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Pet vzorov pravoznanstva

Ta članek sledi trem ciljem. Najprej bomo analizirali nekatere tradicionalne pojme »pravne znanosti« ter predlagali definicije »pravne znanosti *ampio sensu*« (v širšem pomenu), »pravne znanosti *stricto sensu*« (v ožjem pomenu) in pravne dogmatike. Da bi pokazali na različne metodološke alternative, ki so na voljo proučevalcem prava, bo v nadaljevanju predstavljena rekonstrukcija petih modelov ali vzorov pravne znanosti *ampio sensu*. Nato bom utrjeval, da je (zaradi pojmovnih razlogov) treba izbiro pravniške metode nujno utemeljiti z moralnimi razlogi. Nazadnje bom ponudil še nekaj argumentov za vsako od petih metodoloških alternativ pravne znanosti *ampio sensu*.

Ključne besede: pravna znanost, pravna dogmatika, moralni razlogi, pojem prava, pojmovanja znanosti

1 O POJMU PRAVNE ZNANOSTI

Eno najpogostejših pravnoteoretskih razpravljanj je – vsaj v celinskoevropski pravni kulturi – tisto o metodi proučevanja prava. Mnoge od najpomembnejših prispevkov k pravni teoriji v dvajsetem stoletju je mogoče razumeti prav v tej luči. Če naštejemo le nekaj znanih primerov: Kelsen trdi, da je namen njegove čiste teorije v zagotovitvi metode, ki bo pravno znanost dvignila »na raven prave znanosti, in sicer humanistične znanosti.«[1] Ross navaja, da je »vodilna ideja v *On Law and Justice* na področju prava privesti empirična načela do njihovih skrajnih zaključkov«;[2] Hart pove, da se *Koncept prava* posveča »osvetljevanju splošnega okvira pravne misli«;[3] Alchourrónov in Bulyginov pojem normativnega sistema pa se kaže kot idealizacija tega, kar proučevalci pozitivnega prava počnejo.[4]

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1 Hans Kelsen, *Reine Rechtslehre (1934),* v angl. prevodu Stanleyja Paulsona: *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law,* Oxford, Clarendon, 1992, 1; v slov. prevodu Amalije Maček Mergole: *Čista teorija prava,* Ljubljana, Cankarjeva založba, 2005, 9.

2 Alf Ross, predgovor k *On Law and Justice*, London, Steven & Sons, 1957, ix.

3 Herbert L. A. Hart, *The Concept of Law*, Oxford, Clarendon, 1994; v slov. prevodu Jelke Kernev Štrajn: *Koncept prava*, Ljubljana, Krtina, 1994, 7.

4 Carlos Alchourrón, Eugenio Bulygin, *Introducción a la metodologia de las ciencias jurídicas y sociales*, Buenos Aires, Astrea, 1975, 25.

Vendar pa ni jasno, kaj mislimo, ko rečemo »pravna znanost«. Čeprav gre za razpravo, ki traja stoletja – ali pa ravno zaradi tega –, je dejstvo, da nimamo jasnega ali vsaj enotnega, skupnega izrazja.[5] V tem pogledu je posebno ponazorilno ogromno število zadetkov, ki jih knjižnični iskalniki prikažejo po vnosu izrazov, kot sta »znanost o pravu« ali »pravna dogmatika«.

Problem ni le v velikanski količini literature, ki je bila spisana na to temo, temveč predvsem v njeni raznovrstnosti. Pod oznakami, kot so »pravna znanost«, »pravna dogmatika« ali »pravna metoda«, najdemo študije in monografije, ki imajo pogosto le malo skupnega. Medtem ko se nekatere posvečajo pomenu in dometu različnih metodoloških smernic ali samemu pojmu metodologije,[6] so druge posvečene razjasnitvi pravnega pogleda na vprašanja veljavnosti prava (tj. na pogled od znotraj), njegovega razlaganja ali sodnega tehtanja.[7]

Da bi ob vsej raznovrstnosti naredili vsaj minimalen red, lahko to literaturo razdelimo v različne zvrsti: (i) dela, ki vsebujejo zgodovinske rekonstrukcije o različnih pravnoteoretskih gibanjih, ki so skušala odgovoriti na vprašanja, kot sta, kaj je pravo in kaj naj proučevalci prava počnejo;[8] (ii) študije, ki proučujejo teorije različnih avtorjev – navadno Kelsna, Harta in Rossa ter nekaterih drugih, odvisno od preferenc avtorja – o tem, kaj je ali kaj naj bi bila znanost o pravu;[9] (iii) številne študije, ki poleg razvrščanja zgodovinskih šol in avtorjev predstavljajo različne metodološke modele za proučevanje prava;[10] (iv) skupina del, ki se ukvarjajo s pogoji resničnosti razlagalnih trditev proučevalcev prava[11] ali z nekaterimi aktivnostmi, ki jih domnevno izvajajo proučevalci prava;[12] (v) končno je tu skupina del, ki se ukvarjajo z bolj specifičnimi vprašanji, na pri-

5 Carlos Santiago Nino, *Algunos modelos metodológicos de 'ciencia' jurídica*, Mexico, Fontamara, 1999, 9.

6 Geoffrey Samuel, *Epistemology and Method in Law*, Aldershot, Ashgate, 2003.

7 Aleksander Peczenik, *Scientia Juris*, Dordrecht, Springer, 2005; Karl Larenz, *Methodenlehre der Rechtswissenschaft* (1960); v špan. prevodu Marcelona Rodrígez Molinera: *Metodología de la ciencia del derecho*, Barcelona, Ariel, 2001. Primer ekstremne raznovrstnosti je delo Aleksandra Peczenika, Larsa Lindhala in Berta van Roermunda, *Theory of Legal Science*, Dordrecht, Synthesi Library, 1984.

8 Antonio Hernández Gil, *Metodologia del derecho*, Madrid, Editorial Revista de Derecho Privado, 1945; Enrique Zuleta Puceiro, *Paradigma dogmático y cienca del derecho*, Madrid, Editoriales de Derecho Reunidas, 1981. Za teoretsko analizo, utemeljeno na karakterizaciji rimskopravnega pravoslovja, glej Rolando Tamayo Salmerón, *Theory of Legal Science*, Mexico, UNAM, 1986.

9 Mario Jori, *Il metodo giuridico*, Milano, Giuffrè, 1976; Nino 1999 (op. 5); Santiago Sastre Ariza, *Ciencia jurídica positivista y neoconstitucionalismo*, Madrid, McGraw-Hill, 1999.

10 Roscoe Pound, *Interpretations of Legal History*, Gale, Making of Modern Law, 2010; Jerzy Wroblewski, *Contemporary Models of Legal Science*, Lodz, Polish Academy of Sciences, 1989.

11 Giovanni Tarello, *Diritto, enuncati, usi*, Bologna, Il Mulino, 1974; José Juan Moreso, *Legal Indeterminacy and Constitutional Interpretation*, Dordrecht, Kluwer, 1998.

12 Alchourrón in Bulygin 1975 (op. 4).

mer, v kakšnem smislu bi bilo proučevanje prava dogmatična,[13] normativna,[14] tehnična[15] ali celo znanstvena[16] panoga itd.

Da bi torej lahko obravnavali problem pravne znanosti, potrebujemo najprej definicijo, ki bo razjasnila, kaj mislimo, ko govorimo o »pravni znanosti« in podobnih izrazih. S tem ciljem v mislih se moramo znebiti nekaterih uvodnih pomot in večpomenskosti.

Prvi problem je v tem, da imamo več izrazov, ki se lahko nanašajo na isti predmet, pri čemer ni jasno, ali so rabljeni kot sopomenke: »znanost o pravu«, »pravna znanost«, »pravna dogmatika«, »pravno védenje«, »pravna doktrina«, »jurisprudenca«[17] (»jurisprudenčni stili«[18]) in »pravna metoda« (»pravna metodologija«).[19] V nadaljevanju bom uporabljal le prva dva izraza – »pravna znanost« in »pravna dogmatika« –, na način, ki ga bom poudaril ob koncu tega poglavja. V tem pogledu bom najprej analiziral izraz »pravna znanost« in razjasnil nekatera običajna zmotna pojmovanja.

Kot je vse od Ninovega dela[20] naprej dobro znano, je »pravna znanost« večpomenski izraz, in mu je torej mogoče pripisati več, deloma različnih pomenov, med temi pa jih je mnogo izrazito ohlapnih. Poglejmo zdaj vire te večpomenskosti.

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13 Carlos Santiago Nino, *Consideraciones sobre la dogmática jurídica*, Mexico, UNAM, 1989.

14 George Kalinowski, *Querelle de la science normative: (une contribution à la théorie de la science)*, Paris, R. Pichon and R. Durand-Auzias, 1969; Jesús Vega, *La idea de ciencia en el derecho*, Oviedo, Pentagram, 2000.

15 Manuel Atienza, Sobre la jurisprudencia como técnica social, *Doxa* (1986) 3, 491–498; Alfonso Ruiz Miguel, La dogmatica jurídica ¿ciencia o técnica?, v: Antonio Cabanillas Sánchez (ur.), *Estudios jurídicos en homenaje al profesor Luis Díez-Picazo*, Madrid, Civitas, 2002, 5649–5678.

16 Albert Calsamiglia, *Introducción a la ciencia jurídica*, Barcelona, Ariel, 1986.

17 Četudi je pravniška raba utrdila sopomenskost »prava« in »dejavnosti sodišč«, pa slovar španskega knjižnega jezika Španske kraljeve akademije RAE definira »pravo« najprej kot »znanost o pravu«.

18 V znanem eseju Karl Llewellyn analizira tri momente v ameriškem pravoslovju, ki jih je mogoče predstaviti kot prav toliko načinov za proučevanje vsebine prava. Medtem Pound napravlja znano razlikovanje med različnimi načini pristopanja k proučevanju prava. To razdelitev je, s prilagoditvami, ponovno predstavil Felix Cohen. Glej Karl Llewellyn, On the Good, the True, the Beautiful, in Law, *University of Chicago Law Review* (1941/1942) 9, 224–265; Juan Antonio Pérez Lledó, *El intrumentalismo jurídico americano*, Lima-Bogotá, Palestra-Temis, 2007, 1. pogl.; Pound 2010 (op. 10); Felix Cohen, Transcendental Non-Sense and the Functional Approach, v: *The Legal Conscience*, New Haven, Yale University Press, 1960, 33–76.

19 Za kratko, a natančno analizo različnih pomenov, ki jih lahko prevzamejo nekateri od teh izrazov, glej Giovanni Battista Ratti, *Sistema giuridico e sistemazione del diritto*, Torino, Giappichelli, 2008, 205 in nasl.

20 Nino 1989 (op. 13) in Nino 1999 (op. 5).

1.1 Večpomenskost pravne znanosti

i) Za izraz »pravna znanost« je značilna klasična dvopomenskost, saj lahko pomeni tako postopek kakor rezultat.[21] Izraz je namreč mogoče uporabiti za sklicevanje tako na sklop dejavnosti tistih, ki proučujejo pravo, kot na rezultate tovrstnih dejavnosti. Tu uporabljam izraz »pravna znanost« za sklicevanje tako na sklop dejavnosti, ki jih izvajajo (ali ki bi jih morali razvijati) proučevalci prava, kot na metodološke predpostavke, ki vodijo (ali ki bi morale voditi) te dejavnosti.

ii) Do druge večpomenskosti pride vsakič, ko kdo uporabi izraz »pravna znanost« za sklicevanje na sklop panog, ki imajo pravo na neki način za predmet svojega proučevanja. Poleg tega nekateri avtorji[22] uporabljajo to oznako v množinski obliki za sklicevanje na vse panoge, ki se ukvarjajo s pravom: znanost o pravu, pravno teorijo, jurisprudenco, pravno dogmatiko, sociologijo prava, pravno antropologijo, primerjalno pravo, pravno zgodovino itd.[23]

Poleg te, posebno vseobsegajoče rabe izraza »pravna znanost« sta v literaturi pogosti še dve drugi podobni napaki. Prva se pojavlja vsakič, ko je »pravna znanost« uporabljena tako za označevanje proučevanja pozitivnega prava (tj. določenega pravnega reda) kot tudi za študije, ki proučujejo strukturo, okvir ali temelje vseh (ali skupine) pravnih redov.[24] Seveda obstajajo dobri razlogi za to, da lahko domnevamo, da gre pri delu proučevalcev civilnega, kazenskega ali ustavnega prava na eni strani in pravnih teoretikov na drugi strani zgolj za razlike v stopnji splošnosti. Vseeno pa je zaradi pojmovne jasnosti treba ohraniti razlikovanje med tema dvema vrstama proučevanja.

Druga različica te večpomenskosti se pojavlja, ker je izraz »pravna znanost« v tem kontekstu uporabljen vsaj na dva načina: prvič, za nanašanje na (vse) panoge, ki proučujejo vsebino prava; drugič, za označevanje zgolj enega ali nekaj možnih načinov proučevanja prava, ki si zaslužijo oznako »znanstven«. Tu, kot poudarjam v nadaljevanju, uporabljam izraz »pravna znanost *ampio sensu*« (tj. v širšem pomenu) za označevanje vseh metod za določanje vsebine prava;

21 Nino 1989 (op. 13), 10-11; Tamayo Salmerón 1986 (op. 8), 102.

22 Luigi Ferrajoli, *Principia Iuris*, Roma, Laterza, 2007, 8, 21 in 39. Wroblewski včasih brez razlikovanja vse pravne panoge označuje za znanost o pravu. Prim. Wroblewski 1989 (op. 10), 14. Mario Jori prav tako razmišlja o možnosti poimenovanja celote védenja o pravu kot pravna znanost. Prim. Jori 1976 (op. 9), 4.

23 Drugi avtorji, na primer Calsamiglia, tega izraza ne uporabljajo za sklicevanje na vse te panoge. Vendar pa Calsamiglia navaja, da morajo proučevalci pozitivnega prava razviti vse te dejavnosti. Prim. Albert Calsamiglia, Ciencia jurídica, v: Ernesto Garzón Valdés, Francisco Laporta (ur.), *El derecho y la Justicia*, Madrid, Trotta, 1996, 18.

24 Kelsen je eden izmed avtorjev, ki je najbolj pripomogel k tej zmedi, saj ni popolnoma jasno, ali se čistost nanaša na teorijo, na znanost o pravu ali na oboje. Medtem pa, tako se zdi, Amselek ne razločuje med splošno teorijo prava in pravno znanostjo. Prim. Paul Amselek, El paradigma positivista de la dogmática jurídica, *Anuario de Derechos* (2006) 7, 33.

po drugi strani razumem kot »pravno znanost *stricto sensu*« (tj. v ožjem pomenu) metode, ki jih priporočajo tisti, ki menijo, da bi proučevalci prava morali zgolj opisovati vsebino prava (ne glede na to, ali lahko takšno dejavnost opredelimo kot znanstveno).

iii) Tretja večpomenskost je posledica nejasnosti pomena besede »znanost« v izrazu, ki ga analiziramo. Da bi razumeli problem, zadostuje že, da upoštevamo, kako dolgo je trajala razprava o pogojih, ki jim mora panoga zadostiti, da bi bila obravnavana kot znanstvena. Ta razprava na neki način še vedno poteka.[25]

Izraz »znanost« je, kot je poudaril Nino,[26] tudi močno pozitivno pomensko zaznamovan. To ne povzroča večpomenskosti v strogem smislu, so pa zato tisti, ki dejavnost opredeljujejo kot znanstveno, naravnani k preusmerjanju pozornosti na čustveno raven.[27] Večina poskusov definiranja pojma znanosti – po Ninu vedno – vodi v prepričevalne definicije, tj. definicije, ki se osredotočajo na čustveno vsebino izraza, skrivoma spreminjajoč spoznavno vsebino.

Še več, izraz »znanost« ni le večpomenski, temveč so ti pomeni, kot rečeno, tudi ohlapni.[28] To lahko trdimo zato, ker so, četudi izberemo enega od možnih pomenov izraza »znanost«, pogosti primeri, v katerih je dvomljivo, ali določena panoga izpolnjuje pogoje znanstvenosti.

iv) Četrta večpomenskost se nanaša na drugo sporno besedo: tj. pravo. Velik del teoretskih razprav v preteklega pol stoletja je v središče postavljalo pojem prava. Če je pomen »znanosti o pravu« ali »pravne znanosti« odvisen od pojma prava, ki ga predpostavljamo, se zdi, da nevarnost nesporazumov eksponentno naraste.

1.2 Pojmu »pravne znanosti« naproti

Da bi prišli do definicije pojma »pravne znanosti«, ki bi omogočala razjasnitev tega, kateri pomen mu je mogoče pripisati, lahko uberemo različne strategije. Najpomembnejša in tudi najpogostejša strategija je pojmovna analiza izraza »pravna znanost«, tj. razjasnjevanje tega, kaj govorci v določeni skupnosti mislijo in predpostavljajo, ko uporabljajo ta izraz. Seveda pri tem ne gre le za zbirko pomenov, temveč za način oblikovanja preprostejšega in bolj povédnega pojma tega, kaj počnemo, ko govorimo o »pravni znanosti«.

Vendar pa so te definicije »pravne znanosti« problematične, saj vse predpostavljajo določeni pojem prava oziroma temeljijo na njem. Da definicija »pravne znanosti« predpostavlja pojem prava, seveda ni sporno. Sporno pa je napraviti pojem »pravne znanosti« odvisen od določenega pojma prava ter iz takšnega

25 Calsamiglia 1986 (op. 16), 2. pogl.
26 Nino 1989 (op. 13), 13.
27 Tamayo Salmerón 1986 (op. 8), 120.
28 Nino 1989 (op. 13), 11.

opojmovanja izpeljati zaključke o tem, kaj proučevalci pozitivnega prava počnejo oziroma naj bi počeli. Na primer:

> Običajno je pravna dogmatika, vsaj v skandinavski tradiciji, opredeljena kot proučevanje vsebine pravnih pravil (norm) in njihove sistemske ureditve. Splošna izraza, ki se nanašata na ti nalogi, sta 'razlaganje' in 'sistemizacija'.[29]

> Kot znanost o pravu razumemo védenje, ki skuša opisati pozitivnopravne standarde in se je tradicionalno imenovalo pravna dogmatika ali jurisprudenca.[30]

Problem izvira iz napačnega razumevanja vloge pojmov v našem védenju,[31] v tem primeru vloge, ki jo imajo v našem pojmovanju »prava«. Gotovo je razčlenjevanje pojma prava – in katerega koli drugega pojma – uporabno orodje v pravni teoriji. Nevarno pa je misliti, da nam bo analiza ali pa definicija »pravne znanosti«, ki temelji na njej, povedala kaj o tem, kaj proučevalci prava počnejo, ali celo, kaj bi morali početi.[32]

Pretirano zaupanje v učinkovitost pojmovne analize vodi na tem področju v spregled dveh problemov. Prvi je ta, da bo – če je naš namen opisati, kaj proučevalci prava počnejo – definiranje »pravne znanosti« na podlagi določenega pojma prava povzročilo popačeno sliko dejavnosti proučevalcev prava, saj vsi ne uporabljajo ali predpostavljajo istega pojma prava, niti ne uporabljajo vsi istega pojma prava dosledno v vseh svojih dejavnostih. Drugič, če je cilj priskrbeti smernice za to, kaj naj bi proučevalci prava počeli, potem je nujno priskrbeti tudi normativne argumente, ne le definicije.[33]

Da bi opredelili predmet našega proučevanja, potrebujemo torej definicijo, ki se ne razlikuje od tistega, kar navadno mislimo, ko govorimo o »pravni znanosti«, a ki hkrati ne predpostavlja nobenega odgovora na vprašanja o tem, kaj proučevalci prava počnejo in kaj bi morali početi. Najboljša definicija »pravne znanosti«, ki jo v tem trenutku imamo, je tista, ki se neposredno nanaša na uporabljeno metodo (oziroma metodo, ki bi lahko bila ali bi morala biti upo-

29 Prim. Aulis Aarnio, *The Rational as Reasonable*, Dordrecht, Kluwer, 1987, 12.

30 Calsamiglia 1986 (op. 16), 12-13.

31 Pojmi so zgolj orodja, ki omogočajo prepoznavo izsekov resničnosti, ti pojmi pa so del teorij, v katere so zajeti tudi drugi elementi, ki skušajo razložiti določena dejstva ali dogodke. O pravnih pojmih glej Jaap C. Hage, Dietmar von der Pfordten (ur.), *Concepts in Law*, Dordrecht, Kluwer, 2009.

32 O omejitvah in odlikah pojmovne analize kot vodila teoretskopravne refleksije glej Pierluigi Chiassoni, The Simple and Sweet Virtues of Analysis. A Plea for Hart's Metaphilosophy of Law, *Revista Problema* (2011) 5, 53–80.

33 Zamisliti si je mogoče dve rešitvi tega problema: prva je v analizi pojma »pravna znanost« s klasičnimi orodji analitične filozofije, ne da bi se pri tem zavezali kateremu koli pojmu prava. Vendar si ne morem zamisliti, kako bi bilo to mogoče takrat, ko se predlaga definicija nekega izraza, v katerem bi bilo »pravo« (»pravni«) edini pridevnik. Drugič, mogoče je tudi priskrbeti tovrstno definicijo, ne da bi z njo vlekli kakšne zaključke na opisnem in normativnem področju teorije pravne znanosti. Vendar pa se lahko na takšni točki vprašamo, čemu želimo takšno definicijo »pravne znanosti« ali »znanosti o pravu«.

rabljena) in/ali na dejavnosti tistih, ki proučujejo pozitivno pravo (kazensko, civilno, ustavno itn.).

