention. However, there is reason to query whether many of Celano's broader ambitions are fulfilled. It seems that pre-conventions are not as common as he suggests. I have contended that they are not present in his examples of marching or playing chess. And I have expressed doubts about whether there are distinct, "pre-" conventions that render possible the development of Lewis-type conventions.

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28 This reflects Celano's suggestion that conventions involve an agreement and a certain type of arbitrariness (Celano 2016: 10), and that pre-conventions are a type of tacit convention (one which is "… not backed by a train of reasoning": Celano 2016: 12).

29 See Sugden 1998: 404 for the suggestion that this is just another coordination problem to be solved.

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José Juan Moreso*

Celano: ontological commitment and normative bite

In his article on pre-conventions, Celano presents, what the author calls, the *Ontological Commitment Thesis* and *the Normative Bite Thesis*. In this short comment, the author argues that the two theses are together both incompatible with the idea that pre-conventions are facts which have causal powers in human behaviour; also, if the ontological thesis is abandoned, normative determination could not be obtained. In other terms, the author argues that either pre-conventions (as part of the Background) are part of our causal explanation of human behaviour or pre-conventions are abstract entities able to determine human behaviour normatively. In the first case, pre-conventions lack normative meaning, while in the second pre-conventions cannot integrate our causal explanation of human actions. *Tertium non datur*.

Keywords: pre-conventions, facts, normativity, causality

"Les jambes, les bras sont pleines de
souvenirs engourdis."
(Proust 1989: 5)

(I) At the very beginning, Celano presents the core of his suggestive thesis on so-called 'pre-conventions':

> I will argue that there are entities that can be plausibly called 'conventions', which are neither mere *de facto* regularities, nor rules (norms), but that – in a sense to be specified – have both the character of *de facto* regularities, as well as a normative character: they are, literally, 'normative facts'.

Pre-conventions are facts, but facts with a *normative bite*. They are things such as riding a bike or skiing. Celano reminds us of this opportune way of presenting Searle's idea:[1]

> As the skier gets better he does not internalize the rules better, but rather the rules become progressively irrelevant. The rules do not become 'wired in' as unconscious Intentional contents, but the repeated experiences create physical capacities, presumably realized as neural pathways, that make the rules simply irrelevant. 'Practice makes perfect' not because practice results in a perfect memorization of the rules, but because repeated practice enables the body to take over and the rules to recede into

1 Searle 1983: 150–151. Celano's italics.

> the Background /.../ On my view, *the body takes over* and the skier's Intentionality is concentrated on winning the race.

Therefore, pre-conventions have a normative dimension, they allow us to assess whether certain human actions are right practices of skiing or riding a bike. We can call this thesis the *Normative Bite Thesis* on pre-conventions.

However, Celano intends to add another thesis, which we can call the *Ontological Commitment Thesis*, according to which:[2]

> The essential point is that these things are abstract entities (not an actual behavior, but its form); but they are *in the body*: those who know how to swim the crawl, or march, have these forms in their body. *The correct stroke* of front crawl or the way of walking we call 'marching' are tacit bodily schemes, which are intermediate between an image (e.g., a mental picture of somebody swimming, or marching) and rule: embodied diagrams that establish what to do, what is the *correct*, the right or proper way to proceed. And in these diagrams, or at least in many of them, there is a more or less conspicuous conventional component. Human biology sets the limits, a frame. But within these limits we then indulge our whims; and the limits themselves can, sometimes, be manipulated. What front crawl is, is – in part – an arbitrary agreement (in the generic sense introduced above, sect. 2). Because of this conventional component, these wired-in forms (forms in the body, that is) are, inseparably, both natural (a 'second nature') and cultural (I return below, in sect. 8, to the antithesis 'nature *v*. culture').

(II) In this short comment, I shall argue that the *Ontological Commitment Thesis* and the *Normative Bite Thesis* are together both incompatible with the idea that pre-conventions are facts which have causal powers in human behaviour. And if we abandoned the ontological thesis, we could not obtain normative determination. That is to say, either pre-conventions (as part of the Background) are part of our causal explanation of human behaviour or pre-conventions are abstract entities able to determine human behaviour normatively.[3] In the first case, pre-conventions lack normative meaning, while in the second pre-conventions cannot integrate our causal explanation of human actions. *Tertium non datur*.

(III) This is not the place to introduce the *vexata quaestio* of Platonism in philosophy. It is sufficient to accept that if there are abstract entities in a certain sphere (e.g., numbers, possible worlds, reasons for action, and so on), then these entities are "independent of intelligent agents and their language, thought, and practices".[4] Accordingly, they lack causal powers.[5] Given that, for Celano, pre-

2 Notes omitted.

3 I think that this is also a problem for Searle's account. However, for several refinements, see Searle 1992 & 1995. See, for instance, Ross (2005) who puts this problem to Searle's account convincingly.

4 As it is put for mathematical objects by Linnebo 2013.

5 For an acceptance of this kind of abstract entities without ontological commitment (although acknowledging that they have no causal powers), see Parfit 2011: 467–487.

conventions are abstract entities, these things cannot figure in our explanations of human actions and practices. Neural pathways can provide this explanation, but not abstract entities.

(IV) Nonetheless, if pre-conventions have causal powers and can integrate our explanation of human behaviour, then they cannot normatively determine the value of human actions. To determine if a human action is right or not, in accordance with certain patterns of behaviour, we need something more fine-grained than facts as neural pathways. We need something more articulated and structured, something such as reasons for action. Of course, reasons for action can be implicit, but making them explicit should be possible. They should be representable as structured sets of abstract entities.

There are times when Searle seems to realise this problem (Searle 1995: 140) and he presents it as a dilemma – for Searl, not impossible to wade through –:

> If we think of the Background intentionalistically, then we have abandoned the thesis of the Background. We arrived at that thesis in the first place only because we found that intentionality goes only so far. The intentionality is not self-interpreting. But if, on the other hand, we say that the rules play no causal role at all in the behavior, then we must say that the Background is such that this is just what the person does, he just behaves that way. For example, he produces these kinds of sentences and not other kinds. He simply acts the way he does, and that is the end of the story.

I am unable to see a way out to this dilemma.

(V) It is rather odd that Celano does not refer in his illuminating contribution to a human practice which displays all the traits of pre-conventions. The practice that I am thinking about is linguistic practice. Languages are communicative practices, a clear case of the possibility of *knowing how* without *knowing that*. More specifically, human beings master their native language implicitly, they are able to distinguish between right and wrong uses of their language and they are not conscious of the rules that underlie their practice. However, the sets of rules of our languages are codifiable in sets of explicit rules.

In fact, in his latest book, very much in the spirit of Celano's idea, dedicated to human language (see, for example, the sympathy with the Bourdieu's idea of *habitus*),[6] Taylor (2016) develops a Heideggerian idea similar to Celano's pre-conventions. The idea is that of *protodwelling* (from Heidegger's reflections on *Wohnen*, Taylor 1992: 95–100), acknowledging that these background linguistic notions are articulable (Taylor 2016: 334):

> Our being a linguistic animal makes another kind of difference here, beyond that we enact, define, or communicate. Our linguistically formed experience of the world is

6 Bourdieu (1980) elaborates the idea of *habitus* in a way which is similar to Celano's idea of pre-conventions and, on p. 88, brings a quotation by Proust (in the heading of this contribution), in which he replaces 'souvenirs' with 'imperatives'.

full of liminal meanings, which invite articulation, but can easily be ignored, while we are intent in our pursuit of other ends. This is what I called, building on Heidegger's terms, our 'protodwelling'.

Obviously, my considerations leave the problem of intentionality untouched: how are we, thinking bodies, moved by numbers, meanings, possible states of affairs, reasons for action? This is crucial, but the idea of pre-conventions (and Searle's idea of the Background) seems not to be able to provide us with a reliable path to a solution.

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Reasonable stability vs. radical indeterminacy

A disanalogy between domestic rule of law and humanity-based international law

Non domandarci la formula che mondi possa aprirti,
sì qualche storta sillaba e secca come un ramo.
Codesto solo oggi possiamo dirti,
ciò che non siamo, ciò che non vogliamo.
Eugenio Montale, "Non chiederci la parola", in *Ossi di Seppia* (1923)[1]

The main argument of this article is based on a functional disanalogy between what I shall call 'international humanity-based law' constituted by human rights and criminal law on the one hand, and domestic rule of law on the other. If we adopt a functionalist approach, for the purpose of dealing with indeterminacy, our attention has to focus both on the pragmatic objective of the rule of law, i.e., reasonable stability, and on its means, i.e., formalism and legality. Do international key players share these values embedded in the political project of the rule of law? Does humanity-based international law fulfil the requirements of the rule of law? The conclusion of this paper is that the institutions and mechanisms which legal scholars usually refer to when they state that a legal order is a rule of law are almost absent from humanity-based international law. This implies that radical indeterminacy is, in issues of humanity, too formidable an obstacle to achieving the ideal of the rule of law.

Keywords: rule of law, formalism, international law, humanity, deep conventions, indeterminacy

1 INTRODUCTION

In this paper, by identifying some deep differences between domestic and international law, I shall present some arguments about what international law *is not*, and about what its key players *do not want*. If I am right, there is a risk

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1 "Don't ask me for formulas to open worlds for you: all I have are gnarled syllables, branch-dry. All I can tell you now is this: what we are not, what we do not want." Translation by W. Arrowsmith, in E. Montale, *Cuttlefish Bones* (1994).

that some discourses on international law – those that underestimate these differences – sacrifice neutrality on the altar of an ideological pursuit or are, at the very least, victims of irrational hope.[2]

Of course, the fact in itself that a theory has a normative goal is not a problem at all. The problem arises when the line between description and prescription is blurred.[3] Statements about actual law lose all pretension to scientificity if there is an evident mismatch with the reality they pretends to purport.[4] Such statements would be meaningful if and only if we reinterpreted them as statements about the *ought* of a legal order[5] or about a possible future world. And, if this future world appeared very remote or clearly unbelievable to the majority of observers, it would belong to the utopian discourse.[6] Utopia may be a good thing as long as all confusion is avoided. Nevertheless, when a utopian attitude is very powerful and pervasive, observational activity may be, even if unconsciously, distorted.

The issue is not trivial. Although some have argued that "if as international lawyers we want to participate and find consolation in the utopian project of international law, we need to do this not as scholars, but as practitioners",[7] others have replied that, given an appropriate distinction between a 'realistic' and an 'illusionary' utopia, the first one is "emphatically the province of legal scholars".[8] Maybe this province is not monolithic, and this reply makes sense only if we refer to (mainstream liberal) constitutionalist legal scholarship.[9] This contrast shows that there is a plurality of international legal theories (and scholars). The realistic utopia proposed by Cassese in his recent book[10] seems to be a paradi-

2 About the concept of hope and its rationality, see Pettit 2004.

3 According to Kennedy (2011), this overlap between description and prescription, theory and practice, conceptual analysis and critical reform, is probably a typical trait of the post-realist legal scholarship.

4 This is the case, according to Condorelli (2012: 156), of the hope for a future judicial review of the UN Security Council resolutions.

5 As underlined by Mégret (2012: 75), from an idealist perspective, "[i]nternational law is, in a sense, because it must be".

6 When we believe, for certain, that something will not happen, there is no room for rational hope: this belief belongs to the typical (irrational) utopian domain. See Pettit 2004: 154.

7 Feichtner 2012: 1157.

8 Peters 2013: 552.

9 Johns 2009: 5. About the liberal mainstream in international legal scholarship, see Kennedy 2011.

10 Cassese 2012a. There is no room here for a full reconstruction of Cassese's theory. Nonetheless, the book itself and the articles recently published on the topic – see Feichtner 2012, Peters 2013, and Ruiz Fabri 2012 – are clear and rich enough to offer a general idea of his reformist approach. In this article, I shall spend some more lines on the reconstruction of the Dworkinian approach to international law, not only because it is less known amongst internationalist scholars than Cassese's works, but also because it shares some form of optimism with Cassese.

gmatic example of the *reformist trend*.[11] The prominent reformist Lauterpacht once said that "the more international law approaches the standards of municipal law, the more it approximates those standards of morals and order which are the ultimate foundation of all law"; the strongest reason that he had for defending the improbable domestic analogy was the fight against the deniers of the legal nature of international law and their "insistence on the so-called specific character of international law".[12] As long as the reformist attitude is, at least genealogically, deeply related to the domestic analogy,[13] I think that taking the difference between domestic and international law seriously is salutary. If this difference is too deep, then reformists (those who believe in a realistic utopia) have to be reclassified as idealists (those who believe in an illusionary utopia).[14]

To understand how some difference can be *deep*, I shall introduce the notion of 'deep convention' and the notion of 'value-based law', suggesting that rule--based law and value-based law are not built on the same deep convention (2). Then, I shall establish a connection between a rule-based model of decision--making as proposed by Schauer,[15] the concept of the 'rule of law' and the value of stability, and I shall argue that some universalising style of legal reasoning sets forth on a path to reconciling the sceptical particularist claim with the formalist claim of stability (3). Finally, I shall claim that, even if indeterminacy potentially affects both domestic and international law in a similar way, only the first, by virtue of a more formalistic judicial reasoning, maintains itself as a relatively stable legal system. For a domestic legal system *to be a rule of law*, key players have to share the need for a high level of predictability. Even if in many cases they disagree about what the right answer is, they agree about the necessity of making decisions that could constitute, at least potentially, a precedent.[16]

11 Mégret 2012: 79-80.

12 Lauterpacht 2011: 440. As pointed out by Paz (2012a: 242), Lauterpacht's extension of "the tradition of the 'rule of law' … to the international level" is perfectly understandable. About the problem of the *transplantation syndrome*, see Puppo (2012: 220), and, about Dworkin's philosophy of international law specifically, see Jovanović (2015: 451-453) and Çali (2009: 822).

13 It is probably not true that the domestic analogy is constitutive of the reformist approach. I recognise this point as long as it is not always true that the reformist scholar bases her approach on the domestic analogy. Nevertheless, it is still true that, from Kelsen through Lauterpacht to Cassese, the ideal which is supposed to inspire the reform of international law is constructed on the basis of the best expressions of domestic law, that is, the constitutional state. In other words, as long as the reformist takes the train of global constitutionalism, it is difficult to deny that such a train is moved (or has historically been moved) by a domestic locomotive.

14 In the last section, I shall take into account the philosophy of international law proposed by Dworkin (2013) as an example of both the domestic analogy and utopianism.

15 Schauer 1991.

16 The deep relation between the technique of *stare decisis* and the value of stability is stressed by Schauer (2012: 43-44) and Waldron (2012).

By contrast, international law mismatches the model of the rule of law because of a deliberate deformalisation of law-ascertainment[17] and legal reasoning. The difference between domestic and international law is, therefore, placed on the level of legal institutions as responses to some deep purposes, social needs or, in the case of humanity-based law, *oceanic feelings* (4).

