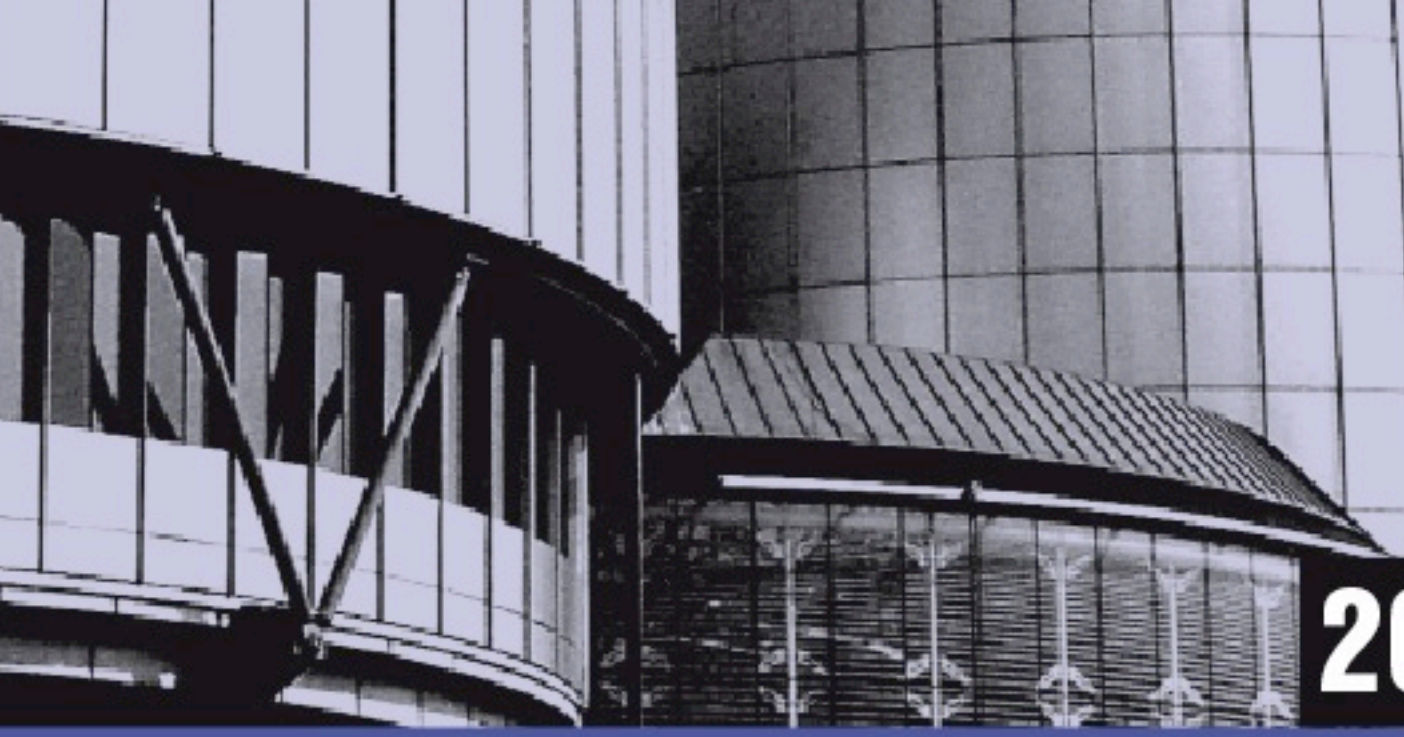

2

Luka Burazin in Andrej Kristan (ur.)

revus

journal for constitutional theory and philosophy of law

revija za ustavno teorijo in filozofijo prava

journal for constitutional theory and philosophy of law

revus

revija za ustavno teorijo in filozofijo prava
časopis za ustavnu teoriju i filozofiju prava
revija za ustavna teorija i filozofija na pravoto

Ljubljana, 2015

revus

VSEBINA

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

TABLE OF CONTENTS

This issue is composed of papers in English, Spanish, Slovenian, Croatian and Bosnian. For English synopses and keywords, see pages 151–156.

Predgovor

Bobbio in pravni pozitivizem

Tridelba in njen avtor sam

1. Dobro je znana Bobbieva razčlenitev treh pomenov izraza pravni pozitivizem: pozitivizem kot splošni pristop k učenju prava, pozitivizem kot nauk o pravu in pozitivizem kot pravna ideologija.[1] Naj jih na hitro predstavim. V prvem pomenu – tj. kot pristop k učenju prava – pozitivizem vzpostavlja »jasno razliko med pravom, kakršno je, in pravom, kakršno bi moralo biti«, obenem pa zavzema »prepričanje, da se mora pravnik ukvarjati s prvim, in ne z drugim«. V drugem pomenu – tj. kot posebni nauk o pravu – pozitivizem zaznamujejo nauk o prisilnosti prava, imperativizem, vrhovnost zakona in razumevanje, da je pravni red zapolnjen (tj. brez pravnih praznin) in notranje skladen (tj. brez antinomij). V tretjem pomenu – kot pravna ideologija – pozitivizem pravu pripisuje pozitivno vrednost že samo zato, ker obstaja; po skrajnejši različici pa pozitivizem »že samo zato, ker postavljeno pravo obstaja, smatra, da je to pravično«, in ker je pravično, naj bi ga bili dolžni spoštovati.[2] Ta tridelba nedvomno sproža več problemov. V zvezi s prvim od razčlenjenih pomenov pravnega pozitivizma, tj. v zvezi s pozitivizmom kot splošnim pristopom k učenju prava, lahko ob pogledu na danes znano razliko med zaprtim pozitivizmom in odprtim pozitivizmom jasno opozorimo na obstoj prav takšne dvopomenskosti izraza pravni pozitivizem, kakršno je Bobbio želel izključiti. K drugemu od pomenov moramo po mojem dodati, da deluje izenačitev pozitivizma kot nauka o pravu s tako skrajno različico pravnega formalizma dokaj arbitrarno. To namreč pomeni, da ob strani pustimo tako normativistične nauke o pravu, ki se (upravičeno) samoopredeljujejo kot pozitivistični, a jih nikakor ne moremo opredeliti za formalistične (Hart je tu dober primer), kakor tudi nenormativistične nauke o pravu, ki jih gre razumno šteti za pozitivistične (npr. tiste, ki jih González Vicén opredeljuje kot zgodovinsko-pozitivistične in pozitivistično-realistične).[3] Kar zadeva pozitivizem kot pravno ideologijo, pa se za prav tako arbitrarnega izkaže poudarek – ta sicer ni ravno Bobbiev, je pa del prevladujočega razumevanja njegove tridelbe – na tako skrajnem stališču, kakršno je Hobbesovo, tj. na trdi-

1 To je zapis prispevka z okrogle mize o Norbertu Bobbiu in prihodnosti filozofije prava v Alicanteju 13. junija 2015, v okviru XXI. *Italijansko-špansko-francoskega seminarja za pravno teorijo*.

2 Bobbio 1992: 37 ss.

3 González Vicén 1979: 171 ss.

tvi, da vedno obstaja odločujoča moralna dolžnost spoštovati pravo. To stališče je redkokdaj zagovarjal kakšen pravnik. Izenačevanje pozitivizma kot pravne ideologije s Hobbesovim stališčem pušča ob strani vse tisto, kar lahko razumno štejemo za najzanimivejše oblike pozitivistične ideologije, tj. vse, kar lahko povzamemo z navedbo takšnih imen, kot so Uberto Scarpelli in – med sodobnimi pozitivisti – Tom Campbell, Liborio Hierro ali Francisco Laporta.

2. Tisto, kar me tu sicer zanima, niso toliko navedene pomanjkljivosti Bobbieve tridelbe, ampak – kot bomo videli v nadaljevanju – nekaj čisto drugega. Naj najprej spomnim na dobro znani podatek, da je v navedenem članku tridelba služila Bobbiu za to, da je razjasnil svoje stališče. Po Bobbiu samem zaznamuje njegovo stališče pozitivizem kot splošni pristop k učenju prava, povsem tuja pa sta mu pozitivizem kot poseben pravni nauk in pozitivistična ideologija prava. Osnovni cilj tega mojega prispevka je, nasprotno, vzbuditi dvom o primernosti te opredelitve, ki jo je postavil Bobbio sam. Utemeljeval bom, da pri Bobbiu najdemo jasno zavzeta stališča – tu gre za njegovo zrelejše obdobje in na vsak način poznejše od tridelbe –, ki jih je mogoče razumeti le kot izraze pozitivizma kot posebnega pravnega nauka (tj. kot formalizma) in kot pravne ideologije. Ti izrazi so po mojem mnenju zelo jasno prisotni v različnih Bobbievih razmišljanjih o Kelsnovem pojmu temeljne norme in o Hartovem pojmu pravila priznavanja. Kot je znano, sta ta pojma odgovora na dve vprašanji: (1) na vprašanje o družbeni usidranosti prava, o nujnosti razlikovanja med pravnim redom, ki ima v dani družbi dejanski vpliv, in drugimi pravnimi redi, ki so umišljeni, opevani, predlagani; (2) na to, kar običajno imenujemo vprašanje normativnosti prava, tj. vprašanje utemeljenosti razumevanja določenih družbenih praks in predpisov, ki jih izdajajo določene oblasti, kot zavezujočih norm, na katere se lahko utemeljeno opremo pri sprejemanju odločitev. Oba pojma – temeljna norma in pravilo priznavanja – sta vsak zase povezana s tema dvema vprašanjema, čeprav se zaradi nekaterih posebnosti slednjih zdi, da se pojem pravila priznavanja v prvi vrsti navezuje na vprašanje družbene usidranosti prava in le posredno tudi na vprašanje njegove normativnosti, pojem temeljne norme pa prav nasprotno, tj. v prvi vrsti na vprašanje normativnosti in le posredno na vprašanje družbene usidranosti. Menim tudi, da je pojem pravila priznavanja v osnovi ustrezen odgovor na vprašanje družbene usidranosti, medtem ko pojem temeljne norme neuspešno odgovarja na vprašanje normativnosti. Kar je tukaj treba pokazati – in bo v nadaljevanju predmet mojega razmišljanja –, pa je, da Bobbieva težnja k spregledu teh dveh pojmov pomeni tudi spregled ali zanemarjenje vprašanj o družbeni usidranosti prava in njegovi normativnosti, na katera omenjena pojma odgovarjata. Hkrati potisne Bobbia sam način, ki nas pripelje do spregleda, nazaj v tista dva pomena pravnega pozitivizma, ki ju je sam zavrnil v besedilu, v katerem je izpeljal razčlenitev; potisne ga nazaj v pozitivizem kot posebni pravni nauk in v pozitivizem kot ideologijo prava. Za obe vrsti pozitivizma je značilen izključno notranji pogled na pravni

red. Tega razumeta kot nekaj samozadostnega tako v zvezi z njegovim obstojem v smislu veljavnega pravnega reda kakor v zvezi z njegovo naravo utemeljenega normativnega reda. Pravkar povedano je zgolj uvodne narave. Poglejmo torej, za kaj gre.

3. Na drugem mestu sem že opozoril na premik,[4] ki se kaže skozi čas v Bobbievem odnosu do pojmov temeljne norme in pravila priznavanja. V zgodnejših besedilih ju je razumel kot nepogrešljiva, pozneje pa je zatrjeval, da sta pojma nepotrebna in da bi ju morali izločiti iz pojmovnega orodja pravoslovcev.

Tako se pojem temeljne norme v delu *Teoria dell'ordinamento giuridico* iz leta 1960 pojavi kot nujen za mišljenje ustanovne oblasti kot normodajne oblasti, za mišljenje njenih izrekov kot norm in za to, da bi lahko prek tega utemeljili veljavnost vseh norm nekega pravnega reda.[5] Kljub temu je potem v članku *Sul principio di legittimità* leta 1964 označil temeljno normo za »popolnoma nepotrebno«, saj se – kot pravi sam – »veljavnost končne norme opira na učinkovitost končne oblasti,« tako da je temeljna norma »norma, kateri pripisujemo vlogo pravne utemeljitve oblasti, ki pravne utemeljitve ne potrebuje, saj ji takšno utemeljitev daje že samo dejstvo njenega obstoja«.[6] Nemogoče bi bilo prezreti, da tu Bobbio zapade v ideološki pozitivizem hobbesovskega tipa, za katerega je nekaj let pred tem poudaril, da ga ne sprejema: končna oblast je utemeljena in naj bi morala biti spoštovana preprosto zato – še enkrat navajam dobesedno –, »ker je dejansko spoštovana.« Dodati pa je treba, da Bobbiev ideološki pozitivizem hobbesovskega tipa zapade v dokaj okorno obliko naturalističnega zdrsa (česar Hobbesu ni mogoče očitati): po Hobbesu je utemeljena in bi morala biti spoštovana vsaka dejansko spoštovana oblast, ker je le na takšni podlagi mogoče vsem zagotoviti varnost; po Bobbiu pa bi jo morali spoštovati preprosto zato, ker je dejansko spoštovana.

V zvezi s pravilom priznavanja najdemo pri Bobbiu prav takšen premik od nujnosti k nepotrebnosti – čeprav drži, da Bobbio ni prikimal končnemu pravilu priznavanja, ampak t. i. *izvedenim pravilom priznavanja* (tj. postavljenim in veljavnim pravilom pravnega reda, katerih veljavnost temelji na drugih pravilih, v skladu s katerimi so bila prva izdana). Po Bobbiu je posebnost teh pravil (dober primer je člen 1.1. Španskega civilnega zakonika), da vsebujejo nekatera merila, v skladu s katerimi »je mogoče razlikovati pravila, ki so del pravnega reda, in tista, ki to niso«. Bobbio k temu doda, da je za opozorilo na to kategorijo sekundarnih pravil zaslužen Hart, ki jih je tudi poimenoval pravila priznavanja.[7] Nekaj let pozneje pa je Bobbio vseeno menil, da je (ožja) kategorija pravil

4 Ruiz Manero 2010: 95 ss.

5 Bobbio 1991: 179–181.

6 Bobbio 1970: 88–89.

7 Bobbio 1980: 324–325.

priznavanja nepotrebna ob (splošnejši) kategoriji »pravil o ustvarjanju prava«. »Pravila o ustvarjanju prava,« piše Bobbio zdaj, »ponujajo nujna in zadostna merila za 'pripoznanje' veljavnih pravil pravnega reda[.] Ko enkrat uvedemo kategorijo pravil o ustvarjanju prava, ni več jasno, kakšno vlogo naj bi posebej igrala pravila priznavanja in kakšno korist naj bi pomenila ta nova kategorija sekundarnih pravil.«[8]

Ob povedanem se zdi razumno trditi, da je že po načelu Ockhamove britve kategorija pravil priznavanja pogrešljiva: če velja *entia non sunt multiplicanda praeter necessitatem*, potem je jasno, da je omenjena izvedena pravila priznavanja treba opustiti; vse, kar z njimi razložimo, je mogoče razložiti tudi s kategorijo pravil o ustvarjanju prava.

Problem pa je, vseeno, v tem, da se Hart s pojmom pravila priznavanja v resnici ne navezuje na nobena postavljena pravila, ampak na končno pravilo, ki po njegovem obstaja zgolj kot »zapletena, a navadno ubrana praksa« prepoznavanja prava po določenih merilih;[9] ta merila obstajajo zgolj, če so v dani pravni skupnosti sprejeta. Pojem tovrstnega pravila (ali temu podobnega, kot je npr. Rossov pojem »obče normativne ideologije«)[10] pa je nujen za osvetlitev dileme, v katero nas vodi (če izključimo možnost padca v zanko neskončnosti) omejitev našega razmišljanja na postavljena pravila: na eni strani dileme je krožnost (veljavnost pravila A je odvisna od drugega pravila B, katerega veljavnost je, nasprotno, odvisna od pravila A), na drugi pa *petitio principi* oz. dokazovanje z nedokazanim (če je določeno pravilo, ki ga postavljamo na začetek verige, veljavno, je to zato, ker je veljavno, tj. ker je pač veljavno).

4. Verjetno najpomembnejši zaključek, ki ga je mogoče potegniti iz razmišljanja o Bobbievi tridelbi, je, da ima uvajanje pojmovnih delitev v pozitivizmu svoje meje. Vsekakor je to pojmovno razčlenjevanje zanimivo, verjetno pa bi bilo še bolj zanimivo, če bi ubralo naslednjo pot: če bi se namesto razpravljanja o različicah pozitivizma in ne glede na to, h kateri od teh različic se prišteva posamezni avtor sam, posvetili trditvam vsakega od tistih avtorjev, ki se sami prištevajo med pozitiviste.

A če je na področju teoretičnega razpravljanja očitno bolje kar najbolj natančno opredeliti predmet razprave (zaradi česar je mogoče reči, da na tem področju načeloma velja, *ceteris paribus,* da je bolje imeti več razčlemb kot manj), pa je stvar verjetno drugačna na področju zgodovine pravne kulture, ki je le del tega, kar bi lahko poimenovali *zgodovina miselnosti*. S tega zornega kota se nam pozitivizem ne kaže več kot splošni tok, ki združuje različne nauke o pravu, ampak bolj kot neko kulturno okolje, v katerem so sočasno prisotna (na

8 Bobbio 1994: 240.

9 Hart 1961: 137.

10 Glej Ross 1963: pogl. III.

prevladujoče neizraženi način, ki je značilen za kulturna okolja, in ne na bolj ali manj opredeljeni način, po katerem je mogoče prepoznati posamične nauke o pravu) tako stališča, ki ustrezajo pozitivizmu kot splošnemu pristopu k učenju prava, kakor tista, ki ustrezajo pozitivističnemu nauku o pravu in pozitivistični ideologiji prava. Bobbio je živel v tem kulturnem okolju in prav verjetno je, da so se mu zato trditve pozitivizma kot formalističnega nauka in pozitivizma kot pravne ideologije, ki jih je najprej s tridelbo postavil pred vrata, pozneje vrnile skozi okno na nezaznan in neopredeljen način.

Kulturno okolje namreč ni sestavljeno iz skupka izraženih trditev. Veliko bolj ga opredeljujejo splošno zavzeta stališča in prioritete, ki niso nujno izraženi, saj so del skupnega zaledja, ki je predpostavljeno, ne da bi bilo to treba izraziti ali postaviti pod vprašaj. Zato je vpliv kulturnega okolja v nekem smislu bolj »zahrbten«. Izogniti se temu vplivu je teže kot vplivu kateregakoli skupka izrecnih trditev, ki tvorijo t. i. teorije ali nauke: trditve neke teorije so tisto, kar nekdo preučuje, o čemer razmišlja in v zvezi s čimer izraža svoje strinjanje ali nestrinjanje (ali pa se izrecne sodbe morda vzdrži). Kulturno okolje pa je tisto, v čemer nekdo živi. Če bi torej želeli opozoriti na glavno značilnost pozitivizma kot kulturnega okolja, bi morali reči, da je to prežeto s skoraj izključno notranjim pogledom na pravo. S takšnim pogledom sta vprašanji družbenega obstoja prava in njegove moralne utemeljitve preprosto neopazni. Kadar pa teh vprašanj iz takšnega ali drugačnega razloga ni mogoče prezreti, se nanju odgovori s predpostavljanjem, da je pravo zmožno samo od sebe ali s pomočjo načela učinkovitosti razložiti svoj družbeni obstoj, svoj vpliv, in da je od znotraj mogoče utemeljiti trditev o veljavnosti prava v smislu njegove zavezujoče narave. Obe predpostavki najdemo v zgoraj obravnavanih Bobbievih stališčih o koristnosti pojmov temeljne norme in pravila priznavanja. Z obema predpostavkama pa se zgodi tako rekoč kot z mumijami, ki razpadejo ob samem stiku z zrakom; obstaneta lahko le kot tihi predpostavki, kakor hitro sta izraženi, pa postane očitno, da nista verjetni in niti mogoči ter da ju je treba opustiti.

Juan Ruiz Manero
redni profesor filozofije prava,
Univerza v Alicanteju (Španija)

Iz španščine prevedel
Andrej Kristan.

Bibliografija

Norberto BOBBIO, 1970: Sul principio di legittimità. *Studi per una teoría generale del diritto.* Torino: Giappichelli.

——, 1975: *Per un lessico di teoria generale del diritto.* Ponatisnjeno z naslovom: Norme secondarie v *Contributi ad un dizionario giuridico*. Torino: Giappichelli, 1994.

——, 1980: Normas primarias y normas secundarias (1968). Navajam po španskem prevodu: *Contribución a la teoría del derecho.* Valencia: Fernando Torres.

——, 1991: *Teoria dell'ordinamento giuridico* (1960). Navajam po španskem prevodu: *Teoría general del derecho*. Madrid: Debate.

——, 1992: Sul positivismo giuridico. *Rivista di filosofia* LII (1961). Navajam po španskem prevodu: *El problema del positivismo jurídico*. México: Fontamara.

Felipe GONZÁLEZ VICÉN, 1979: Sobre el positivismo jurídico. *Estudios de filosofía del derecho*. Facultad de derecho de la Universidad de La Laguna.

Herbert L. A. HART, 1961: *The Concept of Law.* Navajam po španskem prevodu: *El concepto de derecho*. México: Editora Nacional.

Alf ROSS, 1963: *On Law and Justice* (1958). Navajam po španskem prevodu: *Sobre el derecho y la justicia*. Buenos Aires: Eudeba.

Juan RUIZ MANERO, 2010: Bobbio y los conceptos de norma jurídicamente última. *Analisi e diritto* 2010. Tudi v: *El legado del positivismo jurídico. Ocho ensayos sobre cinco autores positivistas*. Lima/Bogotá: Palestra-Temis, 2014.

Bobbio y el positivismo

La triple distinción y el propio Bobbio

1. Es muy conocida la distinción de Bobbio entre tres sentidos de positivismo jurídico: positivismo como enfoque general en el estudio del derecho, positivismo como teoría del derecho, y positivismo como ideología acerca del derecho.[1] Recordándolo muy rápidamente, en el primer sentido – positivismo como enfoque – se trata de sostener "una clara distinción entre el derecho que es y el derecho que debe ser" y también "la convicción de que el derecho del que ocuparse el jurista es el primero y no el segundo". En el segundo sentido – positivismo como teoría específica del derecho –, se trata de la suma de la teoría de la coactividad, del imperativismo, de la supremacía de la ley y de la consideración del sistema jurídico como completo (carente de lagunas) y coherente (carente de antinomias). En el tercer sentido – positivismo como ideología – se trata de la atribución al derecho, por el mero hecho de existir, de un valor positivo y, en su versión más radical, de la consideración de que "el derecho positivo, por el mero hecho de ser positivo, es justo" y existe por tanto, respecto de él, un deber de obediencia.[2] Esta triple distinción plantea, sin duda, bastantes problemas. En cuanto al primero de los sentidos de positivismo en ella distinguidos, el positivismo como enfoque general, resulta claro que – como muestra la distinción de nuestros días entre positivismo excluyente y positivismo incluyente – en el interior de este primer sentido de positivismo subsiste la ambigüedad que Bobbio pretendía desterrar. En cuanto al segundo sentido, resulta, me parece, un tanto arbitrario reducir el ámbito del positivismo como teoría del derecho a lo que podríamos llamar una versión extrema del formalismo. Esto implica el dejar de lado la existencia de teorías del derecho normativistas que se consideran a sí mismas, y con buenos títulos, como positivistas y que de ningún modo pueden ser consideradas como formalistas (Hart sería aquí el ejemplo emblemático) y también de teorías no normativistas del derecho que pueden razonablemente ser consideradas como positivistas (tales como aquellas que González Vicén, por ejemplo, calificaba de positivistas-historicistas o de positivistas-realistas).[3] Y en cuanto al positivismo como ideología acerca del derecho, parece también un tanto arbitrario poner el énfasis, como no tanto el propio Bobbio pero sí la

1 Este texto reproduce la intervención en la mesa redonda sobre *Norberto Bobbio y el futuro de la filosofía del derecho,* que tuvo lugar en Alicante el 13 de junio de 2015 en el marco del XXI Seminario hispano-franco-italiano de teoría del derecho.

2 Bobbio 1992: 37 ss.

3 González Vicén 1979: 171 ss.

manera como predominantemente ha sido leído, en una posición tan extrema como la hobbesiana – esto es, a la tesis de que hay siempre una obligación moral concluyente de obedecer al derecho –, posición que ha sido raramente sostenida por algún jurista. Esta identificación entre positivismo como ideología y hobbesianismo deja fuera a todo aquello que podemos considerar razonablemente como las manifestaciones más interesantes del positivismo como ideología, todo aquello que podemos resumir en los nombres de Uberto Scarpelli, o, entre los positivistas actuales, Tom Campbell, Liborio Hierro o Francisco Laporta.

2. Pero lo que me interesa ahora no son tanto los defectos, digamos, de la triple distinción bobbiana sino, como se verá a continuación, algo bien distinto. Empecemos por recordar el dato bien conocido de que esta triple distinción servía de base, en el texto de Bobbio recién mencionado, para que éste fijara su propia posición. El positivismo de Bobbio se limitaría, según él mismo, al positivismo como enfoque y sería completamente ajeno al positivismo como teoría específica y al positivismo como ideología. Pues bien: el objeto principal de esta intervención es poner en cuestión la propia caracterización que Bobbio hace de sí mismo. En el sentido siguiente: en Bobbio hay tomas de posición – y esto afecta al Bobbio más maduro, al Bobbio en todo caso posterior a la triple distinción a propósito del positivismo – que sólo pueden entenderse como huellas del positivismo como teoría específica, del positivismo como formalismo, y del positivismo como ideología. Estas huellas se encuentran muy claramente, a mi juicio, en diversas reflexiones de Bobbio a propósito del concepto kelseniano de norma básica y a propósito del concepto hartiano de regla de reconocimiento. Dichos conceptos, como es bien sabido, responden a dos preocupaciones: primero, a la preocupación por el anclaje social del derecho, a la preocupación por distinguir el sistema jurídico vigente en una determinada sociedad de sistemas jurídicos alternativos, imaginados, añorados o propuestos; segundo, a la preocupación por lo que ha llegado a ser común denominar el problema de la normatividad del derecho, esto es, la justificación de la consideración de ciertas prácticas sociales y de ciertas prescripciones emanadas de ciertas autoridades como normas vinculantes capaces de proporcionar un fundamento justificado a la adopción de decisiones. Ambos conceptos – norma básica y regla de reconocimiento – se vinculan, cada uno de ellos, con estos dos problemas, si bien las especificidades de cada uno de ellos hacen que el concepto de regla de reconocimiento aparezca primariamente vinculado al problema del anclaje social del derecho y sólo de forma derivada al problema de la normatividad, en tanto que con el concepto de norma básica ocurra justo lo opuesto: que aparece primariamente vinculado al problema de la normatividad y sólo derivadamente al problema del anclaje social. Y creo también que así como el concepto de regla de reconocimiento es una respuesta básicamente adecuada al problema del anclaje social, el concepto de norma básica es una respuesta fracasada al problema de la normatividad. Pero lo que importa aquí mostrar, y sobre ello se articula lo que

viene a continuación, es que la pretensión bobbiana de prescindir de estos conceptos implica el ignorar, el dejar de lado, los problemas a los que los mismos responden (anclaje social y normatividad, como he venido repitiendo). Y que el dejar de lado estos problemas se hace, desde coordenadas que hacen recaer a Bobbio en los dos sentidos de positivismo rechazados por él en el texto en el que traza la triple distinción, esto es, en el positivismo como teoría específica del derecho y en el positivismo como ideología. Ambos positivismos tienen en común una mirada exclusivamente interna al sistema jurídico. Sistema jurídico que se considera como autosuficiente, bien en cuanto a su existencia como sistema vigente, bien en cuanto a su carácter de sistema normativo justificado. Pero todo hasta aquí es meramente introductorio. Entremos, pues, en la cosa.

3. En otra ocasión[4] puse de manifiesto cómo, tanto a propósito del concepto de norma básica como del concepto de regla de reconocimiento hay en Bobbio un desplazamiento, desde considerar, en unos primeros textos, que uno y otro concepto son imprescindibles a defender, en textos posteriores, que se trata de conceptos innecesarios que deberían ser eliminados del instrumental conceptual de la teoría del derecho.

Así, el concepto de norma básica aparece en la *Teoria dell'ordinamento giuridico* de 1960 como necesario para poder pensar el poder constituyente como un poder normativo y sus emisiones como normas y para poder fundamentar a partir de ahí la validez de todas las normas del sistema[5]. Sin embargo, en el texto de 1964 "Sul principio di legittimità", la norma básica es considerada como "perfectamente superflua", porque – dice ahora Bobbio – "la validez de la norma última se funda en la efectividad del poder último", de forma que la norma básica "es aquella norma a la que se asigna la función de legitimar jurídicamente un poder que no tiene necesidad de ninguna legitimación jurídica porque encuentra su legitimación jurídica en el hecho mismo de existir"[6]. No puede dejar de concluirse que aquí Bobbio incurre claramente en el positivismo ideológico hobbesiano que años antes ha declarado no compartir: el poder último es legítimo y debe ser obedecido sencillamente – cito un vez más textualmente – por "el hecho de ser efectivamente obedecido". Y cabe añadir que el positivismo ideológico hobbesiano de Bobbio incurre, a diferencia del defendido por el propio Hobbes, en una forma de falacia naturalista bastante cruda: en Hobbes, todo poder que encuentre efectivamente obediencia es legítimo y debe ser obedecido porque sólo desde esta obediencia cabe garantizar la seguridad de todos; en Bobbio parece que debe ser obedecido sencillamente porque es obedecido.

En relación con el concepto de regla de reconocimiento encontramos el mismo desplazamiento en Bobbio: de la necesidad del concepto a su superfluidad.

4 Ruiz Manero 2010: 95 ss.

5 Bobbio 1991: 179–181.

6 Bobbio 1970: 88–89.

Aunque lo cierto es que, en relación con esto, a lo que Bobbio aludió aprobatoriamente no fue al concepto hartiano de regla última de reconocimiento, sino a lo que podríamos llamar *reglas de reconocimiento derivadas,* esto es, un cierto tipo de normas promulgadas, normas válidas del sistema cuya validez se deriva de otras normas conforme a las cuales se han dictado. Lo peculiar de estas normas, de la que son un buen ejemplo, las disposiciones sobre la ley en general del Código civil italiano, o el art. 1.1. del Cc. español, es que, al decir de Bobbio, las mismas señalan algunos criterios conforme a los cuales "se pueden distinguir las normas que pertenecen al sistema de las que no pertenecen a él". Y, añade Bobbio, el mérito de haber individualizado esta categoría de normas secundarias corresponde /…/ a Hart, que las ha bautizado como normas de reconocimiento"[7]. Unos años después, sin embargo, Bobbio señala que la categoría, más específica, de reglas de reconocimiento resulta innecesaria frente a la categoría, más general, de "normas sobre la producción jurídica". "Las normas sobre la producción jurídica – escribe ahora Bobbio – ofrecen los criterios necesarios y suficientes para 'reconocer' cuáles son las normas válidas del sistema /…/ Una vez admitida la categoría de las normas sobre la producción jurídica, no se ve bien qué función específica puede atribuirse a las normas de reconocimiento y qué utilidad tiene la introducción de esa nueva categoría de normas secundarias"[8].

Pues bien: planteadas así las cosas, parece razonable sostener la prescindibilidad de la categoría de reglas de reconocimiento por la simple aplicación de la navaja ockhamiana: si *entia non sunt multiplicanda praeter necessitatem*, parece claro que debemos prescindir de tales reglas de reconocimiento derivadas; todo lo que explicamos con ellas lo podemos explicar con la categoría de normas sobre la producción jurídica.

El problema, sin embargo, es que el concepto hartiano de regla de reconocimiento no se refiere a normas promulgadas de ningún tipo, sino a una regla última que existe solamente, en términos de Hart, como "una práctica compleja, pero normalmente concordante" de identificación del derecho por referencia a ciertos criterios;[9] criterios que existen solamente en cuanto que aceptados en la comunidad jurídica de que se trate. Y el concepto de una regla de este tipo (o algún otro equivalente, como, por ejemplo, el de "ideología normativa común" de Ross[10]) es necesario para eludir el dilema al que, excluida la posibilidad del regreso al infinito, nos aboca el reducir nuestra consideración a las normas promulgadas: o bien la circularidad – una norma A es válida en función de otra norma B, que a su vez es válida en función de la norma A –, o bien la petición de

7 Bobbio 1980: 324–325.

8 Bobbio 1994: 240.

9 Hart 1961: 137.

10 Véase Ross 1963: cap. III.

principio: una cierta norma a la que situamos al principio de la cadena es válida porque es válida, es válida porque sí.

4. Quizás la principal conclusión que pueda extraerse de la lección bobbiana es que la introducción de distinciones conceptuales en el interior del positivismo sea una empresa con límites. Es, ciertamente, una empresa interesante e incluso quizás lo sería más si se radicalizase en el sentido siguiente: si, más allá de discutir acerca de variedades del positivismo, discutiésemos sin más, dejando de lado el tipo de positivismo que cada uno dice defender, las tesis sostenidas por cada uno de los autores que se consideran a sí mismos como positivistas.

Pero, si en el terreno de la discusión teórica es evidentemente mejor que afinemos lo más posible el objeto de la discusión y por ello podríamos decir que, en este ámbito, vale el principio de que, *ceteris paribus*, cuantas más distinciones mejor, la cosa quizás sea distinta si lo que pretendemos es hacer historia de la cultura jurídica, entendida como una rama de lo que podríamos llamar *historia de las mentalidades*. Porque desde este ángulo el positivismo nos aparece no ya como la corriente general en la que agrupar diversas teorías del derecho, sino más bien como una atmósfera cultural en la que, de forma no ya más o menos articulada como en las diversas teorías positivistas, sino en la forma predominantemente tácita e inarticulada que es propia de una atmósfera cultural, están presentes posiciones correspondientes tanto al positivismo como enfoque general, como al positivismo como teoría formalista del derecho y al positivismo como ideología. En esta atmósfera cultural respiraba Bobbio y ello probablemente es lo que explique que tesis del positivismo como teoría formalista y del positivismo como ideología, que Bobbio había expulsado, mediante su triple distinción, por la puerta, se le acaben colando, de forma medio inconsciente e inarticulada, por la ventana.

Y es que una atmósfera cultural no es un conjunto de tesis explícitas, sino un conjunto de tomas de posición y de prioridades generales que no necesitan ser explicitadas porque forman parte del trasfondo compartido que se da por supuesto sin explicitarlo ni problematizarlo. Por ello, la influencia de una atmósfera cultural es más "insidiosa", por así decirlo, más inescapable que la de cualquier conjunto de tesis explícitas que configuren lo que solemos llamar una teoría: las tesis de una teoría son algo que uno estudia, sobre lo que uno reflexiona y en relación con lo cual uno tiene acuerdos y desacuerdos expresos (así como, eventualmente, suspensiones del juicio asimismo expresas). Una atmósfera cultural es algo en lo que uno vive. Y si quisiéramos señalar el principal rasgo característico del positivismo como atmósfera cultural podríamos decir que este se halla en una visión del derecho casi exclusivamente interna. Desde esta visión, los problemas de la existencia social del derecho y de su justificación moral son sencillamente invisibles. Y cuando, por algún motivo, no puede dejarse de mirar a estos dos problemas los mismos se abordan dando por su-

puesto que el propio interior del derecho es capaz, quizás junto con el principio de efectividad, de dar cuenta de su existencia social, de su vigencia, y que desde el propio interior del derecho puede fundamentarse la afirmación de la validez, en el sentido de obligatoriedad, del mismo. Ambos supuestos se encuentran presentes en las tomas de posición de Bobbio, que aquí hemos examinado, en contra de la necesidad de los conceptos de norma básica y de regla de reconocimiento. Y a ambos supuestos les ocurre, podríamos decir, como a las momias que se desintegran con la simple exposición al aire; sólo pueden existir como presupuestos tácitos; en cuanto se explicitan, su implausibilidad y aun más, su imposibilidad, resulta tan palmaria que se impone su abandono.

Juan Ruiz Manero
catedrático de filosofía del Derecho,
Universidad de Alicante (España)

Bibliografía

Norberto BOBBIO, 1970: Sul principio di legittimità. En: *Studi per una teoría generale del diritto.* Torino: Giappichelli.

——, 1975: *Per un lessico di teoria generale del diritto.* Reproducido bajo el título Norme secondarie en *Contributi ad un dizionario giuridico*. Torino: Giappichelli, 1994.

——, 1980: Normas primarias y normas secundarias (1968). Cito por la trad. esp. de Alfonso Ruiz Miguel en: *Contribución a la teoría del derecho.* Valencia: Fernando Torres.

——,1991: *Teoria dell'ordinamento giuridico* (1960). Cito por la trad. esp. de Eduardo Rozo Acuña en: *Teoría general del derecho*. Madrid: Debate.

——, 1992: Sul positivismo giuridico. *Rivista di filosofia* LII (1961). Cito por la trad. esp. de Ernesto Garzón Valdés. En: *El problema del positivismo jurídico*. México: Fontamara.

Felipe GONZÁLEZ VICÉN, 1979: Sobre el positivismo jurídico. *Estudios de filosofía del derecho*. Facultad de derecho de la Universidad de La Laguna.

Herbert L.A. HART, 1961: *The Concept of Law.* Cito por la trad. esp. de Genaro R. Carrió. *El concepto de derecho*. México: Editora Nacional.

Alf ROSS, 1963: *On Law and Justice* (1958). Cito por la trad. esp. de Genaro R. Carrió. *Sobre el derecho y la justicia*. Buenos Aires: Eudeba.

Juan RUIZ MANERO, 2010: Bobbio y los conceptos de norma jurídicamente última. *Analisi e diritto* (2010). También en: *El legado del positivismo jurídico. Ocho ensayos sobre cinco autores positivistas* (2014). Lima/Bogotá: Palestra-Temis.

Norberto Bobbio†

Jusnaturalizam i pravni pozitivizam

Autor tvrdi da je odnos između jusnaturalizma i pravnog pozitivizma višeslojan te da je isključujuć u samo jednom pogledu. Kako bi to pokazao, raspravu započinje razlikovanjem triju shvaćanja prirodnog prava i pravnog pozitivizma, odnosno njihova shvaćanja kao ideologija, teorija i načina izučavanja prava (ili metoda). Potom ukazuje na to da su jusnaturalizam i pravni pozitivizam suprotni samo kao ideologije. Konačno, autor upozorava na brzoplete karakterizacije pojedinih autora kao jusnaturalista ili pravnih pozitivista – njihova karakterizacija, na kraju, ovisi o tome ocjenjujemo li njihovu ideologiju, teoriju ili metodologiju. | Ovaj je prijevod prvotno objavljen u knjizi Norberto Bobbio, *Eseji iz teorije prava* (Split: Logos, 1988).

Ključne riječi: jusnaturalizam, pravni pozitivizam, ideologija, teorija, metodologija

1 DEFINIRANJE DVAJU TERMINA

/…/ Žestina polemike [između pristaša jusnaturalizma i pravnog pozitivizma] može uistinu navesti na pomisao da se radi o dvjema koncepcijama koje se suprotstavljaju u svim njihovim značenjima, pa da stoga među njima možemo samo birati: ili za jusnaturalizam ili za pozitivizam. Ja ovdje, naprotiv, tvrdim: 1) da se izrazi »jusnaturalizam« i »pravni pozitivizam« upotrebljavaju u toliko različitim značenjima da se odnosi između ta dva pravca postavljaju na različitim razinama ovisno o tome da li je posrijedi jedno ili drugo značenje; 2) da samo u jednom od tih značenja ova dva izraza tvore istinsku alternativu. I upravo zbog nevođenja računa o tim različitim razinama nastaje čudna posljedica da se često argumenti dvaju protivnika uopće ne susreću, te da su i nakon najžešćih sukoba obojica življi nego što su prije bili.

Najprije, nastojim redefinirati izraze »jusnaturalizam« i »pravni pozitivizam«. Pod »jusnaturalizmom« mislim na onaj pravac koji priznaje distinkciju između prirodnog prava i pozitivnog prava i koji zastupa supremaciju prvoga nad drugim. Pod »pravnim pozitivizmom« mislim na onaj pravac koji takvu distinkciju ne priznaje i koji tvrdi da nema drugog prava pored pozitivnog. Primjetna je asimetričnost ovih definicija: dok jusnaturalizam dokazuje superiornost prirodnog prava nad pozitivnim pravom, pravni pozitivizam ne do-

* 1909–2004 | Pokojni profesor pravne i političke filozofije na Sveučilištu u Torinu.

kazuje superiornost pozitivnog prava nad prirodnim pravom – već dokazuje isključivost pozitivnog prava. S druge strane, dok pravni pozitivizam dokazuje isključivost pozitivnog prava, jusnaturalizam ne tvrdi da postoji samo prirodno pravo, jer po njemu postoji također i pozitivno pravo premda u položaju inferiornosti prema prirodnom pravu. Ukratko: pod jusnaturalizmom shvaćam teoriju o *superiornosti* prirodnog prava nad pozitivnim pravom, a pod pravnim pozitivizmom teoriju o *isključivosti* pozitivnog prava. Jusnaturalizam je dualistički, pravni pozitivizam je monistički.

Iz ovakva načina definiranja jusnaturalizma i pravnog pozitivizma može se izvesti jedno prvo zapažanje: ove dvije koncepcije ne iscrpljuju sva moguća shvaćanja prava. Od ovih se mogu zamisliti još barem tri: 1) postoje i prirodno i pozitivno pravo, ali ne u odnosu zavisnosti, nego nezavisnosti i ravnodušnosti; 2) postoji samo prirodno pravo; 3) postoje i prirodno i pozitivno pravo, ali pozitivno je superiorno prema prirodnom pravu.

Prva od ovih triju teorija suprotstavlja se kako jusnaturalizmu, budući da niječe nadmoć prirodnog prava nad pozitivnim, tako i pravnom pozitivizmu, budući da niječe isključivost pozitivnog prava. Zastupaju je samo oni autori koji prirodno pravo i pozitivno pravo ne vide kao dva hijerarhijski postavljena poretka, već kao dvije *species* istog *genusa.* Kad Aristotel kaže, na početku pogl. 7 iz V knjige »Nikomahove etike«, da je u civilnoj pravednosti jedan dio prirodan a drugi dio zakonski, on time razlikuje i razgraničuje dvije sfere normi koje su različite po oblasti i po osnovama važenja, ali koje nisu nužno suprotstavljene a još manje jedna prema drugoj isključujuće. Ne postupa drukčije ni Paulus kada izlaže jednu od čuvenih distinkcija između pozitivnog i prirodnog prava iz *Corpus iurisa:* »lus pluribus modis dicitur: uno modo ..., altero modo ...« (D. 1,1. 11).

Teorija pod 2) bila bi antiteza onoj koju smatramo tipičnom za pravni pozitivizam. No, ne nalazim primjera za nju u povijesti. Isključivo postojanje prirodnog prava karakteristično je za ono naročito stanje čovječanstva kakvo je »prirodno stanje«. Ali, čisto prirodno stanje, gdje ljudi žive isključivo u skladu s prirodnim zakonima, općenito se smatra zamišljenim stanjem, tj. jednom znanstvenom hipotezom, kao kod Hobbesa, ili jednim regulativnim idealom, kao kod Lockea. U povijesnom stanju, u kakvom ljudi stvarno žive, prirodno pravo je pomiješano s pozitivnim pravom – ako nije njime čak i posve zamijenjeno.

Teorija pod 3) je antiteza teorije koju smatramo tipično jusnaturalističkom; ona priznaje distinkciju između prirodnog prava i pozitivnog prava, ali izokreće odnos zavisnosti, dokazujući superiornost drugog nad prvim. Mislim da se mogu historijski prepoznati u ovakvom stavu svi oni autori koji prihvaćaju prirodno pravo, ali ne priznaju mu nikakvu drugu funkciju osim popunjavanja pozitivnog prava u slučaju praznina; u tom smislu prirodno pravo nije posve izbačeno iz sistema, ali ono postoji, da tako kažemo, na marginama sistema,

kao rezervno skladište za odluke suca. Ono nema moć da pobijedi pozitivno pravo tamo gdje je ovo promulgirano, što znači da pozitivne norme prevladavaju tamo gdje postoje; prirodno pravo postaje djelatno, kao dodatni izvor prava, jedino u slučajevima kada pozitivnog prava nema. Ovakva je teza bila široko usvojena među pravnicima prije nego što je nametnuta, zajedno s velikim kodifikacijama, dogma o potpunosti pravnog sistema.

2 TRI OBLIKA JUSNATURALIZMA

Jusnaturalizam tvrdi, kako rekosmo, da je prirodno pravo superiorno nad pozitivnim pravom. Ova superiornost se dokazivala, u osnovnim crtama, na tri načina – koji obilježavaju tri tipična oblika jusnaturalizma skolastički, moderni racionalistički i Hobbesov (ne nalazim bolji naziv za ovaj posljednji).

i) Prirodno pravo je jedan skup osnovnih etičkih načela, najopćenitijih, iz kojih ljudski zakonodavac mora crpiti nadahnuće prilikom postavljanja pravila pozitivnog prava: ova posljednja, prema poznatom izlaganju Sv. Tome, potječu od prirodnog prava ili *per conclusionem* ili *per determinationem*. Prema ovom shvaćanju, prirodno pravo je sistem sastavljen od vrlo malog broja normi (neki kažu: od samo jedne norme), kojima adresati nisu svi ljudi nego prvenstveno zakonodavci. Iz činjenice da su adresati prirodnog prava u prvom redu zakonodavci slijedi i posljedica da se podanici u nekim slučajevima moraju pokoravati čak i nepravednim zakonima ako su legitimno promulgirani.

ii) Prirodno pravo je skup *dictamina rectae rationis* koja daju sadržaj regulaciji, dok je pozitivno pravo skup praktično-političkih sredstava (kao što su uspostavljanje i organiziranje prisilne vlasti) kojima se određuje oblik regulacije; ili, drugim riječima, prvo je preceptivna strana pravila, ono što daje normativnu kvalifikaciju stanovitom ponašanju, dok je drugo sankcionirajuća strana pravila, ono što pravilo čini efikasnim u jednom svijetu, kakav je ljudski, gdje strasti sprečavaju mnoge da slijede naloge razuma. U skladu s kantovskom terminologijom, koja po mom sudu izražava ovo gledište, distinkciji prirodnog prava i pozitivnog prava odgovara razlikovanje između provizornog i definitivnog prava: ono što se u pozitivnom pravu mijenja naspram prirodnom pravu nije sadržaj, nego razne procedure koje služe ostvarenju prirodnog prava. U ovom je značenju prirodno pravo proizvod odnosa koegzistencije pojedinaca izvan države (tj. u prirodnom stanju), pa stoga njegovi adresati nisu samo zakonodavci nego i pojedinačno sve osobe.

iii) Prirodno pravo je osnova ili oslonac čitavog pozitivnog pravnog poretka. Suprotno prethodnoj teoriji, ovdje sadržaj regulacije određuje isključivo ljudski zakonodavac (suveren): funkcija prirodnog prava je naprosto u tome da postavi osnovu legitimnosti vlasti ljudskog zakonodavca propisujući podanicima da se

pokore svemu što će suveren zapovjediti. U ovom shvaćanju, kojem odgovara, smatram, Hobbesova teorija,[1] prirodno pravo se svodi na samo jednu normu. U društvima jednakih: »Treba poštivati data obećanja«; u društvima nejedankih: »Treba se pokoravati zapovijedima nadređenog«. Kao što vidimo, u ovom shvaćanju prirodni zakon služi isključivo tome da se pokrene sistem; ali, jednom pokrenut, sistem sam po sebi funkcionira. Ovako pojmljen prirodni zakon ima za adresate samo podanike. U usporedbi s prethodnom koncepcijom, uloge prirodnog i pozitivnog prava su ovdje izokrenute: ovdje prirodno pravo omogućuje primjenu pozitivnog prava u smislu zasnivanja njegove legitimnosti, dok je tamo prirodno pravo omogućavalo primjenu pozitivnog prava u smislu osiguravanja njegove djelotvornosti. U kantovskoj doktrini čitavo je pravo prirodno s izuzetkom mehanizma prisile; u Hobbesovoj doktrini ono je čitavo pozitivno s izuzetkom postupka legitimizacije. Ova druga koncepcija pripada, gledajući i povijesno, prijelazu od jusnaturalizma u pravni pozitivizam.

3 TRI MOMENTA POZITIVISTIČKE KRITIKE

Prikazano razlikovanje triju osnovnih oblika jusnaturalizma dopušta nam određivanje i sažimanje triju osnovnih momenata pozitivističke kritike. Svaki od tih oblika jusnaturalizma znači jedan način tvrdnje da pozitivno pravo zavisi od prirodnog prava; tri glavna momenta pozitivističke kritike jesu različiti načini kako se prirodno pravo pobijalo u pozicijama koje je ono uzastopno zauzimalo, sve do njegove potpune eliminacije.

Protiv prve pozicije jusnaturalizma – one tradicionalne ili skolastičke, prema kojoj je prirodno pravo jedan skup osnovnih etičkih načela – pravni pozitivizam je koristio historicističku kritiku koja ne prihvaća samoevidentna etička načela apsolutnih i univerzalnih vrijednosti. Takozvani prirodni zakoni su samo formalni (kao *bonnum faciendum*, *male vitandum*) i stoga se mogu ispuniti bilo kakvim sadržajem te tumačiti od svakoga na vlastiti način. Svi glavni filozofski pravci iz prošlog stoljeća bili su u ovom smislu antijusnaturalistički – od desnog do lijevog historicizma, od evolucionističkog do sociološkog pozitivizma, od utilitarizma do pragmatizma, pa sve do iracionalizma. Iz toga je pravni pozitivizam izveo sve konzekvencije: ako nema univerzalno važećih pravila ponašanja, ako su zakoni koji vladaju životom i ljudskim društvom promjenjivi u vremenu, onda nema drugog kriterija za dobro i za zlo do onoga koji od slučaja do slučaja postavlja ustanovljena vlast, ljudski zakonodavac, suveren. Tamo gdje su moguća brojna tumačenja prirodnog zakona najsigurnije je ono tumačenje koje

1 »[P]rirodni zakon zapovijeda da se poslušaju svi civilni zakoni na temelju prirodnog zakona koji zabranjuje kršenje sporazuma« (Hobbes, 1642: *De Cive,* XIV, 10).

na svojoj strani ima pristanak Povijesti, izražen ili u obliku političkog uspjeha (realističke teorije) ili u obliku podrške većine (demokratske teorije).

Protiv drugog oblika jusnaturalizma pozitivistička kritika je uvijek i sve jasnije tvrdila da ne postoje povlaštene pravne materije, te da zbog toga svako ponašanje može postati sadržajem pravne norme. Ono što čini jedno pravilo ponašanja pravnom normom nije ovakav ili onakav sadržaj, nego način njegova proizvođenja i njegova izvršavanja. Ovdje se lako prepoznaju tipična pozitivistička shvaćanja o pravu kao zapovijesti suverena ili kao prisilnoj normi: shvaćanja čija je osobina da pomiču konstitutivni element pojma prava od materije na formu pravnog pravila (odakle i često identificiranje pravnog pozitivizma s formalizmom). U kantovskim terminima, moglo bi se reći da je pravni pozitivizam u ovom pogledu ona doktrina koja, poričući pravni karakter pravu koje je još provizorno, čini od konačnosti bitnu karakteristiku prava.

Treća i posljednja pozicija jusnaturalizma je ona, rekli smo, koja prirodnom zakonu pripisuje funkciju Atlanta u pozitivnom pravnom sistemu, a to znači funkciju osnovne norme sistema. Protiv ove pozicije ide izrazito pozitivističko načelo da se pravo ne zasniva na drugom pravu (što pretpostavlja jedan proces ad infinitum) nego na faktu, tj. na principu djelotvornosti. Ono što čini jedan skup pravila ponašanja u određenom društvu pravnim poretkom nije više postojanje dužnosti poslušnosti pripadnika toga društva na osnovu jednog nadpozitivnog zakona, nego činjenica, gola činjenica, povijesno provjerljiva, da se tom poretku uobičajeno pokorava većina osoba na koje se on odnosi. Ako je poneki autor još voljan da održava na životu jusnaturalističku teoriju o osnovnoj normi, tada se ova pretvara, kao u doktrini Kelsena i njegovih sljedbenika, ne u jednu normu poput svih drugih, već u jednu znanstvenu hipotezu, tj. u jednu normu kod koje se ne postavlja problem važenja onako kao što se postavlja kod drugih normi – budući da se njeno postojanje može prihvatiti samo ako se konstatira njena efikasnost.

4 TRI OBLIKA PRAVNOG POZITIVIZMA

Ako sada pažljivo pogledamo ova tri momenta pozitivističke kritike, vidjet ćemo da iz njih proizlaze tri osnovna oblika u kojima se povijesno pojavljivao pravni pozitivizam – a na što sam već skretao pažnju kad sam ustanovljavao u složenoj pojavi pravnog pozitivizma ili jednu *ideologiju pravednosti* (jednu etiku), ili jednu *opću teoriju prava*, ili jedan *način shvaćanja pravne znanosti* (u vrlo širokom smislu, jednu metodu).