Ker pa pravne znanosti ne enačimo z vsemi dejavnostmi, ki se razvijajo v povezavi s pozitivnim pravom, je v našo definicijo nujno vpeljati dve nadaljnji omejitvi. Prva omogoča razlikovati pravno znanost od drugih panog, ki imajo pravo ravno tako za predmet svojega proučevanja: sociologija prava, pravna antropologija, pravna zgodovina, zakonoslovje. Čeprav tudi te panoge analizirajo pozitivno pravo, so med pravno znanostjo in drugimi panogami razlike tako z vidika metodologije kot z vidika ciljev raziskovanja. Če pustimo ob strani vprašanje metodologije, panoge, kakršni sta sociologija prava in pravna antropologija, sledijo drugačnemu cilju kot proučevalci civilnega, kazenskega ali upravnega prava: njihov cilj je določiti vsebino prava, tj. dognati, kakšna je pravna opredelitev določenega ravnanja v pravnem redu.[34]

Druga omejitev omogoča, da pravno znanost razlikujemo od dejavnosti pravnih praktikov (sodnikov, odvetnikov, uradnikov itd.) in da se hkrati znebimo še zadnje večpomenskosti glede uporabe izraza »pravna znanost«. Izrazi, kakršna sta »pravna metoda« ali »pravna metodologija«, so včasih uporabljeni kot sopomenke »pravne znanosti«. Problem je v tem, da se v običajni rabi »pravna metoda« ne nanaša zgolj na množico metodoloških direktiv, ki jih uporabljajo proučevalci pozitivnega prava, temveč tudi na tiste, ki jih uporabljajo pravni praktiki. Ta večpomenskost je še posebno nevarna, saj vodi k sklepu, da proučevalci pozitivnega prava uporabljajo ali naj bi uporabljali isto metodologijo kot pravni praktiki. Prav gotovo je sicer mogoče reči, da proučevalci pozitivnega prava uporabljajo ali naj bi uporabljali isto metodologijo kot pravni praktiki, a to terja empirični prikaz ali pa praktično utemeljitev.[35]

Na tej točki lahko »pravno znanost *ampio sensu*« definiramo kot dejavnost in/ali metodo, ki jo uporabljajo (ali ki bi jo lahko oziroma bi jo morali uporabljati) tisti, ki se ukvarjajo s spoznavanjem vsebine prava (zato: »proučevalci prava«), in kateri noben pravni red ne pripisuje kakšne pravne vrednosti. Gre torej za metodo in/ali dejavnosti tistih, ki ugotavljajo, katera pravna opredelitev v danem pravnem redu ustreza določenemu ravnanju in katerim ravnanjem pravni red ne pripisuje nobene pravne vrednosti.[36]

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34 To seveda ni edina dejavnost proučevalcev prava, je pa osrednja – do te mere, da so vse druge od nje odvisne.

35 Poleg tega je, ker se pravna znanost navadno ukvarja z opisovanjem standardov, splošnih primerov oziroma se vsaj pogosto ne nanaša na konkretna ravnanja, nenavadno trditi, da imata enako metodo. V najboljšem primeru je lahko sovpadanje metod delno, pri čemer bi bilo mogoče metodo proučevalcev pozitivnega prava zajeti z metodo pravnih praktikov. A je to vprašanje sporno tako z empiričnega kot z normativnega vidika. V tem pogledu glej Peczenik 2005 (op. 7), 2; Aarnio 1987 (op. 29), 15.

36 Z izrazom »pravna vrednost« mislim na priznanje, ki ga lahko, kot delu postopka ustvarjanja ali uporabe prava, pravni sistem podeli dokumentu ali množici izjav zaradi njegovega izvora.

Omeniti velja dve kritiki te definicije pravne znanosti. Prva pravi, da naj ta definicija ne bi bila zelo povédna, saj ne pove ničesar o tem, kaj proučevalci prava počnejo ali kakšno metodo uporabljajo. Druga kritika poudarja, da naj bi bila ta definicija radikalno večpomenska, saj normativna teorija pravne znanosti ponuja zelo različne metode za določanje vsebine prava.

Na ti kritiki je mogoče odgovoriti hkrati: osrednja odlika zgornje definicije je v tem, da zajema nekatere lastnosti, ki se navadno pripisujejo pravni znanosti – dejavnosti proučevalcev prava (proučevalcev civilnega, kazenskega, upravnega prava idr.) –, ne da bi skrivoma vpeljevala razmisleke o tem, kaj proučevalci prava počnejo ali kaj bi morali početi.

Poleg tega je ta definicija zadostna tudi za razlikovanje na eni strani med dejavnostmi tistih proučevalcev prava, ki proučujejo določene dele pravnega reda in dejavnostmi onih, ki jemljejo kot predmet svojega proučevanja pravo kot tako, in na drugi strani med njihovo dejavnostjo in dejavnostjo pravnih praktikov, kot so sodniki in odvetniki. Tako je torej mogoče opredeliti naš predmet proučevanja (tj. pravno znanost), ob tem pa pustiti odprto vprašanje, kakšne dejavnosti proučevalci prava dejansko opravljajo oziroma kaj lahko počnejo ali kaj bi morali početi.

Skupaj z definicijo pravne znanosti *ampio sensu* in z namenom predstaviti merilo, po katerem bi lahko razporedili različne doktrine (tj. pojmovanja pravne znanosti *ampio sensu*) o tem, kaj bi proučevalci prava morali početi, uvajam še dve drugi definiciji: definicijo »pravne znanosti *stricto sensu*« in definicijo »pravne dogmatike«. Kot »pravno znanost v ožjem pomenu« razumem metodo, ki jo priporočajo tisti, ki menijo, da bi se morali proučevalci prava posvečati zgolj opisovanju vsebine pozitivnega prava; s »pravno dogmatiko« pa mislim na metodo, ki jo predlagajo tisti, ki menijo, da se proučevalci prava ne bi smeli omejiti na opisovanje – oziroma sploh ne bi smeli opisovati – pozitivnega prava, temveč bi morali sodnikom predlagati rešitve težkih primerov.[37]

V tem smislu se na primer ne pritožba odvetnika (kaj šele katera koli odločitev sodišča) ne poročila svetovalnih teles, katerih izdaja je obvezna (četudi njihova vsebina ne bi bila obvezna), ne bi šteli kot pravna znanost *ampio sensu*. To bi potemtakem iz tega okvira (pravne znanosti ampio sensu) izločilo vse dokumente, v katerih bi pravni sistem prepoznal veljavo formalnega vira prava. Pri tem lahko opazimo, da na ta način dejstvo, ali neka izjava (ali množica izjav) je ali ni del pravne znanosti, postane dispozitivna lastnost, ki je odvisna od prava samega: če pravni sistem pripozna pravno vrednost – kot jo je rimsko pravo – besedilom proučevalcem prava, ta s tem niso več znanost o pravu, temveč postanejo pravni vir.

37 Ne gre za običajno rabo tega izraza. A dajem prednost tej uporabi izraza, saj se v več mogočih pomenih nanaša na sklop metod za oblikovanje pravnih odgovorov na primere nedoločnosti. Za razpravo o rabah tega izraza glej Álvaro Núñez Vaquero, Dogmática juridica, *Revista Eunomía* (2013) 4 (v tisku).

2 VZORI PRAVNE ZNANOSTI (*AMPIO SENSU*)

Ko imamo enkrat ustrezen pojmovni okvir, lahko proučimo nekaj metod spoznavanja vsebine prava. V nadaljevanju bom predstavil ključne značilnosti petih vzorov oz. modelov pravne znanosti *ampio sensu*: to so normativistični, realistični, argumentacijski, tehnološki in kritiški vzor.[38] A preden proučimo vsakega od teh vzorov, moramo na kratko obravnavati še en predhodni pomislek.

Ta pomislek zadeva naravo omenjenih vzorov. Ti imajo namreč, četudi so bili oblikovani z rabo različnih doktrin o tem, kaj bi proučevalci prava morali početi, hevristično vrednost v načinu, na katerega omogočajo razčlenitev različnih doktrin pravne znanosti *ampio sensu*. A so poleg tega ti vzori uporabni tudi pri proučevanju dejavnosti, ki jih proučevalci prava dejansko opravljajo. Vendar pa, ker gre za rekonstrukcije idealnih tipov, vanje ni mogoče umestiti vseh normativnih doktrin pravne znanosti in tudi dela vseh proučevalcev prava ne.[39]

2.1 Normativistična pravna znanost

Normativistični model je najbolj klasičen vzor v teoriji pravne znanosti. Po mnenju avtorjev, kot so Kelsen, Bobbio, Scarpelli, Jori, Bulygin ali Vernengo, bi se morali proučevalci prava posvečati opisovanju pravil, ki pripadajo pravnemu redu, in njihovi nadaljnji sistematizaciji. V tem pogledu bi bilo pravno znanost mogoče opisati kot normativno panogo, saj so predmet njenega proučevanja norme oz. pravila. Je tudi dejavnost, ki jo je mogoče definirati kot objektivno – četudi ji je, tako njeni zagovorniki, sporno pripisati pridevnik »znanstvena«. To pomeni, da imajo pogoji zatrdljivosti razlagalnih trditev (tj. trditev o vsebini prava, ki opisujejo, kakšne so pravne opredelitve posameznih ravnanj) objektivno naravo, saj izhajajo iz uporabe jasne množice pravil, katerih pogoji uporabe so urejeni in ravno tako jasni.

Četudi nikakor ni očitno, kaj pomeni »opisovati pravila«– kaj šele, kako določiti, katera je tista množica pravnih pravil, ki jih mora pravna znanost opisati –, večina zagovornikov normativističnega vzora pravne znanosti pod izrazom »opisovanje pravil« razume razlaganje normodajnih stavkov. To pomeni opisovanje pomenov, ki jih izražajo predhodno identificirane oblastne direktive.

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38 Bralca je treba opozoriti, da gre tu za nesimetrično klasifikacijo, saj – četudi je temeljno merilo, ki označuje vsakega od teh vzorov, doktrina o tem, kaj naj bi proučevalci prava počeli – vsaka od teh doktrin poudarja drugačna teoretična vprašanja (razlaganje in sistematizacijo prava, teorijo praktičnega sklepanja, stališče o vlogi intelektualcev v naši družbi itd.).

39 Tu mislim na primer na teorijo pravne znanosti Luigija Ferrajolija, ki je nekakšna mešanica normativističnega vzora (kolikor razume razlaganje prava kot v bistvu opisno dejavnost) in kritiškega vzora (v tem smislu, da verjame, da bi morali proučevalci prava predlagati, kako naj bi varovali temeljne pravice). Nadaljnji razvoj tega argumenta pridržujem za druge priložnosti.

Dejavnost opisovanja pravnih pravil lahko povzamemo v treh korakih: i) identifikacija norm (ali določil, ki takšne norme izražajo), ki vzpostavljajo pogoje veljavnosti (pripadanja) za druga pravila pravnega reda; ii) identifikacija in razlaganje oblastnih direktiv, ki izražajo norme, ki naj bi pripadale pravnemu redu; iii) preverba veljavnosti norm, izraženih s takšnimi oblastnimi direktivami, tj. preverba, ali izpolnjujejo merila pripadanja pravnemu redu.

Pravno razlaganje ima v normativističnem vzoru pravne znanosti ključno vlogo, saj je vsako oblastno direktivo o veljavnem pravu – ki zatrjuje pripadanje pravila pravnemu redu – sestavljeno iz dveh trditev: razlagalne trditve o normi, izraženi s pravnim določilom (oblastno direktivo), in trditve o veljavnosti takšne norme.[40] Treba je poudariti, da razlaganje ni le nujni del opisovanja norm, ki so z oblastnimi direktivami izražene; poleg tega je razlaganje nujni del tudi pri ugotavljanju, ali je norma veljavna, saj moramo za takšno ugotovitev razložiti tiste oblastne direktive, ki izražajo pripadnostna merila pravnega reda. Če upoštevamo dejstvo, da so v večini pravnih redov ta merila določena v ustavnih besedilih in so običajno ohlapna in večpomenska, to vprašanje postane še kako pomembno.

Kaj pa po mnenju zagovornikov normativističnega vzora »razlaganje« obsega? Za večino omenjenih avtorjev[41] »razlaganje« pomeni, da oblastna določila uporabljamo v skladu s konvencionalnimi jezikovnimi pravili[42] oz. da zakonska določila (tj. *dejanske izjave v prostoru in času*; angl. *token-statements*) kot posamične primere jezikovne rabe podvržemo množici jezikovnih pravil zakonodajalca (tj. množici *tipskih* izjav). Četudi težki primeri obstajajo – povečini zaradi inherentne ohlapnosti naravnega jezika[43] – in čeprav mora razlagalec včasih odločiti, kateri pomen pripisati zakonskemu določilu, je zakonodajalčev jezik v večini primerov jasen. Skratka, razlagati pomeni opisovati pomen oblastnih direktiv.

Zagovorniki normativističnega vzora pravne znanosti seveda zagovarjajo različna razlagalna stališča, zato obstajajo nesoglasja glede tega, kateri razlagalni kanon naj prevlada: dobesedna razlaga, sistematična razlaga, namenska razlaga itd. Vseeno pa se zdi, da so ti avtorji udeleženi v vsaj neke vrste zmernem

40 Tecla Mazzarese, 'Norm-proposition': Epistemic and Semantic Queries, *Rechtstheorie* (1991) 22, 39–70.

41 Razen seveda za Kelsna. Za jedrnato analizo Kelsnove teorije razlaganja napotujem na svojo uvodno študijo k tej teoriji. Álvaro Núñez Vaquero, Sobre la interpretación, *Eunomia* (2011) 1, 173–184.

42 Eugenio Bulygin, Sull'interpretazione, *Analisi e Diritto* 1992, 11–30; Luigi Ferrajoli, La semantica della teoria del diritto, v: Uberto Scarpelli (ur.), *La teoria generale del diritto. Problemi e tendenze attuali. Studi dedicati a Norberto Bobbio*, Milano, Edizioni di Comunità, 1983.

43 Timothy Endicott, *Vagueness in Law*, Oxford, Oxford University Press, 2001; Genaro Carrió, *Notas sobre el derecho y el lenguaje*, Buenos Aires, Abeledo-Perrot, 2011; Jerzy Wroblewski, *Sentido y hecho en el derecho*, Mexico, Fontamara, 2001.

deskriptivizmu[44] – ne le zato, ker pravo, če med pravnimi določili in z njimi izraženimi normami ne bi običajno bilo nedvoumnega ujemanja, ne bi moglo uresničevati svoje temeljne funkcije (tj. usmerjati ravnanje),[45] temveč predvsem zato, ker dejavnosti opisovanja pravil ne bi mogli opredeliti kot objektivne (in še manj kot znanstvene) dejavnosti.

Vendar pa po mnenju zagovornikov normativistične pravne znanosti opisovanje pravil ni edina dejavnost, ki bi jo proučevalci prava morali razvijati. To, prvo fazo bi morala spremljati druga faza v obliki sistematizacije.[46] Kot »sistematizacijo« pa je mogoče razumeti vsaj tri različne tipe dejavnosti.

a) Izraz »sistematizacija« pomeni pojasnjevanje vseh logičnih posledic pravnega reda in preoblikovanje normativne baze reda z uporabo manjšega števila normodajnih stavkov.[47] Sistematizirati torej pomeni, prvič, izpeljati vse logične posledice normativnega reda, in sicer izključno iz izvornih določil reda in z uporabo v sistemu sprejetih pravil preoblikovanja; in drugič, izraziti to množico pravil z manjšim naborom pravnih določil.

b) Z izrazom »sistematizacija« je mogoče razumeti tudi načrtno razgrinjanje redu pripadajočih norm, njihovo razvrščanje glede na vsebino in izgradnjo pojmovnih kategorij, ki omogočajo njihovo razumevanje in lažjo uporabo. To pomeni razvijanje pravnih institutov (pogodb, civilnih deliktov, skupinskih tožb idr.), ki jih je mogoče uporabiti za ureditev, predstavitev in sklicevanje na množico norm.

c) Končno z izrazom »sistematizacija« mislimo na iskanje rešitev za logične pomanjkljivosti pravnega reda, tj. razreševanje protislovij in zapolnjevanje praznin. A je vendarle sporno, ali pravna znanost mora razreševati te probleme ali pa se morajo, ravno nasprotno, proučevalci prava omejiti na razkrivanje tovrstnih hib, saj bi se, če bi bila protislovja razrešena in praznine zapolnjene, spremenil tudi predmet proučevanja. Vendar je mogoče trditi, da proučevalci prava morajo opravljati tovrstne dejavnosti, ko te zajemajo uporabo jasnih pravil pravnega reda, katerih pogoji uporabe so ravno tako jasni.[48]

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44 Tj. stališču, ki trdi, da je razlaganje v vseh ali vsaj v večini primerov spoznavna dejavnost. Glej Moreso 1998 (op. 11), 156–160.

45 Joseph Raz, Intention in Interpretation, v: Robert George (ur.), *The Autonomy of Law. Essays on Legal Positivism*, Oxford, Oxford University Press, 1996, 249–286.

46 Za natančnejšo analizo pojma regulatornega sistema glej Ratti 2008 (op. 19) in Jorge Rodríguez, *Introducción a la lógica de los sistemas normativos*, Madrid, CEPC, 2002.

47 Eugenio Bulygin, Legal Dogmatics and Systematization of Law, *Rechtsteorie* (1993) 10, 193–210.

48 Poudarimo, da bi bila normativistična pravna znanost, če bi naloge pravne znanosti vključevale razreševanje logičnih pomanjkljivosti sistema, prav tako normativna panoga, saj bi se pravila s tem uporabljala (in ne le opisovala).

2.2 Realistična pravna znanost

Realistični vzor pravne znanosti ima v več svojih različicah izrazito kritično noto. Da bi ustrezno razumeli domet in pomen realističnega vzora pravne znanosti, moramo najprej omeniti kritike, ki so jih avtorji, kot so Holmes, Ross ali Guastini, naperili zoper normativistični vzor. Čeprav se predmet kritik različnih oblik realizma razlikuje, je vseeno mogoče prepoznati dve skupni kritik: eno ontološke in drugo metodološke narave.

Ontološka kritika temelji na skrajni empiristični epistemologiji (tj. na redukcionizmu), s katero soglaša večina zagovornikov tega vzora. Skladno s to kritiko bi bila normativistična pravna znanost, če obstajajo zgolj entitete zaznavne resničnosti, nesmiselna: v svetu namreč ne obstaja nič takega, kot so norme oz. pravila, ki so predmet opisovanja normativistov. Če pravna znanost torej želi biti znanstvena panoga, se morajo njene trditve nanašati na entitete empiričnega sveta. Tako zaradi imperativa preobrazbe pravne znanosti v resnično znanstveno panogo predmet njenega proučevanja ne more biti drugo kot sodne odločitve[49] (v najširšem pomenu) in občutki pravnikov v praksi, da je kaj zavezujoče.

Metodološka kritika črpa iz trditve o nedoločnosti prava. »Trditev o nedoločnosti prava« moramo razumeti kot trditev, po kateri je mogoče isti spor rešiti na več izključujočih se, a enako utemeljenih načinov.[50] To pomeni, da nam, vsaj v nekaterih primerih, množica pravnih razlogov omogoča isto ravnanje pravno opredeliti na med seboj neskladne načine. Če pravna določila torej lahko utemeljijo več kot eno rešitev konkretnega primera, to pomeni, da vzroki ali razlogi, ki sodnike vodijo k izboru ene od več možnih pravnih rešitev, niso pravne, temveč neke druge narave: politične, psihološke, ekonomske itd.[51]

Viri nedoločnosti prava so različni: ohlapnost, uklonljivost, logične pomanjkljivosti v sistemu itd. Vendar pa realisti tradicionalno poudarjajo,[52] da je vir nedoločnosti prava predvsem tudi večpomenskost zakonodajalčevih direktiv

49 Martín Diego Farrell, *Hacia un concepto empírico de validez*, Buenos Aires, Astrea, 1972.

50 Brian Leiter, Legal Indeterminacy, *Legal Theory* (1995) 1, 481–492. Za razpravo o nedoločnosti prava v delu Briana Leiterja glej Álvaro Núñez Vaquero, El realismo jurídico de Brian Leiter, *Diritto e Questioni Pubbliche* (2011) 10, 438–456.

51 V luči te trditve je treba razumeti določene izjave, kot so: »Prerokbe o tem, kaj bodo dejansko storila sodišča, in nič kaj bolj domišljavega, so tisto, na kar mislim s 'pravom'.« (Oliver Wendell Holmes, ml., The Path of the Law, Harvard Law Review 5 (1897) 110, 991–1009, 994). Ali: »Pravila so uporabna, kolikor pomagajo razumeti ali predvideti, kaj bodo sodniki storili oziroma kolikor pomagajo pripraviti sodnike, da nekaj storijo. To je njihov pomen. To je tudi ves njihov pomen, razen če mislimo, da so igrače.« (Karl Llewellyn, The Bramble Bush, New York, Oceana, 1930, 5.)