The key idea of my argument is a functional conception of the rule of law. Despite the global constitutionalist mainstream that grounds the concept of an international rule of law on domestic analogies, I shall base my argument on a disanalogy. Given a functionalist conception of the rule of law, my conclusion will be that the institutions, which we refer to when we affirm that a legal order fulfils the requirements of the rule of law, are absent from international law, at least in some of its paradigmatic expressions, such as humanity-based law.

2 HUMANITY-BASED LAW VS. THE RULE OF LAW: A FUNCTIONALIST APPROACH

Deep conventions say something about the function of the game, while surface conventions say something about the functioning (or the structure) of the game.[18] There is one game, but two social practices. The second practice identifies the sources of international law; it is the practice of law-ascertainment.[19] The first practice, normally invisible, constitutes the legal game itself. If we are actively looking for the rule which is applicable to some international case, when we disagree, for example, about the existence of a particular international customary norm – and perhaps even about the function of international law – it is because we agree about the possibility and the valuable character of the game (international law) and the existence of some social sources.

Such a distinction is ultimately relevant because of the existence of two fundamental legal practices and two questions about the legal game. The first question is "Why do we play?", and the second "How do we play?". If there is a difference between domestic and international law, it can be found at a deeper level. Even if domestic and international players can play together in an apparently harmonic way, the reasons that they have for playing and, consequently, the definitional properties of the game are profoundly different. To the extent that

17 About the actual tendency towards deformalisation, and the need for rejuvenating and revitalising a formalist approach (in law-ascertainment), see d'Aspremont 2011a.

18 The distinction between deep and surface conventions has recently been introduced in analytical legal theory by Marmor 2009. The same intuition, perhaps most articulated, was formulated by Tuori (1997) and developed by Siltala (2000: 151-267). For a deeper analysis of this concept, its relation to the rule of law, and an extensive bibliography, see Puppo 2011.

19 See d'Aspremont 2011, resting his formalist approach to the practice of law-ascertainment on the positivistic *sources thesis*.

I take seriously the answer to the question "Why do we play?", I have adopted a functionalist point of view.

My functionalist approach emphasises the institutional character of law, the inseparability of law and social needs, but it does not deny that the functioning of such institutions relies on rules and even less that it can be aimed at satisfying the requirement of stability or, in Llewellyn's terms, of *reckonability*, taken as *reasonable regularity*.[20] In a nutshell: the realist or functionalist approaches are, in my view, perfectly compatible with a rule-based explanation.[21]

My point here is that the deep convention of a non-pathological domestic law is certainly related to the notion of the rule of law.[22] Because everyone interested in legal and political questions probably has their own definition of the rule of law, it is here necessary to stipulate a working definition. I shall adopt a formalist/procedural[23] conception of the rule of law, as originally proposed by Dicey.[24] This stipulation is not arbitrary, because it most likely reflects a relevant contemporary tendency amongst international scholars[25] and legal philosophers.[26] Dicey distinguishes between three meanings of the *rule of law*. I am, above all, interested in the first two. The first one is as follows: "[it is] the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government";[27] and the second: "[it is] the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts".[28]

A similar approach has been proposed by Waldron who identifies four features of the formal/procedural concept of the rule of law:[29]

20 See Llewellyn 1960.

21 It should be noted that, contrary to the reading of American realism divulged by Hart (1994: ch. 7), Schauer (2011) suggests that Llewellyn has never doubted the possibility for judges to decide on the basis of pre-existing rules.

22 In this sense, a pathological legal system is still an instantiation of what we could call 'law', but it does not fulfil the requirements of the rule of law.

23 About the classical distinction between formalist and substantive conceptions, see Craig (1997).

24 Dicey 1915. According to Dyzenhaus (1999: 10), "[i]n the public law model of England and in those legal orders which follow the English model, the most influential understanding of the rule of law remains that put forward in 1885 by Albert Venn Dicey".

25 See Chesterman 2008; Besson 2010: 172; Buchanan 2010: 89; Tasioulas 2010: 115.

26 See Waldron 2012; Schauer 2012: 30-55; MacCormick 1999: 165. The same conception – as stated by Dyzenhaus (1996: 644) – is implicit in Weber's rational authority: "all that legal order can do is to make social life relatively stable by making it to a large extent certain and predictable".

27 Dicey 1915: 198.

28 Dicey 1915: 189.

29 Waldron 2011: 316-317.

> 1. a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences or ideology;
>
> 2. a requirement that there be general rules laid down clearly in advance, rules whose public presence enables people to figure out what is required of them, what the legal consequences of their actions will be, and what they can rely on so far as official action is concerned;
>
> 3. a requirement that there be courts, which operate according to recognized standards of procedural due process or natural justice, offering an impartial forum in which disputes can be resolved, and allowing people an opportunity to present evidence and make arguments before impartial and independent adjudicators to challenge the legality of official action, particular[ly] when it impacts on vital interests in life, liberty, or economic well-being;
>
> 4. a principle of legal equality, which ensures that the law is the same for everyone, that everyone has access to the courts, and that no one is above the law.

The descriptive question of the function of international law can then be formulated in terms of the rule of law. If we adopt a functionalist approach, our attention has to focus both on the pragmatic objective of the rule of law, i.e., reasonable stability, and on its means, i.e., formalism and legality. Do international key players share these values embedded in the political project of the rule of law? Does international law fulfil the requirements of the rule of law? A negative answer to the second question is problematic if and only if we give an affirmative answer to the first one. As long as scholars seem to agree about the correctness of the negative answer to the second question, the real disagreement concerns the first one. If the answer is negative, the requirements of the rule of law are seemingly irrelevant in the international context. Such irrelevance neither means nor implies the negation of the mere existence of a legal system at the international level; it only means that such an international system cannot be judged – and its performance measured – on the basis of the criteria usually considered to be constitutive of the rule of law.

To answer these questions, it is necessary to introduce a working definition into the second element of the sketched disanalogy, that is, to define what I shall consider to be the reference of the expression 'international law'. As long as it is true that international law is characterised by fragmentation and is, therefore, a multi-dimensional practice, I shall identify, amongst several dimensions of international legal reasoning (or judicial function), a paradigmatic one, which probably aims to solve what Morgenthau calls *tensions*,[30] and which I shall take as my case study.

30 Morgenthau opposes disputes and tensions. On this distinction, elaborated in his doctoral dissertation and refined in Morgenthau 1948: 342-349, see Jütersonke (2012: 51 and Scheuerman (2008: 38). A tension is a situation "involving a discrepancy, asserted by one state against another, between the legal situation on the one hand and the actual power relation on

The key players of this dimension are the "organs of a value-based international community",[31] whose first strong performance was the consequence of World War II crimes, and whose main goal is the protection of humanity; this dimension's paradigmatic case is human rights and criminal courts.[32] In the humanity-based dimension, judges (and scholars) consider themselves to be part of a mission, the very purpose of a Kantian project: the global constitutionalist project and the universal path to perpetual peace are undoubtedly two paradigmatic features of this dimension.

I think the increasing presence of international law in both legal and political discourse is due to this dimension, probably because many international legal scholars imagine the future of international law through this potentially supranational and imperative dimension, as if it were the *telos* of international law.[33] The realistic utopia of international scholars is inseparable from this *telos*.

A foundational moment in the development of this dimension was undoubtedly the introduction of *jus cogens* in the Vienna Convention. That experience shows paradigmatically what I try to demonstrate: international indeterminacy as a result of a deep disagreement between states, and probably as a result of the need to preserve the liberty of states. Taking into consideration that it was impossible to come to an agreement about which principles deserve the status of *jus cogens*, states introduced *jus cogens* as a validity criterion, but did not specify a formal list of *jus cogens* norms. So, a fundamental step in the construction of the value-based dimension of adjudication was characterised by a choice which avoided all formal criterion, a choice in favour of indeterminacy, a choice against rules, formalism and, finally, against the rule of law, a choice which inevitably sacrifices the value of stability, which the next section is dedicated to.[34]

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the other". Jütersonke 2012: 55 (quoting Hans Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen*, 71).

31 Von Bogdandy & Venzke 2013: 52.

32 Von Bogdandy & Venzke 2013: 63-68.

33 See, as a paradigmatic example, Cassese (2012b: 170) and the penetrating analysis by Ruiz Fabri (2012: 1053). According to Mégret (2012: 75-76), "[t]his idea that there is something prior – and, unmistakably, higher – than the state is the defining mark of idealism, and is particularly apparent in contemporary discourse that emphasizes the importance of human rights, for example, as a basic precondition of legitimate statehood".

34 It is possible to consider *jus cogens* norms in a different way: such norms work as the ultimate criterion of validity, and it is precisely due to this that they contribute to the enhancement of determinacy at the international level. This would be true if international courts determined the content of such norms effectively. This is the thinking, I guess, of many international scholars insisting on the positive contribution of the International Court of Justice (ICJ) and the International Law Commission on the Responsibility of States to determining the content of *jus cogens* norms. I could agree with this statement if the judicial international context was limited to the ICJ and the European Court of Human Rights. But, if one takes into account the contribution of the Inter-American Court of Human Rights – which attributes the status

3 RULE OF LAW AND RELATIVE STABILITY: TAKING UNIVERSALISABILITY SERIOUSLY

Functionally, legality is, above all, a powerful tool to plan and control the behaviour of individuals, especially those who, in a given social group, do not share the planners' intentions.[35] It is probable that determinacy and stability were the needs which legality mechanisms satisfied. These needs explain the obvious formalistic preference for written legal sources, as well as for legal arguments based on the text, rather than on the spirit of law.[36]

This connotation, if historically justified, could be replaced with a better one: a rejuvenated (*neo*- or functionalist) formalism[37] is an important tool to understand how lawyers think[38] and eventually to impose a normative framework, especially in international law, a framework which is able to limit the effects of an increasing deformalisation of legal sources.[39]

If we take rules seriously, we necessarily adopt a formalist-like point of view. If rules are not bad, then neither is some kind of formalism. In his book *Playing by the Rules*, Schauer defends a rule-based model of decision-making, according to which law is a set of rules, and rules work as entrenched generalisations.[40] The rule-based model of decision-making is not a guarantee of right answers or a miraculous remedy against indeterminacy. It is, plausibly, what we need if our purpose is to limit arbitrariness without denying the judicial use of discretion, discretion being a situation in which "some institution with the power to control or review will let stand a multiplicity of quite different decisions, including some that the controlling institutions might think wrong".[41] How could this miracle be possible? How could discretion satisfy the requirements of the rule of law? By, in our view, a neo-formalist insistence on the possibility of universalising discretionary decisions, that is, by conceiving a world in which indeterminacy and an acceptable level of stability are compatible.

Despite the inevitable feature of over- and under-inclusion, the stability of a national legal system is preserved if and only if the model of decision-making is

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of *ius cogens* to an increasing quantity of norms – the resulting panorama is nearer to what I claim in this paper than to the one considered by such optimistic opinion.

35 Shapiro 2010.

36 Schauer 2012: 30. See also Leiter 2010.

37 About the international theory side, see Koskenniemi 2006 and d'Aspremont 2011a. On a purely theoretical point of view, see Shapiro 2010, Marmor 2009 and Schauer 2012.

38 Schauer 2012.

39 To the extent that the most relevant social practice, from the positivist perspective shared by d'Aspremont (2011a: 51-62), is a judicial practice, I think that switching from formalism in law-ascertainment to formalism in judicial decision-making is not an arbitrary move.

40 See Schauer 1991: 17 and 47 (on the entrenched feature).

41 Schauer 2012: 191.

rule-based and not a particularistic model (according to which judges, in each case, apply the solution that best satisfies the underlying justification of a rule).[42] The rule-based model treats "the *form* of a legal rule as more important than its deeper purpose".[43] Conversely, according to a particularistic model "no rule is more important than the reason for which it is enacted".[44] Notwithstanding the possible injustice of a solution, the rule-based model satisfies the value of relative stability. This value is essential to the rule of law, whose social function is to establish the best conditions for agents to follow plans without solving difficult moral questions.[45] From Hayek to Waldron, several theorists have recognised constancy, stability and predictability as values protected and/or pursued by the rule of law. According to Hayek, the rule of law makes it possible "to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge".[46] When the virtue of the rule of law is absent, "people will find it difficult to find out what the law is at any given moment and will be constantly in fear that the law has been changed since they last learnt what it was".[47] The fact that many of "the rule-of-law arguments for constancy involve the values of certainty, predictability and respecting established expectations"[48] has been perfectly captured by Schauer:

> there is an important group of values – predictability of result, uniformity of treatment […] and fear of granting unfettered discretion to individual decision-makers […] – that the legal system, especially, thinks it valuable to preserve. These values often go by the name of the Rule of Law, and many of the virtues of the Rule of Law are ones that are accomplished by taking rules seriously as rules.[49]

This requirement of relative stability is, in my opinion, compatible with the recognition of another need, the particularistic need for adequacy. Even if, as

42 About the distinction between the two models, see Schauer 1991: 51.

43 Schauer 1991: 30.

44 Koskenniemi 2006: 591.

45 Shapiro 2010.

46 Hayek 2007: 112.

47 Raz 1979a: 214. In some way, according to Raz, (a formalist conception of) the rule of law is the virtue that can limit the dangers of both naked power and morality. On that, see also Koskenniemi (2002: 174), referring to a turn to ethics in international law: "In such a situation, insistence on rules, processes, and the whole culture of formalism now turns into a strategy of resistance". This is so because "formalism is precisely about setting limits to the impulses – 'moral' or not – of those in decision-making positions in order to fulfill general, instead of particular, interests."

48 Waldron 2012: 28. See also Beckett (2006: 1068), who reconstructs Koskenniemi's neo-formalism: "Although any given legal norm can bear any desired meaning, the only formally valid interpretations are those capable of universalisation, of repetition."

49 Schauer 2012: 35.

has rightly been noted by Atria,[50] the need for certainty could not be satisfied without sacrificing the need for adequacy, I nonetheless think that the need for reasonable or relative stability is able to capture what we could call a meta-need embracing a sustainable dose of the above two needs. Neither absolute certainty nor absolute particularism is desirable. If absolute certainty is the archetypical formalist noble dream, then relative stability is the realist version of this noble dream.[51] Actually, relative stability is what we can fulfil if we recognise that intrinsic indeterminacy affects any normative order.

By the way, the notion of indeterminacy is very ambiguous.[52] If we understand indeterminacy to be the absence of a determinate response to some relevant question, it seems plausible to me to distinguish between four levels of indeterminacy. The first concerns the applicability of a determinate rule to some real situation (e.g., is a given situation a case of genocide?). The solution is indeterminate because we disagree about how we are to juridically qualify the facts of the case. The second concerns the identification of the meaning of some legal provision (e.g., what does the term 'genocide' mean in the Statute of the International Criminal Court?). The third concerns the identification of legal sources (e.g., does a specific customary practice exist?). The fourth concerns the function or purpose of the whole institution. What is international law for?