U njegovom prvom vidu, tj. kao ideologija, pravni pozitivizam se u posljednjoj analizi svodi na tvrdnju da se važeći zakoni moraju poštovati bezuvjetno, a to znači nezavisno od njihova sadržaja, što opet implicira postojanje jedne mo-

ralne obveze poslušnosti važećih zakona. Ovakav stav sam već nazvao *pravnim formalizmom*, definirajući ga sintetički kao koncepciju koja svodi pravednost na važenje, budući da zakone smatra pravednim zbog same činjenice da su važeći.[2] Ovdje se ograničavam na primjedbu da se ova koncepcija može shvatiti kao odgovor na skeptički zaključak, do kojeg ponekad dolazi historicistička i relativistička polemika protiv jusnaturalizma. Ako ne postoji jedan objektivan moralni zakon, koji je dostupan čovjekovu *prirodnom* razumu, može izgledati da je jedini lijek protiv konfuzije moralnih sudova, te protiv posljedičnog nasilja i anarhije, u podčinjavanju *umjetnom* razumu suverena (Hobbes), ili *povijesnom* razumu koji se od slučaja do slučaja ozbiljuje u općoj volji (Rousseau) ili u državi (Hegel).

U njegovom drugom vidu, kao opća teorija prava, pravni pozitivizam je poticao jedan poseban pravac pravne misli za koji je osobeno da svodi pravo na tvorevinu zakonodavca: iz toga je poteklo uobičajeno pripisivanje pravu onih obilježja koja su svojstvena zakonodavnom pravu moderne države (općenitost, imperativnost, prinudljivost, pretpostavljena potpunost). Dakle, izgleda mi da se ovaj pravac može osvijetliti pozivom na drugi moment pozitivističke kritike, tj. na onaj moment koji označava radikalni pomak od jednog materijalnog shvaćanja prava, osobenog za ekstremni jusnaturalizam, k jednom čisto instrumentalnom shvaćanju prava – k shvaćanju do ono što karakterizira pravo nije regulirana materija, nego skup postupaka kojim se bilo kakav skup ljudskih ponašanja može regulirati i zaštiti protiv prekršaja. Formalistička teorija prava koja je svojstvena pravnom pozitivizmu jest, u nekim aspektima, odgovor na nastojanje racionalističkog jusnaturalizma da se izvrši razlikovanje onoga što jest pravno od onoga što nije pravno još prije uspostavljanja onih tehnika organizacije društva od kojih se sastoji država, ako se ova shvati kao aparat za monopolizaciju sile u određenoj društvenoj grupi.

U njegovom trećem obliku, pravni pozitivizam jest jedan od načina shvaćanja znanstvenog proučavanja prava, a time i zadatka pravnika. Cilj pravne znanosti je ispitivanje prava kakvo ono jest, a ne kakvo bi ono trebalo biti. U osnovi ovakve teorije pravne znanosti stoji prihvaćanje jednog jasnog razdvajanja važenja od vrijednosti prava, normi koje mogu biti važeće a da ne budu pravedne (i kojima se isključivo bavi pravna znanost) od normi koje mogu biti pravedne a da ne budu važeće. Do takvog je razdvajanja pravni pozitivizam došao kroz promatranje prava kao puke povijesne činjenice, pa prema tome ne ulazeći u njegovu etičku legitimizaciju, tj. u problem utemeljenja kojemu je jusnaturalizam uvijek posvećivao naročitu pažnju. Treba istaknuti ovdje povezanost između ovog vida pravnog pozitivizma i trećeg kritičkog stava prema jusnaturalizmu, kojim pravnici blokiraju, ukazujući na princip efikasnosti, svako istraživanje etičkog utemeljenja ili legitimizacije koje bi otvorilo vrata jusnaturalizmu.

2 Bobbio 1955: 145–162.

Nije mi toliko stalo do dokazivanja odnosa između pojedinih momenata pozitivističke kritike jusnaturalizma i raznih oblika pravnog pozitivizma koliko do usmjeravanja pažnje na okolnost da izraz »pravni pozitivizam« može označavati različite pristupe pravu i da ima vrlo različita značenja ovisno o pristupima na koja se referira. Ako pojam pravnog pozitivizma svedemo na jednu doktrinu, koja u pogledu tradicionalnog sukoba između prirodnog prava i pozitivnog prava zastupa stav o isključivosti pozitivnog prava, onda ova isključivost ima različita značenja ovisno o tome da li postaje osnovom jedne *etike* (ili političke ideologije), jedne *teorije*, ili jedne *metode*. U prvom slučaju znači da je pozitivno pravo, a ne prirodno pravo, ono koje treba da određuje ljudsko ponašanje; u drugom slučaju, da pozitivno pravo, a ne prirodno pravo, daje najbolje objašnjenje pravne pojave; u trećem slučaju, da pozitivno pravo, a ne prirodno pravo, predstavlja poseban objekt izučavanja u pravnoj znanosti.

5 ODNOS JUSNATURALIZMA I PRAVNOG POZITIVIZMA KAO IDEOLOGIJA

Nakon što se pokazalo da postoje tri različita vida pravnog pozitivizma, sljedeći korak u ovom ispitivanju sastoji se u dokazivanju da je odnos između pravnog pozitivizma i jusnaturalizma različit kod svakog od ta tri vida, i to toliko različit da postaje promašeno, jer je odviše generičko, njihovo uobičajeno suprotstavljanje.

Uobičajeno suprotstavljanje je valjano samo ako se referira na odnos pravnog pozitivizma i jusnaturalizma kao ideologija. Tu je suprotstavljanje čisto, toliko čisto da predstavlja alternativu. Osnovna maksima pravnog pozitivizma kao ideologije može se ovako iskazati: »Treba poslušati zakone kao takve«, dok je osnovna maksima jusnaturalizma: »Treba poslušati zakone samo ako su pravedni«. U prvom slučaju su sami zakoni kriterij pravednog i nepravednog; u drugom slučaju su i zakoni podvrgnuti jednom višem kriteriju vrednovanja (do kojega se dolazi, u jusnaturalističkoj etici, preko spoznaje ljudske prirode). U prvom slučaju možemo govoriti o legalističkoj etici, prema kojoj postoji samo legalna pravednosti; u drugom slučaju, o naturalističkoj etici, prema kojoj postoji još i (ili isključivo) prirodna pravednost. Ako se pažljivo promatra, vidljivo je da antipozitivistička polemika, koju u posljednjim godinama vodi preporođeni i osnaženi jusnaturalizam, jest zapravo jedna ideološka polemika, a to znači jedna polemika gdje se pravnom pozitivizmu imputira zauzimanje određenog stava – i to stava koji je neprimjetan prijelaz od određene metode istraživanja ili od određene teorije na izjavljivanje i veličanje određenih ideala, kao što su pogubni ideali idolatrije države, egzaltacije vođa, obezličenosti itd. Ne ulazim ovdje u raspravu o povijesnoj osnovanosti takvih teških optužbi protiv pravnog pozitivizma, ali mislim da su one neopravdane. Primijetit ću samo da ako se

pozitivizam ne shvati kao metoda ili kao teorija prava, već kao ideologija pravednosti, onda se jusnaturalizam ne pokazuje prema njemu kao jedna metoda ili kao jedna teorija prava, nego kao druga ideologija, pa je tako odnos između njih, na ovoj razini, odnos između dva morala koji se uzajamno isključuju.

Treba još reći da ni na ovoj razini suprotstavljanje pravnog pozitivizma i jusnaturalizma nije uvijek posve čisto. Ono je dosad izgledalo takvo zato jer smo imali u vidu najradikalnije verzije tih dviju ideologija. No, ove radikalne verzije postoje samo kao rekonstrukcije koje prave njihovi protivnici kako bi imali lakše mete napada. U 5. paragrafu eseja »Aspekti pravnog pozitivizma« razlikovao sam jednu radikalnu i jednu umjerenu verziju pozitivističke ideologije. Na sličan način možemo razlikovati dvije verzije prirodnopravne ideologije, radikalnu i umjerenu, pa onda u svemu raspoznati ne dva nego četiri tipična oblika ideologije pravednosti: a) radikalna pozitivistička ideologija, prema kojoj se zakonima kao takvima duguje poslušnost zato jer su pravedni (*teorija aktivne poslušnosti*); b) umjerena pozitivistička teorija, prema kojoj se zakonima kao takvima duguje poslušnost zato jer zakonitost sama po sebi jamči ostvarenje specifične vrijednosti prava, tj. vrijednosti društvenog reda i mira (*teorija uvjetovane poslušnosti*); c) radikalna prirodnopravna ideologija, prema kojoj se zakonima duguje poslušnost samo onda ako su oni pravedni, a budući da nisu svi zakoni pravedni samim tim što su važeći onda svi ljudi imaju pravo na neposlušnost (*teorija aktivne neposlušnosti ili otpora*); d) umjerena prirodnopravna ideologija, prema kojoj zakoni mogu biti nepravedni, ali ih usprkos tome, osim u iznimnim slučajevima, treba poštovati (*teorija uvjetovane neposlušnosti ili pasivne poslušnosti*). I sada, dok nema dvojbe da su dvije radikalne verzije, tj. ona o aktivnoj poslušnosti i ona o aktivnoj neposlušnosti, antitetične i alternativne, one dvije umjerene verzije su međusobno konvergentne i crta razgraničenja između pozitivističke i prirodnopravne ideologije na toj ravni postaje neizvjesna. I moderni umjereni pozitivizam, po kojemu se zakonima duguje poslušnost zato jer je takva poslušnost sama po sebi jedna pozitivna vrijednost za društveni poredak, i umjereni jusnaturalizam, po kojemu se zakonima duguje poslušnost samo ako neposlušnost ugrožava društveni poredak – oba stava znače pohvalu vrijednosti reda. Pored toga, jedan i drugi imaju slične posljedice: navode ljude na poslušnost zakonima u najvećem broju slučajeva, unatoč tome što se ovaj ideal postiže različitim sredstvima – onamo ublažavajući strogost dužnosti poslušnosti, a ovamo ograničavajući dužnost neposlušnosti; i unatoč tome što se polazi od različitih pretpostavki, jer umjereni pozitivist smatra da je red jedno dobro iako nije i najviše dobro, dok umjereni jusnaturalist smatra da je red jedno manje zlo.

6 ODNOS JUSNATURALIZMA I PRAVNOG POZITIVIZMA KAO OPĆIH TEORIJA PRAVA

Drukčije se postavlja problem odnosa pravnog pozitivizma i jusnaturalizma kad se oni promatraju i suprotstavljaju ne više kao ideologije nego kao opće teorije prava, tj. kao načini shvaćanja i objašnjavanja pravne pojave. U ovakvom suprotstavljanju javlja se stara distinkcija između jedne voluntarističke koncepcije (ratione imperii) i jedne racionalističke koncepcije (imperio rationis) prava. Pravni pozitivizam, čiji su nosioci pravnici, nije ovdje jedna egzaltacija države kao moralne osobe, jedna statolatrija: to je jedna teorijska obrada, mogli bismo reći dogmatika, pravnog voluntarizma. Kad se pravo jednom shvati kao volja suverena, onda iz toga slijede dogme o supremaciji zakona nad drugim izvorima i o normi kao imperativu, poziv na prešutnu volju radi opravdavanja običaja, poziv na pretpostavljenu volju radi opravdavanja ekspanzije sistema preko iskazanih normi.

Analogno tome, ako promatramo bez predrasuda historiju jusnaturalizma vidjet ćemo da se prirodnopravne doktrine ne podudaraju uvijek, kao što nas uvjeravaju njihovi moderni branioci, s jednom etikom otpora protiv ugnjetavanja, obrane čovjeka od prohtjeva države, individualnih sloboda protiv pokoravajućih zakona, autonomije protiv heteronomije. U zaštitničkom zagrljaju prirodnog prava uzastopno se nalaze, ovisno o vremenima i prilikama, najrazličitiji morali – kako moral autoriteta tako i moral slobode; kako proglašavanje jednakosti svih ljudi tako i proglašavanje nužnosti robovskog rada; kako vrline individualnog vlasništva tako i vrline zajednice dobara; kako pravo na otpor tako i dužnost poslušnosti. Nedavno je dokazano, polazeći od tekstova, da je i jedan od najzadrtijih protivnika prirodnih prava, Burke, bio ustvari uvjereni jusnaturalist.[3] Izokrećući perspektive i zahtjeve modernih obnovitelja prirodnog prava, koji veličaju njegove zasluge za stvar slobode, Pietro Piovani je napisao knjigu da bi dokazao upravo suprotno – da je jusnaturalizam uvijek bio, i da zbog svoje prirode ne može biti nešto drugo nego jedna etika zakona suprotstavljena etici slobode, pa da ga stoga treba smatrati, jednom zauvijek i bez mogućnosti apela, pravim, »crknutim psom« filozofije prava.[4]

Kako objasniti ovako različita i suprotna tumačenja? I naročito, kako objasniti da se jedna i druga nastavljaju nazivati prirodnopravnim?[5]

3 To se moglo dokazati, razumije se, nakon što su jasno razgraničena dva jusnaturalistička smjera: onaj klasični i skolastički, kojega bi Burke bio sljedbenik, i onaj prosvjetiteljski kojemu su pripadali njemu omrznuti doktrinari revolucije. Ipak, jedni i drugi se pozivahu na isti entitet, na uslužnu prirodu. Ovdje mislim na knjigu Stanlisa 1958.

4 Piovani 1961.

5 Isto pitanje postavlja Fasso (1961: 169–190) u povodu nedavnih flertova jusnaturalista s historicizmom, odgovarajući na to pozivom na terminološku jasnoću, što je ujedno poziv na intelektualno poštenje.

To se može objasniti, smatram, samo na jedan način: shvaćanjem da ono što je zajedničko različitim doktrinama koje su se nazivale i koje se još nazivaju prirodnopravnim nije jedan moral ili jedna ideologija pravednosti (jer su morali koji se izlažu pod etiketom zakona prirode vrlo raznoliki), nego jedna *teorija o moralu* (ili o pravu), i to takva teorija u kojoj se temelji pravila ljudskog ponašanja ne traže u volji zakonodavca (božanskog ili ljudskog), entitet po svojoj biti promjenjiv, nego u konstantnoj, ujednačenoj, vječitoj ljudskoj prirodi. Jusnaturalizam je jedan od uobičajenih načina pojavljivanja objektivističke teorije etike. Razumije se, nemoguće je pronaći jednu etiku zajedničku svim jusnaturalistima, zbog čega su svi pokušaji da se ona utvrdi završavali u zbrci razlikovanja pravih i lažnih jusnaturalista, istinskih i prividnih jusnaturalizama. Ali to se događa zato jer jusnaturalizam tumačimo onakvim kakav on nije, ponavljam, kao određeni sistem vrijednosti i zahtjeva, a ne kao jedan niz više ili manje realističkih shvaćanja o ljudskoj prirodi koja služe objektivnom zasnivanju jednog sistema vrijednosti – bez obzira kakvog. Kad konačno spoznamo da jusnaturalizam nije jedan određeni moral (kao što bi mogli biti, recimo, kršćanstvo, hedonizam, utilitarizam, marksizam), nego jedan način utemeljenja (bilo kakvog) morala, onda nas neće prenaraziti otkriće da je Burke bio jednako uvjereni zagovornik prirodnog zakona kao i njegovi protivnici i neće nam biti potrebno posezati za tako neispravnim historijografskim kategorijama kao što su one o pravom i lažnom jsunaturalizmu: shvatit ćemo da je Burkeu i njegovim protivnicima bilo zajedničko uvjerenje da se najvaljaniji argument u prilog njihovih ideologija sastoji u dokazivanju da su one, i samo one, s isključenjem svih ostalih, utemeljene u prirodi čovjeka. I ovdje bismo mogli reći, uzdišući: »O, ljudska prirodo, što sve nisi opravdavala!«. Ali, ovim bismo započeli kritiku, koja ipak ostavlja netaknutu valjanost argumentacije.

Iz prirodnopravnog utemeljenja prava potječu dakako neke postavke o osnovnim aspektima pravnog iskustva, koje se izrazito suprotstavljaju odgovarajućim postavkama pozitivizma: pravila o ponašanju nisu zapovijesti nego *dictamina rectae rationis*;[6] glavni izvor pravnog stvaranja je priroda stvari a ne zakonodavstvo; sistem pozitivnog prava je nedostatan i nužno nepotpun; postojeći sistem se uputpunjuje, prilagođava i poboljšava, uz djelovanje pozitivnog prava, i slobodnim istraživanjem prava od strane sudaca. No, jusnaturalisti nisu sustavno razvili ove postavke. Neke od njih preuzet će sociološki i realistički pravci pravne teorije, koje možemo smatrati, u nekim aspektima, oblicima moderniziranog jusnaturalizma. Jusnaturalizam i pravni pozitivizam, kao teorije, daleko su od toga da iscrpljuju sve oblasti teorije prava; oni su dva krajnja pola između kojih se razvija niz srednjih koncepcija.

6 Na ovo i druga obilježja jusnaturalizma kao opće teorije prava upozorio je Passerin d'Entreves (1954: 83 i dr.).

7 ODNOS JUSNATURALIZMA I PRAVNOG POZITIVIZMA KAO RAZLIČITIH NAČINA PRISTUPA IZUČAVANJU PRAVA

Na kraju, razmotrimo i suprotnost između pravnog pozitivizma i jusnaturalizma polazeći od shvaćanja pravnog pozitivizma kao pristupa izučavanju prava – a posebno kao pristupa koji izbjegava svaki vrijednosni sud i koji se odnosi prema pravu kao prema jednoj povijesnoj i socijalnoj činjenici koja se ispituje znanstvenom metodologijom. Samo u ovakvom značenju pravni pozitivizam ima nešto zajedničko s filozofskim pozitivizmom: može se reći, uistinu, da je pravnom pozitivizmu u ovom značenju svojstveno usvajanje *pozitivne* metode za proučavanje *pozitivnog* prava. Termin »pozitivno« javlja se u ovom iskazu dva puta – prvo u smislu filozofskog pozitivizma, zatim u smislu pravnog pozitivizma.

Nasuprot ovako shvaćenom pravnom pozitivizmu, jusnaturalistički zahtjev se postavlja drukčije od onoga što je izloženo u prethodna dva paragrafa. U prvom kontekstu se jusnaturalizam ukazao kao zahtjev za suprotstavljanjem jedne etike pravednosti jednoj etici stroge legalnosti (*dura lex sed lex*); u drugom je kontekstu to bio zahtjev za izvođenjem spoznaje prava iz jednog konstantnog entiteta. U ovom novom kontekstu jusnaturalizam se ukazuje kao zahtjev za jednom vrijednosnom definicijom prava, tj. za definicijom koja, prilazeći pravu ne kao pukoj činjenici nego kao nečemu što ima (ili ostvaruje) jednu vrijednost, ograničava upotrebu termina »pravo« na pravedno pravo. Ako se u prvom kontekstu jusnaturalizam javlja kao polemički motiv protiv etičkog formalizma, a u drugom kontekstu više kao protivljenje znanstvenom formalizmu, ovdje je polemika upravljena protiv pravnog formalizma, tj. protiv izrazito pravno-pozitivističkog zahtjeva da se razlikuje pravo od ne-prava tako što se ne uzima u obzir sadržaj pravnih pravila. Kao što vidimo, antiformalističko usmjerenje jusnaturalizma djeluje na tri različite ravne. Drugim riječima, ovaj posljednjih vid suprotstavljanja između jusnaturalizma i pravnog pozitivizma tiče se spora o tome da li u definiciju prava treba unositi referenciju na cilj (opće dobro, pravednost, mir itd.), ili je bolje definirati pravo samo referencijom na procedure, činjenično provjerljive, kojima se ono postavlja i čini važećim. Nema sumnje da pravnopozitivistički *approach* karakterizira ovaj drugi tip definicije, te da takav *approach* omogućuje nevrednujuću pravnu znanost – što pravnik ponosno ističe kada želi pokazati da je on znanstvenik kao svaki drugi.

Posebno u odnosu na ovu tezu o nevrednujućoj pravnoj znanosti jusnaturalizam djeluje, u jednom više generičkom smislu, kao zahtjev za »kritiku zakona". Zapaženo je, po mom shvaćanju ispravno, da i nakon izbacivanja prirodnog prava iz svih njegovih tradicionalnih pozicija nijedan pravnik ne može razumno odbiti zahtjev za kritiku zakona – povijesni nosilac kojeg je bio jusnaturalizam u njegovim različitim oblicima, i to kritiku zakona »kao rešeta na koje

savjest mora staviti svako pravilo koje se javlja kao volja drugih, ali ne još i kao naša volja«.[7] S ovog stanovišta je jusnaturalizam, naspram pravnom pozitivizmu, ništa drugo nego poziv pravnicima da imaju u vidu činjenicu da se prema pravu, kao i prema svakoj ljudskoj pojavi, može zauzeti ne samo stav jednog skrupuloznog, nepristranog i metodičkog istraživača, nego također i vrednujući stav kritičara – o kojemu uostalom zavise promjene i evolucija prava. Ono na čemu će pozitivist još uvijek inzistirati jest da kritiku zakona treba razlikovati od pravne znanosti, budući da se prva ne može voditi jednakom rigoroznošću, tj. ne može biti »znanost«. Ali, nijedan pravnik nije više toliko ograničen da bi ustvrdio kako se prema pravu ne može zauzeti drukčiji stav od neutralnosti koja odgovara znanstveniku. U pravnoj literaturi je uobičajeno razlikovanje razmatranja *de iure condito* od onih *de iure condendo* ili zakonodavne politike. Ne beznačajni problemi koje ova posljednja pobuđuje ne tiču se njene mogućnosti ili njene oportunosti, nego njene znanstvene prirode. Ostaje još da se naglasi kako usmjerenje na kritiku zakona nije nužno vezano za namjeru iskazivanja jedne vrijednosne definicije prava koju smo spominjali na početku ovog paragrafa, premda se oboje javljaju kao vidovi jusnaturalističkog pristupa pravnom iskustvu: jedno je reći, kako se čini u vrijednosnim definicijama prava, da ne postoji drugo pravo pored pravednog prava; drugo je reći da uz ispitivanje prava kao fakta treba pravo još i pozitivno ili negativno ocijeniti na temelju stanovitih vrijednosti kao kriterija ocjenjivanja.

8 ZAKLJUČCI

Ako sada zbrojimo sve što je rečeno o tri forme povijesnog pojavljivanja jusnaturalizma i pravnog pozitivizma, opazit ćemo da se pri tome ovi odnose uzajamno na vrlo različite načine.

Kad se pojavljuju kao dvije različite ideologije o pravednosti, jusnaturalizam i pravni pozitivizam su inkompatibilni (u njihovim ekstremnim oblicima), predstavljajući alternativu koju nije moguće izbjeći. Naime, oni se postavljaju kao dvije kontradiktorne tvrdnje koje se ne mogu zajedno prihvatiti, ali se ne mogu obje ni odbaciti.

Kad se pojavljuju kao dvije različite opće teorije prava, jusnaturalizam i pravni pozitivizam su također inkompatibilni, i to zato jer je nemoguće zastupati istodobno stavove o superiornosti prirodnog prava nad pozitivnim pravom i o isključivosti pozitivnog prava. Međutim, ove teorije se uglavnom postavljaju kao dvije kontrerne tvrdnje koje se ne mogu zajedno prihvatiti, ali se mogu obje odbaciti; na primjer, jedna teorija koja bi tvrdila da su prirodno i pozitivno pra-

7 Cammarata 1941: 13.

vo dvije *species* iz *genusa* »pravo« ne bi bila ni prirodnopravna ni pozitivistička, već neki *tertium quid* između ta dva ekstrema.

Najzad, kad se pojavljuju kao dva različita pristupa pravnom iskustvu, tj. kao jedno zauzimanje stava i kao jedno spoznavanje, jusnaturalizam i pravni pozitivizam su savršeno kompatibilni budući da djeluju na dva različita plana – s jedne strane, kao ocjenjivanje pravednosti zakona s ciljem njihove reforme, a s druge strane kao tumačenje zakona s ciljem njihove bolje teorijske sistematizacije i praktične primjene. U ovom slučaju je kontroverza između pristaša jedne i druge strane posve sterilna.

Ovome bi se još mogla dodati i slijedeća opaska: kao što u posljednjoj opisanoj situaciji može doći do konfliktnog odnosa ako se jusnaturalističko usmjerenje shvati, kako smo istakli u prethodnom paragrafu, kao zahtjev za vrednujućom definicijom prava, tako i u prvoj situaciji (u suprotstavljanju dviju ideologija) može doći do jednog odnosa konvergencije ako se radi o umjerenom jusnaturalizmu i o umjerenom pozitivizmu. Time se još više potvrđuje osnovna postavka ovog eseja da su odnosi između jusnaturalizma i pravnog pozitivizma vrlo promjenjivi i složeni.

Ako se sada vratimo na polaznu točku, tj. na definicije jusnaturalizma i pravnog pozitivizma, koje smo dali u paragrafu 1., možemo bolje razumjeti različita značenja koja dobivaju, u opisanim trima zonama susretanja i odbijanja, spomenuta superiornost prirodnog prava kao obilježja jusnaturalizma i spomenuta isključivost pozitivnog prava kao obilježja pravnog pozitivizma. Na ravni ideološkog odnosa, superiornost prirodnog prava znači da postoje pravila ponašanja čije važenje zasniva važenje pravila pozitivnog prava, te da kao takva trebaju biti poštovana s preferencijom prema ovim posljednjim. Na ravni teorijskog odnosa, superiornost prirodnog prava znači da obraćanje prirodi prije nego li volji zakonodavca nudi jedno pogodnije objašnjenje pravne pojave i jednu čvršću osnovu za izgradnju opće teorije prava. Na metodološkoj ravni, superiornost prirodnog prava znači (ako se pored znanstvenog nevrednujućeg proučavanja prava prihvati i tzv. kritika zakona) da je najbolji način izvođenja kritike taj da se slijede uputstva iz tradicije prirodnog prava. Analogno tome, isključivost pozitivnog prava znači, u prvom slučaju, da postoji dužnost bezuvjetne poslušnosti onome što postavlja zakonodavac – budući da nema viših zakona od toga; u drugom slučaju, da prirodno pravo nije jedan oblik prava koji bi mogao stajati uz razne oblike pozitivnog prava; i treće, da je pozitivno pravo jedini predmet ispitivanja jurisprudencije kao znanosti.

Jedna i ne posljednja svrha ovog eseja, nakon ukazivanja na mnoštvenost i složenost odnosa između jusnaturalizma i pravnog pozitivizma, jest naš poziv da se ubuduće s više opreznosti pripisuje ovom ili onom autoru zasluga (ili krivnja) da je jusnaturalist ili pozitivist. Cattaneo je pokazao u svojoj studiji

o pravnom pozitivizmu u Engleskoj[8] da i neki autori koje smatramo tipičnim predstavnicima pozitivističke tradicije jesu, uz odgovarajuće distinkcije, ili jusnaturalisti, ili nosioci istih zahtjeva kao jusnaturaIisti. Smatram da je najpametniji način odgovora na pitanje da li je određeni autor jusnaturalist ili pozitivist ako kažemo: »zavisi«. Zavisi od točke gledišta s koje polazimo u suđenju. Može biti pozitivist s jedne točke gledišta a jusnaturalist s druge točke. Ukoliko je to relevantno, stavljam kao primjer vlastiti slučaj: pred sudarom ideologija, kad više nisu moguća izvrdavanja, ja sam eto jusnaturalist; s obzirom na metodu ja sam, s jednakim uvjerenjem, pozitivist; najzad, kad se radi o teoriji prava ja nisam ni jedno ni drugo.

S talijanskog jezika
preveo prof. dr. sc. Nikola Visković.

Bibliografija

Norberto BOBBIO, 1955: Formalismo giurdico e formalismo etico. U: *Studi sulla teoria generale del diritto*. Torino: Giappichelli. 145–162.

——, 1965a: Giusnaturalismo e positivismo giuridico. U: *Giusnaturalismo e positivismo giuridico*. Milano: Comunità. 127–146.

——, 1965b: Aspetti del positivismo giuridico. U: *Giusnaturalismo e positivismo giuridico*. Milano: Comunità. Na hrvatskom u: *Gledišta* (1969) 8–9. 101–126.

Angelo Ermanno CAMMARATA, 1941: Giusnaturalismo e critica delle leggi in rapporto alla distinzione tra giustizia ad equita. *Bolletino dell'Istituto di Filosofía del diritto dell'Università di Roma* (1941) 1.

Mario A. CATTANEO, 1962: *II positivismo giurdicio inglese (Hobbes, Bentham, Austin)*. Milano: Giuffrè.

Guido FASSO, 1961: Che cosa intendiamo con diritto naturale? *Rivista trimestrale di diritto e procedura civile* XV (1961) 1. 169–190.

Alessandro PASSERIN D'ENTREVES, 1954: *La dottrina del diritto naturale*. Milano: Comunità.

Pietro PIOVANI, 1961: *Giusnaturalismo ed etica moderna*. Bari: Laterza.

Peter J. STANLIS, 1958: *Edmund Burke and the Natural Law*. Ann Arbor (Mi.): The University of Michigan Press.

8 Cattaneo 1962.

Kenneth Einar Himma

Conceptual Jurisprudence
Konceptualna jurisprudencija

Revusov kanon

Kenneth Einar Himma*

Konceptualna jurisprudencija

Uvod u konceptualnu analizu i metodologiju u pravnoj teoriji

U ovom radu nastojim da čitaoce uvedem u problemsku oblast konceptualne analize pravnih pojmova (ili »konceptualne jurisprudencije«) i njene metodologije. Pokušavam da, na prilično bazičnom nivou, objasnim šta je konceptualna analiza, na koji način se ona obavlja (to jest, njenu odgovarajuću metodologiju) i zašto je ona važna za teoriju prava. Takođe nastojim i da objasnim na koji način je konceptualna analiza povezana sa drugim oblastima filozofije, kao što su metafizika i epistemologija. Zatim, objašnjavam poduhvat u koji se konceptualna jurisprudencija upušta – da opiše ona svojstva po kojima se (1) stvari koje jesu pravo razlikuju od stvari koje nisu pravo, koja svojstva (2) prvopomenute stvari čine pravom. Pritom sam to objašnjenje ilustrovao, nadam se, jasnim primerima. Takođe sam dao objašnjenje i procenu tri različita metodološka pristupa. Na kraju sam razmotrio praktički značaj konceptualne jurisprudencije. | Ovaj je prijevod izvorno objavljen u knjizi Bojan Spaić i Damir Banović (ur.), *Savremeni problemi pravne i političke filozofije* (Šahinpašić: Sarajevo 2016).

Ključne reči: teorija konceptualna analiza, konceptualna metodologija, priroda prava, metafizika prava, praktični značaj, koncepti

1 UVOD

Najznačajniji poduhvat opšte ili konceptualne jurisprudencije, to jest, konceptualne analize prava, jeste davanje filozofski preciznih objašnjenja raznih pojmova koji zauzimaju istaknuto mesto u raspravama o pravu. To znači da se konceptualna analiza bavi objašnjavanjem prirode prava i drugih važnih aspekata pravne prakse. Dok se kod mnogih reči, kao što je reč »šah«, ne prepoznaju pojmovi koji se čine dovoljno značajnim da bi zaslužili dublju filozofsku analizu, to nije slučaj sa pojmom prava. Prakse koje se nazivaju »pravnim« ili se odnose na »pravo« značajne su, kako u moralnom smislu, tako i u smislu praktičke razboritosti; ljudi odlaze u zatvor, plaćaju novčane kazne, plaćaju odštetu za povrede izazvane pravno nedozvoljenim ponašanjem, pa čak bivaju i pogubljeni zbog toga što su prekršili pravo. Stvar je jasnog praktičkog značaja da osiguramo da naši postupci zadovolje stroge norme političkog morala, ali

* himma@uw.edu | Gostujući profesor, Odjel za povijest filozofije, Državno sveučilište u Tomsku; predavač, Pravni fakultet Sveučilišta u Washingtonu.

mi ne možemo znati koje se norme na nas odnose a da pritom ne posedujemo odgovarajuće razumevanja pojma prava.

U ovom radu nastojim da ponudim prijemčiv, ali i sveobuhvatan uvod u konceptualnu teoriju prava. U tu svrhu ovaj rad će razmatrati prirodu i metodologiju konceptualne analize, odnos konceptualne analize prema metafizici i epistemologiji, kao i praktički značaj konceptualne analize.

2 TIPOVI TEORIJSKOG PROMIŠLJANJA O PRAVU

Teorijsko promišljanje o pravu pokriva spektar različitih tema. U većini slučajeva, teorijsko promišljanje o pravu predstavlja nastojanje da se utvrdi sadržaj relevantnog prava u vezi sa pitanjima u kojima na obe strane postoje podjednako dobri argumenti; autori takvih radova nastoje da dođu do zaključaka kojima bi se pravnici praktičari i sudije rukovodili prilikom donošenja odluka. U pravnim časopisima možemo naći članke u kojima autori brane tvrdnju o tome šta bi u nekom konkretnom pitanju trebalo smatrati pravom, a da se pritom ne rukovode moralnim ili razlozima praktičke razboritosti. Nalazimo i one čiji autori opravdavaju određene oblasti prava; tako što utvrđuju osnovne principe koji određuju sadržaj specifičnijih normi; ili tako što pojašnjavaju značenje određenih termina. Postoje, međutim, i oni koji se bave objašnjenjem prirode određenih pravnih praksi.

Bez obzira na taj širok spektar interesovanja za pitanja u vezi sa pravom, teorijska promišljanja se grubo mogu podeliti u tri kategorije. *Empirijska pravna teorija* se uobičajeno bavi utvrđivanjem ili objašnjavanjem određenih odlika ili svojstava postojećih pravnih sistema; takva teorija je, u najmanju ruku, deskriptivna po svom karakteru i usredsređena je na *kontingentna* svojstva pravnih sistema koji se proučavaju (to jest, svojstva koja oni mogu ali ne moraju da imaju). Autori koji se bavi empirijskom pravnom teorijom, mogli bi, recimo, da se bave utvrđivanjem ili objašnjavanjem sadržaja pravnih normi kojima se reguliše tajnost podataka u SAD-u. Isto tako, mogli bi da objašnjavaju ciljeve izvesne pravne prakse u Kolumbiji.

Nasuprot tome, *normativna pravna teorija* se uglavnom bavi utvrđivanjem svojstava koje pravne norme ili institucije, posmatrane sa aspekta političke moralnosti, treba da imaju, odnosno, moraju da imaju da bi se smatrale moralno legitimnim. Pravni teoretičar normativista mogao bi, recimo, da tvrdi da bi pravo, iz perspektive supstantivne moralne teorije, trebalo da štiti tajnost podataka na različite utvrđene načine. Normativisti se po pravilu bave pitanjima moralne legitimnosti – šta se, sa aspekta političke moralnosti, može smatrati opravdanim ograničenjem ponašanja građana koje država sprovodi na osnovu generalnog ovlašćenja da obezbeđuje javni poredak.

Opšta ili *konceptualna* jurisprudencija bavi se onim što se naziva »konceptualnom analizom« najvažnijih pravnih pojmova; to znači da se konceptualna jurisprudencija bavi objašnjavanjem najvažnijih pojmova naše pravne prakse, kao i njihovim međusobnim odnosima. Konceptualna jurisprudencija naročito nastoji da objasni pojmove prava, važenja i pravnog sistema i stoga nastoji da razjasni logičke odnose između tih pojmova i drugih pojmova koji mogu doći u vezu sa njima, kao što su pojmovi moralnosti, autoriteta, pravnih i društvenih obaveza, itd. Konceptualna jurisprudencija će objašnjavati sadržaj svakog pojma i nalaziti mu mesto unutar opšteg pojmovnog okvira kojim se rukovodi, kako naša jezička praksa u vezi sa relevantnim pojmovima-rečima, tako i sama naša pravna praksa.

Cilj ovog rada biće da objasni konceptualnu jurisprudenciju/analizu i različite metodologije za koje se veruje da utvrđuju principe koji imaju najviše izgleda da iznedre jednu uspešnu konceptualnu analizu. Osim toga, ovaj rad izneće i letimičnu ocenu raznih metodologija koje se smatraju odgovarajućim za konceptualnu analizu.

3 KAKO RAZUMETI KONCEPTUALNU ANALIZU

3.1 Šta je to uopšte pojam?

Konceptualna analiza je analiza pojmova; međutim, nameće se jedno teško pitanje: šta je tačno pojam? Značenje reči pojam je donekle zagonetno i nedovoljno razjašnjeno ali, u najmanju ruku, deluje jasno da pojmovi jesu ili korespondiraju sa mentalnim elementima koji su nam potrebni da bismo razmišljali o relevantnim stvarima. Na primer, ne možemo razmišljati, a još manje *govoriti*, o elektronima, a da pritom ne posedujemo ili ne razumemo pojam elektrona.

Iako bi ta tvrdnja mogla da deluje prilično nesporno, ona nam, ipak, manje govori o tome šta je pojam nego što nam se na prvi pogled može učiniti. Ona nam, recimo, ne govori ništa o prirodi pojma; o načinu na koji se pojmovi stiču; niti o tome u kojoj meri su oni prihvaćeni od strane pripadnika jedne zajednice. Jasno je, ipak, da je neophodno da posedujemo ili razumemo pojam neke stvari da bismo bili u stanju da razmišljamo ili govorimo o toj stvari čiji pojam jeste pojam te stvari.[1]

1 Ovde moramo biti oprezni. Nije sasvim jasno koja je to stvar čiji pojam jeste pojam. Na primer, ekstenzija termina »pravni sistem« predstavlja klasu svih stvari za koje je ispravno reći da predstavljaju pravne sisteme; shodno tome, ekstenzija ili referencija termina, odnosi se na neki skup – a ne na neki opšti jedinstveni pravni sistem. Intenzija, naravno, predstavlja ideju ili sadržaj izražen terminom »pravni sistem«. Trebalo bi razumeti da govorimo na donekle metaforičan način kada govorimo o stvari za koju postoji odgovarajući pojam. Ako postoji nešto što jeste pravo *kao takvo* ili neženja *kao takav*, nije jasno (bar nije meni) kakva je to vrsta stvari, osim da ona nije isto što i ekstenzija ili intenzija odgovarajućeg pojma-termina.

Postoje različita mišljenja o tome šta su pojmovi: 1) pojmovi su psihološka stanja koja predstavljaju ideje ili stvari; 2) pojmovi su sposobnosti posebne vrste – tačnije, sposobnost da se napravi razlika između jedne vrste stvari čiji pojam jeste pojam i druge vrste stvari čiji, drugačiji, pojam jeste pojam (to što posedujemo pojmove »drvo« i »žbun« govori o tome da smo sposobni da napravimo razliku između drveća i žbunja); i 3) pojam predstavlja značenje ili »smisao« reči.

Očigledno je da od odgovora na pitanje šta je to pojam zavisi kakva će biti metodologija konceptualne analize. Na primer, ako su pojmovi mentalna stanja kojima se nešto predstavlja, odgovarajuća analiza bilo kog pojma morala bi da kaže nešto o sadržaju te predstave, kao i o prirodi dotičnog stanja (a to bi moglo da bude neko složeno stanje, koje sadrži verovanja i sklonosti raznih vrsta).

Bez obzira na to šta bi pojmovi mogli da budu, oni su blisko povezani sa jezikom. Ljudi koriste *jezik* kako bi izrazili pojmove. Može da se desi da mi nemamo reč za svaki pojam koji posedujemo. Međutim, imamo veliki broj reči kojima možemo izraziti, označiti, odrediti, imenovati pojmove: mi koristimo reč »ljubav« kada razmišljamo ili govorimo o ljubavi, reč »pravo« kada razmišljamo ili govorimo o pravu, i tako dalje. Mi koristimo pojam-termin kojim se označava određeni pojam kako bismo govorili o stvarima koje potpadaju pod dotični pojam.

Naša sposobnost da sa drugima razgovaramo o nečemu čiji pojam jeste pojam (recimo, prava) govori nešto o odnosu između sadržaja pojma i naše upotrebe pojma-termina koji se na njega odnosi. S razlogom možemo smatrati da mi posedujemo neku predjezičku sposobnost da razvijemo pojmove i da razvijemo izvesne pojmove mnogo pre nego što naučimo reči koje se na njih odnose; bez takve sposobnosti, ne bismo mogli da naučimo neki jezik. Međutim, sadržaj naših pojmova u velikoj meri zavisi od jezičke prakse koja se odnosi na reči povezane sa njima, jer mi ne možemo na isti način da shvatamo kako da upotrebimo neku reč, a da pri tom na isti način ne shvatamo i centralni sadržaj pojma.[2] Ako vi i ja posedujemo sasvim različite pojmove prava, mi nećemo moći da razumemo šta onaj drugi govori kada upotrebljava pojam-termin »pravo«.

Iako bi bilo korisno imati podrobnije objašnjenje ovih specifičnih »stvari«, mi, ipak, možemo da se donekle metaforično izražavamo bez neželjenih posledica sve dok imamo na umu da se ne izražavamo sasvim precizno. Takva vrsta izražavanja, međutim, može da bude korisna za raspravu o raznim temama kojima se ovaj rad bavi. Ako nam se to, ipak, čini problematičnim, možemo smatrati da te stvari predstavljaju bilo koji primerak relevantne ekstenzije, pod uslovom da imamo na umu da nas taj određeni primerak interesuje samo utoliko što potpada pod dotični pojam.

2 Ja sam agnostik u pogledu toga kako nastaje takva praksa ili kako bi ona trebalo da se okarakteriše, osim da se za nju tvrdi da (1) predstavlja društvenu praksu koja nastaje i održava se delimično zato što je zajednička za članove jedne zajednice i da (2) suštinski elementi te prakse stvaraju norme koje imaju preskriptivnu snagu za članove date zajednice. Na primer, moglo bi se smatrati da se za našu praksu vezanu za upotrebu reči »neženja« ne može reći ništa više

Tvrdnja da su pojmovi povezani sa jezičkom praksom ne podrazumeva i to da pojmovi *jesu* jezički entiteti; a naročito ne podrazumeva da pojmovi predstavljaju značenja. Ništa u tvrdnji da je sadržaj naših pojmova oblikovan sadržajem jezičke prakse ne podrazumeva da pojmovi predstavljaju značenja, a ne mentalne predstave ili sposobnosti. Pojam vode koji ja posedujem mogao bi jednostavno da se odnosi na moju sposobnost da napravim razliku između stvari koje jesu voda i onih koje to nisu, čak i kada se ta sposobnost menja pod uticajem načina na koji ljudi oko mene upotrebljavaju termin »voda«.

3.2 Tradicionalna konceptualna analiza kao objašnjenje fregeovskog smisla

Tradicionalna metodologija konceptualne analize polazi od pretpostavke da su pojmovi utemeljeni u značenju ili u fregeovskom smislu (Fregean senses). Konceptualna analiza nastoji da nam ispriča priču, zasnovanu na uobičajenim intuicijama o fregeovskom smislu pojma-termina, o nečemu što potpada pod relevantni pojam. Ta priča, utemeljena, kao što jeste, u mišljenjima o značenju termina, ima pretenziju da opiše samu *prirodu* stvari čiji pojam jeste pojam.

Sagledavanje jednog relativno neproblematičnog pojma moglo bi nam pomoći da pokažemo kako je konceptualna analiza tradicionalno težila da utvrdi prirodu neke vrste stvari putem filozofskog objašnjenja značenja relevantnog pojma-termina. Razmotrimo pojam neženje. Ako ostavimo po strani ono što je manje bitno za uobičajeno značenje reči neženja, onda opravdano možemo smatrati da se za svako X može reći da X predstavlja neženju ako i samo ako je X neoženjen odrastao muškarac. Ako je tačna, ta analiza pojma nudi spisak svojstava u kojem ne samo da se pravi razlika između neženja i ne-neženja, već se i objašnjava zašto nešto što je neženja potpada pod tu kategoriju. To jest, analiza pojma utvrđuje ona svojstva koja objašnjavaju zašto je nešto neženja u sledećem smislu: instancijacija svojstava biti neoženjen, biti odrastao i biti muškarac *konstituiše* sve ono što bi moglo da ih instancira kao neženju. Sve dotle dok je biti neoženjen pojmovna odlika svojstva biti neženja, a imajući u vidu značenje pojma-termina »neženja«, biti neoženjen predstavlja deo same prirode svojstva biti neženja.

Trebalo bi naglasiti da ovde nije reč o ideji da instancijacija tih svojstava *prouzrokuje* nešto što ih instancira kao neženju; kakvo god da je objašnjenje zašto je nešto neženja, ono će takođe biti i objašnjenje zašto je nešto neoženjen, odrastao i muškarac – a to potonje objašnjenje razlikovaće se od osobe do osobe

osim da ona obuhvata razne obrasce upotrebe koje dele članovi jedne zajednice. Druga opcija je mišljenje da ova praksa predstavlja konvenciju. U oba slučaja, ta praksa je društvena po svom karakteru i izražava zajedničku normu prema kojoj je upotreba reči »neženja« ispravna samo ako se odnosi na muškarca: onaj ko upotrebljava reč »neženja« a priča o psu, nesumnjivo, greši.

jer će se u kauzalnom objašnjenju navoditi kontingentna svojstva i faktori. »Šta je to što Džima čini neženjom?« je potpuno različito pitanje od pitanja »Zašto je Džim neženja?«; u najmanju ruku, odgovor na drugo pitanje mogao bi da podrazumeva posedovanje informacija lične prirode o Džimu, dok odgovor na prvo pitanje to svakako ne bi.

Konstituisanje nije isto što i prouzrokovanje. Pokretljiva masa vodene pare je ono što nešto čini (*constitute*) oblakom; ali nije uzrok tome da nešto bude oblak. Upravo je posedovanje ovih svojstava ono što određuje da je pokretljiva masa vodene pare oblak; nešto je oblak *na osnovu* toga što je pokretljiva masa vodene pare. Konstituisanje nije neka pojava koji se odvija u vremenu, i to je, delimično, ono što razlikuje konstituisanje od prouzrokovanja, koje jeste pojava koja se odigrava u vremenu. Zašto je određeni skup molekula vode oblak ili pokretljiva masa vodene pare jeste pitanje koje zahteva drugačiju vrstu objašnjenja i analize. Ono zahteva objašnjenje koje je u najvećoj meri empirijsko po svojoj prirodi, u kojem se moraju navesti zakoni prirode i pojave koje se dešavaju u vremenu. Njima se izražavaju uzročnoposledične veze antecedenata i rezultata koji su deo objašnjenja zašto se taj određeni skup molekula vode pretvorio u tu određenu pokretljivu masu vodene pare, to jest u pomenuti oblak. Konceptualna analiza se ne bavi kauzalnim objašnjenjima, već svojstvima koja nešto čine takvim da to nešto potpada pod neki pojam-termin, kao što su »neženja«, »oblak« ili »pravo«.

Ponekad se može čuti mišljenje da tradicionalna konceptualna analiza (TKA), budući da joj je cilj da utvrdi značenja putem uobičajenih intuicija o primeni relevantnog pojma-termina, ne pruža mnogo više od definicije navedene u rečniku. Brajan Lajter (2003: 45), recimo, tvrdi da TKA nije ništa više do »glorifikovana leksikografija«:

> Konceptualnu analizu, onako kako je Džekson vidi, postaje teško razlikovati od banalne deskriptivne sociologije neke agencije za istraživanje javnog mnjenja *Gallup Poll* tipa. I zaista, Džekson izričito kaže da se on zalaže za to da se, kada je to neophodno, »urade ozbiljna istraživanja javnog mnjenja o reakcijama ljudi na različite slučajeve«! Time se, međutim, brišu jasne granice između konceptualne analize i leksikografije: jer nije li cilj leksikografije da statistički proprati uobičajenu upotrebu reči ili pojmova, tačnije obrazac upotrebe koji bi dobro osmišljeno istraživanje javnog mnjenja otkrilo?

To je pogrešno. TKA možda polazi od nečega što liči na leksikografiju, budući da je *utemeljena* u značenju, ali ona je mnogo više od toga. TKA ide dalje od jednostavnog utrđivanja zajedničkih gledišta; to je, naravno, posao leksikografa koji beleži empirijske obrasce upotrebe reči. Konceptualna analiza nastoji da teorijski sagleda ova gledišta tako što utvrđuje dublja filozofska ubeđenja od kojih ona polaze, kao i opštije principe koji ih objašnjavaju. Iako nije sasvim sigurno da ona predstavlja distinktivan filozofski poduhvat, ta vrsta analize, ipak,

umnogome prevazilazi empirijski zadatak utvrđivanja zajedničkih intuicija ili centralnih svojstava naše jezičke prakse.

Takav zaključak se lako može izvesti ako uradimo sledeće: jednostavno uporedimo ono što leksikografi imaju da kažu za reč »pravo« sa onim što Hart ima da kaže kada objašnjava pojam prava. Evo kako leksikografi oksfordskog rečnika *The Oxford American Dictionary* definišu »law« (pravo ili zakon):

> *law* | imenica 1 (često *the law*): sistem pravila koji jedna država ili zajednica priznaje kao sredstvo regulisanja postupaka svojih pripadnika i može da primeni putem propisivanja kazni: *they were taken to court for breaking the law* (našli su se na sudu jer su prekršili pravo ili zakon) | *a licence is required by law* (pravo zahteva posedovanje dozvole) | [pridev] *law inforcement* (primena prava ili zakona).
>
> - pojedinačno pravilo kao deo takvog sistema: *an initiative to tighten up the laws on pornography* (inicijativa da se pooštre pravila o pornografiji).
> - takvi sistemi kao predmet proučavanja ili kao osnova pravničke profesije: *he was still practicing law* (on se i dalje bavio pravom) | [pridev] *a law firm* (advokatska firma). Uporedi sa *jurisprudence* (jurisprudencija).
> - ono za šta se smatra da ima obavezujuću snagu ili dejstvo formalnog sistema pravila: *what he said was law* (to što je on rekao je pravo ili zakon).

Pogledajmo sada koliko toga što je razmotreno u Hartovoj teoriji se ne spominje u leksičkoj definiciji. Prvo, u njoj se uopšte ne spominju brojna pitanja koja su bila u središtu Hartove analize: društvena praksa, pravilo priznanja, sekundarna i primarna pravila, važenje prava, itd. Drugo, leksikograf je svoj zadatak obavio u nekoliko redova, dok je Hartu trebalo više od 200 stranica da u svom delu *The Concept of Law* iznese analizu pojma prava. Čak i ako Hart polazi od zajedničkih stanovišta o značenju »prava«, trebalo bi da bude jasno da on takođe radi i nešto što je potpuno drugačije od onoga što rade leksikografi – i pritom mnogo dublje zalazi u ono što pravo, kao takvo, zaista jeste.

S tim u vezi, biće nam od koristi da se vratimo na pojam neženje. Prema leksičkoj definiciji, neženja je neoženjen odrastao muškarac; svojstvima biti neoženjen, biti odrastao i biti muškarac iscrpljena je priroda neženje, prema ovoj definiciji. Nažalost, ta analiza neženje ostavlja otvorenim važna pitanja – pitanja na koja rečnik ne može dati odgovor, zato što je rečnička definicija upravo ta koja ne govori ništa o tim pitanjima. Na primer, nije jasno da li je Papa neženja. Veliki broj ljudi smatra da Papa nije neženja, iako je on neoženjen, odrastao i muškarac. Isto tako, veliki broj ljudi nerado koristi termin »neženja« da opiše homoseksualca koji živi u društvu u kojem se zakonski ne priznaje bračna jednakost. To nam sugeriše da rečnička definicija mora biti dopunjena, barem jednim dodatnim uslovom: ono što je neophodan uslov da se bude neženja jeste da se bude na odgovarajući način »podoban« za ulazak u brak; problem u oba gorepomenuta slučaja jeste to što nijedna od dve pomenute osobe nije na pravi način podobna za ulazak u brak da bi bila smatrana neženjom. Naravno, da bi

analiza bila kompletna, potrebno je, između ostalog, dati odgovarajuću analizu pojma »podoban«. U svakom slučaju, taj primer bi trebalo jasno da pokaže da TKA, u najmanju ruku, *ima pretenzije* da ode dalje od površinskih značenja koja nudi leksikografija.

4 ODNOS IZMEĐU KONCEPTUALNE ANALIZE I EPISTEMOLOGIJE: TRADICIONALNO GLEDIŠTE

4.1 Tradicionalno gledište

Prema tradicionalnom gledištu epistemologije o konceptualnoj analizi, konceptualne tvrdnje se opravdavaju metodologijom zasnovanoj na apriornoj spoznaji. Iako je istina da bez empirijskog istraživanja nije moguće utvrditi najvažniji sadržaj obrazaca upotrebe koji povezuju reči i pojmove, prema ovom gledištu nikakvo dalje iskustvo nije potrebno da bi se opravdale istinske konceptualne tvrdnje. Čim bude primećeno da ljudi upotrebljavaju reč »neženja« samo da bi označili neoženjenog muškarca, nikakvo dalje iskustvo neće biti potrebno da bi se opravdala tvrdnja da nijedna žena nije neženja. Ta tvrdnja je opravdana kao validna logička dedukcija iz konceptualnih tvrdnji da su samo muškarci neženje i da nijedna žena nije muškarac.