52 Richard Posner, *How Judges Think*, Harvard University Press, 2008; Max Radin, Statutory Interpretation, *Harvard Law Review* (1929/1930) 43, 863–885.

(in sodnih precedensov[53]). Kot večpomenskost moramo razumeti možnost razlaganja istih oblastnih direktiv na podlagi različnih kanonov razlaganja, ki so uporabljivi v pravni skupnosti, in odsotnost trajnih metapravnih meril, po katerih bi lahko ugotovili, katera razlagalna merila naj se uporabijo oziroma katere norme iz oblastnih direktiv izhajajo.[54] Z drugimi besedami: na podlagi različnih razlagalnih tehnik je mogoče iz istih oblastnih direktiv izpeljati različne norme, vse enako legitimne, pri čemer pa pravni red z ničimer ne nakaže, katero od razlagalnih tehnik moramo uporabiti.

Ta trditev o nedoločnosti vodi v skrajno kritiko normativističnega vzora pravne znanosti: normativisti trdijo, da opisujejo vsebino prava, a v resnici privzemajo vrednostne sodbe, ki preprečujejo, da bi njihove normativne trditve opredelili kot opisne. Tako normativistične pravne znanosti ni mogoče opredeliti za opisno ali objektivno dejavnost, saj so njene normativne trditve pogojene s pravno-etičnimi nagnjenji (v širokem pomenu besede) tistih, ki jih podajajo.

Najbolj znani vzor realistične pravne znanosti v celinskopravni kulturi je gotovo model Alfa Rossa. Po njegovem mnenju bi morale propozicije pravne znanosti vsebovati napovedi o tem, kako bodo sodniki odločali v bodočih sporih. Ross je, kot je dobro znano, izpeljal združitev dveh tipov realizma – vedenjskega (po Holmesu) in psihološkega (po Olivecroni) – z zagovarjanjem, da obstoječe pravo sestavlja množica norm, ki jih sodniki občutijo kot zavezujoče (veljavne) in bi jih bili pripravljeni uporabiti (če obstaja dejanje, ki je opisano v proreku norme).[55]

Rossov model gotovo ni edini dostopni vzor realistične pravne znanosti, najbrž ni niti najbolj zadovoljiv. Zagovorniki realističnega vzora pravne znanosti predlagajo različne metode oblikovanja napovedi, pri čemer je očitna njihova raznovrstnost: od proučevanja *ratia* sodnih odločitev, ki je bilo značilno za ameriške realiste, do nedavnih študij Spaetha in Segala, Richarda Posnerja ali novega pravnega realizma pa do *sociologije v pravu* Giovannija Tarella.

Če je trditev o nedoločnosti pravilna – in pravna določila ne določajo, kako naj sodniki razrešijo posamezne spore –, potem se zdi, da proučevalci prava po

53 Hermann Oliphant, A Return to Stare Decisis, *American Bar Association Journal* (1928) 14, 71–162; Karl Llewellyn, Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes are to Be Construed, *Vanderbilt Law Review* 3 (1949/1950), 395–406.

54 Riccardo Guastini, *Nuovi studi sull'interpretazione*, Rim, Aracne, 2009. V slov. prevodu imamo iz te knjige Riccardo Guastini, Uklonljivost, vrednostne praznine in razlaganje, *Revus* (2011) 14.

55 Rossov model je sporen iz dveh razlogov: prvič, ker, četudi Ross nakaže, kateri bi bil osrednji dejavnik sodnih odločitev (ideologija pravnih virov), se ta dejavnik ne izraža v metodi za oblikovanje predvidevanj; drugič, ker Rossova metoda predvideva uporabo pravnih določil, ne pa samih pravil ali sodnih odločitev. Problem je v tem, da če imajo ameriški realisti prav in obstaja razlika med tem, kar sodniki trdijo, da počnejo, in tem, kar dejansko počnejo, potem je predvidevanje sodniške uporabe pravnih določil docela nezanimivo.

realističnem vzoru plujejo proti neke vrste interdisciplinarnosti oziroma sodelovanju tako z zgodovinarji pravne in politične misli kot z ekonomisti, sociologi in psihologi. To pa zato, ker je, če so sodne odločitve zaznamovane s političnimi in ekonomskimi dejavniki, vloga pravne znanosti pa je prav v predvidevanju bodočih sodnih odločitev, nujno dognati, kako ti dejavniki vplivajo na sodne odločitve ali jih določajo.[56]

2.3 Argumentacijska pravna dogmatika

Razprava o znanstveni naravi pravne znanosti je v zgodovini teorije o pravni znanosti gotovo zavzela veliko prostora. Vendar pa je v zadnjih desetletjih to razpravo deloma zamenjala razprava metateoretične in normativne narave. Na kratko: po mnenju avtorjev, kot so Aarnio, Alexy, Atienza, Nino, Peczenik ali Zagrebelsky, proučevalci prava ne le opisujejo vsebino pozitivnega prava – niti ne bi smeli početi zgolj tega, temveč morajo tudi predlagati rešitve težkih primerov, za katere pravo ne daje enega samega pravilnega odgovora, vsaj ne očitno.

Zagovorniki argumentacijskega vzora pravne dogmatike radikalno kritizirajo vzore pravne znanosti v ožjem pomenu (*stricto sensu*): pravna znanost v ožjem pomenu bodisi ni zgolj opisna (in je torej ideološka) bodisi je obsojena na to, da je s praktičnega vidika popolnoma nepomembna.[57] Po njihovem mnenju proučevalci prava tradicionalno opravljajo pomembno družbeno vlogo, ki ni v celoti opisovalna, a ki je hkrati – ne zaradi tega razloga – arbitrarna ali iracionalna in je ni mogoče razložiti. Če sledimo vzorom pravne znanosti v ožjem pomenu (*stricto sensu*).[58] V Ninovih besedah se »znajdemo v nekoliko absurdni situaciji, ko moramo razpravljati o očitnih in celo banalnih zadevah, kot na primer, da dejavnost pravnikov opravlja tudi druge funkcije in ne le tistih, ki jih dopuščajo ti vzori [pravne znanosti v ožjem pomenu].«[59]

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56 Nekateri so zahtevo, da bi se pravna znanost morala ukvarjati z napovedmi sodnih odločitev, vzeli resno, celo resneje kot ameriški realisti sami. Glej Jeffrey Segal, Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, Cambridge, Massachusetts, Cambridge University Press, 2002; Frank Cross, Political Science and the New Legal Realism, *Northwestern University Law Review* 92 (1997/1998) 1, 251–326.

57 Manuel Atienza in Juan Ruiz Manero, Dejemos atrás el positivismo jurídico, *Isonomia* (2007) 27, 7–28. Za poglede zagovornika argumentacijskega vzora v slovenščini glej Manuel Atienza, Argumentiranje in ustava, *Revus* (2009) 9.

58 Ta kritika je resen izziv vsem doktrinam pravne znanosti v ožjem smislu, ne pa tudi nujno za pozitivistično pojmovanje prava. Ne da bi zapadli v protislovje, je namreč mogoče trditi, da prepoznavanje vsebine prava sicer ne terja nujno zatekanja v moralne premisleke (gre za trditev o neobstoju ugotovljive povezanosti med pravom in moralo), da pa bi proučevalci prava vendarle morali predlagati rešitve primerov, v katerih je pravo nedoločno. Prim. Nino 1999 (op. 5), 13.

59 Nino 1999 (op. 5), 13. Podobne besede je mogoče najti pri avtorjih, kot so Amselek, Atienza, Zagrebelsky, Dworkin, Alexy idr.

Po mnenju zagovornikov argumentacijskega vzora postane delo proučevalcev prava zanimivo in relevantno prav takrat, ko zapustijo raven opisovanja, četudi jim ne uspe prepoznati enega samega pravilnega odgovora.[60] To pa seveda ne pomeni, da naj bi proučevalci prava predlagali rešitve težkih primerov na podlagi lastnih preferenc ali moralnih nagnjenj. To dejavnost bi prej morala voditi naslednja dva dejavnika: prvič je to množica pravnih in/ali moralnih vrednot in načel, ki so pozitivizirana v pravnem redu in/ali usmerjajo družbeno prakso, imenovano »pravo«;[61] drugič, proučevalci prava morajo z dajanjem podpornih razlogov utemeljiti vsako od ponujenih rešitev težkih primerov, tj. ponuditi morajo razloge v podporo svojim rešitvam težkih primerov.

Po mnenju večine teh avtorjev naj bi bilo pravno argumentiranje – kolikor utemeljuje neko izhodiščno trditev z načeli in vrednotami – vrsta (ali poseben primer) praktičnega sklepanja.[62] To pomeni, da naj bi razlike, ki se sicer pojavljajo med zagovorniki argumentacijskega vzora glede vprašanja pravnega in moralnega sklepanja, ne bile relevantne za ugotavljanje, ali je neka izhodiščna trditev z argumenti utemeljena.

Med zagovorniki argumentacijskega vzora je mogoče razločiti med tremi razsežnostmi pravnega argumentiranja. Skrajno strnjeno: prvi pristop se ukvarja z logično veljavnostjo argumentov, drugi z njihovo prepričevalno močjo, medtem ko se tretji izrecno ukvarja z vsebinsko verodostojnostjo argumentov. Posebnost te vsebinske razsežnosti pravnega argumentiranja je v tem, da je mogoče vnaprej ugotoviti, katere pogoje mora izhodiščna trditev argumenta izpolnjevati, da bi bila končno razumljena kot najboljša možna pravna rešitev. To pomeni, da iskanje najboljšega odgovora na pravne probleme ni nekaj, kar bi bilo mogoče skrčiti na uporabo množice pravil. Iskanje najboljšega možnega odgovora je dejavnost, ki jo vodi model racionalnosti (in objektivnosti[63]), drugačen od tistega, ki usmerja naše teoretične in spoznavne dejavnosti: gre za *phronesis* ali praktično sklepanje.

Argumentacijska metoda za vzor postavlja proučevalca prava, ki ponuja rešitve pravnih sporov na podoben način kot moralni filozofi ponujajo rešitve moralnih ali etičnopolitičnih problemov: z utemeljevanjem svojih rešitev na podlagi pravil, načel in vrednot. Tovrstna praktična racionalnost, ki je podlaga argumentacijskega vzora (značilnega za deontološko moralo), se zrcali v različnih vodilih, o katerih razpravlja moralna filozofija: to so reflektivno ravnovesje,[64]

60 Aulis Aarnio, *Derecho, racionalidad y comunicación social*, Mexico, Fontamara, 1995.

61 Mislim seveda na Ronald Dworkin, *Law's Empire*, Cambridge, Massachusetts, Belknap Press of Harvard University Press, 1986.

62 Za teorijo posebnih primerov glej Robert Alexy, *The Special Cases Thesis*, Ratio Juris 12 (1999) 4, 374–384.

63 Brian Leiter, *Naturalizing Jurisprudence*, Oxford, Oxford University Press, 2007, 7. pogl.

64 Giorgio Maniacci, *Razionalità ed equilibrio riflessivo nell'argomentazione giudiziale*, Torino, Giappichelli, 2008.

skladnost,[65] celostne razlage norm v njihovi najboljši luči,[66] razprave pred idealnim racionalnim avditorijem[67] idr. Vendar pa je zaradi njegovega poudarjanja v delih Roberta Alexyja[68] najpogostejše vodilo med zagovorniki argumentacijskega vzora tehtanje načel: metoda za uporabo načel in razreševanje njihovih medsebojnih konfliktov.[69]

A iz dejstva, da je pravno argumentiranje poseben primer praktičnega sklepanja, ne sledi, da se pravno argumenitiranje izgublja v moralnem sklepanju. Razprava o najboljši pravni rešitvi namreč lahko obrodi ne najboljši moralni odgovor, temveč *drugi najboljši moralni odgovor*: tj. moralno utemeljen odgovor, ki pa z etičnega vidika ni optimalen, saj pravno argumentiranje poleg moralnih načel in vrednot vodijo tudi specifično pravna načela in vrednote, kot so pravna predvidljivost, stanovitnost skozi zgodovino institucij ipd.

2.4 Realistično-tehnološka pravna dogmatika

Del literature o pravnem realizmu, posebno ameriškem, je posvečen vzoru pravne dogmatike, ki so ga razvili avtorji, povezani s pravnim realizmom, kot so William Douglas, Karl Llewellyn in Felix Cohen. Gre za metodo – bolj prisotno v praksi kot v teoriji –, ki se ne uporablja za napovedi o obstoječem pravu, temveč za predlaganje rešitev težkih primerov (konstruktivna metoda). Tu napravim rekonstrukcijo takšnega vzora pravnega dogmatizma, ki temelji na pogledih omenjenih avtorjev in preostalih ameriških ter drugih realistov (kot so Michel Troper, Vilhelm Lundstedt ali Giovanni Tarello), a tudi predhodnikov in dedičev realizma, kot so Rudolf von Jhering, Richard Posner, Brian Leiter ali Hans Albert.

Da bi razumeli, kaj tehnološki vzor pravne dogmatike vključuje, je treba pokazati na njegovo povezavo z realističnim vzorom pravne znanosti: to povezavo predstavlja trditev o nedoločnosti prava. Gre za trditev, da je z oblastnimi direktivami mogoče isto ravnanje utemeljeno opredeliti na medsebojno izključujoče se načine, zaradi česar se je pri razreševanju sporov treba zateči k zunajpravnim premislekom.

Zagovorniki tehnološkega vzora pa v povezavi s trditvijo o nedoločnosti prava naredijo še korak naprej. Po njihovem mnenju deontološki model praktične racionalnosti – tisti, ki je podstat argumentacijski dogmatiki – nudi

65 Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford, Clarendon Press, 1994; Juan Manuel Pérez Bermejo, *Coherencia y sistema normativo*, Madrid, Marcial Pons, 2006.

66 Dworkin 1986 (op. 61), 45 in nasl.

67 Aarnio 1987 (op. 29), 221 in nasl.

68 Robert Alexy, *A Theory of Legal Argumentation*, Oxford, Oxford University Press, 2009.

69 Carlos Bernal Pulido, *El principio de proporcionalidad y los derechos fundamentales*, Madrid, CEPC, 2003; David Martínez Zorrilla, *Conflictos constitucionales, ponderación e indeterminación normativa*, Madrid, Marcial Pons, 2007.

orodja, ki na podlagi istih pravil ter moralnih in pravnih načel omogočajo utemeljitev izključujočih se odločitev.[70] To pomeni, da pravo ni le nedoločno ali da orodja, ki jih proučevalci prava uporabljajo za razlaganje prava, povzročajo neskladja, temveč, da zagovorniki tega vzora predstavljajo skeptično stališče o praktičnem sklepanju, pojmovno neodvisno od teorij o tem, kakšni so naši pravni redi.

Problem ni le v tem, da objektivno pravilnih vrednot ni (zunanji skepticizem), temveč tudi v tem, da celo če bi se lahko strinjali glede tega, katere vrednote so pravilne, orodja deontološkega moralnega diskurza, ki temelji na pravilih, načelih in vrednotah, dopuščajo utemeljitev medsebojno izključujočih se pravnih odločitev:[71] katero dejanje naj bi bolj spoštovalo naša moralna načela, je odvisno od teže oziroma vrednosti, ki jo vsakemu od teh načelo pripisujejo proučevalci prava (notranji skepticizem). Orodja, kot so reflektivno ravnovesje, komunikacijski dialog ali tehtanje načel, ne zmanjšujejo negotovosti do te mere, da bi služili razumskemu razreševanju sporov med pravili, načeli in moralnimi standardi. Nasprotno, takšna orodja dajejo le videz razumskosti odločitvam, utemeljenim na goli intuiciji ali predsodkih, izpolnjujoč zgolj ideološko funkcijo. Z drugimi besedami: če ni mogoče prepoznati zadostnih pogojev, da bi neko ravnanje šteli za pravilno, potem se proučevalci prava o nudenju rešitev za težke primere lahko zanašajo le na povsem intuitivne, če ne celo idiosinkratične premisleke.

To ne pomeni, da so zagovorniki tehnološkega vzora radikalno skeptični do praktičnega sklepanja – vsaj ne v vseh možnih pomenih izraza »skepticizem«.[72] Čeprav je večina teh avtorjev neobjektivistov (zanikajo obstoj končnega merila moralne pravilnosti), prav ti avtorji takrat, kadar v svojih pravnodogmatskih delih ponujajo rešitve težkih primerov, uporabljajo praktične argumente, ki se zdijo racionalni, a v drugačnem smislu te besede (tj. v odnosu do modela praktične racionalnosti, ki skuša utemeljiti praktične odločitve na podlagi norm, moralnih in/ali pravnih vrednot in načel).

Tem avtorjem je bilo glede moralnih vprašanj pogosto pripisano ohlapno partikularistično pojmovanje, tj. pogled, da nekaj, kar se v nekem primeru šteje kot moralni razlog, morda ni v ničemer relevantno v drugem, podobnem

70 Leiter 2007 (op. 63), 8. poglavje; Brian Leiter, In Praise of Realism (and against nonsense jurisprudence), *The Georgetown Law Journal* 100 (2012) 3, 865–893; Richard Posner, The Problematics of Moral and Legal Theory, *Harvard Law Review* (1997/1998) 111, 1637–1717.

71 Za kratko, a učinkovito predstavitev pluralizma vrednot napotujem na Mauro Barberis, *Etica per giuristi*, Roma, Laterza, 2006, pogl. V.

72 O različnih vrstah skepticizma v metaetiki glej Pierluigi Chiassoni, Tre esercizi per una critica dell'oggetivisimo morale, *Analisi e Diritto* 2009; José Juan Moreso, El reino de los derechos y la objetividad de la moral, v: *Constitución: modelo para armar*, Madrid, Marcial Pons, 2009, 69–94.

primeru.[73] Vendar pa postane pogled teh avtorjev mnogo bolj verjeten,[74] če rekonstruiramo model praktične racionalnosti, ki je podlaga njihovega dela, kakršen je na primer model konsekvencialistične etike. Z drugimi besedami, etike – njena najbolj znana smer je utilitarizem –, ki zagovarja, da je edino merilo moralne opredelitve dejanja to, ali je primerno za dosego najboljšega možnega stanja zadev oz. k njemu prispeva.[75] Tako trditve, ki moralno opredelijo ravnanja, ker posredno obravnavajo dejstva in vzročne zveze, pridobijo resničnostno vrednost.

To ne pomeni, da bi proučevalci prava morali iskati nekakšen smisel v pravu ali zakonodajalčev namen, ali da bo neke vrste sociološka, psihološka ali ekonomska raziskava omogočila odkritje najboljšega stanja stvari. Namesto tega tehnološki vzor pravne dogmatike terja, da proučevalci prava izberejo neko stanje stvari kot najboljše – in to izbiro jasno izrazijo – ter ponudijo dokaze v podporo določene pravne rešitve, primerne za dosego tega stanja stvari.

Seveda še vedno ostaja precejšnje polje diskrecije, saj po mnenju zagovornikov tehnološkega vzora ni objektivnih meril za določitev najboljšega stanja stvari. Vendar pa ima tovrstno praktično sklepanje vseeno vsaj tri prednosti: prvič, naše najboljše védenje o svetu (tisto znanstveno) postavi v jedro praktičnega sklepanja; drugič, praktični diskurz postane bolj obvladljiv, saj imajo končno izreki, ki moralno opredeljujejo ravnanja, resničnostno vrednost; in tretjič, pojmovanje praktičnega uma s tem implicira, da bo izbira katerega koli ravnanja bolj racionalna, ker je to izbrano na podlagi objektivnih meril.[76]

Poleg tega, da predlaga rešitve težkih primerov, tehnološka dogmatika namenja posebno pozornost preoblikovanju pravnih pojmov. Zagovorniki tehnološkega vzora, prvič, predlagajo predvsem, da se vsak pravni pojem zvede na množico empiričnih dejstev, na katera se pojem nanaša,[77] pri čemer naj se iz pravnega jezika izloči vse tiste pojme, ki se nanašajo na neobstoječe entitete in

73 Jonathan Dancy, Moral Particularism, v: *Stanford Encyclopedia of Philosophy*. URL: http://plato.stanford.edu (6. oktober 2012). To povezavo med pravnim realizmom in etičnim partikularizmom je med drugimi predlagal Robert Summers. Glej Robert Summers, *Instrumentalism and American Legal Theory*, Ithaca, New York, Cornell University Press, 1982.

74 Ne gre zgolj za vprašanje verjetnosti, temveč za vprašanje pravilne zgodovinske rekonstrukcije. Glej npr. Cohen 1960 (op. 18); Vilhelm Lundstedt, *Legal Thinking Revised*, Stockholm, Almqvist & Wiksell, 1956; Karl Llewellyn, *The Theory of Rules*, Chicago, University of Chicago Press, 2011, pogl. VI; Giovanni Tarello, *Il realismo giuridico americano*, Milano, Giuffrè, 1962, 199 in nasl.; Giovanni Tarello, La semantica del neustico, v: Tarello 1974 (op. 11).

75 Za kratek, a natančen uvod v etični konsekvencializem glej Juan Carlos Bayón, Causalidad, consecuencialismo y deontologicismo, *Doxa* (1989) 6, 461–500.

76 V tem smislu glej Uvod Maria G. Losana v: Rudolf von Jhering, *Der Zweck Im Recht* (1877); v ital. prevodu Mario G. Losano, *Lo scopo nel dritto*, Torino, Einaudi, 1972.