Only the last form of indeterminacy is deep or radical indeterminacy. The first three categories of indeterminacy are, in some way, a normal feature of any domestic legal system and are perfectly compatible with the formalism of the rule-based model of decision-making. What I mean to say is that the realist claim about indeterminacy is perfectly consistent with the formalist approach to decision-making. Radical indeterminacy, if present, underdetermines the other three levels: "we simply cannot (determinately, objectively or authoritatively) answer the question of what law says until we have answered the question of what law is".[53]

Of course, this last statement needs some further explanations. According to the mainstream positivist approach, what the content of a legal system is does not depend on what law is for. The identification of legal norms depends on social facts, and not on ontological considerations about the nature and/or purpose of a legal order whose content has to be identified. But this approach, in some cases, as in Raz's theory, is explicitly limited to municipal law,[54] precisely because of the social sources (such as legislation) that have historically characterised

50 Atria 1999: 82.

51 See Hart 1983: 138, where he classifies Llewellyn's realist conception of adjudication closer to the *noble dream* than to the *nightmare*.

52 See Solum 1987.

53 Beckett 2005: 224.

54 See Raz 1979b.

municipal legal orders. When no strong social source exists – or, at least, when some crucial sources (such as customs, principles and *jus cogens*)[55] are difficult to identify – and when there is no supreme court whose rulings can authoritatively establish (even if not permanently, at least for a while) the normative content of a system, it is possible that what the content of law is will depend on some judgment about the deep values that are supposed to provide legal norms with moral justification.

If such values are perfectly determined or, at least, judicially determinable, and there is no conflict between them, relative stability can be reached or, from a Dworkinian perspective, even judges could be able to formulate the right answers. But if such deep values are radically undetermined, uncertainty at the deepest level will inevitably project itself onto a more superficial level, that is, the level at which judges are supposed to apply the rules – previously identified – to individual cases, as in the Ferrini case, a real international affaire that I shall take, in the next section, as an illustration of radical indeterminacy.

If we cannot deny that judges decide with discretion (whether great or small, it is beside the point), we can still think that when they use discretion or when they create a new rule, they can be limited by a universalisability test,[56] that is, by adopting the point of view of people who will potentially be affected in the future by this new rule, and it is from that point of view that they would accept the new rule as the best solution.[57]

Universalisation gives form to the substance of a particular situation.[58] Even though, because of the indeterminacy of law, a solution is inevitably the consequence of some use of discretion, discretion is not necessarily arbitrariness[59] if judges submit themselves to the *universalisability test*. The prescription created is universalisable if judges think that the solution adopted will work in similar future cases, and it is due to this that it is able to create expectations.[60]

Nonetheless, this is not always the case. In some cases, such as the Nuremberg Trials, as long as the solution is ultimately the consequence of the application of a set of rules created by a contingent winner to judge and criminalise a contingent loser, we have strong moral reasons to avoid all generalisations. As stressed by Kelsen:[61] what would happen if the case was that wars are not always won

55 See Puppo 2017.

56 See Hare 1952.

57 Beckett 2006: 1069.

58 Jouannet 2007: 386. In that sense, "'[f]ormal' does not mean 'vacuous' […]; formal law always formalizes a particular content or subject-matter".

59 Singer 1984.

60 See Koskenniemi 2002b: 174.

61 Kelsen 1947: 171. Elsewhere (Puppo 2016), I develop Kelsen's rich and ambiguous stance on the Nuremberg Trials and his eventual departure from positivism. In a nutshell: even if Kelsen (1945) clearly defends the humanity-based decision, he does not try to do this – contrary to

by the good guys? The risk, underlined by Koskenniemi referring to Kosovo, is that "a beneficial illegality today makes it easier for my adversary to invoke it tomorrow as precedent for some sombre scheme of his".[62]

When a solution is a universalisable solution, then judges can entrench the generalisation. To say that judges create a rule, if we use Schauer's theory,[63] means that – starting from the observation of a particular case and taking seriously a particular solution because of its universalisability – judges formulate the solution in terms of the consequence of a general rule.

If indeterminacy involves the necessary use of judicial discretion, the universalisability test works as a technique against arbitrariness. There are several ways of creating new law: not all solutions are equivalent. If it is true that judges, like legislators, make law, it is also true that the two institutions do not enjoy the same creative freedom.[64] Neo-formalistic reasoning excludes solutions that seem inevitably arbitrary as long as they are not universalisable.[65]

If a solution seems to us to be universalisable, it is not because judges have adopted a neutral point of view. Actually, it is impossible for judges to neutralise their preferences. However, precisely because of this impossibility, the requirement of transparency and universalisability with respect to judges' preferences and decisions is an essential feature of predictable legal reasoning and finally of a formal-procedural, yet *thick*, conception of the rule of law;[66] formal because no substantive element is constitutive of it; thick because it is still an exigent conception according to which many legal systems, apparently ruled by law, would not satisfy the requirements of the rule of law.

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many international positivist scholars – from a positivist perspective (see Garibian 2007). Such an attempt would have, I guess, perverted the deep value (legality or the rule of law) justifying the positive legal system. The decisions were just, but they had no legal justification, they only had a moral one. In this way, Kelsen does not renounce his methodological positivism, which assumes, at the very least, a distinction between the law that is and the law that we desire. Nevertheless, neither does he adhere to an ideological form of positivism (or ethical legalism), according to which what is legal is also morally correct, and so it has to be obeyed. The law of the Nazi was (probably) legal and the law of Nuremberg was (probably) illegal, but there were strong moral reasons for preferring, in this case, illegality to legality. To defend the Nuremberg rulings on the basis of (an argument derived from) positive law would have threatened that which makes positive law be something valuable. More generally, on Kelsen's blurred lines between the purity of theory and the pacifism of ideology, see Puppo 2015.

62 Koskenniemi 2002b: 170.

63 On the relation between the rule-based model and discretion, see Schauer 1991: 190.

64 See Hart 1994: 253.

65 Hart 1994: 272-273.

66 Transparency is, therefore, an essential feature of the culture of formalism. See Jouannet (2010: 294) and Paulus (2010: 209). An example of a *thick* formal-procedural conception would be the conception proposed by Waldron. See Section 2 of this paper.

4 DEALING WITH RADICAL INDETERMINACY: THE RULE OF LAW VS. OCEANIC FEELING

I shall take, as a starting point, an international case of radical indeterminacy: given the conflict between the jurisdictional protection of human rights on the one hand, and state immunity on the other, in the first case decided by the Italian Court of Cassation the protection of human rights overrode the protection of sovereignty, while in a subsequent decision, decided by the International Court of Justice, the opposite occurred.[67] If international law is a human construct and if its goal is the satisfaction of a bizarre combination of moral (a matter of human beings) and political needs (a matter of sovereignty), it is easy to see that its indeterminacy depends, above all, on the manifest incompatibility between these two needs:

> [T]he claim of indeterminacy […] is not at all that international legal words are semantically ambivalent. It is much stronger (and in a philosophical sense, more "fundamental") and states that even where there is no semantic ambivalence whatsoever, international law remains indeterminate because it is based on contradictory premises.[68]

If we read the ICJ sentence and Cançado Trindade's dissenting opinion, we can clearly perceive the source of radical indeterminacy: the premise about the purpose of international law that the majority of judges accepted deeply contradicts the premise that the former judge of the Inter-American Court of Human Rights accepted. This case is clearly an example of international *tension*, in which it seems that domesticating judicial discretion is very difficult. Not surprisingly, judges, both domestic and international, are particularly unclear about the purposes, sources and finally the factual predicates to which they have to impute legal consequences.

In this section, I shall argue that, while non-pathological domestic legal systems are able to deal with radical indeterminacy, because of some profound

67 See respectively: *Ferrini v Germany*, Italian Court of Cassation, No. 5044/2004, 11 March 2004 reported in (2006) *International Law Reports* (128) 658 ("Ferrini"); *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (International Court of Justice, General List No. 143, 3 February 2012) [28]. Note that recently, in October 2014, the Italian Constitutional Court decided that the Italian Statute imposing the execution of the UN Charter is unconstitutional in the part in which it establishes "the obligation to Italian courts to comply with the ruling of the International Court of Justice (ICJ) of 3 February 2012, which requires that jurisdiction in cases of war crimes and crimes against humanity committed by a foreign state be declined" (URL: http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238).

68 Koskenniemi 2006: 590. Another way of stressing radical indeterminacy is by recalling the deep paradoxical character that international law has been exhibiting since its very beginnings. On this topic, see Jouannet (2007: 379): "international law, past and present, is the reflection of a particular – Western – culture, whilst at the same time claiming not only to internationalize but also to almost universalize the values that it conveys".

institutional and cultural differences, international law is irremediably affected by it.

The importance and efficiency of the formalist approach in domestic legal reasoning and the deformalising tendency in international law can be explained from an institutional and a functionalist perspective. The comparison makes sense especially if we refer to international judges resolving *humanity* issues of criminal law and human rights violations – the judicial dimension in which a "turn to ethics" has been accompanied by an "increasing deformalisation".[69]

In many domestic legal systems, judges receive some legal education, and perhaps they share a common legal culture, formalistic in nature in some sense.[70] Judges – as it is impossible to satisfy the formalist requirement of refraining from creating law – fulfil their duty by creating new general rules to which they would be ready to submit themselves.[71] To the extent that international judges are often international scholars, they have a different view of their role. They cannot rest on the existence of a democratic government that deals with law reform. They have to play an active role, as they have been educated to be reformers and not just the guarantors of stability that characterises the rule of law: the philosophical background of the very influential German international scholarship was "the philosophy of optimism and action, struggle for progress and the perfection of the world".[72] The paradigmatic example was certainly Lauterpacht, "who never was tired of believing in human goodness and the ability of reason to find this goodness, even in the darkest moments of European history".[73]

So, if both domestic and international law suffer from the consequences of indeterminacy, only domestic courts have the tools, the culture and the institutional context to manage it consistently with the requirement of relative stability. By contrast, to the extent that international courts are often confronted with difficult or even unique cases, universalisability is not an achievable goal and is, therefore and rightly so, not a priority. As Morgenthau had already sharply grasped seventy years ago that, unlike the domestic field, a "political situation in the international field is not likely to repeat itself, since the variety of factors of

69 Koskenniemi 2006: 159.

70 Leiter (2010: 128) confirms the same about the US: "formalism [...] is quite obviously the official story about adjudication in the public culture in the United States".

71 The best way of fulfilling this duty is probably through what Llewellyn (1960) calls the *Grand Style* of judicial decision-making, that is, a judicial style perfectly in accord with the "standards of legality [...] deeply rooted in the institutional history and tradition of a political community" (Jovanović 2015: 452) and clearly absent from the international community.

72 Koskenniemi 2002a: 199. For a brilliant analysis of the contribution of Jewish German-speaking scholars to international law, see Paz 2012a.

73 Paz 2012b: 423.

which it is composed makes for an indefinite number of possible combinations. Hence only a strictly individualized rule of law will be adequate to it".[74]

I maintain that such an institutional difference deeply reflects different social conventions, tending to satisfy basic needs or to achieve fundamental moral aims.

Domestic law could seem justified, morally or socially, by virtue of its capacity to solve moral problems in a relatively stable form. What matters is that it solves problems, and not how it solves them. Given some "circumstances of legality", which "obtain whenever a community has numerous and serious moral problems whose solutions are complex, contentious, or arbitrary",[75] we can understand the purpose and authority of law. Because of the existence of a legal plan, we can avoid entering a balancing activity about what, in given circumstances, the best moral reasons for acting are. Koskenniemi shares the same point when he affirms that, in normal domestic situations, "it is possible to live with automatic rules because the alternative is so much worse".[76]

When international law (in matters of criminal or human rights law) tries to guide behaviours, it is confronted with two obstacles. Some subjects refuse to be led, maybe because they "disagree on what is good".[77] When states reject a model of conduct, they contribute to the introduction or the elimination of some customary law, and so to its indeterminacy.[78] Invoking imperative norms (*jus cogens* norms) is probably the only way not to bend against the dogma of the consent of states. These norms, however, cannot have a social source, and therefore tend to increase the deformalisation of legal sources.[79]

Such a solution, i.e., invoking imperative norms, unfortunately creates the second obstacle: the problem of the radical indeterminacy of moral values that justify the identification of *jus cogens* norms.[80] In this state of indeterminacy, international law is not able to provide any plan; it can only generate a set of individual decisions in particular cases, often in situations characterised by a moral or political emergency.[81] Obviously, this is not true if, as some international

74 Morgenthau 1940: 271.

75 Shapiro 2010: 170. The same idea was already formulated by MacCormick (1994: 6): "one vital point of legal institutions is exactly that they exist (inter alia) to settle authoritatively for practical purposes what cannot be settled morally".

76 Koskenniemi 2002b: 169.

77 Koskenniemi 2012b: 165.

78 About the problem of uncertainty in customary law, see Kammerhofer 2010.

79 See d'Aspremont 2011b: 517-518.

80 It seems to me that Cassese (2012b: 164), in approaching the issue of identifying *jus cogens* norms by international judges, implicitly adopts a formalist-like point of view.

81 About the bombing of Serbia, see Koskenniemi 2002b: 171. See also Anghie (2005: 314), who argues that "international law is in a permanent state of emergency". About the relation between the *state of exception* and the *rule of law*, see Puppo 2013.

human rights judges and scholars think, the identification of *jus cogens* norms is not subjective but objective, because it reflects an *oceanic feeling*.[82] Nevertheless, I believe that the burden of proof of the existence of such a universal criterion, of universal objective values, does not rest with me. I shall only sketch an argument against what could be named a Dworkinian trend in international law. For example, Cassese's approach – without stating the existence of universal values – shares the Dworkinian noble dream of a judicial world enlightened by the values inherent in international law, a world with correct answers.[83]

Even if we admit that a Dworkinian approach might be useful for explaining (some) domestic legal order, it would nevertheless be completely useless in the international context, which is characterised, as we have seen, by deep disagreements about moral values, and by the absence of both a supreme judicial body and a democratic legislative power, which are potentially able to solve, at least momentarily, these very disagreements.[84] Because of the deep character of international *tensions*, "it is naive and even counterproductive to expect them to be effectively resolved by judicial or arbitral devices".[85]

Some points that make the Dworkinian theory implausible (unless it is a utopian one) could briefly be mentioned.

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82 According to Freud (1962: 11), who borrows the expression from his friend Romain Rolland, an oceanic feeling is "a feeling as of something limitless, unbounded – as it were, 'oceanic'. This feeling [...] is a purely subjective fact, not an article of faith; it brings with it no assurance of personal immortality, but it is the source of the religious energy which is seized upon by the various Churches and religious systems [...]. One may [...] rightly call oneself religious on the ground of this oceanic feeling alone, even if one rejects every belief and every illusion". This notion of "oceanic feeling" is related to religions, but could also, more interestingly, be associated with a quasi-religious theme, such as international law. On this matter, see Koskenniemi (2012: 11): "Although the 'oceanic feeling' may certainly be real to the extent that the speaker actually feels it, this is no proof of its universal reality, either in terms of being available to others, or its having some objective presence in the world." Not surprisingly, Dworkin takes very seriously the notion of *jus cogens* and quotes judge Cassese as an example of "the moralized approach to international law that [Dworkin is] now defending" (Dworkin, 2013: 26).