Neće se, naravno, uvek desiti da svaki čisto deduktivan argument bude tako neproblematičan kao oni koji su opisani u prethodnom pasusu. To postaje jasno svakome ko pročita Hartovo delo *The Concept of Law* ili Razovo delo *The Authority of Law* ili onome ko se ozbiljno bavi matematikom. Stotine godina bile su potrebne da se pronađe dokaz za Fermaovu poslednju teoremu; a rad u kojem je iznet taj dokaz napisan je na više od sto stranica – i bio je nešto što nijedan laik ne bi ni u snu mogao da razume.

Naravno, TKA podrazumeva nešto više od donošenja zaključaka na osnovu najvažnijih obrazaca jezičke upotrebe. Govoreći o pojmu slobodne volje, Frenk Džekson (1998: 31) opisuje jedan drugi metodološki element:

> Ono što mi želimo da razmotrimo jeste pitanje da li slobodna radnja *u skladu sa našom uobičajenom koncepcijom* ili nečim dovoljno bliskim našoj uobičajenoj koncepciji, postoji i da li je kompatibilna sa determinizmom, i da li će intencionalna stanja *u skladu sa našom uobičajenom koncepcijom* ili nečim njoj dovoljno bliskim preživeti ono što kognitivna nauka bude otkrila o funkcionisanju mozga... Ali, kako da ustanovimo šta je to naša uobičajena koncepcija? Prema mom mišljenju, odgovor jedino možemo dati ako se pozovemo na ono što nam se čini najočiglednijim i najvažnijim o slobodnoj radnji, determinizmu, verovanju ili bilo čemu drugom, a što otkrijemo putem svojih intuicija o mogućim slučajevima.

TKA nastoji da utvrdi pojmovni sadržaj koji nadilazi najočiglednije, i stoga »paradigmatične« odlike naših zajedničkih praksi, tako što razmatra intuicije o

mogućim slučajevima. Iako su dotične intuicije uobičajene, u smislu da ih deli veliki broj ljudi, one često jasno predočavaju odlike naših praksi kojih obični govornici možda nisu svesni sve dok ne počnu da razmatraju takve slučajeve. Na primer, većina govornika će verovatno shvatati da naš pojam prava ne podrazumeva da pravo mora da bude u skladu sa moralom[3] sve dok ne budu upitani da li su nacisti imali pravni sistem ili da li su Džim Krou (Jim Crow) zakoni bili zakoni. Takvi slučajevi nam pomažu da podrobnije proučimo sadržaj naših zajedničkih praksi, utvrđujući pri tom karakteristike pojma koje će morati da se objasne teorijskim putem.

Prema tradicionalnoj koncepciji, relevantne intuicije imaju čisto deksriptivan karakter i ne uključuju moralne intuicije o tome šta je ispravno, a šta pogrešno, šta je dobro, a šta loše. Prema ovom gledištu, mi se prilikom utvrđivanja sadržaja nekog pojma ne rukovodimo moralnim principima,[4] čak ni onda kada se pojmovi koriste za procenu ponašanja. Na primer, prilikom procenjivanja dveju predloženih analiza pojma prava irelevantno je da li je jedna analiza moralno bolja od druge – iako bi moralni standardi očito trebalo da imaju ulogu pri odlučivanju o tome koje norme bi trebalo pretvoriti u pravne. TKA je čisto deskriptivna i opšta, u smislu da se te intuicije odnose na sve moguće slučajeve.[5]

A šta ako se ljudi ne slažu po pitanju relevantnih intuicija? Postoji par različitih načina da se takvo neslaganje izgladi putem »neambicioznog« pristupa tradicionalnoj konceptualnoj analizi koji smatra da se konceptualna analiza bavi utvrđivanjem značenja pojma-termina *onako kao šta ga koristi određena zajednica govornika*.[6] Prvo, mogli bismo da zauzmemo stav, o kojem će više reči biti u sledećem pododeljku, da takvo neslaganje predstavlja znak nekog dubljeg neslaganja koje ukazuje na pripadnost dvema zajednicama koje ne dele isti pojam. Neambiciozan pristup, čini se, pretpostavlja da je konceptualna analiza podesna samo ako je reč o zajednici govornika kojima su relevantne intuicije i društvene prakse zajedničke. Drugo, mogli bismo da zauzmemo stav da do intuitivnog neslaganja može doći i u zajednici govornika koji dele zajednički

3 Ne postoje značajna neslaganja među pravnim teoretičarima, pravnim praktičarima, pa čak ni među laicima kada je reč o ovom pitanju. Uistinu, većina teoretičara prirodnog prava koji pripadaju tomističkoj tradiciji negira da je Akvinski tvrdio da nepravedne norme ne mogu biti pravo.

4 Postoje dve vrste normi koje mogu biti bitne za analiziranje nekog pojma: epistemičke norme, kao što je norma koja nalaže doslednost, i moralne norme, uključujući i one koje upravljaju našim ponašanjem. Da li bi epistemičke norme trebalo da igraju ulogu u teorijskim razmatranjima jeste pitanje koje ne izaziva kontroverze. Vidi Coleman 2001.

5 Veliki broj teoretičara, uključujući i Ronalda Dvorkina, veruje da nije moguće dati čisto deskriptivnu analizu evaluativnih pojmova, kao što je pravo. Vidi, npr. Dworkin 1986.

6 Kao što je Raz (1994: 216–217) zaključio, konceptualna analiza se bavi *našim* pojmovima, pošto su ti pojmovi izgrađeni putem *naših* društvenih praksi – pri čemu se termin »naš« odnosi na pripadnike određene zajednice govornika, to jest na *nas*.

pojam, ali da je tada takvo neslaganje znak da je naše razumevanje tog pojma nepozdano u pogledu važnih pitanja.

Džekson pravi razliku između »ambiciozne« koncepcije konceptualne analize i neambiciozne koncepcije, tvrdeći da bi tradicionalnu konceptualnu analizu trebalo smatrati neambicioznom. Prema ambicioznoj koncepciji, konceptualna analiza nam pruža uvid u to kakav je svet; to znači da bi nam analiza sadržaja našeg pojma prava, recimo, dala uvid u suštinsku prirodu prava, *onakvu kakva ona zaista jeste, nezavisno od naše jezičke prakse i konceptualnih okvira*. Prema neambicioznoj koncepciji, konceptualna analiza nam jedino »govori šta da kažemo za svet u manje fundamentalnim terminima, imajući u vidu izvesnu koncepciju sveta datu u fundamentalnijim terminima« (Jackson 1998: 44) – pri čemu su fundamentalni termini oni termini koji se definišu putem praksi relevantne zajednice govornika.

Ideja o prelasku sa fundamentalnijih termina na one manje fundamentalne odražava zdravorazumski stav prema kojem *analiza* predstavlja pokušaj da se ono što je složeno objasni jednostavnijim terminima. Reč je o ideji prema kojoj kada analiziramo neki pojam, mi ga zapravo razlažemo na jednostavnije sastavne delove tako da izložimo njegovu logičku strukturu i damo objašnjenje njegovog sadržaja koje prevazilazi, ali i sadrži u sebi, uobičajeno leksičko značenje pojma – što je, istorijski gledano, ideja koja se vrlo često javlja. Iako su teoretičari često dopunjavali i modifikovali analizu »analize«, osnovni elementi tog pojma su, bez obzira na to, ostajali uglavnom nepromenjeni.[7]

Ovde je važno istaći da neambiciozna konceptualna analiza za svoje polazište uzima koncepciju sveta »datu u fundamentalnijim terminima«. Ta koncepcija, međutim, mora da bude *nečija* koncepcija; a to je, kao što smo videli, *zajednička* koncepcija utemeljena u *zajedničkim* intuicijama, i shodno tome predstavlja *našu* koncepciju relevantne stvari čiji pojam jeste pojam. Stoga TKA pretpostavlja određenu priču o stvarima – i to onu *našu* priču – i nema pretenzije da opiše svet kakav on jeste, nezavisno od naših priča o stvarima.

Džekson ne govori mnogo o ulozi jezičke prakse u utvrđivanju sadržaja naših pojmova. Iako je možda tačno da svi mogući koncepti egzistiraju u logičkom prostoru zajedno sa ostalim apstraktnim objektima, sadržaj *naših* pojmova je, bar delimično, *fiksiran* našom jezičkom praksom. I zaista, kao što kritičari tradicionalne konceptualne analize tvrde, ako bismo simbol »voda« koristili da označimo nešto drugo, a ne bistru tečnost na koju se on odnosi kada se upotrebljava, onda to da je voda H_2O ne bi bilo konceptualna istina – iako bi, nesumnjivo, postojala neka konceptualna istina koja odgovara odnosu između nekog termina i H_2O. Pojmovi bi mogli da predstavljaju apstraktne objekte koji ne zavise od naših društvenih aktivnosti o kojima postoje objektivne istine koje

7 Beaney 1996; vidi takođe Blackburn 1996.

su potpuno nezavisne od uma, ali *jezik* predstavlja društvenu tvorevinu koja je utemeljena u društvenoj praksi; a to koje pojmove će naše reči izdvojiti ili izraziti delimično se definiše sadržajem te prakse.

Time se sugeriše da objašnjenja tradicionalne metodologije *deskriptivne* konceptualne analize nisu sasvim tačna. Iako filozofi često opravdavaju konceptualne tvrdnje pozivanjem na »uobičajene intuicije«, relevantne intuicije predstavljaju zajedničke poglede koji odražavaju centralnu praksu u vezi sa korišćenjem termina. Ako je, kao što Džekson (1998: 33) tvrdi, »posao oslanjanja na intuicije o mogućim slučajevima jednostavno deo sveobuhvatnog posla razjašnjavanja pojmova putem utvrđivanja načina na koji subjekti klasifikuju mogućnosti«, onda će zajednička gledišta *o jeziku* usloviti relevantne intuicije zato što način na koji subjekti klasifikuju mogućnosti zavisi od centralne prakse koja se odnosi na korišćenje reči. Mi klasifikujemo stvari tako što koristimo reči, koje, sa svoje strane, prema tradicionalnom gledištu, izražavaju ili označavaju pojmove. Analiziranje sadržaja pojma, prema tom gledištu, zahteva utvrđivanje zajedničke prakse koja se tiče relevantne reči.[8]

Neka od relevantnih gledišta mogla bi da budu ne-jezička po svom karakteru i da izražavaju široko rasprostranjeno uverenje o od-uma-nezavisnim svojstvima realnosti koja želimo da označimo. Međutim, u takvim slučajevima, te nejezičke »intuicije« o svetu će, najverovatnije, da odigraju značajnu ulogu u definisanju suštinskih odlika naše prakse u vezi sa pojmom-terminom. Na primer, deo objašnjenja koje će nam reći zašto koristimo termin »voda« da označimo samo bistre tečnosti sa hemijskom strukturom H_2O jeste naučno otkriće da voda jeste H_2O; to nejezičko sagledavanje pomaže nam da objasnimo zašto svi redom koristimo termin »voda« da označimo samo H_2O. Sadržaj pojmova prirodnog sveta često se menja sa pojavom novih naučnih otkrića, zato što naučna otkrića često mogu da donesu promene u pogledu načina na koji upotrebljavamo relevantne pojmove-termine. Konvencije u pogledu upotrebe neke reči, odnosno definicije reči, mogu vremenom da se menjaju, što se često i dešava.

Međutim, relevantna gledišta se obično oblikuju našom centralnom jezičkom praksom u vezi sa upotrebom relevantnog termina. Moja intuicija, recimo, govori da su sve neženje odrasli muškarci, zato što, empirijski gledano, niko ne koristi termin »neženja« da označi dečake ili žene, a ne zato što imam neku, ne-jezičku intuiciju o prirodi neženja. Naša zajednička praksa se sustiče u tački u kojoj se samo za muškarce kaže da su »neženje« – a moje intuitivno mišljenje

8 Kao što Hart (1994/2013: 7) kaže: »Mnoge značajne razlike između različitih tipova društvenih situacija ili odnosa, koje ne vidimo neposredno, mogu se učiniti vidljivim ispitivanjem standardne upotrebe relevantnih izraza i načina na koji oni zavise od socijalnog konteksta. U ovoj oblasti saznanja, posebno je tačna izreka profesora Džona Longšo Ostina (J. L. Austin) da se koristimo 'izoštrenom svešću o rečima da bismo izoštrili naše opažanje fenomena'«.

da su samo muškarci neženje izražava tu zajedničku jezičku praksu i njome je oblikovano.

Stoga TKA sadrži u sebi nesumnjivo empirijski element.[9] Koja gledišta jedna zajednica deli stvar je kontingentnosti koja se ne može utvrditi bez empirijskog opažanja. Iako je tačno da jedan od pouzdanih načina da se obavi empirijski posao jeste, kao što Džekson tvrdi, da se sprovede istraživanje javnog mnjenja, to obično nije neophodno. Ta »kabinetska« sociologija u kojoj prednjače filozofi (koji obično ne uviđaju da se bave sociologijom) dovoljno je pouzdana sve dotle dok neko pripada proučavanoj jezičkoj zajednici.

4.2 Dva metodološka izazova tradicionalnom gledištu: normativna i naturalizovana jurisprudencija

Gledišta koja su opisana u prethodnom pododeljku nisu više neupitna među filozofima. Prvo, sama ideja da je *a priori* znanje moguće postala je predmet rasprave među epistemolozima sklonim reduktivnom empirizmu. Drugo, što je i važnije za našu temu, pretpostavke na kojima počiva tradicionalno gledište konceptualne analize dovode se u pitanje u određenim metodološkim raspravama među teoretičarima koji se bave konceptualnom jurisprudencijom, u pogledu odgovarajuće metodologije za procenjivanje konceptualnih tvrdnji – a naročito, konceptualnih tvrdnji koje se odnose na pravo.

Postoje tri različite metodologije koje se mogu primeniti u konceptualnoj analizi. TKA, kao što smo videli, usvaja deskriptivnu metodologiju, a to znači da se konceptualne tvrdnje opravdavaju samo putem faktički deskriptivnih tvrdnji o sadržaju relevantnih društvenih praksi (koje obično uključuju i jezičku praksu); TKA se takođe rukovodi epistemičkim normama o rezonovanju i konstrukciji dobre teorije, kao što su norme kojima se propisuju doslednost, koherentnost, usaglašenost dokaza iz različitih izvora (konsilencija), itd.; ali prema tradicionalnoj konceptualnoj analizi, moralne norme nisu od važnosti za procenjivanje ili razvijanje analize sadržaja nekog pojma. TKA polazi od naših uobičajenih društvenih praksi i nastoji da donese zaključke o dubljim implikacijama tih praksi, uzimajući ih za svoje polazište u skladu sa gorepomenutim epistemičkim normama.

Iako je TKA »deskriptivna« u smislu da se konceptualne tvrdnje moraju opravdavati pozivanjem na određene društvene prakse, te se stoga može učini-

9 Frederik Šauer (2006: 860–861) iznosi upravo sledeći zaključak: »Poput svojih kolega filozofa tog vremena [Hart] je revnosno proučavao uobičajenu upotrebu tražeći distinkcije koje unutar nje postoje i temeljno je analizirao i definisao termine koji se koriste za označavanje pravnih pojmova ... Konceptualna analiza, kao što je to Hart sigurno uvideo, neminovno počiva, bar delimično, na empirijskom opažanju, a ta empirijska utemeljenost konceptualne analize mogla bi takođe implicitno da daje potporu njegovoj tvrdnji da se bavi deskriptivnom sociologijom.«

ti da ona obuhvata i empirijsku epistemologiju, sadržaj relevantnih društvenih praksi utemeljen je u centralnom značenju relevantnog pojma-termina koje je navodno zajedničko za pripadnike odgovarajuće zajednice u odgovarajućim praksama – a koje formira uobičajene intuicije o kojima je bilo reči u prethodnom pododeljku. Polazeći od te osnove, zagovornici tradicionalne konceptualne analize smatraju da se dalje tvrdnje – kojima se proširuje sadržaj pojma izvan njegovog centralnog značenja u odgovarajućoj zajednici govornika – ako se uopšte mogu opravdati, opravdavaju *a priori*. Stoga, TKA izričito tvrdi da su konceptualne tvrdnje *apriorne* po svom karakteru.

TKA takođe polazi od pretpostavke da su konceptualne tvrdnje *analitičke* po svom karakteru, u smislu da njihova podobnost da budu vrednovane kao istinite zavisi isključivo od sadržaja značenja relevantnih reči. Ono što je karakteristično za analitičke tvrdnje jeste to što za njih moraju da postoje neki generatori istinitosti – to jest, mora da se utvrdi koji su to faktori koji određuju da li je tvrdnja tačna ili pogrešna – intuitivno rečeno, radi se o ideji da je tvrdnja analitička ako i samo ako se njena podobnost da bude vrednovana kao istinita utvrđuje u potpunosti putem značenja relevantnih termina. TKA nastoji da izbaci na površinu dublja konceptualna uverenja koja su sadržana u određenim paradigmatično analitičkim izjavama, kao što je, recimo: pravo je norma. Da li su sve logičke implikacije jedne analitičke izjave takođe analitičke zanimljivo je pitanje, budući da odgovor na to pitanje zavisi od toga da li smatramo da je pojam analitičnosti isključivo semantički po svom karakteru ili smatramo da analitičnost u sebi sadrži neki nejasan epistemički pojam samoočiglednosti ili lako uočljive analitičnosti. U oba slučaja, kao što ćemo videti, TKA smatra da su tvrdnje kojima se osvetljava sadržaj pojma nužno tačne – bez obzira na to da li su sve relevantne implikacije analitičke tvrdnje i same analitičke.

Tradicionalna konceptualna analiza našla se pred dva značajna izazova. Prvo, V.V.O. Kvajn (W.V.O. Quine) tvrdi da se za pojam analitičnosti, od kojeg zavisi TKA, ne može dati objašnjenje koje bi bilo dovoljno čvrsto da bude osnov metodologije koja se vezuje za tradicionalnu konceptualnu analizu. Prema Kvajnovom mišljenju, problem da se analitičnost definiše u kategorijama »tačno«/«netačno« samo na osnovu značenja termina ogleda se u tome što je pojam »značenja« previše »nejasan«. Međutim, i ma koji drugi kriterijum za objašnjenje analitičnosti takođe je osuđen na neuspeh, jer će i njemu, koliko i samom pojmu analitičnosti, biti potrebno dodatno pojašnjenje. Razmotrimo, recimo, ideju da se analitičnost može objasniti preko sinonimnosti: prema toj ideji, tvrdnja je analitička ako i samo ako je subjekatski izraz sinonim za predikatski izraz. Problem sa tim, smatra Kvajn, je to što je pojmu sinonimnosti isto toliko potrebno filozofsko objašnjenje koliko i pojmu analitičnosti i ne može se smatrati adekvatnim objašnjenjem potonjeg pojma. Sve dotle dok sva moguća objašnjenja analitičnosti ispoljavaju istu tu manu, sva ona biće »cirkularna«, a

time i pogrešno upotrebljena kao uporište mišljenju da filozofija ima distinktivnu metodologiju, čiji je predstavnik TKA.

Iako imaju značajan uticaj u pravnoj filozofiji, ti argumenti više nemaju takav uticaj u drugim oblastima – najverovatnije zbog toga što su podložni mnogim prihvatljivim kritikama. I zaista, u nekim aspektima, ti argumenti odmah deluju problematično. Da je tvrdnja da je pojam nejasan, sama po sebi, dovoljna da se opravda njegovo isključivanje iz filozofske rasprave, morali bismo da isključimo pojmove kao što su broj ili kvarkovi, koje je teško objasniti na jasan intuitivan način. Dalje, da je nedostupnost necirkularnog objašnjenja nekog pojma dovoljna da se opravda njegovo isključivanje iz filozofske rasprave, mnogi značajni filozofski pojmovi bili bi isključeni: postoje neki matematički pojmovi (kao što je pojam skupa, koji se definiše preko očiglednih sinonima: »grupa« i »zbirka«) i moralni pojmovi (kao što je pojam dobra) za koje se ne može dati nikakvo necirkularno objašnjenje.[10]

Drugi izazov sa kojim se TKA susreće jeste tvrdnja da je oslanjanje metodologije na intuicije problematično zato što se intuicije razlikuju od jedne do druge kulture i stoga su suviše nepouzdane kao utemeljenje filozofskog objašnjenja bilo čega. Nema, međutim, ničeg iznenađujućeg ili problematičnog u vezi sa tim. Pojmovni okviri se definušu jezikom, a jezik predstavlja društveni artefakt koji se razlikuje od jedne do druge kulture; sve dotle dok jedna reč ne može da se savršeno prevede na drugi jezik, neće se nizati ni intuicije o relevantnom pojmu-terminu. To, međutim, prestaje da bude problem čim se shvati da imamo posla sa truizmom – da TKA nastoji da objasni *naše* pojmove – pojmove koje deli jedna zajednica, što je pretpostavka koja bi, kao što smo videli, trebalo da se pripiše Džeksonovom neambicioznom pristupu tradicionalnoj konceptualnoj analizi.

Bez obzira na to što se dovode u pitanje dobre strane tih argumenata, oni su ipak imali ogroman značaj u raspravama o metodologiji konceptualne jurisprudencije. Naročito ako se zna da su ti argumenti doveli do poziva za zaokretom ka »naturalizovanoj jurisprudenciji«. Lajter, najistaknutiji zagovornik naturalizovane jurisprudencije, tvrdi da bi zbog tih argumenta trebalo odbaciti TKA u korist metodologije koja sledi naučnu metodologiju i koja, stoga, ima empirijski karakter. Takva metodologija mora da odbaci sve pojmove koje Kvajn odbacuje u svom radu »Two Dogmas«, uključujući i modalne pojmove, kao što su nužnost i mogućnost. To podrazumeva odbacivanje ideje da su istinite konceptualne tvrdnje nužno istinite i da se mogu saznati na aprioran način. S obzirom na to da bi trebalo smatrati da filozofska metodologija »sledi nauku«, te da je stoga empirijska po svojoj prirodi, konceptualne tvrdnje su kontingentno istinite, ako su uopšte i istinite.

10 Vidi Grice & Strawson 1956.

Osim problema vezanih za argumente koji se smatraju temeljem naturalizovane jurisprudencije, postoje još neki problemi u vezi sa naturalizovanom jurisprudencijom. Niko nije na prilično jasan način formulisao kako bi naturalizovana jurisprudencija trebalo da se dalje razvija u pogledu analiziranja pojmova. Postoje mnoga pitanja o pravu na koja naturalizovana metodologija može da odgovori – a to su sva ona empirijska pitanja o pravu na koja se mogu dati utvrđeni i utvrdivi odgovori. Ali, kako bi naturalizovana metodologija mogla da se iskoristi u službi konceptualne analize ni najmanje nije jasno – svakako, niko nije bio kadar da je objasni sa temeljitošću i elegancijom sa kojima Frenk Džekson opisuje metodologiju tradicionalne konceptualne analize. U tom smislu, uistinu nije nerazumno smatrati da naturalizovana jurisprudencija nije ništa više do skeptička teorija konceptualne jurisprudencije, koja zapravo tvrdi da je konceptualna jurisprudencija nemoguća – baš kao što je Kvajn verovao da je svojim odbacivanjem modaliteta učinio metafiziku nemogućom. Ovde nije reč o metodologiji »zamene«, u smislu da mi jednostavno zamenjujemo tradicionalnu konceptualnu analizu naturalizovanom metodologijom, a nastavljamo da radimo istu stvar. Naturalizovana metodologija toliko menja prirodu konceptualnog istraživanja da više nije jasno da li relevantno istraživanje potpomognuto tom metodologijom treba da bude okarakterisano kao »konceptualno« istraživanje.

Naravno, uvek možemo prihvatiti te implikacije, kao i druge implikacije Kvajnove analize u vezi sa filozofsko-teorijskim razmatranjima brojeva, moralnih pojmova i drugih pojmova za koje se ne može dati necirkularno objašnjenje; ne postoji ništa što je nalik gorepomenutom, očito ubedljivom kontraargumentu. Postoji, međutim, i dalje snažna intuicija da ima nešto vredno u vezi sa tradicionalnom konceptualnom analizom, za koju se kaže da počiva na analitičkim tvrdnjama i izražava nužne istine o relevantnoj stvari. Uistinu, tradicionalna konceptualna analiza, metafizika, epistemologija i normativne teorije morala i dalje imaju istaknuto mesto u filozofiji, uprkos kvajnovskom izazovu. I zaista, prema nedavnom istraživanju, 64,9% filozofa prihvata analitičko-sintetičku distinkciju, dok je samo 27,1% odbacuje.[11]

Drugi metodološki izazov kojim se dovodi u pitanje dominacija tradicionalne konceptualne analize jeste *normativna jurisprudencija*. Normativna jurisprudencija je po pravilu zasnovana na odbacivanju gledišta prema kojem objasniti šta je pravo (kao takvo) nije isto što i objasniti šta bi pravo trebalo da bude. Pritom, gledište koje se odbacuje podrazumeva da bi konceptualna metodologija trebalo da bude čisto deskriptivna.[12] Zanimljivo je to što Hart (1994/2013: 268), čini se, iznosi tvrdnju koja je u suprotnosti sa gotovo svim ostalim što je

11 Bourget & Chalmers 2014.

12 O toj liniji argumentacije u prilog normativne jurisprudencije, vidi opširnije u Dickson 2001: pogl. 1, deo A.

govorio o metodologiji – da se konceptualna teorija prava katkad može ispravno proceniti na osnovu normativnih razmatranja koja prevazilaze pravila kojima se rukovodimo prilikom razboritog rasuđivanja i argumentovanja:

> Pojam prava koji dopušta razlikovanje nevaženja prava od njegove nemoralnosti, omogućava nam da vidimo složenost i raznovrsnost ovih odvojenih pitanja; dok nas, međutim, uži pojam prava koji ne priznaje pravno važenje nepravednih pravila, čini slepim za to.

Ne bi trebalo pripisivati neki veći značaj ovom argumentu, pošto Hart jasno smatra da je konceptualna metodologija deskriptivna po svom karakteru; međutim, važno je uvideti da gorenavedno zapažanje nije u skladu sa Hartovim jasnim uverenjima, utoliko što je pozivanje na praktičke implikacije prilikom opravdavanja konceptualne teorije irelevantno sa stanovišta čisto deskriptivnog pristupa konceptualnoj metodologiji. Striktno govoreći, pribegavanje takvom razmatranju pretpostavlja istinu jedne moguće teze normativne metodologije – naime, da bi adekvatno objašnjenje pojma prava trebalo da donese neku društvenu korist, te da stoga adekvatnost konceptualne teorije prava zavisi od praktičkih društvenih implikacija njenog usvajanja.

Pobornici normativne jurisprudencije najčešće tvrde da se pojam prava ne može na adekvatan način objasniti ako se u obzir ne uzmu moralne norme koje definišu šta bi trebalo da bude sadržaj ili svrha prava. Pravo, kao takvo, se stoga delimično definiše preko moralne vrednosti njegove svrhe, sadržaja ili prakse. Prema tom stanovištu, kao što to Diksonova (2001: 7) primećuje, »zadatak opisivanja prava 'kakvo jeste' nužno je i neodvojivo povezan sa načinom na koji neko razume kakvo pravo, u moralnom smislu, treba da bude, tako da se ta dva poduhvata ne mogu odvojiti jedan od drugog«.

Svaka od ovih tvrdnji o značaju praktičkih normi (koje se nalaze izvan normi racionalnosti) ima značajne implikacije po metodologiju. Normativna metodologija je slična tradicionalnoj konceptualnoj analizi po tome što polazište konceptualne analize nalazi u široko prihvaćenim shvatanjima u vezi sa relevantnom društvenom praksom i paradigmama obuhvaćenim relevantnim pojmom-terminom. Ono po čemu se normativna metodologija, ipak, razlikuje od tradicionalne konceptualne analize, jeste odbacivanje tradicionalnog gledišta prema kojem uobičajena shvatanja prakse i paradigmi predstavljaju isključivo merilo za testiranje teorije; umesto toga, precizna analiza pravnih pojmova mora da odgovori i na supstantivne moralne norme koje propisuju ili šta sadržaj ovih pojmova *treba* da bude ili kakve društvene posledice jedna konceptualna teorija prava *treba* da ima.[13]

Ali zašto bismo mislili da se odgovor na pitanje šta je pravo kao takvo ne može dati bez odgovora na pitanje šta bi pravo, sa aspekta morala, trebalo da

13 Među istaknutim pobornicima normativne metodologije i njihovim delima nalaze se Stephen Perry (2001) i Jeremy Waldron (2001).

bude? Jedna grupa argumenata – i to, možda, onih najuticajnijih – polazi od pretpostavke da se normativni pojmovi (to jest, pojmovi sa normativnim sadržajem, kao što je onaj obuhvaćen terminom »dobro«) moraju ponekad analizirati tako da se usklade sa nekim relevantnim skupom moralnih normi. S obzirom na to da neko recimo, može smatrati da je konceptualna funkcija prava stvaranje uslova za pravdu, pojam prava je delimično normativan po svom sadržaju, a to bi značilo da analiza prava mora da bude u skladu sa određenim moralnim normama.

Ronald Dvorkin nudi jednu od najznačajnijih odbrana ideje da je sam pojam prava delimično normativan po svom karakteru i da zahteva objašnjenje putem normativne metodologije. Prema Dvorkinovom mišljenju, određeni pojmovi su »interpretativni« po svom karakteru i kao takvi se moraju analizirati u okvirima neke relevantne klase supstantivnih normi. Dvorkin nastoji da pokaže da je pojam prava interpretativan i da stoga zahteva normativnu metodologiju tako što ukazuje na analogiju između pojma prava i pojma učtivosti, pri čemu on ovaj drugi pojam smatra paradigmatičnim primerom interpretativnih pojmova. Dvorkinova (1986: 47) postojana argumentacija vodi ga do zaključka da učtivost predstavlja interpretativni pojam:

> Zamislite sledeći istorijski razvoj jednog imaginarnog društva. U određenim društvenim prilikama, njegovi pripadnici poštuju određeni skup pravila, koje nazivaju »pravilima učtivosti«.. Izvesno vreme, ova praksa predstavlja tabu: pravila jednostavno postoje i ne dovode se u pitanje, niti se menjaju. Ali, onda se sve to, možda polako, menja. Svaki pripadnik razvija složen »interpretativan« stav prema pravilima učtivosti, stav koji se sastoji iz dva elementa. Prvi element jeste pretpostavka da učtivost kao praksa ne samo da postoji, već ima i vrednost, da ona služi nekom interesu ili svrsi ili da se njome sprovodi neki princip – ukratko, da ima neki smisao – koji se može izdvojiti nezavisno od jednostavnog opisivanja pravila koja čine tu praksu. Drugi element je dalja pretpostavka da pravila učtivosti – ponašanje koje ono propisuje ili stavovi koje ono nalaže – nisu nužno ili isključivo ono što su oduvek bila, tako da se striktna pravila moraju shvatati ili primenjivati ili proširiti ili izmeniti ili ograničiti u svetlu tog smisla. Čim taj interpretativni stav bude ukorenjen, institucija učtivosti prestaje da bude mehanička; ona više nije nekritičko uvažavanje runskog poretka. Ljudi sada pokušavaju da pripišu *značenje* instituciji – da ga uvide.

Dvorkin nastavlja sa povlačenjem analogije između normi prava i normi učtivosti kako bi potkrepio svoj stav da je pojam prava interpretativan – to jest, da je prava priroda pojma prava interpretativna, a ne predinterpretativna, kao što to pozitivisti smatraju. Stoga on zaključuje da analiza pojma prava mora da zavisi od određenih moralnih normi koje definišu njegovu normativnu svrhu.

Dvorkinovoj argumentaciji bi se mogli uputiti brojni prigovori. Prvo, nije jasno da li je Dvorkin uspeo da pokaže da pojam učtivosti ima interpretativni sadržaj koji nalaže korišćenje normativne metodologije. Iako je možda tačno da učtivost, u konceptualnom smislu, teži da ostvari neku vrstu svrhe ili vred-

nosti, to ne znači da se sadržaj *pojma* učtivosti ne može objasniti bez pozivanja na *moralne* norme – čak i ako je vrednost kojoj učtivost teži *moralna* vrednost. Svrha učtivosti se najverovatnije definiše putem društvene prakse koja se može posmatrati kao sredstvo za utvrđivanje te svrhe. *Supstantivne norme* učtivosti, svakako da moraju odražavati tu konceptualnu svrhu učtivosti; to što znamo koja je svrha učtivosti pomaže nam da utvrdimo šta bi trebalo da budu norme učtivosti. Međutim, celu stvar ćemo verovatno vratiti korak unazad ako budemo smatrali da se norme učtivosti moraju uzimati u obzir prilikom utvrđivanja šta jeste sadržaj pojma – a da se pritom ne utvrđuje i svrha učtivosti. Nije jasno kako bismo norme učtivosti uopšte mogli i utvrditi i razlikovati od drugih vrsta normi, a da pri tom ne shvatamo konceptualnu svrhu učtivosti. Uistinu, norme učtivosti su to što jesu zato što, ukoliko se poštuju, one omogućavaju subjektu da uskladi svoje ponašanje na način kojim se postiže svrha učtivosti; čini se da svrha učtivosti služi kao merilo ispravnosti dotičnih normi. Ako je to tačno, onda sadržaj svrhe određuje sadržaj normi; sadržaj normi ne određuje sadržaj svrhe, kao što se to u prigovoru pretpostavlja.

Drugo, što je još važnije, jednostavno nije jasno da li se pojam koji ima normativan sadržaj može na odgovarajući način objasniti samo putem metodologije koja uključuje moralne norme. Pojam moralnosti, recimo, ima normativan sadržaj: kada se reči »moralno« i »nemoralno« koriste uz opis nekog postupka, one izražavaju vrednosti koje daju razlog za delovanje. To što je X nemoralno predstavlja dobar razlog da se X ne čini. Vilijam Frankena, međutim, daje prihvatljivu analizu sadržaja pojma moralnosti, a da pri tom ne pribegava moralno normativnoj metodologiji, već se, umesto toga, oslanja na tradicionalnu konceptualnu analizu. O toj teoriji govori sledeći pasus:

> Svi oni koji koriste »moralnost« na normativan način smatraju da se »moralnost« odnosi na kodeks ponašanja koji važi za sve one koji ga mogu razumeti i koji svoje ponašanje mogu uskladiti sa njim. U normativnom smislu, moralni nalozi bi uvek trebalo da budu isključujući, to jest niko nikada ne bi trebalo da prekrši moralnu zabranu ili zahtev iz razloga koji nisu moralne prirode (Gert 2011).

Ova analiza plod je čisto empirijskog sagledavanja načina na koji ljudi koriste relevantne pojmove-termine, što je, naravno, samo stvar pronalaženja implikacija zajedničkih obrazaca uobičajene upotrebe među relevantnom klasom govornika. Stoga, nije jasno da li se može izvesti zaključak da je normativna konceptualna metodologija podesna za pojmove sa normativnim sadržajem.

Tačno je, naravno, da konceptualna jurisprudencija ne može da postoji bez donošenja određenih vrsta vrednosnih sudova koji zavise od normi koje ne pripadaju normama razboritog rasuđivanja i argumentovanja. Ne možete započeti analizu pojma prava ako niste u stanju da izdvojite odlike prava koje su teorijski važne. Moglo bi, recimo, da bude tačno da sve sudije nose sudske toge, ali to nije odlika prava koja je u dovoljnoj meri značajna za pravo da bi bila upotreb-

ljena za objašnjenje pojma prava. Konceptualna jurisprudencija stoga mora, kao što to Diksonova (2001: 51–57) ističe, da bude »posredno evaluativna«, u smislu da nalaže pribegavanje normama koje nam omogućavaju da razlikujemo važne zajedničke odlike prava od nevažnih zajedničkih odlika prava; međutim, uspešan metodološki pristup pravu ne mora da bude »neposredno evaluativan« u smislu da nalaže pribegavanje moralnim normama koje govore o tome kakav bi trebalo da bude sadržaj prava ili relevantnih društvenih praksi.

O tome govori Hart (1987: 39) na sledeći način:

> Analiza koja moralnim tvrdnjama i uverenjima dodeljuje ulogu konstitutivnih elemenata društvenih fenomena, mora i sama, kada se usredsređuje na te, a ne na neke druge odlike, biti rukovođena nekim kriterijumima značajnosti, od kojih će glavni biti eksplanatorna moć onoga što njegova analiza izdvoji. Tako će se njegova analiza rukovoditi procenama, često kontroverznim, o tome šta je važno i stoga će odslikavati takve meta-teorijske vrednosti i neće biti neutralna u pogledu svih vrednosti. Ništa, međutim, ne postoji što bi pokazalo da ta analiza nije deskriptivna, već normativna i opravdavajuća.[14]

Shodno tome, Hart pravi razliku između posrednog evaluativnog pristupa u skladu sa epistemičkim normama, koje omogućavaju da se izdvoje odlike od teorijskog značaja, i normativnog pristupa koji teži da opravda neke od različitih praksi i struktura koje određuju relevantne pojmove koji se proučavaju.

5 ODNOS KONCEPTUALNE ANALIZE I METAFIZIKE

Prema tradicionalnoj konceptualnoj analizi, analiza jednog pojma otkriva prirodu ili suštinu stvari na koju upućuje odgovarajući pojam-reč. Stoga, cilj konceptualne analize prava jeste da da nam saopšti nešto o prirodi ili suštini prava; to znači da bi ona trebalo da nam kaže nešto, ne samo o svim *postojećim* pravnim sistemima, već o svim *konceptualno mogućim* pravnim sistemima. Shvaćena na taj način, konceptualna analiza prava sastavljena je od niza konceptualno (ili metafizički) nužnih istina i stoga potpada pod kategoriju metafizičkog teorijskog promišljanja – baš kao što i analiza pojma slobodne volje potpada pod metafiziku. Hart je skretao pažnju na to da konceptualna analiza može da započne od reči, ali da je važno da se shvati da će adekvatno objašnjenje pojma uključivati istine koje daleko prevazilaze konvencije kojima se uspostavljaju centralna značenja tih reči. Poduhvat analiziranja sadržaja pravnih pojmova jeste poduhvat istraživanja metafizike prava, u kojem se njegova priroda objašnjava preko tvrdnji koje su *nužno* istinite – što je zaštitni znak metafizičkog istraživanja.[15]

14 Među onima koji prihvataju ovu razliku nalaze se, npr. Coleman 2001, Marmor 2001, Waluchow 1994, Dickson 2001 i Finnis 1980.

15 Ovde je važno da zapazimo bitnu razliku između neambicioznog i ambicioznog pristupa kon-

Metafizički karakter konceptualne analize, onako kako se ona tradicionalno shvata, logički je povezan sa gledištem da je epistemologija konceptualne analize *apriorna* po svom karakteru. Empirijsko opažanje je od suštinskog značaja prevashodno za utvrđivanje samo kontingentnih, čulno opazivih svojstava određenih stvari. Na primer, potrebno nam je empirijsko opažanje da bismo saznali da u jednoj kesici sa kamenjem ima četiri kamena, ali ne čini se da je, sa stanovišta uobičajene intuicije, ono potrebno da bismo znali da je 2 + 2 = 4; bilo bi besmisleno kada bismo išli naokolo i pokušavali da potvrdimo istinitost ove aritmetičke tvrdnje putem niza pokušaja u kojima stavljamo dva, pa zatim druga dva kamena zajedno, a potom utvrđujemo i beležimo dobijeni rezultat. Nama je potrebno empirijsko opažanje da bismo saznali da se u kesici nalaze dva kamena, jer bi to moglo da bude i pogrešno; za razliku od toga, mi znamo da je 2 + 2 = 4 shvatajući nekako (funkcionisanje *a priori* sposobnosti, ako takva uopšte i postoji, prilično je zagonetno sa stanovišta epistemološke teorije) da to ne bi moglo da bude pogrešno.

S obzirom na to da suštinska svojstva prava poseduje svaki mogući pravni sistem, a ne samo postojeći pravni sistemi koje možemo da opažamo svojim čulima, empirijsko opažanje nema značaj za konceptualnu analizu – izuzev što je ono nužno za dovoljno dobro razumevanje pojma-termina, koje nam omogućava da izdvojimo paradigmatične primerke stvari na koje se on odnosi. Stoga je za tako shvaćenu konceptualnu analizu potrebna *a priori* metodologija.

Isto tako se smatra da je metafizički karakter konceptualne analize, shvaćene na tradicionalan način, logički povezan sa gledištem da se dublji sadržaj nekog pojma može izvesti iz nekog skupa relativno očiglednih analitičkih istina o stvari koja je obuhvaćena pojmom. Ako je tvrdnja *T* istinita isključivo na osnovu značenja reči koje su upotrebljene da se ona iznese, onda negiranje tvrdnje *T* predstavlja kontradikciju. Pošto je kontradikcija nemoguća, *T* je nužno istinita i stoga metafizička po svom karakteru, budući da se metafizika bavi pitanjima u vezi sa prirodom stvari. Sadržaj pojma će, onda, biti rasvetljen nizom tvrdnji koje su nužno istinite i izvedene iz analitičkih istina koje čine polazište tradicionalne konceptualne analize.[16] TKA, da ponovimo, polazi od pretpostavke da je konceptualna analiza metafizička po svom karakteru.

---

ceptualnoj analizi. S obzirom na to da je neambiciozan pristup izričito utemeljen u kontingentnim društvenim praksama, poput onih koje definišu jezik zajednice, konceptualne istine su nužne *u odnosu na taj skup određenih polazišta*; mi svetu pripisujemo određenu metafizičku strukturu putem konceptualnih tvrdnji koje proizilaze iz društvenih praksi koje stvaramo. S druge strane, budući da ambiciozan pristup teži da utvrdi istine koje ne zavise od ljudske prakse, konceptualne istine će jednostavno bile nužno istinite – i bez obzira na bilo kakav određeni konceptualni okvir koji ljudi pripisuju svetu putem jezičke ili druge društvene prakse.

16 Interesantno je pitanje da li su, pod pretpostavkom da se polazište tradicionalne konceptualne analize sastoji isključivo iz analitičkih istina, i implikacije skupa koji sadrži samo analitičke istine nužno analitičke po svom karakteru. Ako se za bilo koju tvrdnju može reći da je analitička po svom karakteru, to je svakako tvrdnja da se pravo sastoji iz normi. Međutim, tvrdnja da

Kao što je već rečeno, postoje dva metodološka izazova koji dovode u pitanje tradicionalnu konceptualnu analizu – normativna jurisprudencija i naturalizovana jurisprudencija – a one se ne slažu po pitanju toga da li je konceptualna analiza metafizička po svom karakteru. Normativna jurisprudencija, da se podsetimo, smatra da analiza pojma prava mora biti u skladu sa određenim relevantnim moralnim normama, baš kao što mora biti u skladu i sa određenim normama racionalnog diskursa. Iako normativna jurisprudencija ne podrazumeva meta-etički stav da je moralnost objektivna (»moralni objektivizam«), većina teoretičara naklonjenih normativnoj metodologiji takođe se drži moralnog objektivizma.[17] S obzirom na to da moralni objektivizam, kao što se obično smatra, podrazumeva da su moralne norme nužno istinite, ako su uopšte i istinite, primenjivanje moralno normativne metodologije na konceptualnu analizu će isto tako rasvetliti sadržaj relevantnog pojma u terminima nužnih istina koje izražavaju prirodu relevantne stvari. Normativna metodologija, stoga, podrazumeva da konceptualne istine imaju metafizički karakter.

Ono što je mnogo nejasnije jeste da li normativna metodologija polazi od pretpostavke da su konceptualne tvrdnje analitičke, kao što to TKA čini. Problem koji se ovde javlja u vezi je sa prirodom moralnih tvrdnji. Pod pretpostavkom da je moralnost objektivna, što je tipično za normativne pravne filozofe, moralne tvrdnje bi mogle da budu nužno istinite, ali svakako ne po osnovu toga što su analitičke tvrdnje; ne čini se da je po definiciji tačno da je ubijanje ljudi pogrešno. Neko bi, naravno, mogao da zauzme stav da je sadržaj pojma prava moralizovan, u smislu da su relevantne moralne tvrdnje ugrađene u definiciju prava, ali to je duboko i teško pitanje kojim se ovde ne možemo na odgovarajući način baviti. Čak i u tom slučaju, čini se da je svakako jasno da normativna jurisprudencija pretpostavlja da je konceptualna analiza prava metafizička po svom karakteru.

S druge strane, naturalizovana jurisprudencija, kao što se odmah može videti, negira osnovne pretpostavke tradicionalne konceptualne analize u vezi sa

uslovi za postojanje jednog pravnog sistema uključuju društveno pravilo priznanja koje praktikuju zvaničnici nije očigledno analitička – čak i ako ona, po prirodi stvari, zapravo predstavlja nužnu istinu o pravnim sistemima – i izvedena je nekako iz tvrdnje da se pravo sastoji iz normi. Uistinu, s pravom bi se moglo postaviti pitanje da li se polazište – čak i ako se radi o tradicionalnoj konceptualnoj analizi – sastoji isključivo iz analitičkih istina. Opažanja kojima nastojimo da izdvojimo »paradigmatična« obeležja prava i pravnih sistema nisu, čini se, obuhvaćena definicijama prava. Pre će biti da je reč o tome da čim imamo pred-teorijsko razumevanje prava, koje se delimično formira definicijama, utvrđivanje paradigmi bar delimično biva formirano vrednosnim sudovima koji prave razliku između bitnih nužnih odlika prava i onih nebitnih. Ti sudovi, po svemu sudeći, predstavljaju sintetičke nužne istine.

17 Moralni objektivizam je gledište prema kojem se istinitost moralnih tvrdnji utvrđuje putem od-uma-nezavisnih kriterijuma, tj. kriterijuma koji ne uključuju preferencije, uverenja, prakse ili želje bilo kog pojedinca ili grupe. Svaki teoretičar prirodnog prava je pristalica moralnog objektivizma. Isto tako, Ronald Dvorkin je pobornik moralnog objektivizma i neko ko se zalaže za normativnu metodologiju. Vidi, npr. Dworkin 1996.

karakterom konceptualne analize. Prvo, s obzirom na to da je naturalizovana jurispurdencija utemeljena u Kvajnovom odbacivanju analitičko-sintetičke distinkcije, ona, takođe, odbacuje ideju da je konceptualna analiza makar i delimično utemeljena u analitičkim tvrdnjama – pošto, na kraju krajeva, ne postoje takve stvari koje se mogu legitimno definisati. Dalje, s obzirom na to da je naturalizovana metodologija utemeljena na Kvajnovom argumentu, naturalizovana jurisprudencija sledi Kvajna u njegovom odbacivanju filozofske legitimnosti modaliteta nužnosti i mogućnosti. Konačno, s obzirom na to da naturalizovana jurisprudencija smatra da je metodologija konceptualne analize utemeljena u empirijskim tvrdnjama i da sledi naučnu metodologiju, konceptualne tvrdnje biće kontingentne po svom karakteru; na kraju krajeva, prema tradicionalnim gledištima, nisu nam potrebna empirijska opažanja da bismo sagledali karakteristike svih mogućih svetova. Naturalizovana jurisprudencija, stoga, osporava tvrdnju da je konceptualna analiza metafizički poduhvat čiji je rezultat teorija sastavljena od nužnih istina, koje izražavaju prirodu relevantne stvari koja se proučava.

6 KONCEPTUALNA ANALIZA PRAVA: KONCEPTUALNA JURISPRUDENCIJA

Najvažnija odlika konceptualne analize prava, shvaćene na tradicionalan način, jeste metafizička teza da u svakom konceptualno mogućem pravnom sistemu, postoje određena svojstva koja nešto *čine* (*constitute*) pravom. Stoga bi, recimo, konceptualna teorija prava uključila spisak svojstava koja ono što ih poseduje čini pravnim sistemom (»pravo« kao institucionalni sistem normi), kao i spisak svojstava koja ono što ih poseduje čini pravnom normom nekog pravnog sistema (»pravo« kao pojedinačne norme). Instancijancija relevantnih svojstava čini sistem/normu pravnim sistemom/normom u istom onom smislu u kojem svojstvo neoženjenosti čini nekog čoveka neženjom. Svaki onaj institucionalni sistem normi koji instancira odgovarajuća svojstva, iz tog razloga, jeste pravni sistem; svaki onaj sistem koji to ne čini, nije, iz tog razloga, pravni sistem. Isto tako, svaka norma koja instancira odgovarajuća svojstva jeste, iz tog razloga, pravna norma nekog pravnog sistema; svaka ona norma koja ne instancira odgovarajuća svojstva nije, iz tog razloga, pravna norma nekog pravnog sistema.

Konceptualne teorije prava imaju neke interesantne implikacije koje nam omogućavaju da detaljnije proučimo sadržaj određenih zakona i pravnih sistema. Svaka od glavnih konceptualnih teorija prava – pozitivizam, prirodnopravna teorija i Dvorkinov interpretativizam – polazi od pretpostavke da pravo, bar delimično, predstavlja proizvod kontingentne društvene prakse, uključujući i onu koja se odnosi na zakonodavstvo i sudstvo. To znači da sadržaj pravnih normi, uključujući i one koje definišu granice jednog pravnog sistema kojem te norme pripadaju, može da varira od jednog do drugog pravnog sistema. Jedna

od posledica te ideje jeste to da u svakom konceptualno mogućem pravnom sistemu postoji skup normi koje utvrđuju postojanje i strukturu pravnog sistema i obezbeđuju kriterijume na osnovu kojih se jedna norma smatra *važećim* pravom datog sistema. Ako je *S* pravni sistem, a *P* predstavlja iskaz koji opisuje svojstva koja jednu normu čine pravnom[18], onda *P* formuliše nužne i dovoljne kriterijume »pravne validnosti« u *S*-u u sledećem smislu: za svaku normu *n, n* predstavlja pravo u *S*-u u vremenu *t* ako i samo ako *n* instancira *P* u *t*-u.[19] To se može iskazati i na sledeći način:

> *Teza o diferencijaciji:* U svakom konceptualno mogućem pravnom sistemu *S*, postoji skup *KV* (kriterijumi važenja – »criteria of validity«) takav da za svaku normu *n, n* predstavlja pravo u *S-u* u vremenu *t* ako i samo ako *n* ispunjava kriterijume iz skupa *KV* u *t*-u.

Teza o diferencijaciji otuda tvrdi da svaki pravni sistem sadrži uslove pripadanja (*membership conditions*) kojim se definišu kriterijumi važenja za taj sistem – s tim što se smatra da se ti kriterijumi razlikuju od jednog do drugog sistema utoliko što se relevantne društvene prakse razlikuju.

Važno je shvatiti da teza o diferencijaciji, tradicionalno shvaćena, predstavlja metafizičku tezu – a ne epistemološku tezu.[20] Teza o diferencijaciji ne pretpostavlja niti implicira bilo kakve tvrdnje o obimu u kojem se kriterijumi važenja mogu utvrditi ili primeniti u bilo kojem mogućem pravnom sistemu. Uistinu, teza o diferencijaciji je, sama po sebi, logički konzistentna sa različitim tvrdnjama o tome koliko toga možemo znati o sadržaju prava – i kad je reč o pravnim normama kojima se uspostavljaju kriterijumi važenja i kad je reč o pravnim normama koje predstavljaju pravo zato što su važeće prema kriterijumima važenja. Tačno je, naravno, da (1) sadržaj svih pravnih normi u krajnjoj liniji zavisi, u velikoj meri, od društvenih procesa koji se empirijski mogu opaziti i da (2) norme sistema moraju biti razumljive kako bi bile dovoljno efikasne da konstituišu pravni sistem. Tačno je takođe i da teza o diferencijaciji, kao i tvrdnje (1) i (2) podrazumevaju da mi možemo doći do izvesnog znanja o sadržaju prava u određenom pravnom sistemu tako što ćemo u dovoljnoj meri posmatrati prakse koje dovode do kriterijuma važenja i aktivnosti zvaničnika koje su u skladu sa ovim kriterijumima. Međutim, pogrešno je smatrati da osnovne teze konceptualne teorije prava, koja uključuje i tezu o diferencijaciji, impliciraju

18 Iskaz *P* bi, naravno, mogao da izražava ili veoma složeni spisak svojstava koji uključuje disjunkciju ili konjunkciju. Stoga, sve dotle dok pravo predstavlja kompozitni (*cluster*) pojam ili pojam »porodične sličnosti« (*family resemblance*), iskaz u kojem se iznose uslovi obuhvataće sijaset disjunkcija sjedinjenih sa konjunkcijama, koje izražavaju razne stepene sličnosti dovoljne da se jednoj normi dodeli status prava.

19 Da upotrebimo Hartove (1994: 103) reči: »Reći da je dato pravilo važeće znači priznati da je ono prošlo sve testove predviđene u pravilu priznanja *i da je na taj način ono* pravilo sistema.«

20 Tvrdnja da teza o diferencijaciji nije epistemička teza tačna je i unutar naturalizovane metodologije.

da kriterijumi važenja u bilo kom ili svakom pravnom sistemu predstavljaju i epistemički test koji rešava pitanje šta je to merodavno pravo u svakom zamislivom sporu. To gledište je jednom pogrešno pripisano pozitivizmu – kao tzv. teza o pedigreu (*Pedigree Thesis*) – tokom rane faze rasprave između Dvorkina i pozitivista. Međutim, nju je pogrešno pripisivati bilo kojoj od glavnih konceptualnih teorija prava. Kakav god stav o tome zauzimali teoretičari prava, on mora biti utemeljen u nekim drugim uverenjima.