77 Alf Ross, Tû-Tû, *Harvard Law Review* (1956-1957) 70, 812–825; v slov. prevodu Andreja Kristana: Tû-Tû, *Revus* (2008) 7, 89–100.

dejstva, ki jih ni mogoče potrditi;[78] drugič, priporočajo drobitev tradicionalnih pravnih pojmov v različne pojme manjšega obsega, ki se nanašajo na tipe primerov in ki so opisani bolj natančno (nadrobni primeri); in končno, zavzemajo se za posodabljanje teh pojmov v luči morebitnih sprememb v družbeni dejanskosti.[79]

2.5 Kritiška pravna dogmatika

Zadnji vzor je značilen za kritiške teorije prava.[80] Če bi ga želeli strniti v slogan, bi se kritiški vzor pravne dogmatike – ki ga zagovarjajo gibanja, kot so *Critical Legal Studies*, argentinska kritiška teorija ali italijanski *Uso alternativo del diritto* – glasil nekako takole: pravo je nadaljevanje politike z drugimi sredstvi; zato so proučevalci prava politični agenti, ki se morajo zavedati pomembnosti vloge, ki jo igrajo, in se obnašati temu primerno.

Kritiške doktrine pravne dogmatike privzemajo neko različico trditve o nedoločnosti prava v njeni najpogostejši obliki. Vendar je to značilno za mnoge proučevalce prava, tako pripadnike *Critical Legal Studies* kot proučevalce prava drugih pravnih teorij. Kar je posebno v kritiških teorijah pravne dogmatike – vsaj v njenih najpogostejših različicah –, je (glavni) vir te nedoločnosti: nanj kaže trditev o temeljnem protislovju.

Po tej trditvi naj bi bilo pravo današnjih pravnih redov postavljeno na neko ideologijo: tj. politični liberalizem. V liberalizmu pa sta – po mnenju kritikov – včasih prisotna dva protislovna »duha«: individualizem in altruizem, tj. etičnopolitični vrednoti, ki sta neskladni in ki njegovim zagovornikom preprečujeta, da bi ponudili razumne odgovore etičnopolitične ali pravne narave, kadar koli bi se pojavil težak primer.[81] To protislovje nam ne omogoča sprejemati utemeljenih odločitev, obenem pa proučevalcem prava in pravnim praktikom ne preprečuje razreševanja večine sporov v korist individualističnega vidika liberalizma.

78 Cohen 1960 (op. 18).

79 Za primer tovrstne analize glej William Douglas, Vicarious Liability and Administration of Risk, *Yale Law Review* (1956-1957) 70, 812–825.

80 V nadaljevanju se bom osredotočil na *Critical Legal Studies* in argentinsko kritiško teorijo. Iz več razlogov se osredotočam na rekonstrukcijo kritiškega vzora pravne dogmatike teh dveh gibanj, na škodo predstavitve drugih gibanj, kot so *Uso alternativo del diritto* ali *Critique du droit*. Prvič, zato, ker je *Critical Legal Studies* – čeprav danes ostaja le malo od tega gibanja – še vedno referenca za vse tiste, ki se želijo ukvarjati s kritiško pravno znanostjo; drugič, zaradi relevantnosti argentinskih prispevkov na tem področju; in zadnjič, ker se je zaradi razpršenosti kritiške pravne teorije smiselno osredotočiti le na nekatere. Prav tako ne bom upošteval stališč drugih latinskoameriških avtorjev, kot sta Eros Grau ali Oscar Correa, ki so javno pozicionirani v kritiškem toku.

81 »Klasično« trditev o temeljnem protislovju je postavil Roberto Unger. Glej Roberto Unger, *Knowledge and Politics*, New York, Free Press, 1975.

Trditev o temeljnem protislovju naj se ne bi izražala le na področju vsebine; izražala naj bi se tudi v kontekstu strukturiranja prava. Posebno v razliki med pravili in načeli, saj pravo, ki je strukturirano zgolj na temelju pravil, daje videz gotovosti in spodbuja pravne igralce, da sledijo lastnim ciljem, omejenim zgolj s temi pravili, ter tako krepi individualistični vidik liberalizma.[82] To podobo prava, ki temelji zgolj na pravilih, dodatno utrjujejo programi pravnega izobraževanja, kjer se poustvarja posebna *forma mentis*, način razumevanja študija in uporabe prava, ki predstavlja delo pravnikov kot politično nevtralno.[83]

Če torej objektivno poznavanje prava ni mogoče (niti na metapravoslovni ravni) in je vsakršno premišljevanje o pravu podano s političnega gledišča, potem je – po mnenju zastopnikov kritiškega vzora – bolje, da se te pogojenosti zavedamo in napravimo »pravno dogmatiko zavestno pristransko«.[84] Vse to zato, ker bi bili pravniki s svojimi kategorijami in razlagami pripravljeni spremeniti tako način uporabe prava (in na neki način tudi pravo samo) kot družbo, kar je končni cilj kritiškega vzora pravne dogmatike. To predano (ideološko opredeljeno) dogmatiko lahko razčlenimo na dve fazi: na prvo, kritiško fazo in drugo, konstruktivno fazo.

Kritiška faza pomeni sistematično poročanje o političnem vmešavanju, ki ga je mogoče najti v opisovanju in uporabi prava tako pri proučevalcih prava kot pri pravnih praktikih. V tej fazi so kritiki najbolj zainteresirani za javno opozarjanje, da je tisto, kar je predstavljeno kot objektivne razlage in nujne odločitve, popolnoma nenujno in odvisno od preferenc in ideologij pravnikov v praksi. Ko je nenujnost teh rešitev enkrat izpostavljena, je mogoče podvomiti tudi o lahkih primerih z načenjanjem razprav o etičnopolitični izbiri, ki jih pogojuje, in s predlogi novih rešitev konflikta med individualizmom in altruizmom.

Konstruktivna faza kritiškega vzora pravne dogmatike se preslikuje na podobo pravnika (intelektualca), ki je predan služenju določenemu idealu pravičnosti. Ta faza vključuje nudenje koristnih znanj za družbene spremembe in pojmovnih kategorij, ki služijo temu, da se približamo idealu pravičnosti. Ta ideal, ki naj bi mu pravniki sledili in ki naj bi usmerjal njihove dejavnosti, izbere vsak proučevalec prava – če, kot pravijo ti avtorji, je pravo nedoločno – avtonomno, čeprav večina kritiških gibanj ostaja na skrajno levem in emancipatornem političnem bregu. Zato je nujno, da proučevalci prava razumejo pravo kot del širšega političnega sistema in tako ustvarjajo novo znanje, ki temelji na različnih panogah in pristopih k pravu.[85]

82 Duncan Kennedy, Form and Substance in Private Law Adjudication, *Harvard Law Review* (1976) 89, 1685–1778.

83 O pravnem izobraževanju v ZDA glej Juan Antonio Pérez Lledó, *La enseñanza del derecho*, Lima-Bogotá, Palestra-Temis, 2006.

84 Christian Courtis, Alberto Bovino, Por una dogmática conscientemente comprometida, v: Christian Courtis (ur.), *Desde otra mirada*, Buenos Aires, Eudeba, 2001.

85 V tem pogledu so pomembne pravne študije s psihoanalitičnega gledišča Enriqueja Marína.

3 KAKO NAPRAVITI KAJ Z METODAMI

Z nekoliko prilagojenimi besedami Felixa Cohena[86] je mogoče reči, da so na področju teorije pravne znanosti (gre za metadiskurz ali proučevanje znanosti o pravu) pomembna tri vprašanja: prvič, kaj proučevalci prava počnejo; drugič, kaj bi morali početi; in, tretjič, kaj smejo početi.

Čeprav rekonstrukcija vzorov pravne znanosti iz prejšnjega dela prikazuje različne *predpisovalne* vzore pravne znanosti, daje dovolj širok – čeprav ne celovit – odgovor na zadnje vprašanje. Zdaj pa je treba povedati še nekaj o prvem in drugem vprašanju: kaj proučevalci prava počnejo (3.1) in kaj bi morali početi (3.2). Kar sledi, ni mišljeno kot kaj več kot le prvi korak v to smer, saj bi zadovoljiv odgovor na obe vprašanji zahteval samostojno obravnavo.

3.1 Kaj proučevalci prava počnejo

V povezavi z empiričnim vprašanjem, kateri vzor pravne znanosti ima večji ugled, je nujno ločiti dve podvprašanji: (i) kateri vzor ima z normativnega gledišča večjo podporo med tistimi, ki se ukvarjajo s teorijo pravne znanosti; (ii) kateri vzor pravne znanosti *ampio sensu* je bolj široko sprejet v praksi proučevalcev prava.

Čeprav, kot smo že dejali, obstaja več doktrin glede vprašanja, kaj naj bi proučevalci prava počeli, večina teoretikov pravne znanosti – vsaj v zahodni pravni kulturi – uporablja neko različico argumentacijskega in neko različico normativističnega vzora. Realistični, kritiški in tehnološki vzor so manj priljubljeni med tistimi, ki ponujajo predpisovalne vzore.

Odgovor na vprašanje, kateri vzor proučevalci prava uporabljajo pri svojem delu, je podoben prejšnjemu: čeprav nekateri pravniki uporabljajo različice realističnega, kritiškega in tehnološkega vzora, sta najbolj uporabljana normativistični in argumentacijski vzor – v tem vrstnem redu.[87] To seveda ne pomeni, da proučevalci prava ne uporabljajo drugih vzorov, temveč le to, da ti niso v večini.

Za povzetek njegovih stališč glej Christian Courtis, Enrique Marí (1928-2001), *Doxa* (2001) 24, 5–19. Za razpravo o različnih pomenih, ki jih lahko pojem multidisciplinarnost prevzame v proučevanjih prava, sprejetih in predpostavljenih v večini kritiških pravnih teorij, glej Françoi Ost, Science du droit, *Dictionnaire encyclopédique de théorie et de sociologie du droit*, Paris, LGDJ, 1988.

86 »V osnovi sta na področju prava le dve pomembni vprašanji. Eno je, kako sodišča dejansko odločajo v primerih določene vrste. Drugo je, kako bi morali odločati v primerih določene vrste. Če kak pravni 'problem' ne ustreza enemu od teh dveh vprašanj, potem je tak problem enostavno brez pomena, vsak odgovor nanj pa nesmiseln.« Prim. Cohen 1960 (op. 18), 49-50.

87 Opozoriti je treba, da so proučevalci prava – čeprav je to odvisno od referenčne pravne kulture – povečini nagnjeni h kombinirani in pogosto nerazlikovalni rabi argumentacijskega in normativističnega vzora. To pomeni, da velik delež proučevalcev prava kombinira metodološka vodila obeh vzorov, vendar ne v celoti zavestno.

3.2 Kaj bi proučevalci prava morali početi

Vprašanje, kaj bi morali proučevalci prava početi, dopušča dve razlagi: prvič (3.2.1) se lahko razlaga – in pogosto se je razlagalo – kot tehnično vprašanje; drugič (3.2.2) pa se lahko razlaga kot normativno vprašanje v etičnopolitičnem ali moralnem smislu.

3.2.1 Tehnično vprašanje

Iz prvega gledišča vprašanje, kaj bi proučevalci prava morali početi, dopušča dve nadaljnji razlagi, ki sprožata dve novi vprašanji, na kateri pa so bili ponujeni le delni odgovori. Kljub vsemu se zaradi njihove pomembnosti zdi prav vztrajati pri teh argumentih.

i) Vprašanje o tem, kaj bi proučevalci prava morali početi, se je oblikovalo kot vprašanje, odvisno od vprašanja o našem najboljšem pojmu prava. Metoda, ki naj bi jo proučevalci prava uporabili, bi tako bila zgolj posledica našega najboljšega pojma prava – tega, kaj pravo »resnično« je.

Vendar pa je takšno osredotočanje na ta problem, kot smo videli, slabo. Prvič zato, ker imamo različne, tekmujoče pojme prava, s katerimi lahko oblikujemo različne metode proučevanja vsebine prava. Če je ustreznost nekega pojma med drugim odvisna od njegove skladnosti z dano teorijo – in potemtakem od raziskovalnih ciljev, ki naj bi se z njo dosegli –, potem pojem prava ne more pogojevati, katero metodo naj proučevalci prava uporabijo. Postaviti vprašanje o pojmu prava pred normativno vprašanje o tem, kaj bi proučevalci prava morali početi, je kot postaviti voz pred konja.

Drugič zato, ker so tisti pojmi, ki se v pravnofilozofski razpravi zdijo najboljši kandidati za zasedbo položaja pojma prava (tistega, ki naj bi ga proučevalci prava uporabili za opredelitev svojega predmeta proučevanja), pojmovne rekonstrukcije, ki temeljijo na intuicijah pravnih teoretikov o tem, kaj naj bi po mnenju pravnih praktikov tvorilo pravno prakso.[88] Poleg tega, da so si te intuicije pogosto nasprotujoče – sicer takšne filozofske rekonstrukcije ne bi bile potrebne –, ti pojmi prava navadno skušajo v celoti razložiti pravno prakso. Zato so za proučevalce prava nepriročni in zdi se, da odgovarjajo končnemu izidu njihovih raziskav in ne merilom, ki bi jih proučevalci prava morali uporabiti za opredelitev predmeta proučevanja (to pa je funkcija, ki naj bi jo pojem prava opravljal).

88 Večina v zadnjih desetletjih opravljene pojmovne analize o pojmu prava naj bi bila utemeljena na prepričanjih pravnih praktikov o tem, kaj pravo je. Vendar v teh raziskovanjih empirični dokazi navadno niso predstavljeni kot osnova za pripisovanje teh prepričanj pravnim praktikom. Namesto tega se pogosto dogaja, da pravni teoretiki tem pravnim praktikom pripišejo lastno pojmovanje prava. V zvezi s tem glej Leiter 2007 (op. 63), 13 in nasl.

ii) Velik del razprave o tem, katero metodo naj bi proučevalci prava uporabljali, je potekal na metaznanstveni ravni, tj. z razpravo o tem, katero metodo bi morali uporabljati, da bi svojo dejavnost lahko šteli za znanstveno (vsaj v skladu s tistimi merili znanstvenosti, ki so nam dostopna).

Vendar, kot ugotavljajo avtorji, kot je Nino,[89] vprašanja, kaj bi proučevalci prava morali početi, ni modro skrčiti na vprašanje meril katerega koli pojmovanja znanosti, a ne iz razloga, ki ga predpostavljajo zagovorniki argumentacijske dogmatike. Problem ni v tem, da so vzori pravne znanosti v ožjem pomenu brez pomena[90] – za vsakega pravnega praktika je namreč pomemben podatek, kako bodo sodniki odločali v bodočih primerih ali kakšna je razlaga glede na jezikovne konvencije –, temveč v tem, da vsaka dejavnost, tudi znanstvena praksa, zahteva praktično utemeljitev.

Prvi razlog je, da je mogoče znanstveno metodo uporabiti na nešteto predmetih proučevanja, a takšnih raziskav samo zato še ni mogoče imeti za utemeljene: pomislimo na primer na rigorozno napovedovanje števila samoglasnikov, ki bodo uporabljeni v sodni odločitvi.

Drugi razlog je ta, da se argument, če ga skušamo posplošiti in ga razlagamo *a contrario* (v njegovi produktivni različici), zdi nesprejemljiv v tej meri, da bi zgolj znanstvene dejavnosti lahko šteli za utemeljene. Nobena druga dejavnost – na primer raziskave *lege ferenda* ali *sententia ferenda* – ne bi bila utemeljena na tem argumentu, kar se zdi precej neverjetna posledica.

3.2.2 Normativno vprašanje

Drug način razlaganja vprašanja, kaj bi morali proučevalci prava početi, je, da ga oblikujemo kot pravo normativno vprašanje etičnopolitične ali moralne narave. Posebno kot vprašanje o prispevku, ki ga morajo proučevalci prava dati pravni skupnosti.

Najprej je tu zapletena množica argumentov, ki utemeljujejo, da je izbira pravne metode moralno vprašanje. Če »moralne vrednote« opredelimo kot tiste, ki ne zahtevajo ali ne dovoljujejo nadaljnjega argumentiranja za utemeljitev odločitve, potem lahko vsako odločitev opredelimo kot moralno. To morda drži, a trditev verjetno ni posebno zanimiva. Je pa z drugega gledišča mogoče trditi, da se je pri utemeljevanju izbora metode nujno (iz pojmovnih razlogov) sklicevati tudi na nekatere najpomembnejše vrednote, ki navadno veljajo za moralne vrednote.

89 Nino 1989 (op. 13), 13 in nasl.

90 Atienza in Ruiz Manero trdita, da bi bili pravna znanost in/ali čisto opisna pravna teorija brez pomena, saj ne bi služili reševanju težkih primerov. Prim. Atienza in Ruiz Manero 2007 (op. 57); Nino 1999 (op. 5), pogl. I in III.

Vendar pa kot vsak razumen odgovor na praktični problem tudi ta nima zgolj vrednostnih temeljev, temveč so relevantni še empirični in teoretični premisleki. Med razlogi, ki morajo igrati odločilno vlogo pri izboru med možnimi metodami za dognanje vsebine prava, je mogoče najti vsaj naslednje tipe:

a) pravnoteoretski razlogi, na primer, kaj je bistvo razlaganja, doktrine o virih prava, kakšna je narava pravnih pojmov itd.;

b) filozofski razlogi v splošnem, bodisi epistemološki, ontološki ali metaetični razlogi, kot so stališča, kaj se šteje kot utemeljeno védenje, katere entitete obstajajo, pa tudi resničnostne vrednosti moralnih trditev itd.;

c) premisleki empirične, politične, ekonomske in družbeno-pravne resničnosti, kot so razširjenost pravdanja v pravni skupnosti, stopnja nesoglasij v tej skupnosti, družbene spremembe ali spremembe v načinu proizvodnje, stanje institucionalne krize itd.;

č) razlogi moralne oziroma etičnopolitične narave, ki zadevajo vprašanje prispevka proučevalcev prava pravni skupnosti, tj. vloge, ki jo imajo v razvoju, izobraževanju, poznavanju, razlaganju in uporabi prava.[91]

Na tem mestu ni mogoče razložiti, kako vsako od teh meril utemeljuje določen vzor pravne znanosti *ampio sensu*. Namesto tega tu zagovarjam pojmovno

91 Na tej točki se ustavljam, saj so mnogi realisti v preteklosti trdili in še danes trdijo, da se proučevalci prava ne bi smeli ukvarjati s pravno prakso, temveč le z njenim opisovanjem, oziroma da njihova dejavnost ne bi smela upoštevati njihovega potencialnega učinka na prakso. Vendar se zdi ta trditev v tej meri, da želijo, da njihovo proučevanje ne bi bilo nepomembno za pravno prakso – tj. da bi bilo vzeto kot razlog za ravnanje nekoga –, neverjetna. Glede na ta zadnji argument je mogoče predstaviti dva dodatna argumenta. Po prvem je njihova dejavnost pomembna, a ne zahteva moralnega utemeljevanja. V skladu z drugim dejavnost proučevalcev prava za pravno prakso ne bi smela biti relevantna.
Prvi argument je mogoče povzeti takole: tako kot ne mislimo, da je spoznavanje zakonov aerodinamike dejavnost, ki terja moralno utemeljevanje, tako tega ne mislimo za predvidevanja o tem, kako bodo sodniki odločali v bodočih sporih. Seveda, zakonov aerodinamike ne spoznavamo zgolj iz zabave, temveč zato, ker je to znanje uporabno za druge dejavnosti. Posebno je to znanje nujno za tehnične dejavnosti, kakršna je gradnja letal. V tem smislu je gradnja letal (ali katera koli druga tehnična dejavnost) tista, ki utemeljuje spoznavanje zakonov aerodinamike (ali katere koli druge znanstvene dejavnosti). Vendar pa letal ne gradimo zgolj iz zabave, temveč zato, ker štejemo rezultat te dejavnosti za koristen, tj. ker imamo ta cilj za moralno vreden. Podobno je poznavanje tega, kako bodo odločali sodniki, vreden cilj, saj lahko zaradi tega opravljamo nekatere dejavnosti, ki jih štejemo za vredne – take, da vodijo naše ravnanje – in takšne, ki dejansko vplivajo na pravno prakso.
Skladno z drugim argumentom preprosto ni treba, da bi dejavnost pravne znanosti vplivala na pravno prakso. V odgovor na ta argument je mogoče postaviti dva dodatna (proti)argumenta: prvič, skoraj nemogoče je, da bi dejavnost proučevalcev prava ne imela vpliva na pravno prakso, razen če je skrita; drugič, v tem primeru bi se lahko vprašali, zakaj je proučevanje vsebine prava, tj. sama pravna znanost (v širšem smislu), sploh pomembno.
Vsi, tudi realisti so na istem čolnu pravne skupnosti. Na tej točki je mogoče nadaljevati z razpravo med Brianom Leiterjem in Julie Dickson. Glej Julie Dickson, Methodology in Jurisprudence: a critical survey, *Legal Theory* 10 (2004) 3, 117–156; Leiter 2007 (op. 63), 148 in nasl.

trditev,[92] po kateri je, da bi opredelili izbiro ene od metod za določanje vsebine prava kot utemeljeno, (pojmovno) nujno uporabiti etičnopolitične oziroma moralne razloge. Seveda ne trdim, da se bodo vsi proučevalci prava pri izbiri metode dela zatekli k moralnemu utemeljevanju (to je empirično vprašanje), niti ni nujno, da v metodologijo za določanje vsebine prava (kar je metodološko vprašanje) vnesejo premisleke vrednostne narave. Kar trdim, je, da se mora odločitev proučevalcev prava o izbiri metode (zaradi pojmovnih razlogov) opirati na moralne razloge, da bi bila utemeljena.