83 See Feichtner 2012: 1152.

84 Feichtner 2012: 1152; see also Kratochwil (2000: 42), who recalls that "neither a constitutional text nor a doctrine of *stare decisis* apply in international law"; Beckett (2001: 635): "the role of law, and the avoidance of radical indeterminacy in the Dworkinian analysis are all predicated on the centrality of the courts, or at least on the possibility of unilateral recourse to the courts. Dworkin relies on the courts to stabilize the law (and thus authoritatively determine which values are in the system), but in PIL they simply cannot play this role." While it is plausible that the requirement of relative stability can generate, in a domestic context, and this according to Dworkin, some kind of associative obligation, "it is doubtful, to say the least, whether, first, states can meet those psychological requirements, even through their legitimate representatives, and second, whether, even under this assumption, we can meaningfully speak of a sort of international community that generates associative obligations in the Dworkinian sense of the word" (Jovanović, 2015: 454).

85 Scheuerman 2008: 38.

Firstly, to the extent that Dworkin seems to start from the radical conflict between human rights (essential in his theory) and sovereignty (essential, according to him, in any positivistic conception),[86] his position "is hardly in line with his general vision of the unity of value".[87]

Secondly, Dworkin seems to recognise the deep institutional difference between the domestic and the international contexts, specifically with respect to adjudication, when he affirms that "no such structure, in any but the most rudimentary form, is yet in place in the international domain, and none can be expected soon". Consequently, he describes his project – I ignore just how ironically – as a "fantasy upon fantasy".[88]

Finally, it is interesting to summarise the conclusion that Dworkin sketches regarding the NATO bombing of Kosovo. He argues that it was perfectly justified on the basis of the international law having been interpreted in its best light.[89] It is, nevertheless, surprising that Dworkin recognises that the legal interpretation implicit in his right answer "would be fresh legislation, of course, rather than an interpretation of the Charter as it stands".[90] Definitively, it is unclear whether what he proposes is a realistic theory of international law or just some personal vision of what international law could/should be in some imaginable future.

5 CONCLUSION

If, because of its radical indeterminacy, it is very difficult to know which rules are valid at any given time, international law could be conceived of not as a set of rules,[91] but as a set of particular solutions to virtual unique events.[92]

Of course, this claim needs some nuances. It is true that the phenomenon of radical indeterminacy, as long as it depends on the moral values incorporated into a legal system, is not exclusive to international law. Recent jurisprudence on jurisdictional immunity is evidence of this. In Italy, the Court of Cassation first invoked higher values, and then an emergent customary norm, only to ultimately abandon its jurisprudence in order to comply with the international ruling of the ICJ and with a new piece of Italian legislation. After this, the

86 On the anti-positivistic claim and on the conflict between human rights and sovereignty respectively, see Dworkin 2013: 5 and 17-19.

87 Jovanović 2015: 447.

88 Dworkin 2013: 14.

89 Dworkin 2013: 23-26.

90 Dworkin 2013: 26.

91 For several examples in which it seems that rules do not play a significant role in international issues, see Johns 2013.

92 For many striking examples of international events, see Johns, Joyce & Pahuja 2011.

Constitutional Court decided to reaffirm the same values implicit in the first ruling of the Court of Cassation and declared the Italian legislative provision to be unconstitutional.[93] All this seems to demonstrate the deep indeterminacy of the rule of recognition. But, even if this is accepted, if a pluralist conception is endorsed, one could claim that the Italian Constitutional Court had the final word on the matter, and so relative stability was achieved.

Such relative stability is the result of the reiteration of domestic judicial cases. For the same legal problem, in the international arena, only one case, the above mentioned Germany vs. Italy case, was decided, so that it is still unclear what the solution to potential future cases could be. An important difference that also strengthens my argument is that the final word in the Italian saga was founded on the constitutional text, and not on a customary norm. This difference is relevant because the existence and the content of international customary law was precisely the object of the disagreement between the Italian and the International Court of Justice.

The history of international relations is maybe the history of "plans which brought about results different from those intended".[94] The deep need satisfied by international law is probably not, or not only, legal and social stability, which is essential in the construction of a domestic rule of law. This might be only a matter of fact or lead to a serious ontological question: what is international law for? If it is meaningless to take the need for stability as an answer, it is not extravagant to suspect that its purpose is radical indeterminacy itself which, far from being a "structural deficiency",[95] could maximise – despite the good intentions of many (reformer) international scholars and the rhetoric of the United Nation[96] – the political freedom of states, even in the context of humanity-based law.

93 See *Corte Costituzionale, Sentenza n. 248/2014*, in which the sequence of the Italian judicial and legislative interventions is reconstructed.

94 Morgenthau 1947: 129.

95 Koskenniemi 2006: 591.

96 I have to acknowledge that the United Nations aim to guarantee international peace and security, which is comparable to social stability at the domestic level. Nevertheless, this statement has to be relativised both at the empirical and the normative level. Empirically, it is a fact that an international intervention with the purpose of re-establishing peace and security can be stopped by a veto, so that the states that have the right to stop such interventions can maximise their freedom, and so threats against peace and security remain actual. In other words, without a serious reform of the functioning of the UN Security Council, the argument is not convincing. The reason why such a reform has not been introduced is precisely because it would reduce the freedom of some states. In this sense, the empirical difficulty has to be understood to be the result of a normative stance aimed at protecting the liberty of states, or at least of some powerful states.

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Alberto Puppo*

Razonable estabilidad vs. indeterminación radical

Una disanalogía entre el *rule of law* interno y el derecho internacional *basado en la humanidad*

Non domandarci la formula che mondi possa aprirti,
sì qualche storta sillaba e secca come un ramo.
Codesto solo oggi possiamo dirti,
ciò che non siamo, ciò che non vogliamo.

Eugenio Montale, «Non chiederci la parola», en *Ossi di Seppia* (1923)[1]

La tesis principal de este artículo se basa en una disanalogía funcional, entre lo que llamaré «derecho internacional *basado en la humanidad*», constituido por el derecho penal y de los derechos humanos, y el *rule of law* interno. Si se adopta una perspectiva funcionalista, hay que dirigir la atención, para hacer frente a la indeterminación del derecho, tanto hacía el objetivo pragmático del *rule of law* – una razonable estabilidad – como hacía sus medios – el formalismo y la legalidad. Los actores internacionales clave ¿comparten tales valores, inseparables del proyecto político del *rule of law*? El derecho internacional basado en la humanidad ¿satisface las exigencias del *rule of law*? La conclusión de este trabajo es que las instituciones y los mecanismos a los cuales los juristas se refieren usualmente cuando afirman que un orden jurídico constituye un *rule of law*, están, por lo general, ausentes en el derecho internacional basado en la humanidad. Esto implica que la indeterminación radical es, en asuntos relacionado con la protección de la humanidad, un obstáculo demasiado grande al momento de cumplir con el ideal del *rule of law*.

Palabras clave: rule of law, formalismo, derecho internacional, humanidad, convenciones profundas, indeterminación

* apuppo@itam.mx | Profesor asociado, Departamento de Derecho, ITAM (México). Todas las citas han sido traducidas por mi; la expresión *rule of law* no se ha traducido por referirse específicamente al concepto de estado de derecho nacido en la tradición anglosajona, y no al *Rechsstaat* alemán o al *Etat de droit* francés.

1 «No nos pidas la fórmula que mundos pueda abrirte, sí alguna sílaba seca y retorcida como una rama. Sólo eso podemos decirte, lo que no somos, y lo que no queremos». Traducción de Carlo Fabretti, en E. Montale, *Huesos de sepia y otros poemas* (Barcelona, Ediciones Orbis, 1983).

1 INTRODUCCIÓN

En este trabajo, a partir de la identificación de ciertas diferencias profundas entre el derecho interno y el derecho internacional, presentaré algunos argumentos acerca de lo que el derecho internacional *no es*, y acerca de lo que sus actores clave *no quieren*. Si tengo razón, existe un riesgo de que algunos discursos sobre el derecho internacional – que subestiman tales diferencias – sacrifiquen la neutralidad sobre el altar de un proyecto ideológico o, por lo menos, sean víctimas de una esperanza irracional.[2]

Por supuesto, que una teoría tenga un objetivo normativo no es para nada un problema. El problema surge cuando la frontera entre descripción y prescripción se vuelve borrosa.[3] Una afirmación relativa al derecho que es pierde toda pretensión de cientificidad en caso de evidente no correspondencia con la realidad que pretende ser su sustento.[4] Tal afirmación es significativa si y solo si se reinterpreta como una afirmación acerca del *deber ser* del orden jurídico,[5] o acerca un posible mundo futuro. Pero, si tal futuro parece a la mayoría de los observadores muy remoto o claramente increíble, tal afirmación sólo puede ser parte de un discurso utopista.[6] Una utopía puede ser una algo bueno siempre y cuando se evite cualquier confusión. Sin embargo, cuando la actitud utopista es particularmente poderosa y omnipresente, la actividad observacional puede resultar, incluso de forma inconsciente, distorsionada.

La cuestión no es banal. Aunque algunos autores hayan sostenido que «si como juristas internacionalistas queremos participar y buscar consuelo en el proyecto de la utopía internacionalista, hay que hacerlo como jurista práctico y no como científico del derecho»,[7] otros han replicado que, dada una adecuada distinción entre una utopía «realista» y una «ilusoria», la primera es «enfáticamente el territorio en que se mueve el científico del derecho».[8] Quizá tal territorio no es monolítico, y tal réplica adquiere sentido en la medida en que se hace referencia a la ciencia del derecho constitucionalista (dominantemente liberal).[9] Este contraste muestra que existe una pluralidad de teorías (y teóri-

2 Sobre el concepto de esperanza y su racionalidad, véase Pettit 2004.

3 Según Kennedy (2011), esta sobreposición de descripción y prescripción, de teoría y práctica, análisis conceptual y reforma crítica, es probablemente un rasgo típico del jurista post-realista.

4 Sería el caso, según Condorelli (2012: 156), de la esperanza acerca de un futuro *judicial review* sobre las resoluciones del Consejo de Seguridad de la ONU.

5 Como subrayado por Mégret (2012: 75), desde una perspectiva idealista «el derecho internacional es, en un sentido, porque debe ser».

6 Cuando creemos por cierto que algo no ocurrirá, no hay lugar para la esperanza racional: se trataría de un típico (irracional) ámbito utopista. Véase Pettit 2004: 154.

7 Feichtner 2012: 1157.

8 Peters 2013: 552.

9 Johns 2009: 5. Sobre el *liberal mainstream* en la ciencia del derecho internacional, véase Kennedy 2011.

cos) internacionalistas. La utopía realista propuesta por Cassese en su reciente libro[10] parece ser un ejemplo paradigmático de una *tendencia reformista*.[11] Un reformista destacado dijo una vez que «más el derecho internacional se acerca a los estándares del derecho interno más se acerca a aquellos estándares de moralidad y orden que constituyen el fundamento último de todo orden jurídico»; la razón más fuerte que Lauterpacht tenía para defender tal improbable *domestic analogy* era la lucha en contra de los negadores de la naturaleza jurídica del derecho internacional y su «insistencia sobre el así llamado carácter específico del derecho internacional».[12] En la medida en que la actitud reformista es, por lo menos genealógicamente, profundamente relacionada con la *domestic analogy*,[13] creo que es saludable tomar en serio la diferencia entre derecho interno y derecho internacional. Si tal diferencia es demasiado profunda, entonces el reformista (alguien que cree en una utopía realista) debe ser re-clasificado como idealista (alguien que cree en una utopía ilusoria).[14]

Para entender en qué sentido una diferencia puede ser *profunda*, introduciré la noción de convención profunda y la noción de derecho basado en valores, y sugeriré que un derecho basado en reglas y un derecho basado en valores no están construidos sobre la misma convención profunda (§ 2). A continuación, estableceré una conexión entre un modelo de *decision-making* basado en reglas, como el propuesto por Schauer,[15] el concepto de *rule of law* y el valor de la es-

10 Cassese 2012a. Obvias razones de espacio me sugieren no proceder a una completa reconstrucción de la teoría de Cassese. A pesar de ello, el libro mismo y los artículos recién publicados sobre los temas allí desarrollados – véase Feichtner 2012, Peters 2013, Ruiz Fabri 2012 – son lo suficientemente claros y detallados para formarse una idea general de su proyecto. En este trabajo, dedicaré más bien unas líneas a la reconstrucción de la teoría dworkiniana sobre el derecho internacional, no solamente porque es menos conocida, entre los juristas internacionalistas, que la de Cassese, sino también porque Dworkin y Cassese parecen compartir la misma suerte de optimismo.

11 Mégret 2012: 79-80.

12 Lauterpacht 2011: 440. Como destacado por Paz (2012a: 242), la extensión operada por Lauterpacht de «la tradición del "rule of law"… al nivel internacional» es perfectamente entendible. Sobre el problema del síndrome del trasplante, véase Puppo 2012: 220 y, específicamente sobre la filosofía del derecho internacional de Dworkin, Jovanović 2015: 451-453, y Çali 2009: 822.

13 Probablemente no es verdad que la *domestic analogy* es constitutiva del *approach* reformista. Reconozco este punto, en la medida en que no es siempre verdadero que el científico del derecho reformista base su teoría sobre la *domestic analogy*. A pesar de ello, sigue siendo verdad que desde Kelsen, pasando por Lauterpacht, hasta llegar a Cassese, el ideal que se supone esté inspirando la reforma del derecho internacional está construido a partir de la mejor expresión del derecho interno, esto es, el Estado constitucional. En otras palabras, hasta cuando el reformista no baje del tren del constitucionalismo global, parece difícil negar que tal tren es propulsado (o ha sido, históricamente, propulsado) por una locomotora interna.

14 En la última sección, me referiré a la filosofía del derecho internacional propuesta por Dworkin (2013) como ejemplo de *domestic analogy* y de utopía.

15 Schauer 1991.

tabilidad, para sostener que un estilo de razonamiento jurídico centrado en la universalización marca el camino para la conciliación de la tesis escéptica particularista con la tesis formalista de la estabilidad (§ 3). Finalmente, sostendré que, a pesar de que la indeterminación afecta potencialmente de modo similar tanto al derecho interno como al derecho internacional, solo el primero, en virtud de un razonamiento judicial más formalista, conserva su carácter de sistema jurídico relativamente estable. Decir que un sistema jurídico interno es un *rule of law* significa que los jugadores clave comparten la necesidad de un alto nivel de previsibilidad. Aun si en muchos casos están en desacuerdo sobre cuál es la respuesta correcta, están de acuerdo sobre la necesidad de tomar decisiones que puedan constituir, al menos en potencia, un precedente.[16] En cambio, el derecho internacional no corresponde al modelo del *rule of law*, a causa de una desformalización deliberada en la etapa de la identificación del derecho[17] y del razonamiento jurídico. La diferencia entre derecho interno y derecho internacional se sitúa por tanto en el nivel de las instituciones jurídicas, entendidas como respuestas a determinadas finalidades profundas, necesidades sociales o, en el caso del derecho basado en la humanidad, a un *sentimiento oceánico* (§ 4).