Ipak, razumno je smatrati da ni formulisane teze o kriterijumima važenja ne bi mogle da obezbede proceduru odlučivanja o tome šta je merodavno pravo. Kao što to Ronald Dvorkin uverljivo pokazuje u svom delu *Taking Rights Seriously*, apelaciona sudska praksa tiče se donošenja odluka u slučajevima koji su teški, što znači da su argumenti kojima se podupiru slučajevi obe suprotstavljene strane podjednako ubedljivi. U takvim slučajevima sudijama je veoma teško da donesu odluke. Iako neko može da, poput Raza, smatra da do teških slučajeva dolazi zato što postoji praznina u pravu u vezi sa pitanjima koja se u njima postavljaju, ponekad, čak i pod pretpostavkom da je Razovo mišljenje tačno, nije lako utvrditi šta je to što jedan slučaj čini teškim. Najblaže rečeno, teško da se u složenim pravnim sistemima, poput onih koje imaju savremene države, mogu naći procedure za donošenje takvih odluka.

Dalje, teza o diferencijaciji ne govori ništa o prirodi ili moralnom karakteru prava u bilo kom određenom pravnom sistemu. Pravno važeći sadržaj bi mogao – a ne mora – nužno da bude ograničen moralnim principima ili inherentno interpretativnim karakterom prava. Pošto je teza o diferencijaciji agnostička u pogledu tih tvrdnji, ona je u skladu sa klasičnom teorijom prirodnog prava, pravnim pozitivizmom i Dvorkinovim konstruktivnim tumačenjem, te stoga ne može biti tačka razlikovanja pozitivizma i drugih konceptualnih teorija prava. Do sada je to bila zajednička pretpostavka svih zastupnika konceptualne teorije.

Da li kriterijumi prava mogu da se *u potpunosti utvrde* u svakom pravnom sistemu moglo bi da se dovede u pitanje, ali opšta jurisprudencija ne bi mogla da se zasnuje a da ne pretpostavlja da postoji izvesna razlika između prava i neprava. Poslednjepomenuta razlika je toliko fundamentalna za opštu jurisprudenciju i toliko intuitivno plauzibilna da bi nam bio potreban veoma dobar razlog da opravdamo njeno odbacivanje. Teza o diferencijaciji jednostavno govori da se pravne norme razlikuju od drugih normi u svakom društvu sa pravnim sistemom. Posao svake konceptualne teorije prava – to jest, konceptualne jurisprudencije uopšte – jeste da objasni koja su to svojstva po kojima se te norme koje jesu pravo razlikuju od normi koje nisu pravo i koja ove prve čine *pravnim normama*.

7 KONCEPTUALNA ANALIZA: TEORIJSKI I PRAKTIČKI ZNAČAJ

Moglo bi se s pravom postaviti pitanje da li konceptualna jurisprudencija ima ikakav praktički značaj u rešavanju suštinskih problema u vezi sa pitanjem šta jeste ili šta bi trebalo da bude sadržaj određenog prava. Veliki broj autora u oblasti prava razvio je neku vrstu averzije, ako ne i neprijateljskog odnosa, prema izrazito apstraktnim interesovanjima konceptualne teorije prava, verujući da je analiza onoga što je pravo po svojoj prirodi isto onoliko normativno inertna koliko i analiza onoga što je neženja po svojoj prirodi. Na prvi pogled, čini se da razumevanje pojma neženje nema nikakve implikacije koje bi dale odgovor na praktička pitanja koja se mogu javiti u vezi sa tim kako bi neženja trebalo da se ponaša ili bi trebalo da bude tretiran. Teorijska definicija »neženje« jednostavno, po svojoj prirodi, izgleda suviše apstraktno opisna da bi iznedrila bilo kakve interesantne praktičke zaključke.[21]

Ispostaviće se da su pojedini istaknuti autori podržavali upravo ovu tezu, kada je reč o poduhvatu konceptualne jurisprudencije. Ričard Posner, recimo, značajan deo prvog od svojih predavanja pod nazivom *Clarendon Law Lectures*, koja su održana na Oksfordu 1995. godine, posvećuje tvrdnji da je konceptualna jurisprudencija »jalova, nepovezana i pravi primer osiromašenja tradicionalne pravne teorije«.[22] Pasus koji sledi jasno ilustruje omalovažavanje sa kojim on posmatra konceptualnu jurisprudenciju:

> Nemam ništa protiv filozofskih spekulacija. Međutim, bilo bi fino da one urode nekakvim plodom; *nešto* bi moralo da zavisi od odgovora na pitanje »Šta je pravo?« da bi ljudima koji bi mogli da svoje vreme utroše na druge društveno korisne načine bilo smisleno da ga postave. Ništa ne zavisi od tog odgovora (Posner 1996: 3).

Uistinu, Posner (1996: 3) ide tako daleko da tvrdi da »glavni zadatak analitičke jurisprudencije jeste, ili bi bar trebalo da bude, ne da pruži odgovor na pitanje »Šta je pravo?«, već da pokaže da ono i ne treba da bude postavljeno, jer se tako samo komplikuju stvari«.

Kao što se iz rasprave o »neženji« sa početka ovog odeljka moglo videti, Posnerova zapažanja nisu sasvim kontraintuitivna, ali čini se da ona predstavljaju najveći izazov čisto deskriptivnim pristupima konceptualnoj analizi, kao

21 Pojedini autori precenjuju praktičke posledice konceptualne teorije prava. Pojedini autori, neosnovano, veruju da pozitivizam podrazumeva pravni formalizam, teoriju presuđivanja koja je dugo bila opovrgavana. Pošto karakter prakse presuđivanja u bilo kom pravnom sistemu zavisi, prema mišljenju pozitivista, od sadržaja njegovog pravila priznanja, a sadržaj pravila priznanja se razlikuje od jednog do drugog pravnog sistema, pozitivizam ne podrazumeva nikakvu određenu teoriju presuđivanja. Iako pozitivizam dopušta mogućnost pravnog sistema u kojem se sudsko donošenje odluka rukovodi pravilima formalizma, on takođe dopušta i mogućnost da se sudsko donošenje odluka rukovodi dvorkinovskim pravilima.

22 Posner 1996.

što su TKA i naturalizovana jurisprudencija. Na kraju krajeva, postoji jedan opšti problem da se normativne praktičke tvrdnje izvedu iz skupa koji se isključivo sastoji iz čisto deskriptivnih tvrdnji; ako čisto deskriptivne tvrdnje o tome šta je pravo u logičkom smislu ne zavise od normativnih tvrdnji o tome šta bi pravo trebalo da bude, kao što to pretpostavljaju TKA i naturalizovana jurisprudencija, onda se ove poslednjepomenute tvrdnje, bez daljnjeg, ne mogu izvesti iz prvopomenutih tvrdnji. Bez obzira na to, važno je da shvatimo da pobornici normativne metodologije, kao što smo videli, eksplicitno negiraju tvrdnju da su to šta je pravo i šta bi pravo trebalo da bude logički nepovezane stvari. Da li je to negiranje dovoljno da se normativni pristupi izoluju od Posnerove kritike nije sasvim jasno; međutim, postoji dovoljno razlike između normativnih i deskriptivnih pristupa da bi se opravdao izvestan oprez pri razmišljanju da bi kriticizam te vrste mogao da počisti sve metodološke pristupe.

U svakom slučaju, Posnerovo gledište da konceptualna jurisprudencija ne bi trebalo da se praktikuje problematično je čak i ako je on u pravu kada smatra da takva analiza rezultira teorijama koje su u normativnom smislu značajne. Da bi se uvideo taj problem, valjalo bi razmotriti koliko bi Posnerova kritika bila uspešna u nekom drugom kontekstu. Iako je veliki rad na polju čiste matematike utrošen da se stvore tehnologije koje su značajno poboljšale naše živote, jedno od najslavnijih matematičkih dostignuća u skorije vreme nema takvu primenu. Pre nekoliko godina, Endru Vajls sa Univerziteta Prinston osmislio je nešto za šta se veruje da je uspešan dokaz Fermaove poslednje teoreme, koja tvrdi da ne postoje pozitivni celi brojevi x, y, z i $n>2$ takvi da je jednačina $x^n + y^n = z^n$ tačna. Uprkos činjenici da u matematičkoj zajednici niko nužno ne veruje da će to ikada imati neku praktičnu primenu koja će dovesti do poboljšanja čovekovog života, matematičari su utrošili desetine hiljada sati ne bi li pronašli dokaz ili protivdokaz za ovu teoremu.

To se, bar delimično, svakako može objasniti time da razlozi zbog kojih vrednujemo nekakvo znanje nisu instrumentalne prirode. Ponekad je poznavanje teoreme t u instrumentalnom pogledu vredno, u smislu da to znanje obezbeđuje sredstva za postizanje cilja, a to je proizvodnja korisne tehnologije. Mnogo toga u matematičkoj teoriji se očigledno može opravdati putem vrednosti praktične koristi za ljude, ali to nije jedini razlog zbog kojeg bi trebalo ceniti matematička istraživanja. Ako znanje nije uvek intrinsički vredno (to jest, vredno sebe radi, kao cilj sam po sebi), ono ponekad jeste intrinsički vredno. Poznavanje apstraktnih istina kojima se definišu osnovne strukture značajne praktičke vrednosti (kao što je matematika) čini se vrednim sebe radi; uistinu, nije nerazumno smatrati da svo znanje jeste (ili bi trebalo da bude) intrinsički vredno za jedno racionalno biće. Isto to bi važilo i za pojam prava; pod pretpostavkom da analiza pojma prava nema nikakvu praktičku instrumentalnu vred-

nost, plauzibilno je smatrati da razumevanje prirode institucije koja ograničava slobodu autonomnih aktera jeste intrinsički vredno.

Ali, da li je Posner u pravu kada smatra da ništa suštinski ne zavisi od konceptualne analize prava? Postoji, naravno, nešto što se može reći za njegovo gledište. Razmotrimo, na primer, raspravu između Dvorkina i Harta u vezi sa pitanjem sudske diskrecione vlasti. Dvorkin je jednom izjavio da odgovor na pitanje da li je pravično da u jednom teškom slučaju sudije utvrđuju odštetu koja se stavlja na teret optuženog zavisi od toga da li sudijsku odluku treba posmatrati kao nešto što je sadržano u postojećem pravu ili kao stvaranje novog prava; Dvorkin (1967: 31) o tome govori na sledeći način:

> Ako [sudije imaju diskrecionu vlast da donesu odluku u teškim slučajevima tako što stvaraju novo pravo] ... moramo priznati da su porodica ubice u predmetu *Riggs* i proizvođač u predmetu *Henningsen* bili lišeni svoje imovine putem sudske diskrecione ocene primenjene *ex post facto*. To možda neće šokirati mnoge čitaoce – pojam diskrecione vlasti prožima celu pravnu zajednicu – ali to je ilustracija jedne od najzamršenijih enigmi koja nagoni filozofe da se zanimaju za pravnu obavezu. Ako oduzimanje imovine u slučajevima poput navedenih ne može da se opravda pozivanjem na uspostavljenu obavezu, onda se mora naći neko drugo opravdanje, a ništa se ne javlja kao dovoljno dobra zamena.

Takva oduzimanja imovine su moralno nelegitimna zato što je nepravično oduzeti nekoj osobi imovinu prema zakonu koji nije postojao u vreme kada je počinjeno delo za koje se odgovara – ili bar tako argument kaže.

Čini se, međutim, da, kada je reč o tom pitanju, Dvorkinova teorija nije prošla mnogo bolje od Hartovog stava da sudije donose odluke u teškim slučajevima tako što stvaraju novo pravo. Prema Dvorkinovom mišljenju, ono što teške slučajeve razlikuje od drugih slučajeva jeste to što u teškim slučajevima postoji više od jednog mišljenja koje je u skladu sa postojećom institucionalnom istorijom. Stoga, ono što jedno pravno pitanje čini teškim jeste to što nam pravo (shvaćeno tako da uključuje postojeću institucionalnu istoriju) ne daje blagovremeno obaveštenje o tome šta ono nalaže, ako uopšte išta i nalaže.[23] Ako, međutim, pravičnost sprečava oduzimanje imovine od optuženog prema zakonu koji nije postojao kada je učinjeno delo za koje se odgovara, ona takođe sprečava i oduzimanje imovine od optuženog prema zakonu koji ne daje blagovremeno obaveštenje optuženom da dotično postupanje dovodi do takve odgovornosti. Baš kao što je nepravično kazniti dete zato što je prekršilo pravilo koje mu nije saopšteno u terminima za koje bi se opravdano moglo očekivati da će ih ono razumeti, isto tako nije pravično da se neko lice primora da plati odštetu prema zakonu koji na odgovarajući način ne saopštava tom licu da dotično postupanje dovodi do odgovornosti. Da bi se opravdalo utvrđivanje odštete koju neko lice

23 Neki slučajevi su toliko teški da je sudiji potrebna posebna (ili kako Dvorkin kaže »herkulovska«) sposobnost da razazna tačan odgovor na dato pitanje.

treba da plati, nije dovoljno to što ono ima pravnu obavezu; ta obaveza mora biti saopštena u terminima koje kompetentan govornik jezika može razumeti.

Naravno, daleko od toga da ovi primeri mogu da posluže kao osnova za neke konačne zaključke. Oni, međutim, daju povoda za razmišljanje, poput onog Posnerovog, da ne možemo rešiti suštinske probleme prava i morala tako što ćemo jednostavno pojmove vrteti u krug.[24] Pojmovi-reči se koriste da grupišu postupke, događaje i entitete i stoga sve što oni rade jeste izdvajanje određenih klasa postupaka, događaja i entiteta. Jasno je da ne možemo da rešimo nikakve interesantne moralne probleme tako što ćemo samo izmeniti svoje konceptualne karakterizacije nekog postupka, događaja ili entiteta. Da li je udaranje nekoga u lice moralno pogrešno ne može da zavisi od toga da li bi to trebalo okarakterisati kao »napad« ili kao »poljubac«; ako se to ispravno karakteriše kao »poljubac«, onda bismo morali da preispitamo svoje moralne stavove o dopustivosti ljubljenja. Koje supstantivne normativne kvalitete imaju određeni postupci ili događaji ne može da zavisi od toga na koji način se oni, kroz našu jezičku praksu, grupišu sa drugim postupcima ili događajima.

Posner, međutim, ne uspeva da shvati da to nije jedini način na koji bi analiza pravnih pojmova mogla da promeni naše živote. Zagovornici konceptualne analize koji imaju potrebu da opravdaju svoje stavove pozivanjem na društveno korisne posledice obično to čine tako što ukazuju na njene epistemičke koristi. Govoreći o vrednosti konceptualne analize na polju metafizike, Frenk Džekson (1998: 30) kaže:

> Iako se metafizika bavi time kakav je svet, *pitanja* koja mi postavljamo kada se bavimo metafizikom uokvirena su u jeziku i stoga treba da obratimo pažnju na ono što korisnici jezika žele da saopšte rečima koje koriste da postave svoja pitanja. Kada lovci na glave idu u potragu oni traže osobu, a ne foto robota. Ali oni neće daleko stići ako ne obrate pažnju na reprezentativna svojstva data na foto robotu osobe koja se traži. Ta svojstva im daju njihovu metu ili, ako hoćete, definišu predmet njihove potrage. Isto tako, metafizičari neće daleko stići sa pitanjima kao što su: Da li postoje *K*-ovi? Da li su *K*-ovi išta više od *J*-ova? I da li je *K* način na koji je svet u potpunosti određen *J*-om način na koji svet zaista postoji? ako ne postoji neka koncepcija o tome šta se računa kao *K*, a šta kao *J*.

Prema uticajnom Džeksonovom stanovištu, suština konceptualne analize nije u tome da ona sadrži rešenja za važne suštinske probleme prava, etike ili politike. Pre se radi o tome da nam konceptualna analiza pomaže da rešimo te probleme tako što nam pomaže da ih uvidimo i jasnije formulišemo. Tu, apsolutno važnu poentu, Kolman (2001: 13) iskazuje sledećim rečima: »Konceptualna analiza suštinski predstavlja filozofski poduhvat: njen cilj je da nam pomogne da pažljivije razmišljamo«.

24 Cf. Murphy 2001.

Čak i u tom slučaju, pitanje da li i na koji način su teorije konceptualne jurisprudencije vredne jeste jedno važno pitanje. Uvek je korisno znati da li određena oblast teorijskog promišljanja, osim što uvećava obim ljudskog znanja, donosi čovečanstvu i bilo kakve praktične koristi. Trenutno se suviše malo toga nudi na tom polju da bismo mogli da izvedemo bilo kakav opšti zaključak.

S engleskog jezika prevela
Vanja Jovanović.

Bibliografija

Michael BEANEY, 1996: Analysis. *Stanford Encyclopedia of Philosophy*. Ur. Edward N. Zalta. URL: http://plato.stanford.edu/entries/analysis/.

Simon BLACKBURN, 1996: *Oxford Dictionary of Philosophy*. Oxford: Oxford University Press.

David BOURGET & David CHALMERS, 2014: What Do Philosophers Believe? *Philosophical Studies* 170 (3): 465–500.

Jules COLEMAN, 2001: *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory*. Oxford: Oxford University Press.

Julie DICKSON, 2001: *Evaluation and Legal Theory*. Oxford: Hard Publishing.

Ronald DWORKIN, 1967: The Model of Rules. *The University of Chicago Law Review* (1967) 35: 14–46.

——, 1977: *Taking Rights Seriously*. Cambridge (Ma.): Harvard University Press.

——, 1986: Law's *Empire*. Cambridge (Ma.): Harvard University Press.

——, 1996: Objectivity and Truth: You'd Better Believe It. *Philosophy & Public Affairs* 25 (1996) 2.

John FINNIS, 1980: *Natural Law and Natural Rights*. Oxford: Oxford University Press.

Bernard GERT, 2011: The Definition of Morality. *Stanford Encyclopedia of Philosophy*. Ur. Edward N. Zalta. URL: http://plato.stanford.edu/archives/fall2012/entries/morality-definition/.

Herbert Paul GRICE & Peter F. STRAWSON, 1956: In Defense of a Dogma. *Philosophical Review* 65 (1955) 2.

Herbert L.A. HART, 1987: Comment. *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart*. Ur. Ruth Gavison. Oxford: Oxford University Press.

——, 1994: *The Concept of Law*. Revidirano izd. Oxford: Oxford University Press. Hrvatski prijev. Dušan Vranjanac & Goran Dajović. *Pojam prava* (2013). Beograd: Pravni fakultet Univerziteta u Beogradu i JP Službeni glasnik.

Frank JACKSON, 1998: *From Metaphysics to Ethics: A Defence of Conceptual Analysis*. Oxford: Oxford University Press.

Brian LEITER, 2003: Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence. *American Journal of Jurisprudence* (2003) 48: 17–51.

Andrei MARMOR, 2001: *Positive Law and Objective Values*. Oxford: Oxford University Press.

Liam MURPHY, 2001: The Political Question and the Concept of Law. *Hart's Postscript: Essays on the Postscript to The Concept of Law*. Ur. Jules Coleman. Oxford: Oxford University Press.

Stephen PERRY, 2001: Hart's Methodological Positivism. *Hart's Postscript: Essays on the Postscript to The Concept of Law*. Ur. Jules Coleman. Oxford: Oxford University Press.

Richard POSNER, 1996: *Law and Legal Theory*. Oxford: Clarendon Press.

Joseph RAZ, 1979: *The Authority of Law. Essays on Law and Morality*. Oxford: Clarendon Press.

——, 1994: *Ethics in the Public Domain*. Oxford: Oxford University Press.

Frederick SCHAUER, 2006: (Re)taking Hart. *Harvard Law Review* 119 (2006).

Jeremy WALDRON, 2001: Normative (or Ethical) Positivism. *Hart's Postscript: Essays on the Postscript to The Concept of Law*. Ur. Jules Coleman. Oxford: Oxford University Press.

Wil WALUCHOW, 1994: *Inclusive Legal Positivism*. Oxford: Oxford University Press.

Kenneth Einar Himma*

Conceptual Jurisprudence

An Introduction to Conceptual Analysis and Methodology in Legal Theory

This essay attempts to provide an accessible introduction to the topic area of conceptual analysis of legal concepts (or "conceptual jurisprudence") and its methodology. I attempt to explain, at a fairly foundational level, what conceptual analysis is, how it is done (i.e. its appropriate methodology) and why it is important in theorizing about the law. I also attempt to explain how conceptual analysis is related to other areas in philosophy, such as metaphysics and epistemology. Next, I explain the enterprise of conceptual jurisprudence, as concerned to provide an account of those properties that (1) distinguish things that are law from things that are not law which (2) constitute the former things as law, illustrating this explanation with what I hope are intuitive examples. Three different methodological approaches are also explained and evaluated. Finally, the practical importance of conceptual jurisprudence is discussed.

Key words: conceptual analysis, conceptual methodology, the nature of law, metaphysics of law, practical significance, concepts

1 INTRODUCTION

The defining project of general or conceptual jurisprudence – i.e., the conceptual analysis of law – is to provide philosophically rigorous explications of various concepts that figure prominently in discourse about law. That is, conceptual jurisprudence is concerned with giving an explication of the nature of law and other important legal practices. While many words, such as "chess," do not pick out concepts that seem important enough to merit a deep philosophical analysis, this is not true of the concept of law. The practices characterized as "legal" or involving "law" are of great moral and prudential significance; persons are incarcerated, fined, required to pay compensation for injuries caused by legally culpable behavior, and even executed for violating the law. It is a matter of clear practical importance that we ensure our practices satisfy rigorous norms of political morality, and we cannot understand what norms apply without an adequate understanding of the concept of law.

* himma@uw.edu | Visiting Professor, Department of History of Philosophy, Tomsk State University, Part-time Lecturer, University of Washington School of Law.

This essay seeks to provide an accessible, but fairly comprehensive, introduction to conceptual theorizing about law. To this end, the essay will discuss the nature and methodology of conceptual analysis, the relationships of conceptual analysis to metaphysics and to epistemology, and the practical significance of conceptual analysis.

2 TYPES OF THEORIZING ABOUT LAW

Theorizing about law covers a range of topics. Most theorizing in law probably seeks to ascertain the content of relevant law on issues where the reasons fall fairly evenly on both sides; such articles strive for results that can be used by lawyers and judges to guide their deliberations. Some law review articles are concerned with defending a claim about what the law should, for non-moral practical or moral reasons, be on a particular issue. Others are concerned with justifying certain areas of law; with identifying the foundational principles that purport to determine the content of more specific norms; or with clarifying the meaning of certain terms. Yet others are concerned with explaining the nature of certain legal practices.

Despite this wide variety of interests on matters related to law, theorizing about law can usefully be divided into three rough categories. *Empirical legal theory* is usually concerned with identifying or explaining certain features or properties of existing legal systems; such theory is, at least, descriptive in character and focuses on *contingent* properties (i.e. properties that something does, in fact, possess but might not have possessed it) of the legal systems under study. An empirical legal theorist, for example, might be concerned with identifying or explaining the content of legal norms that purport to govern information privacy in the U.S. Similarly, she might be concerned with explaining the function that some set of legal practices in Colombia purports to serve.

In contrast, *normative legal theory* is largely concerned with determining the properties that legal norms or institutions, as a matter of political morality, ought to have or, otherwise put, must have to be morally legitimate. A normative legal theorist, for example, might argue that law, as a matter of substantive moral theory, should protect information privacy in a number of specified ways. Normative legal theorists are typically concerned with issues of moral legitimacy – what restrictions on citizen behavior may, as a matter of political morality, justifiably be enforced by the police power of the state.

General, or *conceptual*, jurisprudence is concerned with giving what is called a "conceptual analysis" of core legal concepts; that is, conceptual jurisprudence is concerned with explicating the core concepts of our legal practices, including the interrelations among them. In particular, conceptual jurisprudence seeks

to explicate the concepts of law, validity, and legal system and thereby seeks to clarify the logical relationships between these concepts and other concepts potentially related to them, such as the concepts of morality, authority, legal and social obligation, etc. A theory in conceptual jurisprudence will explicate the content of each concept and locate them among a general conceptual framework that guides both our linguistic practices regarding the relevant concept-words and our legal practices themselves.

This essay will be concerned with explaining conceptual jurisprudence/analysis and the various methodologies that have been proposed as identifying the principles that are most likely to result in a successful piece of conceptual analysis. In addition, this essay will provide a cursory evaluation of the various methodologies proposed for conceptual analysis.

3 UNDERSTANDING CONCEPTUAL ANALYSIS

3.1 What is a Concept, Anyway?

Conceptual analysis is the analysis of concepts; and this raises a difficult question: what, exactly, is a concept? The notion of a concept is somewhat mysterious and not well understood, but it seems clear, at the very least, that concepts are, or correspond with, mental elements needed to think about things of the relevant sort. For example, it is not possible to think, much less *talk*, about electrons without having or grasping the concept of an electron.

Although this claim much might seem uncontroversial, it tells us less about what a concept is than might initially appear. It doesn't tell us, for example, anything about the nature of a concept; the way in which concepts are acquired; or the extent to which they are shared among members of a community. But it is clear that the possession or apprehension of a concept is a necessary condition for being able to think or talk about the thing of which the concept is the concept of that thing.[1]

1 Some caution is required here. It is not exactly clear what is the thing of which the concept is a concept. For example, the extensional meaning of the term "legal system" is the class of all things that are properly characterized as being legal systems; accordingly, the extensional meaning, or referent, of the term refers to a set – and not to some general unitary legal system. The intensional meaning, of course, is the idea or content expressed by the term "legal system." It should be understood that we are speaking somewhat metaphorically when we talk about the thing of which something is a concept. If there is a thing that is law *as such* or a bachelor *as such*, it is not clear (at least, not to me) what kind of thing it is, beyond its not being identical with either the extensional or intensional meanings of the relevant concept-term. But while it would be helpful to have a more developed account of those special "things," we can speak somewhat metaphorically without undesirable consequences as long as we keep in mind that we are speaking a bit loosely. Such talk, however, is quite useful in discussing the various topics with which this essay is concerned. But if one is still a bit uncomfortable, one can think of

There are different views about what concepts are: (1) concepts are psychological states representing ideas or things; (2) concepts are abilities of a special kind – namely, the ability to discriminate one kind of thing of which a concept is a concept from another kind of thing of which another concept is a concept (having the concepts of tree and bush simply is a matter of being able to distinguish trees from bushes); and (3) concepts are meanings or "senses" of words.

Obviously, the methodology of conceptual analysis must be responsive to what a concept is. For example, if concepts are representational mental states, a proper analysis of any concept would require saying something about the content of the representation as well as about the nature of the relevant state (which might be a compound state involving beliefs and dispositions of various kinds).

Regardless of what concepts turn out to be, they are intimately associated with language. People use *language* to express concepts. We may not have a word associated with every concept we have. But we have a large number of words to express, refer to, convey, or pick out concepts: we use "love" to think or talk about love; "law" to think or talk about law, and so on. We use a concept-term that picks out a particular concept to talk about things that fall under the concept.

Our ability to talk to each other about something a concept is a concept of (say, law) says something about the relationship between the content of a concept and our use of the associated concept-term. It is reasonable to think that we have some pre-linguistic capacity to develop concepts and develop some concepts long before we learn the associated word; without such a capacity, we could not learn a language. But the contents of our concepts are highly responsive to the linguistic practices involving the associated words because we cannot share an understanding of how to use a word without sharing a grasp of the core content of a concept.[2] If you and I have radically different concepts of law, we will not be able to understand what each other is saying when using the concept-term "law."

these things as being any member of the relevant extension provided that we remember that we are interested in that particular member insofar as it falls under the concept.

2 I am agnostic with respect to how these practices arise or should be characterized beyond claiming that (1) they are social practices that arise and are maintained in part because they are shared across a community and that (2) core elements of this practice yield norms that have prescriptive force among members of the relevant community. For example, one might think nothing more specific regarding our practices for using "bachelor" than that they comprise various patterns of usage shared among a community. Alternatively, one might think these practices constitute conventions. Either way, the practices are social in character and express a shared norm that "bachelor" is properly used only of men: it is uncontroversial that someone who uses "bachelor" to talk about a dog has made a mistake.

The claim that concepts are associated with linguistic practices does not imply that concepts *are* linguistic entities; in particular, it does not imply that concepts are meanings. There is nothing in the claim that the content of our concepts is shaped by the content of linguistic practices that would entail that concepts are meanings, rather than mental representations or abilities. My concept of water might simply be an ability to distinguish things that are water from things that are not, even if that ability is responsive to how people around me use the term "water."

3.2 Traditional Conceptual Analysis as Explicating Fregean Senses

The traditional methodology for doing conceptual analysis presupposes that concepts are grounded in meanings or Fregean senses. Conceptual analysis attempts to provide a story, grounded in ordinary intuitions about the Fregean sense of the concept-term, about something that falls under the relevant concept. This story, grounded as it is in views about the meanings of the terms, purports to describe the very *nature* of the thing the concept is a concept of.

It would be helpful to consider a comparatively unproblematic concept to illustrate how conceptual analysis has traditionally sought to identify the nature of a kind of thing through a philosophical explication of the meaning of the relevant concept-term. Consider the concept of a bachelor. Putting aside some minor concerns about the ordinary meaning of bachelor, it is reasonable to think that, for any X, X is a bachelor if and only if X is an unmarried adult male. If correct, this analysis of the concept provides a list of properties that not only distinguishes bachelors from non-bachelors but also explains why something that is a bachelor falls under that category. That is to say, the analysis of the concept identifies those properties that explain why something is a bachelor in the following sense: the instantiation of the properties of being unmarried, adult, and male *constitute* anything that instantiates them as a bachelor. Insofar as being unmarried is a conceptual feature of being a bachelor, given the meaning of the concept-term "bachelor," being unmarried is part of the very nature of being a bachelor.

Here it should be noted that the idea here is not that instantiation of these properties *causes* something that instantiates them to be a bachelor; whatever it explains why something is a bachelor will also explain why something is unmarried, adult, and male – and the latter explanation will differ from one person to another as the causal explanation will make reference to contingent properties and factors. "What makes Jim a bachelor?" is a very different question from "Why is Jim a bachelor?"; at a minimum, answering the latter might require knowledge of personal information about Jim, while answering the former surely does not.

Constitution is a different notion than causation. Being a floating mass of water vapor *constitutes* something as a cloud; it does not cause something to be a cloud. It is the possession of these properties that determine a floating mass of water vapor's status as a cloud; it is a cloud *in virtue of* being a floating mass of water vapor. Constitution is not an event that occurs in time, and this is, in part, what distinguishes constitution from causation, which is an event that occurs in time. Why a particular collection of water molecules is a cloud or a floating mass of water vapor requires a different kind of explanation and analysis. It requires an explanation that is largely empirical in nature, requiring reference to laws of nature and events occurring in time that express the causal antecedents and causal results that go into an explanation of why this particular set of water molecules was transformed into that particular floating mass of water vapor that is the cloud of interest. Conceptual analysis is concerned not with causal explanations, but with the properties that constitute something as falling within the reference of a concept-term, such as "bachelor," "cloud," or "law."

It is sometimes thought that traditional conceptual analysis (TCA), inasmuch as it seeks to identify meanings through ordinary intuitions about the application of the relevant concept-term, involves little more than providing a dictionary definition. Brian Leiter (2003: 45), for example, argues that TCA is nothing more than "glorified lexicography":

> Conceptual analysis, as Jackson conceives it, becomes hard to distinguish from banal descriptive sociology of the Gallup Poll variety. Indeed, Jackson says explicitly that he advocates, when necessary, "doing serious opinion polls on people's responses to various cases"! But this now seems to blur the line between conceptual analysis and lexicography: for does not lexicography aim to track statistically normal usage of words or concepts, precisely the pattern of usage a well-designed opinion poll would detect.

This is a mistake. TCA might start from something that resembles lexicography, as it is *grounded* in meaning, but it is considerably more than this. TCA goes deeper than just identifying shared views; that, of course, is the job of a lexicographer who records empirical patterns of word-usage. Conceptual analysis attempts to theorize these views by identifying deeper philosophical commitments they imply or presuppose, as well as more general principles that explain them. While this might or might not be a distinctively philosophical enterprise, it goes well beyond the empirical task of identifying shared intuitions or core features of our linguistic practices.

There is an easy way to see this point: simply compare what lexicographers have to say about the word "law" with what Hart has to say by way of explication of the concept of law. Here is how the lexicographers for the *Oxford American Dictionary* have defined law:

> law | noun **1** (often **the law**) the system of rules that a particular country or community recognizes as regulating the actions of its members and may enforce by the imposition of penalties : *they were taken to court for **breaking the law** | a license is required **by law** |* [as adj.] *law enforcement.*
>
> - an individual rule as part of such a system : *an initiative to tighten up the laws on pornography.*
> - such systems as a subject of study or as the basis of the legal profession : *he was still practicing law |* [as adj.] *a law firm.* Compare with **jurisprudence**.
> - a thing regarded as having the binding force or effect of a formal system of rules : *what he said was law.*

Notice how much that Hart's theory addresses that is overlooked by the lexical definition. First, there is no mention here of many pieces central to Hart's analysis: social practices; the rule of recognition; secondary and primary rules; legal validity; etc. Second, the lexicographer's job is accomplished in a few lines, while Hart took more than 200 pages to give an analysis of the concept of law in *The Concept of Law*. If Hart starts from the shared views about the meaning of "law," it should be clear that he is also doing something radically different from what lexicographers are doing – and going much deeper into what law really is, as such.

In this connection, it would be helpful to return to the concept of bachelor. According to the lexical definition, a bachelor is an unmarried adult male; the properties of being unmarried, adult, and male exhaust the nature of a bachelor, on this definition. Unfortunately, this analysis of a bachelor leaves important questions open – questions that cannot be answered by a dictionary, because it is the dictionary definition that is indeterminate with respect to these questions. For example, it is not clear whether the Pope is a bachelor. Many people think, when confronted with the issue, that the Pope is not a bachelor, despite being unmarried, adult, and male. Likewise, many people are reluctant to use the term "bachelor" to describe a gay man who lives in jurisdictions not recognizing marriage equality. This suggests that the dictionary definition must be supplemented by, at least, one additional condition: it is a necessary condition for being a bachelor that one be "eligible" in the appropriate way to get married; the problem with both cases described above is that neither person is eligible in the right way for marriage to be considered a bachelor. Of course, the appropriate analysis of "eligible" is needed, among other things, to complete the analysis, but this example should make it clear that TCA, at the very least, *purports* to go beyond the surface meanings provided by lexicography.

4 THE RELATIONSHIP BETWEEN CONCEPTUAL ANALYSIS AND EPISTEMOLOGY: THE TRADITIONAL VIEW

4.1 The Traditional View Described

The traditional view of the epistemology of conceptual analysis is that the methodology for justifying conceptual claims is *a priori*. While it is true that one cannot identify the core content of the patterns of usage that link words and concepts without empirical experience, no further experience, on this view, is needed to justify true conceptual claims. Once it is observed that people use the word "bachelor" only to refer to unmarried men, no further experience is needed to justify the claim that no woman is a bachelor. This claim is justified as a valid logical deduction from the conceptual claims that only men are bachelors and that no woman is a man.

Not every purely deductive argument, of course, will be as easy as those described in the last paragraph. This will be obvious to anyone who has read Hart's *The Concept of Law* or Raz's *The Authority of Law* or to anyone who has done any serious mathematics. It took hundreds of years to find a proof for Fermat's Last Theorem; and the paper proving it was more than one hundred pages long – and something that no layperson could hope to understand.

Of course, there is more to TCA than simply making inferences from core patterns of linguistic usage. Frank Jackson (1998: 31) describes another methodological element in discussing the concept of free will:

> What we are seeking to address is whether free action *according to our ordinary conception,* or something suitably close to our ordinary conception, exists and is compatible with determinism, and whether intentional states *according to our ordinary conception*, or something suitably close to it, will survive what cognitive science reveals about the operations of the brain /…/ But how should we identify our ordinary conception? The only possible answer, I think, is by appeal to what seems to us most obvious and central about free action, determinism, belief, or whatever, as revealed by our intuitions about possible cases.

TCA attempts to identify conceptual content that goes beyond the most obvious, and hence "paradigmatic," features of our shared practices by considering intuitions about possible cases. While the relevant intuitions are ordinary in the sense of being widely shared, they frequently make explicit features of our practices of which ordinary speakers might not be cognizant until they consider such cases. For example, most speakers will probably not realize that our concept of law does not entail that law must conform to morality[3] until asked whether the Nazis had a legal system or whether the Jim

3 There is little disagreement among legal theorists, legal practitioners, or even laypersons on this issue. Indeed, most natural law theorists in the Thomist tradition deny that Aquinas claimed that unjust norms could not be law.

Crow enactments were laws. Such cases help to flesh out the content of our shared practices in more specificity, identifying features of the concept that will have to be explained theoretically.

On the traditional conception, the relevant intuitions are purely descriptive and do not include moral intuitions about right or wrong, good or bad. Identifying the content of a concept, on this view, is not governed by moral principles,[4] even when the concepts are used to evaluate behavior. For example, it is irrelevant in evaluating two proposed analyses of the concept of law whether one analysis is morally better than another – though moral standards obviously should play a role in deciding what norms should be enacted into law. TCA is purely descriptive and purely general in the sense that these intuitions range over all possible cases.[5]

What if people disagree on the relevant intuitions? There are a couple of different ways to reconcile such disagreement with a "modest" approach to traditional conceptual analysis that understands conceptual analysis as concerned with identifying the meaning of a concept-term *as used by a particular community of speakers*.[6] First, one could take the position, discussed in more detail below in the next subsection, that such disagreement signals a deeper disagreement that indicates membership in two communities that do not share the same concept. A modest approach seems to presuppose that conceptual analysis is appropriate only within a community of speakers that share the relevant intuitions and social practices. Second, one could take the position that intuitive disagreement can take place within a community of speakers sharing the same concept but that such disagreement signals that our understanding of the concept is indeterminate with respect to the pertinent issues.

Jackson distinguishes an "immodest" conception of conceptual analysis from the modest conception, claiming that TCA should be thought of as modest. According to the immodest conception, conceptual analysis gives us insight into what the world is like; that is, an analysis of the content of our concept of law, for example, would give us insight into the essential nature of law *as it really is independent of our linguistic practices and conceptual frameworks.* According to the modest conception, conceptual analysis merely "tells us what to say in less fundamental terms given an account of the world stated in more funda-

4 There are two kinds of norm that might figure into analyzing a concept: epistemic norms, like that requiring consistency, and moral norms, including those that govern states. There is no controversy about whether epistemic norms should play a role in theorizing. See Coleman 2001.

5 Many theorists, including Ronald Dworkin, believe it is not possible to give a purely descriptive analysis of evaluative concepts like law. See, e.g., Dworkin 1986.

6 As Raz has put the point, conceptual analysis is concerned with *our* concepts, as those concepts are constructed by *our* social practices – "our" referring to members of a particular community of speakers, namely *us*. See Raz 1994: 216–217.

mental terms" (Jackson 1998: 44) – the fundamental terms being terms defined by the practices of the relevant community of speakers.

The talk of moving from more to less fundamental terms reflects the commonsense view of *analysis* as attempting to resolve and explain what is complex in more simple terms. The idea is that when we analyze a concept, we break it down into simpler constituents so as to display its logical structure and give an explanation of its content that transcends, but incorporates, its ordinary lexical meaning – an idea that is quite common historically. Although theorists have frequently supplemented and modified the analysis of "analysis," the basic elements of that concept have nonetheless remained largely stable.[7]

But the important point here is that modest conceptual analysis presupposes an account of the world "stated in more fundamental terms" as its starting point. This account, however, must be *someone's* account; and, as we have seen, it is a *shared* account grounded in *shared* intuitions and is, thus, *our* account of the relevant thing of which the concept is a concept. TCA thus presupposes a certain story about things – one that is *our* story – and does not purport to describe the world as it is independently of our stories about things.

Jackson understates the role of linguistic practices in determining the content of our concepts. While it might be true that all possible concepts exist in logical space along with every other abstract object, the content of *our* concepts are at least partly *fixed* by our linguistic practices. Indeed, as critics of TCA concede, if we used the symbol "water" to refer to something other than the clear liquid to which it is used to refer, it would not be a conceptual truth that water is H_20 – though there would undoubtedly be some conceptual truth corresponding to the relationship between some term and H_20. Concepts might be abstract objects independent of our social activities about which there are utterly mind-independent objective truths, but *language* is a social construct grounded in a social practice; and which concepts our words pick out or express is partly defined by the content of those practices.

This suggests that explanations of the traditional methodology for *descriptive* conceptual analysis are not entirely accurate. Although philosophers frequently justify conceptual claims by an appeal to "ordinary intuitions," the relevant intuitions are shared views reflecting the core practices for using the terms. If, as Jackson (1998: 33) maintains, "[t]he business of consulting intuitions about possible cases is simply part of the overall business of elucidating concepts by determining how subjects classify possibilities", then shared views *about language* will condition the relevant intuitions because how subjects classify possibilities depends on the core practices for using the words. We classify things by using words, which in turn, on the traditional view, express, mean, or convey

7 Beaney 1996.

concepts. Analyzing the content of a concept, on this view, requires identifying shared practices concerning the word.[8]

Some of the relevant views might be non-linguistic in character and express some widely accepted belief about a mind-independent feature of reality to which we want to refer. But, in such cases, these non-linguistic "intuitions" about the world will likely play an important role in defining core features of our practices regarding a concept-term. For example, part of what will explain why we use the term "water" to refer to only clear liquids with the chemical structure of H_20 is the scientific discovery that water is H_20; this non-linguistic consideration helps to explain why we have converged on using "water" to apply only to H_20. The content of natural-kind concepts frequently changes in response to scientific discoveries because scientific discoveries can frequently result in changes in the way we use the relevant concept-terms. Conventions for using a word, or the definition of a word, can, and frequently does, change over time.

But the relevant views are usually informed by our core linguistic practices regarding the use of the associated term. I have, for example, the intuition that all bachelors are adult males because, as an empirical matter, no one uses the term "bachelor" to refer to boys or women, and not because I have some non-linguistic intuition about the nature of bachelors. Our shared practices converge on calling only men "bachelors" – and my intuition that only men are bachelors is informed by and expresses those shared linguistic practices.

TCA, then, has an undeniably empirical element.[9] What views are shared among a community is a contingent matter that cannot be determined without empirical observation. While it is true that one reliable way to do the empirical work, as Jackson suggests, is to take an opinion poll, it is not usually necessary. Armchair sociology of the sort at which philosophers excel (usually without realizing that they are doing sociology) is sufficiently reliable as long as one belongs to the linguistic community under consideration.

8 Hart (1994: v) put it: "Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions and of the way in which these depend on a social context, itself often left unstated. In this field of study it is particularly true that we may use, as Professor J.L. Austin said, 'a sharpened awareness of words to sharpen our perception of the phenomenon'".

9 Frederick Schauer makes exactly this point: "Like his philosophical colleagues at the time, [Hart] examined ordinary usage closely for the distinctions it embodied and rigorously analyzed and defined the terms used to mark legal concepts /…/ Conceptual analysis, as Hart surely must have recognized, inevitably rests at least in part on empirical observation, and this empirical foundation of conceptual analysis could also implicitly undergird his claim to be doing descriptive sociology." Schauer 2006: 860–861.

4.2 Two Methodological Challenges to the Traditional View: Normative and Naturalized Jurisprudence

The views described in the last subsection are no longer undisputed among philosophers. First, the very notion that *a priori* knowledge is possible has become controversial among epistemologists embracing a reductive empiricism. Second, and more to the point for our purposes, the underlying assumptions of the traditional view of conceptual analysis have been challenged by certain methodological disputes among theorists in conceptual jurisprudence, regarding the proper methodology for evaluating conceptual claims – in particular, conceptual claims regarding law.

There are three different methodologies for engaging in conceptual analysis. TCA, as we have seen, adopts a descriptive methodology in the sense that conceptual claims are justified by only factually descriptive claims about the content of the relevant social practices (which typically include linguistic practices); TCA is also guided by epistemic norms of good theory construction and reasoning, such as norms requiring consistency, coherence, consilience, etc., but moral norms are irrelevant in assessing or building an analysis of the content of a concept, under TCA. TCA begins from our ordinary social practices and attempts to make inferences about the deeper implications of those practices forming the starting point for TCA in a way that conforms to the epistemic norms mentioned above.

Although TCA is "descriptive" in the sense that conceptual claims must be justified by recourse to certain social practices and might, thus, seem to embrace an empirical epistemology, the content of the relevant social practices are grounded in the presumably shared core meanings of the relevant concept-term by the appropriate community in the appropriate practices – which form the ordinary intuitions described in the preceding subsection's discussion of the traditional views above. From that foundation, further claims fleshing out the content of the concept beyond its core meanings in the appropriate community of speakers are thought justified *a priori*, if justified at all, according to proponents of TCA. TCA, thus, assumes explicitly that conceptual claims are *a priori* in character.

TCA also assumes that conceptual claims are *analytic* in character in the sense that their truth-value depends only on the content of the meanings of the relevant words. The distinguishing feature analytic claims has to do with the truth-makers for such claims – i.e. what factors determine whether the claim is true or false: intuitively expressed, the idea is that a claim is analytic if and only if its truth-value is determined entirely by the meanings of the relevant terms. TCA attempts to dig out the deeper conceptual commitments that are implied by certain paradigmatically analytic statements, such as, for example, a law is

a norm. Whether all the logical implications of an analytic statement are also analytic is interesting issue, as it depends on whether one sees the notion of analyticity as being only semantic in character or whether one sees analyticity as incorporating some vague epistemic notion of being self-evident or easily seen to be analytic. Either way, as will be discussed below, the claims that flesh out the content of a concept are, under TCA, thought to be necessarily true – regardless of whether all the relevant implications of an analytic claim are themselves analytic.

There have been two influential challenges to TCA. First, W.V.O. Quine argues that the notion of analyticity on which TCA depends cannot be given an explication that would be sufficiently rigorous to ground the methodology associated with TCA. On Quine's view, the problem with defining analyticity in terms of being true or false wholly in virtue of the meaning of terms is that the notion of "meaning" is too "obscure." But any other candidates for explicating analyticity fail because they are as much in need of clarification as the notion of analyticity itself. Consider, for example, the idea that analyticity can be explained in terms of synonymy: the claim would be that a claim is analytic if and only if the subject term is synonymous with the predicate term. The problem, according to Quine, is that the notion of synonymy is as much in need of philosophical explication as the notion of analytic and cannot count as an adequate explication of the latter. Insofar as all possible explanations of analyticity share this defect, all such accounts are "circular" and hence illegitimately used as the ground for thinking philosophy has a distinctive methodology exemplified by TCA.

While quite influential in legal philosophy, these arguments are no longer as influential in other areas – most likely, because they are vulnerable to many plausible criticisms. Indeed, in some respects, the arguments seem straightforwardly problematic. If the claim that a concept is obscure were, by itself, enough to justify disqualifying it from appearing in philosophical discourse, one would have to disqualify such concepts as number and quarks, both of which are very difficult to explicate in a clear intuitive way. Further, if the unavailability of a non-circular explication of a concept were sufficient to warrant disqualifying it from philosophical discourse, many concepts of philosophical importance would be disqualified: there are some mathematical notions (such as the notion of a set, which is defined in terms of obvious synonyms: 'group' and 'collection') and moral notions (such as the notion of good) for which no non-circular explication can be given.[10]

A second challenge to TCA claims that the methodology's reliance on intuitions is problematic because intuitions differ from culture to culture and hence are too unreliable to ground a philosophical explication of anything. But there is nothing either surprising or problematic about this. Conceptual frameworks

10 See, e.g., Grice & Strawson 1956.

are defined by language and language is a social artifact that differs from one culture to the next; insofar as a word does not translate perfectly in another language, intuitions about the relevant concept-terms will not line up. That, however, is not a problem once the truism is understood that TCA seeks to explicate *our* concepts – concepts that are shared within a particular community, an assumption that should, as we have seen, be attributed to Jackson's modest approach to TCA.

Despite the questions concerning the merits of these arguments, they have nonetheless been extremely influential in debates about the methodology of conceptual jurisprudence. In particular, these arguments have led to a call for a "naturalized jurisprudence." Leiter, the most prominent proponent of naturalized jurisprudence, argues that TCA should be rejected on the grounds of these arguments in favor of a methodology that is continuous with scientific methodology and hence empirical in character. Such a methodology must reject all the notions that Quine rejects in "Two Dogmas," including modal notions, such as necessity and possibility. This implies the rejection of the idea that true conceptual claims are necessarily true and can come to be known *a priori.* Insofar as philosophical methodology should be regarded as "continuous with science" and hence as empirical in nature, conceptual claims are contingently true, if true at all.

Apart from the problems associated with the arguments thought to ground a naturalized jurisprudence, there are further worries about naturalized jurisprudence. No one has articulated a reasonably clear statement of how a naturalized jurisprudence should proceed with respect to analyzing concepts. There are many questions about law a naturalized methodology can answer – indeed, any empirical question about the law that has a determinate and determinable answer. But how a naturalized methodology could be deployed in the service of conceptual analysis is far from clear – certainly, no one has been able to explicate it with the rigor and elegance that Frank Jackson explicates the methodology of TCA. Indeed, for this reason, it is not unreasonable to think naturalized jurisprudence is nothing more than a skeptical theory of conceptual jurisprudence, asserting, in effect, that conceptual jurisprudence is impossible – just as Quine believed metaphysics was rendered impossible by his rejection of the modalities. This does not seem to be a "replacement" methodology in the sense that we simply substitute naturalized methodology for TCA and keep on doing what is the same thing. Naturalized methodology so transforms the nature of a conceptual inquiry that it is no longer clear that the relevant inquiry supported by this methodology ought to be characterized as a "conceptual" inquiry.

Of course, one can always accept these implications, as well as the other implications of Quine's analysis for philosophical theorizing about numbers, moral notions, and other notions that cannot be given a non-circular explication; there is nothing resembling an obviously decisive counterargument given above. But

there nonetheless persists the strong intuition that there is something valuable about TCA, conceived as resting on analytic claims and expressing necessary truths about the relevant thing. Indeed, traditional conceptual analysis, metaphysics, and normative theorizing in morality and epistemology continues to be prominent in philosophy, despite the Quinean challenge. Indeed, according to a recent study, 64.9% of philosophers accept the analytic-synthetic distinction, while only 27.1% reject it.[11]

A second methodological challenge to the ascendancy of TCA is *normative jurisprudence*. Normative jurisprudence is typically grounded in a rejection of the view that giving an account of what law is (as such) is a different enterprise than giving an account of what law ought to be, construed to imply that conceptual methodology should be purely descriptive.[12] Intriguingly, Hart (1994: 211) seems to suggest, contrary to nearly everything else he said on methodology, that a conceptual theory of law is sometimes properly evaluated on the basis of normative considerations that go beyond the norms governing sound reasoning and argument:

> A concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the variety and complexity of these separate issues; whereas a narrow concept of law which denies legal validity to iniquitous rules may blind us to them.

One should not make too much of this argument, as Hart is clear in regarding conceptual methodology as properly descriptive in character; however, it is important to realize that this remark is in tension with Hart's clear commitments insofar as recourse to any such practical considerations in justifying a conceptual theory is irrelevant on a purely descriptive approach to conceptual methodology. Strictly speaking, recourse to such considerations presupposes the truth of one possible thesis of a normative methodology – namely, that an adequate explication of the concept of law should have some beneficial social consequences and, thus, that the adequacy of a conceptual theory of law depends on the practical social implications of adopting it.

More commonly, proponents of normative jurisprudence assert that the concept of law cannot be adequately explicated without recourse to moral norms that define what the content or point of law should be. Law as such is, thus, partly defined in terms of the moral value of its point, content, or practices. On this view, as Dickson (2001: 7) describes it, "the task of characterizing law 'as it is' is necessarily and inextricably bound up with one's understanding of how law morally ought to be, such that the two enterprises cannot be separated".

11 Bourget & Chalmers 2013.

12 For a helpful discussion of this motivation for normative jurisprudence, see Dickson (2001: Ch. 1, Sect. A).

Each of these claims about the relevance of practical norms (beyond the norms of rationality) has some powerful implications for methodology. Normative methodology resembles TCA in locating the starting point of conceptual analysis in widely shared understandings concerning the relevant social practices and paradigms picked out by the relevant concept-term. Where normative methodology departs from TCA, however, is in rejecting the traditional view that the ordinary understandings of the practices and paradigms define the exclusive touchstone for testing the theory; instead, an accurate analysis of legal concepts must answer also to substantive moral norms that stipulate either what the content of these concepts *ought* to be or what social consequences a conceptual theory of law *ought* to have.[13]

But why think that one cannot give an account of what law is as such without considering what law morally should be? One class of arguments – perhaps, the most influential – proceeds from the assumption that normative concepts (i.e. concepts with normative content, such as that picked out by "good") must sometimes be analyzed to conform to some relevant set of moral norms. Since, for example, one might think that law's conceptual function is to create the conditions of justice, the concept of law is partly normative in content, requiring that an analysis of law harmonize with certain moral norms.