Da bi razumeli, v kakšnem smislu igrajo etičnopolitični oziroma moralni razlogi odločilno vlogo pri izbiri metodologije, je priporočljivo navesti nekaj primerov. Predstavljajmo si, prvič, proučevalca prava, ki meni, da je najboljša opredelitev pojma prava tista, ki ga predstavlja kot množico norm, podanih s strani normativne avtoritete, in da obstaja precejšnje soglasje o tem, katera merila in katere vrednote naj se uporabijo pri razlaganju prava, in nazadnje, da je število težkih primerov postranskega pomena. V tem primeru bi bilo mogoče sklepati, da bi moral zaradi pravnoteoretičnih razlogov izbrati metodo normativistične pravne znanosti.

Vendar pa je povsem mogoče sprejeti to trditev in, ne da bi zapadli v protislovje, zagovarjati trditev, da bi se proučevalci prava morali posvečati predlaganju rešitev za težke primere. Tako bi bilo na primer za tega hipotetičnega proučevalca prava opisovanje vsebine prava – zato, ker je za poznavanje deontične opredelitve ravnanja dovolj, da uporabimo razlagalne metode, ki obstajajo v pravni skupnosti – nepomembna dejavnost, saj vsaka obveščena oseba pozna običajno razlago zakonskih določil. Nasprotno bi lahko menil, da mora predlagati rešitve primerov, v katerih je pravo nedoločno, saj na tak način izboljšuje odločitve sodišč, pa četudi se mora zateči k nepravnim razlagam ali pa razširiti pojem prava.

Možna pa je, drugič, tudi nasprotna situacija. Zamislimo si proučevalca prava, ki meni, da pravo vsebuje nekatera načela in vrednote, ki jih lahko spoznamo in uporabimo za prepoznavo enega in edinega pravilnega odgovora na težke primere. Vendar pa bi lahko ta, drugi hipotetični proučevalec prava menil – ker sodniki ne berejo pravne dogmatike, ker se sistematično odmikajo od pravih odločitev ali ker med njimi obstaja precej nesoglasij –, da se mora v svojem raziskovanju posvečati napovedovanju prihodnjih sodniških odločitev. To pomeni, da bi imelo za tega drugega proučevalca prava, čeprav bi se lahko ponudili razlogi za prepoznavo najboljše rešitve težkih primerov, napovedovanje

92 To ni normativna trditev o tem, kaj bi proučevalci prava morali početi, temveč pojmovna trditev o tem, kdaj lahko štejemo, da je iz formalnega vidika utemeljena. Na kratko: če odločitev zadeva moralne dobrine, se ta odločitev ne more izogniti sklicevanju nanje. Ne gre za to, da bi bila odločitev napačna z vsebinskega vidika, temveč za to, da bi bilo nesmiselno odločati o moralnih vprašanjih s sklicevanjem na nemoralne razloge. Nekaj podobnega bi se zgodilo, če bi skušali rešiti empirična ali pojmovna vprašanja s pomočjo moralnih argumentov.

bodočih sodniških odločitev večjo moralno vrednost, saj bi spodbujalo pravno varnost in s tem avtonomijo posameznikov.

Tovrstna stališča si niso nujno nasprotujoča. Vendar, zakaj naj bi moralna oziroma etičnopolitična merila narekovala izbor metodologije? Ker naj bi dejavnost proučevalcev prava bila relevantna v ravnanjih pravnih praktikov – tj. da bi bil rezultat njihovega dela upoštevan kot razlog (za ravnanje) –, mora takšno delovanje imeti moralno osnovo. Razlog je v tem, da delovanje pravnih praktikov – njihovo izobraževanje in ustvarjanje, razlaganje ter uporaba prava – vpliva na etičnopolitične oziroma moralne dobrine (na življenje, svobodo, enakost, avtonomnost, politično stabilnost itd.), zato na enak način rezultati dela proučevalcev prava vplivajo na te moralne dobrine. Ker torej proučevalci prava vplivajo – četudi posredno – na obravnavo moralnih dobrin, ki jih ščiti sistem, se mora utemeljevanje metode – iz razlogov doslednosti – sklicevati na moralne razloge.

Če so razlogi za posvojitev določenega vzora pravne znanosti *ampio sensu* moralne oziroma političnoetične narave in različni raziskovalni cilji zahtevajo različne skladne metode za njihovo uresničevanje, potem mora proučevalec prava ustvariti lastne metodološke premise na podlagi raziskovalnih ciljev, ki jim sledi. Kateri pojem prava, katera teorija razlaganja, katera ontologija pravnih pravil bodo izbrani, je odvisno od ciljev, ki jim proučevalec prava sledi: naj bo to opisati pravila v skladu z jezikovnimi konvencijami, napovedati sodne odločitve ali pa predlagati normativne rešitve lahkih in težkih primerov.

3.3 Nekaj razlogov za pravno znanost

Razčlemba moralnih razlogov, ki utemeljujejo izbor vsakega od predstavljenih vzorov pravne znanosti *ampio sensu,* bi na žalost presegla domet tega dela. Vseeno pa želim za sklep navesti nekaj moralnih razlogov, ki jih je mogoče uporabiti v prid vsakega od teh vzorov.

3.3.1 Normativistična pravna znanost

Pokazati je mogoče na vsaj dva razloga, ki utemeljujejta normativistični vzor. Prvič, izbor normativistične metode lahko temelji na politični ideji, da je pravnemu dokumentu oziroma pravni avtoriteti – na primer pravilom demokratičnega zakonodajalca[93] ali ustavnim normam – treba v praksi sodišč nameniti večje spoštovanje. Normativistična pravna znanost tako postane varuh pravnih virov in zagotavlja, da se veljavno pravo ne spreminja, posebno ne v postopku razsojanja.[94]

93 Jeremy Waldron, *Law and Disagreements*, Oxford, Oxford University Press, 2001.

94 Ferrajoli 1983 (op. 42).

Normativistična metoda najde utemeljitev, drugič, v načelu racionalnosti, saj urejena in sistematična predstavitev vsebine prava olajša prepoznavanje praznin, neskladij in podvajanj, ter s tem povečuje celovitost in skladnost pravnega reda.[95] Tako takšen vzor najde utemeljitev – četudi posredno – v načelu pravne varnosti.

3.3.2 Realistična pravna znanost

Realistični vzor pravne znanosti so njegovi zagovorniki pogosto utemeljevali z besedami, da je to edini znanstveni način, na katerega je mogoče obravnavati proučevanje vsebine prava. Vendar pa smo že videli, da to ni dobra utemeljitev za noben vzor pravne znanosti.

Vseeno je mogoče ponuditi nekaj praktičnih oziroma moralnih argumentov v prid realistični metodi. Prvič, vedeti, kako bodo sodniki v prihodnje razsojali v spornih zadevah, je relevantno za splošno javnost: odločitve sodišč namreč vplivajo na moralne dobrine, védenje o tem, kako bodo sodniki odločali, pa zato vsakemu omogoča, da razumsko načrtuje svoje prihodnje ravnanje. Na primer védenje o tem, pod katerimi pogoji lahko nekdo pristane v zaporu, ima moralni pomen, saj omogoča, da načrtujemo svoje prihodnje ravnanje, kar vključuje večjo stopnjo avtonomije.

Drugič, pravni praktiki (zakonodajalci,[96] sodniki itd.) imajo poseben interes za poznavanje posledic svojih ravnanj na sodni ravni: kako bo implementirana določena reforma, kdaj bodo neko odločitev višja sodišča zavrnila ali kakšne so možnosti za zmago v sodnem primeru. Tako je realistični vzor utemeljen zaradi večje stopnje racionalnosti in večje verjetnosti pragmatičnega uspeha ravnanj, ki upoštevajo, kako jih bodo presojala sodišča, kar pa povečuje tudi kakovost delovanja pravnega reda.[97]

3.3.3 Argumentacijska pravna dogmatika

Glede argumentacijskega vzora pravne dogmatike se brez dvoma zdi, da je osrednja praktična utemeljitev zasnovana na moralni oziroma etičnopolitični kakovosti predlaganih rešitev težkih primerov. Z drugimi besedami, ta vzor bi bilo utemeljeno privzeti prav zato, ker omogoča, tako vsaj trdijo njegovi zagovorniki, pridobivanje najboljših možnih rešitev.[98]

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95 Alchourrón in Bulygin 1975 (op. 4), pogl. IX. Glej tudi Paolo Comanducci, El racionalismo de Alchourrón y Bulygin, v: *Hacia una teoría analítica del derecho*, Madrid, CEPC, 2010, 227–234.

96 Glej Núñez Vaquero 2011 (op. 41).

97 Ta argument sem natančno razvil v Álvaro Núñez Vaquero, Ciencia juridical realista: modelos y justificación, *Doxa* (2012) 35.

98 Glej med drugim Ronald Dworkin, In Praise of Theory, v: *Justice in Robes*, Cambridge, Massachusetts, Harvard University Press, 2006, pogl. 2.

Vendar pa se je mogoče vprašati, zakaj je pomembno predlagati odgovore (oziroma najboljše možne odgovore) na težke primere. Vprašanje, čeprav očitno banalno, dovoljuje dva odgovora: predlagati najboljšo možno rešitev težkega primera ima, prvič, vrednost samo po sebi. Enako kot je govoriti resnico – vsaj glede na nekatere vrednostne sisteme – dobro samo po sebi, je tudi predlagati pravilen odgovor dobro samo po sebi.

Drugič, predlagana rešitev težkega primera ima lahko instrumentalno vrednost v dveh različnih pogledih: prvič, ker predlaganje najboljšega možnega odgovora – na primer s komentiranjem v posebni publikaciji – povečuje možnosti, da ga bodo na koncu sprejela sodišča; drugič, četudi ne gre za »res« najboljši možni odgovor, je že samo ponujanje razlogov in/ali argumentov v podporo določenih možnih rešitev vredno, saj prispeva k razpravi o tem, kaj je treba storiti.

3.3.4 Tehnološki dogmatizem

Na enak način kot argumentacijsko dogmatiko tudi tehnološki dogmatizem utemeljuje, prvič, vrednost oziroma pravičnost odločitev, sprejetih z uporabo te metode.

Vendar pa je na podlagi kritik, ki jih zagovorniki tehnološke dogmatike sprožajo, predvsem zoper argumentacijsko dogmatiko, mogoče ponuditi dodatne razloge, ki utemeljujejo tehnološko metodo. Prvič, večja obvladljivost predlaganih rešitev težkih primerov. Če se, kot trdijo zagovorniki tehnološkega vzora, argumentacijska metoda uporablja zgolj za naknadno (*ex post facto*) utemeljevanje odločitev, sprejetih na podlagi neizrecnih razlogov (in torej nepodrejenih analizi in nadzoru), potem je tehnološki vzor lahko utemeljen, saj omogoča večji racionalni nadzor nad predlaganimi rešitvami. Prav tako bi izbor te metode povečal možnosti pragmatičnega uspeha teh odločitev – v smislu, da dosega cilje, ki si jih zastavlja.

Drugič, če je izbor te metode namenjen zavrnitvi rešitev, ki niso koristne za doseganje stanja, ki je dojeto kot boljše, potem ta metoda podpira tudi pravno varnost in s tem avtonomijo. Če se namreč eden od možnih odgovorov na težak primer izkaže za iracionalnega – v smislu, da ne zadostuje za dosego zastavljenega cilja –, postane manj verjetno, da ga bo katero koli sodišče izbralo, s tem pa se stopnja pravne varnosti (predvidljivosti) poveča.

3.3.5 Kritiški pravni dogmatizem

Spet, tako kot v primeru argumentacijskega in tehnološkega dogmatizma, je tudi tu osrednjo utemeljitev za kritiški vzor mogoče najti v moralni oziroma etičnopolitični pravilnosti rešitev težkih primerov, ki jih predlaga.

Vendar pa kritiški pravni dogmatizem, ki predlaga pretvorbo lahkih primerov v težke, zahteva večji utemeljevalni napor. To pa zato, ker namen ni zgolj predlagati rešitve težkih primerov, temveč predlagati tudi nove in drugačne rešitve lahkih primerov, s spreminjanjem običajnih pravnih rešitev, kar pa se zdi nasprotno načelu pravne predvidljivosti.

A ob tem kritiški vzor pravnega dogmatizma črpa svojo utemeljenost prav tam, kjer se referenčni pravni red zdi najbolj nepravičen. Tako je mogoče reči, da bi morali tam, kjer je pravo nepravično, proučevalci prava več napora namenjati tudi predlaganju rešitev težkih primerov.

Odgovor na vprašanje, katero metodo bi morali proučevalci prava uporabljali, je odvisen od različnih dejavnikov in nanj najbrž ni mogoče odgovoriti na abstraktni ravni. Tu sem skušal ponuditi zgolj zemljevid različnih vzorov pravne znanosti in razjasniti, kakšni argumenti utemeljujejo izbor ene ali druge metode.

Iz angleščine prevedel
Matija Žgur.

Álvaro Núñez Vaquero*

Five Models of Legal Science

This paper pursues three goals. First, some traditional concepts of 'legal science' will be analysed, and a definition of 'legal science *ampio sensu*', 'legal science *stricto sensu*' and 'legal dogmatics' will be proposed. Second, a reconstruction of five models of 'legal science *ampio sensu*' will be presented to show the different methodological alternatives available to legal scholars. Third, I claim that it is necessary (for conceptual reasons) to argue for moral reasons when choosing a legal method. Finally, I offer some arguments for supporting the five methodological alternatives of legal science *ampio sensu*.

Keywords: legal science, legal dogmatics, moral reasons, concept of law, conceptions of science

1 ABOUT THE CONCEPT OF LEGAL SCIENCE

One of the most recurrent discussions in legal-theoretical debates—at least in the civil law legal culture—is that concerning the method of studying law. In fact, many of the most important contributions that have been made in the legal theory of the twentieth century can be read in this key. To give just a few famous examples: Kelsen maintains that the intention of his pure theory is to provide a method "to raise [legal science] to the level of a genuine science, a human science";[1] Ross states that "the leading idea of [*On Law and Justice*] is to carry, in the field of law, the empirical principles to their ultimate conclusions";[2] Hart holds that *The Concept of Law* "is concerned with the clarification of the general framework of legal thought";[3] and the concept of the normative system of Alchourrón and Bulygin appears as an idealization of what scholars of positive law do.[4]

However, it is not clear what we mean by 'legal science'. Despite there being a discussion that has lasted several centuries—or perhaps precisely because of that—the fact is that we do not have a univocal, or even one shared, terminolo-

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1 Hans Kelsen, *Reine Rechtslehre* (1934), in English trans. by Stanley Paulson: *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure theory of law*, Oxford, Clarendon, 1992, 1.

2 Alf Ross, Preface, in *On Law and Justice*, London, Steven & Sons, 1957, ix.

3 Herbert L. A. Hart, *The Concept of Law*, Oxford, Clarendon, 1994, v.

4 Carlos Alchourrón, Eugenio Bulygin, *Introducción a la metodología de las ciencias jurídicas y sociales*, Buenos Aires, Astrea, 1975, 25.

gy.[5] In this sense, an experiment of entering expressions such as 'science of law' or 'legal dogmatics' into our library search engines and merely noting the huge number of titles returned by the system is particularly illustrative.

The problem is not just the enormous body of literature that has been generated on the subject but, above all, the heterogeneity of it. Under labels such as 'legal science', 'legal dogmatics' or 'legal method' we can find studies and monographs that often have little to do with one another: while some of them consider the meaning and scope of the various methodological directives, or about the very concept of methodology,[6] others are dedicated to clarifying what is the legal perspective of the validity of law (the internal point of view), the interpretation, or the judicial balancing.[7]

Despite their heterogeneity, and with the aim of proposing a minimum order, we can group this bibliography into different genres: (i) works made up of historical reconstructions about the different legal theoretical movements that have tried to answer questions such as "What is law?" and "What should legal scholars do?";[8] (ii) studies that examine the theory held by some authors—usually Kelsen, Hart and Ross, plus some others, depending on the preferences of the authors—about what is or should be the science of law;[9] (iii) in addition to sorting between historical schools and authors, a number of studies present different methodological models for the study of law;[10] (iv) a group that deals with the truth conditions of legal statements,[11] or with some of the activities supposedly carried out by legal scholars;[12] (v) finally, there is a group of works that deals with more specific issues, such as in what sense the study

5 Carlos Santiago Nino, *Algunos modelos metodológicos de 'ciencia' jurídica*, México, Fontamara, 1999, 9.

6 Geoffrey Samuel, *Epistemology and Method in Law*, Aldershot, Ashgate, 2003.

7 Aleksander Peczenik, *Scientia Juris*, Dordrecht, Springer, 2005; Karl Larenz, *Methodenlehre der Rechtswissenschaft* (1960); in Spanish trans. by Marcelono Rodrígez Molinero: *Metodología de la ciencia del derecho*, Barcelona, Ariel, 2001. An example of extreme heterogeneity is the volume of Aleksander Peczenik, Lars Lindhal and Bert van Roermund, *Theory of Legal Science*, Dordrecht, Synthesi Library, 1984.

8 Antonio Hernández Gil, *Metodología del derecho*, Madrid, Editorial Revista de Derecho Privado, 1945; Enrique Zuleta Puceiro, *Paradigma dogmático y ciencia del derecho*, Madrid, Editoriales de Derecho Reunidas, 1981. For a theoretical analysis based on the characterisations of Roman law jurisprudence, see Rolando Tamayo Salmerón, *El derecho y la ciencia del derecho*, Mexico, UNAM, 1986.

9 Mario Jori, *Il metodo giuridico*, Milano, Milano, 1976; Nino 1999 (n. 5); Santiago Sastre Ariza, *Ciencia jurídica positivista y neoconstitucionalismo*, Madrid, McGrawhill, 1999.

10 Roscoe Pound, *Interpretations of Legal History*, Gale, Making of Modern Law, 2010; Jerzy Wroblewski, *Contemporary Models of Legal Science*, Lodz, Polish Academy of Sciences, 1989.

11 Giovanni Tarello, *Diritto, enunciati, usi*, Bologna, Il Mulino, 1974; José Juan Moreso, *Legal Indeterminacy and Constitutional Interpretation*, Dordrecht, Kluwer, 1998.

12 Alchourrón and Bulygin 1975 (n. 4).

of law would be a dogmatic,[13] normative,[14] technical,[15] or even a scientific[16] discipline etc.

To address the issue of legal science, the first thing we need, therefore, is a definition that clarifies what we mean when we speak about 'legal science' and similar terms. To this end, we must get rid of some initial misunderstandings and ambiguities.

The first problem which arises is that we have different expressions that can be used to refer to the same object, with it being unclear whether they are used as synonyms: 'science of law', 'legal science', 'legal dogmatic', 'legal knowledge', 'law doctrine', 'jurisprudence'[17] ('jurisprudence styles'[18]), 'doctrinal vector' and 'legal method' ('legal methodology')[19]. I will use only the first two expressions—'legal science' and 'legal dogmatic'—in a way that I will highlight at the end of this section. In this regard, I start by analysing the expression 'legal science' and unravelling some common misconceptions.

As is well-known since the work of Nino,[20] 'legal science' is an equivocal (ambiguous) expression to which partially different meanings can be attributed, many of them suffering from major vagueness. Let us examine these sources of ambiguity.

13 Carlos Santiago Nino, *Consideraciones sobre la dogmática jurídica*, Mexico, UNAM, 1989.

14 George Kalinowski, *Querelle de la science normative: (une contribution à la théorie de la science)*, Paris, R. Pichon and R. Durand-Auzias, 1969; Jesús Vega, *La idea de ciencia en el derecho*, Oviedo, Pentagrama, 2000.

15 Manuel Atienza, Sobre la jurisprudencia como técnica social, *Doxa* (1986) 3, 491–498; Alfonso Ruiz Miguel, La dogmática jurídica ¿ciencia o técnica?, Antonio Cabanillas Sánchez, *Estudios jurídicos en homenaje al profesor Luis Díez-Picazo*, Madrid, Civitas, 2002, 5649–5678.

16 Albert Calsamiglia, *Introducción a la ciencia jurídica*, Barcelona, Ariel, 1986.

17 Although use by jurists has consolidated the synonym between 'law' and 'activity of the courts', the RAE dictionary of the Spanish Royal Academy defines 'law' (Span. *Derecho*), first as a 'science of law'.

18 In a famous essay, Karl Llewellyn analyses three moments in American jurisprudence that can be configured as so many other ways to analyse the content of law. Meanwhile, Pound makes a well-known distinction between different ways of approaching the study of law. This classification is reintroduced, with modifications, by Felix Cohen. See Karl Llewellyn, On the Good, the True, the Beautiful, in Law, *University of Chicago Law Review* (1941-1942) 9, 224–265; Juan Antonio Pérez Lledó, *El instrumentalismo jurídico americano,* Lima-Bogotá, Palestra-Temis, 2007, cap. I; Pound 2010 (n. 10); Felix Cohen, Transcendental Non-Sense and the Functional Approach, in *The Legal Conscience*, New Haven, Yale University Press, 1960, 33–76.