La clave de mi argumento es una concepción funcional del *rule of law*. A contracorriente del *mainstream* constitucionalista global que construye el concepto de *rule of law* internacional sobre la base de la *domestic analogy*, basaré mi argumento sobre una disanalogía. Dada una concepción funcionalista del *rule of law*, mi conclusión será que las instituciones a las cuales nos referimos cuando afirmamos que un orden jurídico satisface los requisitos del *rule of law* se encuentran ausentes en el derecho internacional, por lo menos en alguna de sus expresiones paradigmáticas, como el derecho basado en la humanidad.

2 DERECHO BASADO EN LA HUMANIDAD VS. *RULE OF LAW*: UN ACERCAMIENTO FUNCIONALISTA

Las convenciones profundas dicen algo sobre la función del juego, mientras las convenciones superficiales dicen algo sobre el funcionamiento (o la estructura) del juego.[18] Hay un juego, pero dos prácticas sociales. La segunda práctica identifica las fuentes del derecho internacional; es una práctica de comproba-

16 La relación profunda entre la técnica del *stare decisis* y el valor de la estabilidad es destacada por Schauer (2012: 43-44), y Waldron (2012).

17 Sobre la tendencia actual hacía la desformalización y la necesidad de rejuvenecer y revitalizar un acercamiento formalista (en la identificación del derecho), véase d'Aspremont 2011a.

18 La distinción entre convenciones superficiales y profundas ha sido recientemente introducida en la filosofía analítica del derecho por Marmor (2009). La misma intuición, probablemente más articulada, fue formulada por Tuori (1997) y desarrollada por Siltala (2000: 151-267). Para un análisis más profundizado de este concepto, su relación con el *rule of law*, y más referencias bibliográficas, véase Puppo 2011.

ción del derecho.[19] La primera práctica, normalmente invisible, constituye el juego jurídico en sí. Si estamos buscando activamente cuál es la regla aplicable a un determinado caso internacional, cuando estamos en desacuerdo, por ejemplo, sobre la existencia de una norma consuetudinaria internacional – y quizá, más allá, sobre la función del derecho internacional – es porque estamos de acuerdo sobre la posibilidad y el carácter valioso del juego (el derecho internacional) y la existencia de algunas fuentes sociales.

Tal distinción es en último análisis relevante en razón de la existencia de dos prácticas jurídicas fundamentales y de dos cuestiones acerca del juego jurídico: la primera cuestión es «¿Por qué jugamos?», la segunda es «¿Cómo jugamos?». Si existe una diferencia entre el derecho interno y el derecho internacional, puede encontrarse en el nivel profundo. Incluso si los jugadores nacionales e internacionales pueden jugar juntos de forma aparentemente armónica, las razones que tienen para jugar y, consecuentemente, las propiedades definicionales del juego, son profundamente diferentes. En la medida en que estoy tomando en serio la respuesta a la pregunta «¿Por qué jugamos?», estoy adoptando un punto de vista funcionalista.

Mi acercamiento funcionalista pone énfasis en el carácter institucional del derecho, en la inseparabilidad entre el derecho y ciertas necesidades sociales, pero no niega que el funcionamiento de tal institución reposa sobre reglas y aun menos niega que puede tender a la satisfacción de una exigencia de estabilidad o, en los términos de Llewellyn, de *reckonability,* entendida como *regularidad razonable*.[20] En pocas palabras: un acercamiento realista o funcionalista, desde mi perspectiva, es perfectamente compatible con una explicación basada en reglas.[21]

Mi punto aquí es que la convención profunda de un derecho interno no patológico está indudablemente relacionada con la noción de *rule of law*.[22] Dado que existe probablemente una definición de *rule of law* por cada persona interesada en cuestiones políticas o jurídicas, es necesario estipular una definición operativa. Adoptaré una concepción formal/procesal[23] del *rule of law*, como originariamente fue propuesta por Dicey.[24] Tal estipulación no es arbitraria, ya que

19 Véase d'Aspremont (2011), que relaciona su concepción formalista de la práctica de identificación de las fuentes a la tesis de las fuentes (*sources thesis*).

20 Véase Llewellyn 1960.

21 Debe destacarse que, contrariamente a la lectura del realismo divulgada por Hart (1994: cap. VII), Schauer (2011) ha sugerido que Llewellyn nunca dudó de la posibilidad, para los jueces, de decidir sobre la base de reglas pre-existentes.

22 En este sentido, un sistema jurídico patológico es todavía una instancia de lo que podemos llamar «derecho» pero no cumple con los requisitos del *rule of law*.

23 Sobre la distinción clásica entre concepciones formalistas y sustantivas, véase Craig 1997.

24 Dicey 1915. Según Dyzenhaus (1999: 10): «En el modelo inglés de derecho público y en aquellos ordenes jurídicos que siguen el modelo inglés, el entendimiento más influyente del

refleja por lo demás una relevante tendencia contemporánea entre estudiosos del derecho internacional[25] y filósofos del derecho.[26] Dicey distinguió tres significados del *rule of law*. Estoy interesado, sobre todo, en los dos primeros: *rule of law* significa «la supremacía absoluta o predominancia del derecho regular como opuesto a la influencia del poder arbitrario, y excluye la existencia de arbitrariedades, de prerrogativas, o incluso de una extensa autoridad discrecional por parte del gobierno»;[27] significa también «la igual sujeción de todas las clases al derecho ordinario del país administrado por los tribunales ordinarios».[28]

Una aproximación similar ha sido propuesta por Waldron quien distingue cuatro características del concepto formal/procesal de *rule of law*:[29]

1. una exigencia de que las personas que detentan autoridad deben ejercer su poder dentro de una estructura obligatoria de normas públicas más bien que sobre la base de sus propias preferencias o ideologías;

2. una exigencia de que existan reglas generales dictadas por adelantado, reglas cuyo conocimiento público permite a la gente averiguar lo que se le requiere, cuáles serán las consecuencias jurídicas de sus acciones, y qué pueden esperar cuando está implicada la acción de los autoridades;

3. una exigencia de que existan tribunales, que funcionen conforme a estándares procesales reconocidos de debido proceso o justicia natural, que ofrezcan un foro imparcial en que las controversias puedan ser resueltas, y que permita a las personas una oportunidad de ofrecer pruebas y presentar argumentos ante juzgadores independientes e imparciales para contestar la legalidad de la conducta de las autoridades públicas, particularmente cuando esta afecta intereses vitales relativos a la vida, la libertad o el bienestar económico;

4. un principio de igualdad jurídica, que asegura que la ley es la misma para todos, que todos tienen acceso a los tribunales, y que nadie está por encima de la ley.

La cuestión descriptiva de la función del derecho internacional puede entonces ser formulada en términos de *rule of law*. Si se adopta una aproximación funcionalista, debe centrarse la atención tanto en el objetivo pragmático del *rule of law* – una estabilidad razonable – como en sus medios – el formalismo y la legalidad. ¿Tales valores, inseparables del proyecto político del *rule of law*, son

rule of law sigue siendo el que Albert Venn Dicey desarrolló en 1885».

25 Véase Chesterman 2008; Besson 2010: 172; Buchanan 2010: 89; Tasioulas 2010: 115.

26 Véase Waldron 2012; Schauer, 2012: 30-55; MacCormick 1999: 165. La misma concepción – como ha destacado Dyzenhaus (1996: 644) – está implícita en la noción weberiana de autoridad racional: «todo lo que podemos exigir del orden jurídico es que haga la vida social relativamente estable logrando que sea en gran medida cierta y previsible».

27 Dicey 1915: 198.

28 Dicey 1915: 189.

29 Waldron 2011: 316-317.

compartidos por los actores clave internacionales? ¿El derecho internacional cumple con las exigencias del *rule of law*? Una respuesta negativa a la segunda pregunta es problemática si y solamente si se da una respuesta afirmativa a la primera. En la medida en que los juristas parecen estar de acuerdo acerca de la corrección de la respuesta negativa a la segunda cuestión, el real desacuerdo parecería referirse a la primera; si la respuesta es negativa, las exigencias del *rule of law* serían verosímilmente irrelevantes en el contexto internacional. Tal irrelevancia no significa ni implica la negación de la existencia de un sistema jurídico en el nivel internacional; sólo significa que tal sistema internacional no puede ser evaluado – y sus performances medidas – sobre la base de criterios normalmente considerados como constitutivos del *rule of law*.

Para contestar a estas preguntas, es necesario introducir una definición operativa del segundo elemento de la disanalogía planteada, esto es, hay que definir lo que considero como la referencia de la expresión «derecho internacional». En la medida en que es verdad que el derecho internacional se caracteriza por su fragmentación, y por lo tanto es una práctica pluri-dimensional, me limitaré a identificar, entre varias dimensiones del razonamiento jurídico (o de la función jurisdiccional) internacional, una que considero paradigmática – que probablemente busca resolver lo que Morgenthau llamó *tensiones*[30] – y que tomaré como objeto de estudio.

Los actores clave de tal dimensión son los «órganos de una comunidad internacional basada en valores»[31] – cuya primera impactante manifestación fue consecuencia de los crímenes de la Segunda guerra mundial – en la cual el fin principal es la protección de la humanidad; su expresión paradigmática son los tribunales penales y de derechos humanos.[32] En la dimensión basada en la humanidad, los jueces (y los juristas) se consideran como parte de una misión, el objetivo mismo del proyecto kantiano: el proyecto constitucionalista global y el camino universal hacía una paz perpetua son indudablemente dos características paradigmáticas de esta dimensión.

Creo que la presencia creciente del derecho internacional, en el discurso jurídico y político, es debida a esta dimensión, probablemente porque muchos juristas internacionalistas imaginan el futuro del derecho internacional a través de esta dimensión potencialmente supranacional e imperativa, como si fuera el

30 Morgenthau opone controversias y tensiones. Sobre esta distinción, elaborada en su tesis doctoral, y desarrollada en Morgenthau 1948: 342-349, véase Jütersonke (2012: 51) y Scheuerman (2008: 38). Una tensión es una situación «que involucra una discrepancia, afirmada por un estado en contra de otro, entre la situación jurídica, por un lado, y la relación real de poder, por el otro». Jütersonke (2012: 55, en donde cita Hans Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen*, 71).

31 Von Bogdandy y Venzke 2013: 52.

32 Von Bogdandy y Venzke 2013: 63-68.

telos del derecho internacional.[33] La utopía realista de los juristas internacionalistas es inseparable de dicho *telos*.

Un momento fundacional en el desarrollo de esta dimensión fue sin duda la introducción del *ius cogens* en la Convención de Viena. Esta experiencia muestra de manera paradigmática lo que intentaré demostrar: la indeterminación del derecho internacional como resultado de un profundo desacuerdo entre estados, y probablemente como resultado de la necesidad de preservar la libertad de los mismos. Tomando en cuenta la imposibilidad de un acuerdo acerca de cuáles principios merecían el estatus de *ius cogens*, los estados introdujeron al *ius cogens* como criterio de validez pero no especificaron una lista formal de normas de *ius cogens*. Así, un paso fundamental en la construcción de la dimensión jurisdiccional basada en valores fue la elección de evitar la adopción de un criterio formal, una elección en favor de la indeterminación, una elección en contra de las reglas, del formalismo, y en último análisis en contra del *rule of law*; una elección que inevitablemente sacrifica el valor de la estabilidad, al cual dedicaré la próxima sección.[34]

3 *RULE OF LAW* Y RELATIVA ESTABILIDAD: LA UNIVERSALIZABILIDAD EN SERIO

Desde un punto de vista funcional, la legalidad es, sobre todo, una poderosa herramienta para planear y controlar la conducta de los individuos, especialmente aquellos quienes, en un grupo social dado, no comparten las intenciones de los planeadores.[35] Es probable que las necesidades satisfechas por los mecanismos de la legalidad sean la determinación y la estabilidad del derecho. Estas

33 Véase, como ejemplo paradigmático, Cassese (2012b: 170) y el penetrante análisis de Ruiz Fabri (2012: 1053). De acuerdo a Mégret (2012: 75-76): «Esta idea de que existe algo anterior – y, sin lugar a dudas, superior – al estado es la marca definitoria del idealismo, y es particularmente visible en el discurso contemporáneo que enfatiza la importancia de los derechos humanos, por ejemplo, como precondición de la legitimidad del estado».

34 Es posible considerar al *ius cogens* de manera distinta: tales normas funcionarían como criterio último de validez y, precisamente por ello, contribuirían al fortalecimiento de la seguridad jurídica en el nivel internacional. Esto podría ser verdadero si los tribunales hubieran efectivamente determinado el contenido de tales normas. Esto es lo que piensan, supongo, muchos internacionalistas que insisten sobre la contribución positiva de la Corte internacional de justicia y de la Comisión de derecho internacional sobre la Responsabilidad de los Estados a la determinación del contenido del *ius cogens*. Estaría de acuerdo con esta postura si el contexto judicial internacional fuese limitado a la CIJ y al Tribunal Europeo de Derechos Humanos. Sin embargo, si se toma en cuenta la contribución de la Corte Interamericana de Derechos Humanos – que atribuye el estatus de *norma de ius cogens* a una cantidad creciente de normas – el panorama resultante se aproxima más a lo que sostengo en este artículo que a la opinión optimista arriba mencionada.

35 Shapiro 2010.

necesidades explican la obvia preferencia formalista por las fuentes del derecho escritas así como por los argumentos jurídicos que se basan en textos y no en el espíritu de la ley.[36]

Tal connotación, a pesar de estar justificada desde un punto de vista histórico, puede ser sustituida por una mejor: un rejuvenecido (*neo*, o funcionalista) formalismo[37] es una herramienta importante para entender cómo piensan los abogados,[38] y eventualmente para imponer una estructura normativa, especialmente en derecho internacional, capaz de limitar los efectos de la creciente desformalización de las fuentes del derecho.[39]

Si se toman las reglas en serio, se adoptará necesariamente un punto de vista de tipo formalista. Si tener reglas no es malo, entonces tampoco es malo algún tipo de formalismo. En su libro *Playing by the Rules,* Schauer defiende un modelo de *decision-making* basado en reglas, conforme al cual el derecho es un conjunto de reglas, y las reglas funcionan como generalizaciones atrincheradas.[40] El modelo de *decision-making* basado en reglas no es una garantía de respuestas correctas o un remedio milagroso contra la indeterminación. Se trata, plausiblemente, de lo que necesitamos si nuestro objetivo es limitar la arbitrariedad sin negar el uso de la discrecionalidad judicial, siendo la situación descrita por la discrecionalidad aquella en que «alguna institución con poder de control o revisión admitirá una multiplicidad de decisiones completamente diferentes, incluyendo algunas que la institución de control pueda considerar equivocadas».[41] ¿Cómo podría ser posible tal milagro? ¿Cómo podría la discreción satisfacer las exigencias del *rule of law*? En virtud, desde el punto de vista aquí adoptado, de una insistencia neo-formalista sobre la posibilidad de universalizar las decisiones discrecionales, esto es, de concebir un mundo en que la indeterminación y un grado aceptable de estabilidad son compatibles.