Ronald Dworkin offers one of the most influential defenses of the idea that the very concept of law is partly normative in character and requires a normative methodology to explicate. On Dworkin's view, certain concepts are "interpretive" in character and, as such, must be analyzed against the backdrop of some relevant class of substantive norms. Dworkin attempts to show that the concept of law is interpretive and hence warrants a normative methodology by showing an analogy between the concepts of law and courtesy, the latter of which he takes to be paradigmatic of interpretive concepts. Dworkin (1986: 47) begins with a sustained argument for the conclusion that courtesy is an interpretive concept:

> Imagine the following history of an invented community. Its members follow a set of rules, which they call "rules of courtesy," on a certain range of social occasions. /…/ For a time this practice has the character of taboo: the rules are just there and are neither questioned nor varied. But, then, perhaps slowly, all this changes. Everyone develops a complex "interpretative" attitude toward the rules of courtesy, an attitude that has two components. The first is the assumption that the practice of courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle – in short, that it has some point – that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of courtesy – the behavior it calls for or judgments it warrants – are not necessarily or exclusively what they have always been, so that the strict rules must be understood or applied or extended or modified or qualified by that

13 Influential proponents of normative methodology include Perry (2001: 311–354) and Waldron (2001: 410–433).

> point. Once this interpretive attitude takes hold, the institution of courtesy ceases to be mechanical; it is no longer unstudied deference to a runic order. People now try to impose *meaning* on the institution – to see it.

Dworkin goes on to analogize the norms of law to the norms of courtesy to support his view that the concept of law is interpretive – i.e., that the real nature of the concept of law is interpretive and not preinterpretive as the positivist supposes. Thus, he concludes, an analysis of the concept of law must depend on certain moral norms that define its normative purpose.

There are a number of potential objections here to Dworkin's line of argument. First, it is not clear that Dworkin has succeeded in showing that the concept of courtesy has interpretive content that warrants a normative methodology. While it may be true that courtesy seeks, as a conceptual matter, to realize some kind of point or value, it does not follow that the content of the *concept* of courtesy cannot be explicated without recourse to *moral* norms – even if the value courtesy seeks is a *moral* value. The point of courtesy is likely defined by social practices that can be observed as a means of identifying that point. What must, of course, be responsive to that conceptual point of courtesy are the *substantive norms* of courtesy; knowing the point of courtesy helps us to identify what the norms of courtesy should be. But it, arguably, gets the matter backwards to think that the norms of courtesy must be consulted to identify what the content of the concept is, even beyond identifying the point of the concept. It is not clear how norms of courtesy could even be identified and distinguished from other kinds of norms without having an understanding of the conceptual point of courtesy. Indeed, the norms of courtesy are what they are because, if followed, they enable a subject to conform her behavior in a way that achieves the point of courtesy; the point of courtesy seems to serve as a touchstone for the correctness of the observed norms. If this is correct, then the content of the point determines the content of the norms; the content of the norms does not determine the content of the point, as the objection assumes.

Second, and more importantly, it is simply not clear that a concept that has normative content can be adequately explicated only through a methodology that incorporates moral norms. The concept of morality, for example, has normative content: the use of the words "moral" and "immoral," when used in conjunction with a description of an act, express values that provide reasons for action. That X is immoral is a good reason for not doing X. Yet William Frankena provides a plausible analysis of the content of the concept of morality without recourse to a morally normative methodology, relying instead on TCA. As this theory has been described:

> Among those who use "morality" normatively, all hold that "morality" refers to a code of conduct that applies to all who can understand it and can govern their behavior by it. In the normative sense, morality should never be overridden, that is, no one should

ever violate a moral prohibition or requirement for non-moral considerations (Gert 2011).

This analysis is gleaned from a purely empirical observation of how people use the relevant concept-terms, which is, of course, simply a matter of teasing out the implications of the shared patterns of ordinary usage among the relevant class of speakers. It is, thus, not clear that one can infer that a normative conceptual methodology is appropriate for concepts with normative content.

It is true, of course, that conceptual jurisprudence cannot be done without making certain kinds of value judgment that depend on norms other than those governing good reasoning and argument. One cannot begin an analysis of the concept of law without being able to pick out features of law that are theoretically important. It might be true, for example, that all judges wear robes, but this is not a feature of law that is sufficiently crucial to law that it must figure into an explication of the concept of law. Conceptual jurisprudence must, as Dickson (2001: 51–57) points out, therefore be "indirectly evaluative" in the sense that it requires recourse to norms that enable us to distinguish important common features of law from unimportant common features of law; however, a successful methodological approach to law need not be "directly evaluative" in the sense that it requires recourse to moral norms that state what content the law or relevant social practices should have.

As Hart (1987: 39) puts this important point:

> [A]n analysis which allots a place to moral claims and beliefs as constituents of social phenomena must itself be guided, in focusing on those features rather than others, by some criteria of importance of which the chief will be the explanatory power of what his analysis picks out. So his analysis will be guided by judgements, often controversial, of what is important and will therefore reflect such meta-theoretic values and not be neutral between all values. But again there is nothing to show that this analysis is not descriptive but normative and justificatory.[14]

Accordingly, Hart distinguishes between an indirectly evaluative approach according to epistemic norms that help pick out features of theoretical importance and a normative approach that seeks to justify some of the various practices and structures that determine the relevant concepts of interest.

5 THE RELATIONSHIP BETWEEN CONCEPTUAL ANALYSIS AND METAPHYSICS

As conceived by TCA, the analysis of a concept discloses the nature or essence of the thing referred to by the corresponding concept-word. Thus, a con-

14 Others defending this distinction include, e.g., Coleman 2001; Marmor 2001; Waluchow 1994; Dickson 2001; and Finnis 1980.

ceptual analysis of law is intended to tell us something about the nature or essence of law; that is to say, it is supposed to tell us something about not just all *existing* legal systems, but all *conceptually possible* legal systems. Thus conceived, a conceptual analysis of law consists in a set of conceptually (or metaphysically) necessary truths and thus constitutes a piece of metaphysical theorizing – just as an analysis of the concept of free will is a piece of metaphysics. As Hart cautioned, conceptual analysis may begin from words, but it is important to realize that an adequate explication of a concept will include truths that go far beyond the conventions that establish the core meanings of those words. The project of analyzing the content of legal concepts is the project of exploring the metaphysics of law, explicating its nature in terms of claims that are *necessarily* true – the hallmark of metaphysical inquiry.[15]

The metaphysical character of conceptual analysis, traditionally conceived, is logically connected to the view that the epistemology of conceptual analysis is *a priori* in character. Empirical observation is essential, primarily, for identifying only the contingent sensible properties of particular things. For example, empirical observation is needed to come to know that a bag of rocks contains four rocks, but does not, from the standpoint of ordinary intuition, seem to be needed to know that 2 + 2 = 4; it would be silly to go out and attempt to confirm the truth of this arithmetical proposition by a series of trials in which the sum of putting two rocks together with two more rocks is identified and recorded. We need empirical observation to know that there are two rocks in the bag because that could be false; in contrast, we come to know that 2 + 2 = 4 by grasping, somehow (and the operation of the *a priori* faculty, if such there be, is quite mysterious from the standpoint of epistemological theory), that it could not be false.

Insofar as the essential properties of law are possessed by every possible legal system and not by just the existing legal systems we can observe by our senses, empirical observation is irrelevant in conceptual analysis – except as is necessary to understand the concept-term well enough to pick out paradigm instances of the things to which it refers. Accordingly, the methodology for conceptual analysis, thus conceived, would be *a priori*.

Similarly, the metaphysical character of conceptual analysis, traditionally conceived, is thought to be logically connected to the view that the deeper con-

15 It is important to note an important difference here between a modest and an immodest approach to conceptual analysis. Insofar as a modest approach is explicitly grounded in contingent social practices like those that define the language of the community, conceptual truths are necessary *relative to that set of particular commitments*; we impose a certain metaphysical structure on the world through conceptual commitments that arise out of social practices we construct. In contrast, insofar as an immodest approach seeks to identify truths that are independent of human practices, conceptual truths would simply be necessarily true – and without regard to any particular conceptual framework that people impose on the world through linguistic and other social practices.

tent of some concept can be derived from some set of comparatively obvious analytic truths about the thing the concept picks out. If a claim, *C*, is true wholly in virtue of the meanings of the words used to express it, then the denial of *C* is a contradiction. Since a contradiction is impossible, *C* is necessarily true and hence metaphysical in character, as metaphysics deals with issues concerning the nature of things. The content of the concept, then, will be fleshed out by a set of claims that are necessarily true and derived from the analytic truths that form the starting point of for TCA.[16] Again, TCA presupposes conceptual analysis is metaphysical in character.

As noted above, there have been two methodological challenges to TCA – normative jurisprudence and naturalized jurisprudence – and they disagree on the issue of whether conceptual analysis is metaphysical in character. Normative jurisprudence, as will be recalled, holds that an analysis of the concept of law must conform to certain relevant moral norms, just as it must conform to certain norms governing rational discourse. While normative jurisprudence does not entail a meta-ethical position about whether morality is objective (i.e., "moral objectivism"), most theorists favoring a normative methodology also hold moral objectivism.[17] Insofar as moral objectivism entails, as is commonly held, that moral norms are necessarily true, if true at all, applying a morally normative methodology to conceptual analysis will likewise flesh out the content of the relevant concept in terms of necessary truths that express the nature of the relevant thing. Normative methodology, thus, entails that the character of conceptual truths is metaphysical.

What is considerably less clear is whether normative methodology presupposes that conceptual claims are analytic, as TCA appears to. The problem here arises in connection with the character of moral claims. Assuming, as norma-

16 An interesting question is whether, assuming the starting point of TCA consists entirely in analytic truths, the implications of a set containing only analytic truths are necessary also analytic in character. The claim that law consists of norms is surely analytic in character, if any statement is. However, the claim that the existence conditions for a legal system include a social rule of recognition that is practiced by officials is not obviously analytic – even if it is, in fact, a necessary truth about legal systems, by nature – and is derived somehow from the claim that law consists of norms.

Indeed, one can legitimately question whether the starting point – even for TCA – consists wholly in analytic truths. The observations that purport to pick out "paradigmatic" features of law and legal systems do not seem to be entailed by definitions of law. Rather, once we have a pre-theoretic understanding of law, which is partly informed by definitions, the identification of paradigms seems, at least, partly informed by value judgments that distinguish important necessary features of law from unimportant, and are, arguably, synthetic necessary truths.

17 Moral objectivism is the view according to which the truth-value of moral claims is determined by mind-independent considerations, like preferences, beliefs, practices, or desires. Every natural law theorist in legal theory is a moral objectivist. Likewise, Ronald Dworkin is a moral objectivist, and one who calls for a normative methodology. See, e.g., Dworkin (1996: 87–139).

tive jurisprudes typically do, that morality is objective, moral claims might be necessarily true, but not obviously in virtue of being analytic claims; it does not seem true by definition that killing a human being is wrong. One can take the position, of course, that the content of the concept of law is moralized in the sense that the relevant moral claims are built into the definition of law, but this is a deep and difficult issue that cannot be adequately addressed here. Even so, it seems nonetheless clear that normative jurisprudence presupposes that conceptual analysis of law is metaphysical in character.

In contrast, naturalized jurisprudence, as is readily evident, denies the most basic assumptions of TCA about the character of conceptual analysis. First, insofar as naturalized jurisprudence is grounded in Quine's rejection of the analytic-synthetic distinction, it, too, rejects the idea that conceptual analysis is even partly grounded in analytic claims – since, after all, there are no such things that can be legitimately defined. Further, insofar as a naturalized methodology is grounded in Quine's argument, naturalized jurisprudence follows Quine in rejecting the philosophical legitimacy of the modalities of necessity and possibility. Finally, insofar as naturalized jurisprudence takes the methodology of conceptual analysis to be grounded in empirical claims and continuous with scientific methodology, conceptual claims will be contingent in character; after all, empirical observation is not needed, according to the traditional views, to observe features of all possible worlds. Naturalized jurisprudence, thus, denies that conceptual analysis is a metaphysical enterprise that results in a theory comprised of necessary truths, expressing the nature of the relevant thing under consideration.

6 CONCEPTUAL ANALYSIS OF LAW: CONCEPTUAL JURISPRUDENCE

Fundamental to the conceptual analysis of law, as traditionally conceived, is the metaphysical thesis that, in any conceptually possible legal system, there are certain properties that *constitute* something as law. Thus, for example, a conceptual theory of law would include a list of properties that constitute anything that has them as a legal system ("law" as institutional system of norms), as well as a list of properties that constitute anything that has them as a legal norm of some legal system ("law" as individual norms). The instantiation of the relevant properties constitutes a system/norm as one of law in exactly the same sense that being unmarried constitutes a man as a bachelor. Any institutional system of norms instantiating the appropriate properties is, for that reason, a legal system; any system that does not is, for that reason, not a legal system. Similarly, any norm instantiating the appropriate properties is, for that reason, a law in some legal system; any norm not instantiating the appropriate properties is, for that reason, not a law in some legal system.

Conceptual theories of law have some intriguing implications that enable us to make more specific observations about the content of particular laws and legal systems. Each of the major conceptual theories of law – positivism, natural law theory, and Dworkin's interpretivism – begin from the assumption that law is, in part, manufactured by contingent social practices, including those involved in legislation and adjudication. This means that the content of legal norms, including those that define the contours of the legal system to which those norms belong, can vary from one legal system to the next. One consequence of this idea is that in every conceptually possible legal system there is a set of norms that establish the existence and structure of a legal system and provide criteria that determine when a norm counts as a *valid* law of the system. If *S* is a legal system and *P* is a statement that describes the properties that constitute a norm as law,[18] then *P* states necessary and sufficient criteria of "legal validity" in *S* in the following sense: for any norm *n*, *n* is a law in *S* at time *t* if and only if *n* instantiates *P* at *t*.[19] Another way of putting this is as follows:

> *The Differentiation Thesis:* In every conceptually possible legal system *S*, there is a set *CoV* (for "criteria of validity") such that, for every norm *n*, *n* is a law in *S* at time *t* if and only if *n* satisfies the criteria in *CoV* at *t*.

The Differentiation Thesis, then, asserts that every legal system contain membership conditions defining the criteria of validity for that system – and these criteria are understood to differ from system to system insofar as the relevant social practices differ.

It is important to realize that, as traditionally conceived, the Differentiation Thesis is a metaphysical thesis – and not an epistemological thesis.[20] The Differentiation Thesis neither presupposes nor implies any claims about the extent to which the criteria of validity can be identified or applied in any possible legal system. Indeed, the Differentiation Thesis, by itself, is logically consistent with a variety of claims about how much we can know about the content of the law – both the legal norms establishing validity criteria and the legal norms that are law because valid under the validity criteria. It is true, of course, that (1) the content of all legal norms ultimately depend, in large measure, on social processes that can be empirically observed and (2) the norms of a system must be understandable in order to be sufficiently efficacious to constitute a legal sys-

18 *P*, of course, might express either a very complicated list of properties that include disjunctions or conjunctions. So insofar as law is a cluster concept or family resemblance concept, the statement of the conditions will include a host of disjunctions joining conjunctions, which express the various degrees of resemblance sufficient to confer the status of law on a norm.

19 As Hart puts the point, "To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and *so as a rule of the system*." Hart 1994: 103.

20 The claim that the Differentiation Thesis is not an epistemic thesis is also true on a naturalized methodology.

tem. It is also true that the Differentiation Thesis, together with both (1) and (2), entail that we can come to know something about the content of the law in a particular legal system by observing enough about the practices that give rise to the criteria of validity and the activities of officials that conform to these criteria. But it is a mistake to think that the core theses of a conceptual theory of law, which includes the Differentiation Thesis, implies that the criteria of validity in any or every legal system constitutes an epistemic test that settles the question of what the law is in every dispute that might arise. That view was once incorrectly attributed to positivism as the so-called Pedigree Thesis during the early years of the debate between Dworkin and positivists, but is improperly attributed to any of the major conceptual theories of law. Whatever views a theorist takes on this will have to be grounded in other commitments.

Still, it is reasonable to think that statements of the criteria of validity could not provide a decision procedure for identifying the law. As Ronald Dworkin argues so forcefully in *Taking Rights Seriously*, appellate judicial practice is concerned with adjudicating cases that are hard in the sense that the reasons supporting either of two conflicting holdings are similarly weighty. Such cases turn out to be very difficult for judges to decide. While one might take the position, as Raz does, that hard cases arise because there is a gap in the law on the issue, it is sometimes a tricky matter to determine, even on the assumption Raz is correct, what constitutes a hard case. There are, to put the point modestly, probably no decision procedures to be found in complex legal systems like those of modern municipal states.

Further, the Differentiation Thesis implies nothing about the nature or moral character of the law in any particular legal system. Legally valid content might – or might not – be necessarily constrained by moral principles or the inherently interpretive character of law. Since the Differentiation Thesis is agnostic with respect to such claims, it is consistent with classical natural law theory, legal positivism, and Dworkin's constructive interpretation and hence cannot distinguish positivism from other conceptual theories of law. Up to now, every conceptual theorist has assumed it.

One can doubt that the criteria of law can be *fully identified* in every legal system, but general jurisprudence could not get off the ground without assuming there is some distinction between law and non-law. That latter distinction is so fundamental to general jurisprudence and so intuitively plausible that one would need a very good reason to justify rejecting it. The Differentiation Thesis simply expresses that legal norms are distinct from other norms in every society with a legal system. The job of every conceptual theory of law – i.e. of conceptual jurisprudence, in general – is to explain what properties distinguishes these norms that are law from norms that are not law and constitute the former as *legal norms*.

7 CONCEPTUAL ANALYSIS: THEORETICAL AND PRACTICAL SIGNIFICANCE

One might legitimately wonder whether conceptual jurisprudence has any practical applications in resolving substantive problems concerning what the content of a particular law is, or should be. Many persons in the legal academy have developed something of an aversion, if not hostility, to the highly abstract concerns of conceptual legal theory, believing that an analysis of what law is by nature is as normatively impotent as an analysis of what a bachelor is by nature. At first blush, it would appear that understanding the concept of a bachelor has no implications that would answer practical questions that might arise in connection with how bachelors should act or should be treated. A theoretical definition of "bachelor" just seems, by nature, too abstractly descriptive to yield any interesting practical conclusions.[21]

As it turns out, some prominent legal scholars have argued for precisely this thesis with respect to the enterprise of conceptual jurisprudence. Richard Posner, for example, devotes a substantial portion of the first of his Clarendon Law Lectures, which were given at Oxford in 1995, to arguing that conceptual jurisprudence is "futile, distracting, and illustrative of the impoverishment of traditional legal theory."[22] The following passage is representative of the disdain with which he regards conceptual jurisprudence:

> I have nothing against philosophical speculation. But one would like it to have some pay-off; *something* ought to turn on the answer to the question 'What is law?' if the question is to be worth asking by people who could use their time in other socially valuable ways. Nothing does turn on it (Posner 1996: 3).

Indeed, Posner (1996: 3) goes so far as to argue that "the central task of analytic jurisprudence is, or at least ought to be, not to answer the question 'What is law?' but to show that it should not be asked, because it only confuses matters".

As might be evident from the discussion of "bachelor" at the beginning of this section, Posner's concerns are not utterly counterintuitive, but the challenge seems most plausible directed at purely descriptive approaches to conceptual analysis, such as TCA and naturalized jurisprudence. After all, there is a general problem of deriving normative practical claims from a set consist-

21 Some legal academicians overestimate the practical consequences of a conceptual theory of law. Some academic lawyers believe, incorrectly, that positivism entails legal formalism, a theory of adjudication that has long been refuted. Since the character of adjudicative practices in any legal system depend, according to positivism, on the content of its rule of recognition and the content of the rule of recognition varies from legal system to legal system, positivism does not entail any particular theory of adjudication. While positivism allows for the possibility of a legal system in which formalist norms govern judicial decision-making, it also allows for the possibility that Dworkinian norms govern judicial decision-making.

22 Posner 1996.

ing of nothing but purely descriptive claims; if purely descriptive claims about what law is are logically independent from normative claims about what law should be, as is presupposed by TCA and naturalized jurisprudence, then the latter claims cannot be deduced, without more, from the former. Nevertheless, it is important to realize that proponents of normative methodology explicitly deny, as we have seen, the claim that what law is and what law should be are logically unrelated issues. Whether this denial is enough to insulate normative approaches from Posner's criticism is not entirely clear; however, there is enough of a difference between normative and descriptive approaches to warrant some caution in thinking this criticism would sweep across all the methodological approaches.

In any event, Posner's view that conceptual jurisprudence should not be done, even if he is correct in thinking that such analysis results in theories that are normatively important, is problematic. To see the problem, it would be helpful to consider how Posner's criticism would come off in another context. Though a great deal of work in pure mathematics has been used to create technologies that greatly improve our lives, one of the most celebrated mathematical accomplishments of recent years is not thought to have such applications. A few years ago, Andrew Wiles of Princeton University devised what is believed to be a successful proof for Fermat's Last Theorem, which asserts that there are no positive integers *x, y, z,* and $n > 2$ such that the equation $x^n + y^n = z^n$ is true. Despite the fact that no one in the mathematical community necessarily believes this will ever have practical applications that result in the betterment of the human condition, tens of thousands of hours were devoted by mathematicians eager to finding a proof or disproof of this proposition.

What surely explains this, at least in part, is that we value knowing things for other than instrumental reasons. Sometimes knowing a proposition p is instrumentally valuable in the sense that it that knowledge provides the means to an end of producing a useful technology. Much mathematical theory can obviously be justified by the value of the practical benefits to people, but that is not the only reason to value mathematical inquiry. If knowledge is not always intrinsically valuable (i.e. valuable for its own sake as an end-in-itself), it is sometimes intrinsically valuable. Knowledge of abstract truths defining basic structures of significant practical value (such as mathematics) seems valuable for its own sake; indeed, it is not unreasonable to think that all knowledge is (or should be) intrinsically valuable to a rational being. The same would be true of the concept of law; assuming an analysis of the concept of law has no practical instrumental value, it is plausible to think that understanding the nature of an institution that restricts the freedom of autonomous agent is intrinsically valuable.

But is Posner correct in thinking that nothing of substance turns on a conceptual analysis of law? Certainly, there is something that can be said for his view. Consider, for example, the dispute between Dworkin and Hart on the issue of judicial discretion. Dworkin once argued that the issue of whether it is fair for judges to assess damages against a defendant in a hard case depends on whether the correct way to characterize the judge's decision is as implicit in preexisting law or as creating new law; as Dworkin (1967: 31) put the point:

> If [judges have discretion to decide hard cases by making new law] ... we must acknowledge that the murderer's family in *Riggs* and the manufacturer in *Henningsen* were deprived of their property by an act of judicial discretion applied *ex post facto*. This may not shock many readers—the notion of discretion has percolated throughout the legal community—but it does illustrate one of the most nettlesome of the puzzles that drive philosophers to worry about legal obligation. If taking property away in cases like these cannot be justified by appealing to an established obligation, then another justification must be found, and nothing satisfactory has been supplied.

Such takings of property are morally illegitimate because it is unfair to take property from a person under a law that did not exist at the time of the behavior that gave rise to the liability—or so the argument goes.

But Dworkin's theory seems to fare not much better on this count than Hart's view that judges decide hard cases by making new law. What distinguishes hard cases from other cases, on Dworkin's view, is that, in hard cases, there is more than one holding that coheres with the existing institutional history. What makes an issue of law hard, then, is that the law (construed to include the existing institutional history) doesn't give reasonable notice of what, if anything, it requires.[23] If, however, fairness precludes taking property from a defendant under a law that did not exist when the behavior giving rise to the liability occurred, it also precludes taking property from a defendant under a law that does not give reasonable notice to the defendant that the behavior at issue gives rise to such a liability. Just as it is unfair to punish a child for breaking a rule that was not communicated to her in terms that she could reasonably be expected to understand, it is unfair to compel a person to pay damages under a law that does not adequately inform the person that the behavior at issue gives rise to liability under the rule. It is not enough that to justify assessing damages against a person that she has a legal obligation; that obligation must be communicated in terms that a competent speaker of the language can understand.

These examples are far from being conclusive, of course. But they do provide some reason to think, as Posner does, that we cannot solve substantive

23 Some cases are hard enough that it takes a judge of exceptional (as Dworkin puts it, "Herculean") ability to discern the correct answer to the question.

problems of law and morality simply by moving concepts around.[24] Concept-words are used to group acts, events, and entities and hence do no more than pick out particular classes of acts, events, and entities. It seems clear that we cannot solve any interesting moral problems merely by altering our conceptual characterization of some act, event, or entity. Whether hitting someone in the face is morally wrong cannot turn on whether it is properly characterized as an "assault" or as a "kiss"; if it is properly characterized it as a "kiss," then we will have to rethink our moral views about the permissibility of kissing. What substantive normative qualities any particular act or event has cannot turn on how it is grouped through our linguistic practices with other acts or events.

But Posner fails to realize that this isn't the only way in which an analysis of legal concepts might make a difference in our lives. Proponents of conceptual analysis who feel the need to justify their view by reference to socially useful consequences typically do so by pointing to its epistemic benefits. In discussing the value of conceptual analysis in the area of metaphysics, Frank Jackson (1998: 30) writes:

> Although metaphysics is about what the world is like, the *questions* we ask when we do metaphysics are framed in a language, and thus we need to attend to what the users of the language mean by the words they employ to ask their questions. When bounty hunters go searching, they are searching for a person and not a handbill. But they will not get very far if they fail to attend to the representational properties of the handbill on the wanted person. These properties give them their target, or, if you like, define the subject of their search. Likewise, metaphysicians will not get very far with questions like: Are there *K*s? Are *K*s nothing over and above *J*s? and, Is the *K* way the world is fully determined by the *J* way the world is? in the absence of some conception of what counts as a *K*, and what counts as a *J*.

The point of conceptual analysis, on Jackson's influential view, is not that it entails solutions to important substantive problems of law, ethics, or politics. Rather it is that conceptual analysis helps us to solve those problems by helping us to see and formulate them more clearly. As Coleman (2001: 13) puts this absolutely essential point, "Conceptual analysis is essentially a philosophical enterprise: its aim is to help us think more carefully".

Even so, the issue of determining whether and how theories of conceptual jurisprudence are valuable is an important one. It is always helpful to know whether a particular area of theorizing results in any practical benefits to humanity beyond increasing the store of human knowledge. At this point, too little work in this area has been done to offer any general conclusions.

24 Cf. Murphy 2001.

Bibliography

Michael BEANEY, 1996: Analysis. *Stanford Encyclopedia of Philosophy*. Ed. Edward N. Zalta. URL: http://plato.stanford.edu/entries/analysis/.

Simon BLACKBURN, 1996: *Oxford Dictionary of Philosophy*. Oxford: Oxford University Press.

David BOURGET & David CHALMERS, 2013: *What Do Philosophers Believe?* URL: http://philpapers.org/archive/BOUWDP.

Jules COLEMAN, 2001: *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory*. Oxford: Oxford University Press.

Jules COLEMAN (Ed.), 2001: *Hart's Postscript*: *Essays on the Postscript to The Concept of Law*. Oxford: Oxford University Press.

Julie DICKSON, 2001: *Evaluation and Legal Theory*. Oxford: Hard Publishing.

Ronald DWORKIN, 1977: *Taking Rights Seriously.* Cambridge (Ma.): Harvard University Press.

——, 1986: *Law's Empire*. Cambridge (Ma.): Harvard University Press.

——, 1996: Objectivity and Truth: You'd Better Believe It. *Philosophy & Public Affairs* 25 (1996) 2.

John FINNIS, 1980: *Natural Law and Natural Rights*. Oxford: Oxford University Press.

Bernard GERT, 2011: The Definition of Morality. *Stanford Encyclopedia of* Philosophy. Ed. Edward N. Zalta. URL: http://plato.stanford.edu/archives/fall2012/entries/morality-definition/.

Herbert Paul GRICE & Peter F. STRAWSON, 1956: In Defense of a Dogma. *Philosophical Review* 65 (1956) 2.

H.L.A. HART, 1987: Comment. *Issues in Contemporary Legal Philosophy: The Influence of H.L.A. Hart*. Ed. Ruth Gavison. Oxford: Oxford University Press.

——, 1994: *The Concept of Law*. Revised Ed. Oxford: Oxford University Press.

Frank JACKSON, 1998: *From Metaphysics to Ethics: A Defence of Conceptual Analysis*. Oxford: Oxford University Press.

Brian LEITER, 2007: *Naturalizing Jurisprudence*. Oxford: Oxford University Press.

Andrei MARMOR, 2001: *Positive Law and Objective Values*. Oxford: Oxford University Press.

Liam MURPHY, 2001: The Political Question and the Concept of Law. *Hart's Postscript*: *Essays on the Postscript to The Concept of Law*. Ed. Jules Coleman. Oxford: Oxford University Press.

Stephen PERRY, 2001: Hart's Methodological Positivism. *Hart's Postscript*: *Essays on the Postscript to The Concept of Law*. Ed. Jules Coleman. Oxford: Oxford University Press.

Richard POSNER, 1996: *Law and Legal Theory.* Oxford: Clarendon Press.Joseph RAZ, 1994: *Ethics in the Public Domain*. Oxford. Oxford University Press.

——, 2009: *The Authority of Law. Essays on Law and Morality.* 2nd ed. Oxford: Oxford University Press.

Friderick SCHAUER, 2006: (Re)taking Hart. *Harvard Law Review* 119 (2006).

Jeremy WALDRON, 2001: Normative (or Ethical) Positivism. *Hart's Postscript*: *Essays on the Postscript to The Concept of Law*. Ed. Jules Coleman. Oxford: Oxford University Press.

Wil WALUCHOW, 1994: *Inclusive Legal Positivism*. Oxford: Oxford University Press.

Sebastián Figueroa Rubio*

Expectativas y atribución de responsabilidad

Bajo la hipótesis de que todo juicio de atribución de responsabilidad supone la defraudación de una expectativa, en el texto se propone comprender a estas últimas como estándares que pueden ser adoptados por los miembros de una comunidad para la evaluación de determinados eventos y que les autorizan a buscar una explicación de los eventos que las defraudan. Después de exponer esa forma de comprender las expectativas, se analiza su relación con la responsabilidad considerando la hipótesis señalada. Por último, se explora la relación entre expectativas y responsabilidad como una alternativa a la idea común de que todo juicio de atribución de responsabilidad supone el quebrantamiento de una obligación, sea jurídica o moral, por parte de quien es responsable..

Palabras claves: expectativas, responsabilidad, actitudes reactivas, obligación

1 INTRODUCCIÓN

En este trabajo se propone una forma de ver las expectativas y su relación con los juicios de atribución de responsabilidad. Antes de comenzar con ello, cabe señalar algunos supuestos sobre la perspectiva asumida. En primer lugar, se abraza una visión *strawsoniana* sobre la responsabilidad, esto es, se toma como punto de partida las ideas presentadas por Peter Strawson en su ensayo *Freedom and Resentment*.[1] A su vez, este trabajo difiere de las interpretaciones comunes de ese ensayo centrando la atención en lugares donde usualmente no se hace, en concreto se explora el alcance del ensayo en el ámbito jurídico (no solo en el moral) y se discute la importancia de las expectativas (no solo de las actitudes reactivas) para la comprensión de la responsabilidad.

* figueroa.sebastian@gmail.com | Universidad de Chile, Universidad Diego Portales & Cátedra de Cultura Jurídica de la Universitat de Girona (España).

1 Strawson 2008. Señala Michael McKenna (2012: 3–4, 31), que una concepción *strawsoniana* abraza tres postulados: (a) que la responsabilidad es esencialmente interpersonal; (b) que la responsabilidad se constituye de elementos de la vida comunitaria (e.g. actitudes reactivas) y; (c) que *responsabilizar* es más básico que *ser responsable*, esto es, una concepción de este tipo centra su atención en lo que puede hacer quien adscribe responsabilidad antes que en ciertas características con que cuenta quien es responsable. Este trabajo se centra en el segundo postulado, particularmente en lo que respecta a las expectativas como elemento de la vida en comunidad.

Por otra parte, se adopta la hipótesis de que todo juicio de atribución de responsabilidad comienza con una expectativa,[2] más específicamente con una expectativa defraudada, y que el evento que la defrauda, es aquello *por* lo que alguien es responsable. En este sentido, siempre se puede preguntar a quién responsabiliza "¿Qué esperabas que ocurriera?" con el fin de que explicite *por* qué está responsabilizando a alguien.

Con estos supuestos, este trabajo se ocupará de mostrar una forma de comprender las expectativas para después estudiar su relación con la responsabilidad. Por último, se compara esta idea con el modelo que supone que todo juicio de atribución de responsabilidad conlleva la violación de una obligación por parte de quien es responsable.

2 EXPECTATIVAS

Las expectativas están vinculadas con la idea de esperar de diversas formas, son dos las que aquí interesan. En primer lugar, al referirse a las expectativas presentes en una comunidad, se habla de lo que se espera de nosotros así como de lo que podemos esperar de otros. Se presentan como estándares respecto de que lo que debería suceder. En segundo lugar, las personas pueden adoptar estos estándares y, según lo que digan y hagan, se les atribuye dicha adopción. Esto se expresa diciendo que las personas *tienen* expectativas. Tener una expectativa en este sentido significa esperar *algo*. La apelación a este algo las incluye entre las actitudes proposicionales, junto con creencias y deseos.

Entonces, las expectativas se enlazan con dos dominios: el de la generación de estándares (i.e. lo que se espera del mundo, de los demás y de nosotros) y el de la adopción de dichos estándares por personas (i.e. decir que alguien *tiene o puede tener* expectativas). Se les entenderá como estándares que pueden (en un sentido normativo) ser adoptados por los miembros de una comunidad para la evaluación de determinados eventos y que permiten a dichos miembros buscar una explicación de esos eventos.

En lo que sigue se explica dicha forma de entenderlas. Para ello se considerarán tres de sus características: que con ellas se realizan demandas; que se trata de demandas legítimas o razonables y; que al momento de contrastar las expectativas con ciertos eventos (paradigmáticamente aquellos que las defraudan) es racional buscar una explicación de dichos eventos. Estas características permitirán distinguirlas de otras actitudes proposicionales como esperanzas,

2 Señala Strawson que: "The personal reactive attitudes rest on, and reflect, an expectation of, and demand for, the manifestation of a certain degree of goodwill or regard on the part of other human beings towards ourselves; or at least on the expectation of, and demand for, an absence of the manifestation of active ill will or indifferent disregard". Strawson 2008: 15.

ilusiones y predicciones,[3] así como mostrar su relevancia para la comprensión de las prácticas de atribución de responsabilidad.

2.1 Expectativas, estándares y demandas

Nos enfrentamos ante los demás esperando que se comporten de cierta manera, i.e. por medio de estándares que permiten identificar y evaluar sus acciones. Por eso, usualmente se define a las expectativas como estándares evaluativos.[4]

Cuando consideramos lo que se espera de nosotros o lo que esperamos de los demás en términos de estándares evaluativos, de una u otra forma podemos entender que se trata de cosas que se nos exigen o que exigimos con diversas intensidades. De este modo, las expectativas se presentan como demandas. Pero estas demandas no solo se generan ante las acciones de otros, sino que ante todo tipo de eventos.

Las demandas serán más o menos abstractas. Por ejemplo, si Juan espera que Antonio llegue a casa, dicha expectativa puede entenderse como una demanda abstracta al mundo (e.g. Juan demanda al mundo que traiga a Antonio de alguna manera) o una demanda concreta dirigida a una persona para que actúe de cierta forma (en el ejemplo, la demanda es precisamente a Antonio de que llegue).

Las expectativas, como demandas, se distinguen de las predicciones. Tanto predicciones como expectativas tienen un carácter prospectivo. Sobre ambas debe ser lícito decir que se han podido formar antes del acaecimiento de los eventos relevantes, i.e. los eventos predichos, esperados o inesperados. Esto permite comparar al estándar presente en la expectativa con el evento, así como hacer explicita la disonancia o consonancia entre ambos. Pero al predecir no se hace una demanda, si Juan predice que Antonio vendrá a casa no realiza una exigencia sobre ello.[5]

---

3 Se debe tener en cuenta que las actitudes proposicionales no están completamente separadas, por el contrario, se presentan en conjuntos en las que unas suponen a otras (*vide.* Davidson 2001). Además, los límites entre las diversas actitudes proposicionales no son nada claros y siempre se pueden presentar casos que los desafían. De esta forma, las distinciones acá presentadas entre actitudes proposicionales no son tajantes.
Por último, tampoco se busca resolver en este trabajo otra discusión relacionada acerca de si todas las actitudes proposicionales son reducibles a deseos y creencias. *Vide* Smith 1994: 118–125.

4 *Vide.* Galtung (1959: 214); Mellema 2004: 4.

5 Otros dos signos a considerar. Por una parte, las expectativas se expresan naturalmente por medio del modo subjuntivo (e.g. "espero que mañana *llueva*"), mientras que las predicciones por medio del indicativo (e.g. "predigo que mañana *lloverá*"). Por otra parte, usualmente se exige que las predicciones se hayan hecho explicitas antes del acaecimiento del evento, lo cual no es necesario en el caso de expectativas.

Lo anterior, a su vez, no quiere decir que las expectativas se puedan reducir a deseos, pues a diferencia de estos, la satisfacción de una expectativa no implica la satisfacción de una necesidad o un interés. A veces se espera algo que no se desea. En el ejemplo, puede ser el caso que Juan esperé que Antonio llegue a casa porque se comprometieron a discutir un tema sobre el que Juan preferiría no conversar.[6] Es común que los estándares presentes en las interacciones sean válidos con independencia de lo que los individuos deseen.

2.2 Lo que es de esperar. Expectativas, legitimidad y error

Siendo las expectativas estándares presentes en una comunidad, existe la posibilidad de que un miembro en particular pueda adoptarlas correctamente o estar *equivocado* respecto de ellas (i.e. espera algo que no *puede* esperar). Esto sucede, por ejemplo, por falta de información o una mala percepción de la información (e.g. Juan, creyendo erróneamente que es martes, puede esperar un lunes que Antonio llegue a casa porque acordaron juntarse el martes; también puede ser el caso que haya creído que Antonio le había prometido visitarle, pero él no lo hizo) o por una mala forma de entender las relaciones en las que se está involucrado con otros (e.g. un empleador que espera que sus trabajadores se comporten como sus amigos). La idea de *poder* acá presente, es normativa y se trata de una autorización que tienen las personas para realizar la demanda, de ahí que la demanda se evalúe por su legitimidad o razonabilidad.

En vista de lo dicho, se distingue a una expectativa por su legitimidad, y la ilegitimidad puede darse por diversos motivos. Estos motivos dependerán del contexto. Como señala Wittgenstein: 'Una espera está incrustada en una situación, de la que surge. La espera de una explosión puede surgir, por ejemplo, de una situación, en la que *es de esperar* una explosión'.[7] Así, esperar que mi cuerpo se sienta atraído hacia el suelo, no es razonable en un trasbordador espacial orbitando en el espacio, como si lo es en la Tierra. La legitimidad o razonabilidad permite distinguir a expectativas de ilusiones o esperanzas.[8]

Hay otra forma en que un individuo puede estar equivocado respecto de expectativas: teniendo una idea errónea de las propias. Las expectativas, como actitudes proposicionales, en ocasiones son opacas para los individuos. Una persona que tiene una expectativa (i.e. se le atribuye correctamente) no siem-

6 Este punto es considerado, en el ámbito jurídico, por Luigi Ferrajoli. Según él "Las expectativas por otro lado, no tienen necesariamente por argumento prestaciones (omisivas u comisivas) ventajosas para sus titulares: son, en efecto, expectativas también la exposición a sanciones o a anulaciones". Ferrajoli 1997: 240.

7 Wittgenstein 1999: § 581. También *vide.* Mellema 1998: 479–481.

8 La distinción entre expectativas e ilusiones y esperanzas se puede entender como una entre tipos de expectativas: aquellas legítimas (i.e. las que estamos habilitados para adoptar) de aquellas que no lo son. En este sentido, si se prefiere, se puede entender a esperanzas e ilusiones como expectativas ilegítimas o poco razonables.

pre es consciente de ello.[9] Además, muchas veces las personas toman conciencia de lo que esperan después de que han ocurrido los hechos relevantes o después de conversar con otros acerca de cómo interpretar eventos que llaman su atención.

A simple vista, esta última afirmación estaría en conflicto con el carácter prospectivo de las expectativas antes señalado, pero esto no tiene que ser así, pues las expectativas pueden expresarse de forma *postdictiva* (i.e. pueden ser explicitadas como tales, después de ocurrido el hecho) además de *predictiva*.[10] Justificar que se tiene una expectativa que es anterior al evento ocurrido, no es lo mismo que ser consciente de ellas o expresarlas por medio de enunciados antes de que los eventos relevantes sucedan.

Entonces hay dos formas en que se afirma que una persona está equivocada respecto de las expectativas. En el primer caso, se asume que la determinación de lo que se *puede esperar* en un contexto se realiza con independencia de las creencias concretas de un individuo al respecto. Gregory Mellema afirma que la existencia de una expectativa no depende de su *tenencia* por parte de individuos concretos, lo relevante es la legitimidad para adoptarlas. En el segundo caso, la determinación de las expectativas concretas que una persona tiene se puede hacer con independencia de la percepción que dicha persona tenga respecto de sus propias expectativas.[11] En el primer caso, la atención se centra en la expectativa como estándar, en el segundo en la expectativa como actitud proposicional. En ambos casos la determinación de lo que se *puede esperar* o *de lo que alguien espera* se realiza con independencia de las creencias concretas de un individuo respecto de eso y suponen la posibilidad de errar por parte de estos.

2.3 Defraudación de expectativas y búsqueda de explicaciones

Hasta el momento se ha propuesto entender las expectativas como estándares que los miembros de una comunidad pueden adoptar, en el sentido de que es legítimo hacerlo ante ciertas circunstancias. A su vez, se ha señalado que las

9 *Vide.* Smith 1987.

10 Galtung 1959: 214–215. La toma de conciencia de una persona de que una expectativa ha sido defraudada, así como la determinación de qué expectativa ha sido defraudada, no tiene que ocurrir al mismo tiempo que el evento que la defrauda acaece. Ambas cuestiones pueden suceder tras una reflexión personal o interpersonal temporalmente posterior. También puede ser el caso que una persona exprese ciertas expectativas e individualice posibles eventos futuros que la defrauden (e.g. Juan puede decirnos que se va a juntar con Antonio y que dicha expectativa se frustraría si Antonio no llega a la cita después de determinada hora). Que se pueda explicitar una disonancia entre una demanda legítima y un evento es lo relevante. Junto con ello, la situación de disonancia puede evaluarse a partir de la expectativa en cuestión.

11 *Vide.* Mellema 1998: 480–481; 2004: cap. 2 y 3. Aunque el autor parece, en algunos pasajes, confundir ambos tipos de equivocaciones.

expectativas se presentan como demandas ante el mundo y los demás. La tercera característica que aquí se destacará trata sobre la relación entre expectativas y los eventos que las defraudan:[12] al tener demandas legítimas ante el mundo y los demás, en caso de que estas demandas se vean defraudadas, es racional buscar una explicación de lo sucedido.

Señala Johan Galtung que las expectativas, al ser estándares, pueden compararse con diversos eventos. La comparación puede tener tres tipos de resultados: una consonancia entre el evento y la expectativa, una disonancia entre ambos o que el evento en cuestión no es ni disonante ni consonante, sino que neutral. En este último caso la expectativa es irrelevante como estándar para evaluar el evento (e.g. la expectativa de que Juan llegue a cierta hora parece ser irrelevante, en principio, para evaluar que un niño haya robado un dulce tres años atrás en otro país). Por su parte, la diferencia entre los otros dos casos es de grado, esto es, dependiendo de la expectativa en cuestión, esta puede ser más o menos defraudada y más o menos cumplida, presentándose casos de completa disonancia o consonancia.[13]

Al tratarse de demandas legítimas, una reacción racional en caso de disonancia entre una expectativa y lo ocurrido es la búsqueda de una explicación (i.e. preguntarse "¿Por qué ha ocurrido?") y realizar las indagaciones pertinentes.

Es posible identificar diferencias entre actitudes proposicionales por medio de un modelo disposicional-normativo. En este modelo, *estar dispuesto o dispuesta* se caracteriza por los compromisos de actuar de cierta forma ante determinada situación que se atribuyen a un sujeto.[14] La situación relevante suele ser

12 Puede ser el caso que la expectativa no sea *defraudada*, sino *superada*. En estos casos se suele hablar de supererogación. *vide.* Feinberg 1970; Mellema 2004: 64–66. En ambos casos hay una disonancia entre el estándar y el evento, pero varía la evaluación de dicha disonancia. En este sentido, la diferencia no es lo suficientemente relevante para la discusión acá presente, por lo que se seguirá hablando de *defraudación*.
Dependiendo del tipo de expectativa de que se hable, ante la discrepancia se pueden adoptar diversos cursos de acción, como expresión de una actitud reactiva. De este modo, en los casos de atribución de responsabilidad lo usual es premiar a los casos de supererogación y castigar a los casos de defraudación.

13 A su vez, la disonancia (o consonancia) con una expectativa puede darse de diferentes formas, dependiendo de la expectativa en cuestión. Por ejemplo, si Antonio espera que Juan limpie su habitación, Juan puede realizar dicha limpieza de muchas formas, así como dejar la habitación más o menos limpia. Por otra parte, si Juan espera que Antonio cambie una bombilla de luz, este solo puede cumplir la expectativa cambiando la bombilla. Sobre este punto. *vide.* Mellema 2004: cap. 6.

14 Así, respecto de las creencias Ludwig Wittgenstein señala: "Pregúntate: ¿Qué significa creer en el teorema de Goldbach? ¿En qué consiste esta creencia? /…/ Quisiera preguntar: ¿Cómo interviene esta creencia en ese teorema? Examinemos qué consecuencias tiene esta creencia, adonde nos lleva. "Me lleva a buscar una prueba de este teorema." — Bien; ahora examinemos también en qué consiste realmente tu búsqueda. Entonces sabremos en qué consiste la creencia en ese teorema" (Wittgenstein 1999: I §578. Para más detalles *vide.* Wittgenstein 1999: I §438–453, 465, 572–586; II: x. y las siguientes notas de este trabajo).

precisamente el acaecimiento de algo que contraría el contenido de la actitud proposicional y lo que determina el tipo de actitud proposicional es la respuesta ante ello.[15] En este orden de cosas, característico de las expectativas es la búsqueda de una explicación en caso de disonancia con un evento.[16]

15 Sobre esto *vide.* Narváez 2006; Smith 1987; 1994: cap. IV. Este modelo no define las actitudes proposicionales como propiedades disposicionales de los individuos, de ahí que se le identifique como *disposicional-normativo*.
En este sentido, se entiende junto con Robert Brandom que las teorías sobre actitudes proposicionales ofrecen explicaciones de cuándo es adecuado *atribuirlas* (*vide.* Brandom 2002: 147). Por lo que la pregunta es sobre la correcta atribución de compromisos y no sobre propiedades de individuos. Así, por ejemplo, este autor señalará respecto del conocimiento que: "Cuando se dice que alguien tiene "conocimiento" se hacen tres cosas: *atribuir* un *compromiso*, que puede funcionar como premisa o como conclusión de inferencias que lo relacionan con otros compromisos, *atribuir una habilitación* para ese compromiso y *adquirir* uno mismo ese compromiso. Hacerlo supone adoptar una postura o posición que está esencialmente articulada de una forma *social*, compleja, en el juego de dar y pedir razones", siendo central en este juego "la posibilidad de extraer información a partir de las observaciones de otros" (Brandom 2002: 149–150). A su vez, respecto de la aserción dirá: "Las prácticas específicamente *lingüísticas* son aquellas en las que se les da la significación de aserciones o afirmaciones a algunas actuaciones – la adquisición de compromisos inferencialmente articulados (y por tanto con contenido proposicional). Dominar esas prácticas lingüísticas es aprender cómo llevar la cuenta de los compromisos y las obligaciones, articulados de manera inferencial, de los diversos interlocutores, incluido uno mismo". (Brandom 2002: 202).

16 Con lo señalado se podría distinguir a expectativas de creencias, al menos bajo el modelo que entiende a estas últimas por medio de la metáfora de la dirección de ajuste. Según este modelo, la reacción racional ante la discrepancia entre una creencia y los eventos relevantes para su satisfacción, es abandonar la creencia.
La metáfora de dirección de ajuste, a su vez, fue adoptada célebremente por G.E.M. Anscombe en su libro *Intention* (Anscombe 1963) para realizar la distinción entre observar y tener una intención. Para explicar dicha distinción presenta el ejemplo de un hombre que va de compras con una lista realizada por él (o su mujer) mientras un detective le persigue anotando lo que compra. Cuando el hombre acaba las compras tenemos dos listas, la de él y la del detective. Si la lista realizada por el hombre y las cosas compradas por él no coinciden, y ello se considera un error, se puede entender que se trata de un error del hombre. Pero si la lista realizada por el detective no coincide con lo comprado, el error se halla en la lista del detective. Lo que estaba haciendo el detective era observar y el error en la observación se resuelve cambiando la anotación en la lista. Por el contrario, el hombre no ha hecho lo que tenía intención de hacer y la discrepancia se salda contra lo que se ha hecho. Concluye de esto Narváez Mora lo siguiente: "Conocemos nuestros propósitos sin observarlos y los manifestamos mediante acciones, que permiten la adscripción de los propósitos en cuestión: de ahí que tenga sentido una concepción disposicional acerca de deseos y creencias. Adscribir a un sujeto la intención de comprar *bacon* cuando trae *bacon* a casa en el cesto de la compra no se hace solo a partir de la base de lo que ha traído (podía haberlo comprado por error) sino que además se asume el contrafáctico "Si al llegar a casa el cesto no hubiera contenido *bacon* habría estado dispuesto a volver al supermercado a comprarlo", dado que atribuir la intención de comprar *bacon* apoya la verdad de este contrafáctico" (Narváez 2006: 245). Así, en el caso de la creencia: "creer que p" se define como aquel estado o actitud que al adscribirse a un sujeto apoya el contrafáctico "si percibiese que *no p* abandonaría la creencia de que *p*"". (Narváez 2006: 232 n.3). A través de esto se puede tanto atribuir actitudes proposicionales a otros como explicitar las propias, pudiendo existir discrepancias entre ambas actividades en un caso determinado.

Aplicando estas ideas al ejemplo tratado, si Juan espera que Antonio llegue a determinada hora de forma legítima (e.g. Antonio se lo prometió), un retraso de Antonio autoriza a Juan a preguntarse ¿Por qué Antonio no ha llegado? Si se considera la situación, Juan tenía un estándar acerca del comportamiento de Antonio (e.g. que estaría presente en un lugar determinado a cierta hora); al comparar dicho estándar con un evento relevante (e.g. que una hora después de lo señalado Antonio no se ha presentado en el lugar), puede ser el caso que dicha expectativa haya sido defraudada (e.g. Antonio no está presente en el lugar y la hora determinada). Esto conlleva tanto la posibilidad de buscar una explicación (e.g. Juan puede reflexionar de la siguiente forma: "¿Por qué Antonio no ha llegado? Tal vez tuvo un accidente, tal vez no quería juntarse conmigo, etc."),[17] así cómo una evaluación (e.g. Antonio ha incumplido su promesa, lo cual es moralmente negativo). Respecto a esto último, como se verá, el tipo de evaluación en cuestión dependerá del origen de la expectativa (en el ejemplo, se puede entender que el evento se juzga desde la expectativa moral del cumplimiento de promesas, asumiendo que ello es moralmente negativo).[18] Esta es la puerta de entrada a un juicio de atribución de responsabilidad que puede terminar en la manifestación de un reproche por parte de Juan, en caso de adscribirle a Antonio la defraudación de la expectativa, sobre esto se dirá más en la siguiente sección.

3 VARIEDADES DE EXPECTATIVAS Y RESPONSABILIDAD

Se ha hecho referencia a una gran variedad de expectativas que las personas pueden formarse: ser atraídos hacia el suelo, que otra persona cumpla su promesa, que otra persona cumpla con la ley, que los demás actúen manifestando buena voluntad, etc. También se han presentado tres características que permiten tratarlas a todas como expectativas: que suponen una demanda, que tratan sobre demandas legítimas y que en caso de disonancia con un evento se puede buscar una explicación.

Más allá de dichas características comunes, dentro de este vasto conjunto es posible realizar algunas distinciones. Una distinción clásica, aunque formula-

17 Que la defraudación de una expectativa nos habilite a buscar una explicación, no quiere decir que toda búsqueda de una explicación se justifique por la defraudación de una expectativa.