19 For a brief but accurate analysis of the different meanings that can be ascribed to some of these terms or expressions, see Giovanni Battista Ratti, *Sistema giuridico e sistematizzazione del diritto*, Torino, Giappichelli, 2008, 205 ff.

20 Nino 1989 (n. 13) and Nino 1999 (n. 5).

1.1 The Ambiguity of 'Legal Science'

i) The term 'legal science' suffers from the classical process/product ambiguity.[21] Indeed, this term can be used both to refer to the set of activities performed by the person who studies the law and to the result of such activities. Here I use 'legal science' to refer to both the set of activities carried out by (or that should be developed by) legal scholars and to the methodological assumptions that govern (or should govern) these activities.

ii) The second ambiguity occurs whenever someone uses 'legal science' to refer to the set of disciplines which have, in some sense, the law as an object of study. In addition to that, some authors[22] use the label in the plural form to refer to all the disciplines that deal with law: science of law, legal theory, jurisprudence, legal dogmatics, the sociology of law, legal anthropology, comparative law, history of law, etc.[23]

In addition to this particularly comprehensive use of 'legal science', two other similar mistakes frequently occur in the literature. The first occurs every time 'legal science' is used to refer to both the study of positive law (i.e. a particular legal system) and to studies examining the structure, the framework, or the basis of all (or a group of) legal orders.[24] Of course, there are good reasons to believe that between what civil, criminal, and constitutional legal scholars do, on the one hand, and what legal theorists do, on the other, there is merely a difference of the degree of generality. However, for reasons of conceptual clarity, it is necessary to maintain the distinction between both types of study.

The second variant of this ambiguity occurs because the term 'legal science' is used in at least two ways in this context: first, to refer to the disciplines that study the content of law; second, to designate only one or some of the possible ways of studying the content of law that deserve to be qualified as 'scientific'. Here I use 'legal science *ampio sensu*', as I point out below, on the one hand to refer to all the methods of determining the content of law while, on the other,

21 Nino, 1989 (n. 13), 10-11; Tamayo Salmerón 1986 (n. 8), 102.

22 Luigi Ferrajoli, *Principia Iuris*, Roma, Laterza, 2007, 8, 21, 39. Wroblewski sometimes refers indiscriminately to all legal disciplines as the 'science of law'. Cf. Wroblewski 1989 (n. 10), 14. Mario Jori also contemplates the possibility of naming the entirety of the knowledge of the law as legal science. Cf. Jori 1976 (n. 9), 4.

23 Other authors, such as Calsamiglia, do not use this term to refer to all these disciplines. However, he states that students of positive law must develop all these activities. Cfr. Albert Calsamiglia, Ciencia jurídica, in Ernesto Garzón Valdés and Francisco Laporta (eds.), *El derecho y la Justicia*, Madrid, Trotta, 1996, 17–27, 18.

24 Kelsen is one of the authors who has contributed the most to this confusion. This is because it is not entirely clear whether purity refers to the theory, to the science of law, or both. Meanwhile, Amselek does not seem to distinguish between the general theory of law and legal science. Cfr. Paul Amselek, El paradigma positivista de la dogmática jurídica, *Anuario de Derechos Humanos* (2006) 7, 17–38, 33.

as 'legal science *stricto sensu*' I understand the methods recommended by those who believe that legal scholars should merely describe the content of law (regardless of whether such activity can be qualified as scientific).

iii) The third ambiguity is due to the fact that the meaning of the term 'science' in the expression which we are analysing is unclear. To realize what the problem is, it is enough to take into account how long the debate about the conditions a discipline must meet to be considered scientific has lasted and the fact that, in a sense, it still is.[25]

The term 'science' also has, as Nino has stressed,[26] a significant charge of positive value. This produces no ambiguity in the strict sense, but those who qualify an activity as scientific tend to shift the focus to the emotional level.[27] Most attempts to define the concept of science—according to Nino—would result in persuasive definitions, that is, definitions that focus on the emotional content of the term, surreptitiously modifying the cognitive content.

Moreover, the meaning of the term 'science' is not only ambiguous but vague.[28] This is because although we opt for one of the possible meanings of the term 'science', there are often cases where whether a particular discipline meets the requirements to be qualified as scientific is doubtful.

iv) The fourth ambiguity refers to the other term in question: 'law'. Indeed, much of the theoretical debate of the last half century has placed the concept of law at the core of the discussion. If what we mean by 'science of law' or 'legal science' depends on which concept of law is assumed, the risk of misunderstanding seems to multiply exponentially.

1.2 Toward a Concept of 'Legal Science'

It is possible to adopt different strategies for providing a definition which allows the clarification of which meaning can be attributed to this expression. The most important of these, and also the most frequently adopted, consists of the conceptual analysis of 'legal science', that is, of clarifying what the speakers of a given community mean and assume when they use this expression. It is not, of course, merely a collection of meanings but a way to build a simpler and more explanatory concept about what are we doing when we speak of 'legal science'.

However, these definitions of 'legal science' are problematic because they assume—or, rather, are based on—a particular concept of law. That a definition of 'legal science' would presuppose a concept of law is not objectionable, of course. Now, what is objectionable is to make the concept of 'legal science' depend-

25 Calsamiglia 1986 (n. 16), ch. II.

26 Nino 1989 (n. 13), 13.

27 Tamayo Salmerón 1986 (n. 8), 120.

28 Nino 1989 (n. 13), 11.

ent on a particular concept of law and, from this analysis, derive consequences about what the scholars of positive law do or what they should do. For example:

> Ordinarily legal dogmatics is, at least in the Nordic tradition, defined as the study of the content of the legal rules (norms) and of the systematic order of those. The common terms referring to these tasks are 'interpretation' and 'systematization'.[29]

> We understand by science of law the knowledge that tries to describe the legal-positive standards and has traditionally been called legal dogmatics or jurisprudence.[30]

The root of the problem is a misconception about the role of concepts in our knowledge,[31] in this case, the role that they play in our concept of 'law'. Of course, the analysis of the concept of law—and any other concept—is a useful tool in legal theory. Now, what is dangerous is to think that the analysis of the concept of law, or a definition of 'legal science' based on that, will tell us something about what legal scholars do, or even what they should do.[32]

An overly broad confidence in the virtues of conceptual analysis leads, in this area, to overlooking two problems. The first is that—if our intention is to make a description about what legal scholars do (i.e. to define 'legal science' based on a concept of law—we will return a distorted picture of their activity, because not all legal scholars use or presuppose the same concept of law, nor do scholars use the same concept of law consistently in all their activities. Second, if the aim is to provide guidelines about what legal scholars should do, then it would be necessary to provide normative arguments, not only a definition.[33]

For defining our object of study what we need is, therefore, a definition that does not deviate from what we normally mean by 'legal science', but, at the same time, does not prejudge any answer to questions about what legal scholars do and what they should do. The best definition of 'legal science' that we have, at least for now, is that which refers directly to the method used (or that can

29 Cfr. Aulis Aarnio, *The Rational as Reasonable*, Dordrecht, Kluwer, 1987, 12.

30 Calsamiglia 1986 (n. 16), 12-13.

31 Concepts are merely tools that allow segments of reality to be identified which are part of theories which in turn include other items that attempt to explain certain facts or events. On legal concepts, see Jaap C. Hage and Dietermar von der Pfordten (Eds.), *Concepts in Law*, Dordrecht, Kluwer, 2009.

32 About the limits and virtues of conceptual analysis as a tool for theoretical-legal reflection, see Pierluigi Chiassoni, The Simple and Sweet Virtues of Analysis. A Plea for Hart's Metaphilosophy of Law, *Revista Problema* (2011) 5, 53–80.

33 One can imagine two ways to escape from this problem: the first is analysing the concept of 'legal science' with the conventional tools of analytic philosophy without committing to any concept of law. However, I cannot imagine how this would be possible when a definition of an expression is being proposed in which the term 'law' ('legal') serves as the only adjective. Second, it is also possible to provide a definition of this type without obtaining conclusions in the descriptive and normative fields of the theory of legal science. However, at such a point, we might ask ourselves why we want a definition like this of 'legal science' or 'science of law'.

be used or that should be used) and/or the activities of scholars of positive law (criminal, civil, constitutional, etc.).

However, we do not identify legal science with all the activities developed in relation to positive law, so it is necessary to introduce two further boundaries in our definition. The first limit allows legal science to be distinguished from other disciplines that also take law as an object of study: the sociology of law, legal anthropology, legal history, the science of legislation. Nevertheless, although these disciplines also analyse the positive law, between legal science and other disciplines there are differences both methodologically and in terms of research objectives. In particular, leaving aside the question of methodology, disciplines such as sociology or anthropology pursue different objectives than those of civil, criminal, or administrative scholars whose aim is to determine the content of law, that is, to establish which is the legal qualification of a certain conduct in a legal system.[34]

The second limit allows us to distinguish legal science from the activity conducted by legal operators (judges, barristers, lawyers, etc.), getting rid, as well, of a last equivocal step regarding the use of the term 'legal science'. Sometimes, terms like 'legal method' or 'legal methodology' are used as synonyms of 'legal science'. The problem is that, in its regular use, 'legal method' does not refer exclusively to the pool of methodological guidelines used by positive law scholars but also to those followed by legal operators. This ambiguity is particularly dangerous because it leads to the conclusion that positive law scholars follow, or they should follow, the same methodology as other operators of law. It is possible, of course, to say that positive law scholars are using, or that they should use, the same method as the legal practitioners, but it requires an empirical demonstration or a practical argumentation.[35]

At this point, it is possible to define 'legal science *ampio sensu*' as the activity and/or the method used (or that can be used or that should be used) by those involved in determining the content of law (from this point 'legal scholars'), and to which no legal value is recognized by any legal system. That is, the method and/or the activities of those engaged in establishing what is the legal qualification that corresponds to a behaviour according to a legal system, and those behaviours that the legal system does not recognize as having legal value.[36]

34 It is not, of course, the only activity carried out by legal scholars but it is the main activity to the extent that all others are functional or dependent on it.

35 Moreover, because legal science usually deals with describing standards, generic cases, or at least is not often referred to particular behaviours, it is odd to say that they have the same method. At best, the coincidence of methods could be partial, encompassing the method of legal operators to that of legal scholars of positive law. But this is an entirely debatable issue from the empirical point of view as well as from the normative one. See in this regard, Peczenik 2005 (n. 7), 2; Aarnio 1987 (n. 29), 15.

36 By 'legal value' I mean the recognition that, as part of a procedure for the creation or ap-

It is possible to point out two criticisms of this definition of 'legal science *ampio sensu*'. The first one would be that this definition is not very informative and tells us nothing about what legal scholars do or which method they use. The second one would be that it is a radically ambiguous definition, since very different methods to address the determination of the content of law have been offered from the normative theory of legal science.

It is possible to respond to these two criticisms together: the main virtue of this definition of 'legal science *ampio sensu*' is that it captures some of the properties that are typically attributed to legal science—the activity of legal research professionals (civil, criminal, and administrative scholars, etc.)—without introducing considerations surreptitiously about what legal scholars do or what they should do.

But, in addition, this definition of 'legal science *ampio sensu*' is sufficient for distinguishing, on the one hand, the activity of scholars about specific parts of the legal system from that of other scholars who take the law as an object of study, and, on the other hand, for distinguishing their activity from that of legal operators as judges and lawyers. Thus, it is possible to identify our object of study, leaving the questions about what activities are actually carried out by legal scholars, or what they can do, or what they should do, open.

Together with the definition of 'legal science *ampio sensu*', and in order to introduce a criterion by which we will classify the different doctrines (the conceptions of legal science *ampio sensu*) about what legal scholars should do, I introduce two other definitions: 'legal science *stricto sensu*' and 'legal dogmatics'. By 'legal science *stricto sensu*' I understand the method recommended by those who believe that legal scholars should devote themselves solely to describing the content of positive law; by 'legal dogmatics' I understand the method proposed by those who believe that legal scholars should not be limited to describing—or should not at all engage in describing—the content of law, but must propose solutions to the judges for resolving hard cases.[37]

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plication of law, the legal system can grant to a document or set of statements by reason of its source. In this sense, we exclude from being part of legal science in a broad sense, for example, an appeal by an attorney or a solicitor (let alone any decision of the court), as well as the reports of the advisory bodies that are not binding (even thought their issuance is mandatory). This, of course, would exclude from legal science in the broadest sense any document in which the legal system would recognize the value of formal source of law. Notice how, in this way, whether a statement (or set of statements) is or not a part of legal science becomes a dispositional property that depends on the law itself: if a legal system recognizes legal value—as did the Roman law—to the texts of legal scholars, they are no longer science of law but a source of law.

37 It is not the usual use of this expression. However, I prefer to use this expression because, in several of its possible meanings, it refers to a set of methods used for generating legal responses for cases of indeterminacy. For a discussion about the uses of this term, see Álvaro Núñez Vaquero, Dogmática juridical, *Revista Eunomía* (2013) 4 (forthcoming).

2 MODELS OF LEGAL SCIENCE (*AMPIO SENSU*)

Once we have an adequate conceptual framework, we can analyse some of the methods for determining the content of law. I will present the key features of five models of legal science *ampio sensu*: the normativist model, the realistic model, the argumentativist model, the technological model and the critical model.[38] However, before analysing each of these models of legal science in the broad sense, it is necessary to briefly address a previous consideration.

This consideration has to do with the character of these models, that is, although they have been modelled using different doctrines about what legal scholars should do, they have an heuristic value in the way in which they allow the different doctrines of legal science *ampio sensu* to be organized. But, in addition, these models are useful in analysing the activities that are really carried out by legal scholars. Now, to the extent that they are reconstructions of ideal types, not all the normative doctrines of legal science, nor the work of all legal scholars, fit neatly into any of these models.[39]

2.1 Normativist Legal Science

The normativist model is the most classical in the theory of legal science. According to authors like Kelsen, Bobbio, Scarpelli, Jori, Bulygin or Vernengo, legal scholars should be devoted to describing the set of rules that belong to a legal system, and its further systematization. Legal science could be described, in this case, as a normative discipline as its object of study is constituted by rules. It is also an activity that—while it may be controversial to attribute the adjective 'scientific' to it, according to its own defenders—can be qualified as objective. This means that the assertiveness conditions of the normative statements (statements about the content of law, that describe the qualification of conduct on the basis of law) have an objective quality, that is, are formed by applying a clear set of rules whose conditions of applicability are ordered and are also clear.

Although it is not at all obvious as what it means to describe rules—let alone how to establish which is the set of legal rules that legal science has to describe—by 'description of rules' most defenders of the normativist model of legal science understand the interpretation of normative sentences. That is, the

38 It is necessary to warn the reader here that this is an asymmetric classification because - although the fundamental criterion that characterizes each of the models is a doctrine about what legal scholars should do—each of these doctrines emphasizes different theoretical issues (interpretation and systematization of law, a theory of practical reasoning, a thesis about the role of intellectuals in our societies, etc.).

39 I am thinking here, for example, about the theory of legal science of Luigi Ferrajoli, which would be a mix of the normativist model (insofar as he finds that the interpretation of law is basically a descriptive activity) and the critical model (in terms of that he believes that law scholars should make proposals as regards how to safeguard fundamental rights). I reserve the further development of this argument for another opportunity.

description of the meaning expressed by a set of authoritative directives previously identified.

We can summarize the activity of describing legal rules in three steps: i) identification of the norms (or statements expressing such norms) that establish the conditions of validity (belonging to) of the rest of rules of the legal system; ii) identification and interpretation of authoritative directives that express the norms proposed as belonging to the legal system; iii) testing the validity of the norms expressed by such authoritative directives, that is, whether they satisfy the belonging criteria to the legal system.

Legal interpretation plays a key role in the normativist model of legal science because any authoritative directive about valid law—which claims the belonging of a rule to a legal system—is composed of two statements: an interpretive statement about the norm expressed by a legal disposition (authoritative directive), and another about the validity of such a norm.[40] It should be noted that interpretation is necessary not only for describing the norm expressed by the authoritative directive; rather, for establishing whether a norm is valid, we also have to interpret the directive that expresses the criteria of belonging to this legal system. If we take into account that in most of our legal systems the belonging criteria are posited in constitutional texts, and that they are usually written in vague and ambiguous terms, the question becomes quite relevant.

Now, what does interpretative activity involve, according to the defenders of the normativist model? For most of these authors[41] 'to interpret' consists in applying a set of conventional linguistic rules to the statements coming from the authorities,[42] that is, subsuming the statements expressed by the legislator (*token* statements) to the set of language rules or linguistic conventions followed by the legislator (*type* statements) as particular instances of language use. Although hard cases exist (mainly due to the inherent vagueness of natural language[43]) and sometimes the interpreter must decide what meaning to attribute to a statement—the legislator's language is usually clear in most cases. To interpret, in short, consists of describing the meaning of the authoritative directives.

40 Tecla Mazzarese, 'Norm-proposition': Epistemic and Semantic Queries, *Rechtstheorie* (1991) 22, 39–70.

41 An exceptions is, of course, Kelsen. For a succinct analysis of the theory of interpretation of Kelsen I refer the reader to my introductory study to Hans Kelsen, On Interpretation: Álvaro Núñez Vaquero, Sobre la interpretación, *Eunomía* (2011) 1, 173–184.

42 Eugenio Bulygin, Sull'interpretazione, *Analisi e Diritto* 1992, 11–30; Luigi Ferrajoli, La semantica della teoria del diritto, in: Uberto Scarpelli (ed.), *La teoria generale del diritto. Problemi e tendenze attuali. Studi dedicati a Norberto Bobbio*, Milano, Edizioni di Comunità 1983.

43 Timothy Endicott, *Vagueness in Law*, Oxford, Oxford University Press, 2001; Genaro Carrió, *Notas sobre el derecho y el lenguaje*, Buenos Aires, Abeledo-Perrot, 2011; Jerzy Wroblewski, *Sentido y hecho en el derecho*, Spanish trans. by Francisco Javier Ezquiaga and Juan Igartua, Mexico, Fontamara, 2001.

Different defenders of the normativist model of legal science defend, of course, different interpretative theses, and there are disagreements about which interpretive canon should prevail: the literal, the systematic, the intentionalist, and so on. However, these authors seem to be involved at least in some sort of moderated descriptivism[44] and not just because if there was not normally an univocal correspondence between statements and the norms expressed by them, the law could not fulfil its essential function (to direct behaviour[45]), but because, above all, the "description" of rules could not be qualified as objective (and even less as scientific activity).

According to the defenders of normativist legal science, describing rules is not, however, the only activity that legal scholars must develop. This first phase would be accompanied by a second of systematization.[46] By 'systematization', however, at least three different types of activities can be understood:

a) The term 'systematization' means explaining all the logical consequences of a legal system and reformulating the normative basis of the system using less normative sentences.[47] That is, first, to systematize implies developing all the logical consequences of the normative system from, and exclusively, those original statements of the system and the set of transformation rules accepted in that; and secondly, expressing the same set of rules by a smaller set of normative statements.

b) By the term 'systematization', the organized exposition of the norms pertaining to the legal system can be also understood, grouping those in respect of their content building conceptual categories that allow their understanding and easier use. That is, developing legal institutions (contract, tort, class action, etc.) that can be used to organize, present, and refer to a set of norms in an orderly way.

c) By the term 'systematization' we mean, finally, finding the solution to the logical flaws of the legal system: resolving antinomies and filling gaps. Nevertheless, it is debatable whether legal science must solve such problems or if, in contrast, it must be limited to establishing the existence of such defects since, if antinomies are solved and gaps filled, this would modify its object of study. However, it is plausible to say that such activities must be conducted by

44 That is, a thesis that holds that in all cases to interpret is a cognitive activity or that it is so in most cases. See Moreso 1998 (n. 11), 156–160.

45 Joseph Raz, Intention in Interpretation, in Robert George (ed.), *The Autonomy of Law. Essays on Legal Positivism*, Oxford, Oxford University Press, 1996, 249–286.

46 For a more detailed analysis about the concept of regulatory system, see Ratti 2008 (n. 19) and Jorge Rodríguez, *Introducción a la lógica de los sistemas normativos*, Madrid, CEPC, 2002.

47 Eugenio Bulygin, Legal Dogmatics and Systematization of Law, *Rechstheorie* (1993) 10, 193–210.

legal scholars when they consist of applying rules pertaining to the legal system, clear ones, and whose conditions of applicability are also clear.[48]

2.2 Realistic Legal Science

The realistic model of legal science has, in its different versions, a sharply critical tone. To properly understand the scope and meaning of the realistic model of legal science, we must start just with the criticisms that authors such as Holmes, Ross or Guastini directed, above all, at the normativist model of legal science. Although the object of criticism of the different variants of realism differs from one author to another, it is possible to identify two common criticisms in the various realisms: one of an ontological nature and another of a methodological nature.

The ontological criticism derives from the radical empiricist epistemology (reductionism) to which most of its defenders subscribe. According to this first criticism, if only entities of a sensible reality exist, normativist legal science would be simply pointless: there is nothing in the world like the rules that are objects of description in normativism. Therefore, if legal science wants to be a scientific discipline, its statements have to be about empirical world entities. So, if we want to turn legal science into a really scientific discipline, its object of study cannot be anything but judicial decisions[49] (in the broadest sense) and the sensations of obligation percieved by legal operators.