A pesar del inevitable carácter sobre- y sub-incluyente de las reglas, la estabilidad de un sistema jurídico interno es preservada si y solo si el modelo de decisión judicial está basado en reglas, y no un modelo particularista (de acuerdo al cual el juez, en cada caso, aplica la solución que mejor satisface la

36 Schauer 2012: 30. Véase también Leiter 2010.

37 Véase, del lado de la teoría del derecho internacional: Koskenniemi 2006; d'Aspremont 2011a. Desde un punto de vista exclusivamente teorético, véase Shapiro 2010; Marmor 2009; Schauer 2012.

38 Schauer 2012.

39 En la medida en que la práctica social más relevante, desde la perspectiva positivista compartida por d'Aspremont (2011a: 51-62), es una práctica judicial, creo que no es una movida arbitraria la de pasar del formalismo en la comprobación del derecho al formalismo en la aplicación judicial del derecho.

40 Véase Schauer 1991: 17, y, sobre el atrincheramiento, 47.

41 Schauer 2012: 191.

justificación subyacente a la regla).[42] El modelo basado en reglas considera «a la *forma* de la regla jurídica como más importante que su propósito subyacente».[43] Al contrario, de acuerdo a un modelo particularista «ninguna regla es más importante que las razones por la cuales ha sido formulada».[44] A pesar de la posible injusticia de una solución, el modelo basado en reglas satisface el valor de la estabilidad relativa. Este valor es esencial para el *rule of law*, que tiene la función social de establecer las mejores condiciones, para los agentes, para seguir planes sin tener que resolver difíciles cuestiones morales.[45] Desde Hayek hasta Waldron, varios teóricos han reconocido en la continuidad, la estabilidad y la previsibilidad valores protegidos y/o perseguidos por el *rule of law*. Según Hayek el *rule of law* permite «prever con bastante seguridad cómo la autoridad utilizará sus poderes coercitivos en determinadas circunstancias y planear los asuntos individuales sobre la base de este conocimiento».[46] Cuando la virtud del *rule of law* está ausente, «la gente tendrá dificultades para averiguar cuál es la ley en un momento dado y tendrá constantemente miedo de que la ley haya cambiado desde la última vez en que hayan tomado conocimiento de su contenido».[47] El hecho de que muchos de los «argumentos a favor de la continuidad basados en el *rule of law* involucren los valores de la certeza, de la previsibilidad y del respeto de las expectativas establecidas»[48] ha sido perfectamente captado por Schauer:[49]

> existe un grupo importante de valores – la previsibilidad del resultado, la uniformidad de trato y [...] el temor de conceder una discrecionalidad sin restricciones a los que toman decisiones individuales […] – que el sistema jurídico, en particular, cree que es valioso preservar. Estos valores a menudo se agrupan bajo el nombre *rule of law*, y muchas de las virtudes del *rule of law* son aquellas que se realizan cuando se toman las reglas en serio, como reglas.

42 Sobre la distinción entre los dos modelos, véase Schauer 1991: 51.

43 Schauer 1991: 30.

44 Koskenniemi 2006: 591.

45 Shapiro 2010.

46 Hayek 2007: 112.

47 Raz 1979a: 214. De cierto modo, según Raz, (una concepción formalista del) *rule of law* es la virtud que puede limitar los peligros que derivan tanto del puro poder como de la moralidad. Sobre este aspecto, véase también Koskenniemi (2002: 174), que hace referencia al giro ético en el derecho internacional: «En tal situación, la insistencia en las reglas, los procesos y toda la cultura del formalismo se convierte ahora en una estrategia de resistencia». Esto porque «el formalismo trata precisamente de establecer límites a los impulsos – morales o no – de los que ocupan puestos de decisión, con el fin de satisfacer intereses generales en vez de particulares».

48 Waldron (2012: 28). Véase también Beckett (2006: 1068), en donde reconstruye el neo-formalismo de Koskenniemi: «Aunque cualquier norma jurídica dada puede tener cualquier significado deseado, las únicas interpretaciones formalmente válidas son aquellas susceptibles de universalización, de repetición».

49 Schauer (2012: 35).

Este requisito de estabilidad relativa es, en mi opinión, compatible con el reconocimiento de otra necesidad, la necesidad particularista de adecuación. Incluso si, como bien señaló Atria,[50] la necesidad de certeza no puede satisfacerse sin el sacrificio de la necesidad de adecuación, creo sin embargo que la necesidad de una razonable o relativa estabilidad puede capturar lo que podríamos llamar una meta-necesidad, que abarca una dosis sostenible de las dos necesidades antes mencionadas. Ni la certeza absoluta ni el particularismo absoluto son deseables. Si la certeza absoluta es el arquetípico noble sueño del formalista, la estabilidad relativa sería una versión realista del noble sueño.[51] En realidad, la estabilidad relativa es lo más que podemos alcanzar si reconocemos la indeterminación intrínseca que afecta a cualquier orden normativo.

Por cierto, la noción de indeterminación es muy ambigua.[52] Si entendemos la indeterminación como la ausencia de una respuesta determinada a alguna pregunta relevante, me parece plausible distinguir entre cuatro niveles de indeterminación. El primero se refiere a la aplicabilidad de una regla determinada en alguna situación real (por ejemplo, ¿es una situación dada un caso de genocidio?). La solución es indeterminada porque no estamos de acuerdo en cómo debemos calificar jurídicamente los hechos del caso. El segundo se refiere a la identificación del significado de alguna disposición jurídica (por ejemplo, ¿qué significa el término «genocidio» en el Estatuto de la Corte Penal Internacional?). El tercero se refiere a la identificación de alguna fuente del derecho (por ejemplo, ¿existe una determinada práctica consuetudinaria?). El cuarto se refiere a la función o finalidad de la institución como un todo. ¿Para qué sirve el derecho internacional?

Sólo la última forma de indeterminación es una indeterminación profunda o radical. Las tres primeras categorías de indeterminación son, de alguna manera, una característica normal de cualquier sistema jurídico interno y son perfectamente compatibles con el formalismo del modelo de *decision-making* basado en reglas. Quiero decir que la tesis realista de la indeterminación es perfectamente compatible con un enfoque formalista del *decision-making*. La indeterminación radical, si está presente, subdetermina los otros tres niveles: «simplemente no podemos (con determinación, objetividad o autoridad) responder a la pregunta sobre qué dice el derecho hasta que hayamos respondido a la pregunta sobre qué es el derecho».[53]

Por supuesto, esa última declaración necesita algunas explicaciones adicionales. De acuerdo con un enfoque positivista dominante, lo que el contenido de

50 Atria 1999: 82.

51 Véase Hart (1983: 138), en donde clasifica la concepción realista de la adjudicación de Llewellyn más cerca del noble sueño que de la pesadilla.

52 Véase Solum 1987.

53 Beckett 2005: 224.

un sistema jurídico es no depende del fin que se le atribuye. La identificación de las normas jurídicas depende de hechos sociales y no de consideraciones ontológicas sobre la naturaleza y/o el propósito del orden jurídico cuyo contenido debe ser identificado.

Pero este enfoque, en algunos casos, como en la teoría de Raz, se limita explícitamente al derecho interno,[54] precisamente en razón de las fuentes sociales (como la legislación) que históricamente han caracterizado el ordenamiento jurídico interno. Cuando no existe una fuente social así de solida – o, por lo menos, cuando algunas fuentes cruciales (como las costumbres, los principios y el *ius cogens*[55]) son difíciles de identificar –, y cuando no existe un tribunal supremo cuyas resoluciones puedan establecer con autoridad (aunque no sea de forma permanente, al menos por un tiempo) el contenido normativo del sistema, es posible que lo que el contenido del derecho es dependa de algún juicio sobre los valores profundos que se supone proporcionan una justificación moral a las normas jurídicas.

Si tales valores están perfectamente determinados o, por lo menos, pueden ser determinados judicialmente, y no hay conflicto entre ellos, se puede alcanzar una estabilidad relativa o incluso, desde una perspectiva dworkiniana, los jueces podrían ser capaces de formular respuestas correctas. Pero si tales valores profundos son radicalmente indeterminados, la incertidumbre en el nivel más profundo se proyectará inevitablemente a un nivel más superficial, es decir, al nivel en el que los jueces deben aplicar las reglas – previamente identificadas – a los casos individuales, como en el caso Ferrini, un asunto internacional real que tomaré, en la siguiente sección, como ilustración del fenómeno de la indeterminación radical.

Si no podemos negar que los jueces deciden con discrecionalidad (poca o mucha, ese no es el punto), podemos todavía pensar que cuando lo hacen, o cuando crean una nueva regla, pueden verse limitados por un *test de universalizabilidad*,[56] es decir, por la adopción del punto de vista de las personas que potencialmente se verían afectadas en el futuro por la nueva regla, y desde ese punto de vista, los jueces formularían la nueva regla como base para la mejor solución de casos futuros.[57]

La universalización da forma a la sustancia de una situación particular.[58] Aunque, debido a la indeterminación del derecho, una solución es inevitablemente la consecuencia de algún uso de la discrecionalidad, la discrecionalidad

54 Véase Raz 1979b.

55 Véase Puppo 2017.

56 Véase Hare 1952.

57 Beckett 2006: 1069.

58 Jouannet (2007: 386): en este sentido, «"[f]ormal" no significa "vacio" (…); el derecho formal siempre formaliza un contenido o una materia particulares».

no es necesariamente arbitrariedad[59] si los jueces se someten al *test de universalizabilidad*. La prescripción creada es universalizable si los jueces piensan que la solución, que de ella deriva, funcionará en casos futuros similares; debido a esto, la regla así creada puede crear expectativas.[60]

Sin embargo, no siempre es así: en algunos casos, como Núremberg, en la medida en que la solución fue, en última instancia, la consecuencia de la aplicación de un conjunto de reglas creadas por el vencedor de una guerra para juzgar y criminalizar al que la perdió, tenemos sólidas razones morales para evitar cualquier generalización. Como subrayó Kelsen:[61] ¿qué pasará si no es siempre el caso de que los buenos ganan las guerras? El riesgo, subrayado por Koskenniemi, refiriéndose a Kosovo, es que «una ilegalidad beneficiosa hoy haga más fácil, para mi adversario, invocarla mañana como precedente para algún plan sombrío que tenga».[62]

Cuando la solución es universalizable, entonces los jueces pueden atrincherar la generalización. Decir que los jueces crean una regla, si usamos la teoría de Schauer,[63] significa que, a partir de la observación de un caso particular, y tomando en serio una solución particular por su universalizabilidad, los jueces formulan la solución en términos de la consecuencia de una regla general.

Si la indeterminación implica el uso necesario de discrecionalidad judicial, el *test de universalizabilidad* funciona como una técnica contra la arbitrariedad. Hay varias maneras de crear nuevo derecho: no todas las soluciones son equivalentes. Si es cierto que los jueces, como los legisladores, crean derecho, también

59 Singer 1984.

60 Véase Koskenniemi 2002b: 174.

61 Kelsen 1947: 171. Analizo en otro trabajo, véase Puppo 2016, la postura compleja y ambigua de Kelsen respecto de los juicios de Núremberg y la cuestión relativa a su eventual separación del positivismo. En pocas palabras: incluso si Kelsen (1945) defiende claramente la decisión basada en la humanidad, no intenta hacer esto – contrariamente a muchos juristas internacionalistas positivistas – desde una perspectiva positivista (véase Garibian 2007); tal intento habría pervertido – supongo – el valor profundo (la legalidad o el *rule of law*) que justifica el sistema jurídico positivo. La decisión era justa, pero no tenía una justificación jurídico-positiva, sólo tenía una justificación moral. De este modo, Kelsen no renuncia a su positivismo – que asume, al menos, la distinción entre el derecho que es y el derecho que deseamos; sin embargo, Kelsen no se adhiere a una forma ideológica de positivismo (o legalismo ético) según la cual lo legal es también moralmente correcto, y entonces hay que obedecerlo. El derecho nazi era (probablemente) legal y el derecho de Núremberg era (probablemente) ilegal, pero había fuertes razones morales para preferir, en este caso, la ilegalidad a la legalidad. Defender el fallo de Núremberg sobre la base de (un argumento derivado de) el derecho positivo habría amenazado lo que hace que el derecho positivo sea algo valioso. Más en general, sobre las líneas borrosas, en Kelsen, entre la pureza de la teoría y el pacifismo de la ideología, véase Puppo 2015.

62 Koskenniemi 2002b: 170.

63 Sobre la relación entre el modelo basado en reglas y la discrecionalidad, véase Schauer 1991: 190.

es cierto que las dos instituciones no gozan de la misma libertad creativa.[64] El razonamiento neo-formalista excluye soluciones que parecen inevitablemente arbitrarias, en la medida en que no son universalizables.[65]

Si una solución nos parece universalizable, no es porque los jueces hayan adoptado un punto de vista neutral. En realidad, es imposible para los jueces neutralizar sus preferencias. Pero precisamente por esa imposibilidad, la exigencia de transparencia y universalizabilidad relativa a las preferencias y decisiones de los jueces es un rasgo esencial de un razonamiento jurídico predecible y, en un último análisis, de una concepción formal-procesal, pero *thick*, del *rule of law*;[66] formal porque ningún elemento sustantivo es constitutivo de ella; *thick* porque sigue siendo una concepción exigente según la cual muchos sistemas jurídicos, aparentemente gobernados por el derecho, no cumplirían los requisitos del *rule of law*.

4 TRATANDO CON LA INDETERMINACIÓN RADICAL: *RULE OF LAW* VS. SENTIMIENTO OCEÁNICO

Voy a tomar como punto de partida un caso internacional de indeterminación radical: dado el conflicto entre la protección jurisdiccional de los derechos humanos, por un lado, y la inmunidad del estado, por otro, en un primer caso decidido por la Corte Italiana de Casación, la protección de los derechos humanos derrotó la protección de la soberanía, mientras que en una decisión subsecuente, decidida por la Corte Internacional de Justicia, ocurrió lo opuesto.[67] Si el derecho internacional es una construcción humana y si su objetivo es la satisfacción de una extraña combinación de necesidades morales (una cuestión de seres humanos) y necesidades políticas (una cuestión de soberanía), es fácil ver que la indeterminación depende, sobre todo, de la manifiesta incompatibilidad entre estas dos necesidades:

64 Véase Hart 1994: 253.

65 Hart 1994: 272-273.

66 La transparencia es por lo tanto un carácter esencial de la cultura formalista. Véase Jouannet 2010: 294; Paulus 2010: 209. Un ejemplo de concepción *thick*, formal-procesal, sería la propuesta por Waldron. Véase *supra* sección 2.