18 Todas estas cuestiones están sujetas a debate. Por ejemplo, se puede discutir que el incumplimiento de promesas no es inmoral o utilizarse otro tipo de expectativa para juzgar el evento con la que se le califique como correcto y así sucesivamente. Además, a ello se debe sumar que la persona puede esta equivocada respecto de las expectativas en las dos formas antes vistas.

da de modos diversos, es aquella que diferencia entre expectativas cognitivas y normativas.[19]

Antes de revisar dicha distinción, se debe tener en cuenta que todas las expectativas de las que se hablado hasta acá son normativas, precisamente esto se manifiesta en que se trata de demandas legítimas expresables como estándares evaluativos y al distinguirlas de predicciones, ilusiones y esperanzas se ha resaltado su normatividad. La normatividad es característica de todas ellas, no de una clase y, vistas así, no hay expectativas no-normativas. La etiqueta "normativa" para clasificarlas puede prestarse para equívocos, pero se utiliza en este trabajo por ser muy difundida, por ello a continuación se explica en qué sentido se hablará de "expectativas normativas" como una clase de expectativas diferente a aquellas cognitivas.[20]

3.1 Expectativas normativas y cognitivas

Teniendo presente la observación del párrafo anterior, se hará una distinción entre expectativas basándose en las reacciones adoptadas ante una defraudación que se vuelve intolerable. Se trata de reacciones distintas a la búsqueda de una explicación, que es una reacción común a todas las expectativas sea o no sea intolerable la defraudación.

Que la disonancia se vuelva intolerable tiene por consecuencia que las personas se comprometen en una actividad dirigida a lograr la consonancia. Esto conlleva hacer cambios, ya sea en la expectativa, ya sea en lo que explica que la disonancia haya ocurrido (procurando que un evento similar no se vuelva a repetir). En este sentido, tanto Johan Galtung como Katarzyna Paprzycka, definen la distinción entre expectativas normativas y cognitivas por medio de la noción de dirección de ajuste.[21] Más específicamente las expectativas cognitivas tienen una dirección de ajuste mente-a-mundo mientras que las normativas una mundo-a-mente. Esto quiere decir que si un evento defrauda una expectativa cognitiva, usualmente se abandona o redefine la expectativa, al considerársele falseada.[22] Por el contrario, cuando una expectativa normativa es defraudada, se buscan formas de cambiar al mundo. Galtung señala que en el caso de la

19 Diversas formas de entender la diferencia entre expectativas normativas y cognitivas se encuentran en Coleman 2010: 283–285; Ferrajoli 1997: 245; Galtung 1959: 215–218; Jakobs 2006: 125–130; Mellema 1998; Paprzycka 1999; Wallace 1994: 20–21.

20 Agradezco los comentarios de Diego Papayannis, Matias Parmigiani y un(a) evalaudor(a) anónimo(a) que me impulsaron a realizar esta aclaración.

21 Paprzycka 1999: 632; Galtung 1959: 215–218.

22 En este sentido, algunos hablan de que en estos casos se está ante predicciones. Como se ha señalado, al tener una expectativa se demanda algo al mundo y se busca una explicación ante su defraudación, lo que no sucede al predecir. De todas formas las distinciones entre las diversas actitudes que acá se han presentado están lejos de ser tajantes y en estos casos pueden ser particularmente difíciles de trazar.

frustración de expectativas normativas formadas ante otras personas, se toman medidas de control social o simplemente se ignora a quien se atribuye el evento que genera la disonancia, todo ello con el fin de evitar futuras disonancias.

Günther Jakobs, en su perspectiva sobre el derecho penal señala que las expectativas normativas se reafirman por medio de sanciones, resaltando la función expresiva de estas últimas.[23] Según esta interpretación con las sanciones no se busca (no siempre, al menos) cambiar al mundo, más bien se busca reafirmar una expectativa ante él.

Mellema y Galtung llaman la atención de que todo el rango de expectativas fluctúa entre ambos tipos de reacciones y es muy común que ambos tipos de reacciones sean adecuados en distintas medidas. Tanto en nuestra interacción con otros, como con el entorno natural, estamos dispuestos tanto a intervenir con distintos grados de intensidad para evitar disonancias intolerables, así como a modificar con distintos grados de intensidad nuestras expectativas ante lo que sucederá. La distinción no es dicotómica, sino gradual.

3.2 Expectativas reguladas

Otro criterio que permite entender las diferencias entre expectativas es su origen. Este influye en la legitimidad de las expectativas, en el tipo de evaluación que está en juego y en la resistencia que presentan las expectativas ante su defraudación. Las expectativas se pueden formar por la observación personal de ciertas regularidades, por lo que nuestros padres nos dicen, lo que vemos en televisión, lo que aprendemos en la calle, lo que nos enseñan en la escuela, por lo que dicen las leyes y lo que el conocimiento científico señala como establecido, entre muchas otras cosas. El origen de la expectativa, junto con las razones que pueden apoyar su adopción, permite identificar la evaluación que se realiza de un evento cuando se utilizan como estándar (e.g. moral /inmoral; legal/ilegal, etc.).

Considerando esto, hay un grupo de expectativas al que Gregory Mellema identifica como *expectativas reguladas*.[24] Se trata de aquellas que se forman dentro de sistemas de reglas que están más allá de las relaciones interpersonales espontáneas y que, generalmente, son creadas por órganos especializados en ello. Mellema señala que es característico de este tipo de expectativas que el lenguaje prescriptivo es apropiado para expresarlas. A su vez, en caso de defraudación,

23 *Vide.* Jakobs 1997: 10–11. En un sentido similar Paprzycka vincula a las expectativas normativas directamente con sanciones. A diferencia de estos autores, me parece plausible señalar que la sanción puede estar vinculada a diversos tipos de expectativas, no solo a expectativas normativas. Por otra parte, a diferencia de Jakobs, el objetivo explicativo de este trabajo es más amplio y distingue entre el fin de la pena (en el caso de Jakobs, afirmar la identidad de la sociedad) y su existencia como reacción en un juicio de atribución de responsabilidad.

24 Mellema 2004: 4–6.

la sanción se entiende como reacción adecuada. Casos de estas expectativas son las expectativas formadas por las regulaciones de estatutos de clubes deportivos, de instituciones religiosas o códigos jurídicos.

Si se consideran las tres características propias de toda expectativa, en el caso de las expectativas reguladas, su legitimidad usualmente se debe a la legitimidad de las autoridades que las dictan y/o a la aceptación de ellas que se puede imputar a quienes se aplican las expectativas (i.e. de quienes se espera algo). Esto, a su vez, supone que se pueden realizar demandas que muchas veces se alejan de la razonabilidad (e.g. esperar que los ciudadanos respeten una determinada ley aunque esta no tenga mucho sentido o su seguimiento tenga resultados inmorales)[25] o se contradigan con lo que usualmente ocurre (e.g. aunque sea común que un barrio determinado ocurran asaltos, un individuo puede esperar no ser asaltado).[26] A su vez, dependiendo de la autoridad presente en su formulación, es posible identificar el tipo de evaluación pertinente relativo al contenido de la expectativa (e.g. legal e ilegal en el caso de instituciones jurídicas). Por último, en este tipo de expectativas la forma de explicación común del evento que la defrauda es la de la atribución a una persona (i.e. se explica el evento atribuyéndoselo a alguien), aunque se pueden encontrar otro tipo de explicaciones. Esta forma en que las tres características se manifiestan no es la única. Un análisis similar se puede hacer de las otras expectativas a las que se ha hecho referencia.

Las expectativas son centrales para poder actuar e interactuar con otras personas y con el entorno natural y cultural más amplio. Ellas son una de las formas más comunes de normalizar la realidad, permitiendo orientar la conducta.[27] Con esto no se quiere decir que todas las personas sean conscientes de todas las expectativas, pero de una u otra manera, se pueden hacer explicitas.

3.3 Expectativas, actitudes reactivas y responsabilidad

En los juicios de atribución de responsabilidad, se busca al responsable *por* un evento que llama nuestra atención, con el fin de hacerle responder por ello. Como señala John Gardner: "son responsables quienes son individuali-

25 Un mismo evento puede ser evaluado por diversas expectativas, así, una acción puede ser considerada inmoral, pero legal o viceversa.

26 Las expectativas reguladas (y algunas normativas no reguladas) pueden tenerse *a pesar* del conocimiento con que se cuente sobre el mundo. Por ejemplo, a pesar de que Antonio sea un mentiroso (i.e. sepamos que usualmente miente cuando se le pregunta algo), se puede generar ante él la expectativa regulada (o normativa no regulada) de que no nos mentirá y actuar conforme a ello, basándose en disposiciones de una institución que prohíban mentir o en los principios morales que se puedan aducir al respecto.

27 *Vide.* Jakobs 2006: 127; Kelsen 2009: 74.

zados para cargar con las consecuencias normativas adversas de las acciones incorrectas".[28]

En este contexto, las expectativas, como estándares normativos, determinan la existencia de incorrecciones. Esto es lo que se tiene en mente cuando se dice que la frustración de una expectativa está presente en todo proceso de atribución de responsabilidad. De este modo, cuando una persona responsabiliza a otra, lo hace sobre la apreciación de que una expectativa ha sido defraudada y que dicha defraudación se explica atribuyendo el evento a quien se responsabiliza.

Esto se condice con que la frustración de una expectativa puede estar vinculada a la adopción de una actitud reactiva.[29] Las actitudes reactivas, como el resentimiento y la indignación, son detonadas por el acaecimiento de un evento y se dirigen a una persona, específicamente, a quien se atribuye dicho evento.

Como señala Jay Wallace, dentro de las prácticas de atribución de responsabilidad, el evento que llama la atención y por el cual se reacciona es uno que se vincula a una expectativa.[30] De este modo, las expectativas funcionan como estándares para identificar los eventos relevantes y también para identificar el tipo de evaluación en juego.[31] Las personas son responsables *por* algo que acaece, y esto es reconocible por medio de expectativas.

En consecuencia, en las prácticas de atribución de responsabilidad, una actitud reactiva es detonada por un evento que defrauda una expectativa. La frustración de una expectativa, junto con una explicación de dicho incumplimiento, puede resultar en atribuir un evento a una persona y las actitudes que sea legítimo adoptar por dicha frustración y/o atribución, generan precisamente el

28 Gardner 2012: 183. En este trabajo Gardner comenta la propuesta de Herbert Hart respecto de las variedades de usos de expresiones como "ser responsable" y en el pasaje citado hace referencia particularmente al sentido de responsabilidad como sujeción (en inglés *responsbility-liability*). *Vide.* Hart, 1967.

29 Algunos señalan una relación más fuerte entre defraudación de expectativas y reacciones. Definen a las expectativas normativas como aquellas cuya frustración conllevan una actitud reactiva (Wallace 1994) o una sanción (Papryzcka 1999). La forma en que acá se realiza la distinción no supone dicha conexión fuerte.

30 Wallace señala: "Reactive attitudes as a class are distinguished by their connection with expectations, so that any particular state of reactive emotion must be explained by the belief that some expectation has been breached. It is the explanatory role of such beliefs about the violation of an expectation that is the defining characteristic of the states of reactive emotion as a class, and that provides them with their distinctive propositional objects; beliefs of this sort will therefore always be present when one is in one of the reactive states" Wallace 1994: 33. El punto también es resaltado por Joel Feinberg (1970a) en su tratamiento de lo que denomina *responsibe attitudes*.

31 Al respecto señala Stephen Darwall, desde su perspeciva de segunda persona: "Reactive attitudes thus concern themselves not with a person's overall agency, but specifically with his conduct with respect to claims or demands that other persons have standing to make of him." Darwall 2006: 80.

permiso para llamar a responder por dicho evento. De esta forma, si bien toda atribución de responsabilidad supone la defraudación de una expectativa, no toda defraudación de una expectativa supone la posibilidad de responsabilizar, pues no todo evento relevante en términos de la frustración de una expectativa es atribuible a una persona. Si la frustración de la expectativa no puede ser atribuida a una persona, entonces no tenemos a un responsable.

Además, la atribución de responsabilidad no siempre se basa en la defraudación de expectativas morales, ni de expectativas cuya frustración solo pueda ocurrir por medio de la realización de acciones. Por el contrario, una amplia gama de expectativas puede dar lugar a juicios de atribución de responsabilidad.[32] La conexión entre la defraudación y la persona a quien se atribuye puede ser diversa y llegarse a ella por medio de explicaciones causales, intencionales y mágicas, entre otras. Como hemos visto, las expectativas tienen distintos orígenes y encuentran apoyo en razones de distinto tipo. De hecho, un mismo evento puede relacionarse con distintos tipos de expectativas, siendo evaluados de forma diferente.[33]

Entonces, es recomendable asumir una noción amplia sobre las expectativas, que considere a todo aquello que es legítimo esperar y cuya defraudación nos incite a buscar una explicación. En principio, además, toda esta amplia

32 *Vide.* Williams 1995: 40. Considerar que solo las expectativas morales son relevantes para la responsabilidad, nos lleva a lo que John Goldberg, en el ámbito del derecho de daños, denomina la *falacia moralista.* En sus palabras: "The error in the supposition is its insistence on an unjustifiably rigid or narrow conception of what can count as a wrong. The ideas of committing a wrong, and being held responsive for a wrong, can vary with context without collapsing into vacuity. It is a fallacy – call it the *moralistic fallacy* – to suppose that the essence of wrongdoing is a strong form of culpability or blameworthiness. To fall prey to this fallacy is to treat all wrongdoing as a species of sin; as a transgression that leaves a stain on the wrongdoer's soul and warrants strong condemnation." Goldberg 2015.
Esta observación tiene que ver precisamente con la posibilidad de extender la visión *strawsoniana* al ámbito jurídico. Como se vio en la nota 2, Strawson está centrado en la expectativa de que otros manifiesten buena voluntad hacia nosotros, la cual es una expectativa moral.

33 Esto puede traer como consecuencia que, a partir de determinada expectativa (y de los compromisos que se asumen al identificar su origen), un mismo evento puede ser evaluado positiva y negativamente desde perspectivas diversas. En este sentido, en un proceso de atribución de responsabilidad pueden ser debatidos los principios adoptados (implícita o explícitamente) por quien responsabiliza, así como la relación entre el origen de la expectativa y la forma en que se evalúa el evento a partir de ella.
Otra consecuencia es que un evento puede defraudar una expectativa, mientras que satisface otra. Pensemos en el ejemplo de orden insincera [*insincere commands*] dado por Hart 1982: 247, donde un sargento sádico que considera a uno de sus reclutas como incompetente, le ordena realizar acciones que es muy probable que el recluta olvide o no pueda hacer, por el solo hecho de poder infligirle un castigo por el incumplimiento de una orden. En este caso, el sargento basándose en el conocimiento de las capacidades del recluta puede esperar que este no cumpa con la orden, pero también, dentro del contexto jerárquico en el que se encuentran, puede esperar que cumpla con lo ordenado. Si el recluta olvida o no hace lo ordenado una expectativa del sargento se ve satisfecha y la otra insatisfecha.

gama puede estar vinculada a las prácticas de atribución de responsabilidad. En palabras de Joel Feinberg: 'El punto es este: ordinariamente no planteamos la cuestión de la responsabilidad por algo a no ser que ese algo de alguna manera despierte nuestro interés'.[34]

4 CONSIDERACIONES FINALES: EXPECTATIVAS, REGLAS DE COMPORTAMIENTO Y OBLIGACIONES

Se ha señalado que las expectativas son estándares evaluativos y que, en consecuencia, en un sentido básico toda expectativa es normativa (i.e. no hay expectativas no-normativas), más allá de la clasificación entre expectativas normativas y cognitivas que se pueda hacer. A su vez, el quebrantamiento de dichos estándares detonaría las actitudes reactivas, justificando la búsqueda de un responsable. Para terminar este trabajo quisiera revisar una pregunta que parece legítima en este contexto, ¿Por qué no hablar simplemente de obligaciones o de reglas de comportamiento en vez de expectativas?[35]

En la dogmática penal un rol similar al que en la sección anterior se atribuyó a las expectativas, lo ejercen las reglas de comportamiento. Se les entiende como 'las reglas con arreglo a las cuáles algo es juzgado como correcto e incorrecto, como bueno o malo, tienen carácter directivo (prescriptivo) o evaluativo (axiológico)'.[36] Estas reglas van dirigidas a los ciudadanos (i.e. las personas de quienes se exigen ciertos comportamientos) y tienen la estructura de un estándar categórico. El tipo penal suele ser la forma en que se manifiestan.

Siguiendo lo señalado en las páginas precedentes, las reglas de comportamiento pueden ser vistas como expectativas reguladas.[37] De hecho, las expectativas cumplen las funciones que Hruschka atribuye a las reglas de comportamiento. Para este pensador, las reglas de comportamiento tienen, primero, una función de *configuración,* siendo su cometido 'influir y conformar la vida'[38] de las personas. Esto lo hacen por medio de indicarles qué deben o no deben hacer o qué les está permitido hacer y/o dejar de hacer (i.e. qué se espera de ellas y que pueden esperar ellas de los demás). La otra función es de *baremo de medición*,

34 Feinberg 1970b: 130–131. En este mismo sentido, Darwall 2006: 80–82 y Mackie 1985: 29–30.

35 Han llamado mi atención sobre este punto Claudio Michelon y Maribel Narváez. Además, esta parece ser la propuesta de Jules Coleman (2010: 285), aunque creo que puede entenderse que este autor solo refiere a expectativas reguladas, lo que no entraría en conflicto con lo acá señalado, como se verá.

36 Kindhäuser 2009: 500. Cabe recordar que para Kelsen esto no es indispensable. *Vide.* Kelsen 2009: 60; 1979: 127–128.

37 De hecho, que la expectativa sea regulada, es exigido por el principio de legalidad en el ámbito penal.

38 Hruschka 2005: 28.

dirigiéndose al juzgador, 'el cual valora el hecho *"ex post facto"* en la medida dada por ellas'.[39] Para Hruschka, ambas son dos caras de una misma moneda.

Considerando lo dicho en los párrafos anteriores, hasta cierto punto, la distinción entre reglas de comportamiento y expectativas es puramente terminológica. Pero hay razones que pueden inclinarnos a hablar de expectativas antes que de reglas de comportamiento en el contexto de las prácticas de atribución de responsabilidad. Una de las razones concierne al alcance de esta propuesta, que busca explicar los estándares de comportamiento que se presentan no solo en el derecho penal, sino también en otras áreas del derecho y la moral. El ámbito de las expectativas es más amplio que el de las reglas de comportamiento, al menos en la forma en que se las entiende por los pensadores citados.[40]

A ello Mellema agrega que el ámbito de las expectativas morales es más amplio incluso que el de las obligaciones morales, y la defraudación de cualquiera de estas expectativas, en ciertos contextos, puede derivar en un proceso de atribución de responsabilidad. Un par de ejemplos para ilustrar esta idea.[41] Ante una larga fila esperando por una mesa en un restorán, se puede legítimamente tener una expectativa de que quienes hayan terminado de comer se levanten y dejen el lugar a otros dentro de un tiempo razonable, así como es de esperar que alguien que se haya comprometido a hacer una carta de recomendación diga solo cosas positivas sobre la persona que recomienda. A pesar de tener expectativas legítimas en ambos casos, no se puede decir que los que están sentados en la mesa, ni que quien escribe la recomendación estén obligados a hacer lo que se espera que hagan. Mellema señala que este tipo de expectativas, no equiparables a obligaciones, se pueden reconocer porque ante ellas, la reacción (en términos de sanción) correcta suele ser menos intensa. Así, por ejemplo, en vez de expresarse reproches, se expresa desilusión. Pero una reacción menos intensa, no quiere decir que no se responsabilice a quién se adscribe la defraudación de la expectativa.

El punto es que lo que se demanda en términos de expectativas es más amplio que lo que se puede reconocer como las obligaciones morales (o jurídicas) de alguien. En este sentido, no toda expectativa que genera responsabilidad es una obligación.[42]

---

39 Hruschka 2005: 28.

40 Así, por ejemplo, las expectativas pueden referir a eventos que no necesariamente supongan de forma directa la realización de una acción como sucede en algunos casos de responsabilidad objetiva o colectiva (*vide.int.al*. Cane 2002: cap. 5), cuestión que excede los supuestos de las reglas de comportamiento. Sobre esto se dirá algo más en los párrafos siguientes.

41 Un tratamiento detallado de esos y otros ejemplos en Mellema 2004: cap. 9.

42 Otra razón para hablar de expectativas puede ser la naturalidad con que se dice que una persona *tiene* expectativas (para referir a quien responsabiliza), no se aplica al caso de las reglas, i.e. no se dice "El tiene una regla".

Al hablar de expectativas se tiene en cuenta una normatividad más débil de la que se tiene en cuenta al hablar de reglas de comportamiento y obligaciones. Se puede ser responsable por cuestiones sobre las cuales no tenemos un deber o, al menos, vale dejar abierta tal oportunidad.[43] La diferencia es, sin duda, gradual y si el lector quiere entender reglas de comportamiento y obligaciones morales en un sentido débil, la diferencia entre estas y expectativas se vuelve imperceptible.

Para terminar, otro camino para argumentar se puede considerar, teniendo en cuenta la diferencia que establece Kelsen entre tener una obligación y ser responsable. Para este autor, las obligaciones determinan la existencia de ilícitos y, solo puede realizar un ilícito aquella persona sobre la que recae una obligación. Por otra parte, es responsable la persona sobre la que recae la sanción. Si bien la sanción está conectada al ilícito por medio del juicio de imputación, la persona responsable y la persona obligada no tienen que coincidir. De hecho, precisamente esta distinción permite explicar los casos de responsabilidad vicaria en los que es responsable una persona distinta a la que comete un ilícito.[44] De este modo, Kelsen señala que

> Existe la obligación de conducirse de una manera determinada cuando la conducta opuesta es la condición de una sanción /…/ Por el contrario un individuo es responsable de una conducta determinada (la suya o la de otro) cuando, en caso de conducta contraria, se dirige contra él una sanción. La responsabilidad puede, pues, relacionarse con la conducta de otro, en tanto que la obligación siempre tiene por objeto la conducta de la persona obligada.[45]

No tener presente la distinción entre obligación y responsabilidad puede explicar la exigencia de algunos autores de que siempre debe haber una acción para que haya responsabilidad. Por el contrario, muchas veces se responsabiliza a personas por sus relaciones con objetos y personas, o solo considerando relaciones causales que lo vinculan con el evento en cuestión, con independencia de sus acciones.

Entonces es plausible afirmar que apelar a la defraudación de expectativa como punto de partida de los juicios de atribución de responsabilidad tiene un mayor poder explicativo que apelar al incumplimiento de una obligación o regla de comportamiento. Se puede ser responsable a pesar de no haber incumplido ningún deber con las propias acciones, como sucede en casos de responsabilidad objetiva. En estos casos, las expectativas relevantes no refieren a acciones de individuos sino que a ciertos hechos que se consideran lesivos o peligrosos, e.g. el nivel de contaminación del medioambiente.

---

43 Esto incluso abre la puerta a la posibilidad de traducir reglas de comportamiento y obligaciones en términos de expectativas. Esta parece ser la posición de Ferrajoli 1997: 240–247.

44 Kelsen 1979: 129–133.

45 Kelsen 2009: 78.

Entender a las expectativas como estándares que pueden ser adoptados por los miembros de una comunidad para la evaluación de determinados eventos y que permiten a dichos miembros buscar una explicación de esos eventos, permite entender su vinculación con la responsabilidad, pues precisamente las personas son responsabilizadas por la ocurrencia de una incorrección, la cual no tiene que estar directamente vinculada con el quebrantamiento de una obligación. Además, la búsqueda de una explicación permite abrir la puerta a la realización de una adscripción del evento que defrauda la expectativa a una persona, sea o no sea quien realiza una conducta ilícita.[46] Sobre esa persona se dirigirán las actitudes reactivas de quien responsabiliza.

En un proceso de atribución de responsabilidad, antes de discutir excusas y justificaciones, se puede cuestionar si quien responsabiliza está justificado en tener una determinada expectativa o solo tenía una ilusión; además, considerando el contexto, se puede cuestionar el tipo de evaluación que se hace a partir de dicha expectativa (e.g. legal /ilegal; moral /inmoral); así como si la expectativa adoptada es adecuada (e.g. muchas veces expectativas provenientes de normas jurídicas no nos autorizan para responsabilizar a alguien por su defraudación en contextos extra-jurídicos). También, se puede conversar respecto del evento, cuáles son sus características relevantes (e.g. cómo se le describe) o si ocurrió o no bajo la descripción relevante en términos de la expectativa. Además, se puede poner en duda si el evento realmente tiene una relación suficiente (i.e. de disonancia) con la expectativa y, de existir dicha relación, cómo debe ser evaluado, y así sucesivamente. Ante una acusación, siempre se puede decir "¿Qué esperabas que ocurriera?".

– ***Agradecimientos.*** – Agradezco a Sebastián Agüero, Luis Duarte d'Almeida, Lucas Miotto, José Juan Moreso, Nicola Muffato, Maribel Narvaéz Mora, Juan Ormeño, Diego Papayannis, Matías Parmigiani, Lorena Ramírez, Pablo Rapetti, Jorge Sendra, Javiera Sepúlveda, Camila Spoerer e Ilsse Torres por los fructíferos comentarios y conversaciones sobre los temas acá tratados. También a todos quienes participaron de la discusión en torno a estas ideas en Girona, Edinburgh y Barcelona. Por último quisiera agradecer los agudos y útiles comentarios de dos evaluadores(as) anónimos(as) de Revus.

46 Se puede adscribir un evento a una persona (i.e. cargarlo a su cuenta. *Vide,* Feinberg 1970b), sin que dicha adscripción resulte en una adscripción de responsabilidad. De esta forma, se puede distinguir entre adscribir eventos y adscribir responsabilidad. Esto no supone negar que toda vez que se adscribe responsabilidad se adscribe un evento, pues el evento es aquello *por* lo que se responsabiliza a alguien (más específicamente, se adscribe el evento que defrauda una expectativa), solo señalar que la sola adscripción de un evento a alguien no supone responsabilizarle.

Bibliografía

Gertrude E.M. ANSCOMBE, 1963: *Intention*. 2ª ed. Cambridge (Mass.) & London: Harvard University Press.

Robert BRANDOM, 2002: *La articulación de razones*. Madrid: Siglo XXI de España editores.

Jules COLEMAN, 2010: *Riesgos y Daños*. Trad. castellana de Diego Papayannis. Madrid: Marcial Pons.

Donald DAVIDSON. 2001: Rational Animals. *Subjective, Intersubjective, Objective*. New York: Oxford University Press. 95–105.

Stephen DARWALL, 2006: *The Second-Person Standpoint: Morality, Respect, and Accountability*. Cambridge (Mass.): Harvard University Press.

Joel FEINBERG. 1970: Supererogation and Rules. *Doing & Deserving*. Princeton, New Jersey: Princeton University Press. 3–24.

——, 1970a: Justice and Personal Desert. *Doing & Deserving*. Princeton, New Jersey: Princeton University Press. 55–94.

——, 1970b: Action and Responsibility. *Doing & Deserving*. Princeton, New Jersey: Princeton University Press. 119–151.

Luigi FERRAJOLI, 1997: Expectativas y garantías. Primeras tesis de una teoría axiomatizada del derecho. *Revista DOXA, Cuadernos de Filosofía del Derecho* 20 (1997). 235–278.

John FISCHER & Mark RAVIZZA (Eds.), 1993: *Perspectives on Moral Responsibility*. Ithaca: Cornell University Press.

Johan GALTUNG, 1959: Expectations and interaction Processes. *Inquiry: An interdisciplinary Journal of Philosophy* 2 (1959) 1–4. 213–234.

John GARDNER, 2012: Feinberg y Hart sobre la Responsabilidad. *El legado de H.L.A. Hart. Filosofía jurídica, política y moral*. Comp. M. Kramer, C. Grant, B. Colburn & A. Hatzistavrou. Madrid: Marcial Pons. 169–193.

John GOLDBERG, 2015: Inexcusable Wrongs. *California Law Review* 103 (2015) 3. 467–512.

Peter HACKER, 2000: *Wittgenstein Mind and Will*. Oxford: Blackwell.

H.L.A. HART, 1967: Varieties of responsibility. *Law Quarterly Review* 83 (1967). 346–364.

——, 1982: Commands and Authoritative Reasons. *Essays on Bentham*. Oxford: Clarendon Press. 243–268.

Joachim HRUSCHKA, 2005: Reglas de comportamiento y reglas de imputación. *Imputación y derecho penal. Estudios sobre la teoría de la imputación*. Navarra: Aranzadi. 27–39.

Gunther JAKOBS, 1997: *Derecho Penal parte general*. Madrid: Marcial Pons

——, 2006: Culpabilidad y prevención. *Dogmática penal. Estudios compilados*. 2ª ed. México/ Argentina: Porrúa.119–153.

Hans KELSEN, 1979: *Teoría pura del Derecho*. 2ª ed. Trad. castellana de Roberto Vernengo. México: Porrúa.

——, 2009: *Teoría Pura del derecho*. Buenos Aires: Editorial Universitaria de Buenos Aires.

Urs KINDHÄUSER, 2009: La lógica de la construcción del delito. *Revista de Análisis Especializado de Jurisprudencia* 14 (2009). Trad. castellana de Juan Pablo Mañalich. 499–509.

John MACKIE, 1985: Responsibility and Language. *Persons and Values. Selected Papers II*. Oxford: Clarendon Press. 28–45.

Gregory MELLEMA, 1998: Moral Expectation. *The Journal of Value Inquiry* 32 (1998). 479–488.

——, 2004: *The Expectations of Morality*. Amsterdam: Rodopi.

Michael McKENNA, 2012: *Conversation and Responsbility*. New York: Oxford University Press.

Maribel NARVÁEZ MORA, 2006: Las Expresiones de *lege lata* en tanto que creencias ajustadas a derecho. *Observar la ley. Ensayos sobre metodología de la investigación*. Comp. Christian Courtis. Madrid: Trotta. 231–258.

Katarzyna PAPRZYCKA, 1999: Normative Expectations, Intentions, and Beliefs. *Southern Journal of Philosophy* 37 (1999) 4. 629–652.

Michael SMITH, 1987: Humean Theory of Motivation. *Mind* 96 (1987). 36–61.

——, 1994: *The Moral Problem*. Oxford: Blackwell.

Peter STRAWSON, 2008: Freedom and Resentment. *Freeedom and Resentment and others Essays*. Oxon: Routledge. 1–28.

R. Jay WALLACE, 1994: *Responsibility and Moral Sentiments*. Cambridge & London: Harvard University Press.

Bernard WILLIAMS, 1995: Internal reasons and the obscurity of blame. *Making sense of humanity*. Cambridge: Cambridge University Press. 35–45.

Ludwig WITTGENSTEIN, 1999: *Investigaciones filosóficas*. 2ª ed. Trad. castellana de Alfonso García Suarez & Ulises Moulines. Barcelona: Altaya.

Sebastián Figueroa Rubio*

Expectations and Attribution of Responsibility

Under the hypothesis that every attribution of responsibility rests on the fact that an expectation has been breached, the author proposes to understand expectations as standards adopted by a community to evaluate specific events and allow the members of the community to search for an explanation of the events which breach expectations. After presenting this way of understanding expectations, their relationship with responsibility is analyzed, having in mind the mentioned hypothesis. To close the paper, the relationship between responsibility and expectations is explored as an alternative to the idea that every attribution of responsibility supposes the breach of an obligation, whether moral or legal, by who is held responsible.

Key words: expectations, responsibility, reactive attitudes, obligations

1 INTRODUCTION

This article proposes a way of viewing expectations and their role on processes of attribution of responsibility. Before I begin, some of the assumptions of the underlying perspective should be mentioned. First, a *Strawsonian* vision of responsibility is assumed, based on the ideas presented by Peter Strawson in his essay *Freedom and Resentment.*[1] At the same time, in this work I differ from common interpretations of the essay, centering attention on places usually not considered, in particular, the significance of the essay is explored in the legal (not only moral) domain and the importance of expectations (not only reactive attitudes) is discussed in order to understand responsibility.

* figueroa.sebastian@gmail.com | University of Chile, University Diego Portales & Cátedra de Cultura Jurídica of the University of Girona (Spain).

1 Strawson 2008. Michael McKenna (2012: 3–4, 31) says that a *Strawsonian* approach embraces three ideas: (a) Responsibility is essentially interpersonal; (b) There are some elements of our social life which are constitutive of responsibility (e.g. reactive attitudes) and; (c) Considerations about the nature of "holding responsible" are more important than those about the nature of "being responsible". In order to understand responsibility, we have to start from the judgments and actions of the person who holds another responsible rather than from the characteristics of the one who is responsible. This work is centered on the second postulate, specifically, on expectations as an element of social life.

On the other hand, the hypothesis that every attribution of responsibility process starts with an expectation is embraced,[2] specifically, considering a breached expectation, and that the event that breached the expectation is *for* what someone is responsible. In this context, one may always ask the one attributing responsibility: "What were you expecting to happen?" with the intention that she makes explicit what she is holding someone responsible for.

With these assumptions, this work will show a way of understanding expectations in order to then, study how they are related to responsibility. Finally, this relationship is compared to the model that supposes that every process of attribution of responsibility implies the violation of an obligation from who is responsible.

2 EXPECTATIONS

Expectations are linked to the idea of expecting in several ways and here we are interested in two of them. First, when one talk about the expectations present in a community, one refers to what is expected from us, as well as what one can expect from others. They are presented as standards of what should happen. Second, people may adopt these standards and, according to what they say or do, this adoption is attributed to them. This attribution is expressed by saying that persons *have* expectations and having an expectation means to expect *something*. The reference to that something places expectations in the group of the propositional attitudes, with desires and beliefs.

Therefore, expectations are related to two domains: the generation of standards (i.e. what is expected from the world, others and ourselves) and the adoption of those standards by persons (i.e. to say that someone *has* or *can have* an expectation). In this paper I understand expectations as standards which can be adopted (in a normative sense) by the members of a community in order to evaluate events and that allows those members to ask for an explanation of those events.

Over the next pages this approach is explained. In order to do so I take into account three of its characteristics: demands are expressed through expectations; they are reasonable or legitimate demands and; it is rational to ask for an explanation every time an event generates a dissonance with the standard that forms the expectation. These three characteristics will help us to distinguish expectations from other propositional attitudes like hopes, illusions and

2 Strawson points out that: "The personal reactive attitudes rest on, and reflect, an expectation of, and demand for, the manifestation of a certain degree of goodwill or regard on the part of other human beings towards ourselves; or at least on the expectation of, and demand for, an absence of the manifestation of active ill will or indifferent disregard". Strawson 2008: 15.

predictions,[3] and to show the importance of expectations in understanding practices of attribution of responsibility.

2.1 Expectations, Standards and Demands

We deal with others expecting from them behaviors that have specific meanings. i.e. we face each other using standards which help us to identify and evaluate our actions. This is why expectations are usually defined as evaluative standards.[4]

When we think of what is expected from us or what we expect from others as evaluative standards, we can understand that certain things are required from us or that there are things that we require from others in diverse degrees of intensity. Accordingly, expectations are demands, demands to others and to the world.

Expectations may be more or less abstract. For example, if Juan expects Antonio's arrival, the request could be understood as a general demand to the world (e.g. Juan demands the world that the cosmos brings Antonio in some way) or as a concrete request to a person to act in a certain way (e.g. Juan demands Antonio to come).

Expectations, as demands, are different from predictions yet both have a prospective character. Talking about both we can correctly say that they are formed before the relevant events occur, i.e. the predicted, expected or unexpected event. This makes it possible to compare the standard of the expectation with the event, and to make the dissonance or consonance between them explicit. But in predicting we do not express a demand, if Juan predicts Antonio's arrival, he is not demanding it.[5]

Anyway, expectations cannot be reduced to desires. The fulfillment of an expectation does not suppose the satisfaction of a need or an interest. Sometimes we expect what we do not desire (e.g. Juan expects Antonio's arrival to a meeting which he does not want to have because they are committed to talk about

3 Propositional attitudes are not separated from each other. On the contrary, they act in sets where one implies the others (See Davidson 2001). Besides, the exact limits between different propositional attitudes are far from clear and cases which challenge those limits may always appear. Therefore, the distinctions between propositional attitudes presented in this work are not strict and definitive.
Finally, the discussion about whether all propositional attitudes are reducible to beliefs and desires is not treated here. See Smith 1994: 118–125.

4 See Galtung 1959: 214; Mellema 2004: 4.

5 There are two more ideas to consider. On the one hand, expectations are expressed using subjunctive mood (e.g. "I expect it to rain tomorrow"), while predictions the indicative mood (e.g. "I predict it will rain tomorrow"). On the other hand, we usually we require to make the predictions explicit before the relevant event occurs, but we do not require this in the case of expectations.

something he would rather not to talk about).[6] Commonly the standards which are part of interactions have validity independent of an individual's desires.

2.2 What is to be expected: Expectations, Legitimacy and Error

As expectations are standards which are part of a community, it is possible that a particular member of the community may adopt them correctly or incorrectly. Thus, someone can be *mistaken* about expecting something (i.e. she expects something, but she *cannot* expect it). The mistake can be the outcome of different things. For example, the lack of information possessed by the person, the wrong perception of the information (e.g. Juan's false belief that it is Tuesday on a Monday, can produce his expectation that Antonio arrives on a Monday because they had agreed to meet on Tuesday; also it can be the case that he expects Antonio to come because he believes Antonio promised to do it, but he really did not) or the result of a misunderstanding about the nature of her relationship with the person from whom she is expecting something (e.g. a boss who expects her employees to act as her friends). Here, the meaning of *can* is normative, and consists of the entitlement of individuals to make the demand, this is the reason why the demand can be assessed as legitimate or reasonable.

Having this in mind, an expectation can be distinguished by its legitimacy, and its illegitimacy may be due to various reasons. The reasons are context dependent. As Wittgenstein pointed out: "An expectation is embedded in a situation, from which it arises. The expectation of an explosion may, for example, arise from a situation in which an explosion *is to be expected.*"[7] Thus, to expect that my body will be attracted to the floor in a spaceship is not reasonable. We can distinguish expectations from hopes and illusions by their legitimacy or reasonability.[8]

There is another way in which an individual may be wrong about expectations: having a false idea about her own expectations. Since expectations are propositional attitudes, occasionally they may be opaque to individuals. A person who has an expectation (i.e. an expectation can be appropriately attributed to her) is not always aware of that.[9] In addition, sometimes individuals become

6 This issue is considered by Luigi Ferrajoli in the legal domain: "Las expectativas por otro lado, no tienen necesariamente por argumento prestaciones (omisivas u comisivas) ventajosas para sus titulares: son, en efecto, expectativas también la exposición a sanciones o a anulaciones". Ferrajoli 1997: 240.

7 Wittgenstein 2009: § 581. See also Mellema 1998: 479–481.

8 The distinction between expectations and hopes and illusions can be understood as one between kinds of expectations: legitimates (i.e. those we are entitled to adopt) and no-legitimates. Therefore, if we prefer, we can understand hopes and illusions as no-legitimate or unreasonable expectations.

9 See Smith 1987.

aware of what they expect after the relevant event happens or after a discussion about how to understand specific events that have attracted particular attention.

At first sight, the last affirmation in in conflict with the previously expressed one about the prospective character of expectations. But this conflict is apparent, expectations can be expressed in a *postdictive* (i.e. can be make explicit, after the relevant event occurs) and in a *predictive* way.[10] To justify the possibility of having an expectation previously to the event is different from being aware of it or to expressing it before the relevant events occur.

Therefore, there are two ways through which it is stated that a person is wrong regarding expectations. First, it is assumed that the determination of what *may be expected* in a context is done independently from the concrete beliefs of such individual. Gregory Mellema states that the existence of an expectation does not depend on its *possession* by the concrete individuals, but what is relevant is the legitimacy to adopt them. In the second case, the determination of the concrete expectations that a person has may be carried out independent of the perception that such a person has regarding her own expectations.[11] In the first case, attention is centered on expectation as a standard, in the second one, on expectation as a propositional attitude. In both cases determination of what might be expected or of what someone expects is carried out independently of the concrete beliefs of an individual regarding the situation, and assumes the possibility that they might err.

2.3 Unfulfillment of Expectations and the Search of Explanations

So far, we have proposed understanding expectations as standards that members of a community may adopt, in the sense that it is legitimate to adopt them under certain circumstances. At the same time, it has been pointed out that expectations present themselves as demands to the world and others. The third characteristic that will be pointed out here involves the relationship be-

10 Galtung 1959: 214–215. A person's awareness of an expectation that has been breached, as well as the specification of what expectation has been breached, does not have to occur at the same time in which the relevant event occurs. Both things can take place after a (posterior) personal or interpersonal reflection. Besides, it can be the case that a person expresses expectations and individualizes possible future events that breach them (e.g. Juan may say that he will meet Antonio and that he expectation will be breached if Antonio does not arrive after certain time). Here, the important thing is the possibility to make explicit the dissonance between the event and a legitimate demand. Then, the dissonance can be evaluated from the expectation.

11 See Mellema 1998: 480–481; 2004: chs. 2 & 3. Although in some places, he apparently confuses both kinds of error.

tween expectations and the events that unfulfill them:[12] when having legitimate requirements from the world and others, in the case that they are unfulfilled, searching for an explanation of what has happened is rational.

Johan Galtung notes that expectations, as standards, may be compared to various events. This comparison can have three different results: a consonance between event and expectation, a dissonance between them, or that the event is not consonant nor dissonant, but neutral. In the last case, the expectation is irrelevant as a standard to assess the event (e.g. the expectation of Juan arriving at certain time appears irrelevant, in principle, to asses that a child stole a candy three years before, in another country). On the other hand, the difference between the other two cases is gradual, that is, depending on the expectation. It can be more or less unfulfilled and more or less fulfilled, while also cases of complete consonance or dissonance may be found.[13]

As legitimate requirements, the search of an explanation is a rational reaction in the case of dissonance between an expectation and what has happened, (i.e. to ask oneself "Why did it happen?") and makes the pertinent inquiries.

It is possible to identify differences between propositional attitudes through a dispositional-normative model. In this model, *to be disposed to* (i.e. *to be willing to*) is characterised by commitments to a certain way of behaving faced with a specific situation that are attributed to a subject.[14] The relevant situation, usually, is precisely the occurrence of something opposed to the content of the propositional attitude and what establishes the type of propositional attitude is

12 Sometimes a person goes beyond the call of expectation 'by doing more than what is minimally required to satisfy or fulfil it' (Mellema 2004: 64). These cases are usually qualified as supererogation (See Feinberg 1970; Mellema 2004: 64–66). In these cases, as well as in cases of unfulfillment, there is a dissonance between the event and the standard, but the evaluation of the dissonance varies. The difference is not relevant enough to what is discussed in this article, so I will continue to talk about *unfulfilled* or *breached* expectations.

13 The dissonance (or consonance) between the event and the expectation may take place in a variety of forms, depending on the expectation in question. For example, if Antonio expects Juan to clean his bedroom, Juan may clean it in different ways, and may leave the bedroom more or less clean. On the other side, if Antonio expects Juan to replace a light bulb, he only can satisfy the expectation by replacing the electric bulb. See Mellema, 200: ch. 6).

14 Thus, concerning beliefs, Ludwig Wittgenstein writes: "Ask yourself: What does it mean to *believe* Goldbach's conjecture? What does this belief consists in? /…/ I should like to ask: how does the belief engage with this conjecture? Let us look and see what are the consequences of this belief, where it takes us. "It makes me search for a proof of the conjecture." – Very well; and now let us look and see what your searching really consist in! Then we shall know what believing the conjecture amounts to." (Wittgenstein 2009: § 578. More details in Wittgenstein, 2009: I §438–453, 465, 572–586; II: x. And in the next notes).

the response to that.[15] In this order of things, the search of an explanation is characteristic of expectations in the case of dissonance with an event.[16]

Applying these ideas to the mentioned example, if Juan is expecting Antonio to arrive at a certain time legitimately (e.g. Antonio promised him), a delay of Antonio allows Juan to ask himself: "Why hasn't Antonio arrived?" If the situation is considered, Juan had a standard of Antonio's behavior (e.g. that he would be present in certain place at certain time); by comparing that standard with a

15 On this see Narváez 2006; Smith 1987; 1994: ch. IV. This model does not define propositional attitudes as dispositional properties of the individuals, that's why it is identify as *dispositional-normative*.
Therefore, following Robert Brandom, we can think that theories about propositional attitudes offer accounts of when it is proper to *attribute* them (see Brandom 2000: 117–118). So, the quest is for the proper attribution of commitments, not for the properties of individuals. Thus, for example, Brandom points out about knowledge that: "In calling what someone has 'knowledge', one is doing three things: *attributing* a *commitment* that is capable of serving both as premise and as conclusion of inferences relating it to other commitments, *attributing entitlement* to that commitment, and *undertaking* that same commitment oneself. Doing this is adopting a complex, essentially *socially* articulated stance or position in the game of giving and asking for reasons", being a central issue in this game "the possibility of extracting information from the remarks of others" (Brandom 2000: 119–120). Moreover, when talking about assertion, he says: "Specifically *linguistic* practices are those in which some performances are accorded the significance of assertions or claimings — the undertaking of inferentially articulated (and so propositionally contentful) commitments.5 Mastering such linguistic practices is a matter of learning how to keep score on the inferentially articulated commitments and entitlements of various interlocutors, oneself included". (Brandom 2000: 164–165).

16 Having this in mind, we may distinguish expectations from beliefs, at least under the model that understands beliefs by the direction of fit metaphor. According to that model, facing a discrepancy between a belief and the events relevant to its satisfaction, the rational reaction is to abandon the belief.
The metaphor of the direction of fit was adopted by G.E.M Anscombe in her book *Intention* (Anscombe 1953) in order to distinguish between having an intention and observing it. She explains this through an example: a man goes shopping with a shopping list on his hand, and he is followed by a detective who records what he buys. After the shopping, if the list and what he actually buys do not agree, "then the mistake is not in the list, but in the man's performance /…/, whereas if the detective's record and what the man actually buys do not agree, then the mistake is in the record" (Anscombe 1953: § 32). From that, Maribel Narváez indicates that: "Conocemos nuestros propósitos sin observarlos y los manifestamos mediante acciones, que permiten laadscripción de los propósitos en cuestión: de ahí que tenga sentido una concepción disposicional acerca de deseos y creencias. Adscribir a un sujeto la intención de comprar *bacon* cuando trae *bacon* a casa en el cesto de la compra no se hace solo a partir de la base de lo que ha traído (podía haberlo comprado por error) sino que además se asume el contrafáctico "Si al llegar a casa el cesto no hubiera contenido *bacon* habría estado dispuesto a volver al supermercado a comprarlo", dado que atribuir la intención de comprar *bacon* apoya la verdad de este contrafáctico" (Narváez 2006: 245). Therefore, in the case of beliefs: "creer que p" se define como aquel estado o actitud que al adscribirse a un sujeto apoya el contrafáctico "si percibiese que *no p* abandonaría la creencia de que *p*". (Narváez 2006: 232 n.3). With this model, it is possible to attribute propositional attitudes to others and to explain our own attitudes, and this supposes the possibility of disagreement between both activities in every concrete case.

relevant event (e.g. that an hour after of what was established, Antonio has not arrived to the meeting place), it may be the case that the mentioned expectation has been unfulfilled (e.g. Antonio is not at the established place and time). This leads to the possibility of searching for an explanation (e.g. Juan may reflect in this manner: "Why hasn't Antonio arrived? Maybe he had an accident, maybe he didn't want to meet me, etc."),[17] as well as an evaluation (e.g. Antonio has broken his promise, and that is morally wrong). With regards to the latter, as will be seen, the type of evaluation chosen will depend on the origin of the expectation (in this example, it is judged from the moral expectation of keeping one's promises, assuming that it is morally wrong).[18] This is the entrance to a process of attribution of responsibility that may end in the manifestation of blaming from Juan, in the case of ascribing Antonio the unfulfillment of the expectation. This will be further discussed in the following section.

3 VARIETIES OF EXPECTATIONS AND RESPONSIBILITY

A great variety of expectations that people may adopt has been mentioned: to be attracted to the floor, for another person to keep her promise, for another person to act according the law, that people will act expressing good will, etc. Three characteristics that allow treating them all as expectations have also been mentioned: that they suppose a demand; that they are about legitimate requirements; and that, in case of dissonance with an event, an explanation can be sought.

Beyond these common characteristics, in this wide group, it is possible to make some distinctions. A classic distinction, although formulated in different ways, differentiates between cognitive and normative expectations.[19]

Before analyzing such a distinction, it must be considered that all the expectations mentioned above are normative, this is precisely manifested in the idea that they are legitimate demands that can be expressed as evaluative standards, and distinguishing them from predictions, illusions, and hopes, their normativ-

17 By saying that the unfulfillment of an expectation entitles us to search for an explanation, I am not asserting that *every* search for an explanation is justified by the unfulfillment of an expectation.

18 All this things can be discussed. For example, we can debate whether the break of the promise is immoral, also we can use another kind of expectation to evaluate the event (and the assessment can result in a positive evaluation of the event), etcetera. Besides, the person can be mistaken about his expectation, as we have seen previously.

19 Different ways of seeing the distinction between normative expectations and cognitive expectations can be found in Coleman 1992: 279–281; Ferrajoli 1997: 245; Galtung 1959: 215–218; Jakobs 2006: 125–130; Mellema 1998; Paprzycka 1999; Wallace 1994: 20–21.

ity has been highlighted. Normativity is a characteristic of them all, not of only a class of them and, viewed this way, there are no non-normative expectations. The label "normative" to classify them may lead to misunderstanding, but it is used in this work due to its widespread use, this is why in the following paragraphs the sense of referring to "normative expectations", as different from cognitive expectations, will be explained.[20]

3.1 Normative and Cognitive Expectations

Bearing in mind the previous observation, a distinction between expectations will be espoused based on the reactions adopted when facing the unfulfillment of an expectation that have become unbearable. These are different reactions from the search of an explanation, a common reaction to all expectations whether or not the unfulfillment is unbearable.

The fact that the dissonance becomes unbearable has as a consequence that people commit to an activity directed to achieve consonance. This leads to changes, either in the expectation, or in what explains that the dissonance occurred (ensuring that a similar event doesn't happen again). In this sense, both Johan Galtung and Katarzyna Paprzycka, define the distinction between normative and cognitive expectations by using the notion of direction of fit.[21] More specifically, cognitive expectations have a mind-to-world direction of fit while normative expectations a world-to-mind one. This means that if an event unfulfills a cognitive expectation, the expectation is usually abandoned or redefined, because it is considered false.[22] On the contrary, when a normative expectation is unfulfilled, ways of changing the world are looked for. Galtung points out that in the case of unfulfillment of normative expectations formed when facing other people, politics of social control are taken or simply the individual to whom the event that causes the dissonance has been attributed is ignored, all these actions have the goal of avoiding future dissonances.

Günther Jakobs, in his approach to Criminal Law, says that normative expectations are reaffirmed by punishment, emphasizing the expressive function of the latter.[23] According to this interpretation with punishment, people are not

20 This clarification is due to the comments of Diego Papayannis, Matias Parmigani, and an anonymous reviewer to whom I am very thankful .

21 Paprzycka 1999: 632; Galtung 1959: 215–218.

22 In this sense, some can say that we are dealing with predictions. As has been said, when we have an expectation, we make a demand to the world and we can search for an explanation in case of unfulfillment. We do not do that when we make a prediction. However, these distinctions are very difficult to settle and they are not definitive.

23 See Jakobs 1997: 10–11. In a similar way, Paprzycka links normative expectations directly with sanctions. In contrast, I think it is plausible to link sanctions with different kinds of expectations, not only with normative ones. On the other hand, in contrast with Jakobs, the explanatory scope of this work is wider than his, and I distinguish the justification of punish-

trying to change the world (at least, not always), but to reaffirm an expectation facing it.

Mellema and Galtung highlight that the whole range of expectation fluctuates between both types of reactions and that it is usual that both types of reaction are adequate in different measures. Both in our interaction with others, and with the natural surroundings, we are willing to intervene with different degrees of intensity in order to avoid unbearable dissonances, and/or in order to modify our expectations of what will happen. This is not a dichotomic distinction, but a gradual one.

3.2 Rule Expectations

Another criterion that helps us to understand the differences between expectations is their origins. The origin of an expectation affects its legitimacy, the type of evaluation at stake and the resistance that expectations present when facing their unfulfillment. Expectations may be formed by personal observation of certain regularities, by what our parents tell us, what we see on television, what we learn on the street, what we are taught in school, what the law says, and what scientific knowledge states as established, among many other things. The origin of an expectation, together with the reasons that support its adoption, allows the identification of the kind of evaluation carried out when expectations are used as standards (e.g. moral/immoral; legal/illegal, etc.).

Considering this, there is a group of expectations that Gregory Mellema identifies as *rule expectations*.[24] These are the ones that are created inside normative systems that are beyond spontaneous interpersonal relations and that are generally created by specialized authorities. Mellema points out that a characteristic of this type of expectations is that the language of obligation appears appropriate to express them. At the same time, in the case of unfulfillment, a punishment is considered a suitable reaction. Cases of such expectations are the ones formed by the rules of a club, religious institutions, or legal codes.

If the three characteristics of every expectation are considered, in the case of rule expectations, their legitimacy is usually due to the legitimacy of the authority that dictates them and/or to the possibility to impute their acceptance to the persons whom expectations are applied (i.e. from whom something is expected). This, also, assumes many times requirements are far from what can reasonably be carried out (e.g. to expect that citizens respect a legal norm even if it does not make sense or when following it may lead to immoral results),[25] or

ment (for Jakobs is to affirm the identity of society) from the existence of punishment as a reaction in a process of attribution of responsibility.