The methodological criticism takes its foundation from a thesis about legal indeterminacy. By 'thesis of legal indeterminacy' we understand the thesis according to which it is possible to decide the same controversy, based on the legal system, in incompatible ways all of which are equally justified.[50] That is, the set of legal reasons which allows us, at least in some cases, to legally qualify the same behaviour in incompatible ways. Now, if normative statements can justify more than one solution for particular cases, then the causes or reasons that lead judges to opt for one possible legal solution are not found in law but in other kind of factors: political, psychological, economical, etc.[51]

48 Note in this respect that if the tasks of legal science would include resolving the logical flaws of the system, normativist legal science would also be a normative discipline, because rules would be applied.

49 Martín Diego Farrell, *Hacia un concepto empírico de validez*, Buenos Aires, Astrea, 1972.

50 Brian Leiter, Legal Indeterminacy, *Legal Theory*, (1995) 1, 481–492. For a discussion about the indeterminacy of law in Brian Leiter, I refer to Álvaro Núñez Vaquero, El realismo jurídico de Brian Leiter, *Diritto e Questioni Pubbliche* (2011) 10, 438–456.

51 It is in the light of this thesis that certain statements as "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (Oliver Wendell Holmes, Jr., The Path of the Law, *Harvard Law Review* 5 (1897) 110, 994, or that "[t]he rules are important so far as the help you see or predict what judges will do or so far as they help you get judges to do something. That is their importance. That is all importance, except as

The sources of the indeterminacy of law are varied: vagueness, defeasibility, logical flaws in the system, etc. However, realists have traditionally emphasized the ambiguity of the legislator's directives (and judicial precedents[52]) as a source of the indeterminacy of law.[53] By ambiguity we must understand the possibility of interpreting the same authoritative directives based on a different canon of interpretation applicable in the legal community, and the absence of lasting meta-legal criteria to determine which interpretive criteria is applicable or what norms derive from authoritative directives.[54] In other words: it is possible to derive different norms from the same authoritative directive based on various interpretive techniques, all of them equally legitimate, and the legal system does not indicate which one we must use.

This thesis about indeterminacy leads to a radical criticism of the normativist model of legal science: given that normativists claim that they describe the content of law, what they are actually doing (or assuming) are value assumptions that prevent them from qualifying their normative statements as descriptive. Thus, normativist legal science could not be qualified as descriptive or objective activity because its normative statements are mediated by the legal-ethical preferences (defined in a broad sense) of those who state them.

The realist legal science model which is best known in the civil law culture is certainly Alf Ross'. According to him, the propositions of legal science should be predictions about how judges will decide future controversies. As is well-known, Ross carries out a synthesis between two types of realism—the behavioural (Holmes') and the psychological (Olivecrona's)—arguing that the existing law is the set of norms that judges feel as binding (valid) and would be willing to apply (if there is an action that is described in the antecedent of the norm).[55]

The model of Ross is certainly not the only model of realistic legal science available, and probably not the most satisfactory. Defenders of the realistic model of legal science have proposed different methods for making predictions,

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pretty playthings" (Karl Llewellyn, *The Bramble Bush*, New York, Oceana, 1930, 5) should be understood.

52 Hermann Oliphant, A Return to *Stare Decisis*, *American Bar Association Journal* (1928) 14, 71–162; Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to Be Construed, *Vanderbilt Law Review* 3 (1949-1950), 395–406.

53 Richard Posner, *How Judges Think*, Harvard University Press, 2008; Max Radin, Statutory Interpretation, *Harvard Law Review* (1929-1930) 43, 863–885.

54 Riccardo Guastini, *Nuovi studi sull'interpretazione*, Rome, Aracne, 2009.

55 The model of Ross is objectionable for two reasons: first, because although Ross indicates what would be the main factor that would determine judicial decisions (ideology of the sources of law) that factor is not reflected in the method for making predictions; second, that what the Rossian method predicts is the application of normative statements, not rules or court decisions. The problem is that if the American realists are right and there is a difference between what the judges say they do and what they actually do, to anticipate the use of normative statements by judges would be of little interest.

the heterogeneity among those being the predominant note: I refer to the writings that go from the study of the *rationalle* of judicial decisions by American realists, to the most recent studies by Spaeth and Segal, Richard Posner or New Legal Realism, and moving over to the sociology *in the law* by Giovanni Tarello.

Now, if the thesis of indeterminacy is correct—and normative statements do not determine how judges decide particular controversies—realistic legal scholars seem to be headed towards some sort of interdisciplinarity or collaboration both with historians of legal and political thought, and economists, sociologists and psychologists. This is because if the solutions of the judicial process are determined by political or economic factors, and the role of legal science is precisely to make predictions about how judges will decide future controversies, then it is necessary to establish how these factors influence or determine judicial decisions.[56]

2.3 Argumentativist Legal Dogmatics

The debate on the scientific character of legal science has certainly occupied quite a large space in the history of the theory of legal science. However, for some decades this debate has been partially replaced by another of a metascientific and normative character. In short: according to authors like Aarnio, Alexy, Atienza, Nino, Peczenik, or Zagrebelsky, legal scholars not only describe the content of positive law, nor should they only describe it, but they must also propose solutions for hard cases to which, at least apparently, the law clearly does not provide a single right answer.

Faced with the legal science models *stricto sensu* (the normativist and the realistic one), defenders of the argumentativist model of legal dogmatics propose a radical criticism: a legal science *sticto sensu* is either not purely descriptive (and is therefore ideological) or is sentenced to total practical irrelevance.[57] Legal scholars would traditionally perform, according to defenders of the argumentativist model, an important social function that is neither arbitrary or irrational nor purely descriptive, and that cannot be accounted for by the models of legal science *stricto sensu*.[58] Therefore, in the words of Nino, "one finds oneself

56 Some people took it seriously, even more seriously than the American realists themselves, that legal science should be devoted to making predictions about judicial decisions. See Jeffrey Segal and Harold Spaeth, *The Supreme Court and the Attitudinal Model Revisited*, Cambridge, Massachusetts, Cambridge University Press, 2002; Frank Cross, Political Science and the New Legal Realism, *Nortwestern University Law Review* 92 (1997-1998) 1, 251–326.

57 Manuel Atienza and Juan Ruiz Manero, Dejemos atrás el positivismo jurídico, *Isonomía* (2007) 27, 7–28.

58 This criticism is a real challenge for all the doctrines of legal science in the strict sense, but not necessarily for the positivist conceptions of law. Indeed, we can state, without falling into contradiction, that to establish what is the content of law it is not necessary to resort to moral considerations (thesis about the no identifiable connection between law and morality) but,

in a somewhat ridiculous position of having to argue about obvious and almost things banal like that legal activity of jurists satisfies other functions than the one these models [of legal science *stricto sensu*] allow."[59]

According to defenders of the argumentativist model, it is precisely when legal scholars leave the descriptive plane that their work becomes interesting and relevant, even though it is not possible to identify a single right answer.[60] But this does not mean, of course, that legal scholars should propose solutions for problematic cases based on their own preferences or moral tastes. Rather, their activity should be governed by two factors: first, by the set of values and principles, legal and/or moral, posited in the legal system and/or that govern the social practice called 'law';[61] second, legal scholars must justify—by offering supportive arguments—each of their proposed solutions for hard cases, that is, legal scholars must provide reasons to support their solutions for hard cases.

Legal reasoning, to the extent that it justifies its thesis based on principles and values, would be—as most of these authors say—a type (a special case) of practical reasoning.[62] That is, despite the differences that are present between defenders of the argumentativist model and between legal and moral reasoning, these differences would not be relevant at the time of determining whether a thesis is justified.

Among the defenders of the argumentativist model it is possible to distinguish three dimensions of legal reasoning. In extreme synthesis: the first approach deals with the logical validity of arguments, the second deals with its persuasive capacity, while the third deals specifically with the material (or substantive) plausibility of arguments. What is specific to this material dimension of legal reasoning is that it is possible to identify in advance which are the sufficient conditions that a thesis must satisfy to be finally considered as the best legally possible answer. That is, determining what is the best answer for the legal problem is not a matter that can be reduced to the application of a set of rules. To establish the best possible answer is an activity guided by a model of rationality (and of objectivity[63]) distinct from that which governs our theoretical or cognitive activities: *phronesis* or practical reason.

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however, that legal scholars should propose solutions for those cases where the law is indeterminate. Cfr. Nino 1999 (n. 5), 13.

59 Nino 1999, (n. 5), 13. Similar expressions can be found on authors like Amselek, Atienza, Zagrebelsky, Dworkin, Alexy, etc.

60 Aulis Aarnio, *Derecho, racionalidad y comunicación social*, Mexico, Fontamara, 1995.

61 I am referring, of course, to Ronald Dworkin, *Law's Empire*, Cambridge, Massachusetts, Belknap Press of Harvard University Press, 1986.

62 On the theory of special cases, see Robert Alexy, The Special Case Thesis, *Ratio Juris* 12 (1999) 4, 374–384.

63 Brian Leiter, *Naturalizing Jurisprudence*, Oxford, Oxford University Press, 2007, ch. VIII.

The argumentativist method proposes a model of the legal scholar who offers solutions for legal disagreements in an analogous manner to the way moral philosophers suggest answers for moral or ethical-political problems: justifying their decisions based on rules, principles and values. This kind of practical rationality which underlies the argumentative model (characteristic of deontological morality) is reflected in the different instruments theorized by moral philosophy: reflective equilibrium,[64] coherentism,[65] the holistic interpretation of a set of norms in its best light,[66] the discussion in front of a rational ideal auditorium,[67] etc. However, due to its diffusion through the work of Robert Alexy,[68] the most common instrument among defenders of the argumentativist model is that of the balancing of principles: a method for the application of principles and the resolution of their conflict.[69]

The fact that legal reasoning is a special case of practical reasoning does not imply, however, that legal reasoning will collapse with moral reasoning. Instead, the discussion about the best legal solution can yield, as a result, not the best moral response, but a *morally second best*: a morally justified response that would not be the optimal response from the ethical point of view. This is because legal reasoning would be governed, in addition to moral principles and values, by principles and values specifically legal, like legal certainty, consistency with the institutional history, etc.

2.4 Realistic-Technological Legal Dogmatics

Within the literature on legal realism, especially the American, a section dedicated to the model of legal dogmatics by authors associated with legal realism such as William Douglas, Karl Llewellyn and Felix Cohen may frequently be found. That is, a method—more practiced than explicitly theorized—not used to make predictions about the existing law but used for proposing solutions for hard cases (the constructive method). Here I carry out a reconstruction of such a model of legal dogmatics based on the thesis of these authors, other American realists and from elsewhere (Michael Troper, Vilhelm Lundstedt or Giovanni Tarello), but also precursors and heirs of realism like Rudolf von Jhering, Richard Posner, Brian Leiter or Hans Albert.

64 Giorgio Maniacci, *Razionalità ed equilibrio riflessivo nell'argomentazione giudiziale*, Torino, Giappichelli, 2008.

65 Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford, Clarendon Press, 1994; Juan Manuel Pérez Bermejo, *Coherencia y sistema normativo*, Madrid, Marcial Pons, 2006.

66 Dworkin 1986 (n. 61), 45 ff.

67 Aarnio 1987 (n. 29), 221 ff.

68 Robert Alexy, *A Theory of Legal Argumentation*, Oxford, Oxford University Press, 2009.

69 Carlos Bernal Pulido, *El principio de proporcionalidad y los derechos fundamentales*, Madrid, CEPC, 2003; David Martínez Zorrilla, *Conflictos constitucionales, ponderación e indeterminación normativa*, Madrid, Marcial Pons, 2007.

In order to understand what this technological model of legal dogmatics involves, it is necessary to start pointing to where it overlaps with the realistic model of legal science: the thesis of legal indeterminacy. That is, the thesis that authoritative directives can be used to qualify the same behaviour in some incompatible ways in a justified manner—which makes a resort to extra-legal considerations in deciding disputes necessary.

However, defenders of the technological model go a step further with the thesis of the indeterminacy of law. According to them, the deontological model of practical rationality—the one that underlies the argumentativist dogmatics—provides tools that, based on the same set of rules and moral and legal principles, allow us to justify incompatible decisions.[70] That is, it is not only that the law is indeterminate, or that the tools that legal scholars use to interpret the law will generate indeterminacy; but that defenders of this model present a sceptical thesis about practical reasoning, conceptually independent of any theory about how our legal systems are.

The problem is not only that there are no objectively correct values (external scepticism) but that even if we could agree on what values are correct, the instruments of a deontologic moral discourse based on rules, principles and values allow us to justify incompatible legal decisions:[71] which action would be further honouring our moral principles depends on what weight or value legal scholars attribute to each of them (internal scepticism). Instruments such as reflective equilibrium, communicative dialogue or balancing of principles do not diminish uncertainty to the extent that would allow for resolving conflicts between rules, principles and moral standards rationally. On the contrary, such instruments give only an appearance of rationality to decisions based on mere intuition or simple prejudice, fulfilling a purely ideological function. In other words, if it is not possible to identify sufficient conditions for determining when a conduct should be considered correct, then when legal scholars propose answers for hard cases they will rely on purely intuitive, if not idiosyncratic, considerations.

This does not mean that defenders of the technological model are radically sceptical on matters of practical reasoning, or at least not in all the possible senses of 'scepticism'.[72] Although most of these authors are non-objectivists

70 Leiter 2007 (n. 63), ch. VIII; Brian Leiter, In Praise of Realism (and against non-sensejurisprudence), *The Georgetown Law Journal* 100 (2012) 3, 865–893; Richard Posner, The Problematics of Moral and Legal Theory, *Harvard Law Review* (1997-1998) 111, 1637–1717.

71 For a brief but effective presentation of the pluralism of values, I refer to Mauro Barberis, *Etica per giuristi*, Rome, Laterza, 2006, ch. V.

72 For different types of skepticism in meta-ethics, see Pierluigi Chiassoni, Tre esercizi per una critica dell'oggetivismo morale, *Analisi e Diritto* 2009; Jose Juan Moreso, El reino de los derechos y la objetividad de la moral, in *Constitución: modelo para armar*, Madrid, Marcial Pons, 2009, 69–94.

(they deny the existence of ultimate criteria of moral rightness), when these authors develop legal dogmatic works—proposing solutions for hard cases—they present practical arguments that seem rational, but in a different sense of the term 'rational' (in respect of the model of practical rationality that seeks to justify practical decisions based on norms, moral and/or legal values and principles).

A vaguely particularist conception in moral matters has often been attributed to these authors, that is, the thesis that what counts as moral reason in a particular case may have no relevance in another similar case.[73] However, the thesis of these authors is much more plausible[74] if we reconstruct the model of practical rationality that underlies their work, like that of consequentialist ethics. In other words, ethics—utilitarianism being the best known among them—that argue that the sole criterion to morally qualify an action is that it is suitable for, or contributes to, achieving the best possible state of affairs.[75] Thus, the statements that morally qualify behaviours, as they indirectly deal with facts and causal relationships, result in having truth-value.

This does not mean that legal scholars should seek some purpose in law or intentions on the part of the legislator, nor that some kind of sociological, psychological or economic investigation will allow which is the best state of affairs to be discovered. Rather, the technological model of legal dogmatics requires that legal scholars choose a state of affairs as the best—making that choice explicit—and offering evidence for supporting that a particular legal solution is the appropriate one to attain this state of affairs.

Of course, there is still considerable discretion to the extent that, according to defenders of the technological model, we have no objective criteria for determining what is the best state of affairs. However, this type of practical reasoning has at least three advantages: first, it places our best knowledge about the world (the scientific) at the core of practical reasoning; secondly, practical discourse becomes more controllable since statements that morally qualify behaviours result in having truth-value; and finally, a conception of practical reason in this

73 Jonathan Dancy, Moral Particularism, in *Stanford Encyclopedia of Philosophy.* URL: http://plato.stanford.edu/ (October 6th 2012). This link between legal realism and ethical particularism has been proposed by, among others, Robert Summers. Cfr. Robert Summers, *Instrumentalism and American Legal Theory*, Ithaca, New York, Cornell University Press, 1982.

74 It is not just an issue of plausibility but of correct reconstruction in historical terms. See, for example: Cohen (n. 18); Vilhelm Lundstedt, *Legal Thinking Revised*, Stockholm, Almqvist&Wiksell, 1956; Karl Llewellyn, *The Theory of Rules*, Chicago, University Chicago Press, 2011, ch. VI; Giovanni Tarello, *Il realismo giuridico americano*, Milano, Giuffrè, 1962, 199 ff; Giovanni Tarello, La semantica del neustico, in *Diritto, enunciati, usi* (n. 11).

75 For a brief but accurate introduction to ethical consequentialism, see the reconstruction of this offered in Juan Carlos Bayón, Causalidad, consecuencualismo y deontologicismo, in *Doxa* (1989) 6, 461–500.

way implies that choosing any course of action will be more rational because it is chosen based on objective criteria.[76]

In addition to proposing solutions to hard cases, the technological dogmatics pays special attention to the reprocessing of legal concepts. In particular, defenders of the technological model propose to first reduce all legal concepts to the set of empirical facts referred to,[77] expelling any concept from legal language that refers to non-existing entities or facts that it is not possible to confirm;[78] second, to fragment the traditional legal concepts into different concepts of a smaller scope that refer to types of cases described in a richer way (fine cases); and, finally, to update these concepts in the light of the possible changes that may have occurred in the social reality.[79]

2.5 Critical Legal Dogmatics

The latest model is the one which is typical of the critical theories of law.[80] To summarize it in a slogan, the critical model of legal dogmatics—defended by movements such as *Critical Legal Studies*, Argentinian critical theory or *Uso alternativo del diritto*—it could be the following: the law is a continuation of politics by other means, thus legal scholars are political agents that must be aware of the important role they play, and they should act accordingly.

The critical doctrines of legal dogmatics hold some variant of the thesis of legal indeterminacy in its most common formulations. However, this view is common to many legal scholars, *Crits* and those scholars of other legal theories. What is characteristic of critical theories of legal dogmatics—at least in its most familiar version—is the (main) source of indeterminacy: the thesis of fundamental contradiction.

According to this thesis, the law of our legal systems would be underlayed by an ideology: political liberalism. Yet in liberalism—as the critics declare—there are sometimes two "spirits" of a contradictory nature present: individualism and

76 See in this sense Mario G. Losano, Introduzione, in: Rudolf von Jhering, *Der Zweck Im Recht* (1877); in Italian trans. by Mario G. Losano, *Lo scopo nel diritto*, Torino, Einaudi, 1972.

77 Alf Ross, Tû-tû, *Harvard Law Review*, (1956-1957) 70, 812–825.

78 Cohen 1960 (n. 18).

79 For an example of this type of analysis see William Douglas, Vicarious Liability and Administration of Risk, *Yale Law Journal* (1929) 38, 584–604.

80 Here I will focus on the *Critical Legal Studies* and the Argentinian Critical Theory. I shed light on the reconstruction of the critical model of legal dogmatics in these two movements to the detriment of others such as the *Uso Alternativo del Diritto* or the *Critique du Droit*, for several reasons: the first case, because the *Critical Legal Studies*—although little remains now of them—remain a reference for those wishing to do critical legal science, in the second, for the relevance of the contributions from Argentina that have been performed in this field and, finally, because the heterogeneity of critical legal theory is such that for clarity we should focus on some of them. Nor will I take into account other Latin American authors whose theses are also clearly positioned in the scope of the critical currents, such as Eros Grau or Oscar Correa.

altruism, that is, ethical-political values that are incompatible, and which would prevent its defenders from offering rational responses of an ethical-political or legal nature whenever a hard case is presented.[81] This contradiction, however, does not allow us to take justified decisions, nor does it prevent legal scholars and legal practitioners from ending up deciding most disputes in favour of the individualistic aspect of liberalism.

The thesis of fundamental contradiction would not only be reflected in the field of contents; moreover, it finds expression in the context of the way in which law is structured. In particular, the difference between rules and principles would also show such a contradiction to the extent that a structured law based only on rules gives an appearance of certainty, encouraging legal actors to pursue their goals with the only limit of these rules, enhancing thus the individualistic aspect of liberalism.[82] This image of a law based solely on rules is further reinforced by the programs of legal education, where a particular *forma mentis* is reproduced, a way of conceiving the study and the application of law that presents jurist activity as politically neutral.[83]

Now, if an objective knowledge of law (even at meta-jurisprudential level) is not possible, and any consideration about law is expressed from a political viewpoint, then—according to the critics—it is better to be aware of such conditioning and make a "legal dogmatics consciously committed".[84] All of this because, by their categories and interpretations, the jurists would be willing to change both the way in which the law is applied (and in some sense to change the law itself) and to change the society itself, which is the ultimate goal of the critical model of legal dogmatics. We can articulate this committed dogmatics in two phases: a first critical phase and a second constructive one.

The critical phase is the systematic reporting of political mediations that are found in the description and application of law, both by other legal scholars as well as legal operators. In particular, what critics are interested in this phase is denouncing that what is presented as objective interpretations and necessary decisions are purely contingent and they are dependent on the preferences and ideologies of legal operators. Once the contingency of these solutions is noted, it is possible to question even the easy cases, discussing the underlying ethical-political choice, and proposing a new solution to the conflict between individualism and altruism.