67 Véase respectivamente: *Ferrini vs. Alemania*, Corte di cassazione, Sezioni Unite, No. 5044/2004, 11 de marzo de 2014; *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)*, International Court of Justice, 3 de febrero de 2012. Hay que destacar que recientemente, en octubre 2014, la Corte costituzionale italiana decidió que la ley italiana que imponía la ejecución de la Carta de la ONU era inconstitucional en la parte en que establecía «la obligación para los tribunales italianos de cumplir con la decisión de la Corte internacional de justicia (CIJ) del 3 de febrero de 2012, que exige que se decline la competencia en los casos de crímenes de guerra y crímenes de lesa humanidad cometidos por un estado extranjero».

> la tesis de la indeterminación […] no consiste para nada en que los textos jurídicos internacionales son semánticamente equívocos. La tesis es mucho más fuerte (y en un sentido filosófico, más "fundamental") y afirma que incluso cuando no existe una ambivalencia semántica, el derecho internacional permanece indeterminado ya que está basado sobre premisas contradictorias.[68]

Si leemos la sentencia de la CIJ y la opinión disidente del juez Cançado Trindade, percibimos claramente la fuente de la indeterminación radical: la premisa acerca del propósito del derecho internacional aceptada por la mayoría de los jueces es profundamente contradictoria con la premisa aceptada por el ex-juez de la Corte Interamericana de Derechos Humanos. Este caso es claramente una *tensión* internacional, en la cual parece muy difícil domesticar la discrecionalidad judicial. No es sorprendente que los jueces, nacionales e internacionales, sean particularmente poco claros acerca de los propósitos, de las fuentes y finalmente del predicado fáctico al cual tienen que imputar consecuencias jurídicas.

En esta sección, argumentaré que, mientras que un sistema jurídico interno no patológico es capaz de tratar con la indeterminación radical, en razón de profundas diferencias institucionales y culturales, el derecho internacional queda irremediablemente afectado por esta.

La importancia y la eficiencia de la aproximación formalista en el razonamiento jurídico interno, así como la tendencia desformalizadora en el derecho internacional, pueden ser explicadas desde una perspectiva institucional y funcionalista. La comparación tiene sentido especialmente si hacemos referencia a los jueces internacionales que resuelven problemas de derecho penal y de violaciones de derechos humanos en donde la humanidad está en el centro de la controversia – esto es, a la dimensión jurisdiccional en la cual el «regreso a la ética» ha sido acompañado por una «creciente desformalización».[69]

En varios sistemas jurídicos nacionales, los jueces reciben alguna educación jurídica, y quizás comparten una cultural jurídica común, en algún sentido formalista.[70] El juez – como es imposible satisfacer la exigencia formalista de abstenerse de la creación de derecho – cumple su deber creando nuevas reglas

68 Koskenniemi 2006: 590. Otra forma de destacar la indeterminación radical es llamando a colación el carácter profundamente paradójico que el derecho internacional ha manifestado desde sus comienzos. Sobre este tema, véase Jouannet (2007: 379): «el derecho internacional, pasado y presente, es el reflejo de una cultura – la occidental – particular, mientras al mismo tiempo pretende no solamente internacionalizar sino también casi universalizar los valores de los cuales es portador».

69 Koskenniemi 2006: 159.

70 Leiter (2010: 128) lo confirma respecto de Estados Unidos: «el formalismo (...) constituye obviamente la historia oficial de la adjudicación en la cultura pública estadounidense».

generales a las cuales el mismo estaría dispuesto a someterse.[71] En la medida en que los jueces internacionales son a menudo juristas de renombre internacional, tienen una visión distinta de su papel. No pueden apoyarse en la existencia de un gobierno democrático que se ocupa de reformar el derecho. Tienen que desempeñar un rol activo dado que han sido educados para ser reformadores y no sólo los garantes de la estabilidad que caracteriza al *rule of law*: el trasfondo filosófico de la muy influyente escuela internacionalista alemana fue «la filosofía del optimismo y de la acción, la lucha por el progreso y la perfección del mundo».[72] El paradigmático ejemplo fue ciertamente Lauterpacht, «quien nunca se cansó de creer en la bondad humana y en la posibilidad para la razón de encontrar esta bondad, incluso en los momentos más obscuros de la historia europea».[73]

Entonces, si es cierto que tanto el derecho interno como el internacional sufren las consecuencias de la indeterminación, sólo los tribunales nacionales tienen las herramientas, la cultura y el contexto institucional para manejar esto consistentemente con el requisito de la relativa estabilidad. Al contrario, en la medida que las jurisdicciones internacionales se enfrentan frecuentemente a casos difíciles, o incluso únicos, la universalizabilidad no es un objetivo alcanzable y por lo tanto, a justo título, no es una prioridad. Como Morgenthau hace setenta años ya había comprendido con agudeza, a diferencia del ámbito nacional, una «situación política en el ámbito internacional no es probable que se repita, ya que la variedad de factores que lo componen produce un número indefinido de posibles combinaciones. Por lo tanto, sólo una regla jurídica estrictamente individualizada será adecuada para él».[74]

Sostengo que tal diferencia institucional refleja convenciones sociales profundamente diferentes, que tienden a satisfacer necesidades básicas o a alcanzar objetivos morales fundamentales.

El derecho nacional podría parecer justificado, moral o socialmente, en virtud de su capacidad de revolver problemas morales de forma relativamente estable. Lo que importa es que resuelva los problemas, no cómo los resuelve. Dadas algunas «circunstancias de la legalidad», que «se dan cuando una comunidad tiene numerosos y serios problemas morales, cuyas soluciones son

71 La mejor forma de cumplir con este deber es probablemente mediante lo que Llewellyn (1960) llamó el *Grand style* de toma de decisiones judiciales, esto es, un estilo judicial perfectamente acorde a los «estándares de legalidad (...) profundamente arraigados en la historia institucional y la tradición de una comunidad política» (Jovanović 2015: 452), y claramente ausentes en la comunidad internacional.

72 Koskenniemi 2002a: 199. Un brillante análisis de la contribución al derecho internacional de los juristas judíos de habla alemana se encuentra en Paz 2012a.

73 Paz 2012b: 423.

74 Morgenthau 1940: 271.

complejas, controvertidas o arbitrarias»,[75] podemos entender el propósito y la autoridad del derecho. Debido a la existencia de un plan jurídico, podemos evitar involucrarnos en una actividad de ponderación sobre cuales son, en ciertas circunstancias, las mejores razones morales para actuar. Koskenniemi comparte el mismo punto cuando afirma que en una situación nacional normal, «es posible vivir con reglas automáticas porque la alternativa es mucho peor».[76]

Cuando el derecho internacional (en asuntos penales o de derechos humanos) se propone guiar comportamientos, se enfrenta a dos obstáculos. Algunos sujetos se niegan a ser dirigidos, tal vez porque «están en desacuerdo sobre lo que es bueno».[77] Cuando los estados rechazan un modelo de conducta, están contribuyendo a la introducción o eliminación de alguna norma consuetudinaria, y por lo tanto a su indeterminación.[78] Invocar normas imperativas (normas de *ius cogens*) es probablemente la única manera para no ceder frente al dogma del consentimiento de los estados. Estas normas, sin embargo, no pueden tener una fuente social, y por ende tienden a incrementar la desformalización de las fuentes del derecho.[79]

Esta solución, *i.e.* invocar normas imperativas, desafortunadamente crea el segundo obstáculo: el problema de la indeterminación radical de los valores morales que justifican la identificación de normas de *ius cogens*.[80] En este estado de indeterminación, es casi inevitable que el derecho internacional no provea ningún plan; puede solamente generar un conjunto de decisiones individuales en casos particulares, frecuentemente en situaciones caracterizadas por una emergencia política o moral.[81]

Obviamente esto no es cierto si, como piensan algunos jueces de derechos humanos y algunos juristas y filósofos del derecho, la identificación de normas de *ius cogens* no es subjetiva sino objetiva, porque tales normas reflejan un *sentimiento oceánico*.[82] Empero, creo que la carga de la prueba sobre la existencia

75 Shapiro 2010: 170. La misma idea ya había sido formulada por MacCormick (1994: 6): «un elemento crucial de las instituciones jurídicas es precisamente que existen (inter alia) para resolver con autoridad y para fines prácticos lo que no puede resolverse moralmente».

76 Koskenniemi 2002b: 169.

77 Koskenniemi 2012b: 165.

78 Sobre el problema de la incertidumbre en el derecho consuetudinario, véase Kammerhofer 2010.

79 Véase d'Aspremont 2011b: 517-518.

80 Me parece que Cassese (2012b: 164), cuando trata la cuestión de la identificación de las normas de *ius cogens* por parte de los jueces internacionales, adopta implícitamente un punto de vista cercano al del formalista.

81 Véase Koskenniemi (2002b: 171), sobre el bombardeo de Serbia. Véase también Anghie (2005: 314) cuando sostiene que «el derecho internacional está en un estado permanente de emergencia». Sobre la relación entre estado de excepción y *rule of law*, véase Puppo 2013.

82 Según Freud (1962: 11) – quien toma prestada la expresión de su amigo Romain Rolland – un sentimiento oceánico es «un sentimiento de algo sin límites, ilimitado – como si fuera

de tal criterio universal, sobre la existencia de valores universales objetivos, no me corresponde. Me limitaré a desarrollar un argumento contra la que podría ser llamada la tendencia dworkiniana en derecho internacional. Por ejemplo, la aproximación de Cassese – sin mencionar la existencia de valores universales – comparte el noble sueño dworkiniano de un mundo judicial iluminado por los valores intrínsecos del derecho internacional, un mundo con respuestas correctas.[83]

Aunque se admita que el enfoque dworkiniano podría ser útil para explicar (algún) orden jurídico nacional, su propuesta sería completamente inútil en un contexto internacional caracterizado, como hemos visto, por profundos desacuerdos sobre valores morales y por la ausencia tanto de un órgano judicial supremo como de un poder legislativo democrático, potencialmente capaces de solucionar, al menos momentáneamente, tales desacuerdos.[84] Debido al carácter profundo de las *tensiones* internacionales, «es ingenuo e incluso contraproducente esperar que sean resueltas eficazmente recurriendo a dispositivos judiciales o de arbitraje».[85]

Algunos puntos que hacen implausible (salvo como una utopía) la teoría dworkiniana pueden ser brevemente mencionados.

"oceánico". Este sentimiento, añade, es un hecho puramente subjetivo, no un artículo de fe; no trae consigo ninguna garantía de inmortalidad personal, pero es la fuente de la energía religiosa sobre la cual se han construido las diversas Iglesias y los sistemas religiosos (...). Uno puede, piensa, llamarse justamente a sí mismo religioso sobre la sola base de este sentimiento oceánico, aunque se rechace toda creencia y toda ilusión». Esta noción de "sentimiento oceánico" está relacionada con las religiones pero, lo que es más interesante, podría estar asociada a un tema cuasi religioso: el derecho internacional; véase Koskenniemi (2012: 11): «Aunque el "sentimiento oceánico" puede ciertamente ser real en la medida en que el hablante lo siente, esto no es prueba de su realidad universal, ya sea por ser accesible a los demás o por tener alguna presencia objetiva en el mundo». No es sorprendente que Dworkin tome muy en serio la noción de *ius cogens* y cite al juez Cassese como un ejemplo del «enfoque moralizado del derecho internacional que [Dworkin] está defendiendo ahora» (Dworkin 2013: 26).

83 Véase Feichtner 2012: 1152.

84 Feichtner 2012: 1152; véase también Kratochvil (2000: 42) que recuerda que «en derecho internacional no existe ni texto constitucional ni doctrina del *stare decisis*»; y Beckett (2001: 635), según el cual: «El papel del derecho y la forma de evitar la indeterminación radical se basan, en el análisis dworkiniano, en la centralidad de los tribunales o, al menos, en la posibilidad de un recurso unilateral a los tribunales. Dworkin confía en los tribunales para estabilizar el derecho (y así determinar con autoridad qué valores están en el sistema), pero en PIL [el derecho internacional público] los jueces, simplemente, no pueden desempeñar este papel». Si bien es plausible que el requisito de estabilidad relativa pueda generar, en un contexto interno, y esto conforme a lo que sostiene Dworkin, algún tipo de obligación asociativa, «es dudoso, por decir lo menos, si, en primer lugar, los estados pueden satisfacer esos requisitos psicológicos, incluso a través de sus representantes legítimos y, en segundo lugar, si, incluso bajo esta suposición, podemos hablar de manera significativa de una especie de comunidad internacional que genera obligaciones asociativas en el sentido dworkiniano de la expresión» (Jovanović, 2015: 454).

85 Scheuerman (2008: 38).

Primeramente, en la medida en que Dworkin parece partir del conflicto radical entre derechos humanos (esenciales en su teoría) y soberanía (esencial, de acuerdo con él, en cada concepción positivista),[86] su posición «difícilmente concuerda con su visión general de la unidad de valor».[87]

En segundo lugar, Dworkin parece reconocer la profunda diferencia institucional entre el contexto nacional e internacional, específicamente respecto a la adjudicación, cuando afirma que «ninguna estructura, ni en la forma más rudimentaria, está todavía presente en el ámbito internacional, y ninguna se puede esperar pronto»; en consecuencia, describe su proyecto – ignoro qué tan irónicamente –, como una «fantasía sobre una fantasía».[88]

En fin, es interesante sintetizar la conclusión que Dworkin formula sobre el bombardeo de la OTAN en Kosovo. Argumenta que este estaba completamente justificado sobre la base del derecho internacional interpretado bajo su mejor luz.[89] Es sin embargo sorprendente que Dworkin reconozca que la interpretación jurídica implícita en esta respuesta correcta «sería, por supuesto, una nueva legislación, más que una interpretación de la Carta tal como es».[90] Definitivamente, no es claro si propone una teoría realista del derecho internacional, o sólo su propia visión acerca de cómo debería/podría ser el derecho internacional en un futuro imaginable.

5 CONCLUSIÓN

Si, debido a su indeterminación radical, es difícil saber qué reglas son válidas en cierto momento, el derecho internacional podría ser concebido no como un conjunto de reglas,[91] sino como un conjunto de soluciones particulares para acontecimientos casi únicos.[92]

Esta tesis necesita por supuesto algunos matices. Es verdad que el fenómeno de la indeterminación radical, en la medida en que depende de valores morales incorporados al sistema jurídico, no es exclusivo del derecho internacional. La jurisprudencia reciente en materia de inmunidad jurisdiccional lo confirma. En Italia la Corte de Casación primero invocó valores superiores, luego una norma consuetudinaria emergente, y finalmente abandonó su jurisprudencia para

86 Véase Dworkin (2013: 5 y 17-19), respectivamente sobre la tesis anti-positivista y sobre el conflicto entre derechos humanos y soberanía.