24 Mellema 2004: 4–6.

25 The same event can be assessed using different expectations. Thus, for example, an action can be considered immoral, but legal, and vice versa.

that are contrary to what usually happens (e.g. even though it is common that in a particular neighborhood assaults occur, an individual may expect not to be assaulted).[26] At the same time, depending on the authority who formulates the expectation, it is possible to identify the appropriate kind of evaluation linked to the content of the expectation (e.g. legal and illegal in the case of legal institutions). Finally, in this kind of expectations, the most common explanation of the event that unfulfills it is its attribution to a person (i.e. the event is explained by ascribing it to someone), although other explanations may be found. This way in which the three characteristics are manifested is not the only one. A similar analysis can be done of the other expectations that have been mentioned.

Expectations are central to act and interact with others and with the natural and cultural environment in general. They are one of the most common ways of normalizing reality, allowing us to orientate our conduct.[27] This does not mean that every person is aware of every expectation, but that, one way or another, they can be made explicit.

3.3 Expectations, Reactive Attitudes, and Responsibility

In responsibility processes, people look for the person responsible *for* an event that excites their interest, to make him respond for that. As John Gardner puts it: "Those who are responsible are those who are singled out to bear the adverse normative consequences of wrongful (or otherwise deficient) actions".[28]

In this context, expectations, as normative standards, settle the existence of wrongs. This is what we have in mind when we say that the dissonance between an expectation and an event is always present in responsibility processes. Therefore, when a person holds another responsible, she does it under the appreciation that an expectation has been breached and that the breach is explained by attributing the event to the person held responsible.

This is in consonance with the idea that the unfulfillment of an expectation may be linked to the adoption of a reactive attitude.[29] Reactive attitudes, such as resentment and indignation, are triggered by the occurrence of an event, and are adopted towards others, specifically to whom the event is attributed.

---

26 Rules expectations (and some normative expectations) may be adopted in spite of our knowledge about how the world is. For example, based on the rules of an institution (or in moral principles) we can expect that Antonio will not lie to us, although, we know he usually lies.

27 See Jakobs 2006: 127; Kelsen 2009: 74.

28 Gardner 2008: 132. In the quoted article, Gardner comments H.L.A Hart's proposal about the different uses of expressions as "responsible" and "responsibility" and in the quoted passage he is specifically talking about liability-responsibility. See Hart 1967.

29 To some authors there is a stronger connection between reactions and the unfulfillment of expectations. They define normative expectations as those which unfulfillment leads to a reactive attitude (Wallace 1994) or to a sanction (Papryzcka 1999). The way in which the distinction is understood in this article does not suppose this strong connection.

As Jay Wallace says, in responsibility processes, the triggering event of a reactive attitude is one related to an expectation.[30] In this way, expectations work as standards that help us to identify the relevant events and to identify the kind of evaluative judgments involved as well.[31] Persons are responsible *for* something that occurs, and this is recognizable by means of expectations.

In consequence, in responsibility practices, a reactive attitude is triggered by an event which unfulfilled an expectation. The unfulfillment of an expectation, in addition with an explanation of that unfullfilment, may result in the attribution of an event to a person and the attitudes which are appropriate to adopt for that unfulfillment and/or attribution, generates the entitlement to call them to respond for that event. Therefore, we can say that the dissonance between an expectation and an event is always present in responsibility processes. Nonetheless, not every dissonance results in holding someone responsible. Not every relevant event can be ascribed to a person. If the breach of an expectation cannot be attributed to someone, then we do not have someone responsible for it.

In addition, the attribution of responsibility is not always based on the unfulfillment of moral expectations, nor on expectations whose unfulfillment may only occur by performing an action. On the contrary, a broad range of expectations, can lead to processes of attribution of responsibility.[32] The connection between the unfulfillment and the person to whom it is attributed is diverse and can be obtained through causal, intentional, and magical explanations, among

30 Wallace points out that: "Reactive attitudes as a class are distinguished by their connection with expectations, so that any particular state of reactive emotion must be explained by the belief that some expectation has been breached. It is the explanatory role of such beliefs about the violation of an expectation that is the defining characteristic of the states of reactive emotion as a class, and that provides them with their distinctive propositional objects; beliefs of this sort will therefore always be present when one is in one of the reactive states" Wallace 1994: 33. The point is also expressed by Joel Feinberg (1970a) in what he calls *responsibe attitudes*.

31 About this, from his second person's perspective, Stephen Darwall says that: "Reactive attitudes thus concern themselves not with a person's overall agency, but specifically with his conduct with respect to claims or demands that other persons have standing to make of him." Darwall 2006: 80.

32 See Williams 1995: 40. To consider that only moral expectations are relevant to responsibility lead us to what John Goldberg, in tort law, calls the *moralistic fallacy.* In his words: "The error in the supposition is its insistence on an unjustifiably rigid or narrow conception of what can count as a wrong. The ideas of committing a wrong, and being held responsive for a wrong, can vary with context without collapsing into vacuity. It is a fallacy – call it the *moralistic fallacy* – to suppose that the essence of wrongdoing is a strong form of culpability or blameworthiness. To fall prey to this fallacy is to treat all wrongdoing as a species of sin; as a transgression that leaves a stain on the wrongdoer's soul and warrants strong condemnation." Goldberg 2015.
This point is important in order to see the possible consequences of a *strawsonian* account in the legal domain. As we can see in note 2, Strawson is thinking in one moral expectation (the expectation that other expresses goodwill towards us).

others. As has been pointed out, expectations have diverse origins and find support in different kinds of reasons. In fact, the same event can be related to different kinds of expectations, and be evaluated in different manners.[33]

Therefore, it is recommendable to assume a broad notion on expectations that considers everything that is legitimate to expect and whose unfulfillment encourages the search of an explanation. Also, in principle, this broad range can be related to practices of attribution of responsibility. In Joel Feinberg's words: "The point is this: we do not ordinarily raise the question of responsibility for something unless that something has somehow excited our interest".[34]

4 FINAL CONSIDERATIONS: EXPECTATIONS, CONDUCT RULES, AND OBLIGATIONS

It has been noted that expectations are evaluative standards and that, in consequence, in a basic sense, every expectation is normative (i.e. there are no non-normative expectations), beyond the classification of normative and cognitive expectations that may be carried out. At the same time, the breach of such standards would trigger reactive attitudes, justifying the search for a person that is responsible. To finish this work, I would like to examine what seems a legitimate question in this context, Why not simply talk of obligations or conduct rules instead of expectations?[35]

In criminal law doctrine, a similar role to the one which has been attributed to expectations in the section above, is carried out by general

33 Consequently, it is possible that a specific expectation (and the commitments adopted by identifying its origin) leads us to a disagreement about the evaluation of some event. In this sense, in a process of attribution of responsibility may be discussed the adopted principles by the one who is holding responsible another, and may be discussed the relationship between the origin of the expectation and the way in which the event is evaluated using the expectation.
Another consequence is that an event may breach an expectation, while satisfying another. For this, we can think on what Hart calls *insincere commands*. For example, "a sadistic sergeant-major, finding an incompetent and absent-minded recruit whom delighted in punishing, gave him command after command hoping, as was often the case, that the recruit would forget or fumble over what he was told to do and would thus provide the sergeant with the opportunity which he sought for inflicting punishment" (Hart 1982: 247). In the example, the sergeant, based on his knowledge about the capacities of the recruit, can expect that he will not comply the commands, but, at the same time, in the military context (the *army life* in Hart's words), he is entitled to expect that the recruit will fulfill the commands. So, if the recruit forgets the commands or does not comply the commands, one of the sergeant's expectations will be satisfied and the other will be breached.

34 Feinberg 1970b: 130–131. The same point in Darwall 2006: 80–82 and Mackie 1985: 29–30.

35 The discussion of this point is due to some comments from Claudio Michelon and Maribel Narváez. Indeed, this apparently is an idea defended by Jules Coleman (1992: 281), but I think he is referring only to rules expectations, which is compatible with what is proposed in this article, as we shall see.

conduct rules. They are understood as "the rules under which something is judged as right or wrong, good or bad, they have a directive (prescriptive) or evaluative (axiological) character".[36] This rules are addressed to citizens (i.e. people from whom certain conducts are expected) and they have the structure of a categorical standard. They are usually manifested as criminal offences.

Following what has been mentioned in the previous pages, conduct rules can be understood as rules expectations.[37] In fact, expectations fulfill the functions that Hruschka attributes to conduct rules. According to this author, conduct rules have, first, a *configuration* function, being its mission to influence on and to shape people lives.[38] This is done by indicating them what they must or must not do or what is allowed to be done and/or to stop doing (i.e. what is expected from them and what can they expect from others). The other is a *measurement scale* function, directed to the judge (in a broad sense) who evaluates the events *ex post facto*, using the measure given by the norms.[39] To Hruschka, both are two sides of the same coin.

Considering what has been said in the above paragraphs, to some extent the distinction between conduct rules and expectations is merely terminological. But there are reasons that can make us inclined to talk about expectations rather than conduct rules in the context of attribution of responsibility practices. One of those reasons concerns the scope of the approach defended in this work. My concern is with standards that are present not only in criminal law, but in other areas of law and morals as well. The domain of expectations is broader than that of conduct rules, at least in the way in which they are understood by the quoted authors.[40]

To this, Mellema adds that the domain of moral expectations is even broader than the one of moral obligations, and that the unfulfillment of any of these expectations, in certain contexts, can derive in a process of attribution of responsibility. A couple of examples to illustrate this idea can be useful.[41] At a long queue waiting for a table at a restaurant, one can legitimately have the expectation that people who have finished their meal and are aware of others, will stand up and give their place to others within a reasonable amount of time, so it

36 Kindhäuser 2009: 500. It is worthy to note that Kelsen's thinks that this is not indispensable. See Kelsen 2009: 60; 1967: 111–113.

37 In fact, in Criminal Law the rule of law requires rules expectations to conform crimes,

38 Hruschka 2005: 28.

39 Hruschka 2005: 28.

40 Thus, for example, expectations can refer to events which do not suppose directly the performance of an action like in some cases of strict or vicarious responsibility (See int. al. Cane 2002: ch. 5). These issues exceed what is regulated by conduct rules. I will return to this in the next paragraphs.

41 A more detailed analysis of these examples in Mellema 2004: ch. 9.

is expected from someone that has committed to write a letter of recommendation to say only positive things about the person he is recommending. Although having these expectations, legitimate in both cases, it cannot be said that the people sitting at a table, or the person writing the recommendation are morally obliged to do what is expected from them. Mellema points out that this type of expectations, which are not comparable to moral duties, can be recognized because, when facing them, the correct reaction (in terms of sanction) is usually less intense. Thus, for example, instead of being expressed through blaming, it is expressed through disappointment. But a less intense reaction, does not mean that the one to whom the unfulfillment of the expectation is ascribed is not being held responsible.

The point is that what is required in terms of expectations is broader than what can be recognized as someone's moral (or legal) obligations. So, not every expectation that generates responsibility is an obligation.[42]

By talking of expectations, we hold a weaker normativity than the one held when speaking of conduct rules and obligations. One can be responsible of things to which one does not have a duty, or at least, it is better to make room for this possibility.[43] The difference is, without a doubt, gradual, and if the reader wants to understand conduct rules and moral obligations in a weak sense, the difference between both and expectations becomes imperceptible.

Finally, another way of arguing can be considered, having in mind the difference that Kelsen establishes between having an obligation and being responsible. According to Kelsen, obligations determine the existence of delicts, and only the person who has an obligation can commit a delict. Although the sanction is connected to the delict by imputation, the responsible person and the person with the obligation do not have to coincide. In fact, it is precisely this distinction what allows to explain cases of vicarious responsibility, where the one held responsible is a different person than the one that commits the delict.[44] This way, Kelsen states that:

> There is an obligation to act in a determinate way when the oppose conduct is the condition of a sanction /…/ on the contrary an individual is responsible for a determinate conduct (his own conduct or another person's conduct) when, in case of the opposite conduct, it is directed a sanction towards she. So, responsibility may be related with someone else's conduct, while obligations have always as object the conduct of the obligated person.[45]

42 Another reason to talk about expectations rather than rules is that we say naturally that a person *has* an expectation (talking about who is holding another responsible), but we do not say that a person *has* a rule.

43 This makes room to the possibility of translating conduct rules and obligations into expectations. Ferrajoli (1997: 240–247) apparently agrees with this idea.

44 Kelsen 1967: 114–119.

45 Kelsen 2009: 78.

Not having in mind the distinction between obligation and responsibility can explain the need of some authors for there always to be an action in order to have responsibility. On the contrary, on many occasions, people are held responsible on the basis of their relationship with objects and others, or only considering causal relations that link them to the event in question, independent of their actions.

Then it is plausible to assert that appealing to the unfulfillment of an expectation as a starting point of judgment of attribution of responsibility has a wider explanatory power than appealing to the unfulfillment of an obligation or conduct rule. One can be responsible even when not having unfulfilled any duty with one's own actions, as it is in cases of strict responsibility. In these cases, relevant expectations do not refer to actions of individuals, but to certain facts that are considered harmful o dangerous, e.g. the level of environmental pollution.

Understanding expectations as standards that can be adopted by members of a community in order to evaluate some events and that entitles such members to search for an explanation of those events, allows us to understand their link with responsibility, precisely because people are held responsible due to the occurrence of a wrong, which does not have to be directly linked with the breach of an obligation. Also, the search for an explanation allows us to open the door to the ascription of the event that unfulfills the expectation to a person, whether that person who has or has not the one that commits an illicit conduct.[46] To that person, the reactive attitudes will be directed from whom is holding them responsible.

In a process of attribution of responsibility, before discussing excuses and justifications, one can question if the person attributing responsibility is justified in having a certain expectation or if he only had an illusion; also, considering the context, one can question the type of evaluation that is being carried out from the said expectation (e.g. legal/illegal; moral/immoral); whether the adopted expectation is appropriate (e.g. many times expectations with origins in legal norms do not entitle us to hold someone responsible because of its unfulfillment in extra-legal contexts). Also, one can discuss about the event: what are its relevant characteristics (e.g. how is it described) or whether or not it occurred under the relevant description in terms of the expectation. In addition, whether the event has really a sufficient relation (i.e. dissonance) with the expectation can be questioned, and if such a relation does exist, how should it be

46 An event may be ascribed to a person (i.e. it is charged to her record. See Feinberg 1970b) without the consequence of ascribing responsibility to that person for that event. We can (and should) distinguish between the ascription of events and the ascription of responsibility. This does not suppose the denial that every time we ascribe responsibility we are ascribing an event. The event is *for* what someone is responsible, more specifically, the event which breaches an expectation. The point is that the ascription of an event to someone is not enough to say that she is held responsible.

evaluated, and so on. When faced with an accusation, one can always ask "what did you expect would happen?"

—***Acknowledgment.***— The author thanks Sebastián Agüero, Luís Duarte d'Almeida, Lucas Miotto, José Juan Moreso, Nicola Muffato, Maribel Narvaéz Mora, Juan Ormeño, Diego Papayannis, Matías Parmigiani, Lorena Ramírez, Pablo Rapetti, Jorge Sendra, Javiera Sepúlveda, Camila Spoerer and Ilsse Torres for their useful comments and conversations on the topics here treated. I also wish to thank all those who participated in the discussions on these topics in Girona, Edinburgh and Barcelona. Finally, I wish to thank two anonymous referees of *Revus* for their penetrating and useful comments.

Bibliography

Gertrude E.M. ANSCOMBE, 1963: *Intention*. 2ª ed. Cambridge (Mass.) & London: Harvard University Press.

Robert BRANDOM, 2000: *Articulating Reasons*. Cambridge (Mass.): Harvard University Press.

Jules COLEMAN, 1992: *Risks and Wrongs*. Cambridge: Cambridge University Press.

Donald DAVIDSON. 2001: Rational Animals. *Subjective, Intersubjective, Objective*. New York: Oxford University Press. 95–105.

Stephen DARWALL, 2006: *The* Second-*Person Standpoint: Morality, Respect, and Accountability*. Cambridge (Mass.): Harvard University Press.

Joel FEINBERG. 1970: Supererogation and Rules. *Doing & Deserving*. Princeton, New Jersey: Princeton University Press. 3–24.

——, 1970a: Justice and Personal Desert. *Doing & Deserving*. Princeton, New Jersey: Princeton University Press. 55–94.

——, 1970b: Action and Responsibility. *Doing & Deserving*. Princeton, New Jersey: Princeton University Press. 119–151.

Luigi FERRAJOLI, 1997: Expectativas y garantías. Primeras tesis de una teoría axiomatizada del derecho. *Revista DOXA, Cuadernos de Filosofía del Derecho* 20 (1997). 235–278.

John FISCHER & Mark RAVIZZA (Eds.), 1993: *Perspectives on Moral Responsibility*. Ithaca: Cornell University Press.

Johan GALTUNG, 1959: Expectations and interaction Processes. *Inquiry: An interdisciplinary Journal of Philosophy* 2 (1959) 1–4. 213–234.

John GARDNER, 2008: Hart and Feinberg on Responsibility. *The Legacy of H.L.A. Hart: Legal, Political, and Moral Philosophy.* Comp. M. Kramer, C. Grant, B. Colburn & A. Hatzistavrou. Oxford: Oxford University Press Pons. 169–193.

John GOLDBERG, 2015: Inexcusable Wrongs. *California Law Review* 103 (2015) 3. 467–512.

Peter HACKER, 2000: *Wittgenstein: Mind and Will*. Oxford: Blackwell.

Herbert L.A. HART, 1967: Varieties of responsibility. *Law Quarterly Review* 83 (1967). 346–364.

——, 1982: Commands and Authoritative Reasons. *Essays on Bentham*. Oxford: Clarendon Press. 243–268.

Joachim HRUSCHKA, 2005: Reglas de comportamiento y reglas de imputación. *Imputación y derecho penal. Estudios sobre la teoría de la imputación*. Navarra: Aranzadi. 27–39.

Gunther JAKOBS, 1997: *Derecho Penal parte general*. Madrid: Marcial Pons.

——, 2006: Culpabilidad y prevención. *Dogmática penal. Estudios compilados*. 2a ed. México/ Argentina: Porrúa.119–153.

Hans KELSEN, 1967: *Pure Theory of Law*. English Trans. By Max Knight. Berkeley: University of California Press.

——, 2009: *Teoría Pura del derecho*. Buenos Aires: Editorial Universitaria de Buenos Aires.

Urs KINDHÄUSER, 2009: La lógica de la construcción del delito. *Revista de Análisis Especializado de Jurisprudencia* 14 (2009). Trad. castellana de Juan Pablo Mañalich. 499–509.

John MACKIE, 1985: Responsibility and Language. *Persons and Values. Selected Papers II*. Oxford: Clarendon Press. 28–45.

Gregory MELLEMA, 1998: Moral Expectation. *The Journal of Value Inquiry* 32 (1998). 479–488.

——, 2004: *The Expectations of Morality*. Amsterdam: Rodopi.

Michael McKENNA, 2012: *Conversation and Responsbility*. New York: Oxford University Press.

Maribel NARVÁEZ MORA, 2006: Las Expresiones *de lege lata* en tanto que creencias ajustadas a derecho. *Observar la ley. Ensayos sobre metodología de la investigación*. Comp. Christian Courtis. Madrid: Trotta. 231–258.

Katarzyna PAPRZYCKA, 1999: Normative Expectations, Intentions, and Beliefs. *Southern Journal of Philosophy* 37 (1999) 4. 629–652.

Michael SMITH, 1987: Humean Theory of Motivation. *Mind* 96 (1987). 36–61.

——, 1994: *The Moral Problem*. Oxford: Blackwell.

Peter STRAWSON, 2008: Freedom and Resentment. *Freeedom and Resentment and others Essays*. Oxon: Routledge. 1–28.

R. Jay WALLACE, 1994: *Responsibility and Moral Sentiments*. Cambridge & London: Harvard University Press.

Bernard WILLIAMS, 1995: Internal reasons and the obscurity of blame. *Making sense of humanity*. Cambridge: Cambridge University Press. 35–45.

Ludwig WITTGENSTEIN, 2009: *Philosophical Investigations*. 4a ed. English Trans. By G.E.M Anscombe, Peter Hacker & Joachim Shulte. UK: Blackwell Publishing.

Robert Podolnjak*

Constitutional Reforms of Citizen-Initiated Referendum

Causes of Different Outcomes in Slovenia and Croatia

In the opinion of many Slovenian and Croatian scholars, the constitutional and legislative design of citizen-initiated referendums in their respective countries was in many ways flawed. Referendums initiated by citizens have caused, at least from the point of view of governments in these two countries, many unexpected constitutional, political and/or economic problems. Over the years, several unsuccessful constitutional reforms of the institute of referendum have been attempted both in Slovenia and Croatia. In 2013, Slovenia finally attained its 'constitutional moment' in which it was possible to reach an almost universal consensus in the National Assembly on constitutionally redesigning the legislative referendum. On the other hand, several attempts by the Croatian Parliament to amend the constitutional provision relating to citizens' initiatives have come to nothing due to the interests of the major parties in the constitutional amendment process being different.

Key words: Citizen-initiated referendum, popular initiative, constitutional reform, Slovenia, Croatia

1 INTRODUCTION

In the last few decades, referendums and citizens' initiatives have become a significant supplement to representative democracy in many countries, especially as regards decisions on important constitutional and political questions.[1]

On the other hand, it must be stressed that the institute of referendum, particularly pertaining to citizens' initiatives, is often judged critically because of the possibility of abusing direct democratic decision-making of the people, violations of fundamental human rights and freedoms and, in some cases, disrupting the regular functioning of the institutions of representative democracy.

In its Recommendation on referendums from 2005,[2] the Parliamentary Assembly of the Council of Europe stated that they are "one of the instruments enabling citizens to participate in the political decision-making process". I would also like to emphasise the Assembly's recommendation that, as to the initiators of referendums, "popular initiative should always be possible" (paragraph 13.b.). However, when we speak of popular or citizens' initiatives, there are different applications of this instrument of direct democracy. The terminology and meaning of these instruments of direct democracy differ from the same in English, not to mention other languages. As remarked by Markku Suksi, "there exists no universal referendum terminology".[3]

That being said, the dominant classification is based on Switzerland's direct democracy instruments, which is logical if we bear in mind the significance of the Swiss experience with popular referendums and citizens' initiatives.[4] In its *Guidebook to Direct Democracy in Switzerland*

* robert.podolnjak@pravo.hr | Associate Professor of Constitutional Law, University of Zagreb, Faculty of Law, Department of Constitutional Law.

1 See generally Butler & Ranney (1994), Galagher & Uleri (1996), Qvortrup (2002, 2013, 2014), Altman (2011), Hamon (2012), Setälä & Schiller (2012), Morel (2012) and Tierney (2012).

2 Recommendation 1704 (2005): Referendums: towards good practices in Europe, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17329&lang=en (last accessed on 6 February 2015).

3 Suksi (1993: 10).

4 See Altman (2011).

and Beyond, the Initiative & Referendum Institute Europe gives a threefold classification of direct democracy procedures in Switzerland. The first procedure is the obligatory constitutional referendum initiated by the parliament for the adoption of a draft constitutional amendment or a new constitution. The second procedure is the facultative or optional popular referendum, when "new laws or changes to laws, which have been passed by parliament, are subject to /…/ referendum" if this is required by at least 50,000 voters. This procedure is also called a 'people's veto' or a 'rejective referendum', given that laws passed by parliament "receive final approval or rejection in a referendum vote". Finally, the third procedure is called the citizens' or popular initiative: "citizens have the right to make legislative proposals which must be decided in a referendum vote if the proposal gains the support of 100,000 voters. This allows a part of the electorate to place before the whole electorate issues which parliament does not wish to deal with, or which have not even occurred to parliament".[5] While the obligatory constitutional referendum can be initiated by parliament, the other two procedures – the popular referendum and the popular initiative – can be initiated only by the people.

Swiss scholars explain that the different forms of direct democracy in their country

> *can be classified by two main dimensions. The source of the proposition describes who controls the issues which are subject to a popular vote, or in other words who sets the political agenda. In the Swiss case, this can be either the government or the parliament or the citizens. The other dimension relates to who can call for a vote. This can be either through a constitutional requirement or it can be through collecting signatures.*[6]

In that sense, referendum procedures can be 'decision-controlling' when a referendum is demanded by a political actor who is not the author of the proposal (when, e.g., the people demand a referendum on a legislative act of parliament), or they can be 'decision promoting' when a referendum is demanded by a political actor who is also the author of the proposal (when, e.g., the people demand a referendum on a new policy proposal).[7] The popular referendum is clearly a 'decision-controlling' mechanism, while the popular initiative is a 'decision-promoting' mechanism.

Given these differences between the popular referendum and the popular initiative, I would like to point to two essential characteristics that bind them. They are both forms of citizen-initiated referendums.[8] The essential precondition for such referendums is that the initiators must collect a specified number of signatures within a set period of time, both of which are prescribed in the constitution or the statute. The second characteristic that binds the two forms of citizen-initiated referendums is that they occur against the wishes of either government or parliament. Accordingly, according to Altman, both forms belong to the same class of mechanisms of direct democracy (in his terminology, a reactive referendum and a proactive popular initiative).[9]

It should also be mentioned, for instance, that abrogative initiatives in Italy (and abrogative referendums belong to the category of popular referendums) have been, according to Uleri, "more *decision-promoting* than *decision-controlling* initiatives",[10] rendering the differences between the popular referendum and the popular initiative sometimes blurred. My using the term 'citizen-initiated referendum' in this article relates to both the popular referendum and the popular initiative. Thus, Slovenia's popular referendum and Croatia's popular initiative are comparable. The general term 'referendum' is used to refer to all forms of popular votes, regardless of who the initiator is, or whether it is obligatory or facultative.

5 See Kaufman, Büchi, Braun (2010: 9). More specifically, Swiss citizens cannot launch a popular initiative to enact a new law, but only a procedure for a partial or complete revision of the Constitution. For more about the historic genesis of different instruments of direct democracy in Switzerland, see Serdült (2014: 70–75).

6 Lutz (2012: 20).

7 See Ulery (2012).

8 See Qvortrup (2013: 26–56).

9 See Altman (2013: 621–622).

10 Uleri (2012: 80).

Although the institute of referendum is well established as a means of direct decision-making of the people in most European countries, it is equally true that the institute of citizen-initiated referendum is not usual in the older West European countries – only Switzerland and Italy have different forms of citizen-initiated referendums (and the tiny Lichtenstein). On the other hand, almost all newly adopted East European constitutions provide for various instruments of direct democracy.[11] What is even more interesting for my analysis is that the constitution-makers in several new democracies of Central and Eastern Europe embraced much more enthusiastically the idea of letting the people initiate referendums on constitutional or other matters normally within the jurisdiction of their parliaments. The institute of citizen-initiated referendum is part of the constitutional order in many post-Communist countries, such as Latvia, Lithuania, Slovakia, Ukraine, Hungary, Slovenia, Croatia, Albania, Macedonia and Serbia.

The forms of the institute of citizen-initiated referendum prescribed in the constitutions of these countries differ. Only a minority of these constitutions make it possible for citizens to initiate a constitutional referendum like in Switzerland, or an abrogative legislative referendum like in Italy. They also differ in respect of the questions that may be put to a ballot, the number of signatures that must be collected, or the turnout and/or approval quorums in the rules regulating the validity of referendum results. Ergo, no dominant model can be found.

Bearing in mind the experience with citizen-initiated referendums in the last two decades in the new *democracies of Central and Eastern Europe,* it can be concluded that the constitutional provisions related to popular referendums and popular initiatives, at least in some of them, had been designed without due knowledge of comparative experiences and without necessary constitutional safeguards. As to comparative experiences at national level, only Switzerland and Italy could have been a model. Paradoxically, the two countries with the most experience with different forms of citizen-initiated referendums at sub-national level (i.e., the United States and Germany) have had no experience of direct democracy at national level.[12]

In this article, I analyse only two new democracies which have constitutionalised citizen-initiated referendums – Slovenia and Croatia, two neighbouring countries, both federal republics of former Yugoslavia and both member states of the European Union. Both countries have, in my opinion, been neglected in comparative analyses of citizen-initiated referendums. Although Slovenia is undoubtedly one of the leading European countries with experience of direct democracy in terms of the number of referendums held in this country, it has been left out of most comparative analyses of citizens' initiatives.[13] The reason for this is that, prior to the 2013 constitutional reform, Slovenia had had the multifaceted legislative referendum which could be initiated by citizens (popular referendum), by the opposition (minority referendum similar to the Danish model), or by the second house of Parliament. But Slovenia has never had a citizens' initiative following the Swiss model. Although one of the latest comparative books on referendums in the world states that "the position (of referendum) in Slovenia has become one of the more interesting, perhaps approaching the position in Switzerland or California", a little more than half a page is dedicated to the referendum experience of this country, and the constitutional reform of 2013 is

11 See Brunner (2001: 222).

12 However, it should be noted that it was Carl Schmitt who warned already in 1927 that the institute of citizen-initiated referendum at state level cannot be compared with the same at the level of federal units of a federal state, such as the states of the USA or the Swiss cantons, because they are not states in the full sense of the word. They do not decide on all issues of state importance (e.g., on foreign policy issues), so the range of possible citizens' initiatives is narrowed, and even when an issue to be decided in a referendum at the level of federal units of a federal state is similar to the issue at federal level, the difference between the two could be qualitative. Schmitt writes: "The financial governance of a state of a union or a canton is legally something different from the financial governance of a sovereign state", in Schmitt (2014 (1927): 64–66).

13 See Setälä & Schiller (2012), and Qvortrup (2013).

not even mentioned.[14] As to Croatia, the institute of citizens' initiative was constitutionalised 15 years ago, but the first referendum demanded by the people was held in December 2013. Consequently, Croatia has not been analysed comparatively because no citizen-initiated referendum was held in the period between 2000 and 2013. Writing about the legal right to direct democracy, as opposed to the actual use of mechanisms of direct democracy, David Altman is correct in pointing out that "something does not exist until there is at least one case that proves that it exists. Otherwise, the inclusion of that right in the constitution or basic law of a country could be easily considered just a '*dead letter*'".[15] In the opinion of many Slovenian and Croatian scholars, the constitutional and legislative design of citizen-initiated referendums in their respective countries was in many ways flawed.[16]

Referendums initiated by citizens have caused, at least from the point of view of governments in these two countries, many unexpected constitutional, political and/or economic problems. Over the years, several unsuccessful constitutional reforms of the institute of referendum have been attempted both in Slovenia and Croatia. However, in May 2013, the Slovenian Parliament amended the Constitution as regards the design of legislative referendum. Half a year later, the Croatian Parliament's attempt to amend Croatia's constitutional provision on the institute of citizens' initiative came to nothing. In this article, my objective is to elaborate why the constitutional reform has been successful in Slovenia, and why it has failed in Croatia. I will first give a brief introduction to the similarities and differences between the original design of mechanisms of direct democracy in Slovenia and Croatia, and then between the experience with the same in these two countries.

2 THE ORIGINAL DESIGN OF MECHANISMS OF DIRECT DEMOCRACY IN SLOVENIA AND CROATIA: SIMILARITIES AND DIFFERENCES

Both Slovenia and Croatia were born in a referendum. The Slovenian referendum on sovereignty and independence was held in December 1990, and a similar plebiscite took place in Croatia in May 1991. Both countries also held referendums on EU membership (Slovenia in March 2003, and Croatia in January 2012). According to Stephen Tierney's methodology,[17] all these referendums are, in a broad sense, constitutional referendums, although formally the subject matter of these referendums was not some constitutional provision. The said referendums on independence and on entry to the EU are the most comparable cases in the history of direct democracy in Slovenia and Croatia.[18] Also, no obligatory referendum on enacting or amending the constitution is required in either the Slovenian or the Croatian constitution. Only the facultative constitutional referendum is prescribed in both countries.

On the other hand, the forms of direct democracy in the constitutional orders of these two countries differ greatly.

The Slovenian Constitution prescribes that 30,000 voters may propose a constitutional amendment. According to Article 168, "a proposal to initiate the procedure for amending the Constitution may be made by twenty representatives of the National Assembly, the Government or at least thirty thousand voters".[19] Such pro-

14 See Hill & White (2014: 36–37). David Altman briefly mentions Slovenians (together with the Swiss, Italians and Lithuanians) when writing about European countries which excel in terms of the implementation of citizen-initiated mechanisms of direct democracy at national level. See Altman (2013: 622).

15 Altman (2013: 622).

16 See Ribičič & Kaučič (2014), Toplak (2013), Tomljanović (2001), and Podolnjak & Smerdel (2014).

17 See Tierney (2012: 11).

18 There is another comparable case. The citizens of both countries had the opportunity to vote against same-sex marriage – in Slovenia against the Marriage and Family Relations Act in 2012, and in Croatia for a constitutional amendment of the definition of marriage as a union of woman and man in 2013.

19 The Slovenian Constitution, as amended up to 2006, is available at http://www.servat.unibe.ch/icl/si00000_.html (last accessed on 6 February 2014).

posals are decided on by the National Assembly by a two-thirds majority vote of the representatives present. The National Assembly adopts acts amending the Constitution by a two-thirds majority vote of all representatives (Art. 169 of the Constitution). However, the Constitution also gives a parliamentary minority (at least thirty representatives) the option to demand confirmation of proposed constitutional amendments by referendum (Art. 170). Constitutional amendments are adopted if a majority of those voting in a referendum voted in favour of the same, provided that a majority of all voters participated in the referendum. Thus, the validity of results of constitutional referendums depends on fulfilling a participation quorum requirement. The Slovenian Constitution has been amended several times, but the optional constitutional referendum demanded by 30 representatives has never been required.[20]

A much more interesting part of the Slovenian constitutional arrangement of the referendum was the original design of the legislative referendum. The original Article 90 of the Constitution prescribed that the National Assembly could call a referendum on any issue which is the subject of regulation by law on its own initiative. However, it had to call such a referendum if so required by at least one third of representatives by the National Council (the second house), or by forty thousand voters. Slovenian constitutional scholars emphasised that, comparatively speaking, this was a very high number of proponents that were allowed to initiate a referendum.[21] It is also very important to note that, in contrast to the constitutional referendum, the decision in a legislative referendum would be valid if a majority of those voting cast their votes in favour of the same. So, the participation quorum or the acceptance quorum was not required in the constitutional provision on the legislative referendum drafted in 1991. And finally, the Constitution prescribed that any issue which was the subject of regulation by law could be the subject of a legislative referendum.

The original Croatian Constitution adopted in 1990 envisaged only the facultative referendum on constitutional or legislative matters (Art. 86 of the original Constitution, which is today Art. 87).[22] The Croatian Parliament may call a referendum on a proposal for an amendment of the Constitution, on a bill, or any other issue within its competence. The President of the Republic may, at the proposal of the Government and with the counter-signature of the Prime Minister, call a referendum on a proposal for the amendment of the Constitution or any other issue which he/she considers to be important for the independence, unity and existence of the Republic of Croatia.[23] Neither the Parliament nor the President has ever called a referendum on a proposal for the amendment of the Constitution.

A great change happened in 2000, when the institute of citizens' initiative was constitutionalised. At the proposal of a small parliamentary party (the Croatian Party of Rights), whose votes were necessary for a two-thirds parliamentary majority for accomplishing the most significant constitutional transformation of Croatia's original semi-presidential system into a parliamentary one, Article 86 was amended prescribing that the Croatian Parliament shall call a referendum on all issues that may be put to a referendum by the Croatian Parliament or the President when so demanded by ten per cent of all voters in the Republic of Croatia.

With this constitutional provision, Croatian citizens acquired the full-scale popular constitutional initiative (to demand a constitutional referendum), while Slovenian citizens have at their disposal only the weaker form of constitutional agenda initiative, which must be debated by the Parliament and will, in no circumstances, lead to a referendum.

The final change in the design of the institute of referendum in the Croatian constitutional

20 The answer is simple. There are 90 representatives at the National Assembly and a 2/3 majority (i.e., 60 MPs) is required for passing constitutional amendments. Only if amendments are voted for by exactly 60 representatives at the National Assembly would there be a sufficient number of MPs in the minority to call a constitutional referendum.

21 See Kaučić (2010).

22 The only obligatory referendum prescribed in the Croatian Constitution is the referendum on the Republic of Croatia's association with or disassociation from other states.

23 An analysis of the original constitutional design of referendum may be found in Rodin (2001).

order which was highly relevant for the success of future referendums was the elimination of any quorum as the condition for the validity of the results of a referendum in 2010. The original Croatian Constitution[24] contained both the acceptance (or approval) quorum and the participation quorum. Article 135 (which is today Art. 142) prescribes calling an obligatory referendum as the final formal step required to allow the association (or, for that matter, disassociation) of Croatia with other states. Most importantly, any decision concerning the Republic's association must be reached by a majority vote of the total number of voters (the acceptance quorum of 50% + 1). For all other instances of state referendums, the Constitution prescribes (in Art. 86) that a decision is made by the majority of the votes cast, provided that turnout is above 50% of the electorate (the participation quorum).[25]

It was obvious to the vast majority of Croatian politicians and constitutional scholars that the approval quorum required for referendums on state alliances is too high a barrier and that it could be the greatest obstacle in the process of Croatia's accession to the EU, considering that this organisation is a union of states of sorts (and not simply an international organisation). It was due to this that the Constitution was amended in 2010 and (amongst other changes) all quorums prescribed for the validity of referendum decisions were deleted.[26] The intention of the constitution makers was only to facilitate the decision on the future EU membership referendum, but the consequences have been much larger. It is important to state that it is now much easier to reach any decision in a state referendum, even to amend the Constitution itself, by a simple decision of the majority of the votes cast.

When comparing the Slovenian legislative referendum and the Croatian constitutional arrangement regarding the institute of citizens' initiative, there are two particularly important similarities between the two. The first is a lack of any kind of participation or approval quorums which would prevent referendum decisions supported by a small minority of interested voters (for Croatia this has been valid since 2010).[27] The second is the possibility to call a referendum on any legislative issue (in Croatia on a constitutional issue as well), the consequence of which is that in both countries only their respective constitutional courts can determine whether a certain issue is constitutionally allowed to be decided in a referendum. The legal basis for the authority of the Slovenian Constitutional Court is contained in Article 21 of the *Referendum and Public Initiative Act*, according to which, "if the National Assembly deems that unconstitutional consequences could occur due to the suspension of the implementation of an act or due to an act not being adopted, it requests that the Constitutional Court decide thereon".[28] The legal basis for the authority of the Croatian Constitutional Court is contained in Article 95 of the *Constitutional Act on the Constitutional Court*:

> *"At the request of the Croatian Parliament, the Constitutional Court shall, in the case when ten per cent of the total number of voters in the Republic of Croatia request calling a referendum, establish whether the question of the referendum is in accordance with the Constitution and whether the requirements in Article 86, paragraphs 1-3, of the Constitution of the Republic of Croatia for calling a referendum have been met."*[29]

Keeping in mind the Slovenian referendum experience, Ciril Ribičič, a professor and former judge of the Slovenian Constitutional Court, wrote in 2011 that the arrangement should be changed so as to avoid the Constitutional Court being the sole instance that decides whether a referendum is to be allowed or not. His opinion is that the existing arrangement grants the Constitutional Court such

24 The text of the original Constitution is available at http://www.servat.unibe.ch/icl/hr01000_.html (last accessed on 6 February 2014).

25 See Rodin (2001: 29–30).

26 See Smerdel (2010: 93).

27 On the issue of quorum for the validity of referendum decisions see Žuber (2014).

28 See http://www.us-rs.si/en/about-the-court/legal-basis/the-referendum-and-public-initiative-act/ (last accessed on 28 February 2014).

29 The Constitutional Act on the Constitutional Court is available at http://www.usud.hr/default.aspx?Show=ustavni_zakon_o_ustavnom_sudu&m1=27&m2=49&Lang=en (last accessed on 28 February 2014).

broad discretion with regard to referendums that its decisions, even if well elaborated, are always deemed arbitrary by at least one party involved in the dispute over the possible referendum on some legislative act.[30]

3 THE REFERENDUM EXPERIENCE IN SLOVENIA AND CROATIA

With respect to the number of referendums held, Slovenia is fourth amongst the European countries, preceded only by Switzerland, Italy, and Ireland (but third if only citizen-initiated referendums are counted). There were 21 referendums held in Slovenia, and only three in Croatia. Of these, as I have noted earlier, two were identical (the referendums on sovereignty and independence, and on EU membership). Some referendums called by the Slovenian Parliament on its own initiative (a referendum on Slovenia's membership in NATO and an advisory referendum on the establishment of regions) are not relevant for my topic, which means that we are left with 16 legislative referendums held in Slovenia in the period between 1996 and 2012. Not even a majority of these were held on the initiative of citizens: nine referendums were called at the request of one third of representatives at the National Assembly, seven were called at the request of 40,000 voters, and two were called at the request of the second house – the National Council (the first referendum on the electoral system was called on the initiative of all three authorised bodies). It is very important to emphasise that Slovenia's successful constitutional reform of the legislative referendum concerned the reform of not only the citizen-initiated referendum, but also the so-called 'opposition referendum'.

Slovenia was, together with Denmark, the only European country which constitutionalised the institute of legislative referendum required by a parliamentary minority, and it is precisely this form of referendum which is 'to be blamed' for the majority of legislative referendums held in Slovenia. More specifically, parliamentary oppositions have, in the case of almost all significant legislative projects proposed by the Government, initiated the procedure of demanding a referendum on an act passed by the Parliament, practically continuing the 'legislative battle' on the referendum field. Using the legislative referendum as a weapon of choice of sorts by the defeated parliamentary opposition against the government of the day became almost a rule. In turn, the referendum was used not as an instrument of citizens, but as an instrument of opposition parties against the policies of the government. The implementation of important economic and social reforms was prevented and each legislative referendum was just another decision manifesting distrust of the government.[31]

Between December 2010 and March 2012, six legislative referendums were held in Slovenia against important acts that had earlier been passed by the National Assembly and in all of them the majority of voters voted against these acts. At the request of the parliamentary opposition (mainly representatives of the Slovenian Democratic Party, the then strongest opposition party), legislative referendums were held on the Radio and Television Corporation of Slovenia Act in December 2010, on the Act on the Prevention of Illegal Work and Employment and on the Act Amending the Protection of Documents and Archives and Archival Institutions Act in June 2011. At the request of voters, legislative referendums were held on the so-called Mini Jobs Act in April 2011, on the Pension and Invalidity Insurance Act in June 2011, and on the Marriage and Family Relations Act in March 2012. In each of these, large majorities of voters (i.e., over 70%) voted against the acts passed by the National Assembly (only in the case of the Marriage and Family Relations Act referendum 'only' 55% of the voters voted against).[32] However, the turnout in these referendums was relatively low – less than 15% in the referendum on the Radio and Television Corpora-

30 See Ribičič (2011).

31 See, e.g., Zajc (2012).

32 Even before these referendums, the Slovenian constitutional scholar Ciril Ribičič commented in early 2011: "It is inconsistent with the constitutional idea of referendum that referendum becomes an everyday final phase of the legislative process and threatens to become the inglorious end to all major legal projects. Today it is not difficult to predict that a referendum vote could be called on any substantial law, and also that the law would fail in the referendum." See Ribičič (2011).

tion of Slovenia Act, 30% in the referendum on the Marriage and Family Relations Act, and about 40% in the three referendums held on the same day in June 2011. The economic consequences of rejecting a very important Pension and Invalidity Insurance Act were most damaging,[33] because this prevented the necessary reform of Slovenia's pension system, and it presumably led to the downfall of the Social Democratic government in September 2011. On the eve of the referendums on the reform of the pension system, on the prevention of illegal work, and on so-called 'mini jobs', the then Prime Minister Borut Pahor predicted that, if these acts were to be repealed, the credit rating of Slovenia would also fall and the state would find itself in a debt crisis.[34]

After early elections for the National Assembly held on 4 December 2011, a new centre-right government was formed. However, the structural reforms proposed by the new government led immediately to the already familiar model of vetoing the much needed legislative projects by demanding a legislative referendum. This time it was Positive Slovenia, the strongest opposition party, and some trade unions (by submitting the signatures of its members) that demanded a referendum on the Slovenian State Holding Act, designed to manage all state capital funds, and a referendum on the so-called 'Bad Banks Act' (i.e., Measures of the Republic of Slovenia to Strengthen the Stability of Banks Act), aiming to strengthen the stability of banks.

The Government requested from the Constitutional Court to ban the holding of referendums on these two acts, claiming that their rejection would have unconstitutional consequences. Surprisingly for many Slovenian constitutionalists,[35] the Constitutional Court declared the referendums on both acts unconstitutional. The Constitutional Court held that the delay or rejection of these two acts in referendums would have unconstitutional consequences. On the basis of weighing several conflicting constitutional values (the right to request a referendum vs. safeguarding the efficient functioning of the state and guaranteeing the exercise of its vital functions), the Constitutional Court held that it is necessary to give priority to ensuring the undisturbed exercise of state functions (including the creation of conditions for the development of the economic system), to ensuring respect for the rights guaranteed by the Constitution (in particular, the rights to free enterprise, social security, healthcare, the rights of disabled persons, and security of employment) coupled with respect for the fundamental principles of international law and international treaties, and to ensuring the effectiveness of the legal order of the European Union, over the right to request a legislative referendum.[36] The Court's decision, which was decided almost unanimously (8-1), was harshly criticised. It seemed that the Court changed its earlier jurisprudence on the admissibility of a referendum taking account of changed economic circumstances.[37]

With its unprecedented decision, the Court has effectively limited the right of the opposition or the voters to call a legislative referendum on key economic and social legislation. More importantly, after several earlier unsuccessful attempts, this decision influenced, in a way, the willingness of political parties in the Slovenian Parliament (and, in particular, of the opposition) to amend the Constitution with respect to the design of the legislative referendum. The previous main opposition party (i.e., the Slovenian Democratic Party), which had used the legislative referendum against government policies several times and successfully so, was now the governing party experiencing itself all the 'evils associated with the legislative referendum demanded by the opposition'. On the other hand, the opposition parties, especially Positive Slovenia and the

33 The redesigned Pension and Invalidity Insurance Act, agreed amongst all social partners, was unanimously adopted by the National Assembly in December 2012.

34 "Sezona Svetlikovih referendumov" ("The Season of Svetlik's Referendums"), *Večer*, 11 April 2011.

35 See Ribičič (2012), Bučar (2013), "Bugarič: Odločba US je ena najslabše napisanih odločb v zgodovini", *Delo*, 19 December 2012, available at http://www.delo.si/novice/politika/bugaric-odlocba-us-je-ena-najslabse-napisanih-odlocb-v-zgodovini.html (last accessed on 28 February 2014).

36 The decision of the Constitutional Court U-II-1/12, U-II-2/12 (in English) is available at http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/399443A23488727DC1257AFA004A8AC6 (last accessed on 6 February 2014).

37 See Bučar (2013: 3). For an opposing argument, see Avbelj (2013).

Social Democrats, realised that the referendum as a weapon against the economic policies of the Government could now be successfully blocked by the Constitutional Court. As a result, the referendum lost its relevance as a means of bringing down the Government. It is, hence, no coincidence that the process of amending the Constitution progressed expediently once the Constitutional Court had reached its decision banning referendums on the Slovenian State Holding Act and the so-called 'Bad Banks Act'.[38]

In comparison with Slovenia, Croatia's experience with referendums is much more limited. As mentioned earlier, Croatia has held only three referendums to date. The great majority of Slovenian referendums have been legislative referendums, while all three referendums in Croatia have been constitutional. Slovenian voters demanded seven referendums, while Croatian voters only one – the already much debated referendum on the constitutional definition of marriage.

While in Slovenia only 40,000 signatures (i.e., about 2.5% of all voters) are to be collected within 45 days, in Croatia the signatures of as much as 10 per cent of all voters at the minimum (i.e., more than 400,000)[39] are to be collected within 15 days. The number of citizen-initiated referendums is, accordingly, clearly much higher in Slovenia. The constitutional and legislative requirements for collecting signatures in Croatia are, in comparison with other European countries which have the institute of citizens' initiative, the most stringent. As a result, it is extremely difficult to collect the needed number of signatures for calling a referendum on a citizens' initiative in Croatia. Evidently, this can be accomplished only by a very strong organisation or association.[40] In other countries with the institute of citizen-initiated referendum, such as Switzerland, Italy or Slovenia, political parties are often behind initiatives, lending their support and necessary infrastructure. In Croatia, however, political parties are, as a rule, in the background, while the leading role belongs to trade unions, war veterans associations, religious organisations, etc.

The constitutional provision on the citizens' initiative came to the forefront of public debate in Croatia for the first time in April 2001. Namely, the leaders of a number of war veterans associations submitted a petition backed by 400,000 signatures to the President of the Croatian Parliament, requiring a legislative referendum that was to provide defenders who fought in the Croatian Homeland War the same legal treatment as the treatment granted to members of the winning and liberation armies in World War II. Moreover, in the petition they also asked not to be prosecuted for possible war crimes committed during the Homeland War. However, the parliamentary majority was not inclined to call a referendum on the basis of such a petition, since the then Referendum Act did not provide for the procedure

38 See the Report on the Draft to Start the Procedure of Amending the Constitution of the Republic of Slovenia with the Draft Constitutional Law, submitted to the National Assembly on 15 January 2013.

39 The requisite number of signatures was a question decided on by the Croatian Constitutional Court in December 2014. The 'In the Name of the Family' Citizens' Initiative collected more than 380,000 signatures for the initiative called 'Let Us Elect Deputies by Name'. The Croatian Parliament refused to call a referendum maintaining that the requisite number of signatures is approximately 450,000, which is 10% of all registered Croatian voters. The Constitutional Court decided that "ten per cent of the total electorate of the Republic of Croatia" refers, within the meaning of Article 87.3 of the Constitution, to all Croatian citizens who have reached eighteen years of age with a registered domicile in the Republic of Croatia who are registered as voters in the electoral register on the day set as the first day of collecting signatures for calling a referendum (i.e., reference day). The Constitutional Court established that on 21 September 2014 there were 4,042,522 such voters. This implies that Croatian diaspora voters are excluded from the requisite number of voters' signatures, because signatures for the purpose of calling a referendum can, according to the law, be collected only within the Republic of Croatia. See the Constitutional Court's Decision No. U-VIIR-7346/2014 from 10 December 2014.

40 In October 2011, the Slovenian scholar Cirila Toplak wrote that, "in Croatia, the Constitution provides for the possibility of referendum under such conditions that it is virtually impossible to hold one /…/ Therefore, it is not surprising that, in Croatia, only a single referendum has been held so far, the one on secession from Yugoslavia in 1991 /…/ Only the largest political parties in Croatia have the infrastructure to collect nearly half a million signatures necessary to call a referendum and, so far, not a single one has done it". See Toplak (2011).

of organising a citizen-initiated referendum and one was necessary to determine the conditions and criteria under which a referendum could be implemented.

In the coming years, several citizens' initiatives tried to collect the necessary number of signatures so as to be able to demand a referendum on some important matters, but all of them were unsuccessful (repealing the Constitutional Act on the Cooperation of the Republic of Croatia with the International Criminal Tribunal, NATO membership, the Arbitration Agreement between Slovenia and Croatia on a maritime border dispute[41]). Following these three unsuccessful initiatives, Croatian citizens succeeded in collecting the necessary number of signatures on several occasions.

In June 2010, Croatian trade unions collected more than 800,000 signatures requiring a referendum against the Government's Draft of the Act on Amendments to the Labour Act, which contained provisions which would limit the continuation of workers' rights established by collective agreements to six months after the expiration or termination of collective agreements, and provisions which would make the cancelation of collective agreements between trade unions and employers possible. The Government quickly withdrew the proposed draft from parliamentary procedure, after which the Parliament refused to call a referendum, claiming that there is no legislation to be decided on. The trade unions lodged a complaint against the Parliament with the Constitutional Court, arguing that lawfully collected signatures cannot be ignored and that the trade unions have no guarantee that, in a few months' time, the Government would resubmit the same draft to the Parliament. The question was whether the trade unions would need to collect the signatures again to be able to bring the issue to a referendum.

The Constitutional Court ruled that there are no grounds for the referendum initiated by trade unions now that the Government withdrew from Parliament its proposed changes to the Labour Act. The decision was severely criticised by centre-left opposition parties (Social Democrats and the Labour Party), who claimed that the Court is under the influence of the governing Croatian Democratic Union. Ivo Josipović, the then President of the Republic and a distinguished professor of law, publicly expressed his dissatisfaction with the Court's decision, openly stating that he would have voted differently. He was of the opinion that the Court's decision could provoke further dissatisfaction of the citizens and reinforce a lack of popular trust in state institutions.[42]

The second and most successful citizens' initiative to date in Croatia was the initiative of the 'In the Name of the Family' organisation backed by the Catholic Church, calling for a referendum on the question: "Are you in favour of the Constitution of the Republic of Croatia being amended with a provision stating that marriage is a life union between a woman and a man?" The Initiative was a response to the Government's alleged plans to legalise same-sex marriage. In May 2013, the Initiative collected almost 750,000 signatures,[43] thereby fulfilling the basic condition to call the first citizen-initiated constitutional referendum in Croatia.

This Initiative has sharply divided the Croatian public with regard to its content and caused considerable controversy. Moreover, individual actors both from within the Croatian Parliament and without offered different constitutional interpretations with respect to the treatment and obligation of the state authorities in relation to decision-making and the possible consequences of decisions made by citizens in a constitutional referendum.