81 The "classical" thesis about fundamental contradiction was made by Roberto Unger. See Roberto Unger, *Knowledge and Politics,* New York, Free Press, 1975.

82 Duncan Kennedy, Form and Substance in Private Law Adjudication, in *Harvard Law Review* (1976) 89, 1685–1778.

83 About legal education in the U.S., see Juan Antonio Pérez Lledó, *La enseñanza del derecho*, Lima-Bogotá, Paletra-Temis, 2006.

84 Christian Courtis and Alberto Bovino, Por una dogmática conscientemente comprometida, in Christian Coutis (Ed.), *Desde otra mirada*, Buenos Aires, Eudeba, 2001.

The construction phase of the critical model of legal dogmatics is projected onto the image of the jurist (-intellectual) who is committed to serving a particular ideal of justice. This second phase involves constructing useful knowledge for social change, conceptual categories that serve to bring us closer to the ideal of justice. The ideal of justice that jurists should pursue and to which they should guide its activity is chosen—if, as these authors say, the law is indeterminate—by each legal scholar autonomously, although most critical movements remain on the left political wing, the radical and the emancipatory. To this purpose, it is necessary that legal scholars understand law as a part of a larger social system, thus generating new knowledge based on different disciplines and approaches to the law.[85]

3 HOW TO DO THINGS WITH METHODS

Slightly modifying a quotation from Felix Cohen,[86] it can be said that there are three important issues in the field of theory of legal science (the meta-discourse or study of the science of law): what legal scholars do; what they should do and what they can do.

While the reconstruction of five models of legal science in the previous section presented different *normative* models of legal science, it constitutes a sufficiently wide response—but not exhaustive—to the last question. Now it is necessary to say something about the first two questions: what legal scholars do (3.1) and what should they do (3.2). What follows is not intended to be anything else than a first step in that direction, since answering both questions satisfactorily would require a separate work.

3.1 What Legal Scholars Do

In relation to the empirical question as to which model of legal science has the greater prestige, it is necessary to differentiate between two different issues: first, which model has greater support among the theorists of legal science from

85 Important in this respect are legal studies from the psychoanalytic point of view of Enrique Marí. For a summary of the positions held by Mari, see Christian Courtis, Enrique Marí (1928–2001), *Doxa* (2001) 24, 5–19. For a discussion about the different meanings that the concept of "multidisciplinary" can take in studies of law, claimed and assumed by much of the critical legal theory, see François Ost, Science du droit, in André-Jean Arnaud et al. (eds.), *Dictionnaire encyclopédique de théorie et de sociologie du droit*, Paris, Librairie générale de jurisprudence et de droit, 1988.

86 "Fundamentally there are only two significant questions in the field of law. One is 'How do courts actually decide cases of a given kind'. The other is, 'How ought they to decide cases of a given kind'. Unless a legal 'problem' can be subsumed under one of these forms, it is not a meaningful question and any answer to it must be nonsense". Cfr. Cohen 1960 (n. 18), 49-50.

the normative point of view?; and second, what model of legal science *ampio sensu* is more widely accepted in the practice of legal scholars?

As it has been said before, while there are several doctrines about what legal scholars should do, the majority of jurisprudence theorists subscribe—at least in Western legal culture—to some variant of the argumentativist model, and to some variant of the normativist model. The realistic, critical and technological models receive less support among those who are behind the normative theory of legal science, thought it is possible to find some defenders of these, too.

Quite similar is the answer to the question of which method legal scholars use in their research: while some scholars adopt some variant of realistic models and critical technology, further methods are practiced in this order, first the normativist and later the argumentativist.[87] However, this does not mean that other models are not subscribed and used by a number of scholars, but only that those are not the majority.

3.2 What Legal Scholars Should Do

The question of what legal scholars should do also allows for two different interpretations: first, it can be—and often it has been—interpreted as a technical question (3.2.1); but it has also been interpreted as a normative question in ethical-political or moral sense (3.2.2).

3.2.1 A Technical Question

From the first point of view, the question of what legal scholars should do allows two further interpretations which generate two different questions and to which partial responses have been offered. However, given its importance, it seems appropriate to insist on these arguments.

i) The question of what legal scholars should do has been formulated as a dependent question to that about our best concept of law. Which method should legal scholars employ would simply be a corollary about what is our best concept of law, what law "really" is.

However, focusing on the issue in these terms is, as we have seen, a bad idea. First, because we have different concepts of law in competition with which we can build different methods to study the content of law. If the adequacy of a concept depends, among other factors, on its consistency within a given theory—and therefore on the research objectives that are pretended to be achieved by it—then the concept of law cannot determine which method should be used by legal

87 It should be noted that the main tendency among legal scholars is—although this depends on the legal culture of reference—a combined use, and often undifferentiated, of argumentativist and normativist methods. That is, a large number of scholars combine the methodological tools of both models, but not in a fully conscious manner.

scholars. Putting the question of the concept of law before the normative question about what legal scholars should do is like putting the cart before the horse.

Second, because those that appear to be the best candidates within the legal philosophical debate to occupy the position of the concept of law (the one that legal scholars should employ to identify their object of study), are conceptual reconstructions based on intuitions about what legal theorists consider what legal operators believe is the legal practice.[88] Beyond the fact that these intuitions are often contradictory—otherwise such philosophical reconstructions would not be necessary—these concepts of law intend to account for the totality of legal practice. For this reason, those are unwieldy for legal scholars, and seem rather to respond to the final product of the research of those, not the criteria that should be used by them to identify the object of study (the function that the concept of law should accomplish).

ii) Much of the discussion about which should be the method used by legal scholars has been discussed in meta-scientific terms, that is, analysing which method they should use to consider their activity as scientific (at least under any of the scientific criteria available).

However, as authors such as Nino have said,[89] it is not a good idea to reduce the question of what legal scholars should do to the criteria of any conception of science—altough the right reason for not doing it is not what many defenders of the argumentativist dogmatics believe. Indeed, the problem is not that the models of legal science in the strict sense are irrelevant[90]—to know how judges will decide future disputes or what is the interpretation according to the linguistic conventions is relevant to any legal operator—but that all activity, even scientific practice, requires a practical justification.

The first reason is that the scientific method can be applied to countless objects of study but such investigations can never be considered justified by this: consider, for example, a predictive and rigorous study on the number of vowels that will be used in a judicial decision.

The second reason is that if we try to universalize the argument, and we interpret it *a contrario* (in its productive version), it seems unacceptable to the extent that only scientific activities would be justified. Any other activity—i.e.

88 Much of the conceptual analysis developed in recent decades about the concept of law claims to be based on the beliefs of the legal operators about what the law is. However, in such investigations empirical evidence is not normally provided as a basis for attributing these beliefs to legal operators. Rather, what usually happens is that legal theorists ascribe their own conception of what the law is to legal operators. See in this regard Leiter 2007 (n. 63), 13 ff.

89 Nino 1989 (n. 13), 13 ff.

90 Atienza and Ruiz Manero claim that a legal science and/or a purely descriptive legal theory would be irrelevant because they would not serve for solving hard cases. Cfr. Atienza and Ruiz Manero 2007 (n. 57); Nino 1999 (n. 5), ch. I, III.

lege ferenda or *sententia ferenda* research—would not be justified on the basis of this argument, and it seems a very implausible consequence.

3.2.2 A Normative Question

The second way to interpret the question of what legal scholars should do is to shape it as a genuinely normative question of an ethical-political or moral nature. In particular, as the question of the contribution that legal scholars have to make to the legal community.

There is a first set of arguments to justify that choosing a legal method is a moral question. If we define 'moral values' like those that do not require or permit further arguments for justifying a decision, then it can be said that any choice can be qualified as moral. Perhaps this thesis is true, but it probably does not have much interest. Nonetheless, from a second point of view it is possible to state that it is necessary (for conceptual reasons) to use some of the most important values that are normally considered moral values, for justifying the choice of method.

However, as any reasoned response to any practical problem, it is not based solely on axiological considerations but empirical and theoretical considerations are also relevant. Among the reasons that have to play a decisive role in choosing between the possible methods for establishing the content of law we can find at least the following types of reasons:

a) Theoretical-legal reasons: for example, what interpretation is about, doctrines of the sources of law, what is the nature of legal concepts, etc.

b) Philosophical reasons in general, whether epistemological, ontological or meta-ethical such as the positions on what is considered justified knowledge, what are the entities that exist, the truth values of moral statements, etc.

c) Considerations of the empirical, political, economic and socio-legal reality, such as the level of litigation within the legal community, what is the degree of disagreement within that community, a social change or a change in production methods, a moment of institutional crisis, etc.

d) Reasons of a moral or political ethical nature, concerning the contribution that legal scholars have to make to the legal community. That is, the role to be played by legal scholars in the development, education, knowledge, interpretation and application of law.[91]

91 I stop at this point because many realists have held, and currently hold, that legal scholars should not engage themselves in legal practice but only in describing it, or that its activity should not take into account their potential impact on legal practice. However, to the extent that they intend that their research would not be irrelevant to the practice of law—that it would be considered reasons for action by someone—the thesis seems implausible. Given this last argument, two further arguments can be presented. In the first, the activity is relevant but does not require a moral justification. According to the second, the activity of legal scholars should not be relevant to legal practice.

This is not the place to explain how each of these criteria justifies the adoption of a particular model of legal science (*ampio sensu*). Rather, here I defend the conceptual thesis[92] by which it is (conceptually) necessary to use ethical-political or moral reasons in order to qualify the choice of one of the methods for establishing content of the law as justified. Of course, I'm not arguing that all legal scholars will decide which method they will use in resorting to moral considerations (the empirical question), nor should they necessarily introduce value considerations in its methodology for determining the content of law (the methodological question). What I hold is that in order to be justified, the choice of the method of legal scholars must be based on moral reasons (for conceptual reasons).

For understanding in what sense the ethical-political or moral reasons play a conclusive role in the methodological choice it is advisable to start with some examples. Imagine, first, a legal scholar who believes that the best definition of the concept of law is the one presented as a set of norms from normative authorities, that there is a considerable agreement on what criteria and techniques should be used to interpret the law, and that the number of hard cases is marginal. So, it would be plausible to think that, due to legal-theoretical reasons, he should adopt the method of normativist legal science.

The first argument can be summarized as follows: in the same way that we do not consider knowing the laws of aerodynamics as an activity that requires a moral justification, nor would it predict how judges will decide future disputes. Now, we do not know the laws of aerodynamics for the mere fun of it but because this knowledge will be useful for other activities, in particular, as necessary knowledge for technical activities, such as building airplanes. In this sense, it is aircraft construction (or any other technical activity) which justifies the knowledge of the laws of aerodynamics (or any other scientific activity). However, if we build airplanes then it is not for the mere fun of it but because we consider the result of such activity valuable. That is, because we consider these objectives as morally valuable. Similarly, knowing how judges will decide is a worthy purpose because you can perform some activities that we consider valuable – as guiding our behaviour – that actually affect legal practice.
According to the second argument, the activity of legal science simply does not have to impact on legal practice. In response to this argument, it is possible to pose two further arguments: first, it is almost impossible that the activity of legal scholars have no impact on legal practice, unless it is kept concealed; secondly, it would be possible to question, then, why it is important to study the content of law, that is, to make legal science (*ampio sensu*).
Everyone, including the realists, is in the same boat in the legal community. On this point, the discussion between Brian Leiter and Julie Dickinson can be followed. Cf. Julie Dickson, Methodology in Jurisprudence: a critical survey, *Legal Theory* 10 (2004) 3, 117–156; Leiter 2007 (n. 63), 148 ss.

92 This is not a normative thesis about what legal scholars should do but a conceptual thesis about when we can consider a decision as justified from a formal point of view. In short: if the decision affects moral goods, the decision cannot avoid referring to these goods. It is not that the decision would be wrong from the material point of view, but it would be incongruous to decide moral issues by reference to non-moral reasons. Something similar would happen if we try to resolve empirical or conceptual questions through moral reasons.

However, it is perfectly possible to accept this thesis and to hold, without falling into contradiction, that legal scholars should devote themselves to proposing solutions for hard cases. For example, the description of the content of law could be for this hypothetical scholar—because in order to know the deontic qualification of behaviour it is enough to apply interpretive methods existing in the legal community—an irrelevant activity because any informed person knows the conventional interpretation of the statements of the legislator. On the contrary, the scholar may consider that what he should do is to suggest solutions for cases for which the law is indeterminate because in such way he improves the decisions of the courts, even if it were necessary to resort to non-legal considerations or expand their concept of law.

Secondly, the opposite situation is also possible. Imagine a scholar who believes that the law includes some principles and values that we can know and use to identify a single right answer for hard cases. However, this second hypothetical legal scholar might consider that—since judges do not read legal dogmatics, they systematically move away from these right decisions, or because there is much disagreement among them—he should devote his research to predicting how judges will decide future disputes. That is, although reasons might be offered to establish which is the best answer to hard cases, for this second scholar it would have greater moral value to make predictions on how judges will decide, because that would promote legal security and, therefore, the autonomy of the subjects.

Positions like these are not necessarily contradictory. But why should moral or ethical-political criteria determine methodological choice? Since the activity of legal scholars should be relevant—that is, that the result of their activity would be taken into account as a reason—in the action of legal operators, such activity must have a moral basis. The reason is that the activity of legal operators—their education, and the creation, interpretation and application of law—affects ethical-political or moral goods (life, liberty, equality, autonomy, political stability, etc.) so, in the same way, the results of the research work of legal scholars affect such moral goods. Therefore, given that legal scholars influence—albeit indirectly—the treatment of moral goods protected by the order, then the justification of the method—for reasons of consistency—must refer to moral reasons.

If the reasons for adopting a particular model of legal science (*ampio sensu*) are of a moral or political ethical nature, and different research objectives require different coherent methods for such purposes, then the legal scholar must take his own methodological premises based on the research objectives pursued. What concept of law, what theory of interpretation or what ontology of legal rules is chosen will depend on the objective pursued by the legal scholar:

to describe rules according to linguistic conventions, to predict court decisions or to propose normative solutions for easy and hard cases.

3.3 Some Reasons for Legal Science

To analyse what are the moral reasons that justify the adoption of each of these models of legal science (*ampio sensu*) unfortunately exceeds the scope of this work. Nonetheless, to finish, I would like to highlight some of the moral reasons that can be used in support of each of these methods.

3.3.1 Reasons for Normativist Legal Science

At least two reasons can be pointed to as justification for the normativist method. First, the preference for normativist method may be based on the political consideration that a legal document or legal authority should be given greater respect in the practice of the courts as, for example, the rules from a democratic legislator,[93] or the norms of the constitution. Normativist legal science thus would become the guardian of the sources of law, ensuring that a valid law is not modified, especially during the adjudication process.[94]

Second, normativist method finds justification on the principle of rationality, because presenting the content of law in an orderly and systematic way facilitates the identification of gaps, contradictions and redundancies, promoting wholeness and coherence of the legal system.[95] Thus, such a model would find justification—even indirectly—on the principle of legal certainty.

3.3.2 Reasons for Realistic Legal Science

The realistic model of legal science has frequently been justified by its advocates as the only scientific way to address the study of the content of law. However, we have already seen that this is not a good justification for any model of legal science.

Nevertheless, it is possible to offer some practical or moral arguments in favour of the realistic method. First, to know how judges will decide future controversies is relevant to the general public: to the extent that court decisions affect moral goods, to know how judges will decide allows anyone to plan his own behaviour rationally. For example, to know under what conditions it is possible to end up in jail has moral significance because it allows the planning of our actions, which involves a greater degree of autonomy.

93 Jeremy Waldron, *Law and Disagreements*, Oxford, Oxford University Press, 2001.

94 Ferrajoli 1983 (n. 42).

95 Alchourrón y Bulygin 1975 (n. 4), ch. ix. See also, Paolo Comanducci, El racionalismo de Alchourrón y Bulygin, in *Hacia una teoría analítica del derecho*, Madrid, CEPC, 2010, 227–234.

Second, legal operators (legislator,[96] judges, lawyers, etc.) have a special interest in knowing what the consequences of one's own actions at the judicial level will be: how a reform will be implemented, when one's own decision will be rejected by the higher courts or what possibilities exist to win a court case. The realistic method finds, in this way, justification by the greater degree of rationality and higher probability of pragmatic success of decisions made taking into account how these actions will be considered by the courts, which also promotes the better functioning of the legal system.[97]

3.3.3 Reasons for Argumentativist Legal Dogmatics

Regarding the argumentativist model of legal dogmatics, it seems beyond doubt that the main practical justification is based on the moral or ethical-political quality of the proposed solutions for hard cases. That is, it would be justified to adopt the argumentativist method precisely because it serves, at least according to its advocates, to obtain the best possible response.[98]

However, it is possible to wonder why it is important to propose answers (or the best answer possible) to hard cases. The question, while apparently banal, allows for two different answers. First, to provide the best possible solution to a hard case would have an intrinsic value. That is, in the same way that telling the truth would be good—at least accordingly to some value systems—in itself, it would be the same presenting which is the correct answer.

Second, a proposed solution to a hard case can have instrumental value in two different ways: first, because providing the best answer possible—for example, through a comment in a specialized publication—makes it more likely to be finally adopted by the courts; second, even though it was not "really" the best possible answer, to give reasons and/or arguments supporting some of the possible solutions is valuable to the extent that it contributes to the discussion on what it is due to do.

3.3.4 Reasons for Technological Dogmatics

In the same way as in the case of argumentativist dogmatics, technological dogmatics finds its justification first in the goodness or rightness of the solutions taken in using it.

However, based on the criticisms that advocates of technological dogmatics direct, mainly against argumentativist dogmatics, it is possible to provide ad-

96 See, in this regard, Núñez Vaquero 2011 (n. 41).

97 I have developed this argument extensively in Álvaro Núñez Vaquero, Ciencia jurídica realista: modelos y justificación, in *Doxa* (2012) 35.

98 See, among others, Ronald Dworkin, In Praise of Theory, in *Justice in Robes*, Cambridge Massachusetts, Harvard University Press, 2006, ch. II.

ditional reasons that would justify the technological method. First, the greater controllability of the proposed solutions to hard cases. If, as defenders of the technological model claim, the argumentativist method would serve only as *ex post facto* justification of decisions based on non-explicit reasons (and therefore not subject to analysis and control), then the technological model could be justified because it is a method that allows the proposed solutions to be more rationally controlled. Also, the adoption of this method would increase the chances of pragmatic success—in the sense that it achieves the goals it sets—of those decisions.

Second, if the adoption of this method is used to discard those solutions that are not instrumentally suitable to achieve the state of affairs that is considered better, then this method also supports the certainty of law and therefore autonomy. This is because if one of the possible answers to the hard case is shown to be irrational—in the sense that it is not enough to achieve the stated objective—it is less likely that it would be adopted by any court and, in this way, the degree of legal certainty increases.

3.3.5 Reasons for Critical Legal Dogmatics

Again, and as with argumentativist and technological dogmatics, the primary justification for supporting the critical model is founded on the moral or ethical-political rightness of its proposed solutions for hard cases.

However, in the case of critical legal dogmatics, as it proposes converting easy cases in hard cases, it requires greater effort in terms of justification. This is because the aim is not only to make proposals for hard cases but also to propose new or different solutions for easy cases, modifying the conventional legal solution, which seems to go against the principle of legal certainty.

That being said, the critical model of legal dogmatics finds more justification precisely where the legal system of reference is considered to be very unfair. In this sense, it is plausible to say that where the law is unjust, it would be more justified that legal scholars devote their efforts to also proposing solutions to hard cases.

The method which should be used by legal scholars is a question that depends on different factors, and probably cannot be answered in abstract terms. Here I have only tried to provide a map of the different models of legal science and to clarify what kind of arguments justify the choosing of one of the methods.

Translated from Spanish by
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Synopsis

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Five Models of Legal Science

Keywords: legal science, legal dogmatics, moral reasons, concept of law, conceptions of science

Summary: 1. About the Concept of Legal Science. — *1.1. The Ambiguity of 'Legal Science'.* — *1.2. Toward a Concept of 'Legal Science'*. — 2. Models of Legal Science (ampio sensu). — *2.1. Normativist Legal Science.* — *2.2. Realistic Legal Science.* — *2.3. Argumentativist Legal Dogmatics.* — *2.4. Realistic-Technological Legal Dogmatics.* — *2.5. Critical Legal Dogmatics.* — 3. How to Do Things with Methods. — *3.1. What Legal Scholars Do.* — *3.2. What Legal Scholars Should Do.* — *3.2.1. A Technical Question.* — *3.2.2. A Normative Question.* — *3.3. Some Reasons for Legal Science.* — *3.3.1. Reasons for Normativist Legal Science.* — *3.3.2. Reasons for Realistic Legal Science.* — 3.3.3. Reasons for Argumentativist Legal Dogmatics. — 3.3.4. Reasons for Technological Dogmatics. — 3.3.5. Reasons for Critical Legal Dogmatics.

This paper pursues three goals. First, some traditional concepts of 'legal science' will be analysed, and a definition of 'legal science *ampio sensu*', 'legal science *stricto sensu*' and 'legal dogmatics' will be proposed. Second, a reconstruction of five models of 'legal science *ampio sensu*' will be presented to show the different methodological alternatives available to legal scholars. Third, I claim that it is necessary (for conceptual reasons) to argue for moral reasons when choosing a legal method. Finally, I offer some arguments for supporting the five methodological alternatives of legal science *ampio sensu*.

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