87 Jovanović 2015: 447.

88 Dworkin 2013: 14.

89 Dworkin 2013: 23-26.

90 Dworkin 2013: 26.

91 Véase Johns 2013 para varios ejemplos en que parece que las reglas no juegan un rol significativo en los asuntos internacionales.

92 Véase muchos ejemplos impactantes de acontecimientos internacionales únicos en Johns, Joyce & Pahuja 2011.

cumplir con el fallo de CIJ y con la nueva legislación italiana. Después de esto, la Corte Constitucional decidió reafirmar los mismos valores implícitos en el primer fallo de la Corte de Casación y declaró inconstitucional la legislación italiana.[93] Todo ello parece demostrar la profunda indeterminación de la regla de reconocimiento. Pero, incluso si se adopta una concepción pluralista, se podría afirmar que la Corte Constitucional italiana ha dicho la última palabra, y por lo tanto que se ha alcanzado una relativa estabilidad.

Tal estabilidad es el resultado de la reiteración de casos judiciales nacionales. En el mismo caso, en la arena internacional, sólo un asunto, el previamente mencionado *Alemania vs. Italia*, ha sido decidido, por lo que sigue sin estar claro cuál sería la solución para un posible caso futuro. Una diferencia importante, que también fortalece mi argumento, es que la palabra final en la saga italiana fue encontrada en un texto constitucional, no en una norma consuetudinaria. Esta diferencia es relevante porque la existencia y el contenido del derecho consuetudinario internacional fue precisamente el objeto del desacuerdo entre la Corte italiana y la internacional.

La historia de las relaciones internacionales es posiblemente la historia de «planes que llevan a resultados diferentes a los previstos».[94] La profunda necesidad satisfecha por el derecho internacional no es probablemente, o no solamente, la estabilidad social y jurídica, esencial en la construcción del *rule of law* en ámbito interno. Esto puede representar sólo una cuestión de hecho o conducir a una seria cuestión ontológica: ¿para qué sirve el derecho internacional? Si no tiene sentido tomar la necesidad de estabilidad como respuesta, no es extravagante sospechar que su finalidad es más bien la indeterminación radical misma que, lejos de ser una «deficiencia estructural»,[95] podría maximizar – a pesar de las buenas intenciones de muchos juristas internacionalistas (los reformistas) y la retórica de las Naciones Unidas[96] – la libertad política de los estados, incluso en el contexto del derecho basado en la humanidad.

93 Véase Corte costituzionale, Sentenza n. 238/2014, en la cual se reconstruye con precisión la secuencia de las intervenciones de los jueces y del legislador italianos.

94 Morgenthau 1947: 129.

95 Koskenniemi 2006: 591.

96 Tengo que reconocer que las Naciones Unidas tienen como objetivo garantizar la paz y la seguridad internacionales, objetivos que son comparables a la estabilidad social en el plano interno. Sin embargo, tal afirmación tiene que relativizarse tanto a nivel empírico como normativo. En términos empíricos, es un hecho que una intervención internacional para restablecer la paz y la seguridad puede ser detenida por el veto, así que los estados que tienen el derecho de detener tales intervenciones pueden maximizar su libertad, y consecuentemente la amenaza para la paz y la seguridad no desaparece. Por lo tanto, sin una reforma seria del funcionamiento del Consejo de Seguridad de la ONU, el argumento no es convincente. La razón por la que no se ha hecho esa reforma es precisamente que reduciría la libertad de algunos estados. En este sentido, la dificultad empírica tiene que ser entendida como el resultado de una postura normativa, destinada a proteger la libertad de los estados, o al menos de algunos estados poderosos.

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Synopsis

Bruno Celano

Pre-conventions
A fragment of the Background

SLOV. | *Pred-konvencije. Fragment Ozadja.* V tem zapisu avtor trdi, da obstajajo konvencije posebne vrste, ki niso niti norme niti ponavljajoča se ravnanja, temveč delijo značilnosti obeh. Potem ko površno analizira pomen pojma »konvencija«, poda avtor nekaj primerov vrste pojava, ki ga ima v mislih: telesne sposobnosti, *know-how*, okus in stil, *habitus* (P. Bourdieu), »discipline« (M. Foucault). Avtor nato zbere nekaj argumentov v prid svoji trditvi: (i) razmisleke o identitetnih pogojih precedensov (D. Lewis) in o možnosti projiciranja predikatov ter induktivnem sklepanju na splošno (N. Goodman); (ii) misli o upoštevanju pravil (L. Wittgenstein); (iii) pregled Searlovih idej o »Ozadju« intencionalnosti. Zaključi z nekaj komentarji na temo častitljivega nasprotja med »naravo« in »konvencijo«.

Ključne besede: konvencija, običaj, upoštevanje pravil, projiciranje (indukcija), Ozadje intencionalnosti

ENG. | In this paper I argue that there exist conventions of a peculiar sort which are neither norms nor regularities of behaviour, partaking of both. I proceed as follows. After a brief analysis of the meaning of 'convention', I give some examples of the kind of phenomena I have in mind: bodily skills, know-how, taste and style, *habitus* (P. Bourdieu), "disciplines" (M. Foucault). Then I group some arguments supporting my claim: (i) considerations about the identity conditions of precedents (D. Lewis) and about the projectibility of predicates in inductive inference generally (N. Goodman); (ii) thoughts about rule-following (L. Wittgenstein); (iii) an examination of some of J. R. Searle's ideas about the "Background" of intentionality. I conclude with some remarks about the time-honoured antithesis 'nature' *v.* 'convention'.

Keywords: convention, custom, rule-following, projectibility (induction), the Background of intentionality

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Synopsis

Marco Brigaglia

Rules and norms
Two kinds of normative behaviour

SLOV. | *Pravila in norme. Dve vrsti normativnega ravnanja*. Celanov pojem »pred-konvencija« je utemeljen na razlikovanju med domnevno različnima vrstama normativnega ravnanja, tj. med *upoštevanjem »pravila«* in *ravnanjem v skladu z »normo«*. To razlikovanje ima osrednjo vlogo v Celanovi razpravi in zaznamuje pomembno točko na njegovi intelektualni poti. Kljub temu pa ostaja to razlikovanje v komentirani razpravi povečini implicitno. Avtor tega prispevka ga zato osvetli z jasno opredelitvijo obeh vrst normativnega ravnanja. Ob tem posebej izpostavi tudi pomen njunega razlikovanja, izrazi nekaj misli (in želja) v zvezi s Celanovimi raziskavami v bodoče, končno pa poda še (obrobno) kritiko.

Ključne besede: sledenje pravilom, hitri in počasni miselni procesi, pravila in navade, norme in normativnost

ENG. | Celano's notion of a "pre-convention" is grounded in the opposition between two allegedly different kinds of normative behaviour: *observing a "rule"* and *conforming to a "norm"*. This opposition plays a central role in Celano's paper, and marks a crucial point in his intellectual trajectory. Nevertheless, it remains largely implicit. In this paper, I try to make it fully explicit, giving a more precise characterisation of both kinds of normative behaviour. I also focus on the importance of distinguishing between them, express some conjectures (or wishes) regarding Celano's future research, and propose a (marginal) criticism.

Key words: rule-following, fast and slow mental processes, rules and habits, norms and normality

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Synopsis

Federico José Arena

Embodied conventions
Some comments on their social dimension and intentionality

SLOV. | *Utelešene konvencije. Nekaj misli o njihovi družbeni razsežnosti in intencionalnosti*. To je kratek komentar k Celanovi razpravi Pred-konvencije. Avtor v njem uvodoma osvetli Celanovo filozofsko metodo. Zatem opozori, da ostaja v Celanovem prikazu utelešenih konvencij nerazjasnjena družbena razsežnost konvencionalnosti. Končno pa še trdi, da je zaradi dvoumnosti pojma Ozadje pomanjkljiv tudi Celanov prikaz pred-konvencij (tj. utelešenih konvencij iz Ozadja).

Ključne besede: filozofska metoda, družbena razsežnost, Ozadje

ENG. | In these brief comments on Bruno Celano's "Pre-conventions. A Fragment of the Background", I propose further thoughts on what, following Celano's analysis, I call embodied conventions. I begin with a number of remarks on Celano's philosophical method. Then I claim, first, that the social dimension of conventionality remains obscure in his account of embodied conventions, and, second, that his account of pre-conventions (embodied conventions that are in the Background) is still imprecise due to the ambiguity of the notion of the Background.

Keywords: philosophical method, social dimension, Background

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Synopsis

Dale Smith

A new type of convention?
Some remarks on Bruno Celano's "Pre-conventions"

SLOV. | *Nov tip konvencij? Nekaj pripomb k Celanovim Pred-konvencijam*. Celano v omenjeni razpravi zagovarja obstoj in filozofsko pomembnost posebnega tipa konvencij, ki je drugačen od doslej obravnavanih in presega vrsto običajnih filozofskih delitev. Gre za »pred-konvencije«. Avtor komentarja meni, da je Celanu nemara res uspelo dokazati obstoj tega tipa konvencij, ki vladajo našim sodbam o slogu ali okusu. Če to drži, nas lahko njihovo preučevanje nauči marsičesa (mdr. o razmerju med konvencijami in pravili). Kljub temu pa avtor podvomi v izpolnitev širših ambicij Celanove razprave. Meni namreč, da pred-konvencije niso tako pogoste, kot trdi Celano, in da niti niso prisotne v vseh primerih, ki jih slednji poda. Končno pa podvomi še v resničnost Celanove trditve, da ta nov tip konvencij dejansko omogoča razvoj tistih, bolj poznanih, za katere se je zanimal David Lewis.

Ključne besede: Bruno Celano, pred-konvencije, konvencije, David Lewis

ENG. | In "Pre-conventions: A fragment of the Background", Bruno Celano argues for the existence and philosophical significance of what he calls "pre-conventions" – a type of convention distinct from those hitherto discussed in the literature, and which transcends a number of orthodox philosophical distinctions. In these comments, I suggest that Celano may have shown that there is a distinct type of convention governing judgments of style or taste. If so, we may learn some important lessons (e.g. concerning the relationship between conventions and rules) by examining this new type of convention. However, I express doubts about whether the broader ambitions of Celano's paper are fulfilled. I contend that pre-conventions are not as common as he suggests, and are not present in some of the other examples he gives. I also express doubts about whether he is right to suggest that there is a distinct type of convention that renders possible the development of conventions of the sort which David Lewis was interested in.

Keywords: Bruno Celano, pre-conventions, conventions, David Lewis

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Synopsis

José Juan Moreso

Celano: Ontological Commitment and Normative Bite

SLOV. | *Celano: Ontološka zaveza in normativni prijem*. Avtor tega komentarja izlušči iz Celanove razprave Pred-konvencije dve tezi: *tezo o ontološki zavezi* in *tezo o normativnem prijemu*. Združeni naj bi bili ti dve tezi neskladni z mislijo, da so pred-konvencije dejstva, ki vzročno vplivajo na človeško ravnanje. Ob tem naj bi ob morebitni opustitvi teze o ontološki zavezi ne dosegli normativnega oznamovanja. Z drugimi besedami: avtor komentarja trdi, da so pred-konvencije (kot del Ozadja) bodisi del vzročno-posledične razlage človeških ravnanj bodisi abstraktne danosti, ki človeška ravnanja normativno oznamujejo. V prvem primeru so pred-konvencije brez normativnega pomena, v drugem primeru pa ostanejo brez vsakršne vloge v vzročno-posledični razlagi človeških dejanj. Tretje možnosti ni.

Ključne besede: pred-konvencije, dejstva, normativnost, vzročnost

ENG. | In his articles on pre-conventions, Celano presents, what the author calls, the *Ontological Commitment Thesis* and *the Normative Bite Thesis*. In this short comment, the author argues that the two theses are together both incompatible with the idea that pre-conventions are facts which have causal powers in human behaviour; also, if the ontological thesis is abandoned, normative determination could not be obtained. In other terms, the author argues that either pre-conventions (as part of the Background) are part of our causal explanation of human behaviour or pre-conventions are abstract entities able to determine human behaviour normatively. In the first case, pre-conventions lack normative meaning, while in the second pre-conventions cannot integrate our causal explanation of human actions. *Tertium non datur*.

Keywords: pre-conventions, facts, normativity, causality

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Synopsis

Alberto Puppo

Reasonable stability vs. radical indeterminacy
A disanalogy between domestic rule of law and humanity -based international law

SLOV. | *Razumna stabilnost proti radikalni nedoločnosti. Disanalogija med notranjo vladavino prava in na človečnosti utemeljenim mednarodnim pravom.* Osrednji argument te razprave temelji na funkcionalni disanalogiji med tem, kar avtor imenuje »na človečnosti utemeljeno mednarodno pravo« (sestavljajo ga človekove pravice in kazensko pravo), ter notranjo vladavino prava. Če privzamemo funkcionalistični pristop, potem moramo z namenom soočenja z nedoločnostjo nameniti pozornost tako pragmatičnemu cilju vladavine prava (tj. razumni stabilnosti) kot sredstvoma za dosego tega cilja (tj. formalizmu in zakonitosti). Pa ključni mednarodni igralci delijo te vrednote, ki prežemajo politični projekt vladavine prava? Ali na človečnosti utemeljeno mednarodno pravo izpolnjuje zahteve vladavine prava? Avtor te razprave sklene, da v mednarodnem pravu, ki je utemeljeno na človečnosti, skoraj ni mogoče zaslediti ustanov in mehanizmov, na katere se pravni strokovnjaki običajno nanašajo, ko neki pravni red označijo kot primer vladavine prava. To pomeni, da je radikalna nedoločnost prevelika ovira, da bi lahko pri ščitenju človečnosti dosegali zgled vladavine prava.

Ključne besede: vladavina prava, formalizem, mednarodno pravo, človečnost, globoke konvencije, nedoločnost

ENG. | The main argument of this article is based on a functional disanalogy between what I shall call 'international humanity-based law' constituted by human rights and criminal law on the one hand, and domestic rule of law on the other. If we adopt a functionalist approach, for the purpose of dealing with indeterminacy, our attention has to focus both on the pragmatic objective of the rule of law, i.e., reasonable stability, and on its means, i.e., formalism and legality. Do international key players share these values embedded in the political project of the rule of law? Does humanity-based international law fulfil the requirements of the rule of law? The conclusion of this paper is that the institutions and mechanisms which legal scholars usually refer to when they state that a legal order is a rule of law are almost absent from humanity-based international law. This implies that radical indeterminacy is, in issues of humanity, too formidable an obstacle to achieving the ideal of the rule of law.

Keywords: rule of law, formalism, international law, humanity, deep conventions, indeterminacy

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