The most important controversies were as follows: Is the Parliament obliged to call a referendum in all cases required by a popular initiative

41 Interestingly, in June 2010 the same issue was put to a referendum in Slovenia (called by the National Assembly on its own initiative), and 51.54% of voters voted for the law ratifying the Arbitration Agreement. The official results of the referendum are available at http://www.dvk-rs.si/index.php/si/arhiv-referendumi/referendum-o-zakonu-o-arbitraznem-sporazumu-6-junij-2010 (last accessed on 28 February 2014).

42 "Constitutional Court decides against referendum on labour law", Croatian Times.

43 Officially, only 683,948 signatures were accepted by the state authorities, but that was also more than was needed to call a referendum.

which met the constitutional requirements? Can the process of constitutional change through a referendum be carried out outside and beyond the procedure for changing the Constitution provided for in Chapter IX of the Constitution? Can the Croatian Parliament obstruct in any way the will of the people expressed either by signing a request for a referendum or through voting in a referendum? May MPs vote against calling a referendum required by a citizens' initiative claiming that they have no imperative mandate? Can the people decide in a referendum on issues which many consider to be discriminatory for a certain group of people? Should the Constitutional Court issue an opinion on the constitutionality of referendum questions even if not requested by the Croatian Parliament? These and other contentious issues have become the subject of intense political and scholarly discussion. The opinion of some leading MPs from the governing coalition was that the Parliament could not be forced to call a referendum whose goal is to diminish the rights of same-sex partners, and that the constitution-making power belongs, under the Constitution, solely to the Parliament.[44]

In a joint statement, all professors of constitutional law from the law faculties in the country expressed their concern over the possibility that such opinions could lead to a constitutional and political crisis without precedent. Their joint statement highlights the following:

> *The Croatian Parliament is obliged to hold a constitutional referendum if one is requested by 10 per cent of the total number of voters /…/ Rejection by the Croatian Parliament to call a referendum when an initiative has fulfilled all the necessary formal and legal requirements would be a denial of the very essence of a citizen-initiated referendum and could have incalculable consequences for the constitutional stability of the country. Any decision made by the citizens in a constitutional referendum would be, by its very nature, constitutional in character, and would be binding on all state bodies. It would represent a change in the Constitution that comes into force upon confirmation that the referendum was held in accordance with the Constitution.*[45]

The request for the implementation of a referendum by the 'In the Name of the Family' Citizens' Initiative pointed, yet again and even more so than previously, to all the shortcomings in the constitutional and statutory regulation on the institute of popular initiative.[46]

The six month long debate on the said citizen-initiated referendum culminated finally in November 2013 with the Parliament's decision to call a referendum and with several decisions by the Constitutional Court declaring that the referendum is constitutionally admissible. It should be emphasised that the Constitutional Court had intervened several times prior to the calling of the referendum warning the Parliament to respect the Constitution not only in its obligation to call a citizen-initiated referendum, but also in respecting the results of the referendum vote as an act of the constituent power of the people to change the Constitution.[47]

The first referendum demanded by a popular initiative was held on 1 December. With a relatively modest turnout of 37.9%,

44 The above-mentioned chapter IX titled "Amending the Constitution" (Articles 147–150) prescribes only the parliamentary route of the amending process. The constitutional referendum is mentioned only in Art. 87. The Constitution is available in English at http://www.sabor.hr/Default.aspx?art=2405 (last accessed on 28 February 2014).

45 The statement (in Croatian) is published in Podolnjak & Smerdel (2014: 233–235).

46 This much was also confirmed by Professor Jasna Omejec, President of the Croatian Constitutional Court, when, following the referendum on marriage, she stated: "So far, the legislator has not developed sufficiently the rules of procedure and the method of implementation of popular constitution-making initiatives within the /…/ constitutional norms. Accordingly, the Croatian Constitutional Court had to, in its own practice; build the rules which must be followed when it comes to the implementation of popular constitution-making initiatives." See Omejec (2014).

47 See especially the Warning with regard to the Proposal of a Decision by the Committee on the Constitution, Standing Orders and Political System of the Croatian Parliament to call a national referendum of 24 October 2013, No. U-VIIR-5292/2013, and the Communication on the Citizens' Constitutional Referendum on the Definition of Marriage (SuS-1/2013, 14 November 2013).

almost two-thirds of voters (946,433 or 65.87%) voted for amending the Constitution with the inclusion of the definition of marriage as a union of man and woman.[48]

Almost at the same time, a number of war veterans associations (officially, the Committee for the Defence of Croatian Vukovar) succeeded in collecting the necessary number of signatures for a referendum to amend the Constitutional Act on the Rights of National Minorities. More specifically, they intended to change minority language rights in the sense that a minority language can be granted only in local self-government units where at least half of the population is from an ethnic minority. Under the current legislation in Croatia, national minorities must comprise at least one-third of the population to claim these rights. The problem with the minority language rights escalated with the instalment of bilingual public signs in Vukovar, where, according to the last census, the Serbian minority constitutes more than one-third of the total population.[49] At the request of the Croatian Parliament, the Constitutional Court decided that the referendum question was constitutionally inadmissible.[50]

Two more citizens' initiatives by several trade unions were successful in collecting the requisite number of signatures in 2014, but the Constitutional Court decided that their referendum questions, formulated as specifically worded draft laws, were also constitutionally inadmissible.[51] The first initiative demanded a referendum on preventing the outsourcing of non-core services in the public sector, and the second demanded a referendum against the monetisation of the Croatian motorways. Although the requested referendums were not held, due to the Constitutional Court's decisions, the Croatian Government nevertheless abandoned its plans for the outsourcing of services in the public sector and the monetisation of the motorways.[52]

At the time of writing this article, no official report was made on whether the latest citizens' initiative of trade unions and NGOs, who were collecting signatures in May-June 2015 on two questions,[53] had collected the necessary number of signatures for calling a referendum.

4 CONSTITUTIONAL REFORM OF THE CITIZEN-INITIATED REFERENDUM: SUCCESS IN SLOVENIA, FAILURE IN CROATIA

Following several unsuccessful attempts over the years, in May 2013, the Slovenian Parliament amended consensually, with the support of all political parties, Article 90 of the Constitution regulating the institute of legislative referendum. At the same time, none of the Croatian Parliament's attempts to amend the constitutional provision on the institute of citizens' initiative, including the last one in December 2013, have borne fruit.

Slovenian constitutional experts have long been critical of the constitutional arrangement and the practice of the legislative referendum in their country, although, it must be said, they were not of the same

48 State Electoral Commission of the Republic of Croatia, Report on the National Referendum held on 1 December 2013, available at http://www.izbori.hr/2013Referendum/rezult/rezultati.html (last accessed on 20 December 2013).

49 See "Anti-minority referendum in Croatia to go to the Constitutional Court for review", available at http://www.minorityrights.org/12252/press-releases/antiminority-referendum-in-croatia-to-go-to-the-constitutional-court-for-review.html (last accessed on 28 February 2014).

50 Decision No. U-VIIR-4640/2014 from 12 August 2014.

51 See the Constitutional Court's Decisions No. U-VIIR-1159/2015 from 8 April 2015 and No. U-VI-IR-1158/2015 from 21 April 2015.

52 See, e.g., "Deputy PM regrets halting of reform by anti-outsourcing initiative", available at https://vlada.gov.hr/news/deputy-pm-regrets-halting-of-reform-by-anti-outsourcing-initiative/16719 (last accessed on 20 May 2015), or "Croatia backs up from monetization of highways", available at http://www.globalpost.com/dispatch/news/xinhua-news-agency/150313/croatia-backs-monetization-highways (last accessed on 20 May 2015).

53 The first referendum question relates to the lowering of the number of signatures required for calling a citizen-initiated referendum ("Do you agree that 200,000 signatures should be enough for calling a referendum?") and the second to the way the signatures could be collected ("Do you agree that collecting referendum signatures should be allowed in areas where public assembly is allowed?").

opinion in proposing alternative solutions. In essence, the consensus reached by constitutional scholars was that the legislative referendum should remain an instrument in the hands of citizens alone, and should no longer be available to the parliamentary opposition (or the second house) as a means of undermining not only the Government of the day, but also the parliamentary system as a whole. They also agreed, in principle, that some issues are not suitable to be decided in a referendum, but could not agree on the precise formulation of those issues. Finally, there were significant differences of opinion as to the issue whether a specific type of quorum for the validity of referendum decisions should be designed.[54]

The length of this article does not allow me to comment on all the initiatives aiming to reform the constitutional arrangement of the legislative referendum submitted to the Slovenian National Assembly. There had been several unsuccessful initiatives prior to 2013, but none of them received the required two-thirds majority of MPs' votes. As commented by the Slovenian constitutional scholar Igor Kaučič, "changes of the Constitution are completely in the hands of the representatives – they shaped them and they are the ones who decide whether to let the people confirm them – the voters are completely excluded from the process."[55] Consequently, the long-awaited constitutional reform of the legislative referendum could be implemented only in a special constitutional moment. This moment finally arrived with the severe economic and financial crisis in Slovenia (which had been created partly by many referendum decisions). Moreover, the party that used the referendum as the 'opposition weapon' in 2010 and 2011 became the governing party after the early elections in December 2011, changing its benevolent attitude to the institute of the referendum now used by the opposition. Ultimately, opposition parties were prevented from using the referendum as a tool of subverting the government by the Constitutional Court's changed attitude to the right to request a call for a referendum vs. ensuring the undisturbed exercise of state functions. These were, in my opinion, the crucial preconditions for setting the stage for a successful constitutional reform.

In September 2012, fifty representatives of the National Assembly submitted a draft proposal to amend the Constitution,[56] and amendments to Articles 90, 97 and 99 of the Constitution[57] were accepted by 86 (and only one against) MPs in May 2013. The amendments were adopted consensually following a prolonged public debate, with Slovenian constitutional scholars in a supporting role.

The first and most important change adopted is that, in the future, the National Assembly is obliged to call a referendum on the entry into force of an act that it has adopted if so required by only forty thousand voters, with the right of either a parliamentary minority (30 MPs) or the second house to call a referendum having been eliminated. This part of the reform was the *sine qua non* of any meaningful reform of the legislative referendum, and it was the least controversial for all the actors involved in the constitution-making process (except, of course, the second house – the National Council). The accepted solution was elaborated as a consistent application of the principle that only voters should have the right to require a referendum, because they do not participate directly in the law-making process.

The second most important aspect of the reform was the exclusion of some issues from the referendum vote. In the future, popular votes will be banned on legislation on urgent meas-

54 See Kaučič (2010), Kristan (2012), and Ribičič (2011).

55 An interview with Igor Kaučič, available at http://www.dnevnik.si/objektiv/intervjuji/1042553184 (last accessed on 27 February 2014).

56 The proposal to initiate the procedure for amending the Constitution with a Draft of the Constitutional Act is available (in Slovenian) at http://stres.a.gape.org/prenova_slo/Prenova_SLO/spremememba_ustave_RS/Predlog_spremememb_ustave_13_9_12.pdf (last accessed on 28 February 2014).

57 See the Constitutional Act Amending Articles 90, 97, and 99 of the Constitution of the Republic of Slovenia, adopted on 24 May 2013 and entered into force on 31 May 2013 (*Official Gazette of the Republic of Slovenia* No. 47/2013 of 31 May 2013, available at http://www.us-rs.si/en/about-the-court/legal-basis/constitution/constitutional-acts-amending-the-constitution-of-t/, last accessed on 28 February 2014).

ures to ensure the defence of the state, security, or the elimination of the consequences of natural disasters, on legislation on taxes, customs duties and other compulsory charges, on acts adopting the state budget, on acts ratifying treaties, and on acts eliminating unconstitutionalities in the field of human rights and fundamental freedoms or any other unconstitutionality. The most controversial aspect of these bans was the exclusion of financial issues from the referendum vote. The original formulation in the draft proposal had been even more restrictive than the one adopted.[58] In its Opinion on the draft proposal, the Expert Group of constitutional scholars, appointed by the Constitutional Commission of the National Assembly, elaborated that the definition of legislation on financial issues that would be banned from being voted on in a referendum is too restrictive and that, in practice, it could mean "a ban of referendum for the majority of laws, since they dominantly regulate fiscal issues or, at least, directly or indirectly affect them".[59] The Opinion of the Expert Group was accepted by the National Assembly, but the final formulation is still too restrictive for some constitutional scholars.[60]

The third innovation is the adoption of the model of the 'rejective' referendum, according to which an act is rejected in a referendum if the majority of voters who have cast valid votes voted against the act, provided that at least one fifth of all qualified voters voted against the act. The most significant features of this model are: the issue put to a referendum is a complete act, and not only its specific provision/s; a referendum is subsequent (to an act already adopted by the National Assembly, yet still not published and not enforced); in a referendum, voters decide on the enforcement of an act (the so-called suspensive referendum, because the calling of a referendum delays the enforcement of the act until the referendum decision has been made); the referendum vote concerns the rejection, and not the validation of an act.[61]

The initial concept formulated by 50 MPs in the draft proposal from September 2012 was completely different. It had prescribed that an act comes into force if it is supported by the majority of voters, with the additional condition that the result is valid if at least 35% of the citizens who have the right to vote have attended the referendum.[62] The Expert Group was against

58 The draft proposal included the formulation that a referendum would be banned not only on all legislation on taxes, customs duties and other compulsory charges, but also on acts on which the direct execution of the state budget depends, and acts that have impact on other public expenditures or guarantees. It was rightly concluded in the public debate that such a formulation excludes almost all acts from the referendum vote, because almost all acts have an impact on public expenditures.

59 The Opinion of the Expert Group, in Report related to the proposal to initiate the procedure for amending the Constitution with a Draft of the Constitutional Act, available at http://imss.dz-rs.si/imis/f9650d809e82f514027c.pdf.(last accessed on 28 February 2014), 13.

60 Miro Cerar reminded that Slovenia changed its Constitution, adopting not only a new constitutional design of the legislative referendum, but also the balanced budget rule ("Revenues and expenditures of the budgets of the state must be balanced in the medium-term without borrowing" Art. 148, para. 2), available at http://www.us-rs.si/en/about-the-court/legal-basis/constitution/constitutional-acts-amending-the-constitution-of-t/ (last accessed on 28 February 2014). Fiscal issues are made impossible as referendum issues in the future, although each legislative referendum may impact on balancing the public finances. Thus, it would be necessary to analyse in each particular case if the demand for a legislative referendum has an impact on the balance of public revenues and expenditures. Keeping in mind that the Constitution also contains the principle of the social state and certain social rights, only the Constitutional Court can decide on the possible conflict of these constitutional principles. See Cerar (2013).
From amongst Slovenian constitutional scholars, Ivan Kristan has been the most critical of the content of the constitutional amendments regarding the legislative referendum, maintaining that the ban on future legislative referendums has been defined too broadly, and that, prior to these constitutional changes, the people could decide on all legislation, while in the future they will not be able to decide on any act of importance. Consequently, Kristan argues, the people are no longer sovereign in Slovenia, regardless of what the Constitution writes. See Kristan (2013: 16–19).

61 See Kaučič (2013; 2014).

62 The proposal to initiate the procedure for amending the Constitution with a Draft of the Constitutional Act is available (in Slovenian) at http://

this participation quorum, rightfully pointing to negative experiences with this form of quorum (e.g., Italy), and proposed instead the approval quorum, which is, in the Slovenian context, the quorum of rejection of an act passed by the National Assembly.[63]

The National Assembly accepted the concept of 'rejective' referendum, but in the final stage of the adoption of the constitutional amendments it changed the percentage of voters needed to reject an act, reducing it from the 25% recommended by the Expert Group to 20%. This decision has been strongly objected to by the majority of constitutional scholars involved in the Expert Group.[64]

Let us now turn to Croatia's attempts to reform the constitutional design of the citizen-initiated referendum. There have been three initiatives in this regard to date and all of them unsuccessful. The first came in the process of amending the Constitution in 2010. The then opposition parties (i.e., the Labour Party and the Social Democrats) proposed the lowering of the number of signatures required to call citizen-initiated referendums from 10% (i.e., around 450,000 signatures) to 200,000. The Social Democrats also proposed that some issues be excluded from the referendum vote: matters diminishing the constitutionally defined human rights, fundamental freedoms and equality, and the protection of minority rights, as well as proposals relating to the tax system and the state budget. However, the Social Democrats did not insist on their proposal in the final bargaining with the governing Croatian Democratic Union over the package of constitutional amendments, which was mainly related to Croatia's accession to the EU.

The second initiative came following the last parliamentary elections in October 2012. Labour party MPs (the most referendum-friendly party in recent years) and other opposition party MPs (mainly representatives of the Croatian Democratic Union) proposed lowering the number of signatures required to call citizen-initiated referendums to 200,000. As emphasised by the proponents of the initiative, since 2000, when the institute of citizens' initiative was introduced into the Croatian Constitution, not one referendum demanded by citizens has been called, and that obviously represents "a great democratic deficit".[65]

The Government of Prime Minister Zoran Milanović (the Social Democratic Party) did not accept the initiative, claiming that constitutionally the referendum on the institute of citizens' initiative is well positioned and that, for a country of the size of Croatia, "10 per cent of voters is not too high, but a sensible number". He announced that the Referendum Act will be changed and that the deadline for collecting signatures will be extended from 15 to 30 days, holding that to be enough in further 'liberalising' citizens' initiatives. The Prime Minister concluded that, in his opinion, referendums are "the ideal space for populists and they will be showed to be the pinnacle of democracy and popular decision-making".[66] It should be noted that, to date, his Government has not proposed amendments to the Referendum Act with the purpose of extending the time set for collecting signatures. I would also like to remind that Zoran Milanović, as the leader of the parliamentary opposition in 2010, had once been much

stres.a.gape.org/prenova_slo/Prenova_SLO/sprememba_ustave_RS/Predlog_sprememb_ustave_13_9_12.pdf (last accessed on 28 February 2014).

63 The Opinion of the Expert Group, 14.

64 However, Slovenia's first experience with citizen-initiated referendums after the constitutional reform (on the issue of rejection of the Archives Act) shows that the originally proposed rejection threshold could have been sufficient. In the referendum held in June 2014, the act was rejected by 67% of voters, but the referendum itself was invalidated by a small voter turnout of only 12%, far below the rejection quorum of 20% of the electorate.

65 The draft proposal to initiate changing the Constitution with a Draft of the Changes of the Constitution of the Republic of Croatia, October 2012 (available at https://vlada.gov.hr/UserDocsImages//Sjednice/Arhiva//61.%20-%2019.a.pdf) (last accessed on 28 February 2014).

66 The citations are given according to the audio recording of the session of the Government held on 15 November 2012.

friendlier to citizens' initiatives. He publicly signed the request for a referendum on the amendments to the Labour Act, and formally proposed lowering the number of signatures required for citizen-initiated referendums to 200,000.[67]

The third and almost successful initiative to amend the constitutional provision on the citizen-initiated referendum came in November 2013, unintentionally coinciding with the call of the first citizen-initiated referendum. The initiative to amend the Constitution had been launched by MPs from the governing Social Democrats several months earlier with a draft of constitutional amendments, according to which there would be no statute of limitations for politically motivated killings.[68] In September 2013, the proposal was changed so that now the statute of limitations was to be removed from the Constitution for all first-degree murders and not just politically motivated murders. However, the parliamentary majority needed the support of some smaller opposition parties to achieve the two-thirds majority necessary for amending the Constitution, because the main opposition party – the Croatian Democratic Union – was unwilling to support the proposed constitutional amendment. One of the opposition parties (i.e., the regional Croatian Democratic Alliance of Slavonia and Baranja, HDSSB) insisted on the constitutional recognition of regions, and another opposition party (i.e., the Labour Party) conditioned its support with the lowering of the number of signatures required for citizen-initiated referendums to 200,000, which they have been proposing on several occasions since 2010. The demands of these opposition parties were accepted, and so for the first time since the introduction of the institute of citizens' initiative in the Croatian Constitution this institute became a question of wider constitutional and political debate.

The Draft Amendments to the Constitution proposed by the Parliament's Committee on the Constitution, Standing Orders and Political System put forward three significant changes in the institute of citizen-initiated referendum.

First, the number of requisite signatures would be lowered to 200,000. This part of the proposal was acceptable to all actors involved in the process of amending the Constitution.

Second, some issues would be banned from being voted on in a referendum: issues relating to the limitation or reduction of human rights and fundamental freedoms, issues referring to Croatia's international obligations, the adoption and implementation of the state budget and the tax system, defence and national security issues, and appointments within the scope of the Croatian Parliament's authority. This proposal had, from the point of view of constitutional design of the citizen-initiated referendum, two errors, as was emphasised by Professor Branko Smerdel:

> *First, the list of situations on which a citizen-initiated referendum would be banned is too extensive and undefined. By citing whole chapters of the Constitution instead of specific provisions, half of the Constitution is under ban. If such a proposal were to be accepted, almost any referendum would become impossible. With such a solution, the right to call a referen-*

67 It seems to me that the best analysis of just how different Zoran Milanović's opinions were in 2010 (when he was the opposition leader) and 2012 (when he became the Prime Minister) on the value and usefulness of citizens' initiatives is given by Bruno Frey's following point: "The decision-makers in all political areas, be it the executive, the legislative or the legal branch, find it difficult or even impossible to imagine that the citizens are motivated and capable of participating in politics. This is a general feature of all such decision-makers – once they are in power. The reason is simple: they do not want to share power with the population. Many opposition parties and opposition movements strongly favour citizen participation in politics, but once they get into power, they very quickly see things differently and no longer want to give up part of their power." See Frey (2003: 44).

68 This pertained to the problem of applying the European Arrest Warrant to some Croatian citizens, after the Croatian Parliament had adopted the controversial Act on Judicial Cooperation in Criminal Matters with EU Member States (the so-called *Lex Perković*), but this is not the subject matter of this paper.

dum is practically abrogated. Secondly, it is not defined who decides whether some specific referendum issue belongs to the list of banned matters. I think this is not an accidental, but a deliberate attempt to eliminate the Constitutional Court."[69]

The third aspect of the said change was the introduction of the participation quorum: referendums will be considered valid on the condition that at least 40% of all voters attended it.[70]

In a very short, almost nonexistent public debate,[71] and without Croatian constitutional law experts playing any formal advisory role in the process, the final Draft Proposal of Constitutional Amendments was submitted to the Parliament in early December 2013, with only one change entered in comparison to the initial draft. The 40%-of-all-voters participation quorum was replaced with the approval quorum, as a result of objections coming from some scholars and non-governmental organisations. According to the new proposal, the Constitution could be changed in a referendum only if the change was supported by more than 50% of all eligible voters, organic laws with the support of at least 35% of all voters, and ordinary laws with the votes of more than 25% of the electorate.[72]

An extraordinary session of the Parliament was convened with the only purpose of adopting the proposed constitutional amendments. On the very eve of the parliamentary vote, the Croatian Democratic Alliance of Slavonia and Baranja (HDSSB) demanded a postponement and asked for an extension of the public debate on some of the amendments proposed. Without this party's MPs, the needed 2/3 parliamentary majority could not be achieved. Why HDSSB changed its mind is not clear – one of the possible reasons could be that this party was the only rightist party in the Parliament to support the amendments initiated by a centre-left government. At the beginning of 2014, there were some signs that the debate on constitutional amendments could be reopened, but the constitution-making moment had already passed.

All initiatives to amend the constitutional provision on the institute of citizen-initiated referendum in Croatia have come, as a rule, at moments when an initiative succeeded in collecting the necessary number of signatures (in 2010 when trade unions demanded holding a referendum on the Labour Act; in 2013 when Catholic and war veterans associations demanded referendums on marriage and the language rights of national minorities respectively) and when the calling of a referendum became the most important political issue of the day. It could hence be predicted that the next constitutional debate is highly likely to arise with some new controversial citizens' initiative.

5 CONCLUSION

Both Slovenian and Croatian constitutional law experts and other scholars have for years argued that the constitutional design (and in Croatia the legislative design too) of the institute of citizen-initiated referendum in their respective countries has serious shortcomings. The most important amongst them was the possibility to call a referendum on any constitutional (in Croatia) or legislative (in both countries) issue, the consequence of which was that only the two countries' respective constitutional courts could determine whether a certain issue was constitutionally allowed to be decided on in a referendum. Another shortcoming in both countries was a lack of some form of participation or approval quorum which would prevent referendum decisions sup-

69 An interview with Professor Smerdel ("SDP vrijeđa Josipovića"), *Jutarnji list*, 27 January 2014, p. 10.

70 Proposal to Establish the Draft Bill of Amendments to the Constitution, November 2013, available at www.sabor.hr/fgs.axd?id=26061 (last accessed on 28 February 2014).

71 Professor Branko Smerdel, the doyen of Croatian constitutionalists, commented that "he has never heard of secret public debates, such as the one now taking place on constitutional amendments. Not even the former (Communist) regime could produce anything of the sort", available at http://www.vecernji.hr/hrvatska/je-li-ustavni-sud-prekoracio-ovlasti-905695 (last accessed on 28 February 2014).

72 Draft Proposal of Amendments to the Constitution, December 2013, available at http://www.sabor.hr/prijedlog-promjene-ustava-republike-hrvatske (last accessed on 28 February 2014).

ported by a small minority of interested voters.[73] In Slovenia, there was the additional problem of misuse of referendums initiated by a parliamentary minority.

The shortcomings of the Slovenian legislative referendum caused serious economic problems, preventing the needed economic and social reforms. In Croatia, constitutional problems were brought into the public eye due especially to a popular constitutional initiative and the issue dealt with in the very first constitutional referendum (definition of marriage) in Croatia. Nevertheless, there are similarities between Slovenia's and Croatia's issues put to citizen-initiated referendums. The citizens of both countries demanded a referendum looking to proscribe same-sex marriages – in Slovenia it was against the Marriage and Family Relations Act in 2012, and in Croatia it was for the constitutional definition of marriage as a union of woman and man in 2013. Also, the legislative regulation of labour relations was a referendum issue in both countries.

Up to 2013 there had been several unsuccessful attempts to reform the constitutional design of the referendum in both countries. In 2013, Slovenia finally reached its 'constitutional moment' in which it was possible to reach an almost universal consensus in the National Assembly on constitutionally redesigning the institute of legislative referendum. This consensus was a result of several interconnected factors: negative experiences with citizens' initiatives during a long period of time; both as opposition or governing parties, the major parties (the Social Democrats and the Slovenian Democratic Party in particular) were facing problems caused by successful citizen's initiatives; the Constitutional Court effectively limited the right of the opposition or the voters to call legislative referendums on essential economic and social legislation, which resulted in the referendum losing most of its value for opposition parties as a way of continuing the legislative battle by other means. Of course, the serious economic and social crisis that struck Slovenia was also instrumental in bringing together the relevant parties to accept the necessary constitutional amendments.

The Slovenian constitution-makers concentrated exclusively on the reform of the institute of legislative referendum, which encompassed the following three important aspects: the creation of the model of 'rejective' legislative referendum initiated only by voters, the exclusion of some issues from the referendum vote (with the additional side effect restricting the role of the Constitutional Court, which was unpredictable in its rulings on the admissibility of referendums), and the installation of the quorum of rejection of an act passed by the National Assembly.

On the other hand, the Croatian Parliament's several attempts to amend the constitutional provision on the institute of citizens' initiative have come to nothing so far. The fact is that these attempts were made in 2010, 2012 and 2013 only in response to some successful initiatives, and because the issues that these successful initiatives brought into the public eye became much more serious once all quorums prescribed for the validity of referendum decisions were eliminated in 2010. Unlike Slovenia, the major parties in Croatia (i.e., the Social Democrats and the Croatian Democratic Union) did not play a direct role in either proposing or supporting citizens' initiatives – this was mainly reserved for various organisations and associations of war veterans, trade unions, Catholic associations, etc. However, when it suited them, the said parties did support these initiatives indirectly. It is a fact that the two major parties have not been the initiators of the constitutional reform of the citizen-initiated referendum in recent years (this role is reserved for the small Labour Party), and when they did officially support a proposal for a constitutional amendment to redesign the institute of citizens' initiative (the Social Democrats in 2010, the Croatian Democratic Union in 2012), it was never at the same time and both did it from the opposition. Both major parties have experienced great problems in dealing with successful initiatives (the Croatian Democratic Union in 2010, and the Social Democrats in 2013), but this has not motivated the leaders of either party to propose a new constitutional arrangement of the citizens' initiative. An additional problem in Croatia is that

73 This problem manifested itself in Croatia following the constitutional amendments from 2010, when all types of quorums were removed.

the Constitutional Court is not perceived by all parties as a neutral umpire, especially when dealing with citizen-initiated referendums.

The process of amending the Croatian Constitution from the second half of 2013 was fraught with several difficult and disconnected topics. Regulation of the institute of citizen-initiated referendum was only one of them. From the very onset, the process was a hostage of political trade-offs, and the two major parties were on opposite sides during this process. The process of amending the Constitution was extremely short and mostly secret, without a serious public debate and with almost no formal participation by Croatian constitutionalists. Their opinion was, from the beginning, that the Parliament should establish an Expert Group of professors of constitutional law who would prepare a draft of amendments related to the issues of citizen-initiated referendum (and other issues within the scope of the proposed constitutional changes), as had earlier been done by the Slovenian National Assembly. This suggestion was never accepted, although such expert groups of constitutional lawyers had been appointed in 2000 by the President of the Republic and in 2009 by the Government to prepare draft amendments, and in both cases these groups formulated drafts which were later, with only small modifications introduced, passed by the Parliament in 2000 and 2010.

It can be concluded that, unlike Slovenia, Croatia is still waiting for its 'constitutional moment' to solve the pressing problem of its exceptionally dysfunctional constitutional (and legislative) framework of the institute of citizens' initiative.

References

David ALTMAN, 2011: *Direct Democracy Worldwide*. Cambridge: Cambridge University Press.

——, 2013: Bringing direct democracy back in: toward a three-dimensional measure of democracy. *Democratization* 20 (2013) 4. 615–641.

Anti-minority referendum in Croatia to go to the Constitutional Court for review. Available at: http://www.minorityrights.org/12252/press-releases/antiminority-referendum-in-croatia-to-go-to-the-constitutional-court-for-review.html (last accessed on 28 February 2014).

Matej AVBELJ, 2013: Konec ali začetek slovenskega ustavnega prava (The End or the Beginning of the Slovene Constitutional Law). *Pravna praksa* 32 (2013) 1. 6–8.

France BUČAR, 2013: Prepoved referenduma – za kaj v resnici gre (The Ban of the Referendum – What is actually going on). *Pravna praksa* 32 (2013) 1. 3.

Bojan BUGARIČ: Odločba US je ena najslabše napisanih odločb v zgodovini. *Delo* (19 December 2012). Available at: http://www.delo.si/novice/politika/bugaric-odlocba-us-je-ena-najslabse-napisanih-odlocb-v-zgodovini.html (last accessed on 28 February 2014).

Georg BRUNNER, 2001: Direct vs. Representative Democracy. *Direct Democracy: The Eastern and Central European Experience.* Eds. Andreas Auer & Michael Butzer. Aldershot: Ashgate.

David BUTLER & Austin RANNEY (Eds.), 1994: *Referendums around the World: The Growing Use of Direct Democracy*. Washington D.C.: AEI Press.

Miro CERAR, 2013: Dve pomembni ustavni spremembi (Two important constitutional changes). URL: http://www.iusinfo.si/DnevneVsebine/Kolumna.aspx?id=99045.

Constitutional Court decides against referendum on labour law. *Croatian Times*.

Croatia backs up from monetization of highways. *Global Post*. Available at: http://www.globalpost.com/dispatch/news/xinhua-news-agency/150313/croatia-backs-monetization-highways (last accessed on 20 May 2015).

Deputy PM regrets halting of reform by anti-outsourcing initiative. Available at: https://vlada.gov.hr/news/deputy-pm-regrets-halting-of-reform-by-anti-outsourcing-initiative/16719 (last accessed on 20 May 2015).

Bruno S. FREY, 2003: Direct Democracy for Transition Countries. *Journal of Institutional Innovation, Development and Transition* 7 (2003). 42–59.

Michael GALAGHER & Pier Vincenzo ULERI (Eds.), 1996: *The Referendum Experience in Europe*. Houndmills: Macmillan Press.

Francis HAMON, 2012: *Le Referendum: Etude comparative*. 2nd ed. Paris: LGDJ-Lextenso.

Ronald J. HILL & Stephen WHITE, 2014: Referendums in Russia, the Former Soviet Union and Eastern Europe. *Referendums Around the World: The Continued Growth of Direct Democracy*. Ed. Matt Qvortrup. Basingstoke: Palgrave Macmillan.

Igor KAUČIČ, 2013: Zavrnitveni zakonodajni referendum (The Rejective Legislative Referendum). *Javna uprava* 49 (2013) 1/2. 33–51.

——, 2014: Ustavne omejitve in prepovedi zakonodajnega referendum (Constitutional Restrictions and prohibitions of the Legislative Referendum). *Zbornik znanstvenih razprav* 74 (2014). 59–92.

Igor KAUČIĆ, 2010: *Zakonodajni referendum*. Ljubljana: GV Založba.

Bruno KAUFMAN, Rolf BÜCHI & Nadja BRAUN, 2010: *Guidebook to Direct Democracy in Switzerland and Beyond*. Marburg: The Initiative & Referendum Institute Europe.

Ivan KRISTAN, 2012: Referendumu vrniti legitimnost, Državnemu zboru pa avtoriteto (Returning Legitimacy to the Referendum and Authority to the National Assembly). *Pomen ustavnosti in ustavna demokracija (Significance of Constitutionality and Constitutional Democracy)*. Ed. Igor Kaučič. Ljubljana: Faculty of Law of the University of Ljubljana.

——, 2013: Plebiscit 1990 in sprememba Ustave 2013 (The Plebiscite of 1990 and the Change of the Constitution of 2013). *Pravna praksa* 32 (2013) 49/50. 16–19.

Georg LUTZ, 2012: Switzerland: Citizens' Initiatives as a Measure to Control the Political Agenda. *Citizens' Initiatives in Europe: Procedures and Consequences of Agenda-Setting by Citizens*. Eds. Maija Setälä & Theo Schiller. Basingstoke: Palgrave Macmillan.

Laurence MOREL, 2012: Referendum. *The Oxford Handbook of Comparative Constitutional Law*. Eds. Michel Rosenfeld & Andras Sajo. Oxford: Oxford University Press.

Jasna OMEJEC, 2014: Narodna ustavotvorna inicijativa i razgraničenje nadležnosti između Hrvatskog sabora i Ustavnog suda (The Popular Constitutional Initiative and the Delimitation of Competences between the Croatian Parliament and the Constitutional Court). *Informator* (2014) 6258.

Robert PODOLNJAK & Branko SMERDEL (Eds.), 2014: *Referendum narodne inicijative u Hrvatskoj i Sloveniji – Ustavnopravno uređenje, iskustva i perspective*. Zagreb: Hrvatska udruga za ustavno pravo.

Mads QVORTRUP, 2002: *A Comparative Study of Referendums: Government by the People*. Manchester: Manchester University Press.

Matt QVORTRUP, 2013: *Direct Democracy: A comparative study of the theory and practice of government by the people*. Manchester: Manchester University Press.

Matt QVORTRUP (Ed.). 2014: *Referendums Around the World: The Continued Growth of Direct Democracy*. Basingstoke: Palgrave Macmillan.

Ciril RIBIČIČ, 2011: Slovenija in referendum: Referendumsko odločanje ne sme nadomeščati vloge parlamenta (Slovenia and referendum: Referendum decisions cannot replace the role of the Parliament). URL: http://www.dnevnik.si/mnenja/komentarji/10424 25320.

——, 2012: Odstop od prejšnje strogosti. *Mladina* (21 December 2012).

Ciril RIBIČIČ & Igor KAUČIČ, 2014: Constitutional Limits of Legislative Referendum: The Case of Slovenia. *Lex Localis – Journal of Local Self-Government* 12 (2014) 4. 899–928.

Siniša RODIN, 2001: Country Report – Croatia. *Direct Democracy: The Eastern and Central European Experience*. Eds. Andreas Auer & Michael Butzer. Aldershot: Ashgate.

Meta ROGLIČ & Jože POGLAJEN, 2012: dr. Igor Kaučič (interview). *Dnevikov objektiv*. Available at: http://www.dnevnik.si/objektiv/intervjuji/1042553184 (last accessed on 27 February 2014).

Sezona Svetlikovih referendumov (The Season of Svetlik's Referendums). *Večer* (11 April 2011).

Carl SCHMITT, 2014 (1927): *Volksentscheid und Volksbegehren, Ein Beitrag zur Auslegung der Weimarer Verfassung zur Lehre von der unmittelbaren Demokratie*. Berlin: Duncker & Humblot.

SDP vrijeđa Josipovića (An interview with Professor Smerdel). *Jutarnji list*, 27 January 2014, 10.

Uwe SERDÜLT, 2014: Referendums in Switzerland. *Referendums Around the World: The Continued Growth of Direct Democracy*. Ed. Matt Qvortrup. Basingstoke: Palgrave Macmillan.

Maija SETÄLÄ & Theo SCHILLER (Eds.), 2012: *Citizens' Initiatives in Europe: Procedures and Consequences of Agenda-Setting by Citizens*. Basingstoke: Palgrave Macmillan.

Branko SMERDEL, 2010: The Constitutional Order of the Republic of Croatia on the Twentieth Anniversary of the 'Christmas' Constitution – The Constitution as a Political and Legal Act. *The Constitution of the Republic of Croatia*. Zagreb: Novi Informator.

Markku SUKSI, 1993: *Bringing in the People: A Comparison of Constitutional Forms and Practices of the Referendum*. Dordrecht/Boston/London: Martinus Nijhoff publishers.

Stephen TIERNEY, 2012: *Constitutional Referendums: The Theory and Practice of Republican Deliberation*. Oxford: Oxford University Press.

Biljana TOMLJANOVIĆ, 2001: Referendum građanske inicijative. *Zbornik Pravnog fakulteta u Zagrebu* 6 (2001). 1381–1394.

Cirila TOPLAK, 2011: *Referendum: a measure against democratic deficit vs. tool of political blackmail*. CEPSA Annual Conference. Vienna. URL: www.cepsa.at/ablage/2011/paper_toplak.docx.

——, 2013: Referendum: prednosti i nedostaci. *Političke analize* (2013) 14. 44–49.

Pier Vincenzo ULERI, 2012: Institutions of Citizens' Political Participation in Italy: Crooked Forms, Hindered Institutionalization. *Citizens' Initiatives in Europe: Procedures an Consequences of Agenda-Setting by Citizens*. Eds. Maija Setälä & Theo Schiller. Basingstoke: Palgrave Macmillan.

Drago ZAJC, 2012: O referendumu, Državnem svetu in spremembah Ustave (On referendum, the National Council and the changes of the Constitution). *Pravna praksa* 31 (2012) 29/30. 11–13.

Bruna ŽUBER, 2014: Kvorum na zakonodajnem referendumu v našem in v primerjalnem pravu (Quorum for Legislative Referendum in Our and Comparative Law). *Pravnik* 68 (2014) 1/2. 61–88.

Council of Europe (www.coe.int/):

—— Recommendation 1704 (2005): Referendums: towards good practices in Europe.

Croatian Legislation (*www.nn.hr*):

—— *The Constitution of the Republic of Croatia* (Ustav Republike Hrvatske). Narodne novine. No. 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

—— *The Constitutional Act on the Constitutional Court* (Ustavni zakon o Ustavnom sudu). Narodne novine, No. 99/99, 29/02, 49/02.

—— *The draft proposal to initiate changing the Constitution with a Draft of the Changes of the Constitution of the Republic of Croatia*. October 2012. https://vlada.gov.hr/UserDocsImages//Sjednice/Arhiva//61.%20-%2019.a.pdf

—— *Proposal to Establish the Draft Bill of Amendments to the Constitution***,** November 2013. www.sabor.hr/fgs.axd?id=26061

—— *Draft Proposal of Amendments to the Constitution*, December 2013. http://www.sabor.hr/prijedlog-promjene-ustava-republike-hrvatske.

Slovenian Legislation (www.uradni-list.si/):

—— *The Constitution of the Republic of Slovenia* (Ustava Republike Slovenije) (Uradni list RS. No. 33/91, 42/97, 66/00, 24/03, 69/04, 68/06, 47/13)

—— *The proposal to initiate the procedure for amending the Constitution with a Draft of the Constitutional Act*, September 2012. URL: http://stres.a.gape.org/prenova_slo/Prenova_SLO/spremememba_ustave_RS/Predlog_spremememb_ustave_13_9_12.pdf

—— *Report related to the proposal to initiate the procedure for amending the Constitution with a Draft of the Constitutional Act,* January 2013. http://imss.dz-rs.si/imis/f9650d809e82f514027c.pdf.

—— *The Constitutional Act Amending Articles 90, 97, and 99 of the Constitution of the Republic of Slovenia*, Uradni list RS, No. 47/2013.

—— *The Referendum and Public Initiative Act* (Zakon o referendum in o ljudski inicijativi (Uradni list RS. No. 15/94, 13/95, 38/96, 43/96, 59/01, 11/03, 48/03, 84/04, 24/05, 139/06, 26/07)

The Constitutional Court of Croatia (www.usud.hr/):

—— Decision No. U-VIIR-4640/2014 from 12th August 2014

—— Decision No. U-VIIR-7346/2014 from 10th December 2014

—— Decision No. U-VIIR-1159/2015 from 8th April 2015

—— Decision No. U-VIIR-1158/2015 from 21st April 2015

—— The Communication on the citizens' constitutional referendum on the definition of marriage. SuS-1/2013 from 14th November 2013

—— Warning with regard to the Proposal of a Decision of the Committee on the Constitution, Standing Orders and Political System of the Croatian Parliament to call a national referendum. U-VIIR-5292/2013 from 28th October 2013

The Constitutional Court of Slovenia (www.us-rs.si/):

—— Decision U-II-1/12, U-II-2/12 from 7th December 2012

Synopsis

Juan Ruiz Manero

Bobbio and Legal Positivism

The Triple Distinction and Bobbio Himself

SLOV. | *Bobbio in pravni pozitivizem. Tridelba in njen avtor sam.* Prispevek kritično obravnava znano Bobbievo tridelbo pravnega pozitivizma na pozitivizem kot splošni pristop k učenju prava, nauk o pravu in ideologijo. Avtor uvodoma opozori na nekaj problemov same tridelbe, nato pa se osredotoči na Bobbievo samoopredelitev znotraj nje. Na primeru Bobbieve obravnave pojmov temeljne norme in pravila priznavanja pokaže, kako ga njegovo kasnejše zavračanje teh dveh pojmov nezavedno privede do sprejemanja pravnega pozitivizma kot nauka o pravu in pravne ideologije – ki ju je sicer zavračal. Avtor vidi razlog za ta nezavedni Bobbiev zdrs predvsem v njegovi vpetosti v specifično pravnokulturno okolje, ki ga prežema notranji pogled na pravo. Ob tem predlaga, da zavrnemo tridelbo pravnega pozitivizma in ga namesto tega proučujemo kot skupek ne vedno ločljivih stališč, ki tvorijo specifično pravnokulturno okolje.

Ključne besede: Norberto Bobbio, pravni pozitivizem, splošni pristop k učenju prava (metodologija), nauk o pravu (teorija), pravna ideologija

ENG. | This contribution critically examines Bobbio's famous distinction between legal positivism as a method, a theory and an ideology. The author highlights first certain problems of the distinction itself and then focuses on Bobbio's self-determined position within it. Delving on Bobbio's analysis of the concepts of basic norm and rule of recognition, he demonstrates how Bobbio's later rejection of these two concepts implies acceptance of positivistic legal theory and ideology – despite the fact that he explicitly rejected them in the first place. The reason for this Bobbio's slip is found in his absorption in the positivist legal culture which is permeated with the internal point of view on the law. He suggests rejecting Bobbio's tripartite distinction of legal positivism and proposes instead to view this as a set of seldom indivisible standpoints forming a specific legal culture.

Key words: Norberto Bobbio, legal positivism, positivist methodology, positivist theory, positivist ideology

Juan Ruiz Manero is a Professor of legal philosophy at the University of Alicante (Spain). | Address: Universidad de Alicante, Ap. de correos 99, 03080 Alicante, España. E-mail: juan.ruiz@ua.es.

Synopsis

Norberto Bobbio

Jusnaturalizam i pravni pozitivizam

SLO. | *Naravnopravništvo in pravni pozitivizem. A*vtor zatrjuje, da je odnos med naravnopravništvom in pravnim pozitivizmom večplasten in da je samo po enem od pogledov njun odnos izključujoč. V ta namen v razpravi najprej razlikuje med tremi pojmovanji naravnega prava in pravnega pozitivizma, in sicer m ed ideologijo, teorijo in načinom preučevanja prava (ali metodo). Nato pokaže, da resnično nasprotje predstavljata zgolj pojmovanji naravnopravništva in pravnega pozitivizma kot ideologij. Na koncu nas posebej posvari še pred prenagljenostjo sodb o naravnopravniški ali pozitivnopravniški naravnanosti posameznih avtorjev – te sodbe so namreč odvisne od tega ali presojamo njihovo ideologijo, teorijo ali metodologijo. | Delo je bilo sprva objavljeno v izvirniku kot Giusnaturalismo e positivismo giuridico, *Rivista di diritto civile* VIII (1962): 503–515, ta hrvaški prevod pa v knjigi Norberto Bobbio, *Eseji iz teorije prava* (Split: Logos, 1988).

Ključne besede: naravnopravništvo, pravni pozitivizem, ideologija, teorija, metodologija

ENG. | *Natural Law and Legal Positivism.* In this paper, the author argues that the relationship between natural law and legal positivism is multi-faceted and it is only in one of these perspectives that they can be seen as mutually exclusive. To show this, he first distinguish between three conceptions of natural law and legal positivism, respectively; namely, an ideology, a theory and a method of studying law (a methodology). Thereafter, he demonstrates that only as ideologies are natural law and legal positivism contradictory. He ends with a warning against hasty characterizations of certain legal scholars as either natural lawyers or legal positivists – their position, after all, depends on whether we evaluate their ideology, theory or methodology. | This paper was published first in Italian as Giusnaturalismo e positivismo giuridico, *Rivista di diritto civile* VIII (1962): 503–515. It was republished as a chapter in Norberto Bobbio, *Giusnaturalismo e positivismo giuridico* (Milano: Comunità).

Key words: natural law, legal positivism, ideology, theory, methodology

Norberto Bobbio (1909–2004) was a professor of legal and political philosophy at the University of Turin.

Synopsis

Kenneth Einar Himma

Conceptual Jurisprudence

An Introduction to Conceptual Analysis and Methodology in Legal Theory

SLO. | *Pojmovno pravoslovje. Uvod v pojmovno analizo in metodologijo v teoriji prava.* Avtor skuša ponuditi razumljiv uvod v tematsko področje pojmovne analize pravnih pojmov (tj. »pojmovno pravoslovje«) in temu primerno metodologijo. Na precej osnovni ravni razloži, kaj pojmovna analiza je, kako se jo opravlja (tj. po kakšni metodologiji) in zakaj je pomembna za teorijo prava. Obenem prikaže, kako je pojmovna analiza povezana z drugimi filozofskimi področji, kot sta metafizika in epistemologija. Nato pojmovno pravoslovje opiše kot dejavnost, usmerjeno v razlago tistih lastnosti, ki (1) pravno ločijo od nepravnega in (2) pravo vzpostavljajo kot tako. Ta opis pospremi z nekaj intuitivnimi primeri in z razlago ter oceno treh različnih metodoloških pristopov, na koncu pa obravnava še praktični pomen pojmovnega pravoslovja.

Ključne besede: pojmovna analiza, pojmovna metodologija, narava prava, metafizika prava, praktični pomen, pojmi

ENG. | This essay attempts to provide an accessible introduction to the topic area of conceptual analysis of legal concepts (or "conceptual jurisprudence") and its methodology. I attempt to explain, at a fairly foundational level, what conceptual analysis is, how it is done (i.e. its appropriate methodology) and why it is important in theorizing about the law. I also attempt to explain how conceptual analysis is related to other areas in philosophy, such as metaphysics and epistemology. Next, I explain the enterprise of conceptual jurisprudence, as concerned to provide an account of those properties that (1) distinguish things that are law from things that are not law which (2) constitute the former things as law, illustrating this explanation with what I hope are intuitive examples. Three different methodological approaches are also explained and evaluated. Finally, the practical importance of conceptual jurisprudence is discussed.

Key words: conceptual analysis, conceptual methodology, the nature of law, metaphysics of law, practical significance, concepts

Kenneth Einar Himma is a Visiting Professor at the Department of History of Philosophy, Tomsk State University and a Part-time Lecturer at the University of Washington School of Law. | Address: University of Washington School of Law, William Gates Hall, Box 353020, Seattle, WA 98195-3020, United States. E-mail: himma@uw.edu.

Synopsis

Sebastián Figueroa Rubio

Expectativas y adscripción de responsabilidad

SLO. | *Pričakovanja in pripisovanje odgovornosti.* Ob predpostavki, da vsako pripisovanje odgovornosti temelji na dejstvu, da je bilo prekršeno neko pričakovanje, avtor predlaga, da se pričakovanja razume kot družbeno sprejete standarde za ocenjevanje konkretnih dogodkov, ki omogočajo članom skupnosti iskanje razlage dogodkov, ki kršijo pričakovanja. Potem ko predstavi omenjeno razumevanje pričakovanj v luči zgornje predpostavke, avtor prouči, v kakšni zvezi so pričakovanja z odgovornostjo. Razpravo nato zaključi s predlogom, da zvezo med pričakovanji in odgovornostjo razumemo kot alternativo ideji, po kateri vsako pripisovanje odgovornosti predpostavlja kršitev neke moralne ali pravne obveznosti tistega, ki mu odgovornost pripisujemo.

Ključne besede: pričakovanja, odgovornost, odzivne naravnanosti, obveznosti

ENG. | *Expectations and Attribution of Responsibility.* Under the hypothesis that every attribution of responsibility rests on the fact that an expectation has been breached, the author proposes to understand expectations as standards adopted by a community to evaluate specific events and allow the members of the community to search for an explanation of the events which breach expectations. After presenting this way of understanding expectations, their relationship with responsibility is analyzed, having in mind the mentioned hypothesis. To finalize, the relationship between responsibility and expectations is explored as an alternative to the idea that every attribution of responsibility supposes the breach of an obligation, whether moral or legal, by who is held responsible.

Key words: expectations, responsibility, reactive attitudes, obligations

Sebastián Figueroa Rubio is lecturer in legal theory at the University of Chile and the University Diego Portales in Santiago (Chile) & a researcher at the Cátedra de Cultura Jurídica at the University of Girona (Spain). | Address: Universidad de Chile, Facultad de Derecho, Av. Santa María 0200, 3er piso, Dirección de Investigación. Providencia, Santiago, C.P. 7520400. Chile. E-mail: figueroa.sebastian@gmail.com.

Synopsis

Robert Podolnjak

Constitutional Reforms of Citizen-Initiated Referendum

Causes of Different Outcomes in Slovenia and Croatia

SLO. | *Ustavne reforme referenduma na zahtevo volivcev. Razlogi za različne izide v Sloveniji in na Hrvaškem.* Po mnenju mnogih slovenskih in hrvaških strokovnjakov je bila ustavna in zakonska zasnova referenduma na zahtevo volivcev v njihovih državah v mnogočem pomanjkljiva. Referendumi, sproženi s strani volivcev, so po mnenju vlad v teh dveh državah povzročili številne nepričakovane ustavne, politične in/ali ekonomske probleme. V preteklih letih je bilo tako v Sloveniji kot na Hrvaškem več neuspelih poskusov ustavne reforme referenduma. Leta 2013 je Slovenija končno doživela svoj 'ustavni trenutek', v katerem je bilo mogoče v Državnem zboru doseči skoraj popoln konsenz glede ustavnega preoblikovanja zakonodajnega referenduma. Po drugi strani so bili številni poskusi hrvaškega parlamenta, da bi spremenili določbe glede ljudske iniciative neuspešni zaradi interesa največjih strank, da bi bil postopek spreminjanja ustave drugačen.

Ključne besede: referendum na pobudo volivcev, ljudska iniciativa, ustavna reforma, Slovenija, Hrvaška

ENG. | In the opinion of many Slovenian and Croatian scholars, the constitutional and legislative design of citizen-initiated referendums in their respective countries was in many ways flawed. Referendums initiated by citizens have caused, at least from the point of view of governments in these two countries, many unexpected constitutional, political and/or economic problems. Over the years, several unsuccessful constitutional reforms of the institute of referendum have been attempted both in Slovenia and Croatia. In 2013, Slovenia finally attained its 'constitutional moment' in which it was possible to reach an almost universal consensus in the National Assembly on constitutionally redesigning the legislative referendum. On the other hand, several attempts by the Croatian Parliament to amend the constitutional provision relating to citizens' initiatives have come to nothing due to the interests of the major parties in the constitutional amendment process being different.

Key words: Citizen-initiated referendum, popular initiative, constitutional reform, Slovenia, Croatia

Robert Podolnjak is an Associate Professor of Constitutional Law at the University of Zagreb, Faculty of Law (Department of Constitutional Law). | Address: Trg maršala Tita 3, 10000 Zagreb, Croatia. E-mail: robert.podolnjak@pravo.hr.